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The dual citizen ban – what was Barton thinking?

Bruce Dyer[1]

Dual citizen[2] **parliamentarians are banned** under Australia's Constitution – even if they don't know of their foreign citizenship. It's one thing to ban foreign citizens from Parliament, but banning Australian citizens because of dual nationality they never sought, and may be unaware of, is quite another. Very few other countries do that.[3]

The ban's far-reaching implications became evident in 2017 when the High Court disqualified five dual citizen parliamentarians.[4] Four of them believed they were only Australian citizens and had little reason to think otherwise.[5]

If you persevere with the detail, the High Court's judgment provides compelling examples of the bewildering complexity, and long half-life, of citizenship. Senator Canavan, for example, was only an Australian citizen when born, and his

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[1] Principal, Conisante Consulting. Initial research for this was undertaken in November 2017 to January 2018, when I was a Professor of Practice (Law) at Monash University (part-time). I would like to thank the following for their helpful comments on this post or the legal arguments that accompany it: Alan Shaw, Asher Gibson, Callum Dyer, Cheryl Gibson, George Williams, Jean Rumbold, Jeff Goldsworthy, Michelle Siekierka and Nathan Dyer. I alone am responsible for all errors and views expressed.

[2] "Multiple nationality" may be a better term given that a person may have more than two nationalities: Alfred Michael Boll, *Multiple Nationality and International Law* (Martinus Nijhoff Publishers, 2007) page 2

[3] See Joachim K. Blatter, Stefanie Erdmann and Katja Schwanke, "Acceptance of Dual Citizenship: Empirical Data and Political Contexts" Working Paper Series "Glocal Governance and Democracy", Institute of Political Science at pp 26-7 University of Lucerne, February 2009, https://zenodo.org/collection/user-lory_unilu_ksf_wp_ggd. One country with a similar ban is Pakistan: Faryal Nazir, *Report on Citizenship Law: Pakistan* RSCAS/EUDO-CIT-CR 2016/13 December 2016, https://cadmus.eui.eu/bitstream/handle/1814/44544/EudoCit_2016_13Pakistan.pdf . However, there have been calls in Pakistan for amendments: Ahmed Bilal Mehboob, "The case of dual nationals" *Dawn*, August 19, 2019, https://www.dawn.com/news/1500370

[4] *Re Canavan* [2017] HCA 45

[5] *Re Canavan* [2017] HCA 45 at [88] (Ludlam), [93] (Waters), [106] (Joyce) and [112]-[119] (Nash). Senator Roberts, who was also disqualified, was held to have known there was at least a real and substantial prospect he was a dual citizen: *Re Roberts* [2017] HCA 39

parents and grandparents were then also only Australian citizens.[6] A few years later, an old Italian law was declared unconstitutional. That made Senator Canavan's Australian born mother an Italian citizen and, on one view, him also. The High Court found, on the evidence, that he was not disqualified – but it looked like a close call.[7]

The dual citizen ban results from the last part of s44(i) (**the second limb**), which provides that "*a subject or a citizen ... of a foreign power*"[8] is incapable of being chosen or sitting as a parliamentarian. This overlaps with the first part of s44(i) banning a person "*under any acknowledgment of allegiance ... to a foreign power*" (**the first limb**).

To lift the ban, any foreign citizenship must cease before a person nominates for election.[9] If foreign law is an insurmountable obstacle, it may be enough to take all steps reasonably required.[10]

Why are dual citizen parliamentarians banned? The High Court's answer is that the ordinary meaning of the words requires it, and s44(i)'s purpose and drafting history does not support any other approach.[11]

But why was the ban thought a good idea in 1900, when the Constitution was enacted? No doubt, s44(i) seeks to protect against parliamentarians who may unduly favour, or be influenced by, foreign powers. It treats foreign citizenship as indicating predisposition to that. Reasonable as that may seem, it's less so

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[6] *Re Canavan* [2017] HCA 45 at [75], [80]-[81]
[7] *Re Canavan* [2017] HCA 45 at [86]
[8] The omitted words include a person who is *"... entitled to the rights or privileges of a subject or citizen... "*. Although this sounds broad, it cannot mean "entitled to any/some of the rights etc" as that would disqualify anyone who visits another country due to the doctrine of "local" or "temporary" allegiance: see eg: John W. Salmond, "Citizenship and Allegiance" (1902) 18 L Q Rev 49 at 50, 52. If it means "entitled to all of the rights etc" it adds little to "subject or citizen". So it presumably means something like "entitled to substantially all of the rights etc" in which case it may cover the equivalents of denizens, and naturalized persons in the UK prior to 1870, who were denied certain privileges like the right to be members of parliament (see text below at footnotes 26 to 30). Very similar language was used in the 1891 draft and some of the colonies' constitutions, where it clearly did not catch dual citizens unless they had taken some act such as seeking foreign naturalization: see footnotes 56 and 57. The amendments that created the dual citizen ban (see text at footnote 63) did not make any material change to the language of this phrase
[9] See *Re Canavan* [2017] HCA 45 at [72]
[10] See *Re Gallagher* [2018] HCA 17 at [27] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). See also at [43]-[46] (Gageler J) and [51]-[69] (Edelman J)
[11] *Re Canavan* [2017] HCA 45 at [13]-[36], [70]-[72]

where foreign law makes a person a citizen because a grandparent was a citizen.[12]

I think there is an argument – which the High Court has not yet been asked to consider – that the framers of the Constitution never intended the second limb to ban dual citizens, even though the words clearly require that to a modern reader. Of course, any citizen voluntarily seeking to become a foreign citizen would "acknowledge" foreign allegiance and be banned under the first limb. But that would not catch those who did not seek, and were unaware, of their foreign citizenship.[13]

Since 1992, it has been accepted in the High Court that if an Australian citizen is also claimed as a citizen under foreign law, our law recognises both nationalities making the person a foreign citizen under s44(i) (subject to very limited exceptions).[14] That approach (**90's approach**) was supported by mid-twentieth century authorities.[15]

I argue that when the Constitution was enacted in 1900 the approach to dual nationality (**1900 approach**) was very different. (Note that before 1948 there were no Australian citizens[16] – only British subjects[17] – so references to British subjects below include all we now call Australian citizens.)

- All British subjects owed absolute allegiance to the Queen. Under English law, that allegiance prevailed over competing obligations.
- English case law generally disregarded any foreign nationality of a British subject unless a statute clearly required otherwise.
- I argue that in 1900 a British subject would not have been considered a foreign citizen merely because the laws of a foreign power also claimed that subject as its citizen. Rather, the competing foreign claim to that subject's allegiance would generally have been ignored, and they would be treated the same as any other British subject.
- Under the 1900 approach, the second limb of s44(i) would have had virtually no application to British subjects. Rather, s44(i)'s effect would

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[12] British law did that, in 1900, if the father of the person was a natural born British subject when the person was born. See eg: A V Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (1896) at 177

[13] Since the ordinary meaning of "acknowledgment" implies at least an act by the person acknowledging allegiance etc, and arguably also implies knowledge or intention

[14] *Sykes v Cleary* (1992) 176 CLR 77 at 105-107 (Mason CJ, Toohey and McHugh JJ), 110-112 (Brennan J). Deane J (at 127-128), Dawson J (131-132) and Gaudron (135, 139) adopted a similar approach on this issue, but allowed greater scope for qualifications. The approach in *Sykes* was accepted by all parties in *Re Canavan* [2017] HCA 45 at [19]

[15] See footnote 31

[16] See eg: *Attorney-General for the Commonwealth v Ah Sheung* (1906) 4 CLR 949 at 951 (Griffith CJ, Barton and O'Connor JJ)

[17] *Sue v Hill* (1999) 199 CLR 462 at 527-8 (Gaudron J)

have been similar to that of equivalent clauses in the Australian colonies' constitutions.
- If the 1900 approach still applied today, s44(i) would not have disqualified any of the dual citizen parliamentarians who have lost their places in recent years.

If these arguments are correct, what it means for the interpretation of s44(i) today is not as obvious it might appear. I will return to that after outlining the basis for the 1900 approach.

The law on nationality was very different in 1900.[18] English law's use of "subject" rather than "citizen" reflected the notion of "subjection to one lord and king". Until 1870, all British subjects owed absolute and indelible allegiance to their sovereign, for life. Allegiance was a feudal concept,[19] and those roots were still obvious in 1900.[20]

For centuries, English common law had based nationality on place of birth, which clashed with the prevailing European approach based on descent. Conflict between these approaches made competing claims to allegiance, and dual nationality, inevitable.[21] They arose, for example, whenever a child with a French father was born in the British Empire. That was the case for British born Angus Macdonald,[22] who had lived since infancy in France. In 1747 he was nevertheless treated as a British subject, convicted of treason and sentenced to

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[18] The High Court considered this, in a different context, in *Singh v Commonwealth* (2004) 222 CLR 322, [2004] HCA 43 in particular, at [59]-[100], [106], [133] (McHugh J), [149], [163]- [184], [190], [201]-[202] (Gummow, Hayne and Heydon JJ), [222]-[225] (Kirby J), [297]-[304], [307]-[308] (Callinan J). In relation to dual nationality, see: Peter J Spiro, "Dual Nationality and the Meaning of Citizenship" (1997) 46 Emory LJ 1411; Peter J. Spiro, *At Home in Two Countries: The Past and Future of Dual Citizenship* (New York University Press, 2016); Alfred Michael Boll, *Multiple Nationality and International Law* (Martinus Nijhoff Publishers, 2007)

[19] John W. Salmond, "Citizenship and Allegiance" (1902) 18 L Q Rev 49 at 49-51. In describing the feudal origins of allegiance (*ligeance*, or latinized, *ligeantia*), John Salmond refers to the fundamental maxim of feudalism to the effect that a person could not have two "liege lords" (as opposed to other lords, to whom only qualified fealty was owed), and adds (at 51): "*If enmity and war shall arise between two lords, he who is in the faith of each must adhere to him in whose ligeance he is*".

[20] Although allegiance was by then owed to the crown in a politic, rather than personal, capacity: *Re The Stepney Election Petition; Isaacson, Petitioner; Durant* (1886) 17 QBD 54 at 63, 65

[21] Also the approach to private international law in England differed from many European countries and was at a stage of significant development. See eg: A V Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (1896) at 15-22

[22] *Aeneas Macdonald's Case* (1747) 18 State Tr 857

death for his support of the Jacobite rising. (He was later pardoned on condition that he never return to Britain.)

Dual nationality (or "double allegiance" as it was usually known) was more of a problem for individuals than the states claiming their allegiance. Most states preferred to have an exclusive claim to their citizens' allegiance. But they couldn't stop foreign states defining citizenship broadly so as to create competing claims. If a state wanted to attract more subjects or citizens – as many then did – its best option was to ignore the issue. If both states did that, their conflicting claims were a serious problem for anyone unfortunate enough to be in Angus Macdonald's position, but that was rare if the person stayed in one state and ignored the other state's claims.

Britain, like most states, regarded its claims to a subject's allegiance as paramount, and had done so for centuries. Nineteenth century empire building ensured that Britain was effectively competing with other countries for much needed subjects. It was unthinkable for Britain to subordinate its needs to the claims of other States.

The 1812 naval war between Britain and the US provided a striking illustration of the importance of this issue to Britain. One cause of the war was the British practice of stopping US ships to "impress" naturalized Americans into naval service, treating them as British subjects who continued to owe indelible allegiance to the King.[23] The Prince Regent (later, King George IV) strongly defended Britain's right to ignore the US's competing claims to allegiance in his response to the US declaration of war, and asserted that for Britain to abandon its claim *"would be to expose to danger the very foundation of our maritime strength"*.[24] The issue was too important for Britain to concede in the treaty

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[23] See for example: Peter J Spiro, "Dual Nationality and the Meaning of Citizenship" (1997) 46 Emory LJ 1411 at 1421-1423; Thomas S. Martin, "Nemo Potest Exuere Patriam: Indelibility of Allegiance and the American Revolution" (1991) 35 American Journal of Legal History 205 at 217-218

[24] Quoted in the Appendix to the Report of the Royal Commissioners for inquiring into the Laws of Naturalization and Allegiance (HMSO London 1869) (**1869 Royal Commission Report**), page 35:

> *There is no right more clearly established than the right which a Sovereign has to the allegiance of his subjects, more especially in time of war. Their allegiance is no optional duty ... it began with their birth, and can only terminate with their existence.…*
>
> *... it is obvious that to abandon this ancient right of Great Britain, and to admit these novel pretensions of the United States, would be to expose to danger the very foundation of our maritime strength.*

ending the 1812 war. It continued to be a source of tension with the US for at least half a century.[25]

Finally, after a lengthy and comprehensive Royal Commission report in 1869, there was legislative reform in Britain. The Naturalization Act of 1870 (**1870 Act**) permitted British subjects to be naturalized in a foreign country and cease to be British subjects. That meant allegiance was no longer "indelible" for those who left the British empire, but special cases aside, the expectation that allegiance was absolute and paramount for others continued.

The 1870 Act also removed old restrictions[26] on naturalized British subjects (who would likely be dual citizens) becoming members of either house of the Imperial parliament in London.[27] That was an extension of reforms 25 years earlier[28] which had recognised the importance of such privileges for Britain's interest in attracting immigrants able to make significant contributions to the nation. The Lord Chief Justice of England at the time noted another advantage of conferring such privileges:[29]

> *... it is desirable to attach the newly admitted subject as much as possible to the country of adoption, and not to leave room for any feeling of hardship or wrong arising from a sense of illiberal jealousy or ungenerous distrust.*

This policy of giving the same privileges and recognition to all subjects, including naturalized dual citizens, was affirmed again in 1901 following a review underway when the Constitution was enacted.[30]

When the High Court adopted the 90's approach it was not asked to consider the position in 1900, nor was that obviously relevant. The court applied the common law at that time, referring to mid-twentieth century cases,[31] and the

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[25] See the 23 page account, introduced with the comment that "it would be impracticable ... to attempt to give a full account", in the Appendix to the 1869 Royal Commission Report, p29

[26] As recommended by the 1869 Royal Commission Report pp.vi, xi

[27] The restrictions had been introduced by the Act of Settlement of 1701 to ease public suspicion of foreigners prompted by the Dutch favourites of William III: see eg the Report from the Select Committee on the Laws Affecting Aliens, House of Commons, 2 June 1843 p.iii

[28] Aliens Act 1844 (7 & 8 Vic. c. 66)(Imp); Report from the Select Committee on the Laws Affecting Aliens, House of Commons, 2 June 1843 pp.x

[29] Sir Alexander Cockburn, *Nationality: or the Law Relating to Subjects and Aliens, Considered with a View to Future Legislation* (London 1869) at 210-211. The Lord Chief Justice was not reluctant to express extra-judicial views: Roderick Munday, "The Judge Who Answered His Critics" (1987) 46(2) Cambridge Law Journal 303-314.

[30] Report of the Naturalization Law Committee (HMSO London 1901) (**1901 Report**) page 10 at [20]- [21]

[31] The authorities cited were: *Oppenheimer v Cattermole* [1976] AC 249 at 261, 263-264, 267, 278-279, *Kramer v Attorney-General* [1923] AC 528 at 537, *R v*

1930 Hague Convention, which required recognition of foreign citizenship and dual nationality.[32] However the common law's approach in 1900 was very different. The approach then was generally to ignore any foreign nationality of a British subject, and disregard dual nationality, unless a statute clearly required otherwise.

As was explained in 1963 by Peter Nygh – who went on to become the author of a seminal Australian text on conflict of laws and a Family Court judge:[33]

> *... it is difficult to imagine any circumstances in which the courts would give effect to the existence of the second nationality except of course where they are expressly directed to do so by statute or ...* [he describes a case covered by the 1870 Act[34]].

Burgess; Ex parte Henry (1936) 55 CLR 608 at 649, 673, *Stoeck v Public Trustee* (1921) 2 Ch 67, at 82, per Russell J, *Ex parte Konen* (1941) 59 WN (NSW) 29 at 30. I suggest that *Stoeck* and *Kramer* do not go so far as to establish that the common law recognised dual citizenship in the absence of a clear statutory requirement to that effect. Brennan J also referred to *R v Lynch* [1903] 1 KB 444, but only as an example of war-time qualification of the application of foreign law based on public policy.

[32] *Convention on Certain Questions relating to the Conflict of Nationality Laws*, The Hague, 12 April 1930, Articles 1-3:

> *Article 1*
> *It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.*
> *Article 2*
> *Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.*
> *Article 3*
> *Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.*

The Convention was ratified by Britain on April 6th, 1934 and Australia on November 10th, 1937

[33] P E Nygh, "Problems of Nationality and Expatriation before English and Australian Courts" (1963) 12 International and Comparative Law Quarterly 175 at 182

[34] That being:

> *... the case where a court has to determine whether a person was entitled to renounce his United Kingdom or Australian citizenship on the ground that he possessed another nationality*

as provided in s4 of the 1870 Act

The reason for that approach was explained by W E Hall in 1894:[35]

> *English law knows no distinction between different classes of natural born British subjects in respect of rights or obligations. All alike, whatever their parentage, have the same duty of allegiance, the same rights within the British dominions, and, subject only to a qualification introduced in certain cases for reasons of public policy, the same right to recognition and protection abroad.*

The statement above relates to natural-born British subjects, but the approach to naturalized British subjects was generally the same when they remained within the British empire. Leading scholars at the time, Professors Westlake (Cambridge)[36] and Dicey (Oxford),[37] expressed views to similar effect.[38]

The 1900 approach of disregarding foreign nationality of British subjects continued into the early part of the twentieth century at least.

One case in 1903 concerned Australian-born Arthur Alfred Lynch, who was convicted of treason for his role in the Boer War.[39] He was sentenced to hang, but ultimately pardoned.[40] Lynch went to South Africa as a war correspondent, became naturalized as a citizen of the South African Republic and then fought in the war against Britain. He argued that he ceased to be a British subject under the 1870 Act when naturalized,[41] and so could not be guilty of treason.[42] The

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[35] W E Hall, *A Treatise On The Foreign Powers And Jurisdiction Of The British Crown* (London 1894) at p20 (§15)

[36] J Westlake, *A Treatise on Private International Law* (4th ed 1905) at 356. He expressed similar views in his text *International Law Part 1 Peace* (1904) at 221-9, for example (at 227):

> *... British law does not deviate from the accepted view that nationality is single in principle, but the principle is tempered in practice by forbearance, extended willingly or stipulated by treaty, in the case of conflicting claims by states to the subjection of an individual.*

[37] A V Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (1896) at 174

[38] See also: the 1901 Report, page 11 at [28], to which Professors Westlake (Cambridge) and Dicey (Oxford) were both advisers; and Clive Parry, "The Duty to Recognise Foreign Nationality Law" (1958) Heidelberg Journal of International Law 337, who comments regarding the "duty" in article 1 of the 1930 Hague Convention that *"[a]ny duty of recognition of foreign nationality laws is thus an imperfect and eccentric one"* (at 360) and is *"an otiose conception insofar as domestic nationality laws are concerned"* (at 362).

[39] *R v Lynch* [1903] 1 KB 444

[40] Geoffrey Serle, "Lynch, Arthur Alfred (1861–1934)", Australian Dictionary of Biography, Volume 10, (MUP 1986)

[41] Under s6 of the 1870 Act

[42] *R v Lynch* [1903] 1 KB 444. At that time it was generally accepted that only subjects could commit treason outside the King's realm. See eg: S. C. Biggs,

court held that the 1870 Act did not permit naturalization in an enemy country during war. Lynch's South African citizenship was ignored, apart from treating the first steps to obtain it as treason.[43] Lynch's exploits were covered extensively in Australian newspapers from 1900 on as he made a slow but deliberate path to England, despite warnings, to be arrested and tried.[44]

During World War I it was held that a natural born British subject, Mr Freyberger, who was also an Austrian (enemy) subject by descent, could not make a "declaration of alienage"[45] to become solely an enemy subject and obtain a discharge from the British army.[46] Freyberger was treated the same as any other British subject, with no recognition of his other nationality.[47]

Courts would, of course, still recognise the foreign nationality of a British subject if clearly required to by statute. This was held to be the case where a British Order expressly charged property of "German nationals" to give effect to the treaty ending World War I.[48] The House of Lords considered that only German law could give meaning to "German national".[49]

It is clear that in 1900, and for the first part of the twentieth century at least, there was no general assumption that the foreign nationality of British subjects who were dual citizens would be recognised under English law. Rather, unless there was a clear contrary intention, they were generally treated the same as any other British subject.

"Treason and the Trial of William Joyce" (1947) 7(1) *The University of Toronto Law Journal* 162-195

[43] *R v Lynch* [1903] 1 KB 444 at 458 (Lord Alverstone CJ, Wills and Channell JJ agreeing, at 459, 460). See P E Nygh, "Problems of Nationality and Expatriation before English and Australian Courts" (1963) 12 International and Comparative Law Quarterly 175 at 183

[44] See eg: Evening News (Sydney), Saturday 6 October 1900, p3 'An Australian "Boer"; Tasmanian News (Hobart), Tuesday 26 November 1901, p4 "AN AUSTRALIAN TRAITOR ELECTED TO PARLIAMENT. A TIMELY WARNING. 'IF HE GOES TO ENGLAND ARREST AWAITS HIM' ON THE CHARGE OF TREASON."; The Evening Star (WA) Friday 17 January 1902 p4 "Galway's Member. WARRANT ISSUED FOR ARREST OF 'COLONEL' LYNCH. LONDON, Jan. 16, 2.41 pm."; The Telegraph (Brisbane) Thursday 12 June 1902 p4 "'Colonel' Lynch. Arrested in London. Conveyed to Bow Street. LONDON, June 11."

[45] Under a provision substantially the same as s4 of the 1870 Act, which allowed a child born as a dual citizen the right on becoming an adult to make a declaration and cease to be a British subject

[46] *The King v Commanding Officer, 30th Battalion Middlesex Regiment, Ex Parte Freyberger* [1917] 2 KB 129 (KB and CA). See also: *Gschwind v Huntington* [1918] 2 KB 420

[47] Even though the right to make a such a declaration could hardly be more important than during a war between the states to which he owed allegiance

[48] *Kramer v Attorney-General* [1922] 2 Ch D 850 (CA); [1923] AC 528 (HL). See also *In Re Chamberlain's Settlement; Chamberlain v Chamberlain* [1921] 2 Ch 533

[49] [1923] AC 528 at 537 (Viscount Cave)

Under the 1900 approach, a British dual citizen would be treated the same as any other British subject unless s44(i) clearly required otherwise. In contrast to the term "German national",[50] the phrase "subject ... of a foreign power" could only be interpreted in the first instance under the law of Australia – since Australia itself would be "foreign" under the laws of any other country. On the 1900 approach, the common law of England and Australia would ignore any foreign nationality of British subjects and treat them only as subjects of the Queen, and therefore, not "foreign".

The effect of the second limb of s44(i) under the 1900 approach would have been limited.[51] However, it would not have been entirely superfluous even though, in 1900, s34(ii) separately required all parliamentarians to be subjects of the Queen.[52] Arguably, the second limb was needed to ensure that parliamentarians who became foreign citizens after being elected would lose their places.[53] More importantly, the requirement to be a subject in s34(ii) only applied until parliament provided otherwise. Consequently, the second limb was needed to limit how far parliament could go, without a referendum, if it dispensed with s34(ii).[54]

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[50] See *Kramer* [1923] AC 528 at 535-7

[51] On any reading there is substantial overlap between the first and second limbs of s44(i), and consequently a limited role for the second limb is not surprising. Section 44(i) borrows most of its language from the colonial precedents on which it was based: see footnote 57. In those precedents there would also have been very substantial overlap between the two limbs since a person seeking to be naturalized would invariably be required to take an oath of allegiance.

[52] Either natural born or at least 5 years naturalized under a law of the UK, a federating colony, the Commonwealth or a State

[53] Under s45. An example would be where a parliamentarian, after being elected, voluntarily naturalized as a foreign citizen, and ceased to be a British subject under s6 of the 1870 Act, but was permitted by the foreign country to naturalize without any acknowledgment that triggered disqualification under the first limb of s44(i). In such a case, if it were not for the second limb of s44(i), s45 would not apply, as it is not expressed to vacate for failing to continue to satisfy the requirements of s34(ii).

[54] On the 1900 approach the second limb allowed parliament a degree of flexibility that may have been thought appropriate at federation. For example, parliament could have allowed persons naturalized as British subjects in New Zealand, or other parts of the Empire, to be parliamentarians. Parliament could also have permitted denizens to stand for election. Although the concept of denizen had been overtaken by naturalization, the fact that the *Naturalization and Denization Act* 1898 (NSW) retained denizens suggests uncertainty as to whether denization would continue. Barton should have been aware of that legislation, given it was passed on 6 July 1898, when he was still a member of the NSW Legislative Council. On denizens, see eg: Sir Francis Piggott, *Nationality*

The drafting of the Constitution was a long and tortuous process taking nearly a decade. Drafts were prepared by a drafting committee and debated by delegates from the federating colonies at four lengthy Convention sessions – the first in 1891 and the rest, after a long break, in 1897-8. The agreed draft was then twice put to "referendum" votes by federating colonies. Finally, the Imperial parliament in London passed it, with some amendments, in 1900.

The drafting committee did not lack for legal expertise. It was chaired by Sir Samuel Griffith QC in 1891, and by Edmund Barton QC, then Leader of the Convention, in 1897-8. Both chairs drove the drafting and were heavily involved.[55] Griffith, Barton and Richard O'Connor QC, another member of 1897-8 committee, would later comprise the new High Court for its first three years.

The first draft of what became s44(i)[56] was similar to clauses in the federating colonies' constitutions.[57] Two amendments to it are worth noting – one made at

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Including Naturalization And English Law On The High Seas And Beyond The Realm – Part I Nationality and Naturalization (London 1907) Chapter VI

[55] See eg: Williams, *The Australian Constitution: A Documentary History*, (2005) sections 8 to 31 and especially at 61-2, 134, 162-5, 212, 259-61, 794

[56] Williams, *The Australian Constitution: A Documentary History*, (2005) section 11. There were separate clauses for the Senate and the House of Representatives, each providing that:

> *The place of a* [Senator / Member of the House of Representatives] *shall become vacant ...:*
> *(2) If he takes an oath or makes a declaration or acknowledgment of allegiance, obedience or adherence to a Foreign Power, or does any act whereby he becomes a subject or citizen, or entitled to the rights or privileges of a subject or citizen of a Foreign Power*

[57] Especially Constitution Act 1867 (Q) (31 Vict No 38), s23 (which had "rights or privileges" language); and Western Australia Constitution Act 1890 (Imp) (53 & 54 Vict c26), Sched 1, s29(3) ("rights or privileges" language). The language was closest to a combination of the WA clause and s31(2) of the British North America Act 1867. See also: Constitution Act 1854 (Tas) (18 Vict No 17), ss13, 24 (no "rights or privileges" language); New South Wales Constitution Act 1855 (Imp) (18 & 19 Vict c54) Sched 1, ss5, 26 ("rights or privileges" language); Victoria Constitution Act 1855 (Imp) (18 & 19 Vict c55), Sched 1, s24 (no "rights or privileges" language); Constitution Act 1855-6 (SA), ss12, 25 ("rights or privileges" language for the House of Assembly but not the Legislative Council). With the exception of the WA example, the Australian precedent clauses consist of long lists in which "or shall" appears to mark the beginning of a new category for vacating office. Some distinguish between acts involving acknowledgment of allegiance (the basis for the first limb of s44(i)) and acts whereby a person becomes a citizen or equivalent (the basis for the second limb of s44(i)). However, several combine both into one list/category: Tas s24 (but not s13), NSW s26 (but not s5), Vic s24, SA s25 (but not s12), WA s29(3).

the start of the process, and one at the very end. The first[58] changed a provision causing elected parliamentarians to lose their places on doing certain acts, into one that made anyone who did those acts "incapable" of being elected.[59] That meant the relevant acts – such as swearing a foreign oath of allegiance – disqualified them indefinitely. A question at the Convention,[60] and a confidential criticism by the British Colonial Office,[61] both suggested that the disqualification should be lifted for someone who later became a naturalized British subject.

The second noteworthy amendment was a redraft that created the dual citizen ban. It did that by changing the basis for disqualification from an act to a status – from disqualification after doing a specified act, to disqualification while being a foreign citizen or equivalent. None of the drafts before that amendment, and none of the precedents in the colonies' constitutions, would have disqualified any of the parliamentarians found to be dual citizens in recent years.

The change from action to status addressed the British Colonial Office's criticism since it meant that disqualification would end once a person stopped being a foreign citizen. Barton noted on his copy of the British Colonial Office's comments that its criticism had been addressed.[62] That may have been the reason for the redraft.

But the other effect of the change was to create a broad dual citizen ban that disqualified British subjects who had done nothing to seek – and might not even

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[58] Made following *The Lucinda* voyage: Williams, *The Australian Constitution: A Documentary History*, (2005) section 13

[59] Some of the colonies' constitutions contained similar clauses disqualifying (rather than merely vacating the place of an elected parliamentarian) for treason, certain convictions or undischarged bankruptcy (see NSW ss11, 16 , Vic ss4, 11, WA s23), but disqualification for seeking foreign citizenship was new: *Re Canavan* [2017] HCA 45 at [35]. The drafting committee appears to have concluded that all these grounds should be treated the same. The amended wording would not have disqualified any of those disqualified under s44(i) in *Re Canavan*, as none had done "any act" to become a foreign citizen.

[60] *Official Report of the National Australasian Convention Debates*, (Adelaide), 15 April 1897 at 736. Mr Gordon put the case of German fellow colonists *"who may have taken the oath of allegiance to a foreign power, especially those who have served in the ranks in Germany"*, and suggested a change to make them eligible again if they became naturalized British subjects

[61] Which was provided indirectly to the drafting committee: Williams, *The Australian Constitution: A Documentary History*, (2005) at 713 and 727. The British Colonial Office comment suggested that a person who had given their allegiance to a foreign power in the past should be eligible if they again become a British subject

[62] The hand-written note is beside the comment regarding s44(i) and states: *"This is subs (1), which is now in such a form as to cover the case put."* See: MS 51-Papers of Sir Edmund Barton, 1827-1940 [manuscript]./Series 6/Subseries 1001-01d/Item 1001, available at https://nla.gov.au/nla.obj-225156973/view

have been aware of – their additional foreign citizenship. The circumstances suggest that was not intended.

This change was made only two weeks before the Convention ended in March 1898.[63] At that time Barton and the Convention were under great pressure to resolve several controversial issues and bring a decade's hard work to a successful close. The change was one of 140 amendments made by the drafting committee that Barton was asked to run through. He declined, suggesting that members instead review a page-by-page comparison with the previous draft.[64] Barton portrayed the amendments as *"merely questions of drafting"*[65] that did not alter the sense, except where required by the Convention.[66]

Other parts of s44 were debated at length, but there was no explanation or discussion of the dual citizen ban at all.[67] It may be that the drafting committee did not realise the redraft would ban dual citizen parliamentarians.[68] No one

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[63] On 2 March 1898 the members of the Convention were still working off the final Sydney version of the draft Bill, and finding it increasingly difficult to do so. The drafting committee had circulated amendments, but it appears the members had not been able to give them any real consideration:

> *Mr. ISAACS.- ... I quite agree with my honorable friend (Mr. Symon) that it is impossible to know exactly where we are until we have not only a clean print of the Bill in our hands, but have also had some little opportunity of reading it. I have gone as carefully as I can through the amendments circulated by the Drafting Committee, and I have had them incorporated in my own copy of the Bill.*
> *Mr. SYMON.-You have been more industrious than most of us have been.*
> *Mr. ISAACS.-But I am still somewhat unable to consider these amendments without reference to the whole Bill. I think we should be able to reconsider the clauses with reference to the Bill as a whole, and we shall have to get a clean print of the Bill, and have some little time to read it, before we can do that with confidence. ...*

Official Report of the National Australasian Convention Debates, (Melbourne), 2 March 1898 at 1744-1745. See also 1741-1746 generally.
The clean print, in a page-by-page comparison with the Sydney draft, was provided at the beginning of the session on Thursday 3 March 1898

[64] *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898 at 1914

[65] *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898 at 1914, see also the similar general comments of Barton on 3 March 1898 at 1820, 1823

[66] *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898 at 1914, 1915

[67] *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 7 March 1898 at 1931-1942. The clause was agreed to after an amendment to what is now the qualification to s44(iv) in the last paragraph of s44

[68] See Garran's comment that he and Barton were working until four or five in the morning: Garran, *Prosper the Commonwealth* at 123. It would not be

was seeking a dual citizen ban. There was no precedent for such a ban, and some of the colonies' parliaments probably had dual citizen parliamentarians. The colonies' electorates that needed to approve the draft constitution would have included dual citizen voters.[69]

It was more than two years after the Convention finished before the Constitution was enacted by the Imperial parliament. During that time, the draft received close scrutiny by its opponents, the parliaments and electorates of each colony, leading Australian and British lawyers, the British Colonial Office and the British government. Other changes were made as a result of that scrutiny, to secure support in NSW and at the insistence of the British government. However, no concern was raised about the late introduction of an unprecedented dual citizen ban that was contrary to the approach Britain itself had taken 30 years earlier and was about to reaffirm.[70]

If the redraft was understood to create a dual citizen ban,[71] the lack of discussion and opposition was surprising. It made perfect sense, however, if the 1900 approach applied.[72]

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surprising, in the circumstances, if the Convention also did not realise that. Mr Patrick Glynn commented in his diary at the end of the Melbourne session:

> *The work was rushed at the finish, owing to eagerness of some N.S.W. and W.A. delegates to return. ...*
> *... questions, often involving new or serious issues, have been within the past week ... settled with a hast and apparent want of consideration that must affect public confidence in their adequacy as adjustments*

Entry dated 12 March 98 pp 31-32 (manuscript pp386-387, images 175, 177) Papers of Patrick McMahon Glynn, National Library of Australia, Series 3. Diaries, 1880-1927, 28 February 1892 - 21 March 1903 (Item 4)
http://nla.gov.au/nla.obj-562503041/

[69] Dual citizen electors were mentioned in another context on the very day the amendments to s44(i) were provided to the Convention:

> *... there is a very great body of people who are not registered. For instance, in South Australia there are a good many Germans who are not naturalized, but who, under a change in our laws, are becoming naturalized. They are entitled to become electors ...*

Official Report of the National Australasian Convention Debates, (Melbourne), 3 March 1898 at 1855 (Mr Glynn).
Such persons would be dual citizens after being naturalized unless their other citizenship terminated automatically on becoming a British subject – which was not the case in many relevant countries according to the survey of citizenship laws in the Appendix to the 1869 Royal Commission Report pp 19-29

[70] See footnotes 26 to 30

[71] And query why Barton would have wanted to risk introducing a dual citizenship ban, given his passionate commitment to the cause of federation: see eg John Reynolds, *Edmund Barton* (Sydney 1948) chapters 8-13, Geoffrey Bolton, *Edmund Barton* (2000) chapters 4-10

As mentioned already, the 1900 approach meant the second limb of s44(i) had limited effect, although it would still have limited how far parliament could go if it removed the requirement for parliamentarians to be subjects of the Queen. What the second limb would have prevented, without a referendum, was foreign citizen parliamentarians who owed no allegiance to the Queen. That was precisely what Barton had argued for at the 1897 Sydney Convention session:[73]

> *Persons who have taken the oath of allegiance to a foreign power are not to be classed in the same category as citizens of the country for the purpose of joining in legislation*.

Barton's statement accurately summarises the effect of the 1900 approach to s44(i).[74] Dual citizens, like any other citizens, would be disqualified under the first limb of s44(i) if they swore allegiance to a foreign power. Dual citizens by descent and naturalized British subjects, who had not done that,[75] would be treated the same as all other "citizens of the country".

What would it mean for s44(i) if the arguments above are correct? If the ordinary meaning of s44(i) had the meaning given by the 1900 approach at federation,[76] that had a number of advantages over the 90's approach, including:

- Disqualification of parliamentarians did not turn on the vagaries of foreign laws and the procedures of foreign governments. Rather, it

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[72] Query whether in the late nineteenth century there may have been reluctance in the Australian colonies to assume, when reading the second limb of s44(i), that competing foreign claims to the allegiance of a British subject would be recognised, or given credence, by British subjects in Australia. Baskerville argues that just 30 years earlier, as a result of events including the attempted assassination of Prince Alfred at Clontarf on 12 March 1868, the "dynamic loyalism" of the colony of NSW was *"suddenly forced into a straightjacket of effusive publicly-stated deference to the one Queen and empire"*: B G Baskerville, *The Chrysalid Crown: An un-national history of the Crown in Australia 1808 – 1986* PhD thesis, Department of History, School of Philosophical and Historical Inquiry, University of Sydney February 2017, at p131 and Chapter 3 generally (https://ses.library.usyd.edu.au/bitstream/2123/16395/1/Baskerville_BG_Thesis.pdf)

[73] *Official Report of the National Australasian Convention Debates*, (Sydney), 21 September 1897 at 1013

[74] This statement related to the draft as it stood before the amendments creating the dual citizen ban. However, if Barton thought, or assumed, that the 1900 approach would be taken in reading the recast final version of s44(i), his representations to the Convention as to the changes being matters of "drafting" (see at footnotes 64 to 66) fairly reflected his understanding

[75] Or otherwise brought themselves under an acknowledgment within the first limb

[76] And potentially, for some decades following

depended primarily on the first limb of s44(i) – whether a person *"is under any acknowledgment of allegiance, obedience, or adherence to a foreign power"*. The second limb had limited effect apart from preventing parliament from permitting, without a referendum, the election of parliamentarians who were only foreign citizens and owed no allegiance to the Queen.

- The test for disqualification was clear, based on matters likely to be within the knowledge of the person concerned, and did not require foreign law advice, continuous monitoring of all foreign nationality law and genealogical research.

That may help explain why s44(i) did not appear to be problematic for over 90 years, including during two world wars when concern regarding allegiance was understandably extreme. It may also suggest that the framers of the Constitution, and even the population generally, had a better appreciation of the challenges and complexity of "double allegiance" than we do. Whether either of those suggestions is correct is more a matter for historians than lawyers.

What the arguments above, if correct, would mean for the interpretation of s44(i) today is a different matter. I suspect Barton thought the recast s44(i) continued to give effect to the approach he advocated to the Sydney Convention.[77] But the significance of that for the current meaning of s44(i) is limited.[78]

The legal relevance of historical context and the intentions of the framers, and constitutional interpretation in general, are both difficult and controversial issues beyond the scope of this comment. It is enough to note that the High Court is generally, and unsurprisingly, less inclined to examine the historical context closely where the ordinary and natural meaning of the language is clear.

In this case, we consider the ordinary meaning of "*subject ... of a foreign power*" to be clear because we assume it to depend in the case of an Australian citizen (or at federation, a British subject), on whether any foreign law treats that person as a citizen. The arguments above suggest that, in 1900, the ordinary meaning was different because a British reader would assume its meaning in relation to a British subject would be determined by English law, and foreign law claims to that subject's allegiance would be disregarded. Whether the High Court would consider that justifies examination of the historical context is not clear to me.

An alternative approach might be to focus on the common law relied on in the decisions that adopted the 90's approach. The High Court could overturn that aspect of those decisions, although the High Court rarely does that. Another possibility may be that – if it is accepted that the common law's approach to dual nationality changed in the mid-twentieth century – parliament could enact

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[77] See text at footnote 73

[78] See eg *Singh v Commonwealth* (2004) 222 CLR 322; [2004] HCA 43 at [21] (Gleeson CJ), [52] (McHugh J), [159] (Gummow, Hayne and Heydon JJ), [247] (Kirby J), [294] (Callinan J)

legislation to reverse any effect of that change on s44(i) and restore the 1900 approach.[79]

A number of independent inquiries have considered s44(i) and recommended removal or reform of the dual citizen ban.[80] It may not be among the most important reforms to put to a referendum. Nevertheless, the ban is unfortunate and does harm. Our dual citizens should not be made to feel like second-class citizens. Doubting loyalty without reason undermines it.[81] And this is not a good time to reduce unnecessarily the pool or diversity of eligible parliamentarians.

Bruce Dyer

28 August 2019

[79] For example, by means of parliament passing legislation to reverse, with respect to the interpretation of s44(i) only, any change in the common law regarding recognition of dual citizenship and the application of foreign law to competing claims of sovereignty. See eg: *Sykes v Cleary* (1992) 176 CLR 77 at 137 (Gaudron J); *Re Gallagher* [2018] HCA 17 at [51] (Edelman J)

[80] For a summary, see: Ashley Kelaita, 'Section 44(i) of the Constitution: Where to from here?', Constitutional Critique, 5 June 2018, (Constitutional Reform Unit Blog, University of Sydney, http://blogs.usyd.edu.au/cru/)

[81] As was noted by the Lord Chief Justice of England in 1869: see footnote 29