

BUT WAIT ... THERE'S MORE: THE ONGOING COMPLEXITIES OF SECTION 44(I)

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This article discusses a number of unexplored aspects of section 44(i) and highlights some potential scenarios that may arise. In particular, the paper explores the possibility that as many as 26 Parliamentarians in the 45th Australian Parliament may be disqualified because of their status as Commonwealth citizens with the right of abode in the United Kingdom. The paper also considers the term 'foreign power' under section 44(i) in the context of territories with disputed statehood.

I INTRODUCTION

Having lain largely dormant for many years, over the past 18 months section 44(i) of the Australian Constitution has recently claimed many political careers. While many Australians perhaps hoped that multiple High Court decisions and resulting by-elections would mean that the country could put the 'parliamentary eligibility crisis' behind it, instead we seem to have only scratched the surface. This paper aims to highlight a number of the potentially significant issues that remain unexplored with regards to section 44(i).

Section 44(i) disqualifies anyone from sitting in Parliament if they are: (1) under acknowledgement, obedience, or adherence to a foreign power; (2) a citizen of a foreign power; (3) or entitled to the rights and privileges of citizens of a foreign power.¹ The Parliamentary eligibility crisis has, to date, resulted in 15

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members of the 45th Parliament being disqualified or resigning, by virtue of their falling into the second category. At the time of nomination for the 2016 election, these members were dual citizens of Australia and a foreign power. As legislation requires Parliamentarians to be Australian citizens, the second category of section 44(i) effectively restricts dual citizens from Parliament.²

The first category of acknowledgement, and the second prohibiting holding a foreign citizenship are relatively clear. The second was also further clarified by the High Court of Australia in a number of recent cases.³ The third category, disqualifying individuals entitled to the rights and privileges of citizens of a foreign power, is significantly more ambiguous. It is unclear what is included in the phrase ‘...entitled to the rights and privileges of citizens of a foreign power...’.

Two unexplored elements arise with the third category. The first is the entitlement to the rights of citizens. The type or scenario of entitlement which will invoke section 44(i) is unclear. The entitlement of specific rights or the broader entitlement of citizenship may both be reason for disqualification. The second is that rights must stem from a foreign power. This is not unique with the third category and applies to the entirety of section 44(i). While the

¹ *Australian Constitution* s 44(i). See also *Sykes v Cleary* (1992) 176 CLR 77, 110 (Brennan J) which categorised section 44(i) into three categories. But see *Re Canavan*; *Re Ludlam*; *Re Waters*; *Re Roberts (No 2)*; *Re Joyce*; *Re Nash*; *Re Xenophon* (2017) 91 ALJR 1209, 1219 [23] (*‘Re Canavan’*) where the High Court did not dismiss the approach taken by Justice Brennan in *Sykes* but took instead a two category approach to section 44(i) that distinguished between the first limb (where a person is under ‘any acknowledgement of allegiance, obedience, or adherence to a foreign power’) which focused on the conduct of the person concerned, and the second limb (which concerns being a ‘subject or citizen or entitled to the rights or privileges of a subject or citizen of a foreign power’) that involved questions of legal status or of rights under the law of a foreign power. While recognising that the approach taken by Justice Brennan differs from the approach adopted in *Re Canavan*, it is useful for the purposes of this paper as it clearly distinguishes between the status of being a subject or citizen of a foreign power and the separate status of an entitlement.

² *Commonwealth Electoral Act 1918* (Cth) s 163.

³ *Re Canavan* [2017] HCA 45; *Re Gallagher* [2018] HCA 17.

interpretation of ‘foreign power’ has been clarified to a significant degree by the High Court in cases such as *Sue v Hill*,⁴ there still remains some areas of doubt. In particular, if Australia does not recognise a foreign power’s sovereignty, and consequently their citizenship, it is unclear if individuals who are citizens of that foreign power will be disqualified under section 44(i).

This article aims to explore these unexplored elements within the third category of section 44(i). It will discuss the extent of the above identified issues and how they apply today.

II THE DEVELOPMENT OF SECTION 44(I)

A *Drafting*

There is little debate regarding section 44(i) in the original Constitutional Convention debates. Australian citizenship also did not exist until 1949. Therefore, some consider the inclusion of section 44(i) a result of short sightedness and anti-foreigner sentiments by the framers of the Constitution.⁵

To the contrary, the lack of debate indicates that the provision was not contentious. It reflected other constitutions at the time.⁶ It also must be noted that the framers did debate Australian citizenship (referred to as citizenship of the Commonwealth).⁷ The framers debated whether to define citizenship in the Constitution (similar to how US citizenship is defined) but ultimately couldn’t agree on whether to include it in the Constitution, and how it would interact with State citizenship.⁸ Any argument that the framers of Constitution acted

⁴ (1999) 199 CLR 462.

⁵ Joint Standing Committee on Electoral Matters, Parliament of Australia, *Excluded: The Impact of Section 44 on Australian Democracy* (2018) 14 (‘*Excluded*’).

⁶ *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 21 September 1897, 1013.

⁷ *Ibid* 948.

⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1750–69.

with an anti-foreigner sentiment is weakened by the fact that discussions on citizenship did not exclude naturalisation.⁹

From looking at the relevant Convention debates and the specific wording that was ultimately included in the Constitution, we can see that the purpose of section 44(i) is to provide a basic safeguard to parliamentary integrity, and prevent foreign infiltration.¹⁰ A proposal to add the phrase ‘...until Parliament otherwise provides’ was overwhelmingly denied by the framers in a clear attempt to preserve section 44 as a safeguard to parliamentary integrity.¹¹

Initially, the entirety of section 44(i) was phrased in an active voice, suggesting it only applied to foreign citizenship acquired actively.¹² However, the second and third categories of the final version were ultimately worded passively.¹³ It has been suggested that this change was substantial and negated the true intentions of the framers.¹⁴ The first category still requires the active act of acknowledgement.¹⁵ The second and third categories were originally worded as follows:

‘...has done any act whereby he has become a subject or citizen or entitled to the rights or privileges of a subject or a citizen of a Foreign Power ...’.¹⁶

⁹ See also *Australian Constitution* s 34(ii).

¹⁰ *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 21 September 1897, 1011–5; *Official Report of the National Australasian Convention Debates*, Adelaide, 15 April 1897, 736.

¹¹ *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 21 September 1897, 1011–5.

¹² *Ibid.*

¹³ *Excluded*, above n 5, 16.

¹⁴ *Ibid* 17.

¹⁵ *Australian Constitution* s 44(i).

¹⁶ *Official Report of the National Australasian Convention Debates*, Sydney, 9 April 1891, 950, cl 46.

It is important, however, not to overstate the significance of this change. The underlying intention of the provision remains identical and, importantly, both versions do not distinguish between voluntary and involuntary acts.

B *High Court Cases*

To understand section 44(i) it is essential to understand the way that its interpretation has been developed through a number of key High Court cases. One of the practical challenges to understanding the Constitution in the Australian context (and, indeed, other countries where the Constitution guaranteed both separation of powers and judicial review) is that the High Court is reactive and can only offer interpretations in response to existing controversies that are brought before the Court. This is not intended as a criticism, as there are important reasons for not allowing a judicial system to explore hypotheticals. But it does mean that our understanding of specific constitutional provisions necessarily develops gradually over time, and that definitive resolutions to complex constitutional questions may not be quickly or easily found. Section 44(i) provides an example of this, and it explains why after an extensive national discussion over the past two years there remain aspects of the provision that have not been judicially considered, and that still therefore remain unclear.

1 *Crittenden v Anderson*

The first time that the High Court considered section 44(i) was in 1949. The election of Mr Anderson, a Roman Catholic was challenged on the basis that as a Catholic, he was obedient to a foreign power, namely the Holy See.¹⁷ The High Court ruled that it is section 116, and not section 44(i), which is the relevant constitutional provision when the right of an individual to sit in Parliament is challenged on the grounds of religion. Applying section 44(i) in

¹⁷ *Crittenden v Anderson* (Unreported, High Court of Australia, Fullagar J, 23 August 1950).

such cases to disqualify a person would essentially establish a religious test to sit in Parliament.¹⁸ The Court found that contention to be untenable in light of section 116. The Court also suggested that a foreign power's sovereignty would need to be considered, however, it did not discuss the meaning of foreign power any further.¹⁹

2 *Sykes v Cleary*

The High Court did not have to consider section 44(i) again until 1992.²⁰ *Sykes v Cleary* dealt with challenges under both sections 44(i) and 44(iv). The majority of the High Court held that candidates must satisfy the requirements of section 44(i) at the time of nomination, which has subsequently become the accepted position.²¹ The question of whether someone has renounced their foreign citizenship was held to depend on the law of the foreign power.²² The Court, despite acknowledging that someone may not be aware they are a foreign citizen, essentially ruled that ignorance of foreign citizenship is not a defence.²³

The Court considered the international principle of real and effective nationality, which is based upon a factual relationship between an individual and the State whose nationality is in question.²⁴ The Court noted that a unilateral renunciation, such as the one previously taken when naturalising as an

¹⁸ Ibid 4.

¹⁹ Ibid.

²⁰ *Sykes v Cleary* (1992) 176 CLR 77.

²¹ Ibid. Noting, however, that this was not a unanimous interpretation, with a narrower construction being adopted by Justice Deane in *Sykes v Cleary*. The majority in that case interpreted the words 'shall be incapable of being chosen' as referring to the entire process of being chosen, which included nomination as an essential part. By contrast, Justice Deane interpreted the relevant time for considering eligibility as being the declaration of the poll, which represented the final step in the choice that was made by the voters. The issue was put beyond doubt in *Re Canavan*, with the High Court unanimously accepting (at [3]) the broader majority view from *Sykes v Cleary* as representing the settled position.

²² Ibid 106 (Mason CJ, Toohey and McHugh JJ).

²³ Ibid 108 (Mason CJ, Toohey and McHugh JJ).

²⁴ *Liechtenstein v Guatemala (Judgement)* [1955] ICJ Rep 4, 20.

Australian, was insufficient to meet the requirements of section 44(i), if further steps are available under foreign law to fully relinquish ties to the foreign power.²⁵

It was suggested that an Australian cannot be irredeemably prevented from sitting in Parliament due to the operation of a foreign law. It would be contrary to the intentions of the framers for an Australian to be disqualified if a foreign power involuntarily imposed a continuing right of citizenship.²⁶ The Court noted that an individual who finds themselves in this position will meet the requirements of section 44(i) if they take all reasonable steps to renounce such citizenship.²⁷ Steps required would depend on circumstances.²⁸ This would also prevent foreign governments from interfering in Parliament, and later become known as the ‘reasonable steps’ exception.²⁹ This was the first discussion of the ‘reasonable steps’ exception, however the full reach and operation of this exception would not come to be further explored until *Re Canavan*,³⁰ some 25 years later.

3 *Sue v Hill*

Throughout the early operation of section 44(i), the term ‘foreign power’ was not a contentious issue. However, the question of whether the UK was a foreign power eventually had to be answered. After considering the decreasing British influence over the Australian executive, judicature, and legislature, the High Court ruled that the UK has been a foreign power since at least 1986,³¹ after the passage of the *Australia Acts*.³² The High Court also gave the term foreign

²⁵ *Sykes v Cleary* (1992) 176 CLR 77.

²⁶ *Ibid* 107 (Mason CJ, Toohey and McHugh JJ).

²⁷ *Ibid*.

²⁸ *Ibid* 108 (Mason CJ, Toohey and McHugh JJ).

²⁹ *Re Gallagher* [2018] HCA 17.

³⁰ *Re Canavan* [2017] HCA 45.

³¹ *Sue v Hill* (1999) 199 CLR 462.

³² *Australia Act 1986* (Cth); *Australia Act 1986* (UK) c 2.

power its ordinary meaning of ‘any sovereign state other than the State for whose purposes the question of the other’s status is raised’.³³ It was also held that the term ‘foreign power’ invites questions of international and domestic sovereignty,³⁴ and whether a nation is classified as a foreign power can change over time.³⁵

4 *Re Canavan*

Despite the High Court’s clarifications as to the interpretation of section 44(i), the events of 2017-18 highlighted that much still remained unclear. In *Re Canavan* the High Court unanimously upheld the decision of the majority in *Sykes v Cleary*, and held that five of the seven parliamentarians which had been referred to the Court were not eligible to sit in the Australian Parliament.³⁶ It held that knowledge of foreign citizenship is irrelevant for the purposes of section 44(i), and that foreign citizenship can be conferred involuntarily.³⁷ On this point it was observed that, as questions of disqualification would arise ‘only where the facts which establish the disqualification have been brought forward in Parliament’, the facts leading to that referral would always have been knowable and hence (subject to the laws of the relevant nation) renounceable.³⁸

Of particular interest to this paper was the consideration in *Re Canavan* of the citizenship status of Senator Nick Xenophon. Specifically, the Court was asked to consider whether Senator Xenophon was disqualified by virtue of being a British Overseas Citizen (BOC). The High Court essentially ruled that a BOC was not a real citizenship as it did not confer the rights of British nationality,

³³ *Sue v Hill* (1999) 199 CLR 462, 524.

³⁴ *Ibid* 487.

³⁵ *Ibid* 525.

³⁶ *Re Canavan* [2017] HCA 45.

³⁷ *Ibid*.

³⁸ *Ibid* [60].

primarily, the right of abode in the UK.³⁹ This is despite the relevant foreign law itself describing a BOC to be a form of citizenship.⁴⁰

5 *Re Gallagher*

Following the events of *Re Canavan*,⁴¹ a citizenship register detailing the family history of each individual Parliamentarian was established. It transpired from entries on this register, that some former British citizens only received confirmation of the registration of their renunciation after the close of nominations for the 2016 elections.⁴² Senator Katy Gallagher was one such example. Senator Gallagher had entered the Senate on 26 March 2015 to fill a casual vacancy, and served as a Senator for the Australian Capital Territory. Her nomination as a candidate for the 2016 federal election was lodged on 31 May 2016, with the election itself being held on 2 July 2016 and Senator Gallagher being formally returned as a duly elected Senator on 2 August 2016. It transpired, however, while Senator Gallagher had begun the process of renouncing her British citizenship in April 2016, her declaration of renunciation was not registered by the Home Office of the United Kingdom until 16 August 2016, some eleven weeks after her nomination had been filed.⁴³

Under British law, renunciation only takes effect upon registration.⁴⁴ Senator Gallagher claimed that as there was nothing more she could have done, she was covered under the ‘reasonable steps’ exception. The High Court ruled that, in fact, she was not.⁴⁵ The High Court clarified the ‘reasonable steps’ exception

³⁹ Ibid [134].

⁴⁰ *British Nationality Act 1981* (UK) c 61, s 40.

⁴¹ *Re Canavan* [2017] HCA 45.

⁴² House of Representatives Citizenship Register, see *David Feeney, Justine Keay, Susan Lamb, Rebekha Sharkie, and Josh Wilson*; Senate Citizenship Register, see *Katy Gallagher*.

⁴³ *Re Gallagher* [2018] HCA 17, [1]-[4].

⁴⁴ *British Nationality Act 1981* (UK) c 61, s 12(2).

⁴⁵ Only one individual had their case heard by the High Court but four others, whose factual scenarios were practically identical, resigned upon the High Court delivering its decision. One resigned prior to the case.

and noted it contained two limbs.⁴⁶ First, the relevant foreign law must prohibit renunciation, or renunciation must be unreasonable.⁴⁷ Second, individuals who find themselves in such a position must still take all reasonable steps to renounce.⁴⁸ As British citizens can renounce citizenship relatively easy, with a clearly established renunciation process in place, the exception did not apply in the case of Senator Gallagher.

What amounts to reasonable steps in any individual case is still not necessarily certain and remains dependent on an individual's circumstances. However, what would be considered reasonable steps is objective.⁴⁹ Whether renunciation is unreasonable will also be considered objectively. It is likely to include a requirement of foreign military service, or danger to person or property.⁵⁰

The High Court unanimously declared that Senator Gallagher had been ineligible to be elected. Immediately following this decision four other parliamentarians in similar situations announced their resignations from the House of Representatives, triggering by-elections in their seats.⁵¹

C *Constitutional Reform*

Since Federation, every inquiry considering section 44(i) has recommended its deletion, with the latest being in 2018.⁵² Potential issues exist with section 44(i), such as the ones discussed in this paper. Yet past parliamentary inquiries have often focused on issues which do not actually pose any practical problems. For example, the latest report by the Joint Standing Committee on Electoral Matters

⁴⁶ *Re Gallagher* [2018] HCA 17.

⁴⁷ *Ibid* [36].

⁴⁸ *Ibid* [32].

⁴⁹ *Ibid*.

⁵⁰ *Ibid* [60]–[65].

⁵¹ Specifically, Justine Keay (Member for Braddon), Susan Lamb (Member for Longman), Rebekha Sharkie (Member for Mayo) and Josh Wilson (Member for Fremantle).

⁵² *Excluded*, above n 5.

(‘*JSCEM*’) identified the potential for foreign powers to unilaterally extend citizenship to Parliamentarians in an attempt to disqualify the Parliamentarians and destabilise the Government.⁵³ *JSCEM*, however, failed to note the individual Justices within the High Court had already considered this possibility and observed that section 44(i) would not extend to such scenarios where foreign powers attempted to exceed their jurisdiction.⁵⁴

III THE SCOPE OF ENTITLEMENT UNDER SECTION 44(I)

As noted, section 44(i) can be divided into three categories or limbs, with prospective Parliamentarians only needing to fall foul of one limb to be disqualified.⁵⁵ The third limb disqualifying anyone entitled to the rights and privileges of citizens of a foreign power is unclear and open to differing possible interpretations. It is unclear if it refers to the entitlement of citizenship or the entitlement of rights deriving from a status akin to citizenship, or even both.

The confusion to this matter is exacerbated when one looks at the plain English definition of ‘entitle’. Entitle is defined as ‘Giv[ing] (someone) a right or a claim to receive or do something’.⁵⁶ Therefore, the term ‘entitled’ in section 44(i) could either refer to the entitlement of rights or a claim to citizenship, if not both.

The High Court has given the term ‘entitled’ a rather broad scope, explaining that it connotes

‘a state of affairs involving the existence of a status or of rights under the law of the foreign power’.⁵⁷ In reality, countries do not tend to distribute rights

⁵³ *Ibid*, 9.

⁵⁴ *Sykes v Cleary* (1992) 176 CLR 77, 113 (Brennan J).

⁵⁵ *Ibid* 109–10 (Brennan J).

⁵⁶ Susan Butler (ed), *Macquarie Dictionary* (Macquarie Dictionary Publishers, 6th ed, 2013) 493.

⁵⁷ *Re Canavan* [2017] HCA 45 [17].

freely or expansively to non-citizens. However, some instances where this does occur are outlined below.

A Entitlement of the Rights of Citizens

1 Citizenship and the Rights Associated with It

It is difficult to assign a proper legal definition to the term ‘citizenship’, particularly as it is used interchangeably with the term ‘nationality’.⁵⁸ It is suggested that ‘nationality’ deals with the relationship between an individual and the State from an external view, while ‘citizenship’ implies internal rights conferred to the individual from the State.⁵⁹ The High Court does not seem to prefer one term over the other, and has used the terms interchangeably when applying section 44(i).⁶⁰

The international community has moved away from rigid determinations of citizenship. With the granting of fundamental rights at international law, many Australians will find themselves subject to rights of foreign powers.⁶¹ Such rights are unlikely to invoke section 44(i) as they are arguably the rights of ‘society’ or ‘the international community’ and are not unique to a specific person or class of people. Many rights and privileges remain reserved for citizens and the conferral of at least some of these rights is what will be likely to invoke section 44(i).⁶²

The main rights of citizenship include, but are not limited to the right to: free movement; a passport; vote; stand for election; access the public service;

⁵⁸ British Institute of International and Comparative Law, *The Rights and Responsibilities of Citizenship* (2008) 3 (*‘Citizenship Report’*).

⁵⁹ *Ibid* 4.

⁶⁰ *Sykes v Cleary* (1992) 176 CLR 77, 107 (Mason CJ, Toohey and McHugh JJ).

⁶¹ *Citizenship Report*, above n 58, 7.

⁶² *Ibid* 11.

protection; welfare; employment; and health care.⁶³ Duties of citizens can include: allegiance; voting; military conscription; and jury duty.⁶⁴ For the purposes of the third category of section 44(i), a comparison of the above hallmarks given to the citizens of a foreign power, and those given to the individual whose candidacy is in dispute must be taken as not every hallmark is present in every citizenship.⁶⁵

Not every presence of the above hallmarks is likely to invoke section 44(i). For example, every Australian citizen is entitled to consular assistance from Canada in locations where an Australian diplomatic mission does not exist.⁶⁶ While consular assistance is in many instances a right of a citizen, it is unlikely the rights stemming from this particular agreement between Australia and Canada, or any similar, will invoke section 44(i). The above agreement is a reciprocal agreement, which is not only part of Canadian law but also Australian law.

The High Court could theoretically construe section 44(i) to be wide enough to include situations like the above. This is, however, unlikely based upon the High Court's originalist interpretive approach to section 44(i). It would be contrary to the intention of the framers of the Constitution, as international agreements, similar to the Australian-Canadian one, were considered by the framers, with it being expressly observed that '[s]urely it is never intended that by a person travelling in another country, who becomes entitled to privileges conferred on him by a treaty between two high powers, he should be disqualified from holding a seat in the Federal Parliament'.⁶⁷

⁶³ Ibid 14.

⁶⁴ Ibid.

⁶⁵ *Sykes v Cleary* (1992) 176 CLR 77, 106 (Mason CJ, Toohey and McHugh JJ).

⁶⁶ *Exchange of Notes constituting an Agreement between the Government of Australia and the Government of Canada for Sharing Consular Services Abroad*, Australia-Canada, signed 7 August 1986, [1986] ATS 18 (entered into force 7 August 1986).

⁶⁷ *Official Report of the National Australasian Convention Debates*, Adelaide, 15 April 1897, 736 (Mr Carruthers).

Rights or privileges, not resulting from a bilateral or multilateral agreement, and that are ordinarily only provided to citizens, would on the other hand be likely to invoke section 44(i). Justice Brennan considered that the third category would be invoked when there is acknowledgment of allegiance to a foreign power as a result of the rights or status conferred to an individual by the foreign power.⁶⁸ For example, in 2012, when Julian Assange nominated as a candidate for the Australian Senate, he was under the protection of the Ecuadorian Embassy in London, and therefore, would likely to have been disqualified by virtue of section 44(i) and the rights granted to him by Ecuador. Like the second category, the third does not seem to require actual knowledge.⁶⁹

Whether an individual holding the rights of foreign citizens will be disqualified under section 44(i) appears to depend on how many rights are conferred to him or her. It would have to be significant enough to create an imputed sense of allegiance. In relation to individual rights, we will have to wait and see if such a case arises before the High Court.

2 *Commonwealth Citizenship*

While it is hard (and arguably pointless) to consider the endless combination of foreign rights which would potentially disqualify an Australian from sitting in Parliament, we can consider specific non-citizen statuses which do confer the hallmarks of citizens. There is potentially a not insignificant number of these. Arguably the most common to Australians is the status of Commonwealth citizenship under British law. There are two main ‘forms’ of Commonwealth citizenship under British law. The first is Commonwealth citizenship with UK

⁶⁸ *Sykes v Cleary* (1992) 176 CLR 77, 110 (Brennan J).

⁶⁹ *Re Canavan* [2017] HCA 45 [21]–[23].

permanent residence, and the second is Commonwealth citizenship with the right of abode in the UK.

(a) *Commonwealth Citizens with the UK Permanent Residency*

A Commonwealth citizen under British law is any citizen of the countries listed in the *British Nationality Act*.⁷⁰ Australia is included in that list. The intention of Commonwealth citizenship was to create a single class of citizenship between Commonwealth countries, somewhat similar to the modern example of European Union ('EU') citizenship.⁷¹ While that is not actually the case today, Commonwealth citizens with UK permanent residency are provided with some of the rights of British citizens.⁷² For example, Commonwealth citizens with UK permanent residency have the right to vote, stand for election, and hold public office in the United Kingdom.⁷³ Further, Commonwealth citizens also have the duty to serve in a jury if called upon.⁷⁴

(b) *Commonwealth Citizens with the Right of Abode in the UK*

While the majority of Australians need to hold UK permanent residency in order to obtain some of the rights of British citizens in the UK, some do not. Some Australians (and other Commonwealth citizens) are granted the right of abode in the UK and therefore do not need permanent residence (or cannot be granted any visa for that matter).⁷⁵ The right of abode is the unconditional freedom from immigration control and is arguably the most important right of citizenship.⁷⁶ An individual with the right of abode in the UK is free to enter and exit the UK

⁷⁰ *British Nationality Act 1981* (UK) c 61, sch 3.

⁷¹ Goldsmith, *Citizenship: Our Common Bond* (2007) 14.

⁷² *Representation of the People Act 1983* (UK) c 2, s 4.

⁷³ *Representation of the People Act 1983* (UK) c 2, s 1; *Electoral Administration Act 2006* (UK) c 22, s 18(2).

⁷⁴ *Juries Act 1974* (UK) c 23, s 1; *Representation of the People Act 1983* (UK) c 2, s 4.

⁷⁵ *Immigration Act 1971* (UK) c 77, s 2(b).

⁷⁶ Goldsmith, above n 71, 20; See also *Re Canavan* [2017] HCA 45, [120]–[135].

without hindrance.⁷⁷ Individuals with the right of abode are also able to work, study, apply for welfare, vote, and stand for public office.⁷⁸ As an interesting counter-example, the rights afforded to EU citizens in the UK are distinct and lessor than those afforded to Commonwealth Citizens with the right of abode in the UK due to their conditional nature.⁷⁹

(i) *Individuals Afforded the Commonwealth Right of Abode in the UK*

Due to Australia's historical links with the UK, certain Australians have the right of abode in the UK.⁸⁰ However, since 1 January 1983, the right of abode is only afforded to British citizens.⁸¹ This change in law did not, however, affect individuals already holding the Commonwealth right of abode.⁸² A Commonwealth citizen could either obtain the right of abode by birth or marriage. If a female Commonwealth citizen married a male with the right of abode on or before 31 December 1982, and does not fall foul of certain exclusions, she would have the right of abode by virtue of her husband's status.⁸³ Further, if someone held Commonwealth citizenship prior to 1 January 1983, and at the time of their birth at least one of their parents was a Citizen of the United Kingdom and Colonies ('*CUKC*') by birth, then they will have the right of abode by birth.⁸⁴ Both scenarios conferring the right of abode to Commonwealth citizens do not apply if the individual has not been a Commonwealth citizen at any time since 1983.⁸⁵ Individuals with a Commonwealth right of abode have practically the same rights as British

⁷⁷ *Immigration Act 1971* (UK) c 77, s 1.

⁷⁸ *Immigration Act 1971* (UK) c 77, s 1; *Representation of the People Act 1983* (UK) c 2, s 1; *Electoral Administration Act 2006* (UK) c 22, s 18(2).

⁷⁹ Goldsmith, above n 71, 25–9.

⁸⁰ *Immigration Act 1971* (UK) c 77, s 2.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Immigration Act 1971* (UK) c 77, s 2, later amended by *British Nationality Act 1981* (UK) c 61, s 39.

⁸⁴ *Ibid.*

⁸⁵ *Immigration Act 1971* (UK) c 77, s 2(b)(ii).

citizens, and under the *Immigration Act* the term ‘British citizen’ includes Commonwealth citizens with the right of abode.⁸⁶

Individuals who are Commonwealth citizens with the right of abode may also have a claim to the right of abode by virtue of British citizenship if their father was a CUKC.⁸⁷ Such individuals therefore have two claims to the right of abode. Individuals with the Commonwealth right of abode and only a CUKC mother do not automatically receive British citizenship, but some may register for it.⁸⁸ Individuals who have two claims to the right of abode and renounce their British citizenship, retain the right of abode by virtue of their Commonwealth citizenship.⁸⁹ Therefore, while technically such individuals have renounced British citizenship, they maintain all the rights and privileges associated with it through the separate operation of their Commonwealth citizenship.

There are at least 26 current Parliamentarians who potentially could have the right of abode in the UK due to the evidence of British family history on the parliamentary citizenship register.⁹⁰ Three of these participated in the recent JSCEM inquiry into section 44.⁹¹ This includes the Deputy Chair of JSCEM, who was part of the majority report that recommended the preparation of a proposed referendum question to potentially repeal section 44(i).⁹² There are

⁸⁶ *Ibid* s 2(2).

⁸⁷ *British Nationality Act 1948* (UK) c 56, later amended by *British Nationality Act 1981* (UK) c 61.

⁸⁸ *Borders, Citizenship and Immigration Act 2009* (UK) c 11.

⁸⁹ UK Home Office, *Nationality: Right of Abode* (version 4, 2018) 7; See also wording of *Immigration Act 1971* (UK) c 77, s 2.

⁹⁰ House of Representatives Citizenship Register, see *Tony Abbott, John Alexander, Adam Bandt, Chris Bowen, Mark Butler, Nick Champion, Lisa Chesters, George Christensen, Pat Conroy, Kate Ellis, Andrew Giles, Justine Keay, Michael Keenan, Madeline King, Susan Lamb, Brian Mitchell, Ben Morton, Bill Shorten, Ann Sudmalis, and Alan Tudge*; Senate Citizenship Register, see *Alexander Gallacher, Susan Lines, Louise Pratt, Rachel Siewart, Dean Smith, and Glenn Sterle*.

⁹¹ *Excluded*, above n 5, xv-i; House of Representatives Citizenship Register, see *Andrew Giles, and Ben Morton*; Senate Citizenship Register, see *Rachel Siewart*.

⁹² *Excluded*, above n 5, xv; House of Representatives Citizenship Register, see *Andrew Giles*.

also additional Parliamentarians who would also have the Commonwealth right of abode but for some minor detail. For example, Rebekha Sharkie,⁹³ and Paul Fletcher,⁹⁴ would have obtained the Commonwealth right of abode if they had been naturalised as Australians at an earlier date.⁹⁵

It is also evident that should the Commonwealth right of abode be deemed a problem in relation to section 44(i), it is one which will eventually ‘solve’ itself. For example, Tony Abbott,⁹⁶ and Jordan Steele-John,⁹⁷ both have identical ties with the UK, but Jordan Steele-John was born after 1983 and does not have the right of abode in the UK for this reason alone.⁹⁸ Despite being a potential problem which solves itself, the question of whether the status of Commonwealth right of abode invokes section 44(i) is consequently a vital one to know and understand for the foreseeable future.

(ii) Comparison of the Commonwealth Right of Abode and British Citizenship

There are very few disadvantages in being a Commonwealth citizen with the right of abode rather than a British citizen. A Commonwealth citizen with the right of abode can work freely in the UK, enter and exit the UK without restriction, study in the UK, and much more.⁹⁹ Individuals with the Commonwealth right of abode can also stand for election and vote.¹⁰⁰ These rights are not subject to any conditions such as residence. However, while

⁹³ Member for Mayo.

⁹⁴ Member for Bradfield.

⁹⁵ House of Representatives Citizenship Register, see *Rebekha Sharkie*, and *Paul Fletcher*.

⁹⁶ Member for Warringah and former Prime Minister.

⁹⁷ Senator for Western Australia.

⁹⁸ House of Representatives Citizenship Register, see *Tony Abbott*; Senate Citizenship Register, see *Jordan Steele-John*.

⁹⁹ *Immigration Act 1971* (UK) c 77, s 1.

¹⁰⁰ *Representation of the People Act 1983* (UK) c 2, ss 1, 4.

British citizens are able to vote in UK Parliamentary elections while overseas, Commonwealth citizens who ordinarily can vote if in the UK are not.¹⁰¹

The most obvious difference between the two statuses is the name. British citizens are British, whereas on the other hand Commonwealth citizens with the right of abode are not.¹⁰² However, Commonwealth citizens are not considered aliens in the UK.¹⁰³ This is further highlighted by the ability for Commonwealth citizens to sit in the British Parliament (including in the House of Lords), and serve in the British military. There are some roles that are reserved exclusively for British citizens, but the rights granted to Commonwealth citizens with the right of abode are extensive.

The Commonwealth right of abode is a statutory status conferred automatically and is something a person either has or does not have.¹⁰⁴ It confers both rights of citizens and duties, such as the duty to serve in a jury if called upon.¹⁰⁵ However, regardless of whether someone is British or a Commonwealth citizen, they must be able to prove they have the right of abode.¹⁰⁶ A British citizen or subject can prove they have the right of abode with a British passport stating their status.¹⁰⁷ A Commonwealth citizen with the right of abode can prove their claim to the right of abode with a 'certificate of entitlement' which is affixed to their passport.¹⁰⁸ The lack of a certificate does not mean an individual does not have the right of abode, in the same way that a lack of a passport does not mean

¹⁰¹ *Representation of the People Act 1985* (UK) c 50, s 1.

¹⁰² *British Nationality Act 1981* (UK) c 61.

¹⁰³ *Ibid* s 50.

¹⁰⁴ UK Home Office, above n 89, 4.

¹⁰⁵ *Juries Act 1974* (UK) c 23, s 1

¹⁰⁶ *Immigration Act 1971* (UK) c 77, s 1(1).

¹⁰⁷ *Ibid* s 3(9).

¹⁰⁸ *Ibid*.

an individual is not a British citizen. Therefore, the certificate of entitlement is akin to the ‘evidence of Australian citizenship’.¹⁰⁹

Further, a Commonwealth citizen with the right of abode cannot obtain a British passport. In the UK this is merely a symbolic difference as a Commonwealth citizenship with a certificate of entitlement attached operates in an identical way to a British passport and individuals can use British immigration channels. However, when travelling to other countries, Australians with the Commonwealth right of abode are considered Australian and not British.

With the imminent departure of the UK from the EU, the difference between the Commonwealth right of abode and British citizenship in the EU is less relevant. However, it is still useful to consider as it would be relevant when determining potential instances of disqualification from this current Australian Parliament (and subsequent Parliaments, depending on the date of the next Federal election, and any agreement between the UK and EU). The UK’s future relationship with Europe may continue to create rights or privileges for British citizens. For example, in 1999, prior to the expansion of EU rights, European travel advantages were considered to be a right or privilege associated with British citizenship.¹¹⁰

Any citizen of an EU Member State is automatically a citizen of the EU.¹¹¹ EU citizenship doesn’t replace national citizenship, it merely complements it.¹¹² There is no definition or uniform process to obtain EU citizenship as each Member State has a different definition and process to obtain national

¹⁰⁹ *Australian Citizenship Act 2007* (Cth).

¹¹⁰ *Sue v Hill* (1999) 199 CLR 462, 572 [292].

¹¹¹ *Treaty on the Functioning European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) (‘FEU’) art 20.

¹¹² *Ibid.*

citizenship.¹¹³ Every citizen of the Union has the right to move freely and reside freely in the territory of any Member State.¹¹⁴ European citizenship further extended the rights available under the free movement of people principle.¹¹⁵

The UK has declared that for the purposes of the EU, a national, and consequently anyone entitled to EU rights, is anyone who is a: British citizen; British subject with the right of abode by virtue of Part IV of the *British Nationality Act 1981* (UK) c 61; and British Dependent Territories citizen who acquired their citizenship from a connection with Gibraltar.¹¹⁶ Consequently, Commonwealth citizens with the right of abode do not have the EU right of free movement or EU citizenship by virtue of their UK status.

An interesting, and arguably absurd exception does arise with EU rights however. A Commonwealth citizen, with the right of abode in the UK is eligible to vote and stand for elections to the European Parliament.¹¹⁷ While it would potentially create considerable political complexities for the EU, it appears likely that a Commonwealth citizen would not be prevented from standing for election. This is due to the power of EU member states to set their own qualification on the entitlement to EU rights. The European Court of Justice has also noted that the UK can expand voting rights to Commonwealth citizens.¹¹⁸ This little quirk results in non-citizens of the UK potentially representing the UK at an official international level. How Commonwealth citizens could physically serve in the European Parliament if elected remains unclear as the

¹¹³ Nigel Foster, *Foster on EU Law* (Oxford University Press, 6th ed, 2017) 342.

¹¹⁴ *FEU* art 21.

¹¹⁵ *D'Hoop v Office National de l'Emploi* (C-224/98) [2002] ECR I-6191.

¹¹⁶ *Declaration by the United Kingdom of Great Britain and Northern Ireland on the definition of the term "nationals"* [2016] OJ C 202/358.

¹¹⁷ *European Parliamentary Elections Act 2002* (UK) c 24, s 8.

¹¹⁸ *Spain v UK* (C-145/04) [2004] ECR I-7961.

EU free movement of people does not extend to them, but the theoretical possibility does appear to exist.

Commonwealth citizens with the right of abode in the UK essentially have all the rights and duties of British citizens. This is for reasons connected to British constitutional traditions. It is these traditions and historical bonds which gave Commonwealth citizens, and not EU citizens, the right to vote in the 'Brexit' referendum.¹¹⁹ Consequently, 26 members of the Australian Parliament, may also have a status entitling them to some of the rights of EU citizens (and consequently 27 other foreign powers) despite not being citizens of any of the EU member states.

(iii) Likely High Court Interpretation

As discussed above, the Commonwealth right of abode is essentially only distinguishable from British citizenship by name. Whether it is sufficient to invoke section 44(i) of the Constitution remains ultimately a question for the High Court. However, by looking at the High Court's past approach to section 44(i), we can anticipate how it may interpret the Commonwealth right of abode in relation to section 44(i).

According to British law, Australian law (or the law of another Commonwealth country) is what will determine whether someone has Commonwealth citizenship. The Commonwealth right of abode is a statutory status under British law. The right of abode in the UK is the right of British citizens, and British law stipulates that certain Australians are also entitled to it.¹²⁰

¹¹⁹ Kevin Ponniah, 'EU Referendum: The Non-Britons Planning to Vote', *BBC News* (Online), 20 May 2016 <<https://www.bbc.com/news/uk-politics-eu-referendum-36316467>>.

¹²⁰ *Immigration Act 1971* (UK) c 77, sch 3.

It is well accepted that while Queen Elizabeth II is physically the head of State of both Australia, and the UK, the Queen of the UK is an entirely separate legal and governmental entity from the Queen of Australia.¹²¹ The rights associated with the Commonwealth right of abode stem from the Queen of the UK and Australian citizenship stems from the Queen of Australia. This is despite the fact that the renunciation of the latter relinquishes the former.¹²²

Therefore, any argument suggesting that the Commonwealth right of abode does not invoke section 44(i) on the basis that Australian citizenship is status under Australian law is likely to fail. Any reference to the Commonwealth right of abode being a historical remnant and consequently not derived from a foreign power will also likely fail as the UK has been a foreign power since at least 1986.¹²³ Further, Australian citizenship law makes no reference to ‘Commonwealth citizenship’.¹²⁴

While the High Court has not discussed the right of abode without British citizenship, they have discussed the opposite, British citizenship without the right of abode.¹²⁵ The High Court ruled that the term ‘citizen’ is not determinative and a consideration of the rights, privileges, and obligations stemming from foreign law must be undertaken.¹²⁶ The entitlement of rights, privileges, and obligations connote a state of affairs involving the existence of a status or of rights under the law of the foreign power.¹²⁷ While arguably there remains three categories of potential disqualification under section 44(i), the High Court in *Re Canavan* has fused the second and third categories to some

¹²¹ *Sue v Hill* (1999) 199 CLR 462, 489.

¹²² *Immigration Act 1971* (UK) c 77, s 2.

¹²³ *Sue v Hill* (1999) 199 CLR 462.

¹²⁴ *Australian Citizenship Act 2007* (Cth).

¹²⁵ *Re Canavan* [2017] HCA 45.

¹²⁶ *Ibid* [134].

¹²⁷ *Ibid* [22].

extent.¹²⁸ This ultimately leads to a combined second limb which preferences substance over name. While the existence of citizenship and rights depend on the operation of foreign law, what constitutes a ‘citizen’, and whether the rights invoke section 44(i) is a matter for Australian law.¹²⁹

At times, it may be difficult to reconcile the High Court’s position on section 44(i). The Court has noted that questions of citizenship depend on foreign law.¹³⁰ Yet, when dealing with Senator Xenophon’s eligibility, the Court discussed whether it considered a BOC to be a citizen under section 44(i). This is despite a BOC being labelled a ‘citizen’ under British law. This again suggests that the High Court prefers an approach that favours substance over name when considering section 44(i).

Another difficulty when reconciling the High Court’s position on section 44(i) arises when considering the cases of Senator Xenophon (a BOC), and Senator Nash (a British citizen) alongside each other. Both a British citizen and a BOC owe an allegiance to the Queen of the UK by virtue of their status.¹³¹ Despite the fact that neither individual made an oath to the Queen of the UK, only Senator Xenophon was ruled eligible to sit in Parliament.¹³²

As noted, the High Court ruled that Senator Xenophon was not disqualified under section 44(i) based upon his status as a BOC.¹³³ The Court placed significant emphasis on the fact that the status of a BOC did not confer the right of abode in the UK or any obligations on Senator Xenophon.¹³⁴ The British

¹²⁸ Ibid [21]–[23], [134].

¹²⁹ Ibid [134].

¹³⁰ *Re Canavan* [2017] HCA 45, [37]; *Re Gallagher* [2018] HCA 17, [9].

¹³¹ *Re Canavan* [2017] HCA 45, [133].

¹³² Ibid [119].

¹³³ Ibid [134].

¹³⁴ Ibid [131], [134].

status of Commonwealth right of abode, does confer the right of abode and obligations such as jury duty. It lies somewhere in between British citizenship and BOC, arguably much closer to British citizenship. In applying the Court's substance over name approach, it is likely that the Commonwealth right of abode will be sufficient to invoke section 44(i) due to its nature under British law. This means the 26 current parliamentarians who potentially have the right of abode may not be constitutionally permitted to sit in the Australian Parliament. It would not matter that they lacked knowledge or did not actively pledge any allegiance, just as it did not matter to the British citizens who were disqualified.¹³⁵ If this interpretation is correct it also means that between 24 June 2010 and 27 June 2013, and again from 13 October 2013 and 15 September 2015, both Australia's Prime Minister and Opposition Leader may have been ineligible to sit in the Australian Parliament.¹³⁶

3 *Non-Citizen Nationals*

A national may not always be a citizen. US nationality is a perfect example of this. All US citizens are US nationals but not all US nationals are US citizens.¹³⁷ Individuals who are born in an outlying possession of the US are US nationals.¹³⁸ Outlying possessions of the US refer to American Samoa and Swains Island.¹³⁹ Further, unlike the Commonwealth right of abode, US nationality can be obtained by descent.¹⁴⁰

¹³⁵ Ibid.

¹³⁶ House of Citizenship Register, see *Bill Shorten*, and *Tony Abbott*; Daniel Wills, 'Julia Gillard's parents 'elated'', *The Daily Telegraph* (online), 24 June 2010 <<https://www.dailytelegraph.com.au/julia-gillards-parents-elated/news-story/02c528bea4ad1d800aece63b9a22eb47>>.

¹³⁷ 8 USC § 1101(a)(22); *Ricketts v. Attorney General of the United States*, 16 F 3d 3182, 3186 (3rd Cir, 2018).

¹³⁸ 8 USC § 1408(1).

¹³⁹ Ibid § 1101(a)(29).

¹⁴⁰ Ibid § 1408(2).

Individuals who are US nationals but not US citizens are noted as such, with their passports stating their lack of US citizenship.¹⁴¹ Due to their status as non-citizens, US nationals do not have any voting rights, are excluded from certain types of employment, and have difficulty accessing things such as federal programs and visas.¹⁴² However, despite not possessing all the rights of US citizens, US nationals still possess the right to live and work in the US, and can serve in the US military.¹⁴³ US nationals also owe a ‘permanent allegiance’ to the US.¹⁴⁴

The status of a non-citizen US national is an interesting one, and like the Commonwealth right of abode confers many of the rights of citizens onto non-citizens. Not all non-citizen nationalities do this though. For example, British Overseas Citizenship¹⁴⁵ provides very few of the rights of British citizens to individuals.¹⁴⁶ A weak non-citizen national status, like British Overseas Citizenship, will not invoke section 44(i).¹⁴⁷ However, someone with a stronger non-citizen national status, similar to a US non-citizen national, may well find themselves disqualified under section 44(i) as their status confers significant rights and an allegiance to a foreign power.¹⁴⁸ It does not appear that any current Australian Parliamentarians hold a non-citizenship nationality of this nature.

4 *Permanent Residency*

¹⁴¹ 8 FAM § 505.

¹⁴² Danny Cevallos, ‘Should American Samoans be citizens?’, *CNN* (online), 11 February 2014 <<https://edition.cnn.com/2014/02/11/opinion/cevallos-citizenship-american-samoa/index.html>>.

¹⁴³ *Ibid.*

¹⁴⁴ 8 USC § 1101(a)(22).

¹⁴⁵ While termed as a ‘citizenship’, BOC fits the definition of a non-citizen national in this context.

¹⁴⁶ *Re Canavan* [2017] HCA 45, [123]–[135].

¹⁴⁷ *Ibid.*

¹⁴⁸ *Prima facie* US nationality will not necessarily invoke section 44(i) due to the operation of US law regarding the loss of nationality. See discussion below in Part V(B).

Permanent residents may be considered to hold the right of abode on a *de facto* basis. However, the specific rights granted to permanent residents differ between jurisdictions. For this reason, it cannot be said for certain that all Australian citizens holding a foreign permanent resident status, regardless of the nationality of that permanent residency, are disqualified from sitting in Parliament.

Since permanent residencies are generally visas which must be applied for, any prospective Parliamentarian will know if they have one. The High Court has yet to determine if a permanent residence will disqualify a Parliamentarian. However, it is unlikely to do so because despite its name, permanent residency visas can expire, and the rights of citizens do not. Although, notwithstanding this, if a Parliamentarian actively seeks a permanent residency while in Parliament, this may fall foul of section 44(i).

This scenario is, however, unlikely to ever be an issue in practice as permanent resident visas generally require a term of continuous residence in the foreign country. This would be difficult for a sitting Australian parliamentarian to achieve while serving in the Australian Parliament. In some instances, residency may not be required. The US, for example, can grant permanent residency to the spouse of a US citizen even if they have never lived in the US.¹⁴⁹ Despite how easily permanent residency may be granted, a sitting Parliamentarian is realistically unlikely to apply for one. This consequently limits the potential for this scenario to arise before the High Court.

B *Entitlement to Citizenship*

¹⁴⁹ U.S. Citizenship and Immigration Services, *Consular Processing*, (4 May 2018) Department of Homeland Security <<https://www.uscis.gov/greencard/consular-processing>>.

As previously mentioned, it is unclear what is included with the term ‘entitled’.¹⁵⁰ It may also refer to the entitlement to obtain or claim citizenship. The High Court touched on this in *Re Canavan*.¹⁵¹ The Court held that since Italian law only provided Senator Canavan with a potential entitlement to Italian citizenship, he was not disqualified under section 44(i).¹⁵² In reaching this decision, the High Court also cited the potential for Italian citizenship to extend indefinitely, and noted that the active steps which needed to be taken in order to obtain that citizenship were matters of substance.¹⁵³

To take an extremely broad approach, everyone may be entitled to the citizenship of many countries if they fulfil the required steps. However, this interpretation is absurd. Based upon *Re Canavan*, it is likely that the High Court will not rule anyone who needs to take substantive steps to acquire foreign citizenship disqualified under section 44(i) where they have not taken those steps.¹⁵⁴

A more likely interpretation is that a person who only needs to take mere administrative steps is ‘entitled’ to the rights of citizenship in a way that would enliven the disqualification under section 44(i). In *Re Canavan*, three Parliamentarians were unaware they had obtained foreign citizenship, with two obtaining that foreign citizenship by descent.¹⁵⁵ Yet, they were all disqualified despite never exercising their foreign rights and privileges.¹⁵⁶ In order for them to have exercised these rights, they would have had to undertake the mere administrative process of obtaining documents.¹⁵⁷ Arguably, if such individuals

¹⁵⁰ See above n 56 and accompanying text.

¹⁵¹ [2017] HCA 45, [74]–[87].

¹⁵² *Ibid* [85].

¹⁵³ *Ibid*.

¹⁵⁴ *Ibid*.

¹⁵⁵ *Ibid* [5]–[8].

¹⁵⁶ *Ibid*.

¹⁵⁷ As citizens, proving their citizenship via a passport or certificate is merely administrative.

were disqualified, then individuals who do not currently hold foreign citizenship, but are able to obtain it via a mere administrative process are also likely to be disqualified. As potential disqualification would differ immensely depending on an individual's place of birth, family history, and time of birth, the High Court would have to consider such persons individually with reference to their circumstances.

Individuals who would be able to obtain a citizenship by virtue of a mere administrative action would likely be able to do so by non-automatic descent. If a case of entitlement to Italian citizenship, similar to Senator Canavan's, arises, then for the above reasons, such entitlement will be unlikely to disqualify an individual.

1 *Australian Citizenship Law*

While obviously no one will be ever disqualified under section 44(i), for being entitled to the rights of Australian citizenship, Australian citizenship law provides a perfect example of citizenship law entitling certain individuals to citizenship via a mere administrative process. If a foreign power conferred citizenship by descent in an identical manner to Australian law, then entitlement to such a citizenship may disqualify someone under section 44(i).

The *Australian Citizenship Act* distinguishes citizenship by descent from automatic citizenship and naturalisation.¹⁵⁸ If an individual meets all the requirements set out in the Act, then the Minister must approve citizenship.¹⁵⁹ Conversely, if they don't the Minister must refuse.¹⁶⁰ The Minister has no discretion. Obtaining Australian citizenship by descent is consequently an administrative procedure. Therefore, there is a strong possibility, that if a

¹⁵⁸ *Australian Citizenship Act 2007* (Cth) pt 2 div 2 sub-div A.

¹⁵⁹ *Ibid* s 17(2).

¹⁶⁰ *Ibid* s 17(1A).

foreign citizenship can be obtained in a similar manner to Australian citizenship, then such individuals will be disqualified under section 44(i). This would be because the granting of citizenship is a mere technicality which must be undertaken to obtain the documents required to exercise the rights of citizenship.

2 *British Nationality Law*

British citizenship is generally conferred either automatically at birth, by descent, or via naturalisation. However, in some instances, it may be conferred by a mere administrative action. British citizenship can be obtained by the mere act of applying to be registered if an individual would have, for example, become a CUKC, if it were not for discrimination on basis of gender. This would apply to individuals born between 7 February 1961 and 1 January 1983, to CUKC mothers.¹⁶¹ Registration would arguably be a mere administrative formality in such situations, as it differs to other situations of registration which provide the Secretary of State discretion in whether to register an applicant as a British citizen.¹⁶²

Due to the automatic conferral of British citizenship, few will be entitled to British citizenship in the above way. However, out of the 26 members of the current Parliament who potentially may have the Commonwealth right of abode, nine potentially derive that right solely from their CUKC mothers and seven appear to be consequently entitled to be registered as British citizens. Of these seven, it is relevant to note that one applied for registration and then prior to nominating for election, renounced British citizenship.¹⁶³ This means that there is a real risk that these other six Parliamentarians could be potentially ineligible to sit in the Parliament on the basis of their entitlement to be registered as British

¹⁶¹ *British Nationality Act 1981* (UK) c 61, s 4C.

¹⁶² *Ibid* s 3.

¹⁶³ House of Representatives Citizenship Register, see *Andrew Giles*.

citizen. Evidence shows that at least four are aware of this potential entitlement.¹⁶⁴

3 *Israeli Citizenship*

Under Israeli law, a Jewish person, as well as his/her descendants or spouse, are entitled to gain Israeli citizenship.¹⁶⁵ If the third category of section 44(i) includes the entitlement to citizenship, then the question of whether a Jewish person is eligible to sit in the Australian Parliament may arise. This entitlement to Israeli citizenship is a religious test under Israeli law. Therefore, a further constitutional complexity arises as the citizenship entitlement would seemingly impose a religious test to enter Parliament.¹⁶⁶

Putting the question of section 116 to one side, this entitlement to Israeli citizenship will still not disqualify someone by virtue of section 44(i). Citizenship in this case is not obtained by a mere administrative act. Rather it requires a Jewish person to migrate to Israel before citizenship can be claimed. Further, even upon migration, citizenship may be denied for multiple reasons.¹⁶⁷ The entitlement is not realised by mere administrative steps, and therefore would appear to fall outside the scope of section 44(i).

IV ENTITLEMENT TO RIGHTS AND CITIZENSHIP OF DISPUTED FOREIGN POWERS

The quality and nature of rights and statuses conferred to Parliamentarians will be considered by the High Court when determining if they are disqualified under

¹⁶⁴ House of Representatives Citizenship Register, see *Chris Bowen, Mark Butler, George Christensen, Kate Ellis*.

¹⁶⁵ Kim Rubenstein, 'Does Section 44 affect Jewish MPs?', *The Australian Jewish News* (online), 7 September 2017 <<https://www.jewishnews.net.au/section-44-affect-jewish-mps/68414>>.

¹⁶⁶ *Crittenden v Anderson* (Unreported, High Court of Australia, Fullagar J, 23 August 1950).

¹⁶⁷ Rubenstein, above n 165.

section 44(i).¹⁶⁸ The discussion of the quality and nature of rights and citizenship has, to date, primarily focused on the quality of the rights themselves. An interesting question arises as to whether section 44(i) is invoked in relation to an individual's rights or citizenship stemming from countries with disputed international recognition. Would such citizenship or rights be of such lower quality that such individuals will not be disqualified under section 44(i)? If Australia does not recognise a foreign power and its citizens, then how can those citizens be disqualified under section 44(i)?

Like many situations involving section 44(i), this would depend on the specific circumstances. Not every State with disputed international status is the same at an international legal level. It is safe to say that UN Member States, will definitely be considered foreign powers, particularly as Australia recognises all of them. Any other State however, is unclear. As the majority of nations Australia does not recognise are relatively small this is unlikely, in practice, to hugely impact Australian democracy. Although, due to migration patterns, this issue would most likely arise in relation to individuals with Palestinian, Taiwanese, and Kosovan links.

A *Meaning of Foreign Power within Scope of Section 44(i)*

In plain English, the term 'foreign power' has a fairly broad meaning. However, when read in the context of section 44(i), 'foreign power' is a narrower concept and arguably 'foreign government' or 'foreign country' or similar are more appropriate.

1 *High Court Interpretation*

The High Court only directly dealt with what constitutes a foreign power under section 44(i) in *Sue v Hill*, focusing on the specific question of whether the UK

¹⁶⁸ *Re Canavan* [2017] HCA 45, [123]–[135].

was a foreign power.¹⁶⁹ The Court noted the term ‘foreign power’ is to be given its ordinary meaning as ‘any sovereign state other than [Australia]’.¹⁷⁰ The term foreign power did not invite discussions about the relationship between the power and Australia, but rather questions of international and domestic sovereignty.¹⁷¹ It was also noted ‘foreign power’ could refer to different states at different times.¹⁷² Whether a state was considered a foreign power for the purposes of section 44(i) in the past did not necessarily affect its status as one in the present.¹⁷³

(a) *United States v Wong Kim Ark*

Anyone born in the US is a US citizen by birth.¹⁷⁴ In 1898, the US Supreme Court discussed birthright citizenship.¹⁷⁵ In this decision, the term ‘foreign power’ is used interchangeably with the term ‘foreign sovereign’.¹⁷⁶ When drafting the Australian Constitution, it is a common fact that the framers considered the US Constitution and would therefore have been likely to have considered ‘foreign power’ the same way as the US Supreme Court. Therefore, an argument can be made that it is unlikely that the term ‘foreign power’ in a constitutional context would mean anything besides a sovereign nation.

2 *Definition of Sovereign State*

Whether an entity is considered a sovereign state is a matter of international law. A sovereign state is a non-physical juridical entity which contains a permanent population, single government, defined territory, and the capacity to

¹⁶⁹ *Sue v Hill* (1999) 199 CLR 462.

¹⁷⁰ *Ibid* 524–6.

¹⁷¹ *Ibid* 487.

¹⁷² *Ibid* 525.

¹⁷³ *Ibid* 487.

¹⁷⁴ *United States Constitution* amend XIV.

¹⁷⁵ *United States v Wong Kim Ark*, 169 US 649 (1898).

¹⁷⁶ *Ibid*.

enter into foreign relations.¹⁷⁷ The declarative theory of statehood does not require international recognition when considering statehood, while the constitutive theory does. State practice in the recognition of sovereign states falls in between both theories, meaning that some level of recognition is needed to establish whether an entity is a sovereign state.¹⁷⁸ Consequently, it can be safely said that entities with no international recognition would be extremely unlikely to be considered foreign powers as they do not meet the definition of a sovereign state. States with limited recognition may require further evaluation.

The High Court also noted that the term foreign power raises questions of domestic sovereignty.¹⁷⁹ Domestic sovereignty deals with the actual control of territory by an authority within that territory.¹⁸⁰ International sovereignty is not necessarily affected by a lack of domestic sovereignty.¹⁸¹

Typically, a sovereign state will exist both in law and reality (*de jure* and *de facto*). A *de jure* state will have international sovereignty, while a *de facto* state will have domestic sovereignty. It seems that for a state to be considered a foreign power for the purposes of section 44(i) it must be both a *de jure* state and a *de facto* state.¹⁸²

It must be noted that questions of sovereignty only really arise in relation to complex international political matters. Many issues may arise if the High Court, for the purposes of section 44(i), reaches a conclusion of sovereignty

¹⁷⁷ *Convention on Rights and Duties of States adopted by the Seventh International Conference of American States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 16 December 1934) art 1.

¹⁷⁸ Malcolm N Shaw, *International Law* (Cambridge University Press, 5th ed, 2003) 369.

¹⁷⁹ *Sue v Hill* (1999) 199 CLR 462, 487.

¹⁸⁰ Stephen D Krasner, *Problematic Sovereignty: Contested Rules and Political Possibilities* (Columbia University Press, 2001) 7.

¹⁸¹ *Ibid.*

¹⁸² *Sue v Hill* (1999) 199 CLR 462, 487.

different from the official position of the Australian Government. It is for this reason that questions of international recognition are best left to the other branches of the Government.

B *States Which May Fall Short of a 'Foreign Power'*

Many entities around the world claim to be States despite limited international recognition. It is not possible to conclusively conclude whether any of them will be considered a 'foreign power'. Further, prospective politicians would be well advised to avoid any doubt by taking steps to renounce any foreign allegiance regardless of international recognition. This limits the possibility of further High Court discussions as to the meaning of 'foreign power' in the constitutional context. However, it is still useful to understand the limits of the Constitution. This section will discuss a number of examples, in particular whether the State of Palestine, Republic of China (ROC), and Republic of Kosovo would meet the current definition of a foreign power under section 44(i). Due to migration patterns to Australia and their comparative size these three examples are, out of all the territories with disputed statehood, the most likely to be potentially considered by the High Court in the future.

1 *State of Palestine*

The State of Palestine is an UN non-member observer state.¹⁸³ It is recognised by 137 UN member states. These 137 UN member states recognise the State of Palestine *de jure*. Palestine is not properly a *de facto* state however. It does not exercise full domestic sovereignty with significant portions of its territorial claim under the *de facto* control of Israel.¹⁸⁴ Arguably, Palestine is a state *de jure* and *de facto* but its existence in both law and fact is limited. Whether this

¹⁸³ GA Res 67/19, UN GAOR, 67th sess, 44th plen mtg, Agenda Item 37, UN Doc A/RES/67/19 (4 December 2012).

¹⁸⁴ These areas are also recognised in some instances as part the *de jure* state of Israel.

existence is sufficient to answer the High Court's questions on international and domestic sovereignty is unclear.

To further complicate matters, states who do not recognise the State of Palestine, including Australia, tend to recognise the Palestinian Authority in certain contexts. This includes accepting Palestinian Authority passports.¹⁸⁵ However, the acceptance of these passports does not mean accepting the concept of Palestinian citizenship.¹⁸⁶ Australia's formal diplomatic relations with Palestine also do not matter when considering whether Palestine is a foreign power.¹⁸⁷

The State of Palestine is unlikely to satisfy the questions of international and domestic sovereignty required for a nation to be considered a 'foreign power'.¹⁸⁸ Therefore, the High Court would be likely to follow the Australian Government's stance with regards to the non-recognition of Palestine. However, this will lead to a result clearly contrary to the intentions of the framers of the Constitution as an individual with what would commonly be considered a foreign citizenship will be eligible to sit in Parliament. Should the Court interpret Palestine as a foreign power, without noting a change in the definition, then this is likely to create political issues. This would be despite the High Court's decision being ineffective at an international level. This example clearly highlights some of the complexities and sensitivities that surround the operation and interpretation of section 44(i).

¹⁸⁵ *Visitor*, Department of Home Affairs
<<https://www.homeaffairs.gov.au/trav/visa/appl/visitor>>.

¹⁸⁶ Resource Information Centre, *Palestine/Occupied Territories: Information on passports issued by the Palestine National Authority* (17 December 1998) United States Bureau of Citizenship and Immigration Services <<http://www.refworld.org/docid/3df0b9914.html>>.

¹⁸⁷ *Sue v Hill* (1999) 199 CLR 462, 487.

¹⁸⁸ *Ibid.*

2 *Republic of China*

Both the ROC and the People's Republic of China (PRC) claim *de jure* sovereignty over both Mainland China and Taiwan. The ROC only has domestic sovereignty over Taiwan, rather than the entire legal claim that it asserts over both Taiwan and Mainland China. Only 16 UN member states maintain official diplomatic relations with ROC. Australia, like the majority of the world, used to recognise the ROC as the legitimate government of China.¹⁸⁹ Since 1972, Australia has recognised the PRC as the sole legitimate government of China and Taiwan as a province of the PRC's China. Despite this, Australia maintains informal relations with the ROC. However, Australia's relations with ROC and its previous recognition of the ROC does not affect the ROC's status as a 'foreign power'.¹⁹⁰ The ROC, while it claims Mainland China, is even less likely to be considered a 'foreign power' than Palestine. However, this would again result in an outcome that would seem to be contrary to the intentions of the Constitution's framers.

3 *Republic of Kosovo*

The Republic of Kosovo is another state with limited international recognition. Its situation is, in many respects, more similar to that of Palestine, but it currently has no status in the UN despite being recognised by 113 member states. A key difference between Kosovo and Palestine however, is that Australia formally recognises Kosovo.¹⁹¹ Further, it may be said that Kosovo is a *de facto* state. Whether it currently is a *de jure* state at international level remains unclear.

¹⁸⁹ GA Res 2758, UN GAOR, 26th sess, 1976th plen mtg, UN Doc A/RES/2758 (25 October 1971).

¹⁹⁰ *Sue v Hill* (1999) 199 CLR 462, 487.

¹⁹¹ Stephen Smith, 'Australia Recognises the Republic of Kosovo' (Media Release, 19 February 2008).

If the High Court, in considering the question of foreign power for the purpose of section 44(i), considers Kosovan citizens to be disqualified, then it is unlikely to create any controversy. However, if the Court believes that Kosovo is not sovereign at an international level, then issues unrelated to section 44(i) alone may arise.

V RENUNCIATION

A *Constitutional Imperative*

A unilateral renunciation of foreign citizenship is not sufficient to comply with section 44(i) if there are further steps under foreign law which can be taken to fully sever links with the foreign power.¹⁹² However, an Australian cannot be irredeemably prevented from participation in Parliament by the operation of foreign law.¹⁹³ This has been described by the High Court as a constitutional imperative.¹⁹⁴ This imperative will be engaged when a person has shown that they have taken all reasonable steps to renounce foreign links.¹⁹⁵

The test for reasonable steps contains two limbs and is described above.¹⁹⁶ The test would apply to citizens of foreign nations whose laws prevent renunciation. This would be clear by referring to the relevant foreign law. The test also applies when renunciation is too onerous.¹⁹⁷ What is less clear is when renunciation becomes onerous. This is however identical to the exception in German citizenship law where if renunciation is too onerous, German citizens may hold dual citizenship.¹⁹⁸ As the test is objective, citizenships too onerous to renounce for the purposes of German citizenship law, could be useful in determining

¹⁹² *Sykes v Cleary* (1992) 176 CLR 77, 113 (Brennan J).

¹⁹³ *Ibid.*

¹⁹⁴ *Re Canavan* [2017] HCA 45, [72].

¹⁹⁵ *Ibid.*

¹⁹⁶ See above Part II(B)(5).

¹⁹⁷ *Re Gallagher* [2018] HCA 17, [27].

¹⁹⁸ *Staatsangehörigkeitsgesetz, StAG* [Nationality Act] (Germany) 22 July 1913, BGBI I, 1913, 102.

which citizenships would be too onerous to renounce to comply with section 44(i).

B *Renunciation of Status Akin to Citizenship*

The same test and considerations for the renunciation of citizenship would apply for the renunciation of a status conferring the rights of citizenship. It would depend on the foreign power and on the status held. Some citizenship and statuses may even be automatically lost. A good example of this is US nationality (and consequently US citizenship). US nationals lose their nationality if they voluntarily enter employment with a foreign government where an oath or declaration is required to accept the position and they intend to relinquish US nationality.¹⁹⁹ The constitutional oath of allegiance,²⁰⁰ combined with the declaration of meeting the requirements of section 44(i) suggests *prima facie* that US nationality (and citizenship if applicable) is automatically lost when nominating for Parliament.

1 *Commonwealth Right of Abode*

As discussed above, there are at least 26 members of the current Parliament who may potentially be disqualified under section 44(i) for holding the right of abode in the UK.²⁰¹ It is unclear whether this status can actually be ‘renounced’. Under British law, an individual does not have the right of abode if after 1983 they ceased being a Commonwealth citizen at any point, even temporarily.²⁰² An Australian can lose the right of abode in the UK if they renounce Australian citizenship temporarily and then regain it. This would undoubtedly be an absurd outcome if imposed as a requirement for an individual to be eligible to enter the Australian Parliament. Further, if someone is a sole Australian citizen,

¹⁹⁹ 8 USC § 1481(a)(4).

²⁰⁰ *Australian Constitution* s 42.

²⁰¹ See above n 135 and accompanying test.

²⁰² *Immigration Act 1971* (UK) c 77, s 2(b)(ii).

Australian law prevents the renunciation of Australian citizenship.²⁰³ Even if legislation was passed to allow this, it would be unlawful under international law.²⁰⁴

Under British law, there are only provisions to renounce British citizenship,²⁰⁵ British overseas territories citizenship,²⁰⁶ British overseas citizenship,²⁰⁷ British subject status,²⁰⁸ and British National (Overseas).²⁰⁹ Applications are made to the Secretary of State.²¹⁰ There is no specific provision to 'renounce' the Commonwealth right of abode. However, the Secretary of State is able to make an order to deprive a Commonwealth citizen of the right of abode.²¹¹ This can occur if the Secretary of State thinks it is in the public good.²¹² Deprivation of citizenship or rights is sufficient to satisfy section 44(i).²¹³

Deprivation simply requires the Secretary of State to believe that it is in the UK's best interest to deprive the right of abode. An individual with the Commonwealth right of abode could therefore request the Secretary of State to deprive him or her of the right of abode as they wished to stand for election to the Australian Parliament. Arguably it is in the UK's public interest to prevent the rights of citizens being conferred upon someone who does not want them, and who is nominating as a candidate for the Parliament of a foreign power. For example, one could say it is not in the UK's best interest for an Australian Prime Minister, Opposition leader, or any Australian Parliamentarian to vote in UK

²⁰³ *Australian Citizenship Act 2007* (Cth) s 33.

²⁰⁴ *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) art 8.

²⁰⁵ *British Nationality Act 1981* (UK) c 61, s 12.

²⁰⁶ *Ibid* s 24.

²⁰⁷ *Ibid* s 29.

²⁰⁸ *Ibid* s 34.

²⁰⁹ *Ibid* s 12.

²¹⁰ *Ibid*; except for renunciation of British overseas territories citizenship.

²¹¹ *Immigration Act 1971* (UK) c 77, s 2A.

²¹² *Ibid*.

²¹³ *Re Canavan* [2017] HCA 45, [119].

elections, or to sit in the UK Parliament. Denying certain rights to individuals of foreign Governments is not a unique concept. The UK, like the rest of the world, does not confer citizenship to foreign diplomats or officials, or their families. Approving this ‘renunciation’ of the Commonwealth right of abode would therefore be similar.

The only legal method in UK law to remove the Commonwealth right of abode is through deprivation. It is not at all onerous to request the Secretary of State to make a deprivation order. All it would require is a letter. Therefore, requesting a deprivation order may constitute a reasonable step to be taken when attempting to renounce the Commonwealth right of abode.

The power to deprive the right of abode from Commonwealth citizens is a discretionary power of the Secretary of State, who may not want to deprive prospective Australian Parliamentarians of the right of abode. This would not matter and candidates would still likely have to request the Secretary of State to make a deprivation order even if they know their request will be ignored.²¹⁴ This would likely demonstrate that a person is not ‘under any acknowledgment of allegiance obedience, or adherence’ to a foreign power.²¹⁵ This will be further heightened if the current Secretary of State grants deprivation orders, but following a change in the British Government, a future Secretary of State refused to do so. As it would have been an avenue by which others renounced the Commonwealth right of abode, objectively, it is reasonable to expect others to copy the actions of their predecessors.

In any event, none of the 26 members who potentially have the Commonwealth right of abode have undertaken any effective steps to renounce this status. Some

²¹⁴ Cf *Re Gallagher* [2018] HCA 17.

²¹⁵ *Ibid.*

asked about their status in the UK, but this was after nomination.²¹⁶ The others who renounced British citizenship still have not satisfied the reasonable steps test as renunciation of British citizenship does not affect the Commonwealth right of abode.²¹⁷ Therefore, all 26 members who potentially have the Commonwealth right of abode may be sitting in Parliament unconstitutionally.

C *Renunciation of Entitlement to Citizenship*

It is unclear how one can renounce an entitlement to citizenship. One can argue that reasonable steps would constitute a formal letter noting the renunciation of all future claims to citizenship. As it is unlikely there would be a legal mechanism under foreign law to renounce an entitlement to citizenship, a unilateral renunciation may be sufficient in such cases.²¹⁸ The High Court may also consider the fulfilment of the normal renunciation steps as reasonable steps to renounce an entitlement to citizenship despite the futile nature of this.²¹⁹

It is unclear if this would be accepted or have any legal effect under the law of a foreign power though. It does not seem likely that a foreign power would prevent such an individual from exercising their entitlement to citizenship in the future. This is potentially illustrated through the example of Mark Butler, who tried to renounce British citizenship only to be told that he did not currently hold it.²²⁰ It is also interesting to note that the majority of nations also have a provision to allow for the resumption of citizenship after renunciation.²²¹

²¹⁶ House of Representatives Citizenship Register, see *Tony Abbott, John Alexander, Adam Bandt, Chris Bowen, Mark Butler, Nick Champion, Lisa Chesters, George Christensen, Pat Conroy, Kate Ellis, Andrew Giles, Justine Keay, Michael Keenan, Madeline King, Susan Lamb, Brian Mitchell, Ben Morton, Bill Shorten, Ann Sudmalis, and Alan Tudge*; Senate Citizenship Register, see *Alexander Gallacher, Susan Lines, Louise Pratt, Rachel Stewart, Dean Smith, and Glenn Sterle*.

²¹⁷ UK Home Office, above n 89, 7.

²¹⁸ Cf *Sykes v Cleary* (1992) 176 CLR 77, 107 (Mason CJ, Toohey and McHugh JJ).

²¹⁹ Cf *Re Gallagher* [2018] HCA 17, [66].

²²⁰ House of Representatives Citizenship Register, see *Mark Butler*.

²²¹ *British Nationality Act 1981* (UK) c 61, s 13.

However, this tends to be discretionary and therefore would be unlikely to constitute an entitlement of citizenship as discussed above.²²²

VI CONCLUSION

Section 44(i) provides for a potentially endless discussion of Australian law, international law, and foreign domestic law in regards to when an individual will be disqualified from sitting in the Australian Parliament. Despite almost two years spent with the Australian Parliament, High Court, and wider Australian public considering the question of dual citizenship in considerable detail, we have barely yet scratched the surface. As this paper demonstrates, there remain considerable issues, quirks, and uncertainties still to be considered with respect to section 44(i).

The most pressing concern with section 44(i) is the eligibility of individuals with the Commonwealth right of abode, who hold a near identical status with British citizens. Should this issue reach the High Court, it would be the first time the Court would be asked to directly consider the third category under section 44(i) and it is likely to create intense political interest. The lack of the right of abode saved Senator Xenophon from disqualification in 2017. It therefore appears likely that Court, using the same approach and reasoning, may well consider the Commonwealth right of abode as a status invoking section 44(i).

It is also interesting to consider how the High Court would approach the question of whether a particular nation would be classified as a ‘foreign power’. Based upon the High Court’s previous decisions, it appears that a foreign power may not include certain countries, as discussed above. This may lead to a situation where individuals with British family history are disqualified but not citizens of certain other ‘nations’. When considering Australia’s constitutional

²²² See above Part III(B).

history and its current and constitutional connections with the UK, this outcome is somewhat ironic.

While we may see a case on section 44(i) discussing the Commonwealth right of abode, it is unlikely to go further. The other issues with section 44(i) highlighted in this paper are significantly less likely to occur in practice due to the nature and political awareness of section 44(i).

Despite potential issues, section 44(i) has an important role to play in ensuring that the integrity of Parliament is maintained. Despite recent controversies, it has stood the test of time. It is important that we understand the extent and limits of section 44(i). There needs to be a through discussion on how we can resolve potential issues which may arise in the future, and which have arisen from time to time. While many Australians had perhaps hoped to put the dual citizenship controversy behind them, this paper shows that there are still significant uncertainties. Most importantly, it demonstrates that there may still be a significant number of current Australian parliamentarians who are not actually eligible to sit in the Parliament. Clarifying the scope and reach of section 44(i) is essential to maintain public confidence in the legitimacy of the current Australia Parliament, and also to avoid uncertainty with regards to future elections.