Oaths and Affirmations of Public Office

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INTRODUCTION

Traditionally, many persons appointed or elected to public office have been required by law to take some oath or affirmation before or shortly after they enter upon the office. Sometimes more than one oath or affirmation is required of them. The form of the required oath or affirmation is usually prescribed by statute and is promissory and affirmative in character.[1] A person who takes the prescribed oath concludes with the words "So help me God". A person who, instead, takes an affirmation will solemnly and sincerely affirm and declare that he or she commits himself or herself to some obligation.

What is promised by the taker of a promissory oath or affirmation often relates to the duties of a particular public office, for example that of a judge of a particular court. The person taking such an oath or affirmation may also be required to take an oath or affirmation of allegiance. In Australia this oath or affirmation is one by which a person pledges to be faithful to the Queen, her heirs and successors. Sometimes the law requires no more than the taking of an oath or affirmation of this kind. For example, in most Australian jurisdictions those elected as members of parliament are required to take only the oath or affirmation of allegiance.

Should Australian voters decide that they no longer want an hereditary monarch to be their head of state, the forms of the prescribed oaths and affirmations of allegiance would obviously need to be revised. There could even be a question about whether there is any need to retain oaths and affirmations of this kind. After all, under Australian law persons can owe a duty of allegiance without ever having taken an oath or affirmation of allegiance.[2] Such an oath or affirmation is not even required of persons who seek to become Australian citizens by naturalization. Today all that is required to obtain that status is grant of a certificate of Australian citizenship and a pledge of commitment to Australia and its people.[3]

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1 The distinction between affirmative and negative oaths/affirmations of a promissory character is one enunciated by the Supreme Court of the United States of America. An oath/affirmation of a promissory character relates to conduct in the future. A promissory oath or affirmation in the affirmative form contains words which commit the taker to positive action in the future. A promissory oath or affirmation in the negative form commits the taker not to engage in certain conduct. See *Cole* v *Richardson*, 405 US 676 (1972).

2 See pp 153–7.

3 *Australian Citizenship Act* 1948 (Cth) s 15 and Schedule 2 as amended by Act No 71/1993. There are two forms of the pledge. Form 1 reads:

> "From this time forward [under God],
> I pledge my loyalty to Australia and its people,
> Whose democratic rights I share,
> Whose rights and responsibilities I respect, and
> Whose laws I will uphold and obey".

Form 2 is the same but omits the words in brackets.

Were Australia to become a republic, most of the changes that would need to be made to the existing forms of other oaths or affirmations required of members of parliament and of public officers could be effected by ordinary legislation. The one exception is the oath or affirmation of allegiance presently required of members of the federal Parliament by s 42 of the federal Constitution, in the forms prescribed in the schedule to the Constitution. That schedule cannot be altered except by formal amendment of the Constitution. Were an oath, affirmation or declaration to be required of the President of the Australian Republic, that requirement might also be introduced by formal amendment of the Constitution, in accordance with s 128.

Whether or not Australians choose to have as their head of state someone other than an hereditary monarch, the current law relating to the oaths or affirmations required of persons elected or appointed to various public offices stands in need of review. Much of this law derives from English law and it may be thought by some to be no longer entirely appropriate to Australia's circumstances. Some may even question whether any good purpose is now served by laws which require that certain officers of government take prescribed oaths or affirmations of office. Legal duties will be incumbent on those who accept appointment to public office even if entry upon the office is not conditioned on the taking of a prescribed oath or affirmation. The same is true of those who have been elected to public office.

This article surveys the antecedents of Australia's current laws relating to the oaths or affirmations required of those appointed or elected to public office. It reviews the current laws and examines some particular issues arising under them: notably, the consequences of failure or refusal to take a required oath or affirmation, and the sanctions for breach of oath or affirmation. Reference is made to the oaths or affirmations required of public officers under the republican constitutions of the United States of America, Ireland, and India. There follows an analysis of the concept of allegiance: to whom or to what is a duty of allegiance owed and what the duty entails. The article concludes with an examination of arguments for and against retention of requirements that persons appointed or elected to public office take oaths or affirmations in order to perfect their title to occupy the office.

THE ENGLISH BACKGROUND

(a) The law as of 1788

In 1788 when the first of Great Britain's colonies in Australia was settled by Europeans, English law to do with the swearing of oaths by public officials was still a largely unreformed body of law. Its general effect was to exclude from nearly all public offices, including membership of parliament, persons who were not communicants of the Church of England. The oath of judicial office was still that which had been prescribed under a royal ordinance of 1346 (20 Edw III c 1). The *Corporations Act* 1661 (13 Car II, st 2, c 1), the *Test Act* 1672 (25 Car II, st 2, c 2) and the *Parliamentary Test Act* 1678 (30 Car II, st 2, c 1) remained on the statute books in a largely unamended form.

Under these and other laws, persons chosen to occupy various public offices could not enter upon the office unless they had sworn prescribed oaths. Typically these

oaths included not merely an oath acknowledging the duties attending the particular office, but also the oath of allegiance to the monarch, the oath of supremacy and, from 1701, an oath of abjuration renouncing the title of the son of James II and his heirs to the throne.[4] The oath of supremacy had been introduced during the reign of Elizabeth I[5] but its form had been simplified in 1689 by one of the first statutes enacted by the parliament of William and Mary (1 Will and M sess 1, c 8). Those who swore the revised oath of supremacy condemned the doctrine "that princes excommunicated or deprived by the Pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever". They also declared "that no foreign prince, person, prelate, or potentate hath, or ought to have, any power, jurisdiction, superiority, pre-eminence, or authority, ecclesiastical, within this realm".

Additional requirements had been imposed by the *Corporations Act* 1661 and the *Test Acts* of 1673 and 1678 enacted during the reign of Charles II. The first was the making of a declaration against transubstantiation, that is, a declaration that the deponent did not believe that in the sacrament of the Lord's Supper there is any transubstantiation of the elements of bread and wine into the body and blood of Jesus Christ, either at or after the consecration of the bread and wine. Included in this declaration were statements denouncing invocation of saints and sacrifice of the mass as practised in the Church of Rome. A further requirement for officers of municipal corporations and persons in the monarch's service was that they receive the sacraments of the Church of England within a certain time after election or appointment. From 1727 the effects of these discriminatory laws were ameliorated by the practice of enacting indemnity Acts, almost annually, but these Acts seem to have been of no avail except to Protestant dissenters.[6]

By the end of the nineteenth century the laws of England regarding promissory oaths had been radically transformed. They had been greatly simplified and purged of religious tests. The process of reform was, however, slow and the reforming legislation was sometimes passed by slim parliamentary majorities. Some of the legislative reforms would have been extended to New South Wales and Van Diemen's Land (now Tasmania) by force of s 24 of the *Australian Courts Act* 1828 (9 Geo IV c 83). Subsequent legislation of the United Kingdom parliament was usually adopted by the colonial legislatures. The history of the nineteenth century reforms of the laws of England must therefore be treated as part of the Australian history.

(b) Nineteenth century reforms

The sacramental test imposed by the *Corporation* and *Test Acts* was removed by the United Kingdom Parliament in 1828 (9 Geo IV c 17). Instead those to whom these Acts applied were required to subscribe to a declaration in the following terms:

4 13 & 14 Will III c 6. The form of the oath was elaborated in later statutes, eg 1 Geo I, st 2, c 13. (1714); 6 Geo III c 53 (1766).

5 1 Eliz I c 9 (1558); 5 Eliz I c 13 (1563).

6 1 Geo II, st 2, c 23. The last of such Acts of indemnity was 10 Geo IV c 12 (1829).

> "I AB do solemnly and sincerely in the presence of God, profess, testify, and declare, upon the true faith of a Christian, that I will never exercise any power, authority, or influence which I may possess by virtue of the office of _____ to injure or weaken the Protestant church as it is by law established in England or to disturb the said church, or the bishops and clergy of the said church, in the possession of rights and privileges to which such church, or the said bishops and clergy, are or may be by law entitled".[7]

A person chosen to fill a municipal office could not enter upon the office unless this declaration had been made.[8] Those appointed to offices under the Crown had to subscribe to the declaration within six months after their appointment. In default the appointment was deemed void.[9]

This enactment would not have provided any relief to Jews who could not, in conscience, make a declaration "upon the true faith of a Christian". Roman Catholics might not have scruples about subscribing to the new declaration, but they continued to be disqualified, effectively, from occupying public offices because of the terms of the required oath of supremacy and declaration against transubstantiation and its associated declarations. Subscription to this declaration would have been regarded by some of them as a denunciation of central tenets of their faith. The disabilities of Roman Catholics were not removed until the enactment of the *Catholic Relief Act* 1829 (10 Geo IV c 7).

Following the *Act of Union with Ireland* 1800 (39 & 40 Geo III c 67) the case for Catholic emancipation was prosecuted with increasing vigour, including within the parliament of the now united kingdoms of England, Scotland and Ireland. Petitions for reform were received annually from Roman Catholics. In 1812 the House of Commons passed a motion in favour of reform, but in 1813 a bill to achieve this end was defeated. Four other proposals for reform were passed by the House of Commons between 1821 and 1828. George III opposed emancipation of his Roman Catholic subjects, as also did George IV who succeeded him in 1820. George III apparently had doubts about whether he could, consistently with his coronation oath, assent to repeal of the restrictive laws. By the coronation oath, prescribed by statute in 1688 (1 Wm & M, c 6, s 3), he had promised "to maintain the protestant reformed religion established by law". One of the objections to emancipation was, apparently, that the pope could and might release Catholics from obligations they had assumed under civil oaths prescribed by the laws of the realm.[10]

By 1829 the case for reform had become irresistible. Agitation in Ireland by Daniel O'Connell and the Catholic Association he had formed had reached a point at which there was threat of civil war. O'Connell himself had in 1828 been elected as the member for County Clare in the House of Commons, but as a Catholic could not

7 Sec 2.
8 Sec 3.
9 Sec 5.
10 E Halévy, *England in 1815* (2nd ed 1949) 478.

take his seat in the nation's parliament. The Tory Government, led by the Duke of Wellington relented, and George IV reluctantly assented to the bill for reform.

The *Roman Catholic Relief Act* 1829 repealed entirely all existing statutes which required the making of a declaration against transubstantiation and the associated declarations. Henceforth Roman Catholics would be able to sit in the parliament, to occupy most offices under the Crown and to be members of lay corporations, but only if they swore a prescribed oath in lieu of the existing oaths of allegiance, supremacy and abjuration. The terms of the prescribed oath were such as to require deponents to denounce the doctrine that princes excommunicated by the pope might be deposed or murdered by their subjects; likewise to repudiate the pope's authority in temporal matters within the realm. A promise not to subvert the established Church of England was also exacted. Offices from which Roman Catholics were to remain debarred included those of regent, lord chancellor of England and lord lieutenant of Ireland. Priests of the Roman Catholic Church could not sit in the House of Commons.

A statute of 1833 (3 & 4 Will IV c 49) which permitted Quakers and Moravians to make an affirmation in lieu of prescribed oaths was interpreted by the House of Commons as allowing their admission as members of that House. Another Act of 1833 (3 & 4 Will IV c 82) extended this dispensation to the Separatists and a statute of 1838 covering Quakers, Moravians and Separatists enabled them to enter upon municipal offices to which they had been elected by making a declaration in lieu of the prescribed oath of office (1 & 2 Vic c 5). Members of these religious sects regarded themselves, and were generally acknowledged to be Christians, but they had conscientious objections to the swearing of oaths.

The disabilities of Jews from occupying public offices were partially removed in 1845 by a statute which enabled them to enter on municipal offices by subscription to a revised form of the declaration prescribed by statute in 1828 (9 Geo IV c 17). The revision was achieved simply by omission from the declaration of the words "upon the true faith of a Christian" (8 & 9 Vic c 52). A statute of 1858 (21 & 22 Vic c 49) had authorised the Houses of parliament to omit the same form of words from the oath required of members of parliament, including the peers. This statute had been immediately preceded by another (21 & 22 Vic c 48) which abolished the previously separate oaths of allegiance, supremacy and abjuration and replaced them with a single promissory oath by which a deponent swore allegiance to the monarch, and to honour the rules of succession to the throne and, in addition, make a declaration denouncing the authority of any foreign power, prelate or potentate, within the realm, in matters ecclesiastical or spiritual.

Over the following years the forms of promissory oaths were simplified and requirements to make declarations removed. The *Parliamentary Oaths Act* 1866 (29 & 30 Vic c 19) introduced a much shortened form of the oath of allegiance to be sworn by members of parliament before they sat and voted. Penalties for sitting and voting without having sworn the oath were, however, retained. The new form of oath omitted the words "upon the true faith of a Christian". Another Act of 1866 (29 & 30 Vic c 22) abolished the requirement imposed by 9 Geo IV c 17 (1828), and by some other Acts, regarding the making of declarations not to act to the injury of the established church.

The statutes which had required the making of a declaration against transubstantiation, invocation of saints, and sacrifice of the mass as practised in the Church of Rome were formally repealed in 1867 (30 & 31 Vic c 62). The Acts so repealed included the *Parliamentary Test Act* 1678 (30 Car II, st 2, c1). There was, however, a qualification. The Act was not to be construed as enabling Roman Catholics to exercise any civil office, franchise or right for the exercise of which the making of the declaration was specifically required. Another Act of 1867 (30 & 31 Vic c 75) simplified the special oaths to be sworn by Roman Catholics and Jews.

Major reforms were effected by the *Promissory Oaths Act* 1868 (31 & 32 Vic c 72). This Act shortened the oath of allegiance; prescribed a very short form of oath of office for those appointed to offices in the service of the Crown, and introduced a much abbreviated version of the oath of judicial office. Those who were required to take these oaths were specified and the consequences of failure to take the required oath were spelled out. This statute remains on the United Kingdom's statute books though with some amendments. The process of reform was almost completed on the enactment of the *Promissory Oaths Act* 1871 (34 & 35 Vic c 48). This Act formally repealed a large number of the prior statutes which had virtually been overtaken by earlier reforming legislation.

The last item on the agenda for parliamentary reform in the United Kingdom was what should be done for those who had conscientious objections to swearing oaths in the forms prescribed by law, or who had no religious beliefs at all. Concessions had already been made to members of some of the Christian sects: Quakers, Moravians and Separatists. But apart from the Jews, the parliament had made no concessions to non-Christians, to others who might have scruples about swearing the prescribed oaths, or to persons who professed no religious beliefs and perhaps even avowed themselves to be atheists. The disabilities of such persons were not removed until the enactment of the *Oaths Act* 1888 (51 & 52 Vic c 46). Under this Act a person who objected to swearing a prescribed oath on religious grounds, or because the person had no religious beliefs, was permitted to make an affirmation instead.

What finally spurred the enactment of this legislation was the case of Charles Bradlaugh. His case became something of a *cause celebre* and it is still regarded as one of some constitutional significance. It is so regarded not merely because it was the catalyst for the enactment of the *Oaths Act* 1888, but also because it presented some nice legal issues to do with the role of the ordinary courts of law in the interpretation and enforcement of statutes which prescribed qualifications for entry upon office as an elected member of the House of Commons, and exercise of the right of a member to sit and vote in that House.

(c) The case of Charles Bradlaugh

Bradlaugh had been elected as the member for Northampton in April 1880. He was a professed atheist, indeed a militant one. On 3 May 1880 he sought to make an affirmation of allegiance rather than swear the oath of allegiance prescribed by the *Parliamentary Oaths Act* 1866. His application was referred to a select committee which concluded (by a majority of one) that, under s 4 of the Act, he was not a person who was qualified to make an affirmation in lieu of the oath. Bradlaugh had then signified his willingness to take the oath, but there were objections on account

of his professed atheism. The question of his qualification to take the oath was referred to a select committee. The committee advised that he not be permitted to take the oath, but that he should be allowed to make an affirmation, on the clear understanding that if he sat and voted he might incur the penalties prescribed by the *Parliamentary Oaths Act* 1866.

Initially the House of Commons rejected the recommendation of the select committee, but on 1 July 1880 the House relented by resolving that Bradlaugh be permitted to affirm, subject to any penalties he might incur under the Act if, having made affirmation, he sat and voted in the House. The challenge thus presented was taken up by a common informer, Clarke, who sued Bradlaugh to recover the monetary penalty imposed by s 5 of the 1866 Act. At first instance Clarke was successful,[11] but on Bradlaugh's appeal, the Court of Appeal held in March 1881 that the monetary penalty was recoverable only at the suit of the Crown.[12] At the same time the Court of Appeal held that Bradlaugh was not someone who, under the 1866 Act or any other Act, was entitled to make an affirmation instead of an oath. He was not a Quaker, Moravian or a Separatist. Bradlaugh's failure to take the prescribed oath of allegiance at the time it was tendered to him meant that the seat to which he had been elected was vacant.

Bradlaugh recontested the seat and was re-elected in April 1881. Following his re-election a Bill was introduced in the Commons to enable persons in his situation to make an affirmation instead of swearing the oath of allegiance. The Bill was, however, abandoned, and when in August 1881 Bradlaugh attempted to force his way into the legislative chamber he was ejected.

On 20 February 1882 Bradlaugh managed to make his way to the Bar of the House from which station he administered to himself and swore the prescribed oath of allegiance. The next day the House resolved to expel him. That action was sufficient to create a vacancy in the seat to which Bradlaugh had been elected. At the ensuing by-election Bradlaugh was once again re-elected, but the House would not allow him to take either oath or affirmation.

A bill was introduced in the House on 20 February 1883 which, if passed into law, would have made it possible for Bradlaugh to have satisfied the requirements of the *Parliamentary Oaths Act* 1866, by making an affirmation of allegiance. But on 3 May 1883, that bill was rejected by the Commons by three votes. The next day Bradlaugh appeared before the House to plead his case, but to no avail. On 9 July 1883 he was, by resolution, excluded from the chamber, unless he undertook not to disturb its proceedings. His next appearance before the House was in February 1884. On this occasion a motion for his expulsion was passed and on 12 February a writ for a new election was issued.

Following the Commons' resolution of July 1883, Bradlaugh initiated court proceedings for a declaration that the Commons' resolution to exclude him was void, and an injunction to restrain the Sergeant at Arms, Gossett, from executing that resolution. The case came before the Queen's Bench Division of the High Court,

[11] *Clarke* v *Bradlaugh* (1881) 7 QBD 38.
[12] *Bradlaugh* v *Clarke* (1883) 8 App Cas 354.

constituted by Lord Coleridge CJ and Stephen and Mathew JJ. The Court disclaimed jurisdiction to rule on the correctness of the House's interpretation and application of the *Parliamentary Oaths Act* 1866, at least in proceedings of the kind initiated by Bradlaugh. The Court nonetheless signified that the position would be quite different if the proceedings were to recover monetary penalties from Bradlaugh.[13] The Attorney-General later brought such a suit.[14] In that suit the Court of Appeal held that a person who, like Bradlaugh, did not believe in the existence of a supreme, divine being was disqualified from taking the prescribed oath of allegiance. The Court also considered what was required to fulfil the stipulation in s 3 of the *Parliamentary Oaths Act* 1866 that the oath of allegiance be "solemnly and publicly made and subscribed". In the Court's view the oath had to be taken with the assent of the House, in accordance with the House's Standing Orders, and after the member had been called on by the Speaker to be sworn.

Following his exclusion from the Commons in February 1884, Bradlaugh sought re-election, and with success. But again he was not permitted to take his seat and on 6 July 1885 the seat to which he had been elected was declared vacant. At the general elections held in November 1885 Bradlaugh was re-elected. At the swearing in ceremony on 13 January 1886, the new Speaker declared that he would not allow any objections to be made to Bradlaugh's willingness to take the oath of allegiance. Bradlaugh was accordingly sworn in. No further court proceedings were brought against him. He was re-elected at the general elections in June 1886 and remained an active member of Parliament until his death in 1891. During his years as a sitting and voting member of the Commons, Bradlaugh was a vigorous supporter of the bills which eventually bore fruit in the *Oaths Act* 1888.

On 27 January 1891 the Commons resolved, unanimously, that its journals be amended by deletion of all records of its previous votes for Bradlaugh's expulsion. Bradlaugh was not present on this day. He lay unconscious on his deathbed. He died three days later without ever learning of the Commons' resolution.[15]

The case of Charles Bradlaugh would surely have been known to some of those who contributed to the drafting of Australia's federal Constitution. The right of members of the federal Parliament to make an affirmation of allegiance, in the form prescribed by the *Oaths Act* 1888, in lieu of the oath, was entrenched by s 42 of that Constitution. Nothing was said in the Constitution about who was qualified to affirm.

13 *Bradlaugh* v *Gossett* (1884) 12 QBD 271.

14 *AG* v *Bradlaugh* (1885) 14 QBD 667. This latter case was a proceeding to recover the statutory penalty of £500 from Bradlaugh for sitting and voting in the House of Commons on 14 February 1884 without having first taken the oath prescribed by the *Parliamentary Oaths Act* 1866, as amended by s 2 of the *Promissory Oaths Act* 1868.

15 On the career of Charles Bradlaugh see I Jennings (ed), *Champion of Liberty: Charles Bradlaugh* (1933); WL Arnstein, *The Bradlaugh Case* (1965); and *Dictionary of National Biography, Supplement* (1901) 248–50. Proceedings before the House of Commons in the case of Bradlaugh are described in TE May, *A Treatise upon the Law, Privileges and Usages of Parliament* (9th ed 1883) 210–15.

RECEPTION OF THE ENGLISH LAWS IN AUSTRALIA

At the time the first of the British colonies in Australia was settled by colonists, it was assumed that the laws for the colony would include not merely British statutes enacted specifically for the colony or for colonies at large, but also those of the laws then in force in England as were capable of being applied in the colony. The laws in force in England when New South Wales was settled in early 1788 included a number of statutes which required oaths to be taken by public officers.

Section 24 of the Act 9 Geo IV c 83 — the *Australian Courts Act* 1828 — declared that the laws in force in England on 25 July 1828 were to be applied in New South Wales and Van Diemen's Land so far as they could be applied there. Van Diemen's Land (since 19 January 1856 called Tasmania) had been separated from New South Wales in 1825. The statutory reception date of 25 July 1828 was to be a critical date not only for what is now New South Wales but also for Victoria and Queensland, both of which were part of New South Wales at the time. On their establishment as separate colonies, in 1851 and 1859 respectively, they received the laws then in force in the parent colony.[16] Those laws included the English laws received into New South Wales on 25 July 1828, as altered in some cases by subsequent legislation of that colony.

For Western Australia and South Australia the vital dates for reception of English law were 18 June 1829 and 28 December 1836 respectively.[17]

The Governors of the Australian colonies were formally appointed by Letters Patent under the Great Seal of the sovereign. It is therefore not surprising that their commissions should have required them to take the oaths and make declarations which, at the time, were required by British statutes of those appointed to offices under the Crown. The commission issued on 2 April 1787 to the first Governor of New South Wales, Captain Arthur Phillip, effectively required him to take the oaths of abjuration and allegiance prescribed by 1 Geo I c 13 (1714) and 6 Geo III c 53 (1766); and the declaration against transubstantiation prescribed by the *Test Act* 1672 (25 Car II, st 2, c 2). In addition he was required to take an oath of assurance by which he recognised the title of George III to occupy the throne of Great Britain; an oath as Captain-General and another oath of office as a Governor in a Plantation.[18] Similar requirements appeared in the Commissions issued to Phillip's successors as Governor of New South Wales.[19]

The early arrangements for the administration of justice in the Australian colonies seem also to have been predicated on the assumption that British laws required the taking of oaths on the part of those appointed to judicial office. Like the Governors, the persons appointed to principal judicial offices were formally appointed by the monarch. Under the First Charter of Justice for New South Wales, dated 2 April 1787, those appointed as judges of the Court of Civil Jurisdiction and the Court of

[16] 14 Vict No 44 (NSW) (1851) as to Victoria; *Supreme Court Act* 1867 (Q).
[17] See 9 Geo V No 20 (WA), s 23; *Acts Interpretation Act* 1915 (SA).
[18] *Historical Records of Australia*, Series IV, vol 1, 19–21.
[19] See the Commission of Sir Ralph Darling (July 1825) in *Historical Records of Australia*, Series I, vol 12, 100–1.

Criminal Jurisdiction were required to take oaths of allegiance and office.[20] These requirements were substantially repeated in the Second Charter of Justice of 1814.[21] Curiously, in the Third Charter of Justice of 1823 there were no stipulations about oath taking except in relation to appointments by the Governor to the office of Sheriff.

The systems of government set in place in the Australian colonies by the imperial authorities clearly envisaged that the functionaries of government in the colonies would include Justices of the Peace, appointed by the colonial Governor. Appointees to this office would have a variety of functions, and the oaths of office to be administered to them, by direction of Imperial authorities, reflected this variety. The stipulated oaths were relatively long and quite specific in relation to the particular duties of office. A phrase which recurs in the prescribed oath was that the Justice swore to "do equal right to the poor and the rich after my cunning, wit and power, and after the laws and customs of the realm and statutes made thereof".[22]

By their commissions, the Governors of the Australian colonies were authorised to appoint not merely Justices of the Peace but also officers such as coroners and constables of police. The Governors were also authorised "to administer or cause to be administered unto" persons so appointed "such oaths as are usually given for the performance and execution of their offices and places". The commissions did not identify what those usual oaths were, or even indicate when the taking of an oath was required as a matter of law. Some guidance to the Governors was, no doubt, provided by instructions from the imperial authorities.[23]

The royal instructions issued on the eve of the federation of the Australian colonies to the Governors of the colonies which were to become States of the Commonwealth of Australia still contained a clause which gave them a discretion to require any person in the public service to take the oath of allegiance and such other oath or oaths as might be prescribed by any law in force in the State.[24]

From the 1820s the colonial Governors were directed by their commissions to be advised by an Executive Council. Governor Darling's commission of July 1825 contained such a requirement and a further requirement that those appointed to the Council should take the oaths of allegiance and abjuration, the declaration against transubstantiation and "the usual oath for the due execution of their place and trust respectively".[25]

20 *Historical Records of Australia*, Series IV, vol 1, 11. (The Charter was issued pursuant to 27 Geo III c 2 (1787).)

21 Ibid 92.

22 Ibid 56–7, 112. See also *Historical Records of Australia*, Series III, vol 1, 729–30. See also Governor Darling's Commission, referred to in n 19 above at 102–3. There were phrases in the oath which had long appeared in the oath of office sworn by Justices of the Peace in England: see M Dalton, *Countrey Justice* (1619), 10–11.

23 Instructions were given regarding the oath of office to be taken by constables: see *Historical Records of Australia*, Series III, vol 1, 729–30; *Historical Records of Victoria*, vol 1, 185–6.

24 Clause 2 of instructions of 29 October 1900.

25 *Historical Records of Australia*, Series I, vol 12, 101–2. At the first meeting of the Executive Council and the Legislative Council of Western Australia in February 1832, the members were required to take the oath of abjuration and affirm their loyalty to the Protestant religion: see FK Crowley, *Australia's Western Third* (1960) 9.

When provision was eventually made for the establishment of legislatures in the Australian colonies, attention had to be given to the oaths, if any, to be required of those appointed or elected as members. From the outset it was accepted that these legislatures could not be brought into being except by authority of the United Kingdom Parliament. It was therefore for that Parliament to decide what oaths should be taken. The requirements might be similar to those for members of the Parliament at Westminster, but they would not necessarily be the same, for the British statutes which prescribed the oaths to be sworn by members of that Parliament clearly did not apply to members of colonial legislatures.

Section 24 of the imperial statute 4 Geo IV c 96 (1823) provided authority for the establishment of a Legislative Council in New South Wales. (A royal warrant for the appointment of this body was issued on 7 July 1825.) Section 44 of the same Act authorised the separation of Van Diemen's land, by Order of Council, and the creation of a Legislative Council in that new colony. Section 32 of the Act prescribed the oath of office to be sworn by those appointed to each Council. A person could not enter on this office unless he swore that he would, "to the best of my judgment and ability faithfully advise and assist the Governor ... [of the Colony] in all such matters as shall be brought under my consideration as a member of the Council ...". In addition the person was obliged to swear —

> "that I will not, directly or indirectly, communicate or reveal to a person, or persons, any matter which shall be brought under my consideration, or which shall become known to me as a member of the said Council."

This latter part of the oath of office was akin to a part of the oath sworn by Privy Councillors in the United Kingdom. There was no mention in s 32 of an oath of allegiance or of abjuration. The 1823 Act was of temporary duration and was replaced by 9 Geo IV c 83 (1828) — known as the *Australian Courts Act*. Section 27 of this later Act was in exactly the same form as s 32 of the 1823 Act.

Those in London who were charged with oversight of legislation for the Australian colonies must have come to the view that the oath of office which had been prescribed for the Legislative Councillors under the Acts of 1823 and 1828 was not entirely appropriate. The Act of 1842 for the government of New South Wales and Van Diemen's Land (5 & 6 Vic c 76), which made provision for partly elected Legislative Councils demanded of the Councillors no more than an oath of allegiance, or an affirmation in lieu if that was authorised by law.[26] This requirement was retained in s 12 of the *Australian Constitutions Act* 1850 (13 & 14 Vic c 59), the Act which authorised the Legislative Councils of New South Wales, Van Diemen's Land, South Australia and Western Australia, and of Victoria after it had been constituted as a separate colony,[27] to enact legislation to create bi-cameral parliaments. The constitutions enacted pursuant to the 1850 Act reflected this stipulation in the

[26] Sections 25 and 26.
[27] Under s 32.

Imperial Act. They also prescribed the form of the oath and affirmation of allegiance.[28] In most cases the form was very short, but under Tasmania's Constitution members were required to promise not merely to "be faithful and bear true allegiance" to the Queen, her heirs and successors, but also to —

> "defend her to the utmost of my Power against all traitorous Conspiracies and Attempts whatever which shall be made against Her Person, Crown and Dignity; and that I will do my utmost Endeavour to disclose and make known to Her Majesty, Her Heirs and Successors, all Treasons and traitorous Conspiracies and Attempts which I shall know to be against Her or any of them; and all this do I swear without any Equivocation, mental Evasion, or secret Reservation, and renouncing all pardons and Dispensations from any person or Persons whatever to the contrary."

These words were taken from the oath of allegiance prescribed by British legislation and from the oath prescribed by s 2 of the *Roman Catholic Relief Act* 1829 (UK). They were omitted entirely from the oath of allegiance later prescribed by the *Promissory Oaths Act* 1869 (Tas).

The law-making powers granted to the Australian colonial legislatures were sufficiently wide to enable them to enact legislation which altered those of the English laws on oath taking which had been received into the colony, and also to adopt the statutes which had been passed by the United Kingdom parliament after the relevant reception date. The only restrictions on the legislative powers of these colonial legislatures were that they could not make laws which were repugnant to imperial statutes which applied in the colony by paramount force, and could not, until the enactment of the *Colonial Laws Validity Act* 1865 (UK), make laws which were repugnant to the fundamental laws of England.

These restrictions on the legislative powers of the Australian legislatures meant that they could not dispense with the requirement that members of the local legislature take the oath or affirmation of allegiance, for that requirement had been imposed by imperial statutes having paramount force, namely the statues of 1842 and 1850. Prior to the enactment of the *Colonial Laws Validity Act* 1865 there might even have been doubts about the validity of colonial legislation at variance with received English laws on oaths to be taken by persons appointed or elected to public office.

Some of the Australian colonial legislatures were prompt to enact statutes to adopt the reforming statutes which had been enacted by the United Kingdom Parliament after the date on which English laws had been transplanted in the colony. Some did so simply by declaring a particular United Kingdom statute to be part of the law of the colony. For example, in 1830 the legislatures of New South Wales and Van

[28] 18 Vic No 17 (Tas) s 26; 17 Vic No 41 (NSW) s 35 in Schedule 1 of 18 & 19 Vic c 54 (1855); Victorian Constitution s 32 — schedule to 18 & 19 Vic c 55 (1855); Act No 2 of 1855/6 (SA); Order in Council of 6 June 1859 containing Queensland's Constitution; *Constitution Act* 1889 (WA) s 22.

Diemen's Land adopted the *Roman Catholic Relief Act* 1829 in this way.[29] Several of the legislatures dealt with United Kingdom statutes which had granted dispensations to Quakers, Moravians, and Separatists in the same way.[30] In some other cases the colonial legislatures used reforming United Kingdom legislation as a model for local legislation to simplify the law about oathtaking and to revise the form of required oaths.

In 1845 the New South Wales legislature enacted legislation which enabled the Governor in Council to substitute declarations in place of oaths of office, except in cases where an oath of allegiance was required by law.[31] Of considerably more importance was the enactment in 1857 of a statute under which an oath of allegiance (in a prescribed form) alone was required in all cases in which previously it had been necessary to take the oaths of allegiance, supremacy and abjuration (or any of them), or the oath prescribed by the *Roman Catholic Relief Act* 1829 (UK); or to make a declaration under 9 Geo IV c 17 (1828).[32] The Victorian and Queensland legislatures enacted similar statutes in 1858 and 1867 respectively.[33] The framers of this legislation apparently assumed that the British laws which imposed these oath-taking requirements applied in the colony, or else they thought it desirable to resolve any doubts about the applicability of those laws in the colony.

These colonial enactments also prescribed the oaths of office required of public officers. Officers were to be sworn to discharge the duties of the office, according to law, to the best of their knowledge and ability without fear, favour or affection. The judicial officers were to be sworn also to "do equal justice to the poor and the rich".[34] These words had appeared in the oath of judicial office prescribed under Edward III's ordinance of 1346 (20 Edw III c 1).

In 1869 the Parliaments of South Australia and Tasmania enacted statutes modelled on the United Kingdom's *Promissory Oaths Act* 1868.[35] The Parliament of New South Wales followed suit in 1870.[36] Subsequently doubts were expressed

[29] 10 Geo IV No 9 (NSW); 10 Geo IV No 5 (VDL). Both Acts were enacted in 1830. A copy of the *Roman Catholic Relief Act* was despatched to Governor Darling on 2 April 1829. The Secretary of State for the Colonies, Sir George Murray, indicated to the Governor that the Act should be understood as extending to the colonies, even though there were no express words in it to say that it was the United Kingdom's Parliament intention that the Act so applied. Sir George Murray recommended that, to remove any doubts, local legislation be enacted to declare that the Act applied in New South Wales: *Historical Records of Australia*, Series I, vol xiv, p 716. On 14 April 1830, the Governor was able to report that the recommendation had been acted upon and that the Act had been adopted by local legislation passed on 1 January 1830: *Historical Records of Australia*, Series I, vol xv, p 421.
On their separation from New South Wales, Victoria and Queensland would have received the New South Wales statute. South Australia and Western Australia would have received the United Kingdom statute as part of their "inherited" law.

[30] See 8 Will IV No 2 (NSW) (1837); 7 Vic No 13 (WA) (1844); *Oaths Act* 1867 (Qd) ss 18 and 19.

[31] 9 Vic No 9, ss 1 and 5. The preamble recited 5 & 6 Will IV c 62 (1835), an Act which substituted declarations for oaths in certain cases.

[32] 20 Vic No 9, s 1.

[33] 21 Vic No 45, s 1 (reproduced in s 109 of Act No 1133 (1890) and s 155 of Act No 3757); *Oaths Act* 1867 (Q) s 2.

[34] 23 Vic No 9 (NSW) s 3; 21 Vic No 45 (Vic) s 2; *Oaths Act* 1867 (Qd) s 3(1).

[35] Act No 6 of 1869/70 (SA); *Promissory Oaths Act* 1869 (Tas).

[36] 33 Vic No 14. This Act also repealed 9 Vic No 9 (1845) and 20 Vic No 9 (1857).

about whether the bill for the New South Wales Act should have been reserved for the Queen's personal assent. Legislation to overcome these doubts was, however, enacted in 1873.[37]

All of the Australian colonial legislatures were eventually to enact legislation to allow any person to make an affirmation rather than take an oath of allegiance or of office, though some moved more slowly than others.[38]

When the time came for Australians to consider a constitution for a federation of the colonies, the question of what oath or oaths (or affirmations) should be required of those elected as members of the federal legislature, or of those appointed to offices within the executive and judicial branches of a federal government, appears not to have been one of central concern. There was little debate on the proposal that the federal constitution should include a section which required members of the federal Parliament to take an oath or affirmation of allegiance. Although provision was to be made for at least one federal court, the High Court of Australia, there seems to have been no suggestion that the federal constitution should prescribe any oath or affirmation to be taken by persons appointed to federal judicial offices. Nor was there any suggestion that the federal constitution should include provisions on oaths or affirmations to be taken by the Governor-General or by persons appointed to other offices within the executive branch of federal government.

The framers of Australia's federal constitution took as one of their models for such a constitution that of the United States of America. It was a constitution which included provisions on the oaths/affirmations to be taken by the President and by various others appointed or elected to public office.[39] But they were provisions in relation to a republican form of government and they may have been regarded as irrelevant to an Australian federation whose head of state would be the King or Queen of the United Kingdom and his or her dominions. It was only during the closing stages of debate on the shape and content of a constitution for an Australian federation that it was proposed that the constitution should contain a provision which picked up the words in Article IV, s 3 of the United States Constitution declaring that "no religious test shall be required as a qualification to any office or public trust under the United States". The proposal came from Henry Bournes Higgins, one of the members of the Victorian delegation attending the Australasian Federal Convention at its third session held in Melbourne in 1898.

Higgins thought that Australia's federal constitution should assure freedom of religion. The clause he proposed was one which drew primarily on the freedom of religion guarantee contained in the United States' Bill of Rights. But the motion he finally moved, and which was carried by a majority of the delegates (25:16), included words borrowed from Article VI, s 3 of the United States Constitution. Those words, now enshrined in s 116 of the Constitution of the Commonwealth of Australia, state that "no religious test shall be required as a qualification for any office or public trust under the Commonwealth". The record of the debates indicates

37 36 Vic No 31.

38 See Victorian Act No 45, s 4 (1858); *Oaths Act* 1867 (Qd) s 17; *Promissory Oaths Act* 1870 (NSW); *Affirmations Act* 1896 (SA).

39 See p 151 below.

that there was no consideration of the implications of this prohibition.[40] Debate on the motion moved by Higgins concentrated rather on his original proposal that a freedom of religion guarantee in the federal constitution should restrict the legislative powers of both the federal and State parliaments. Opposition to that proposal forced Higgins to modify it so that the guarantee would apply only to the Commonwealth. The concluding words of s 116 of the federal Constitution are mirrored in s 46(2) of Tasmania's *Constitution Act* 1934. This Act was essentially a consolidated version of prior State laws on matters constitutional. Section 46(2) states that —

> "No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief, and no religious test shall be imposed in respect of the appointment to or holding of any public office."

This provision is not entrenched and may be overridden by subsequent inconsistent legislation. The provision does, however, tie the hands of the executive branch of government.

CURRENT AUSTRALIAN LAWS

(a) Vice-regal Representatives

Section 2 of the Australian federal Constitution provides for a "Governor-General appointed by the Queen to be Her Majesty's representative in the Commonwealth ... ". Section 126 gives the Queen power to authorise the Governor-General to appoint deputies. Neither the Constitution nor any federal statute requires these persons to take any oath or affirmation before assuming office. But Clause II(a) of the Letters Patent relating to the Office of Governor-General of the Commonwealth of Australia, dated 21 August 1984, states that:

> "before assuming office, a person appointed to be the Governor-General shall take the Oath or Affirmation of Allegiance and the Oath or Affirmation of Office in the presence of the Chief Justice or another Justice of the High Court of Australia".

Clause III(d) requires these oaths or affirmations to be taken also by someone appointed as Administrator. In contrast those appointed as deputies of the Governor-General under s 126 of the Constitution take the oath or affirmation of allegiance only.[41] Clause V states the oath or affirmation of allegiance is to be in the form set out in the Schedule to the Constitution. It also sets out the form of the oath or affirmation of office. A person who takes this oath or affirmation undertakes to "well and truly serve" the Queen, her "heirs and successors according to law in the particular office and to do right to all manner of people after the laws and usages of the Commonwealth of Australia, without fear or favour, affection or ill-will".

[40] See *Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne 1898,* vol I, pp 656–62; vol II, pp 1769, 1779.

[41] Clause IV(b)(ii).

The Letters Patent issued by Queen Victoria in October 1900 constituting the offices of Governor and Lieutenant Governor of the Australian States required each of them to take the oath of allegiance in the form of s 2 of the *Promissory Oaths Act* 1868 (UK) and also "the usual oath for the due execution of the office of Governor, and for the due and impartial administration of justice".[42] Subsequent statutes of some States have required those who have accepted appointment to the office of Governor to take both the oath of allegiance and an official oath.

The official oath required of the Governor of South Australia under the *Oaths Act* 1936 (SA) is similar to the official oath prescribed by s 3 of the *Promissory Oaths Act* 1868 (UK). The only real difference is that the words "according to law" have been added.[43]

Following the enactment of the *Australia Acts* 1986 (UK and Cth) three of the State parliaments amended the Constitution Acts of their State to include more detailed provisions about the offices of Governor, Lieutenant Governor and Administrator, including provisions relating to the oaths (or affirmations) to be taken by those who accept appointment to these offices. The State parliaments which enacted such legislation were those of New South Wales, Queensland and Victoria. Queensland's *Constitution (Office of Governor) Act* 1987 requires the taking of oaths of allegiance and of office "subject to and in accordance with the law and practice of the State".[44] The amendments to the New South Wales *Constitution Act* 1902 and the Victorian *Constitution Act* 1975 also require an oath of allegiance and an oath of office to be taken by the vice-regal officers, the form of the latter being almost exactly in the terms of the oath of judicial office prescribed by s 4 of the *Promissory Oaths Act* 1868 (UK).[45] Section 42 of the *Northern Territory (Self Government) Act* 1978 (Cth) imposes like requirements in relation to the Administrator of the Territory.

In Tasmania and Western Australia the oaths of office required of the vice-regal representatives are specified in the Letters Patent Relating to the Office of Governor.[46] They are "the usual Oath or Affirmation of Allegiance and the usual Oath or Affirmation of Office". The former is presumably that which was prescribed by the Letters Patent issued by Queen Victoria on 29 October 1900 (since revoked). It was in the form prescribed by s 2 of the *Promissory Oaths Act* 1868 (UK). The "usual" oath or affirmation of office is presumably the same as that described in the same Letters Patent, that being "the usual oath for the due execution of the office of Governor, and for the due and impartial administration of justice".[47]

(b) Executive Councillors and Ministers of the Crown

Executive Councils have been retained as part of the scheme of government in all of the Australian polities. They are formally separate and distinct from the Cabinets made up of Ministers of the Crown, or some of them, though there is overlapping membership of the two institutions.

42 The Letters Patent are reproduced in volume 5 of the *Commonwealth Statutory Rules 1901–1956* at p 5326 et seq.
43 Sections 5 and 9.
44 Sections 8 and 9.
45 NSW: ss 9A(3)(5), and 9E; Vic: ss 6, 6A and 6D.
46 Dated 14 February 1986, Clause IV.
47 Tas Clause IV; WA Clause V.

Under s 64 of the federal Constitution all Ministers of State appointed by the Governor-General are members of the Federal Executive Council ex officio.[48] They are members of the Council even if they have not been chosen as members of the Cabinet. Persons other than Ministers may be appointed to the Council and those appointed as members of the Council continue to be members until their appointments are formally terminated. In practice those who are summoned to meetings of the Council are limited to those of its members who are officers of the government of the day.

Under s 50(2) of Victoria's *Constitution Act* 1975, the State's Ministers of the Crown are also members of the State's Executive Council, ex officio. The position under South Australia's *Constitution Act* 1936 is a little different because a limit has been placed on the number of Ministers who may be members of the Council.[49]

Sections 35B and 35C of the New South Wales *Constitution Act* 1902 provide for an Executive Council consisting "of such persons as may be appointed by the Governor, from time to time ...". Although the Ministers of the Crown are not stated to be members of the Executive Council ex officio, s 34E of the *Constitution Act* 1902 stipulates that the Ministers must be chosen from among the members of the Executive Council. The practical effect of this section is that, before the Premier seeks formal appointment of persons as Ministers, he or she must take steps to ensure that those persons have first been installed as members of the Executive Council.

Queensland's *Constitution (Office of Governor) Act* 1987 provides for an Executive Council. Although it does not make Ministers members of the Council ex officio, in practice they are appointed as members. Under s 33 of the *Northern Territory (Self Government) Act* 1978 (Cth) the Ministers are also members of the Executive Council. Indeed no one else may be appointed as a member of the Council. The Australian Capital Territory has no Executive Council, though s 39 of the *Australian Capital Territory (Self Government) Act* 1988 (Cth) provides that the Executive shall consist of the Chief Minister and the other Ministers appointed by him or her.

Tasmania and Western Australia remain the only States in which there is no statutory provision for appointment of members of the Executive Council. In these States the constitution of the Councils is still governed by the Letters Patent relating to the office of Governor which were issued on 14 February 1986 and which came into force on 3 March 1986, the day on which the *Australia Acts* 1986 (UK and Cth) came into force.

In New South Wales, South Australia, Tasmania and the Northern Territory, Executive Councillors are required to take a prescribed oath or affirmation of office.[50] This oath/affirmation appears to be an abbreviated version of that taken by

[48] In practice, those to be appointed as Ministers are first sworn as members of the Council: AR Browning (ed), *House of Representatives Practice* (2nd ed 1989) 116.

[49] *Constitution Act* 1936 (SA) s 66(2).

[50] *Oaths Act* 1900 (NSW) s 5; *Oaths Act* 1936 (SA) s 6; *Oaths Act* 1869 (Tas) s 5; *Northern Territory (Self Government) Act* 1978 (Cth) s 13(6) and (7). Under s 6 of the *Promissory Oaths Act* 1869 (Tas) Executive Councillors who hold any office are required to take not only the Executive Councillor's oath, but also the oath of allegiance and the oath of office. The oath required of members of the Executive Council in the Northern Territory is also required of Ministers. It is no more than an oath of secrecy.

Privy Councillors in the United Kingdom.[51] The form prescribed by s 10(1) of the *Oaths Act* 1900 (NSW), and set out in Schedule 5 of the Act, is fairly typical. It reads:

> "I ... being chosen and admitted of Her Majesty's Executive Council in New South Wales, do swear that I will to the best of my judgment at all times when thereto required freely to give my counsel and advice to the Governor or officer for the time being Administering the Government of New South Wales for the good management of the public affairs of New South Wales, that I will not directly or indirectly reveal such matters as shall be debated in council and committed to my secrecy, but that I will in all things be a true and faithful councillor".

In South Australia this is called the oath of fidelity.[52] Ministers who are not members of the State's Executive Council, and the Parliamentary Secretary to the Premier, are not required to take this oath. They are required to take only the oath (or affirmation) of allegiance and the official oath (or affirmation), the latter being one which promises no more than good and true service to the Queen.[53] These provisions are linked to s 66(2) of the State's *Constitution Act* 1936. This places a limit on the number of Ministers who may be appointed as members of the Executive Council.

In Queensland and Western Australia there is no statutory requirement that Executive Councillors take an oath of office. The requirement is imposed rather by the Letters Patent relating to the office of Governor in each of these States, issued on 14 February 1986. Clause XIX in each states that before assuming office a person who has been appointed a member of the Executive Council "shall take the usual Oath or Affirmation of Allegiance and the usual Oaths or Affirmations of Office ...". What those usual oaths and affirmations are is not indicated.

The oath of office taken by those appointed as members of the Executive Council in Victoria is similar to that taken by persons appointed to the Executive Council in New South Wales. It reads:

> "I Do Swear that I will, to the best of my judgment and ability, faithfully advise and assist the Governor, Lieutenant-Governor, Deputy Governor or Administrator of the Government of the State of Victoria, in all such matters as shall be brought under my consideration as a Member of the Executive Council of the said State. And I do swear that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be so brought under my consideration, or shall become known to me as a Member of the said Council, and which shall by the said Governor, Lieutenant Governor, Lieutenant-Governor, Deputy Governor or Administrator of the Government be directed to be kept secret".

This oath (or the affirmation in lieu) is not prescribed by legislation or Letters Patent.

Section 62 of the federal Constitution provides that persons appointed as members of the Federal Executive shall be sworn to office. The form of the oath or affirmation is not prescribed by the Constitution or by federal legislation. The oath or affirmation now tendered by Council members is fairly short. Members swear or affirm that

[51] Privy Councillors take the oath or affirmation of allegiance and the special oath of office: see 8 *Halsbury's Laws of England* (2) (1996 reissue), 'Constitutional Law' para 923; *Anson's Law and Custom of the Constitution*, vol ii (the Crown) (4th ed by AB Keith) (1935) 153.

[52] *Oaths Act* 1936 s 6. Executive Councillors also take the oath or affirmation of allegiance and the official oath or affirmation.

[53] Section 6A.

they "will, when required, advise" vice-regal representative, "to the best of... [their] judgment, and consistently with the good government of the Commonwealth of Australia" and also "will not disclose the confidential deliberations of the Council".

There is no universal requirement that Ministers of the Crown take an oath or affirmation of office. As has already be mentioned, South Australian Ministers who have not been appointed to the Executive Council must take the oath or affirmation of allegiance, and also the official oath or affirmation. Under s 6 of Tasmania's *Promissory Oaths Act* 1869, Executive Councillors who hold any office must also take the same oaths or affirmation. Offices for this purpose must surely include ministerial office. Under s 38 of the *Northern Territory (Self Government) Act* 1978 (Cth) Ministers are required to take the same oath of secrecy as Executive Councillors.

Even when there are no specific prescriptions about the oaths or affirmations to be taken by Ministers, Ministers will, in practice, will be required to take at least an oath or affirmation of allegiance in their capacity as members of the relevant legislature. Most Ministers will also be required to take the oaths or affirmations of office required of members of Executive Councils. There may even be a practice whereby Ministers are formally installed in ministerial office by the taking of an oath or affirmation of ministerial office. In Victoria, for example, Ministers are still sworn in by the oath or affirmation of office prescribed by s 67 of the now repealed *Public Service Act* 1974. By that oath or affirmation, they promise "at all times and in all things [to] discharge the duties of "the office" according to law and to the best of their "knowledge and ability, without fear, favour or affection".

Nowadays, little or any legal consequence is attached to the fact that a member of an Executive Council, or a Minister, has taken an oath or affirmation of secrecy and has done so by virtue of some legal requirement. The legal significance of the taking of such an oath or affirmation has been considered by courts primarily in the context of the laws of evidence which govern the conduct of judicial proceedings. Rules of common law make it possible for courts to exclude relevant evidence on the ground that its admission would be contrary to the public interest. In recent time the availability of this so-called public interest immunity has been narrowed by the courts and in one of the leading cases before the High Court of Australia — *Sankey* v *Whitlam*[54] in 1978 — Gibbs ACJ firmly rejected the argument that this immunity is automatically attracted when evidence about proceedings before the Federal Executive Council is sought to be adduced, and is so attracted because of the oaths or affirmations taken by members of that Council. A duty of confidentiality cemented by an oath or affirmation of secrecy, Gibbs ACJ suggested, was but one of the considerations to be taken into account by a court when an objection to admission of certain evidence is made.[55]

In the later case of *Commonwealth* v *Northern Land Council*[56] the High Court stressed that production of Cabinet documents to a court should be ordered only in exceptional circumstances and when the public interest in the proper administration

[54] (1978) 142 CLR 1.
[55] Ibid at 42–3. Cf *R* v *Turnbull* [1958] Tas SR 80.
[56] (1993) 176 CLR 604.

of justice outweighs the public interest in maintaining the confidentiality of proceedings in Cabinet.

(c) Members of Parliament

Except in the Australian Capital Territory, all persons elected as members of Australian parliaments are required to take an oath or affirmation of allegiance, in a prescribed form. Their entitlement to sit and vote as members of the House to which they have been elected is contingent on their first having taken the oath or affirmation, in a form prescribed by statute.[57] That form is now a fairly simple one. Typically it is one which requires a pledge of allegiance to the Queen and her heirs and successors, according to law. The rules according to which the Queen's heirs and successors are to be identified are still, in both the United Kingdom and Australia, those laid down in England's *Act of Settlement Act* 1701.

In the case of the States and the self-governing Territories of the Commonwealth, the requirement has been imposed by ordinary legislation and thus can be changed at any time. In the case of the federal Parliament, it is a constitutional requirement[58] and cannot therefore be altered except by formal constitutional amendment under s 128 of the Constitution.

Under s 6A of the ACT's *Oaths and Affirmations Act* 1984 persons elected to the Legislative Assembly of the Territory have a choice between taking the customary oath or affirmation of allegiance and taking an oath or affirmation to "faithfully serve the people of the Australian Capital Territory as a member of the Legislative Assembly and discharge my responsibilities according to law".

(d) Judicial Officers

In all Australian jurisdictions there are statutes which require judicial officers to take an oath or affirmation of allegiance and an oath or affirmation of judicial office.[59] The form of the latter is similar to that prescribed by s 4 of the *Promissory Oaths Act* 1868 (UK), the critical words being a promise to "well and truly serve" in the named judicial office and to "do right to all manner of people according to law without fear or favour, affection or ill will".

[57] *Commonwealth of Australia Constitution*, s 42 and Schedule; *Constitution Act* 1902 (NSW) s 12; *Constitution Act* 1867 (Qd) ss 4 and 5; *Constitution Act* 1934 (SA) s 42; *Constitution Act* 1934 (Tas) s 30; *Constitution Act* 1975 (Vic) s 23 and Schedule 2; *Constitution Act* 1889 (WA) s 22 and Schedule E; *Northern Territory (Self Government) Act* 1978 (Cth) s 13(6) and (7) and Schedule 3; *Australian Capital Territory (Self Government) Act* 1988 (Cth) s 9.

[58] Section 42. Swearing in practices are described in *Odger's Australian Senate Practice* (7th ed 1995) 160 and AR Browning (ed), *House of Representatives Practice* (2nd ed 1989) 173–5.

[59] *High Court of Australia Act* 1979 (Cth) s 11; *Federal Court of Australia Act* 1976 (Cth) s 11; *Family Law Act* 1975 (Cth) s 26 (Family Court of Australia); *Oaths Act* 1900 (NSW) s 4; *Oaths Act* 1867 (Qd) s 3(1); *Oaths Act* 1936 (SA) ss 7 and 11; *Promissory Oaths Act* 1869 (Tas) s 4; *Magistrates' Courts Act* 1989 (Vic) s 7(5); *Magistrates' Court General Regulations* 1990 (Vic) reg 201 and Schedule 1; *Justices Act* 1902 (WA) s 16; *Supreme Court Act* 1935 (WA) s 9(2); *District Court of Western Australia Act* 1969 (WA) s 11(2); *Family Court Act* 1997 (WA) s 13; *Supreme Court Act* 1933 (Cth) ss 19 and 42 (ACT); *Magistrates' Courts Act* 1930 (ACT) s 10P; *Supreme Court Act* (NT) ss 37 and 41J; *Magistrates Act* (NT) s 20. The oath of office prescribed by Schedule 4 of Victoria's *Public Service Act* 1974 covered judges of the Supreme Court, though it did not positively require them to take the oath. But this Act was repealed by the *Public Sector Management Act* 1992. The later Act did not refer to judges.

Queensland's *Oaths Act* 1867 prescribes a somewhat different form.[60] It is this:

> "I ... do sincerely promise and swear that as ... I will at all times and in all things do equal justice to the poor and rich and discharge the duties of my office according to the laws and statutes of the realm and of this State to the best of my knowledge and ability without fear favour or affection".

(e) Other Public Officers

Persons appointed or elected to public offices other than those already considered may be required by statute to take a prescribed oath or affirmation, or make a prescribed declaration, within a certain time after their election or appointment, or before entry upon the office. Police officers, for example, are commonly required to take an oath or affirmation or declaration of office.[61]

In Queensland, South Australia, Victoria and Western Australia members of local government councils are required to make promissory declarations relating to the duties and functions of office.[62] In Victoria and Western Australia they are also required to take the oath or affirmation of allegiance.[63]

Section 26 of Western Australia's *Public Sector Management Act* 1994 requires the Commissioner for Public Sector Standards to make a solemn and sincere promise and declaration that he or she "will well and truly serve" the Queen and her heirs and successors, "according to law", in that office, and will "according to the best of ... [his/her] skill and ability, faithfully, impartially and truly execute that office and perform its duties".

Section 101 of Victoria's *Public Service Management Act* 1992 contemplated that persons who accepted positions in the State public service could be required under some other Act to take an oath or affirmation of office. The form of that oath was prescribed in Schedule E. The commitment was "at all times and in all things" to "discharge the duties of" the office or position, "to the best of ... [the person's] knowledge and ability without fear, favour or affection". As from 1 July 1998 this Act was replaced by the *Public Sector Management and Employment Act* 1998. This Act makes no provision in relation to oaths of office.

Section 7 of the New South Wales *Oaths Act* 1900 is unique. It authorises the Governor, by order, to require any public officer to take an oath or affirmation of allegiance and the official oath or affirmation, the latter being in the form prescribed by s 3 of the *Promissory Oaths Act* 1868 (UK). Other State Acts may, of course, expressly require persons to take these oaths or affirmations.

The form of the official oath set out in s 3 of the *Promissory Oaths Act* 1868 (UK) is substantially reproduced in the oaths legislation of New South Wales, South

60 Section 3(1).

61 *Australian Federal Police Force Act* 1979 (Cth) s 28; *Police Service Administration Act* 1990 (Qd) s 3.3; *Police Act* 1952 (SA) ss 16, 17, 20B; *Police Regulation Act* 1898 (Tas) ss 16, 18, 23 and 24; *Police Regulation Act* 1958 (Vic) s 13; *Police Act* 1892 (WA) s 10; *Police Administration Act* (NT) ss 26 and 27. An oath/affirmation was once required of persons enlisted in the defence forces *(Defence Act* 1903 s 76) but this requirement was removed in 1964.

62 *Local Government Act* 1993 (Qd) s 190(1); *Local Government Act* 1934 (SA) s 52; *Local Government Act* 1989 (Vic) s 63; *Local Government Act* 1995 (WA) s 2.29.

63 *Local Government Act* 1989 (Vic) s 64; *Local Government Act* 1995 (WA) s 2.29.

Australia, Tasmania, and the ACT though in the case of South Australia with the addition of the words "according to law".[64] This legislation does not, except in New South Wales and Tasmania, specify who is required to take the official oath or affirmation.[65]

In some Australian jurisdictions the Ombudsman is obliged to take an oath or affirmation of office by which faithful and impartial performance of the office is promised. By the same oath or affirmation the Ombudsman undertakes not to divulge information acquired in the course of executing the office except in accordance with the relevant Act.[66] An oath or affirmation promising faithful and impartial performance of the duties of office is also required of those appointed as members of the Australian and Western Australian Industrial Commissions.[67]

LEGAL CONSEQUENCES OF REFUSAL OR FAILURE TO TAKE AN OATH OR AFFIRMATION

In his *General Abridgment of Law and Equity*, published in the mid-eighteenth century, Charles Viner wrote:

> "A new oath cannot be imposed on any judge, commissioner, or any other subject without authority of parliament, but the giving of every oath must be warranted by act of parliament, or by the common law time out of mind".[68]

This statement was essentially the same as that which Sir Edward Coke had made on the subject in the third volume of his *Institutes*, first published in 1641.[69] The statement is undoubtedly true of contemporary law.

Unless there is a statutory requirement that a person elected or appointed to a public office shall take an oath or affirmation in order to perfect the person's title to occupy the office, no one has authority to prevent the person entering upon the office without having first taken some oath or affirmation. If the office has been created by or pursuant to statute, the person or body having power to appoint to the office probably cannot even make an offer of appointment conditional on the prospective appointee undertaking to make an oath or affirmation. Such a course of action would hardly be consistent with the statute which confers the power of appointment and which may also have prescribed the qualifications for appointment to the office.

The imposition of such a condition is tantamount to an addition to the qualifications for appointment prescribed by statute, and it may fly in the face of a deliberate decision on the part of the enacting parliament not to make a person's entitlement to occupy a statutory office dependent on his or her having taken any oath or affirmation.

64 *Oaths Act* 1900 (NSW) s 3; *Oaths Act* 1936 (SA) s 9; *Promissory Oaths Act* 1869 (Tas) s 3; *Oaths and Affirmations Act* 1984 (ACT) s 6 and Schedule 1.

65 *Oaths Act* 1900 (NSW) s 11; *Promissory Oaths Act* 1869 (Tas) s 9.

66 *Parliamentary Commissioner Act* 1974 (Qd) s 9; *Ombudsman Act* 1973 (Vic) s 10; *Parliamentary Commissioner Act* 1971 (WA) s 8; *Ombudsman Act* (NT) s 10.

67 *Workplace Relations Act* 1996 (Cth) s 19; *Industrial Relations Act* 1978 (WA) s 11.

68 (2nd ed 1793) vol 16, p 48(3).

69 3 Co Inst (6th ed 1680) Chap 74, p 165.

Tasmania's *Promissory Oaths Act* 1869 includes a provision taken from s 7 of the United Kingdom's *Promissory Oaths Act* 1868. It states that if a person who is required to take an oath under the Act declines or neglects to take the oath when it is duly tendered to him or her, by someone authorised to tender the same, then if he or she has already entered on that office the office is vacated. If he or she has not entered on the office, he or she is disqualified from entering on it.

If the declarations required of local government councillors in Queensland and Victoria are not made within a specified time after election, those elected vacate the office.[70] In Western Australia a local government councillor who acts in office without having taken the required oath or affirmation of allegiance and made the required declaration commits a criminal offence. The maximum penalty is a fine of $5000 or imprisonment for one year.[71] This provision is akin to s 5 in the *Parliamentary Oaths Act* 1866 (UK). This stipulates that if a member of either House sits and votes without having taken the required oath within the prescribed time, he or she is liable to a penalty of £500. In addition a member of the House of Commons vacates the seat to which he or she was elected.

Under Australian legislation those elected as members of parliament are not entitled to sit and vote in the House to which they have been elected unless they have taken the required oath or affirmation, but they do not now incur any penalties if they do sit and vote without having fulfilled that requirement.

In September 1901, Alfred Deakin, in his capacity as Attorney-General for the Commonwealth, advised that, in his opinion, the direction in s 42 of the federal Constitution that a member of the federal Parliament "shall before taking his seat make and subscribe" the oath of allegiance was "directory, and not absolute" in the sense that "neglect of the requirement does not invalidate what is done afterwards".[72] Deakin presumably meant no more than that the validity of parliamentary proceedings would not be affected by the participation in them of members who had not complied with s 42. In practice, of course, responsibility for enforcing s 42 rests in the hands of the presiding officers of the two Houses.[73]

Where the making of an oath, affirmation or declaration is a condition which must be satisfied before a person can be regarded as the lawful occupant of a public office, and thus entitled to exercise the powers given to occupants of that office, then logically it would seem to follow that no legal force or effect can be accorded to the acts of persons who have presumed to exercise the powers of office without having taken the prescribed oath, affirmation or declaration. But under the common law of England and of legal systems derived from it such acts may be recognised as legally valid by virtue of the de facto officer doctrine. Such acts may be so recognised if they are acts which would have been valid had they been performed by an officer de jure and if the defect in the title of the person who has performed the acts is not readily

[70] *Local Government Act* 1993 (Qd) s 190(4) — office is vacated if the required declaration has not been made within one month or within such longer period as is allowed by the Minister; *Local Government Act* 1989 (Vic) s 65 — three months.

[71] *Local Government Act* 1995 (WA) s 2.29.

[72] Attorney-General's Department, *Opinions of the Attorneys-General of the Commonwealth of Australia: volume I, 1901–1914* (1981) 27–8.

[73] See n 58 above.

discoverable by members of the public.[74] Should the defect in title be failure to take the requisite oath or affirmation it will seldom be that it is one which is readily discoverable. It is certainly not reasonable to expect members of the public who have occasion to seek the exercise of powers attached to a particular public office to make inquiries to satisfy themselves that the person held out to be the lawful occupant of the office has taken the requisite oath or affirmation of allegiance or office.

In a case decided in 1676 the Court of King's Bench held that the de facto officer doctrine could not be invoked to validate the decision of someone who had failed to satisfy the oath-taking requirements imposed by the *Test Act* 1672.[75] Later judges were to pronounce this ruling to be wrong[76] and there are nineteenth century decisions in which English courts clearly accepted that the de facto officer doctrine could apply in cases in which someone had failed to swear a prescribed oath of office.[77]

BREACH OF OATH OR AFFIRMATION

Breach of an oath or affirmation of allegiance, or of an official oath or affirmation, is not of itself a crime though the conduct which constitutes the breach may attract criminal liability. For example, someone who has violated the oath or affirmation of allegiance may have done so by reason of conduct which amounts to treason or sedition.

Should a member of parliament violate the oath or affirmation of allegiance he or she may thereby become disqualified from sitting and voting as a member and may incur monetary penalties recoverable in a court of law. All Australian constitutions (or other legislation on membership of Houses of parliament), except Victoria's, include a provision similar to s 44(i) of the federal Constitution. It declares that:

> "Any person who -
> (i) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; ...
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives".[78]

74 See E Campbell, "De Facto Officers" (1994) 2 *A J Admin* L 5.

75 *Hipsley* v *Tucke* (1676) 3 Keb 721 (84 ER 973); 2 Lev 184 (83 ER 310); T Jones 81 (84 ER 1157); 2 Mod 198 (86 ER 1019).

76 *Andrews* v *Linton* (1702) 2 Lord Raym 884 per Holt CJ (92 ER 91); *R* v *Lisle* (1738) And 163 at 166 per Lee CJ (95 ER at 346). See also Hawkins, *Pleas of the Crown* (7th ed 1795) Chap 8, s 16.

77 *Margate Pier Co* v *Hannam* (1819) 3 B & Ald 266 at 271 (106 ER 661 at 663); *R* v *Mayor, Aldermen and Burgesses of the Borough of Cambridge* (1840) 12 Ad & E 702 (113 ER 980). See generally CL Pannam, "Unconstitutional Statutes and De Facto Officers" (1996) 2 *FL Rev* 37 at 43–4.

78 *Nile* v *Wood* (1987) 167 CLR 133 at 140; *Sykes* v *Cleary* (No 2) (1992) 109 ALR 577; *Constitution Act* 1902 (NSW) s 13A(b); *Legislative Assembly Act* 1867 (Qd) s 7; *Constitution Act* 1934 (SA) ss 17(b) and (c), 31(b) and (c); *Constitution Act* 1934 (Tas) s 34(b) and (c); *Constitution Acts Amendment Act* 1899 (WA) s 38(4).

Should the conduct which is in violation of a member's oath or affirmation of allegiance have attracted criminal liability and sentence, then again the member may thereby have become disqualified from sitting and voting.[79]

The Houses of the Australian State parliaments,[80] and until 1987 the Houses of the federal Parliament also, could simply expel one of their members adjudged by them guilty of breach of the oath or affirmation of allegiance.

The motion of Prime Minister WM Hughes in 1920 that the member for Kalgoorlie, Hugh Mahon, be expelled from the House of Representatives, on account of his seditious and disloyal utterances, asserted also that Mahon had violated the oath of allegiance. The motion was carried and the member's seat was declared vacant.[81] Section 8 of the *Parliamentary Privileges Act* 1987 (Cth) removed from the Houses of the federal Parliament their power to expel members.

The statute which creates a public office will often limit the grounds on which occupants of the office may be suspended or removed. Although breach of the oath or affirmation of office taken by the office-holder would not of itself be such a ground, conduct which does constitute a ground for suspension or removal could also be in violation of the oath or affirmation. The misbehaviour on the part of a judge which is claimed to be the cause for his or her removal from office could, for example, be conduct in breach of the judicial oath of office.

Judges who have committed themselves under oath or affirmation to uphold a particular constitution may consider it in breach of that oath or affirmation to accord legal validity to the acts of government which has effectively overturned that constitution by revolutionary means. In such a situation some judges may take the view that their proper course is to resign from office.[82]

OATHS OF OFFICE UNDER REPUBLICAN CONSTITUTIONS

Under a republican constitution there is obviously no place for laws which require anyone to take an oath of allegiance to a monarch, his/her heirs and successors, or an oath which promise good and true service to the same. This is not to say that republican constitutions must necessarily preclude prescription of oaths of allegiance or office. Many countries formerly of the British Empire and whose head of state was for a time an hereditary monarch have constitutions which preserve the notion that certain persons who are elected or appointed to public offices should be required to take oaths or affirmations of allegiance and office.

[79] *Commonwealth of Australia Constitution,* s 44(ii); *Constitution Act* 1902 (NSW) s 13A(e); *Legislative Assembly Act* 1867 (Qd) s 7; *Constitution Act* 1934 (SA) ss 17(g) and (h) and 31(g) and (h); *Constitution Act* 1934 (Tas) ss 14(2), 34(e); *Constitution Act* 1975 (Vic) ss 44(1), 44(3), 48(2)(a) and (b); *Constitution Acts Amendment Act* 1899 (WA) ss 7 and 20. See also *Nile* v *Wood* (1987) 167 CLR 133 at 139.

[80] This is by virtue of the legislation which endows them with the same powers and privileges as the House of Commons. There is no such legislation in New South Wales but it has been held that the inherent powers of the Houses include a power to expel members adjudged by them to be guilty of conduct unworthy of a member: *Armstrong* v *Budd* (1969) 71 SR (NSW) 386.

[81] 94 *Cwlth Parl Deb* 6283–4, 6382–473.

[82] Cf *Madzimbamuto* v *Lardner-Burke,* 1968 (2) SA 284.

The precedents most relevant to Australian circumstances are those of the United States of America, Ireland and India.

Under the United States Constitution no one is required to take anything that can be described as an oath or affirmation of allegiance. Article II, s 1.8 of that Constitution provides that before the President enters on the execution of that office he shall take an oath or affirmation in the following form:

> "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States".

Article VI, s 3 provides that members of the federal and State legislatures and also federal and State judicial officers —

> "shall be bound by oath or affirmation to support this Constitution; but no religious test shall be required as a qualification to any office or public trust under the United States".

These constitutional prescriptions require a commitment to the Constitution rather than fidelity to a person or loyalty to the country itself.

The United States Supreme Court has accepted that a legislature may add to the oaths or affirmations which are required under Article VI of the Constitution so long as the additional requirements do not infringe the rights guaranteed by the First and Fourteenth Amendments and do not insist that those who are required to make an oath or affirmation should, as a precondition, declare whether they believe in God.[83] The Court has also held that if a person who has been elected as a member of a legislature indicates his or her willingness to take the oath under Article VI, it is not open to the House to which he or she has been elected to inquire into the sincerity of the person's beliefs.[84]

The 1937 Constitution of the Republic of Ireland requires the elected President of the republic to make a formal promise in much the same terms as that required of a person elected as President of the USA.[85] Curiously this Constitution does not prescribe promissory undertakings for other public officers, except for the judges of the Supreme Court.[86] The form of the judicial oath borrows from that of the judicial oath prescribed by the *Promissory Oaths Act* 1868 (UK), but with the addition of words committing the judge to uphold the Constitution and the laws of the Republic.

India's Constitution requires oaths or affirmations to be taken by the President, Ministers, members of parliament and judges of the Supreme Court.[87] The oath or affirmation to be taken by the President is one by which he or she promises to discharge the functions of that office faithfully and to "preserve, protect and defend the Constitution and the law ...". In addition the President pledges devotion "to the service and well-being of the people of India".[88] The oath or affirmation for Ministers

[83] *McCulloch* v *Maryland,* 17 US (Wheaton) 316 at 416 (1819); *Torcaso* v *Watkins,* 367 US 488 (1961); *Cole* v *Richardson,* 405 US 676 (1972). See also 63 *American Jurisprudence* 2nd, 711 § 58, 762 § 131 and 132, 1092 § 594.

[84] *Bond* v *Floyd,* 385 US 116 (1966).

[85] Art 12.8.

[86] Art 34.5.

[87] There are similar requirements under the Constitution in relation to the States.

[88] Section 60.

borrows phrases from the judicial oath prescribed by the *Promissory Oaths Act* 1868 (UK) but includes in addition words by which the Minister pledges faithful and conscientious discharge of ministerial duties and "true faith and allegiance to the Constitution of India".[89] By a constitutional amendment of 1963 Ministers and members of parliament are to pledge that they "will uphold the sovereignty and integrity of India".[90] Like Ministers, members of parliament pledge "true faith and allegiance to the Constitution" and faithful discharge of their duties.[91] The judicial oath/affirmation of office is similar to the judicial oath prescribed by the *Promissory Oaths Act* 1868 (UK) but includes in addition words by which a judge undertakes to "uphold the Constitution and the laws".[92]

Professor George Winterton has suggested that a President of the Commonwealth of Australia, if there is to be such an officer, should be required by the federal Constitution to make a declaration in much the same form as the presidential oath prescribed under Ireland's Constitution.[93] The required declaration would read as follows:[94]

> "I ... , do solemnly and sincerely promise and declare that I will maintain the Constitution and uphold the laws, that I will fulfil my duties faithfully and conscientiously in accordance with the Constitution and the law, and that I will dedicate my abilities to the service and welfare of the people of Australia".

Professor Winterton has proposed that the Constitution for a republican Australia should retain the Federal Executive Council but that membership of this body should be restricted to the federal Ministers for the time being, each of whom should "make the oath or affirmation prescribed by the Parliament".[95] An oath or affirmation of allegiance would still be required of members of the federal Parliament but the allegiance would be to the Commonwealth of Australia, that is to the nation.[96]

In none of these republican models is there any concept of allegiance to a person or holder of office. If allegiance is to be pledged it is to the constitution or the nation. This is a long way from the concept of allegiance under the common law of England.

In the next section of the article I examine the development of this concept and what it now means under Australian law.

89 Section 75(4).
90 Sixteenth Amendment.
91 Section 99.
92 Section 124(6).
93 "A Constitution for an Australian Republic", published as a supplement to *The Independent Monthly*, June 1993.
94 Proposed s 59(8).
95 Proposed s 62C(2).
96 Proposed schedule.

ALLEGIANCE AND OATHS AND AFFIRMATIONS OF ALLEGIANCE

Writing in the mid seventeenth century, Sir Edward Coke identified four classes of persons who, by common law, owed allegiance to the king of England.[97] They were (i) natural born subjects of the king; (ii) those who had become subjects by Letters Patent, by Act of Parliament or by virtue of annexation of new territory by the king; (iii) aliens who resided within the king's territories; and (iv) those who had taken an oath of allegiance to the king.[98] Common law on allegiance has not changed materially since Coke's time, though the law according to which a person's status as an alien or non-alien is to be determined is now largely statutory. In Australia that law is the *Australian Citizenship Act* 1948 (Cth). All who are citizens under this Act owe allegiance to the Queen.

What is known as local and temporary allegiance is still owed to the Queen by non-enemy aliens who reside within the realm or in territories of which she is head of state.[99] Ordinarily such persons are released from their duty of allegiance when they take up residence outside these territories.[100] They are not, however, released from that duty if they go abroad with a passport which signifies that they are a subject of the monarch, even if the passport has been procured by fraud or deception.[101]

After the American War of Independence courts in England and Scotland were confronted with some cases in which they had to decide on the status of those persons who had, before the war, been British subjects resident in one of the American colonies and had chosen to remain in America after the Declaration of Independence. English courts took the view that these persons had been released from their duty of allegiance to the British monarch. They took notice of the fact that in 1783 Great Britain had, by the Treaty of Paris, recognised America's independence.[102]

Since Coke's time, ideas about the nature of the duty of allegiance have undergone change. Coke understood the duty to be one owed to the monarch as a natural person rather than to the crown as a body corporate or politic. The notion that allegiance was owed to the monarch in person was central to the opinion of the

97 3 *Coke's Institutes,* Chap 1 (1644). See also Sir Matthew Hale, *The History of the Pleas of the Crown*, vol 1 (1736), Chap 10; JM Jones, *British Nationality Law* (1956) 57–61; DM Jones, "Sir Edward Coke and the Interpretation of Lawful Allegiance in Seventeenth Century England" (1986) 7 *Hist of Political Thought* 321.

98 At one time male subjects of twelve or more years of age could be required to take the oath of allegiance at a court leet or sheriff's tourn: *Coke on Littleton* f 68b; 2 *Coke's Institutes* c 3, sec 94; M Hale, *The History of the Pleas of the Crown,* vol 1 (1736) 64; 1 *Blackstone's Commentaries,* Chap 10, p 368. Writing in the late thirteenth century Britton mentioned a minimum age of fourteen: *Britton* (trans FM Nichols, vol 1 1805) Book 1, cap 13 (p 48).

99 *Calvin's Case (1608)* 7 *Co R 1 at 6a, 6b; 77 ER 377; R v Tucker (1695)* 1 Ld Raym 1; 91 ER 897; *The Angelique* (1801) 3 Ch Rob App 7; 165 ER 497; *Routledge* v *Low* (1868) LR 3 HL 100.

100 *Calvin's Case* (1608) 7 Co R 1; 77 ER 377; *De Jager* v *Attorney-General of Natal* [1907] AC 326; *Johnstone* v *Pedlar* [1921] 2 AC 262.

101 *Joyce* v *Director of Public Prosecutions* [1946] AC 347.

102 *Doe d Thomas* v *Ackland* (1824) 2 B & C 779; 107 ER 572; *Auchmuty* v *Mulcaster* (1826) 5 B & C 771; 108 ER 287. See also *Marryat* v *Wilson* (1799) 1 Bos & P 430; 126 ER 993; G Chalmers, *Opinions of Eminent Lawyers,* vol 2 (1814) 367–417 (opinion of 1 Feb 1814); and C Parry, *Nationality and the Citizenship Laws of the Commonwealth and the Republic of Ireland* (1957) 73, 125.

Exchequer Chamber in *Calvin's Case* in 1608.[103] This case was essentially a test case brought by collusion to procure a judicial ruling on the effect of the union of the Crowns of England and Scotland in 1603, in the person of James VI of Scotland and James I of England. Robert Calvin had been born in Scotland in 1605. Were he to be regarded as an alien in England, he would have been disabled from holding any real property in that realm. Twelve out of the fourteen judges who advised in the case, among them Coke, held that the *post nati*, meaning those like Calvin who had been born in Scotland after the accession of James to the throne of England, were to be regarded as natural born subjects of the king of England.

The opinions delivered in *Calvin's* case indicated that the judges appreciated that there was a distinction between the capacities of a monarch: the one a personal, the other a politic capacity. It appears that under English law, but not Scots law, the monarch was then recognised to be a body politic. The reasoning of the majority was that if allegiance was owed to James only as a body politic under English law, it would necessarily follow that persons born in Scotland after the union of the two thrones in the person of James would, for the purposes of English law, have to be regarded as aliens within the realm of England. The conclusion of the majority was that the *post nati*, but not the *ante nati*, were to be recognised as subjects of the king of England.

The nature of the duty of allegiance was a subject of considerable debate following the exodus of James II from England in December 1688. The central problem was who was entitled to succeed him: his natural heir, his son James, or his daughter, Mary, and her husband, William of Orange who had led the armed forces responsible for the overthrow of James II?[104] The claims of Mary and William were to prevail, but not without considerable disputation about their bases. There were some who considered that they could not bear or swear allegiance to anyone other than the natural heir of James II. There were others who argued that Mary and William could be recognised as lawful successors of James II, and allegiance to them pledged, on the ground that James II had forfeited his right to reign and to command the allegiance of his subjects. This argument drew upon old ideas about the relationship between king and subjects.[105] The bond between them, it was suggested, was one of mutual obligations: on the part of the king, those undertaken on the swearing of the coronation oath. Should a king act in breach of that oath, it was argued, his subjects were released from their duty of allegiance to him. It was this argument that underpinned the resolution of the Commons on 28 January 1689 declaring the throne to be vacant. The Lords agreed that James II had violated his "compact" with his

[103] 7 Co R 1; 77 ER 377. The case is discussed in WS Holdsworth, 9 *History of English Law* (3rd ed 1944) 72–86; JM Jones, *British Nationality Law* (1956) 51–7; C Parry, *Nationality and the Citizenship Laws of the Commonwealth and the Republic of Ireland* (1957) 40–3. See also LA Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (1977) 202–53. This reproduces the Lord Chancellor's speech in the Exchequer Chamber.

[104] See H Nenner, *The Right to be King: The Succession to the Crown of England 1603–1714* (1995) 174–5, 193–4, 213, 214.

[105] See WS Holdsworth, 9 *History of English Law* (3rd ed 1944) 73–7; F Pollock and FW Maitland, 1 *History of English Law* (2nd ed 1968) 298–30.

subjects, but by vote of 55:41 they rejected the Commons' assertion that "the throne was thereby vacant". After conference between the two Houses, the Lords resolved that Mary and William be declared king and queen of England.[106]

This important episode in English constitutional history may be interpreted as a shift from the notions which ran through the judicial opinions in *Calvin's* case to the idea that the office of king was but a particular kind of public office. The opinions in *Calvin's* case had attached duties of allegiance to kings as natural persons. The opinions which prevailed in 1689 were ones which rather attached duties of allegiance to the institution of monarchy and to a monarch only so long as he/she conformed with the duties attached to that office. In other words, the duty of allegiance was to be attached primarily to the monarch in his/her capacity as a body politic.

This subtle shift in thinking about the nature of the duty of allegiance was reflected in Blackstone's influential *Commentaries on the Laws of England*, first published in 1765. There it was stated that allegiance is owed to the sovereign not merely in his personal capacity but also in his political capacity.[107] In 1886, in the case of *In re Stepney Election Petition; Isaacson* v *Durant*,[108] the court considered that allegiance was owed to the sovereign only in his or her political capacity.

The question for judicial decision in this case was whether a person born in Hanover before the accession of Queen Victoria to the throne of Great Britain, but presently resident in Great Britain, was a British subject and thus qualified to be elected as a member of the House of Commons. From the time George I ascended to the English throne, under the English *Act of Settlement* 1701, the thrones of the kingdoms of England (and from 1707 the United Kingdoms of England and Scotland) and of Hanover had been occupied by the same person. The rules governing succession to the throne in the two kingdoms were, however, different and on the death of William IV the Hanoverian throne passed to his brother, the Duke of Cumberland.[109] In the opinion of the court, a person born in Hanover before the accession of Victoria did not become a British subject. His or her allegiance was owed to the king of Hanover and his successors.[110] Lord Coleridge CJ observed that a number of English statutes, including the *Act of Settlement* 1701, had spoken of the Crown rather than the sovereign. By these statutes, Lord Coleridge CJ suggested, Parliament had "clearly recognize[d] that to the King in his politic, and not in his personal capacity, is the allegiance of his subjects due".[111]

Today nearly all of Britain's former colonies and dominions are fully independent of the United Kingdom, though several have retained the Queen — among them Australia, Canada and New Zealand — as their head of state. In that capacity Queen Elizabeth II is effectively Queen of several distinct polities. This fact is reflected in

[106] See *Taswell-Langmead's English Constitutional History* (11th ed by TFT Plucknett 1960) 445–6.

[107] 1 *Commentaries* 371.

[108] (1886) 17 QBD 54.

[109] King Ernest.

[110] At the time the Emperor of Prussia.

[111] (1886) 17 QBD 54 at 65–6. Lord Coleridge CJ delivered the opinion of a court of three judges. The other statutes mentioned by Lord Coleridge CJ were 12 Car 2, c 24 (on tenures); 1 Geo I, st 2, c 4 (1714) on naturalization; 4 Geo II c 21 (1738) and 13 Geo III c 21 (1772), both on British nationality.

the *Royal Style and Titles Act* 1953 (Cth) as amended in 1973. Elizabeth II is there declared to be styled "Queen of Australia and Her other Realms and Territories, Head of the Commonwealth". Courts have also recognised the divisibility of the Crown and, correspondingly, duties of allegiance. In *R* v *Foreign Secretary; Ex parte Indian Association*[112] May LJ stated that in matters of law and government the Queen of the United Kingdom "is entirely different and distinct from" the Queen of, say, Australia, Canada or New Zealand. In *Nolan* v *Minister for Immigration and Ethnic Affairs*[113] the High Court of Australia held that today the references in the Australian federal Constitution to a "subject of the Queen" must now be read as references to a "subject of the Queen of Australia", meaning Australian citizens.[114] It follows that these citizens owe allegiance to the Queen only in her capacity as Queen of Australia.

Those persons who reside in Australia but are not Australian citizens continue to owe a duty of allegiance to the Queen in her capacity as Queen of Australia[115] and, according to opinions expressed by several of the Justices of the High Court in *Kahn* v *Board of Examiners (Vic)*,[116] they are not precluded from taking the oath of allegiance. If that view is correct it must follow that a person who has accepted appointment to a public office may be qualified to take the prescribed oath or affirmation of allegiance, and to occupy the office even though he or she is not an Australian citizen.

The forms of the oaths and affirmations of allegiance prescribed by Australian statutes do not, generally speaking, differentiate between the different capacities in which the Queen now serves.[117] Those taking such an oath or affirmation pledge themselves to be faithful and bear true allegiance to the Queen, her heirs and successors, according to law. Nowadays this pledge would, no doubt, be regarded as one to the Queen of Australia only.

Section 2 of Queensland's *Oaths Act* 1867, as amended, is unique. The allegiance to be pledged under that section is "to Her Majesty Queen Elizabeth the Second, as lawful Sovereign of the United Kingdom, Australia and her other Realms and Territories, and to her Heirs and Successors, according to law". It is to the Queen in all her capacities politic. In today's world this hardly makes sense. It might even be argued that an Australian citizen who takes an oath or affirmation of allegiance to the

[112] [1982] QB 892 at 928.

[113] (1988) 165 CLR 178. The case concerned who could be regarded as aliens for the purposes of s 51(xix) of the federal Constitution.

[114] Sections 34 and 117 refers to "a subject of the Queen". See also *Street* v *Queensland Bar Association* (1989) 168 CLR 461 at 553–4 per Toohey J.

[115] In *Nolan* v *Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, Gaudron J (at 189) seems not to have recognized that, at common law, aliens resident in Australia owe allegiance to the Queen of Australia.

[116] (1939) 62 CLR 422 at 430–1 per Latham CJ, 434–5 per Rich J, 441–2 per Starke J. See also *In re Ho* (1975) 10 SASR 250 at 254 per Bray CJ.

[117] *Oaths Act* 1900 (NSW) Schedule 2; *Oaths Act* 1867 (Qd) s 2; *Oaths Act* 1936 (SA) s 8; *Promissory Oaths Act* 1869 (Tas) s 2; *Constitution Act* 1975 (Vic) ss 6D, 23 and Schedule 2; *Constitution Act* 1889 (WA) Schedule E; *Northern Territory (Self Government) Act* 1978 (Cth) Schedule 2; *Oaths and Affirmations Act* 1984 (ACT) Schedule IA.

Queen of the United Kingdom has, for the purposes of s 44(i) of the federal Constitution, acknowledged allegiance to a foreign power, and is thereby incapable of being chosen or of sitting as a member of parliament.[118]

CONCLUSIONS

Whether oaths or affirmations should continue to be required of those appointed or elected to particular public offices and, if so, what forms the oaths and affirmations should take, are questions on which there are likely to be differences of opinion.

One question may be whether any good purpose is now served by a requirement that a person appointed or elected to a public office should take an oath or affirmation of allegiance, even if be only to the Queen of Australia. If the person is an Australian citizen he or she will owe allegiance to the Queen of Australia whether or not he or she has taken an oath of allegiance. Should that person have acquired Australian citizenship by naturalization, and have done so since 1993, the only pledge that person will have made to attain that status will have been that of commitment in the form prescribed by s 15 of the *Australian Citizenship Act* 1948 (Cth). This is not an oath or affirmation of allegiance in the traditional sense. It makes no reference to the Queen. Loyalty is pledged rather to the nation.

Oaths or affirmations of allegiance are not required of those elected to the Legislative Assembly of the Australian Capital Territory. Such persons may, if they wish, swear or affirm their allegiance to the Queen. If they choose not to take this oath or affirmation they must take the prescribed oath or affirmation of service.

Those who take an oath or affirmation of allegiance in Australia should understand that they are pledging loyalty to the Queen, but some may not appreciate that they are pledging loyalty to Her Majesty in her capacity as Queen of Australia. Many may not appreciate that they are pledging loyalty not merely to the Queen as a person, but also to the office of Queen, that is, an attachment to royalty.

If oaths and affirmations of allegiance are retained in Australia, their form might usefully be revised, where necessary, to make it clear that loyalty is pledged to the Queen of Australia only.

Were requirements to take oaths or affirmations of allegiance to be removed, there could still be good reasons for retaining provisions under which installation in certain public offices depends on the tendering and taking of an oath or affirmation of office. Swearing in to an office, at least if it is a matter of public record, establishes a firm date on which the occupant of the office has assumed the powers and duties

[118] At one stage Queensland and Victorian legislation on oaths and affirmations of allegiance spoke of the Queen of Queensland and of the Queen of Victoria respectively. Although, for constitutional purposes, it is now accepted as correct to speak of the Crown in right of the Commonwealth, and the Crown in right of the several States, it is the federated Commonwealth of Australia which is the nation. The Queen of Australia is the head of state of that nation. She is represented in the polities of the federation by different vice-regal representatives. See G Winterton, "The Constitutional Position of State Governors" in HP Lee and G Winterton, *Australian Constitutional Perspectives* (1992) 274–5. In 1987 and 1994 the Queensland and Victorian Parliaments revised their legislation on the form of the oath/affirmation of allegiance to omit the reference to the Queen of the State.

attached to the office. The swearing in may have been an occasion of public ceremony: witness the swearing in of Justices of the High Court of Australia and of Presidents of the United States.

To require a person to take an oath or affirmation of office in order to perfect that person's title to occupy the office is not, in the words of a former Chief Justice of the Supreme Court of the United States, "to create specific responsibilities ...".[119] The powers and duties attached to the office stem from sources other than the oath or affirmation. The purpose of requiring the oaths or affirmations of office required under the United States Constitution was, the Chief Justice surmised, rather "to assure that those in positions of public trust were willing to live by ... constitutional processes ...".[120] He was, of course, referring to the commitments to the United States Constitution required of the President and other officials of government under Article II, s 1.8 and Article VI, s 3.

If the tendering and taking of an oath or affirmation of office is required, under Australian law, in order to perfect a person's title to occupy a particular public office, there can be no sound objection to the inclusion within the terms of the oath or affirmation of words by which a person commits himself or herself to the performance of the duties of the office in accordance with the Constitution and according to law. For some public offices, it is entirely appropriate that the commitment be even more specific. That represented in the typical oath or affirmation of judicial office is a good example. It recognises that judges are not to be regarded as mere servants of the Crown. Their oath or affirmation of office is not in the same form as the official oath prescribed by s 3 of the *Promissory Oaths Act* 1866 (UK). It is a distinctively judicial oath/affirmation which is predicated on assumptions regarding the independence of the judiciary of the executive arm of government, and the responsibilities which attend judicial office.

The forms of oaths and affirmations of public office should, perhaps, be more carefully attuned to the nature of the particular office. The terms of the oath or affirmation for an executive office, for example, should be distinguishable from those of an oath or affirmation for a judicial office. Some of the oaths and affirmations presently prescribed for executive offices are not very much different from those for judicial offices. Promissory phrases which appear in each may include to do "equal right [or justice] to poor and rich", or "to do right to all manner of people"; to perform the duties of office "without fear, favour or affection [or ill will]", with perhaps the addition of the words "according to law". Doubtless it is entirely appropriate that, regardless of the nature of the functions to be assumed, those taking oaths or affirmations of public office should commit themselves to perform those functions according to law and the Constitution.

If persons elected as members of a parliament are to continue to be required to be "sworn in", and the oath or affirmation tendered to them is no longer to be one of allegiance to the Queen, thought will need to be given to the form of the pledge they

[119] *Cole* v *Richardson*, 405 US 676 at 684 per Burger CJ.

[120] Ibid. On the occasion of his swearing in as Chief Justice of the High Court of Australia on 21 April 1995, Sir Gerard Brennan commented on the significance of the oath of judicial office sworn by him: (1995) 183 CLR ix–x.

are expected to make. Precedents for special oaths and affirmations of parliamentary office are to be found in the republican constitutions considered in this article and also in the *Oaths and Affirmations Act* 1984 (ACT).

If the taking of oaths and affirmations is to be a requirement for entry upon a public office, that requirement surely needs to be imposed directly by statute. It is certainly hard to justify the maintenance of statutory provisions which authorise a vice-regal representative, or anyone else, to impose such a requirement, not as a general rule, but in individual cases.[121]

POSTSCRIPT

Under the proposed alterations to the federal Constitution to be submitted to electors in November 1999, the person chosen as President of the Commonwealth would, before beginning his or her term of office, be required to 'make and subscribe before a Justice of the High Court an oath or affirmation of office' in a prescribed form. An incoming President, who would be required to be an Australian citizen, would promise as follows:

> I will be loyal to Australia and its people, whose rights and liberties I respect and whose laws I will uphold, and that I will serve Australia and all its people according to law without fear or favour.

The oath or affirmation required of members of the federal Parliament would be one pledging loyalty to Australia and its people, whose laws the member promises to uphold.

[121] See *Oaths Act* 1900 (NSW) s 7.