Can a republican be admitted to practice?

As we move closer to the referendum on the republic the legal profession will need to consider the relevance of the oath of allegiance currently sworn by all newly admitted legal practitioners. A recent applicant for admission in Victoria found that by maintaining his republican convictions he could not be admitted to practice. Beach J found in *Moller v The Board of Examiners for Legal Practitioners*[1] that the oath of allegiance to Her Majesty the Queen is a prerequisite to becoming a legal practitioner.

Moller was born in the Republic of South Africa and took out Australian citizenship in February 1995. As a staunch republican, Moller did not apply for citizenship until the *Australian Citizenship Act* 1948 was amended in 1994. These amendments removed the requirement for applicants for Australian citizenship to swear an oath of allegiance to the Queen. Under s15 of that Act an applicant can take a pledge either "under God" or without being "under God". The pledge requires the applicant to give his or her "loyalty to Australia and its people", to share the country's democratic beliefs, respect its rights and liberties and to uphold and obey Australia's laws.

Moller applied for a waiver of the oath of allegiance to the Queen when he was completing his articles with a law firm in Melbourne. Having completed these articles he would have been eligible for admission to practice. While r14.05(1) of O.14 of Chapter II of the *Supreme Court Rules* states "A person applying to be admitted to legal practice in Victoria shall take the oath of allegiance and an oath of office", r14.06(1) states "The Court may upon application excuse a person from taking the oath of allegiance". Under s6(1)(c) of the *Legal Practice Act* 1996 (Vic) the Supreme Court may only admit a person to legal practice who "takes the oath, or makes the affirmation, required by the Court".

In his application to be excused from taking the oath Moller stated: "I have a conscientious objection to taking an oath of allegiance to Her Majesty the Queen. My objection is bona fide and unrelated to any disloyalty or lack of respect for either the laws of Australia or Her Majesty the Queen. Rather, my objection stems from my sincere and genuine belief that to take an oath is a solemn, serious and sincere act which should not be undertaken lightly or without full and proper consideration of its content and import . . . I believe that Australia should adopt a republican form of government." He said that if he were to take the oath of allegiance to the Queen he might be "accused of inconsistency or hypocrisy" in relation to his republican views. He finally argued that he was consistent in his views; he did not make a commitment to Australia, by taking out Australian citizenship, until he did not have to take an oath of allegiance to the Queen.

Beach J rejected Moller's application by strictly applying the case law and the statute. Beach J quoted from Ormiston J in *Nicholls v Board of Examiners for Barristers and Solicitors*,[2] an earlier case dealing with an oath of allegiance for a resident foreign national, not an Australian citizen. Ormiston J stated: "Allegiance is a concept which is at the same time both obvious and subtle. Its precise nature has varied over the centuries . . . It should be observed, however, that it is not now an obligation peculiar to monarchical systems of government . . . "

He concluded that since the legal disabilities of aliens had largely been abolished their duty of allegiance could not be disputed, although he found no authority to suggest that the oath of allegiance would create any new or different obligation on a resident foreign national. He saw significant differences between the duty of allegiance owed by non-citizens and that owed by citizens, and concluded that the applicant in this case required different considerations than those for an Australian citizen.

Ormiston J also stated: "When Parliament amended s5(2) of the *Legal Profession Practice Act* 1958, it chose to retain the obligation to take an oath of allegiance for those who wished to become admitted to practice, but gave a right to those applicants to seek exemption from that obligation."

Beach J, in applying Ormiston J's views, held that as an Australian citizen Moller had to swear an oath of allegiance. This oath was not one made to Her Majesty as Queen of England but as the head of state of Australia. Beach J stated: "Once the applicant became a citizen of this country he assumed a duty of allegiance to Australia and to its Head of State. The requirement that he take an oath of allegiance as a condition of being admitted to practice is nothing more than a recognition of that duty. The taking of an oath of allegiance to Her Majesty as Queen of Australia amounts to no more . . . than taking an oath of allegiance to Australia. The fact that the applicant is a dedicated republican is not to the point. The swearing of the oath will

not change that fact nor will it prejudice the applicant in that regard."

Beach J also pointed out that under s8(1) of the *Legal Practice Act* any person admitted to practice became an officer of the Supreme Court and that generally this was not the situation before the enactment of the new Act. Thus he felt that if Moller wanted to become an officer of the Supreme Court he had to swear the same oath in the same manner as any other officer of the Court.

In this last comment Beach J appears to be saying that anyone, citizen or non-citizen, would have to take the oath of allegiance to the Queen to become an "officer of the Supreme Court". I would argue that this view would render r14.06(1), the provision for an application to be excused from taking the oath, completely useless.

I would also argue that under Ormiston J's views, adopted by Beach J, if Moller had refrained from taking out Australian citizenship, he would have been admitted to practice because he would have had different duties to the head of state than those of a citizen. He would thus have been able to protect his commitment to his republican views. Furthermore, the fact that s15 of the *Australian Citizenship Act* no longer requires an oath of allegiance to the Queen should have enabled Beach J to be more flexible in applying the waiver provisions under r14.06(1) to both citizens and non-citizens. These provisions give the judges of the Supreme Court some flexibility in allowing applicants to avoid the oath of allegiance to the Queen. When these provisions were first adopted in 1978,[3] the Supreme Court did excuse an applicant from taking the oath,[4] but in a later case took a more restrictive approach and rejected the application.[5]

By contrast to Victoria, the UK removed the oath of allegiance for barristers and solicitors to the Queen last century under the *Promissory Oaths Act* 1868, while New South Wales abolished the requirement by amending its rules in 1977.[6] Beach J could also have looked at the views of the former NSW Chief Justice Lawrence Street in *Re Howard*.[7] This case took place before the abolition of the oath in New South Wales. Street CJ exercised the inherent jurisdiction of the Supreme Court and waived the oath of allegiance to the Queen to allow a US citizen to be admitted to practice. Although *Howard* differs from *Moller* in that Howard was a non-citizen seeking to protect his US citizenship, the views expressed by Street CJ are relevant to both situations. Street CJ recognised that the obligations of a solicitor or barrister to the sovereign exist independently of the oath. Street CJ stated: "[T]he taking of an oath of allegiance in association with admission to practice is part of the formal ceremony attendant thereon but the law is clear that the bond of allegiance exists at common law independently of whether the oath be taken or not. The formal taking of the oath has significance in a ceremonial but not a legal sense."

Rule 14.06 gives the judges of the Supreme Court in Victoria the power to waive the oath of allegiance to the Queen. The judges should be more willing to support applicants who refuse to take an oath when it violates their strong convictions. ■

Notes

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1. [1999] VSC 55 (10 March 1999).
2. [1986] VR 719 at 728.
3. *Legal Profession Practice (Amendment) Act* 1978 (Vic), s2.
4. See J Disney, J Basten, P Redmond and S Ross, *Lawyers* (2nd ed), Law Book Company, 1986, p282 citing *R v Miller* [1979] VR 381 at 383-384.
5. See *Re MacGregor* [1983] 1 VR 427 at 430-431.
6. See Disney, note 4 above, p291.
7. [1976] 1 NSWLR 641.