HIGH COURT OF AUSTRALIA

Street

Vs.

Queensland Bar Association

(Mason C.J.(1), Brennan(2), Deane(3), Dawson(4), Toohey(5), Gaudron(6) and McHugh(7) JJ.)

16 November 1989

MASON C.J.

1.Mr Street is a barrister resident in New South Wales and admitted to practice as a barrister in the Supreme Courts of New South Wales, Victoria, South Australia and the Australian Capital Territory. He was refused admission as a barrister of the Supreme Court of Queensland on 22 May 1987. This refusal was based upon his failure to comply with two requirements which formed part of the Rules Relating to the Admission of Barristers of the Supreme Court of Queensland ("the Rules").

2. First, Mr Street intended to remain a resident of New South Wales notwithstanding that the necessary affidavit required him to state on which day he "arrived ... in the State of Queensland". This requirement is said to mean that the person seeking admission must be a resident of Queensland. Secondly, he did not cease practice in New South Wales, nor did he intend to do so. A statement that he ceased to do so was explicitly required to be made in the affidavit referred to above. Mr Street's intentions have not changed in the relevant respects.

3. The Full Court of the Supreme Court, having rejected argument based upon ss.92 and 117 of the Constitution to the effect that the requirements which Mr Street had failed to meet were invalid by reason of contravention of one or both of those provisions, ordered that Mr Street's application for admission to practice as a barrister in the Supreme Court of Queensland be refused. On 10 June 1987 Mr Street filed notice of an application to this Court for special leave to appeal from that decision. Before the application could be heard, the Governor in Council on 2 July 1987 amended the Rules. These amendments are described below. The Court subsequently adjourned the application until the present hearing.

4. Mr Street claims that he is unable to comply with the amended Rules without foregoing his place of residence in Sydney and his practice as a barrister in New South Wales. He contends that the amended Rules are in contravention of ss.92 and 117 of the Constitution for reasons similar to those that he advanced before the Supreme Court in relation to the Rules before they were amended. He has brought a second action, by way of stated case, which requires examination of the amended Rules.

5. The first question is whether the amendments of 2 July 1987 are retrospective in their application to Mr Street. If their effect is to preclude him from continuing to seek admission under the Rules as they stood when he initially sought admission, then the question whether the Full Court erred in its decision is not one appropriate for the grant of special leave to appeal, especially since the questions

of general principle raised by the application for special leave are broadly the same as those raised by the stated case. If the amendments are not retrospective in their application to Mr Street, then those questions naturally arise in the context of Mr Street's application for admission and the case would be appropriate for the grant of special leave.

6. It is therefore necessary to consider s.20 of the Acts Interpretation Act 1954 (Q), which states:

"(1) Where any Act repeals or amends ...
wholly or in part any former Act ..., then,
unless the contrary intention appears, such
repeal or amendment ... shall not -
...
(c) Affect any right, interest, title,
power or privilege created, acquired,
accrued, established or exercisable, or
any status or capacity existing, prior
to such repeal or amendment ...; or
...
(e) Affect any investigation, legal
proceeding, or remedy in respect of any
such right, interest, title, power,
privilege, status (or) capacity ..."

7. Unless the contrary intention appears, "Act" extends to include Orders in Council: s.5(2). No contrary intention was suggested. Nor is there any "contrary intention" in the amending Order in Council for the purpose of s.20. The question then becomes whether on 2 July 1987 there existed in relation to Mr Street a right, interest, title, power or privilege within the meaning of s.20. It is not clear from the available materials to what extent Mr Street had complied with the Rules as they then stood. But in the Supreme Court, Connolly J. said that he was "in all respects qualified to be admitted as a barrister in Queensland, save that he intends to continue as a resident of New South Wales and has not ceased to practise and does not intend to cease to practise as a barrister of his State of residence". This statement strongly suggests that, had Mr Street's constitutional arguments prevailed, he would have been granted admission. The Full Court suggested no other impediment to admission. In view of the approach of the Full Court, it appears that the order for admission would have been no more than a formality had it accepted his arguments. If the Full Court was wrong in not doing so, then Mr Street was denied the right to admission, a right established by him and subject only to its formal recognition by the Supreme Court.

8. The grant of special leave to appeal is opposed on the ground that as the Rules were amended on 2 July 1987 the questions sought to be argued by Mr Street are no longer of general interest. The answer to that submission is that the questions sought to be argued are of general importance even though the actual decision in the appeal may not directly affect applications for admission under the amended Rules. Mr Street's case raises questions concerning the interpretation of ss.92 and 117 of the Constitution in the context of the admission to practice as a barrister in Queensland of a person admitted to practice as such in another State. The validity of the legislative exclusion from practice in Queensland of non-resident practitioners admitted to practice in other States is in itself a matter of public importance. In this situation the Court should not refuse to grant special leave when the applicant had a vested right under s.35 of the Judiciary Act 1903 (Cth) to apply for special leave to appeal when the Rules were amended. And I should point out that this Court's function is to determine whether the decision appealed from was correct when it was given: Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan [1931] HCA 34; (1931) 46 CLR 73;

Mickelberg v. The Queen [1989] HCA 35; (1989) 63 ALJR 481; 86 ALR 321.

The indications that the amendments are not retrospective in this case are sufficiently strong to warrant the grant of special leave. On this basis special leave to appeal should be granted. I shall therefore consider the appeal before turning to the stated case.

9. Prior to 2 July 1987, r.15 of the Rules stated as follows:

> "Subject to the provisions of any Statute relating to admission and to the provisions of these Rules, every person applying to be admitted as a barrister shall:-
> ...
> (d) possess one or other of the following qualifications:-
> (1) He shall have passed or be deemed to have passed at all stages as required under these Rules;
> (2) He shall have obtained a degree in Law with prescribed or approved subjects at a University within the State of Queensland or other Australian University approved by the Board, not being an honorary degree, and shall have performed all necessary practical work to the satisfaction of the Board, and shall have passed Stage 6 within the meaning of Rule 32; or
> (3) He shall have been duly admitted as a barrister-at-law or advocate in the United Kingdom; or
> (4) He shall have been duly admitted as a barrister-at-law in New South Wales or as a barrister-at-law in the Dominion of New Zealand or as a barrister and solicitor in Victoria; provided that in the latter case proof be given that he has signed and remains upon the roll of counsel of that State, and provided that

in any of the three cases mentioned in this paragraph it be established to the satisfaction of the Board, that the State in question, or the Dominion of New Zealand, as the case may be, grants reciprocity of admission to barristers-at-law of the Supreme Court of Queensland; or

(5) He shall have been duly admitted as a barrister or as a barrister and solicitor of any State other than Queensland, New South Wales and Victoria or of the Australian Capital Territory or of the Northern Territory, provided that it be established to the satisfaction of the Board that the State or Territory in question grants reciprocity of admission to barristers-at-law of the Supreme Court of Queensland, and provided that he shall in that State or Territory have been in actual practice for twelve months exclusively as a barrister. He shall undertake that on admission and while remaining on the roll of barristers of the Supreme Court of Queensland he shall not practise elsewhere as a solicitor; or

(6) He shall be a solicitor of the Supreme Court of Queensland having been five years in actual practice in Queensland; or

(7) He shall have obtained the degree of Bachelor of Arts (Law) (or the equivalent degree however entitled) with prescribed or approved

> subjects at the Queensland Institute of Technology, not being an honorary degree, and shall have performed all necessary practical work to the satisfaction of the Board, and shall have passed Stage 6 within the meaning of Rule 32."

Rule 38(d) stated that a person relying upon a previous admission was required to include in an affidavit the statements set out in Form 10, which provided, so far as is relevant:

"(6) That I ceased to practise as a barrister in (here set forth the dates when the applicant ceased to practise in the various Courts to which he has been admitted, and the nature of his employment hereafter.)
(7) That I arrived on the day of , 19 , in the State of Queensland."

Although counsel contended otherwise, I do not regard the relevant parts of Form 10 as inconsistent with the Rules or beyond the scope authorized by them; r.38(d) clearly incorporates the terms of the Form by reference and is not merely procedural in nature.

10. I turn first to consider s.117 of the Constitution in its application to the impugned provisions. The section is in these terms:

> "A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

11. This Court has twice considered this provision at length, first in Davies and Jones v. The State of Western Australia [1904] HCA 46; (1904) 2 CLR 29 and later in Henry v. Boehm [1973] HCA 32; (1973) 128 CLR 482. Counsel for Mr Street submitted that the Court should reconsider these decisions. It is convenient in the first instance to ascertain precisely what Davies and Jones and Henry v. Boehm decided.

12. In Davies and Jones rates of estate duty payable in relation to beneficiaries who were "persons bona fide residents of and domiciled in Western Australia" were reduced in comparison with those payable generally. The relevant beneficiary was neither a resident of, nor domiciled in, Western Australia. Had he been domiciled in Western Australia the result would arguably have been different, but, since he was not, the Court held that there was no discrimination between subjects of the King residing in Queensland and those residing in Western Australia. The beneficiary's individual circumstances determined the result. The relevant discrimination, which in the Court's view was on the basis of domicile, was not the mischief aimed at by s.117. Accordingly, the

executors' action to obtain on behalf of the beneficiary the reduced rates of duty failed. Had the only effective discrimination been on grounds of residence, then s.117 would have applied to render it ineffective. Thus Barton J. stated that it is "discrimination on the sole ground of residence outside the legislating State that the Constitution aims at in the 117th section" (at p 47). Likewise, O'Connor J. (at p 49) considered that the section was directed to a disability or discrimination based solely on the ground of residence in another State. In this respect his Honour pointed out that the word "residence" had quite a different meaning from the word "domicile" in the Western Australian statute imposing estate duty. In the ultimate analysis Davies and Jones decided no more than that a disability or discrimination by reference to residence and domicile is not a discrimination which falls within the operation of s.117.

13. Henry v. Boehm stands as authority for the proposition that a requirement of continuous residence within South Australia for a period of time, on the part of a legal practitioner admitted to practice in another State, as a condition of entitlement to apply for admission as a legal practitioner within South Australia, was not a disability or discrimination falling within s.117. Barwick C.J., McTiernan, Menzies and Gibbs JJ., with Stephen J. dissenting, held that rr.27 and 28 of the Rules of Court Regulating the Admission of Practitioners 1955-1972 (SA) did not fall within the section. The Rules were as follows:

> "27.(1) An applicant previously admitted elsewhere shall reside for at least three calendar months in the State continuously and immediately preceding the filing of his notice of application for admission.
> (2) This rule shall not apply to an applicant who satisfies the Board of Examiners -
> (i) that he ordinarily resides in and is domiciled in this State; ...
> 28.(1) An applicant previously admitted elsewhere shall, in the first place, be admitted conditionally only for a period of one year.
> (2) After the expiration of that period the applicant may be granted absolute admission if he satisfies the Court by affidavit that since his conditional admission, and until the day of the application for the order absolute, he has continuously resided in the State, and has not pursued any occupation or business other than the proper business of a practitioner.
> (3) This Rule shall not apply to any applicant who does not require the residential qualification prescribed by the preceding Rule."

14. The argument in Henry v. Boehm was that the Rules discriminated against the plaintiff on account of his residence in Victoria because they required him to give up his residence in that State

as a condition of practising in South Australia: see p 483. The majority met that argument with the proposition that the concept of "resident" in s.117 connotes a person whose residence is not merely temporary but has a degree of permanence about it: see pp 487, 489-490, 492-493, 496-497. The plaintiff's permanent residence in Victoria was not impeded. Consequently the Rules, by insisting on the plaintiff's temporary continuous presence in South Australia for three months under r.27 and twelve months under r.28, did not discriminate against his continuing residence in Victoria. The majority also concluded that the Rules did not subject the plaintiff to any disability or discrimination which would not equally apply to him if he were a resident of South Australia: see pp 490, 494, 498. This conclusion necessarily followed from the interpretation which the majority gave to the word "resident" in s.117 and from the consequential finding that the Rules did not require the plaintiff to abandon his residence in Victoria.

15. It seems that the ultimate finding that the Rules did not subject the plaintiff to any disability or discrimination which would not apply equally to him if he were a resident of the legislating State may have reflected a view on the part of one or more Justices that such a disability or discrimination would otherwise fall within the ambit of s.117. However, it is significant that Barwick C.J. (with whom McTiernan J. agreed) found it unnecessary to explore the implications of the view of Griffith C.J. in Davies and Jones (at p 39) that if residence of any kind in a State was made the basis of a privilege in a State, the State law must accord the like privilege to persons having residence of the same kind in another State. Whilst finding difficulty with this proposition, Barwick C.J. found no reason to determine its correctness. Nor did Gibbs J.: see pp 495-496. This suggests that the majority did not regard the meaning of "resident" as conclusive of the case.

16. Gibbs J. observed (at p 496) that O'Connor J., who referred in Davies and Jones (at p 53) to the imposition of "some other substantial condition or requirement", may have meant "that the imposition of the additional condition or requirement should not have been a merely colourable attempt to disguise the fact that the discrimination was really based on residence alone". Later Gibbs J. remarked (at p 496):

> "It is unnecessary to consider whether, in accordance with the suggestion made by O'Connor J., in some cases the specification of a period of residence might, having regard to the provisions of the statute as a whole, be treated as insubstantial or illusory so that in reality the law should be regarded as effecting a discrimination on the ground of residence alone."

17. But the point remains that Henry v. Boehm decided that the suggested discrimination, ineligibility for admission in the absence of continuous "residence" in South Australia for the stipulated periods, was not within the operation of s.117 because all persons, whether permanently resident in South Australia or not, were subject to the requirements as to "residence". Stephen J., in his dissenting judgment, took issue on several grounds with this approach to the operation of s.117. Whereas the majority compared the situation of the out-of-State resident with that of actual residents of the legislating State, Stephen J. compared the actual situation of the out-of-State resident with his hypothetical situation were he a resident of the legislating State. His Honour observed (at p 501):

> "... the process of comparison which the

> section calls for must be undertaken, the plaintiff's actual situation must be contrasted with a hypothetical one which differs from actuality only because it assumes the plaintiff to be a resident of South Australia; in making the comparison called for by s.117 no departure from actuality is to be made other than this one, relating to the plaintiff's residence".

This comparison gave meaning to the section's central comparative words "if he were", rather than placing a strained meaning on the word "would" which is a term of emphasis but is in the subjunctive form appropriate to the hypothetical situation postulated. On this view the possible situation of other persons was "wholly irrelevant" (at p 502).

18. It followed that Stephen J. disagreed with the majority in another important respect, rejecting (at pp 502-503) the view that a disadvantage is equally applicable to all if it is the consequence of a requirement of universal application. As his Honour remarked (at p 502):

> "(I)f the discriminating factor relates to the personal attributes of individuals some only of whom possess those attributes then, while the requirement may be said to apply equally to all, the disadvantage will apply unequally for it will apply only to those who do not possess those attributes."

So it is no answer that a challenged statutory requirement as to residence applies equally to all, to those resident in the legislating State as well as to those resident out of the State; the disadvantage involved in compliance with the requirement may nevertheless apply unequally (at p 503) by compelling the out-of-State resident to give up his place of abode in order to qualify for admission in the legislating State.

19. The final point of departure in the judgment of Stephen J. was that his Honour (at p 504) agreed with the "distributive" meaning assigned to "resident" in s.117 by Griffith C.J. in Davies and Jones (at p 39). There the Chief Justice applied the section:

> "to any kind of residence which a State may attempt to make a basis of discrimination, so that, whatever that kind may be, the fact of residence of the same kind in another State entitles the person of whom it can be predicated to claim the privilege attempted to be conferred by the State law upon its own residents of that class".

20. There are powerful reasons for adopting this interpretation of "resident" in s.117. The very object of federation was to bring into existence one nation and one people. This section is one of the comparatively few provisions in the Constitution which was designed to enhance national unity and

a real sense of national identity by eliminating disability or discrimination on account of residence in another State. In this respect the section should be seen as a counterpart to other provisions in the Constitution which prohibit discrimination between the States in matters of taxation, trade and finance (ss.51(ii), 92 and 99). In James v. The Commonwealth [1936] UKPCHCA 4; (1936) 55 CLR 1; (1936) AC 578 Lord Wright (at pp 43-44; p 614 of AC) regarded the section as analogous to s.92 and referred to it as providing a constitutional guarantee of equal rights of all residents in all States. And, although the language of s.117 differs from that of Art.IV s.2 of the United States Constitution, there can be no doubt that the American model had an influential impact on the framers of our Constitution, at least to the extent of illustrating the need for a provision which, by guaranteeing to out-of-State residents who were British subjects an individual right to non-discriminatory treatment, would bring into existence a national unity and a national sense of identity transcending colonial and State loyalties.

21. These considerations, as well as the use of the expression "resident in" rather than "resident of" (cf. ss.75(iv), 100; Henry v. Boehm, at pp 504-506), point to a liberal, rather than a narrow, interpretation of "resident" in s.117, an interpretation which will guarantee to the individual a right to non-discriminatory treatment in relation to all aspects of residence. Accordingly, I favour the "distributive" interpretation adopted by Griffith C.J. in Davies and Jones and Stephen J. in Henry v. Boehm in preference to that taken by the majority in the latter case. The assimilation of "resident" in s.117 to "permanent resident" is arbitrary in the sense that the word is capable of a variety of shades of meaning and there is nothing in the context to support the selection of a meaning which works the greatest restriction in the operation of the section.

22. Section 117 is contained in Ch.V of the Constitution, which is entitled "The States". Chapter V contains a miscellany of provisions, all of which, except s.116, relate to the States. Some of these sections (ss.114, 115, 116) expressly prohibit the States or the Commonwealth from doing certain things. Others (ss.119, 120) impose duties upon the States. Section 117 is strikingly different. It is not expressed in terms similar to those of the surrounding sections. Notably, it relates not to a State or the Commonwealth, but to a "subject of the Queen". Its form and language indicate that s.117 is directed towards individuals and their protection from disability or discrimination of the kind contemplated by the section, and that it is not, except to that extent, a restriction on State or Commonwealth legislative power. So a person not subjected to any relevant disability or discrimination by a particular law could not have that law held invalid by establishing that it subjects a third person to such a disability or discrimination; that circumstance would not lead to a striking down of the offending law. Conversely, a person who would, but for s.117, be so affected by the law is immune from its operation in so far as it subjects him to impermissible disability or discrimination, though the law itself remains valid in its application to persons who would not be so affected. Perhaps an enactment might be rendered wholly invalid by s.117 if it depended for its operation upon the imposition of a prohibited form of disability or discrimination, but that is not a question which I need to examine. Its only significance in the present case is that it may serve to explain references to the validity of the State legislation in Davies and Jones. These remarks are explicable on the basis that, had the Court equated domicile with residence or otherwise regarded domicile as within the province of s.117, the result would possibly have been to deny the validity of the offending enactment because it enacted a prohibited form of discrimination.

23. The preponderant weight of opinion denies the individual focus which Stephen J. gives to s.117. With the exception of his Honour's dissenting judgment in Henry v. Boehm, all the judgments in Davies and Jones and Henry v. Boehm insist on comparing the way in which the non-resident of the legislating State is affected by the law of that State with the way in which residents of that State are

affected: Davies and Jones, per Griffith C.J. at p 39, Barton J. at p 45 and O'Connor J. at p 49; Henry v. Boehm, per Barwick C.J. at p 489, Menzies J. at pp 492-493 and Gibbs J. at p 496. This approach denies the individual focus of the section by addressing itself to the general range of circumstances in which the State law applies.

24. However, as Stephen J. points out, the terms of the section invite a comparison of the actual situation of the out-of-State resident with what it would be if he were a resident of the legislating State. The section does not invite a comparison between his actual situation and that of other residents of the legislating State. Such a comparison poses the question whether or not the law necessarily applies differently to residents of the legislating State. The answer to that question will almost invariably be in the negative due to the range of persons in differing situations within the legislating State and the fact that some of those persons will probably be affected by the law in the same manner as the out-of-State resident. Thus, the mode of comparison adopted in the decided cases, though not suggested by the terms of the section, has confined the operation of the constitutional guarantee. When that mode of comparison is combined with the assimilation of "resident" to "permanent resident", the effect has been to deprive the section of any significant utility.

25. Another difficulty with the existing interpretation of s.117 is that it appears to proceed according to a narrow view of what amounts to a disability or discrimination. The statement of Griffith C.J. in Davies and Jones (at p 39) that I have already quoted, which was endorsed by Stephen J. in Henry v. Boehm, like that of Barwick C.J. in Henry v. Boehm (at p 489), suggests that, in order to bring the section into operation, the State law must make the fact of being a resident in another State the criterion of the disability or discrimination. Again, this seems to be an unduly limiting notion. In terms, the section applies when a subject of the Queen, being an out-of-State resident, is subject to a disability or discrimination under State law. The section is not concerned with the form in which that law subjects the individual to the disability or discrimination. It is enough that the individual is subject to either of the two detriments, whatever the means by which this is brought about by State law. This approach to the interpretation of the section accords with the approach generally adopted in connection with statutes proscribing particular kinds of discrimination. They are either expressed or construed as proscribing an act or a law the effect of which is relevantly discriminatory: see, for example, Birmingham City Council v. Equal Opportunities Commission (1989) 2 WLR 520, at pp 525-526; (1989) 1 All ER 769, at p 774; Mandla v. Dowell Lee [1982] UKHL 7 [1982] UKHL 7; ; (1983) 2 AC 548; Ontario Human Rights Commission v. Simpsons-Sears Limited 1985 CanLII 18 (SCC); (1985) 2 SCR. 536. It would be surprising if it were otherwise, especially since such statutes are generally intended to provide relief from discrimination rather than to punish the discriminator: see Simpsons-Sears, at p 547. It would make little sense to deal with laws which have a discriminatory purpose and leave untouched laws which have a discriminatory effect.

26. Once this is recognized, it becomes all the more difficult to accept that the fact that a requirement as to residence is universal in its application is necessarily an answer to the operation of s.117. Such a requirement may have a discriminatory effect in relation to an out-of-State resident for the simple reason that it may apply unequally by subjecting him to a greater burden or disadvantage than that imposed on a resident of the legislating State. So to forbid all persons from wearing a turban is on its face a prohibition applicable to all persons without distinction, but in effect is a discrimination based upon religious grounds because its only impact will fall upon adherents of a creed or religion which requires the wearing of turbans: Mandla v. Dowell Lee; Bhinder v. Canadian National Railway Company (1985) 2 SCR 561. An examination of the effect of the relevant law is both necessary to avoid depriving s.117 of practical effect and consistent with its emphasis upon the

position of the individual.

27. One further aspect of the section needs explanation. A disability or discrimination may still apply in theory after residence is changed, yet be so reduced in its impact as a result of the change that it is rendered illusory. Stephen J. acknowledged this possibility and indeed that recognition was central to his decision. He stated (at p 507):

> "Were he resident ... in South Australia the requirement of the rules would bear quite differently and less onerously upon him; their precise effect in such a hypothetical situation cannot be predicated but at least it is clear that were he resident in South Australia the disability involved in lengthy residence away from Victoria would either be wholly absent or be substantially mitigated."

Thus his Honour saw the phrase "equally applicable" in s.117 as embracing the notion discussed above. It seems to me that for s.117 to apply it must appear that, were the person a resident of the legislating State, that different circumstance would of itself either effectively remove the disability or discrimination or, for practical purposes in all the circumstances, mitigate its effect to the point where it would be rendered illusory.

28. A disability or discrimination is rendered illusory if the fact of residence would substantially deprive it of its onerous nature. A requirement of continuous residence for a certain period would in my view be an example of a law whose onerous effect on non-residents would be rendered illusory under this test. A disability or discrimination based upon grounds apart from residence is effectively removed if those grounds relate to characteristics which are in the circumstances concomitants of the individual's notionally changed residence. To this extent I would accept the argument that s.117 is not susceptible of "colourable evasion" by State legislatures.

29. In the foregoing discussion I have stated why it is that I cannot accept the correctness of the interpretation placed on s.117 in Davies and Jones and, more importantly, Henry v. Boehm. Moreover, the adoption of the interpretation expounded in the preceding paragraph of these reasons would be inconsistent with the actual decision in Henry v. Boehm. Needless to say I am reluctant to depart from an earlier decision of this Court. However, two of the factors relied upon by the Court in John v. Commissioner of Taxation [1989] HCA 5[1989] HCA 5; ; (1989) 63 ALJR 166, at p 174 [1989] HCA 5; ; 83 ALR 606, at p 620, for overruling the earlier decision in Curran v. Federal Commissioner of Taxation [1974] HCA 46; (1974) 131 CLR 409 are present in this case. The earlier decisions do not rest upon a principle gradually worked out in a significant succession of cases. And the decisions have not been independently acted upon in a manner or to an extent that works against reconsideration of them. Furthermore, there is in the present case an additional factor. The question at issue relates to an important provision in the Constitution dealing with individual rights central to federation. The earlier decisions placed an incorrect interpretation upon it. The Court has a responsibility to set the matter right.

30. Accordingly, I would apply the principle, along the lines mentioned above, that s.117 renders a disability or discrimination invalid if the notional fact of residence within the legislating State would effectively remove the disability or discrimination or substantially deprive it of its onerous

nature.

31. Applying this test to Mr Street's appeal, it is clear that a requirement that he cease to practise outside Queensland would be less onerous were he to live in Queensland, although it would still be a significant imposition. The notional change of residence does not justify the Court in assuming that, were he to live in Queensland, Mr Street would practise only or even principally in Queensland; not only is that to take the consequences of the notional change a step too far, but it is effectively to assume that, but for his residence, Mr Street would have been admitted to practice in Queensland, which is the ultimate question.

32. But it is not necessary to take that step. If Mr Street were a resident of Queensland, a requirement that he cease practice outside Queensland would still permit him to practise in the State in which he resided. This stands in marked contrast to the actual position, which requires Mr Street to practise only in a State in which he does not reside. The disability is one imposed upon residents and non-residents alike, but in the case of a resident its effect is mitigated to a very substantial extent. Only a non-resident is prohibited from practising where he resides. The inconvenience suffered by a resident as a result of compliance with the requirement pales in significance beside the onerous and in many cases impossible burden imposed upon a non-resident. Thus par (6) of Form 10 is a provision within the terms of the applicable test.

33. Paragraph (7) presents a certain difficulty of construction. On its face, arrival in Queensland is perhaps not indicative of the taking up of residence in Queensland. But, taken in conjunction with the requirement in par.(6), it seems sufficiently clear that par (7) implicitly requires that the applicant has abandoned interstate residence and moved to Queensland. Indeed, the fact that the affidavit prescribed by the Form is only to be sworn by persons previously admitted outside Queensland, coupled with the terms of par (6), compels that conclusion.

34. That paragraph thus requires Mr Street to reside in Queensland. That is something which, as a previously admitted barrister, he would still be required to do were he a resident of Queensland. But the notional fact of residence would effectively remove any disability or discrimination caused. Paragraph (7) therefore falls within the terms of the test I have explained.

35. It remains to consider whether the disability or discrimination imposed on Mr Street is of a kind contemplated as falling within the proscription in s.117. In Davies and Jones, O'Connor J. stated (at p 53) that s.117 "does not prohibit a State from conferring special privileges upon those of its own people who, in addition to residence within the State, fulfil some other substantial condition or requirement". It is implicit in that statement that a privilege granted upon the basis of residence alone may offend s.117. Even if one were minded to draw a distinction between the imposition of a disability and the denial of a privilege, the word "discrimination" is wide enough to cover the denial of a privilege in appropriate cases.

36. But this does not advance the matter very far. Clearly there must be some limit upon the ambit of s.117, especially when it is considered that it is not primarily a restriction upon legislative power. The section is intended to prohibit within certain limits the imposition of a disability or discrimination based upon residence, but does not specify what limits, if any, there may be to its operation. The delegates to the Conventions rejected a "privileges and immunities" formulation similar to that found in Art.IV s.2 of the United States Constitution because they thought the formulation too vague. However, the "privileges and immunities" concept is not so dissimilar to "disability or discrimination". It is therefore useful to look to the approach which the United States

Supreme Court has taken to the meaning of "privileges and immunities" as used in Art.IV s.2.

37. Broadly speaking, the test adopted consists of two stages. First, the Court decides whether or not the interest violated is a "fundamental right" basic to national unity: Baldwin v. Montana Fish and Game Commission [1978] USSC 82; (1978) 436 US 371. If it is, then the second question is whether the legislating State can demonstrate a substantial reason for the discrimination. This involves showing that the discrimination against persons in their capacity as non-residents is justified, not merely that the law as a whole is justified: Hicklin v. Orbeck [1978] USSC 128[1978] USSC 128; ; (1978) 437 US 518, at pp 525-526; Supreme Court of New Hampshire v. Piper [1985] USSC 49; (1985) 470 US 274, at p 284.

38. Both constitutional provisions broadly serve the same purpose: Davies and Jones, at p 52, per O'Connor J.; and see Stow, "Section 117 of the Constitution", (1906) 3 The Commonwealth Law Review 97, at p 98. However, there is not the same foundation for saying that s.117 was intended to protect fundamental rights as there is in the case of Art.IV s.2. The Australian Constitution contains very few provisions guaranteeing fundamental rights. The consequence is that s.117 must be understood as providing protection in relation to rights generally. But, as is accepted in the United States, that protection should be seen as serving the object of nationhood and national unity.

39. The second limb of the United States test is a recognition that some limit must be placed upon the application of the general principle. In my view it is necessary to adopt a similar approach when considering whether or not a particular disability or discrimination is prohibited by s.117. To allow the section an unlimited scope would give it a reach extending beyond the object which it was designed to serve by trenching upon the autonomy of the States to a far-reaching degree. Accordingly, there may be cases where the need to preserve that autonomy leads to a recognition that a particular disability or discrimination is not prohibited. The object of s.117 is very broad-ranging in its nature and it is difficult to conceive of a disability or discrimination which does not offend that object unless to prohibit the imposition of the disability or discrimination would threaten the autonomy of the relevant State.

40. The basis for insisting on some limitation to the operation of the privileges and immunities clause in the United States was expressed by the Supreme Court of the United States in Baldwin in the following terms (at p 383):

> "Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States."

41. A similar basis underlies the correct approach to the interpretation of s.117. The preservation of the autonomy of the States demands that the exclusion of out-of-State residents from the enjoyment of rights naturally and exclusively associated with residence in a State must be recognized as standing outside the operation of s.117. Take, for example, the exclusion of out-of-State residents from the right to enjoy welfare benefits provided by a State under a scheme to assist the indigent, the aged or the ill. Generally speaking, I doubt that such an exclusion would amount to a disability or discrimination within the section. The exclusion would not seem to detract from the concept of

Australian nationhood or national unity which it is the object of the section to ensure, because it would offend accepted notions of State autonomy and financial independence and a due sense of a State's responsibility to the people of the State to say that the Constitution required the State to extend the range of persons entitled under the scheme to out-of-State residents. The same comment might be made about a requirement that a person is not eligible to be the licensee of an hotel unless he resides on the premises.

42. On the other hand, the same comments could not be made about the exclusion of out-of-State residents from participation in professional activities open to residents of the legislating State or the imposition of discriminating burdens on such out-of-State residents, unless the exclusion could be justified as a proper and necessary discharge of the State's responsibility to the people of that State, which includes its responsibility to protect the interests of the public. Such an action against out-of-State residents would be inconsistent with the constitutional object of Australian nationhood and national unity, unless the State were able to demonstrate that the interests of the State in maintaining its autonomy, over and above such interest it might have in giving an advantage to its residents over non-residents, required such action to be taken. Obviously, there will be circumstances in which need for regulation of activity, including professional activity, in order to protect the public in a State, requires that conditions be prescribed which may have a greater impact on out-of-State residents than residents of the legislating State. The qualifications and experience prescribed for entry into professional practice in another State may be insufficiently rigorous compared to those appropriate to the legislating State. There may even be a case for justifying the imposition of conditions on out-of-State professionals, though clearly conditions requiring any form of residence within the State would call for stronger justification.

43. But there is in my view no compelling justification for the disability or discrimination imposed upon Mr Street which would suffice to deny s.117 its effect. The United States Supreme Court has consistently rejected arguments invoked in support of bar residence requirements similar to those in the present case; see, for example, Piper, at pp 285-287; Barnard v. Thorstenn (1989) 57 LW 4316. It was found in Piper that there was no evidence that non-resident attorneys would lack familiarity with local rules and procedures, would be less likely to behave in an ethical manner, would be unlikely to perform their share of voluntary work or would be unable to perform their professional duties as satisfactorily as resident attorneys. Greater difficulty in physically attending proceedings was acknowledged, but was not viewed as a sufficient ground for denying admission. These conclusions apply with equal force to the position in Queensland. I am reinforced in that view by the fact that States other than Queensland do not see the need for special treatment of residents of their home States in order to ensure that proper professional and ethical standards are maintained. No peculiar characteristic of the Queensland legal profession or of Queensland law or practice has been suggested that would call for unique treatment.

44. My conclusions are:

> (1) Mr Street is a subject of the Queen resident in New South Wales.
> (2) The Rules subject him to a disability or discrimination, namely giving up his practice in his State of residence, which would not be equally applicable to him if he were a resident of Queensland. The Rules also subject him to a further disability or discrimination of that kind,

namely giving up his residence in New South Wales.
(3) The need to ensure proper professional and ethical standards for the legal profession in Queensland does not justify the imposition of this disability or discrimination upon practitioners resident outside Queensland.

45. It follows that I would allow the appeal and remit the matter to the Supreme Court of Queensland for the making of orders in accordance with the judgment of this Court. From Mr Street's point of view there would then be no necessity for me to consider either the arguments raised in relation to s.92 or the stated case. In these circumstances it would not be desirable to embark upon an analysis of the operation of s.92 in this context.

46. However, in view of the general importance of the matter, it is desirable to deal with the stated case, in so far as it concerns the operation of s.117. The first question in the stated case can therefore be answered, despite its practical irrelevance to Mr Street, without embarking upon further constitutional analysis. The same is not true of the second question, which I accordingly refrain from addressing.

47. The amendments made to the Rules on 2 July 1987, in so far as they are relevant, can be shortly stated. In r.15, the following extra paragraph was inserted:

"(e) if he relies on a qualification set out in paragraph (d)(3), (4) or (5), have the intention of practising principally in Queensland."

A form of conditional admission was stipulated in the case of persons relying on a previous out-of-State admission, in these terms:

"15B. (1) An applicant for admission who relies on a qualification set out in rule 15(d)(3), (4) or (5) shall in the first place be admitted conditionally only for a period of one year.
(2) After the expiration of the said period of one year, the applicant may be granted absolute admission if he satisfies the court that, since his conditional admission and until the date of the application for the order absolute, he has practised principally in Queensland and has not pursued any occupation or business other than that proper for a barrister."

Finally, pars (6) and (7) of Form 10 were omitted and the following par (6) substituted:

"(6) It is my intention to practise principally in the State of Queensland

commencing on (here set forth any
relevant date)."

The stated case asks the following relevant question:

"1. Are the Rules of the Court relating to
the admission of Barristers of the
Supreme Court of Queensland, as amended
by Order in Council dated the (2nd) July
1987, invalid as being contrary to
Section 117 of the Constitution?"

48. The amendments can be seen to require that a person admitted to practice as a barrister in Queensland practises principally in Queensland. No longer does a person relying upon a previous admission have to reside in Queensland. Leaving aside r.15B, the requirement that a person practise principally in Queensland is one which would be substantially deprived of its onerous nature were Mr Street to reside in Queensland. Accordingly, Mr Street could not be refused admission on the basis that he failed to comply with r.15(e) or par (6) as amended. That is a result of Mr Street's individual circumstances. Were he, for example, to reside close to the Queensland border, the notional change of residence might make insufficient difference to warrant the conclusion of invalidity.

49. Rule 15B has the effect of requiring Mr Street substantially to abandon his non-Queensland practice for one year. That is a contravention of s.117 for reasons similar to those I have already stated. However, I think that the other requirement stipulated in r.15B(2) and the words concerning the system of conditional admission itself are severable both from the offending words of r.15B and from the invalid r.15(e) and par (6) of Form 10. Hence I regard r.15B as invalid in its application to Mr Street only to the extent to which it provides: "has practised principally in Queensland and".

50. I would answer question 1 as follows: "Rule 15(e), par (6) of Form 10 and Rule 15B(2) are inapplicable to the plaintiff to the extent that they would require him, on any fresh application for admission, to have an intention of practising principally in Queensland or so to practise during the period between conditional and absolute admission."

51. As the parties have agreed to bear their own costs in these matters, there should be no order as to costs.

BRENNAN J. The jurisdiction of the Supreme Courts of each of the Australian States extends to the admission, disciplining and disbarring of barristers and has done so from colonial times: In Re The Justices of the Court of Common Pleas at Antigua [1830] EngR 528; (1830) 1 Knapp 267 (12 ER 321); In re Spensley (1864) 1 WW & AB (L) 173; In re Davis [1947] HCA 53; (1947) 75 CLR 409, at pp 414,419,423, 427,429; Ziems v. The Prothonotary of the Supreme Court of NSW [1957] HCA 46[1957] HCA 46; ; (1957) 97 CLR 279, at pp 287, 290-291. That is an important jurisdiction affecting the organization of the court itself, for the proper functioning of a court depends on the proper discharge of their duties by the advocates who are entitled to appear before it: Giannarelli v. Wraith [1988] HCA 52; (1988) 165 CLR 543, at pp 555-558, 578-580,588-589. As Dixon J. pointed out in In re Davis, at p 420:

> " The Bar is no ordinary profession or

> occupation. The duties and privileges of advocacy are such that, for their proper exercise and effective performance, counsel must command the personal confidence, not only of lay and professional clients, but of other members of the Bar and of judges."

The exercise of the jurisdiction of the Supreme Court of Queensland to admit barristers to practice is now governed by Rules of Court enacted by Order in Council with the concurrence of at least two judges of the Court: Supreme Court Act of 1921 (Q), s.11(2)(v). At an earlier time, the exercise of the jurisdiction was governed by rules made by the judges of the Court. The rules express the qualifications of an applicant who, by training, experience and character, is suitable for admission to practise as a barrister of the Court. There can be no doubt about the validity of provisions of the Rules of Court which set out what an applicant must show as to training, experience and character in order to satisfy the Court that she or he is suitable to be admitted to practice.

2. In Re Sweeney (1976) Qd R 296, W.B. Campbell J. traced the history of the provisions governing the admission in Queensland of barristers previously admitted elsewhere who rely on previous admission to show suitability to be admitted in Queensland. For present purposes, it is sufficient to take up that history at the judgment of Lutwyche J. in In re Owen (1865) 1 QSCR 139. Refusing Mr Owen's application for admission, his Honour said (at p 140):

> "An affidavit of residence or intention to practise is necessary to ground an application for admission to the bar of this colony. If Mr Owen should ever decide upon becoming a resident practising barrister in Queensland, this Court will give him a hearty welcome; but, at present, the application must be refused."

This approach was carried into the Regulae Generales of the Supreme Court of 27 November 1896 ("the 1896 rules"). Rule 45(3) of the 1896 rules prescribed the "Conditions to be performed before admission" in these terms:

> "If he is a barrister previously admitted elsewhere, he shall at least five days before seeking admission -
> (a) Submit his certificate of admission to the Board;
> (b) File with the Registrar an affidavit in and containing the several allegations specified in form 14; and
> (c) Deliver a copy of such affidavit to the secretary."

Paragraphs (6) and (7) of form 14 read as follows:

> "(6) That I ceased to practise as a barrister

in (here set forth the dates when the applicant ceased to practise in the various Courts to which he has been admitted, and the nature of his employment thereafter);
(7) That I arrived on the day of 18 , in the colony of Queensland;".

As amended from time to time thereafter, the 1896 rules governed the admission of barristers of the Supreme Court of Queensland until the Rules relating to the Admission of Barristers of 4 December 1975 ("the 1975 rules") came into operation.

3. Although the 1896 rules reserved to the Court a general power of exemption (r.59), the Court was not accustomed to exempt any applicant relying on previous admission elsewhere from the necessity to depose to the allegations contained in pars (6) and (7) of form 14 unless there were "special circumstances": Ex parte Evatt (1931) QWN 11; In re O'Sullivan (1940) QWN 37; In re Holmes (1944) QWN 33. In the first two of these cases, special circumstances were held to exist but not in the third.

4. The requirement that an applicant depose to the allegations contained in pars (6) and (7) of form 14 created a protection for the Queensland Bar against competition by barristers who, having been admitted previously to practice elsewhere and practising out of Queensland, sought admission to practise in Queensland in order to supplement their original practice. In In re O'Sullivan Mr McGill K.C., appearing for the Barrister's Board, submitted:

> " The Queensland bar should be protected. The University has recently provided a system of legal education and a number of young men have come to the bar, and their interests must be considered. The objection is in no way personal to the applicant. The Board is anxious to protect this bar and to have principles formally laid down. When application is made for exemption under r.59, surely strong circumstances are required."

Although the majority of the Court held that special circumstances existed in the case of Mr O'Sullivan (a New South Wales barrister), E.A. Douglas J. in dissent said:

"I hope this will not be a prelude to a practice by which members of the junior bar will be sent up here in place of engaging members of the Queensland bar. I regret that I have to express these views, but I think that if we are going to allow members of the junior bar to come in, it should be done by express amendment of the rule. I do not think that reciprocity in the real sense

of the term will be in danger if we refuse this application, because it is quite sufficient, I think, for the purposes of reciprocity that residents or persons who intend to reside in Queensland or New South Wales may be admitted to the respective bars."

In In re Holmes, another application by a New South Wales barrister for admission in Queensland, Macrossan ACJ. found in form 14 two requirements - cessation of practice in the courts of earlier admission and Queensland residence:

"Nos. 6 and 7 of these allegations clearly contemplate that an applicant for admission who is a barrister previously admitted elsewhere should have ceased to practice as a barrister in the other court or courts to which he has been admitted elsewhere, and should have become a resident of this State, before applying for admission as a barrister here."

E.A. Douglas J., rejecting an argument that reciprocity is itself a special circumstance within the meaning of r.59, said:

" I think that if it is desired there should be a general reciprocity, irrespective of any conditions, between the barristers of this court and the barristers of New South Wales, the rules should be amended; and if the board desire that should be done they can approach the proper authorities for the purpose of having the rules amended. According to the New South Wales rules, there is no limitation with respect to residence, but it is a fact that nearly all the barristers who have been admitted in New South Wales from Queensland went there for the purpose of residence. There are one or two exceptions."

5. The 1975 rules, prior to their amendment by the Order in Council of 2 July 1987, made provision similar to the provision made by the 1896 rules for the admission of barristers who had previously been admitted elsewhere. The 1975 rules were made pursuant to s.11(2)(v) of the Supreme Court Act. It is convenient first to refer to those rules in their unamended form. Rule 38 of the 1975 rules provided:

> " Every person seeking admission as a barrister shall:-

...
(d) If he relies upon a previous admission,
include in his affidavit the matters set
out in Form 10".

The form of affidavit (form 10) in the 1975 Rules contained these paragraphs:

"(6) That I ceased to practise as a barrister
in (here set forth the dates when the
applicant ceased to practise in the
various Courts to which he has been
admitted, and the nature of his
employment hereafter.)
(7) That I arrived on the day of
, 19 , in the State of
Queensland."

The allegations in form 10, which was part of the Order in Council enacting the 1975 rules, prescribe requirements for admission as effectively as if they were set out seriatim in r.38. The Supreme Court interpreted these provisions in the same way as it had interpreted the corresponding provisions of the 1896 rules. In Re Sweeney, a majority (Wanstall ACJ. and W.B. Campbell J., D.M. Campbell J. dissenting) followed In re Holmes, holding that the 1975 rules, like the 1896 rules, imposed requirements of residence in Queensland and ceasing to practise elsewhere and did not make reciprocity a special circumstance justifying an exercise of the exempting power: see per Wanstall A.C.J., at pp 298-300, and W.B. Campbell J., at pp 309-311.

6. The 1896 rules and the 1975 rules and the decisions which applied them denied admission in Queensland to applicants who relied on prior admission as barristers elsewhere in Australia unless the applicant, having ceased to practise as a barrister outside Queensland, came to reside in Queensland or unless "special circumstances" were found to exist. The restrictions on admission imposed on barristers who had been admitted in other States were abrogated for a time by the Barristers Act 1956 (Q) but that Act was repealed by The Barristers Act of 1956 Repeal Act of 1960 (Q).

7. Neither the 1896 rules nor the 1975 rules contain any suggestion that residence in Queensland or cessation of practice elsewhere is necessary or desirable to ensure that the applicant for admission has the training, experience or character necessary to show that the applicant is suitable to be admitted to practise at the Bar of the Supreme Court of Queensland. The requirements of Queensland residence and cessation of practice elsewhere were applied by r.15 to applicants for admission who relied on previous admission in New South Wales. Prior to its amendment by an Order in Council of 2 July 1987, that rule required an applicant -

(a) to be of good fame;
(b) to be proficient in the English language;
(c) to have complied with all the conditions of the
rules applicable to him; and
(d) to establish to the satisfaction of the
Barristers' Board that New South Wales grants
reciprocity of admission to barristers-at-law

of the Supreme Court of Queensland.

8. These qualifications apply indifferently to all New South Wales barristers seeking Queensland admission, wherever resident. No distinction relevant to training, experience, character or general suitability to practise as a barrister of the Supreme Court of Queensland is drawn between those barristers admitted in New South Wales who are resident in Queensland and those who are not resident in Queensland. The difference between residents and non-residents in their entitlement to admission to practise in Queensland arises solely from the provisions of r.38(d) and pars (6) and (7) of form 10 as construed by the Supreme Court. Having regard to the history of these provisions and the absence of any rational connection between an applicant's suitability to practise at the Queensland Bar on the one hand and the requirements of residence and cessation of practice in the courts of prior admission on the other, their only purpose can be the protection of the locally resident Queensland Bar from competition from barristers admitted and resident in other States. It is irrelevant in these proceedings to consider whether the Queensland Bar needed or needs any such protection, whether the interests of the Queensland Bar would not be better served by open competition and whether open competition is likely to reflect fairly the comparative professional merits of the competitors. In the years when I practised at that Bar, those were - I presume they still are - issues which excited much controversy.

9. The construction which Re Sweeney placed on r.38(d) and pars (6) and (7) of form 10 is not the only construction which the words of those provisions might have supported, but that construction accords with the settled construction of the 1896 rules which the 1975 rules substantially re-enacted. Although re-enactment of a statute generally gives no great support to a prior judicial construction of its terms (Reg. v. Reynhoudt [1962] HCA 23; (1962) 107 CLR 381, at p 388), the Order in Council which enacted the 1975 rules was made with the concurrence of at least two judges of the Supreme Court (Supreme Court Act, s.11(1)) and it is inconceivable that the provisions of the 1896 rules which had been held to impose the residential restriction were substantially re-enacted in the 1975 rules without the intention of maintaining the then settled construction.

10. The applicant, Alexander Whistler Street, applied to the Supreme Court of Queensland for admission as a barrister of that Court, relying on his previous admission as a barrister of the Supreme Court of New South Wales. Mr Street is permanently resident in New South Wales. From what appears in the judgments of the Full Court which heard Mr Street's application for admission, it seems that he complied in all respects with the rules of the Supreme Court of Queensland relating to the admission of barristers save that he intends to continue to reside in New South Wales and he does not intend to cease to practise as a barrister in that State. The Full Court refused his application: (1988) 2 Qd R.209. Connolly J., with whom Shepherdson J. agreed, said (at p 210):

> "He is in all respects qualified to be admitted as a barrister in Queensland, save that he intends to continue as a resident of New South Wales and has not ceased to practise and does not intend to cease to practise as a barrister (of) his State of residence. In these circumstances, it is clear that the court is precluded by a line of decisions from admitting him to practise: Re Sweeney (1976) Qd R 296; Re Holmes (1944) QWN 33; Re O'Sullivan (1940)

QWN 37."

Mr Street applied for special leave to appeal against the order refusing his application but, before that application was heard, the rules relating to the admission of barristers were amended in material respects by the Order in Council of 2 July 1987. The application for special leave was opposed. Mr Street submits that he had a right to admission which was erroneously refused by the Supreme Court and that that right is unaffected by the subsequent amendment of the rules. Accordingly, if special leave to appeal against the order of the Supreme Court be granted, he seeks an order admitting him to practice as a barrister of that Court. For the reasons stated by each of the Chief Justice, Dawson and McHugh JJ., I agree that the amendment leaves unaffected Mr Street's claimed right to admission under the rules as they stood prior to the amendment and that it is appropriate to grant him special leave to appeal.

11. If his appeal be successful, Mr Street would not need to make another application for admission under the amended rules. However, if Mr Street were to make another application for admission, the amendment would require him to depose to an intention, if admitted, to practise principally in Queensland. That is not Mr Street's intention. He commenced other proceedings in this Court challenging the validity of the rules as amended by the Order in Council of 2 July 1987. In those proceedings, the Chief Justice has stated a case reserving two questions of law for determination by this Court:

> "1. Are the Rules of the Court relating to the admission of Barristers of the Supreme Court of Queensland, as amended by Order in Council dated (2) July 1987, invalid as being contrary to Section 117 of the Constitution?
> 2. Are the Rules of the Court relating to the admission of Barristers of the Supreme Court of Queensland, as amended by Order in Council dated (2) July 1987, invalid as being contrary to Section 92 of the Constitution?"

12. Mr Street's appeal and the stated case both raise for consideration the questions whether s.92 of the Constitution invalidates those provisions of the rules which have precluded or would now preclude Mr Street's admission and whether those provisions purportedly impose on him a disability or discrimination from which s.117 of the Constitution protects him. It will be convenient to consider the 1975 rules as they stood before the amendment of 2 July 1987 in order to dispose of the appeal before considering the rules as they now stand in order to answer the questions in the stated case. Section 92 and section 117 compared.

13. The argument founded on s.92, if successful, would lead to a different conclusion from that to which the argument founded on s.117, if successful, would lead. The s.92 argument, if successful, would lead to the conclusion that particular provisions of the 1975 rules are invalid because their purpose or their substantial effect is such that they are to be characterized as discriminatory against interstate trade or commerce in a protectionist sense: Cole v. Whitfield (1988) 165 CLR 360, at pp 407-408,409-410; Bath v. Alston Holdings Pty.Ltd. [1988] HCA 27; (1988) 165 CLR 411, at p 424. Section 92 restricts legislative power, so that a purported law which offends s.92 is to that extent

made without power. Therefore, a law which is invalidated by s.92 binds nobody: any person is free to ignore the invalid law, whether or not that person is engaged in interstate trade or commerce. Conversely, s.92 gives no relief to a person who is engaged in interstate trade or commerce and whose trade or commerce is adversely affected by a law unless the purpose or substantial effect of the law is such that it is to be characterized as discriminatory against interstate trade or commerce in a protectionist sense. By contrast, s.117 does not restrict legislative or other power; it does not operate by invalidating the law or the governmental act by or under which the disability or discrimination is imposed. It confers an immunity on individuals or, if we choose to employ the rhetoric of rights, confers a constitutional right not to be subjected to a certain disability or discrimination. The object of s.92 is to secure the freedom of markets; the object of s.117 is to secure equal treatment for the individuals whom it protects.

14. In considering the two arguments, the narrower consequence of the s.117 argument - individual protection rather than general invalidity of a law - suggests that it should be considered first. If the applicant's argument on s.117 prevails, it will be unnecessary to consider whether some provisions of the 1975 rules, if not the rules as a whole, are invalid. The issues arising on the s.92 argument include two questions of significance for the purposes of ss.51(i) and 92 of the Constitution. The first question is whether a supplier of personal services resident outside a State who goes into another State in order to supply services wholly within the other State is engaged in interstate trade or commerce; the second is whether barristers, in the conduct of their profession, are engaged in trade or commerce. These are questions which ought to be answered only in a case where it is necessary to do so. It will not be necessary to do so in this case unless the applicant's argument on s.117 fails.

15. The decision of this Court in Henry v. Boehm [1973] HCA 32; (1973) 128 CLR 482 stands in the way of Mr Street's argument on s.117. In that case, the Court held that s.117 did not affect the application to a Victorian barrister and solicitor of rules in the South Australian Rules of Court Regulating the Admission of Practitioners 1955- 1972 which required an applicant relying on previous admission elsewhere to reside continuously in South Australia for three months prior to applying for admission and, after conditional admission, for at least a further 12 months until order absolute. It will be necessary to consider the authority of that decision after examining the terms of s.117.

16. Section 117 is a singular provision. It does not purport to limit the grant of legislative power to the Commonwealth, to restrict the scope of any power of a State, to afford any protection against the subjection of a person in a State to a disability or discrimination imposed by or under a valid law if that person is not a subject of the Queen resident in another State or to afford any protection against disability or discrimination imposed on any person in a Territory. It is not in terms directed either to the Commonwealth or the States. It is found in Ch.V - "The States" - but its mere presence in Ch.V does not mean that it has no operation when a disability or discrimination is imposed by or under a law of the Commonwealth: cf. s.116 which, though in Ch.V, is directed in terms only to the legislative power of the Commonwealth. However, as the protection afforded by s.117 extends only to the subjection of a person in a State to an impermissible disability or discrimination, it is understandable that s.117 should be within Ch.V. Section 117 is not directly concerned with the nature of the power by which an impermissible disability or discrimination is purportedly imposed.

17. Section 117 is expressed to protect the persons whom the section mentions: "A subject of the Queen, resident in any State". It gives no protection to those who are subjects of the Queen but who are not residents in a State; nor does it give protection to those who are residents in a State who are

not subjects of the Queen; nor, of course, does it give protection to those who possess neither qualification. Its protection is limited to natural persons (cf. Western & Southern Life Insurance Co. v. Board of Equalization [1981] USSC 114; (1981) 451 US 648, at p 656) and does not appear to extend to subjects of the Queen resident in a Territory: cf. Anderson v. Scholes (1949) 83 FSupp. 681, at p 687. Section 117 makes the persons within the class it describes immune from ("shall not be subject ... to") an impermissible disability or discrimination however imposed. Thus the immunity extends to disability or discrimination arising by exercise of executive or judicial, as well as legislative, power. The section does not purport to restrict the immunity it confers to disability or discrimination imposed directly by a law. An impermissible disability or discrimination may be imposed as well by executive or judicial act as by law. The exercise of an executive discretion against a protected person on the ground that she or he is not a resident in the relevant State ("out-of-State residence") subjects that person to a relevant discrimination. Similarly, it would offend s.117 for a judge to impose a more severe penalty on an offender who is a protected person merely on the ground of out- of-State residence. Section 117 cuts across the exercise of all governmental power, conferring immunity directly on individuals; their immunity is not a consequence of a limitation on a power. A law which imposes an impermissible disability or discrimination on a protected person is not invalid; it remains in full force and, except in relation to protected persons, in full effect. Uniquely in the Constitution, s.117 carves out an area of personal immunity which cannot be breached by law, executive action or judicial order. It is a constitutional guarantee to each person within the protected class that no law or act of government will subject her or him to a certain kind of disability or discrimination. The difficulty in construing s.117 is to identify the kind of disability or discrimination which falls within the guarantee and thus to define the area of immunity enjoyed by each subject of the Queen resident in a State.

18. It is unnecessary to determine in this case whether the term "subject of the Queen" in s.117 (meaning thereby the Queen in right of Australia: Nolan v. Minister for Immigration and Ethnic Affairs [1988] HCA 45; (1988) 165 CLR 178, at p 186) is synonymous with the term "Australian citizen". The closest analogies of the United States Constitution - Art.IV s.2 and the 14th Amendment - resolve this question so that the American cases can provide little guidance: see, for example, United Building & Construction Trades v. Mayor [1984] USSC 25; (1984) 465 US 208, at p 216. The Federal Convention meeting in Melbourne in 1898 consciously left the question open: see the Debates, vol.v, pp 1784-1797, 1801-1802. The question was not raised in Nolan which established that "subject of the Queen" is the antonym of "alien" in s.51(xix) of the Constitution: see pp 185-186. It may be that resident friendly aliens are subjects of the Queen in right of Australia so long as they remain in Australia: see Arnerich v. The King (1942) NZLR 380. However, as there is no doubt but that Mr Street is a "subject of the Queen" on any interpretation of that term, the question need not be answered in this case.

19. Nor is it necessary to determine in this case the degree of permanency of residence which confers on a subject of the Queen the status of a "resident in any State". Mr Street, being permanently resident in New South Wales, is a "resident in" that State. However, the question of permanency was material to the decision in Henry v. Boehm and it will be necessary to refer to the question in considering the authority of that case. For the moment, it is sufficient to note that Mr Street is a person who, if s.117 has been offended, is entitled to the protection it affords. Section 117: "disability or discrimination".

20. The scope of the immunity conferred on a protected person by s.117 is limited to "any disability or discrimination" falling within the descriptive clause: "which would not be equally applicable to him if he were a subject of the Queen resident in such other State." Disability is a term apt to

describe an incapacity to take, exercise or enjoy a right, power or privilege. That meaning is consistent with both modern dictionary definitions and the ancient definition (1721) of "disability" in William Rastal's Les Termes de la Ley:

> "when a Man by an Act or Thing, by himself or his Ancestor done or committed, or for or by any other Cause, is disabled or made incapable to do, inherit, or take Benefit or Advantage of a thing, which otherwise he might have had or done."

Less clearly, the term "disability" might be held to describe a liability to suffer a diminution in legal rights or an increase in legal liabilities, but that meaning in the context of s.117 is subsumed in the connotation of "discrimination" and it is unnecessary to attempt an exhaustive definition of "disability". The term "discrimination" is to be distinguished from "disability" in three relevant respects: discrimination connotes a comparison (Post Office v. Crouch (1974) 1 WLR 89, at p 97; (1974) 1 All ER 229, at p 238), but disability does not; discrimination imports a ground for differentiating between the persons compared, but disability is not concerned with the reason why it is imposed; and discrimination extends beyond the discriminatory imposition of a legal incapacity or liability to the discriminatory withholding of any benefit (including any right, power or privilege) and to the discriminatory imposition of any burden (including any liability to suffer a diminution of legal rights or an increase in legal liabilities). Discrimination is a broader term than disability but the two terms are not mutually exclusive: a discriminatory imposition of a disability is comprehended by both.

21. The hypothesis contained in the descriptive clause must be adopted in each case to ascertain whether the particular protected person has been subjected to a relevant disability or discrimination. When a protected person alleges that he is subject to a disability or discrimination in a State other than his State of residence, a comparison must be made between the disability or discrimination to which the person is purportedly subjected in the other State and the disability or discrimination, if any, to which he would be subjected "if he were a subject of the Queen resident in such other State." The actual position of the protected person must be compared with the hypothetical position. The starting point is to identify the disability or discrimination to which the protected person is purportedly subject; the next enquiry is whether, if that person were resident in the State in which she or he is purportedly subject to the disability or discrimination, she or he would be subject to it to the same extent ("equally applicable"). Section 117 is focussed on the individual and looks to the actual benefit withheld or the actual burden imposed on the individual ("applicable to him"), not to the means by which the protected person is subjected to it. For the purposes of s.117, it is not the indifferent application of a law to in-State and out-of-State residents which is material, but the actual impact on a protected person of a law or governmental act in comparison with the impact it would have if that person were an in-State resident.

22. The descriptive clause in s.117 does not directly identify the comparison which "discrimination" imports. Strictly speaking, to say of discrimination that a protected person would not be equally subjected to it if that person were a resident in another State says nothing directly about the comparison which might establish discrimination. Discrimination against a person is not established by showing that that person is treated differently in different situations. Nevertheless, the comparison needed to establish discrimination in the relevant sense must correspond with the qualification which the descriptive clause applies to "disability". Just as it is necessary to compare

the position of a protected person who is subjected to a disability with her or his position if she or he were resident in the State in which the disability applies in order to determine whether the disability attracts the operation of s.117, so it is necessary to compare the position of the protected person (who, ex hypothesi, is not resident in the State in which the discrimination applies) with the position of another notional person who, though resident in that State, is otherwise in the same position as the protected person in order to determine whether the discrimination attracts the operation of s.117. Such a comparison is required because s.117 is concerned only with discrimination to which the protected person would not be "equally" subject if that person were a resident in the relevant State. To apply that test, the notional person must be in the same position as the protected person in all respects save residence in the relevant State. Subject to an exception of necessity, presently to be examined, when a law or governmental act withholds a benefit from a subject of the Queen resident in another State or imposes a burden on that person which would not be withheld from or imposed on an in-State resident in the same position as the protected person, discrimination is established for the purposes of s.117.

23. As s.117 affords protection to individuals when the individual is subject to a disability or discrimination which would not be "equally applicable to him" if he were an in-State resident, it focusses upon the impact of a governmental measure on the individual not merely upon the applicability of the measure to a class of which the individual is a member. To determine the impact of a measure on an individual, it is necessary to take account of the particular circumstances of the individual. In other words, s.117 is concerned not only with legal rights and liabilities but also with the actual effect on the individual of legal rights and liabilities produced by a law or other governmental action. In this respect, discrimination within s.117 extends to what McIntyre J. called "adverse effect discrimination" in Ontario Human Rights Commission v. Simpsons-Sears 1985 CanLII 18 (SCC); (1985) 2 SCR 536, at p 551; 23 DLR (4th) 321, at p 332:

> "It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force."

See also Griggs v. Duke Power Co. [1971] USSC 46; (1971) 401 US 424, at p 431. Discrimination in s.117 thus extends beyond a law, administrative policy or judicial practice of general application to the actual impact which a law, policy or practice produces on the persons to whom it is directed. The comparison which establishes discrimination is not necessarily made by reference to questions of law alone. It may have to be made by reference to the facts of the particular case: see Cole v. Whitfield, at pp 407-408.

24. A protected person who invokes the protection of s.117 against discrimination created by a law does not have to show that the character of the law is discriminatory. It is not its character but the impact which the law has and, on the hypothesis of in-State residence, would have on a protected person which is material. A law which does not have a discriminatory character may produce an

impermissible discrimination in a particular case, and a law which does have that character may not do so in a particular case. Characterization is a useful and familiar process when the validity of a law depends on the grant of, or restriction on, legislative power; but the character of a law does not necessarily determine whether a personal immunity from the discriminatory withholding of benefits or the discriminatory imposition of burdens is infringed by operation of the law. That is not to say that the character of a law is immaterial. A law which withholds a benefit or imposes a burden on the ground of out-of-State residence is not only discriminatory on its face but likely to be discriminatory in its effect.

25. By making a comparison between the treatment of a protected person and the treatment of a notional person in the same position except for out-of-State residence, any relevant difference in effect of a putative discriminatory measure can be identified. Whatever grounds are advanced for the treatment of a protected person in a particular way, the same grounds must be applied to the notional person in order to compare the treatment notionally accorded to her or him. If there be several grounds advanced for treating a protected person in a particular way, one of which is out-of-State residence, and the application of those grounds to the notional person would in the particular circumstances result in the same treatment being accorded to her or him as to the protected person, there is no discrimination which attracts s.117. Thus, if the qualifications for admission under the 1975 rules had required an applicant to have graduated in law from a recognized university, to have completed a course of practical training to a standard satisfactory to the Barristers Board and to be resident in Queensland, s.117 would not entitle an out-of-State barrister who did not possess the first two qualifications to admission. There would be no difference between the position of such a barrister and a notional counterpart resident in Queensland: neither would be eligible for admission. A difference in treatment on the ground of out-of-State residence alone is needed to attract the operation of s.117. Section 117 does not place out-of-State residents in a position of privilege over in-State residents. What s.117 is designed to avoid is the treatment of protected persons unequally and disadvantageously on the ground of out- of-State residence.

26. That is not to say that s.117 is attracted only when the granting of a benefit or the avoidance of a burden is conditioned expressly on residence within the State. Discrimination of the relevant kind may be imposed on a ground which is expressed in another way. A governmental measure which is expressed to discriminate on a ground which is a natural or ordinary concomitant of out-of-State residence may single out protected persons for differential treatment as surely as if out-of-State residence were the ground expressed. In such a case, a protected person who is singled out for differential treatment or who is at a disadvantage in comparison with a notional in-State counterpart is subject to discrimination which "would not be equally applicable to him if he were a subject of the Queen resident in such other State." The facts in Mandla v. Dowell Lee [1982] UKHL 7; (1983) 2 AC 548 furnish an example. There, discrimination on the ground of race was prohibited. A Sikh family challenged a general rule which denied admission to a school to children who would not abide by dress requirements forbidding the wearing of turbans. Sikhs are bound by custom and cultural rules to wear a turban, and the effect of forbidding turbans was to discriminate against Sikh children. By contrast, in Bhinder v. Canadian National Railway Co. (1985) 2 SCR 561; 23 DLR (4th) 481, a Sikh who lost his job because he would not remove his turban and wear a hard hat whilst working failed to establish compensable discrimination. A majority of the Supreme Court of Canada held that the hard hat was a bona fide occupational requirement. The condition requiring the wearing of a hard hat was not discriminatory: per McIntyre J. at pp 588-589; p 500.

27. Although it is misleading to derive principles from discrimination cases decided under statutes which are not analogous to s.117, I refer to these two turban cases as illustrations of two

propositions which are inherent in the concept of discrimination. First, discrimination on a prohibited ground may be effected, albeit indirectly, when the expressed ground is a natural or ordinary concomitant of the prohibited ground. Secondly, where the concomitant ground has a rational connection with an objective unrelated to the prohibited ground, it may not be discriminatory. That is because a class which is singled out for adverse treatment on a ground which has a rational connection with an unrelated objective - Sikhs who refuse to wear hard hats when the wearing of hard hats is a bona fide occupational requirement, for example - are relevantly unequal to others to whom the ground applies and the difference in treatment reflects the inequality. The absence of discrimination consists as much in the unequal treatment of unequals as in the equal treatment of equals. I need not repeat what I said on that topic in Gerhardy v. Brown [1985] HCA 11; (1985) 159 CLR 70, at pp 128-131, but I would add the observation of Vierdag, The Concept of Discrimination in International Law, (1973), at p 61:

> "discrimination occurs when in a legal system
> no inequality is introduced in the enjoyment
> of a certain right, or in a duty, and as a
> result thereof no sufficient connection
> exists between the unequalness of the
> subjects treated and the right or the duty."

However, a difference in treatment on a ground which is rationally connected with an unrelated objective will nevertheless be discriminatory if the difference is not proportionate to the relevant inequality: see the reference to proportionality in the Belgian Linguistic Case (No.2) [1968] ECHR 3; (1968) 1 EHRR 252, at p 284.

28. It follows that, when a condition on obtaining a benefit or avoiding a burden is so expressed that protected persons are naturally or ordinarily disadvantaged in complying with it because they do not reside in the State, s.117 may relieve a protected person from compliance with the condition in part or in whole. On the other hand, if there is a rational and proportionate connection between the condition and some objective other than the subjecting of protected persons to different treatment because they are out-of-State residents, s.117 does not apply. If there be such a connection, there is no discrimination within s.117; if there be no such connection, there is discrimination within s.117. Take, for example, the familiar requirement that a licensed victualler reside on the licensed premises. Although residence on the premises is a condition which would be naturally more difficult or burdensome (indeed, which would be impossible) for a person who resides out of the State to comply with, it is a condition which has a rational and proportionate connection with supervision of licensed premises. Section 117 is not attracted by such a requirement. There will often be room for disagreement about the existence of discrimination within s.117 when a condition is not stated in terms of out-of-State residence but in terms which are a natural or ordinary concomitant of that ground and where it is sought to justify the condition as having a rational and proportionate connection with some legitimate objective. An examination of such a connection is not an enquiry into the motives or intentions of the legislature or governmental authority which seeks to apply the condition. A connection, if any, is to be found by reference to the effect which application of the condition would naturally or ordinarily achieve and the significance of the objective to the entire scheme or activity affected by the condition. Of course, a distinction between a legitimate objective and the impermissible objective of subjecting protected persons to different treatment on the ground of out-of-State residence is not always easy to draw where the relevant law or governmental act relates to some scheme or activity which is located within the State. But it must be remembered that s.117 is concerned not with the locality of schemes or activities but with the terms on which out-of-

State residents may, if they choose, participate in them.

29. In so far as the application of s.117 depends on a finding of fact, the onus of showing that the law or governmental act has an impact in a State on a protected person which is different from the impact it would have if that person were a resident in the State rests upon that person. But once that onus is discharged, the onus shifts to the party seeking to give effect to the law or governmental act to show that the difference in treatment has a rational and proportionate connection with a legitimate objective. As Judge Tanaka said in South West Africa Cases (Second Phase) (1966) ICJR 6, at p 309:

> " Equality being a principle and different treatment an exception, those who refer (French: appliquent) to the different treatment must prove its raison d' tre and its reasonableness."

30. Subject to an exception of necessity, the effect of s.117 is that when a subject of the Queen resident in one State goes into or has dealings in another State, that person must be treated as if she or he were a resident in the other State. It is a guarantee of equal treatment under the law. The guarantee supplements the freedom of interstate intercourse which is secured by s.92. Sections 92 and 117 are the constitutional pillars of the legal and social unity of the Australian people just as ss.90 and 92 are the constitutional pillars of national economic unity. Subject to an exception of necessity, equality of treatment within each State of the subjects of the Queen resident in any State is a basic doctrine of the Constitution and a fundamental feature of the federation.The exception of necessity.

31. The s.117 guarantee of equality of treatment is not expressed to be subject to any qualification or exception. Nor is there any firm constitutional foothold for an implication that s.117 should be read down to permit discrimination in favour of in-State residents in order to foster local sentiment or to advance local interests. Yet it is clear that there must be some exception to a general application of its terms. Section 117 is drawn on the assumption that out-of-State residence can never be a ground for denying to a protected person any right to which that person would be entitled if she or he were resident in the relevant State. Yet s.7 of the Constitution demonstrates that the assumption is ill-founded: a subject of the Queen, resident in one State, must be denied a vote for the senators for another State voting as one electorate. In my opinion, the guarantee of equality of treatment is qualified only by necessary implication from the Constitution itself. No such necessity can be found in the constitutional conferring of powers on the institutions of government or in the constitutional recognition of the powers of government. Although governments (in each of their branches) may exercise their powers as they see fit within the limits of the law, the very purpose of s.117 is to ensure - and in terms it ensures - that the exercise of power by the institutions of government is ineffective when it reaches the borders of the Alsatia created by s.117. The necessity to treat a protected person differently on the ground of out-of-State residence must therefore be found not in the powers vested in the institutions of government but in the existence of those institutions and in the protection of their functions. The necessity to preserve the institutions of government and their ability to function is an unspoken premise of all constitutional interpretation (see The Commonwealth v. Tasmania. The Tasmanian Dam Case [1983] HCA 21; (1983) 158 CLR 1, at p 214) for it is the necessity to preserve the Constitution itself. But that necessity does not require or authorize a qualification of the constitutional text in order to maintain what might be thought to be a convenient fund of power or a desirable distribution of power. Nothing less than the

need to preserve the institutions of government and their ability to function can justify the erection by a government of a barrier to the legal and social unity of the Australian people.

32. The necessity to preserve the institutions of government or their ability to function demands that electoral laws providing for a franchise based on residence in a State be given full effect. It may require giving full effect to laws which impose a requirement of in-State residence in order to ensure the attendance of members of the three branches of government at their respective places of duty or to ensure their familiarity with conditions within the State in which those duties are performed. It may justify other laws in the same way. Future cases will tell. Although discrimination based on local residence within a State does not in terms attract the operation of s.117, discrimination on that basis may take many forms and it must be left to future cases to say whether s.117 is attracted in a particular case. In the United States, problems of that kind arising under the Privileges and Immunities clause (Art.IV s.2) of the Constitution have provoked contrasting judicial opinions: see United Building & Construction Trades v. Mayor. However, even if discrimination based on local residence within a State were to attract the application of s.117 in the generality of cases, it could not do so in the case of an electoral law creating a parliamentary franchise based on local residence. In such a case, the necessity of preserving the means of electing the members of the Parliament would necessitate the exclusion of non-local residents from the poll and the case would fall outside the purview of s.117.

33. The exception of necessity is narrowly confined: indeed, it may not amount to discrimination at all. When it is necessary to treat a protected person differently on the ground of out-of-State residence (as in the case of voting in an election of senators for another State), that ground reflects the fact that the protected person is in a position which is relevantly and necessarily different from the position she or he would be in if she or he were an in-State resident. It is precisely because she or he is not an in-State resident that the Constitution requires her or him to be differently treated. Such different treatment is not truly discriminatory. However, as s.117 comprehends disabilities as well as discriminations, an exception of necessity must be recognized.

34. In applying s.117 to an application by an out-of-State resident for admission to a Bar, it is not appropriate to assume that the cases which have addressed a similar question in the Supreme Court of the United States furnish applicable or appropriate guidance. Obviously, s.117 differs textually from both Art.IV s.2 (the Privileges and Immunities clause) and from the 14th Amendment (the equal protection clause) of the United States Constitution. The United States cases since Supreme Court of New Hampshire v. Piper [1985] USSC 49; (1985) 470 US 274 have founded on the Privileges and Immunities clause rather than on the 14th Amendment but the notion of discrimination in s.117 has more conceptual affinity to the 14th Amendment than to the Privileges and Immunities clause. The doctrine of fundamental rights developed by the United States Supreme Court in applying that clause - those privileges and immunities "bearing upon the vitality of the Nation as a single entity" (see Baldwin v. Montana Fish and Game Commission [1978] USSC 82; (1978) 436 US 371, at p 383; Piper, at p 279) - cannot be safely translated into our constitutional jurisprudence. And the test of "a substantial State interest" which can justify denial of equal treatment to non-residents (Supreme Court of Virginia v. Friedman (1988) 101 LEd. 2d 56, at p 63; Piper, at p 284) is applied in the United States in a professional and social milieu which is significantly different from that in Australia or which is not known to be the same as in this country: see Barnard v. Thorstenn (1989) 57 LW.4316. The facts of particular cases of discrimination and the decisions given in those cases in the United States and elsewhere illustrate the recurrent problems of discrimination but extreme caution is needed in applying any of those cases lest differences in statutory texts, underlying doctrine or evaluation of social conditions be overlooked.The authority

of Henry v. Boehm.

35. In Henry v. Boehm, the rules relating to the admission of practitioners with out-of-State qualifications required only temporary residence in South Australia: three months' continuous residence prior to application for admission and at least 12 months after conditional admission until the order for admission was made absolute. The majority held that compliance with the requirement for temporary in-State residence did not necessitate the abandoning of a residence elsewhere: see per Barwick C.J. at p 489, McTiernan J. (who agreed with the Chief Justice's judgment) at p 490, Menzies J. at p 493, and Gibbs J. at p 498. By contrast, the 1975 Queensland rules prior to their amendment on 2 July 1987, require a New South Wales barrister resident and practising in that State to give up his residence in New South Wales permanently. It is possible to distinguish the requirement in Henry v. Boehm from the requirement in the present case. The distinction is important because it was accepted by the majority in Henry v. Boehm that the ground of discrimination necessary to attract the operation of s.117 is out-of-State residence. Barwick C.J. said (at p 489):

> "At least prima facie therefore being a resident of another State must be made by the law the basis of the imposition or creation of the disability or discrimination. But, of course, the necessary direct effect of the operation of a statute or statutory provision according to its true construction must be regarded in considering whether the law does make residence out of the State a criterion of its operation. Here, quite clearly in my opinion, the rules do not in terms make the fact of being an out-of-State resident the basis of their operation."

Menzies J. said (at p 493):

"It is only laws effecting a disability or discrimination upon or against a person resident in one State by reason only of his non-residence in another State that are condemned by s.117. That is the decision in Davies and Jones v. Western Australia [1904] HCA 46; ((1904) 2 CLR 29). Whether the rules operate to impose such a disability or discrimination is the inquiry here."

Gibbs J. said (at p 496):

"What the section proscribes is a disability or discrimination based solely on the ground of residence in another State: Davis and Jones v. Western Australia, per Barton J.

(at p 47), and per O'Connor J. (at p 49). It follows that a discrimination in favour of a person who not only resides within the State but also satisfies some additional condition or requirement would not infringe the constitutional guarantee (at least, according to O'Connor J. in Davies and Jones v. Western Australia (at p 53), if that other condition or requirement was substantial, by which it may have been meant that the imposition of the additional condition or requirement should not have been a merely colourable attempt to disguise the fact that the discrimination was really based on residence alone)."

The decision in Davies and Jones v. The State of Western Australia (1904) 2 CLR 29, on which all of their Honours relied, was founded on the view summed up by Barton J. (at p 47) in a sentence cited by Barwick C.J. (at p 488):

"'It is discrimination on the sole ground of residence outside the legislating State that the Constitution aims at in the 117th section'."

To rebut the argument that the residential requirement of the South Australian Rules did discriminate on the ground of out-of-State residence, their Honours were concerned to show out-of-State residence meant a more or less permanent residence out of the State and that applicant out-of-State practitioners who wished to remain out-of-State residents could comply with the requirement of temporary in-State residence. That rebuttal is not open in this case where the 1975 rules prior to their amendment refused admission to suitably qualified New South Wales barristers who declined to abandon their residences and practices in that State. Under those rules, out-of-State residence is the stated ground of discrimination whereby suitably qualified New South Wales barristers were refused admission to practise in Queensland. Even if Henry v. Boehm were followed, the ground of discrimination contained in the 1975 rules prior to their amendment would properly be identified as out-of-State residence so that s.117 would be attracted. There was nothing to suggest that there was any rational and proportionate connection between the requirement of permanent residence in Queensland on the one hand and suitability for admission to practise in Queensland on the other.

36. Henry v. Boehm presents other difficulties. The proposition that for a subject of the Queen to be "resident in a State" there must be a degree of permanency can be accepted only to the extent that it is relevant to distinguish residence from a mere sojourn or transient presence in a State. Otherwise "resident" imports no particular degree of permanence. This was perceived by Griffith C.J. in Davies and Jones v. The State of Western Australia where he said (at p 39):

> " The word 'resident' is used in many senses. As used in sec.117 of the Constitution, I think it must be construed distributively, as applying to any kind of

> residence which a State may attempt to make a basis of discrimination, so that, whatever that kind may be, the fact of residence of the same kind in another State entitles the person of whom it can be predicated to claim the privilege attempted to be conferred by the State law upon its own residents of that class."

Although, as Menzies J. pointed out in Henry v. Boehm (at p 493), this passage cannot be understood as suggesting that s.117 is to be construed by reference to actual State laws, it rightly attributes to residence a comprehensive meaning embracing residences of differing permanency, so that s.117 might apply to "any kind of residence which a State may attempt to make a basis of discrimination". I should have thought that continuing residence for the periods specified in the South Australian rules would have amounted to residence for the purposes of s.117 and that residence in South Australia for that period was inconsistent with residence in Victoria during the same period.

37. The majority held that s.117 gave no protection to out-of-State residents against the need to comply with a temporary residential condition on admission where the law imposed the same condition on all subjects of the Queen similarly qualified: see pp 486-487,490, 491,498. The operation of s.117 was held not to be attracted even though the fulfilment of the condition of temporary residence by an out-of-State resident is naturally and ordinarily more burdensome than it would be if that person were residing in the State. That approach is inconsistent with some of the principles which, as I have sought to explain, inhere in the concept of discrimination. The majority rejected the notion that the imposition of the same condition upon all persons to whom a law applies, though not formally discriminatory, may be discriminatory in effect. Their Honours did not recognize that discrimination may exist when, by reason of differing factual circumstances affecting the persons to whom the law applies, the law has a different impact on one or more of those persons. Stephen J. recognized these principles in his dissenting judgment (at p 502):

> " ... I regard it as incorrect to say of a disadvantage that because it is the consequence of a requirement of universal application that disadvantage is equally applicable to all; if the discriminating factor relates to the personal attributes of individuals some only of whom possess those attributes then, while the requirement may be said to apply equally to all, the disadvantage will apply unequally for it will apply only to those who do not possess those attributes."

38. I respectfully agree that there is no warrant for excluding from the connotation of "discrimination" in s.117 the discriminatory imposition of a disadvantage by a law of general application. The question therefore arises whether, construing s.117 inconsistently with the construction adopted by the majority in Henry v. Boehm, I should accept the authority of that decision or adopt the construction which I conceive to be correct. I respectfully agree with the

observation of Gibbs J. in Queensland v. The Commonwealth (1977) 139 CLR 585, at p 599:

> "No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court."

Though adopting this approach, I am satisfied that I should give effect to the construction which I would hold the text of s.117 demands. There are three considerations which lead to this conclusion: first, if "discrimination" in s.117 were not to extend beyond the imposition of a legal disability or liability on the express ground of out-of-State residence and to encompass the discriminatory impact of a law or governmental act on a protected person, s.117 would be a shell without substance and its protection would be illusory. By narrowing the connotation of "discrimination" to formal discrimination, the reasons for decision of the majority fail to accord to the text of s.117 its full meaning and deprive that section of its capacity to establish and maintain equality of treatment in each State of the subjects of the Queen resident in every State. The second consideration which leads me to refuse to follow Henry v. Boehm is that the developments of the law since that decision have given us new insights into the law of discrimination and those insights reveal shortcomings in the reasons of the majority. To adhere to Henry v. Boehm would be to fossilize s.117 while the general law of discrimination continues to develop. The third consideration is that the doctrine of stare decisis, never conclusive in determining the true construction of the Constitution, is least cogent in its application to those few provisions which are calculated to protect human rights and fundamental freedoms (to use contemporary nomenclature), notably ss.92 (freedom of intercourse), 116 and 117. Giving the majority judgments in Henry v. Boehm the great respect which they command both as a considered authority of this Court and as the writings of some of its most distinguished jurists, I am unable to accommodate their Honours' approach to s.117 to its text and purpose. I am unable to regard Henry v. Boehm as an authority which ought to be maintained.

39. The Full Court saw Henry v. Boehm as standing in the way of Mr Street's argument on s.117. Even if it be not distinguished in this case, it does not stand in the way of that argument in this Court. The residence and cessation of practice requirements of the 1975 rules have no rational and proportionate connection with the standards of training, experience and character which might properly be demanded as a condition of admission as a barrister. The 1975 rules present no obstacle to the admission of a New South Wales barrister who has resided and practised in that State, if the barrister comes to reside and practise in Queensland but she or he is treated differently if residence and practice in New South Wales are retained.Section 117 in the present case.

40. The two requirements of residence and practice are, in Mr Street's case and in the case of most barristers admitted to practice and resident and practising in New South Wales, in substance both residential requirements. A barrister ordinarily practises, or chiefly practises, in or near her or his place of residence: the nature of a barrister's practice makes residential propinquity a virtual necessity except in rare instances or for comparatively brief periods when the barrister accepts out-of-town briefs. To require residence in Queensland and cessation of practice in New South Wales as conditions of admission in Queensland of New South Wales barristers who are otherwise qualified to be admitted in Queensland is to discriminate against those who do not reside in Queensland on the ground of out-of-State residence. An applicant qualified for admission who resides in New South Wales must give up the barrister's place of residence and must cease to practise in the State of actual residence but if the barrister were resident in Queensland the place of residence could be retained and practice in the State of residence could be carried on. The 1975 rules, prior to their amendment by the Order in Council of 2 July 1987, thus subjected Mr Street to a discrimination which would not have been equally applicable to him if he were resident in Queensland. He has thus established that he was subjected to discrimination within the meaning of s.117. He is entitled to an order giving effect to his constitutional immunity from that discrimination. The grounds assigned for refusing him admission were invalid and his appeal against the order of the Supreme Court of Queensland must be allowed.

41. The Order in Council of 2 July 1987 removed pars (6) and (7) from form 10 and thus removed the residential and cessation of practice requirements which had been found to inhere in those paragraphs. Another requirement was inserted: that applicants relying on prior admission as a barrister in New South Wales or in certain other jurisdictions should "have the intention of practising principally in Queensland": r.15(e). A new par (6), deposing to such an intention, was inserted in form 10. A new r.15B was inserted:

> " (1) An applicant for admission who relies on a qualification set out in rule 15(d)(3), (4) or (5) shall in the first place be admitted conditionally only for a period of one year.
> (2) After the expiration of the said period of one year, the applicant may be granted absolute admission if he satisfies the court that, since his conditional admission and until the date of the application for the order absolute, he has practised principally in Queensland and has not pursued any occupation or business other than that proper for a barrister."

(This rule follows the drafting of r.28 in the South Australian rules which survived scrutiny in Henry v. Boehm.) For the reasons stated, a requirement imposed on a barrister admitted to practice and resident and practising in New South Wales to carry on practice principally in Queensland is tantamount to a requirement to give up the barrister's place of residence in New South Wales. It has no rational and proportionate connection with ensuring that an applicant is suitable for admission to practice as a barrister. The requirement imposed by the Order in Council of 2 July 1987 thus purports to subject Mr Street to discrimination falling within s.117. If Mr Street were to make another application for admission, s.117 would protect him from the requirements relating to

practising principally in Queensland.

42. I would answer the first question in the stated case in the manner proposed by the Chief Justice. It is not appropriate to answer the question in the terms in which it is posed, namely, whether the rules are invalid. Section 117 does not deny their validity but denies their effect on a protected person in Mr Street's position.

43. The discrimination which falls within s.117 does not include the effect of the provisions of r.15B(1) nor the requirement imposed by r.15B(2) of satisfying the Court (in the circumstances there set out) that an applicant for absolute admission "has not pursued any occupation or business other than that proper for a barrister". That is a requirement which has a rational and proportionate connection with suitability for admission by order absolute and which is imposed indifferently on those applicants who rely on prior admission in New South Wales or in certain other jurisdictions whether they be resident in Queensland or in another State. It imposes no burden which is related to out-of-State residence or with which an out-of-State resident would find it more onerous to comply than would an in-State resident. That requirement does not attract the operation of s.117.

44. The appropriate order in Mr Street's appeal is to remit the matter to the Supreme Court of Queensland to hear and determine his original application in conformity with the law as stated by this Court.

45. The law, which today pushes open the doors of the Supreme Court of Queensland for entry by suitably qualified barristers admitted and practising in other States, opens too the doors of State universities, hospitals and other institutions for entry by subjects of the Queen resident in other States on the same terms as residents of the relevant State. If a State were able to grant preference to its own residents in its own institutions there could be no valid objection to Queensland's grant of preference in its Courts to its resident Bar. Section 117 precludes that preference.

46. Assuming that Mr Street is otherwise qualified, he will be entitled to an order by the Supreme Court of Queensland admitting him to practise as a barrister of that Court.

47. As Mr Street's argument on s.117 succeeds, it is unnecessary to consider the argument founded on s.92 or to answer the second question which the stated case reserved for consideration by this Court.

DEANE J. It is often said that the Australian Constitution contains no bill of rights. Statements to that effect, while literally true, are superficial and potentially misleading. The Constitution contains a significant number of express or implied guarantees of rights and immunities. The most important of them is the guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by the "courts" designated by Ch.III (s.71). Others include: the guarantee that the trial on indictment of any offence against any law of the Commonwealth shall be by jury (s.80); the guarantees against discrimination between persons in different parts of the country in relation to custom and excise duties, and other Commonwealth taxes and bounties (ss.51(ii), 51(iii), 86, 88 and 90); the guarantee of freedom of inter- State trade, commerce and intercourse (s.92); the guarantee of direct suffrage and of equality of voting rights among those qualified to vote (ss.24 and 25); the guarantee of the free exercise of religion (s.116); and the guarantee against being subjected to inconsistent demands by contemporaneously valid laws (ss.109 and 118).

2. All of those guarantees of rights or immunities are of fundamental importance in that they serve the function of advancing or protecting the liberty, the dignity or the equality of the citizen under the Constitution. Some of them, such as ss.71, 90, 92, 109 and 118, are also integral parts of the very structure of the federation. Section 117 falls into that last- mentioned category. Its immediate operation is to protect the citizen resident in one State from being subjected in another State to "disability or discrimination" of the kind which it designates. It also constitutes a structural provision directed to the promotion of national economic and social cohesion and the establishment of a national citizenship.

3. There was, in earlier years, a tendency in some judgments in the Court to distort the content of some of these constitutional guarantees by restrictive legalism or by recourse to artificial formalism. Thus, a series of decisions culminating in Grannall v. Marrickville Margarine Pty. Ltd. [1955] HCA 6; (1955) 93 CLR 55, at p 78, and Mansell v. Beck [1956] HCA 70; (1956) 95 CLR 550, at pp 564-565, substituted for s.92's substantive guarantee of the freedom of inter-State trade and commerce, a ritualistic formula which was quite inadequate to address the substance of protectionism and which could itself constitute an actual source of substantive inequality to the detriment of the local trader (cf. Miller v. TCN Channel Nine Pty. Ltd. [1986] HCA 60; (1986) 161 CLR 556, at p 618). Another series of decisions culminating in Bolton v. Madsen [1963] HCA 16; (1963) 110 CLR 264 undermined s.90's protection of the local manufacturer or trader, faced with inter-State competition, from the disadvantageous burden of locally imposed excise duties (cf. Hematite Petroleum Pty. Ltd. v. Victoria [1983] HCA 23; (1983) 151 CLR 599, at pp 660-662) by denying the character of an "excise duty" (for the purposes of s.90) to any tax which, regardless of substance, failed to satisfy the formal requirements of a formularized criterion of operation. Yet another series of cases culminating in Zarb v. Kennedy [1968] HCA 80[1968] HCA 80; ; (1968) 121 CLR 283 lent support for a restrictive construction of s.80 which, by ignoring substance in favour of form, would make the Constitution's prescription of trial by jury a hollow mockery which could be avoided by the stratagem of subjecting persons accused of even the most serious of offences to summary trial by a magistrate.

4. Likewise, the decisions of this Court on s.117 of the Constitution represent, while they stand, a triumph of form over substance. In Davies and Jones v. The State of Western Australia [1904] HCA 46; (1904) 2 CLR 29, it was held that the section's guarantee that a resident of a State shall not be subject in another State to any disability or discrimination "which would not be equally applicable to him" if he were resident in that State is not infringed if the discrimination or disability is the result of a failure to satisfy a dual requirement of residence and domicile. A discrimination based on "domicile" was not, so it was said, within the purview of the section and the protection of the section only applied in relation to discrimination or disability based solely on residence (see per Barton J. at p 47 and per O'Connor J. at p 49). In Henry v. Boehm [1973] HCA 32; (1973) 128 CLR 482, it was held by a majority of the Court (Barwick C.J., McTiernan, Menzies and Gibbs JJ.; Stephen J. dissenting) that a requirement of the South Australian Rules of Court that an applicant for admission as a legal practitioner "reside ... in the State continuously" for three months preceding the filing of his notice of application and for a further twelve months between conditional and absolute admission did not infringe the section's guarantee for the reason that it applied indifferently to both residents and non-residents of South Australia. The fact that the Rules went on to provide that the particular residential requirements did not apply at all to an applicant who satisfied the Board of Examiners "that he ordinarily resides in and is domiciled in this State" did not affect the position since the inclusion of the requirement of domicile meant that any discrimination or disability was not "made by the rules on the basis of residence alone" (see per Barwick C.J. at p 488). Upon analysis, the two decisions stand as authority for the proposition that, putting to one side

the case of a merely colourable attempt to avoid the operation of the section, a law will contravene s.117 only if it imposes a disability or discrimination which is based solely on the precise "ground" or "basis" that the person in question is not "resident" in the relevant State in the particular sense of having a degree of permanency of residence there (see, e.g., Davies and Jones v. Western Australia, at pp 47, 53; Henry v. Boehm, at pp 488, 493, 496). That being so, discrimination or disability based on domicile or mere temporary residence is outside the scope of the section notwithstanding that permanent residence will ordinarily be determinative of domicile and temporary residence will commonly be an incident of permanent residence. Henry v. Boehm is also authority for the general proposition that the question whether a disability or discrimination is based solely on non-residence in the relevant sense falls to be determined by reference to the formal operation of the impugned law and not its substantive effect (see per Barwick C.J., with whom McTiernan J. agreed, at p 489 and per Menzies J. at p 491). Indeed, the effect of the majority judgments in the case seems to me to be to substitute yet another formularized formal criterion of operation for the words of the Constitution. Thus Barwick C.J. commented (at p 489):

> "Section 117 relates to disability or discrimination imposed or created by legislation. At least prima facie therefore being a resident of another State must be made by the law the basis of the imposition or creation of the disability or discrimination. But, of course, the necessary direct effect of the operation of a statute or statutory provision according to its true construction must be regarded in considering whether the law does make residence out of the State a criterion of its operation."

5. In the recent cases of Cole v. Whitfield [1988] HCA 18; (1988) 165 CLR 360 and Philip Morris Ltd. v. Commissioner of Business Franchises [1989] HCA 38; (1989) 63 ALJR 520; 87 ALR 193, the Court unambiguously rejected the preference of form for substance in the construction of the provisions of s.92 and s.90 of the Constitution. In Cole v. Whitfield (at p 408), it was pointed out that it was simply impossible to extract from the substantive guarantee of s.92 "a formula which was capable of automatic application by reference to the formal operation of a law." In Philip Morris Ltd. v. Commissioner of Business Franchises, all members of the Court other than Dawson J. rejected the preference of form over substance which underlay the formularized criterion of liability which had been enunciated by a unanimous Court in Bolton v. Madsen as the touchstone of a duty of excise for the purposes of s.90. For his part, Dawson J. indicated that his continued acceptance of the criterion of liability formula was founded not on a preference for form over substance in the construction of a constitutional provision but on his Honour's view that, on the current state of the authorities, it was impossible "to identify the substance which ought to prevail" (at p 545; p 236 of ALR). It is in the context of the rejection in these two recent cases of the preference for mere form over substance which was involved in the substitution of a formularized criterion of operation or liability for the words of the Constitution that one must approach the question whether the earlier decisions on s.117 of the Constitution should be allowed to stand.

6. The reference in s.117 to a "subject of the Queen" must be understood, in contemporary circumstances, as a reference to a subject of the Queen of Australia, that is to say, as a reference to

an Australian citizen (see Nolan v. Minister for Immigration and Ethnic Affairs [1988] HCA 45; (1988) 165 CLR 178, at pp 185-186). In terms, the section confers upon such a "subject of the Queen" who is resident in any State an immunity from being "subject in any other State to any disability or discrimination which would not be equally applicable to him if he were ... resident in such other State" (emphasis added). As Stephen J. pointed out in Henry v. Boehm (at p 501-502), what the section requires is a comparison between the non-resident citizen's actual position under the impugned law and the position in which he would be under that law if he were resident in the particular State. If the non-resident citizen is subjected in that State to discrimination or disability which would not be "equally applicable to him" if he were resident, the guarantee of s.117 will, to that extent, be infringed. There is neither need nor justification for diverting attention from the comparison which the section in terms requires by a formularized requirement to the effect that the particular discrimination or disability must be based solely on non-residence (i.e. "residence out of the State": per Barwick C.J., above) in the sense that "non-residence" constitutes the formal "criterion of operation" of the relevant law. To the contrary, such a formula will inevitably constrict and distort the plain meaning of the words of s.117 for so long as it focuses exclusively upon the comprehensive negative notion of non-residence and disregards the elements involved in the positive notion of being "resident" which the section identifies as the basis of the requisite comparison. I turn to explain why that is so.

7. Whatever be its precise abstract connotation, the notion of being "resident in a State" is a complex one, ordinarily involving, in a concrete case, the interaction of a number of constituent factors. Let it be assumed, for the sake of argument, that the notion of being "resident in State X" embraces "a", "b" and "c" as necessary and sufficient elements. On that assumption, the injunction of s.117 could be relevantly translated as "A citizen who is resident in a State other than State X shall not be subject in State X to a discrimination or disability which would not be equally applicable to him or her if he or she were resident in State X, that is to say, if he or she were "a", "b" and "c"". That being so, a law of State X which imposed a discrimination or disability on a citizen who was resident in another State on the sole "basis" (or by reference to a formal "criterion of operation") of non-"b" would infringe the guarantee of s.117 since the non-resident citizen would, if he or she were resident in State X, be "b" and therefore not subject to the particular discrimination or disability. Such a law would not, however, infringe Henry v. Boehm's substituted formula to the effect that a law will not infringe s.117 unless the comprehensive notion of "non-residence" is made the sole "basis" or "ground" of the discrimination or disability since such a law focuses on only one element of that notion.

8. It is true that the example in the above passage is necessarily hypothetical in that, while the notion of residence is a complex one, it is not one which can be subdivided, in the abstract, into a number of discrete, necessary and sufficient elements or factors. Regardless of the precise meaning which one gives to the word "resident" in s.117, the relative importance, and even the identity, of the factors which are determinative of whether a particular person is or is not resident in a particular State are likely to vary from case to case. So to say does not, however, undermine the relevance of the example. To the contrary, it serves to underline the artificiality and unacceptability of any attempt to displace the comparison which s.117 requires to be made between the actual position of the particular non-resident and the position in which he or she would have been if he or she were a resident by a formula which ignores the position of the affected person and focuses solely on the formal operation of the impugned law. Even though it is not possible precisely to identify in the abstract a number of necessary and sufficient elements of the notion of being a resident for the purposes of s.117, it is apparent that a formula which precludes the applicability of s.117 in any case where the law is not based solely on the comprehensive notion of non- residence or residence will

fail to reflect the plain meaning of the words of the section. If, for example, the discrimination or disability to which a particular non-resident was subjected was based on the "absence of any connection" with the legislating State, it would not be based solely on non-residence. Nonetheless, such a discrimination or disability would plainly satisfy the requirement of the section that it be one "which would not be equally applicable to" the affected non-resident if he or she were a resident of that State. It may be arguable that this inadequacy of the "sole basis" formula could be overcome by a reformulation which widened the proscribed basis of discrimination or disability so that it included, in addition to non-residence, the absence of any attribute or incident of residence. Any such reformulation would not, however, overcome a more general objection to the substitution, for the words of s.117, of a formula which pays regard only to the formal operation of an impugned law.

9. It is a long-settled general principle of construction that the provisions of a national constitution must be broadly interpreted and applied: their substance should not to be confounded by narrow technicality or legalism (see, e.g., Jumbunna Coal Mine, No Liability v. Victorian Coal Miners' Association (1908) 6 CLR 309, at pp 367-368; Reg. v. Coldham; Ex parte Australian Social Welfare Union [1983] HCA 19; (1983) 153 CLR 297, at p 314). In particular, a constitutional guarantee, such as that contained in s.117, calls for "a generous interpretation ... suitable to give to individuals the full measure of the fundamental rights and freedoms referred to" (Minister of Home Affairs v. Fisher (1980) AC 319, at p 328; and see, also, Maneka Gandhi v. Union of India (1978) 2 SCR. 621, at p 670; Hunter v. Southam Inc. (1984) 2 SCR. 145, at pp 155-156). A "close and literal construction deprives (such guarantees) of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance" (Boyd v. United States [1886] USSC 48[1886] USSC 48; ; (1886) 116 US 616, at p 635; Byars v. United States [1927] USSC 3; (1927) 273 US 28, at p 32). That general principle of construction precludes the substitution of a rigid and artificial formula for a constitutional provision such as s.117 and requires that regard be had to substance rather than mere form both in the construction of such a provision and in its application to the facts of a particular case. If authority in this Court be required for that last-mentioned proposition, the above-mentioned cases of Cole v. Whitfield and Philip Morris Ltd. v. Commissioner of Business Franchises supply it. In my view, neither the "sole basis" formula nor the disregard of substance which it involves should be allowed to survive those two cases. To the contrary, the provision of s.117 should, in accordance with settled principle, "be construed with all the generality which the words used admit" (per Dixon C.J., Kitto, Taylor, Menzies, Windeyer and Owen JJ., Reg. v. Public Vehicles Licensing Appeal Tribunal (Tas.); Ex parte Australian National Airways Pty. Ltd. [1964] HCA 15[1964] HCA 15; ; (1964) 113 CLR 207, at p 225) and with regard being had to substance rather than mere form. That being so, s.117 protects a non-resident from being subjected to disability or discrimination of the type to which it refers regardless of whether the disability or discrimination is directly imposed or is the indirect result of the operation of the relevant legislative provisions (e.g. the confinement of a benefit or advantage to a class which excludes a non-resident). If the substance of what is involved is disability or discrimination of the type referred to in s.117, mere differences in the form of the relevant legislation will not be effective to take it beyond the reach of the constitutional guarantee.

10. The words of s.117 must, of course, be construed in their context in a constitution which is founded upon the existence of the various States as distinct entities under the federation. So construed, s.117 does not require that no distinction at all be drawn in a State between non-resident and resident. Section 117 only applies when a non-resident is "subject to ... disability or discrimination". Those words, construed in their constitutional context, convey the notion of some superimposed incapacity or disadvantage in the sense that the incapacity or disadvantage, regardless

of whether it be direct or indirect, does not flow naturally from the structure of the particular State, the limited scope of its legislative powers or the nature of the particular right, privilege, immunity or other advantage or power to which it relates. Thus, a provision in a State constitution conferring particular voting rights in State elections upon residents of the State as a whole or upon persons resident in particular electorates in the State will have the effect of precluding non-residents from voting. The incapacity of the non-resident to vote flows, however, not from some superimposed disqualification or qualification but from the nature of the franchise in a political system based, to a significant extent, on residential divisions and representation. A similar comment could be made of a federal law precluding a person resident in Victoria who happened to be present in New South Wales from voting in the election of New South Wales senators. Again, State financial assistance to a particular class of its residents (e.g. a rental subsidy to disadvantaged tenants) could place an ineligible visitor who was resident (and a tenant) in another State at a comparable disadvantage if that other State provided no such subsidy. The disadvantage would, however, not flow from the subjection of the non-resident to a disability or discrimination. It would flow naturally from the nature of the subsidy and the scope of State powers and responsibility under the constitutional division of governmental authority. Yet again, a requirement that a person who lacks the requisite intra-State qualifications have certain extra-State qualifications or be subjected to some scrutiny of competence before holding himself or herself out as qualified and competent to carry on practice as a medical practitioner or a solicitor or barrister in a State will not involve subjecting a non- resident to disability or discrimination for the purposes of s.117 if the requisite qualifications or scrutiny represent no more than regulation of a kind necessary to protect the public. Such regulation flows naturally from what is involved in the practice of medicine or law and the obvious need to protect the public from unqualified and incompetent practitioners.

11. Apart from the phrase "subject ... to any disability or discrimination", the aspect of s.117 which is most likely to give rise to difficulty in the construction and application of the section is the descriptive phrase "which would not be equally applicable to him if he were a subject of the Queen resident in such other State." Even if one accepts the view of the majority in Henry v. Boehm (see, per Barwick C.J. at pp 488-489; per Gibbs J. at p 497) that the word "resident" in s.117 is used in the particular sense of connoting an idea of permanence, that descriptive phrase will plainly have a distributive operation in that it will encompass not only those cases where the relevant legislative qualification or disqualification is residence or non-residence in that sense but also those cases where, regardless of the form of the legislation, a non-resident is made subject to a relevant disability or discrimination which would not, as a matter of substance, be "equally applicable" to the person affected if he were a resident. In that regard, the significance of the word "equally" in s.117 should not be ignored or discounted. Thus, for example, a State law which subjects persons who do not satisfy a requirement that they be present in the State for a continuous period of three months to some "disability" or "discrimination" (i.e. within the meaning of those words as used in s.117) might be said to make "no distinction between" residents (in the sense of permanent residents) and non-residents (see Henry v. Boehm, at p 489). It could not, however, properly be said that, as a matter of substance, the actual disability or discrimination to which such a law subjects a particular non-resident who was, during the relevant period, present in his home State would have been "equally applicable" to him if he were a resident of the first-mentioned State. In so far as such a non-resident is concerned, the law subjects him to a disability or discrimination as a consequence of his having been present at the place where he permanently resides. If he were a resident, his continuous presence at the place where he permanently resides would have protected him from, rather than subjected him to, that disability or discrimination. Similarly, a law which subjects a non-resident to a "disability" or "discrimination" if he has failed to carry on business principally within the

particular State for a particular period cannot properly be seen as subjecting the particular non-resident trader to a disability or discrimination which would be "equally applicable" to him if he were a resident. In so far as a trader who carries on business principally in his home State is concerned, such a law will subject him to the particular disability or discrimination if, and only if, he is not resident in the particular State.

12. In the present case, the effect of the Rules of the Queensland Supreme Court prior to their amendment on 2 July 1987 was held by the Full Court of the Supreme Court, in accordance with earlier authority, to be that the applicant was precluded from being admitted to the Queensland Bar on the basis of his qualification as a member of the New South Wales Bar unless he became a resident of Queensland and ceased to carry on practice in New South Wales. There is obviously some force in an argument advanced on behalf of the applicant to the effect that that construction of the Rules gives undue substantive effect to the somewhat ambiguous contents of a prescribed form. The Rules must, however, be construed in their proper historical context and it appears to me that, when construed in that context, they did impose the requirements which the Full Court attributed to them. It was solely on the ground that the applicant failed to satisfy those requirements of residence and ceasing to carry on practice elsewhere that the Full Court refused his application for admission. As Connolly J. observed in the Full Court ((1988) 2 Qd R 209, at p 210):

> "He (i.e. the applicant) is in all respects qualified to be admitted as a barrister in Queensland, save that he intends to continue as a resident of New South Wales and has not ceased to practise and does not intend to cease to practise as a barrister (of) his State of residence."

Since the Full Court's decision, the Rules have been amended to substitute, for those requirements, a less stringent requirement to the effect that an applicant for admission as a barrister in Queensland on the basis of his qualification as a barrister of another State must have the intention of practising principally in Queensland and must so practise during the twelve months between conditional and absolute admission. The Rules in their present form still preclude the applicant from being admitted to the Queensland Bar since he intends to continue to practise principally in New South Wales.

13. In the light of the material before the Court and in the context of modern circumstances in this country including the existence of a unitary system of law administered in the various States and Territories by both national and State courts (see Breavington v. Godleman [1988] HCA 40; (1988) 62 ALJR 447, at pp 472-473 [1988] HCA 40; ; 80 ALR 362, at pp 403-406), the conclusion is inevitable that neither the old requirements of residence in Queensland and ceasing to carry on practice elsewhere nor the new requirement of carrying on practice principally in Queensland can properly be seen as flowing naturally from, or being a natural incident of, the privilege of practising as a barrister in Queensland in the sense of being a necessary professional qualification or safeguard. The origin and basis of those restrictions is to be found in the conviction - no doubt genuine - that it is necessary or desirable, from the point of view of maintaining the overall strength of the local Queensland Bar, that out-of-State practitioners be precluded from being "brought in" to appear in cases before Queensland State courts. In those circumstances, the requirements of residence and sole practice in Queensland under the old Rules and the requirement of principal practice in Queensland under the amended Rules must all be seen as superimposed. They are superimposed barriers in the path of the practitioner from another State who desires to practise in

Queensland. That being so, the non-resident practitioner who is precluded from being admitted to the Queensland Bar because he or she resides or carries on practice in his or her home State (under the old Rules) or principally carries on practice in his or her home State (under the amended Rules) is, in my view, subjected to a "disability" and "discrimination" within the meaning of those words as used in s.117. The question arises whether that disability or discrimination is, for the purposes of that section, one "which would not be equally applicable to him if he were" a resident in Queensland.

14. Under the amended Rules, an inter-State barrister who relies on his or her qualification as such cannot be admitted to practice in Queensland otherwise than on the basis that he or she will carry on practice principally in Queensland. Where an applicant is, and intends to remain, a resident of a State other than Queensland, the effect of that requirement is that he or she is disabled from being admitted to the Queensland Bar otherwise than on the basis that he or she will carry on practice principally in a State other than the State in which he or she resides. If such an applicant were a resident of Queensland, he or she would not be subjected to that disability at all. It follows that the disability which the amended Rules would impose upon the applicant is a disability which would not be equally applicable to him if he were resident in Queensland. The position is a fortiori under the Rules prior to their amendment in that, under the Rules in that earlier form, non-residence in Queensland was of itself a disqualifying factor and the added requirement that practice be solely in Queensland was even more onerous, from the point of view of the non-resident, than is the requirement under the amended Rules.

15. It follows that the requirements of residence in Queensland and ceasing to carry on practice elsewhere upon which the Full Court of the Supreme Court relied in refusing to admit the applicant to the Queensland Bar could not validly apply to him by reason of the provisions of s.117 of the Constitution. The applicant is, for the reasons given by the Chief Justice and Dawson J., entitled to have his appeal from that decision of the Full Court determined on the basis of the Rules in their earlier form (i.e. prior to their amendment on 2 July 1987). In the circumstances, the appropriate course appears to me to be to set aside the order of the Full Court and remit the matter to that court so that it may deal with the application and make the orders which their Honours would have made were it not for their view that those requirements were applicable to the applicant.

16. There are four additional matters which should be mentioned. The first is that it should be apparent from what has been said above that I am of the view that the conclusion reached by Stephen J. in his dissenting judgment in Henry v. Boehm is to be preferred to that reached by the majority in that case. In my view, Henry v. Boehm should be overruled. The second is that I consider that the distinction drawn between "residence" and "domicile" in Davies and Jones v. Western Australia is, in the ordinary case, illustrative of the sort of "tabulated legalism" which should be "avoided" in the construction of a fundamental constitutional guarantee such as s.117 (cf., per Lord Wilberforce, Minister of Home Affairs v. Fisher, at p 328). Section 117 looks to the position of the non-resident citizen affected by the relevant disability or discrimination. In the ordinary case, the identity of the State in which a citizen is domiciled corresponds with, and depends upon, the identity of the State in which he is permanently resident and there is no practical significance between a disability or discrimination based on domicile and one based on residence. It was thus in Davies and Jones v. Western Australia. Accordingly, I am of the view that the decision in that case should also be overruled. The third additional matter which I would mention is that it is unnecessary for the purposes of the present case to consider whether s.117 is applicable to Commonwealth laws or to disability or discrimination resulting from executive action or is concerned only with "disability or discrimination imposed or created by (State) legislation" (see per

Barwick C.J., Henry v. Boehm, at pp 487, 489).

17. The final additional matter arises from the provisions of the amended Rules to the effect that an applicant for admission who relies upon a previous admission shall in the first place be admitted conditionally for a period of one year and must not, during that period, pursue any occupation or business other than that proper for a barrister. Those provisions are severable from the requirement that, during the period of conditional admission, an applicant principally carry on practice in Queensland. They appear to me to fall in a different category to that requirement in that they can properly be seen as flowing naturally from, or being a natural incident of, the privilege of being admitted to practice as a barrister in Queensland in the sense that they represent no more than a reasonable professional qualification or safeguard. That being so, those provisions are properly to be seen as merely regulatory of the Queensland legal profession and as not involving the subjection of the non-resident to discrimination or disability. They are not, however, applicable to the applicant's current application for admission which must, as has been said, be disposed of pursuant to the Rules in their earlier form.

18. In the result, I would grant special leave to appeal, allow the appeal, set aside the order of the Full Court of the Supreme Court refusing the applicant's application for admission as a barrister and remit the matter to that court so that orders can be made for the applicant's admission. I would answer Question 1 in the stated case: Rule 15(e), Form 10(6) and Rule 15B(2) are inapplicable to the applicant to the extent that they would require him, on any fresh application for admission, to have an intention of practising principally in Queensland or so to practise during the period between conditional and absolute admission. My conclusion as to the effect of s.117 makes it unnecessary that I deal with the applicant's alternative argument based on s.92 of the Constitution. Accordingly, it is unnecessary to answer Question 2 of the stated case.

DAWSON J. The plaintiff is resident in New South Wales and carries on practice as a barrister of the Supreme Court of that State. He is also admitted to practise in Victoria, South Australia and the Australian Capital Territory. He applied for admission to practise as a barrister of the Supreme Court of Queensland. On 22 May 1987, his application was refused by that Court.

2. The admission of barristers in Queensland is governed by rules made under The Supreme Court Act of 1921 (Q). At the time the plaintiff made his application and at the time it was refused, r.15(4) provided for the admission, upon a reciprocal basis, of a person duly admitted, as was the plaintiff, as a barrister in New South Wales. Rule 38 provided in par.(c) that every person seeking admission should file an affidavit which set out his compliance with the rules. Paragraph (d) of the same rule provided that, if he relied upon a previous admission, the applicant should include in his affidavit "the matters set out in Form 10".

3. Form 10, which was contained in a schedule to the rules, commenced with the words "I, A.B., of , in the State of Queensland, esquire, do make oath and say that- ". It contained in par.(6) the allegation "That I ceased to practise as a barrister in (here set forth the dates when the applicant ceased to practise in the various Courts to which he has been admitted, and the nature of his employment hereafter.)", and in par.(7) the further allegation "That I arrived on the day of , 19 , in the State of Queensland." Rule 57 provided that the forms in the schedule to the rules "shall be adopted and they shall be applied where appropriate". It is thus clear that the matters contained in Form 10 were authorized by the rules and formed part of them.

4. In refusing the plaintiff's application for admission, the Full Court of the Supreme Court of

Queensland applied its own previous decision in Re Sweeney (1976) Qd R 296. In that case, the Court held that the effect of the relevant rules and Form 10 was that an applicant for admission who was previously admitted elsewhere should have ceased to practise in the other jurisdiction or jurisdictions in which he was admitted and should have become a resident of Queensland. The plaintiff argued that if this was so, the relevant rules contravened s.117, and were invalid by reason of s.92, of the Constitution. Both arguments were rejected and the plaintiff's application was refused upon the grounds that he had not ceased to practise elsewhere and had not become a resident of Queensland. Connolly J., who delivered the principal judgment, said of the plaintiff: "He is in all respects qualified to be admitted as a barrister in Queensland, save that he intends to continue as a resident of New South Wales and has not ceased to practise and does not intend to cease to practise as a barrister (in) his State of residence."

5. On 10 June 1987, the plaintiff filed notice of an application for special leave to appeal from the decision of the Full Court. On 2 July 1987, the rules were amended by Order in Council. A new par.(e) was added to r.15 requiring an applicant for admission who relied upon a previous admission to "have the intention of practising principally in Queensland". A new rule, r.15B, was inserted providing that an applicant who relied upon a previous admission should in the first place be admitted conditionally only for a period of one year and that thereafter he might be granted absolute admission if he satisfied the court that, since his conditional admission, "he has practised principally in Queensland and has not pursued any occupation or business other than that proper for a barrister". Form 10 was amended and the amendments included the substitution for pars (6) and (7) of a new par (6) containing the allegation "It is my intention to practise principally in the State of Queensland commencing on (here set forth any relevant date)."

6. When the application for special leave came on for hearing it was opposed, mainly upon the ground that, by reason of the amendment to the rules, the questions raised by the plaintiff under ss.92 and 117 of the Constitution were academic. The Court was of the view that, even if the old rules had ceased to apply, nevertheless the issues under the amended rules remained substantially the same. Accordingly, it adjourned the application for special leave to enable the plaintiff to issue fresh proceedings based upon the amended rules. The plaintiff issued a writ seeking declarations, with the result that a case was stated by the Chief Justice submitting the following questions for determination by the Court:

> "1. Are the Rules of the Court relating to the admission of Barristers of the Supreme Court of Queensland, as amended by Order in Council dated the 23rd July 1987 (sic), invalid as being contrary to Section 117 of the Constitution?
> 2. Are the Rules of the Court relating to the admission of Barristers of the Supreme Court of Queensland, as amended by Order in Council dated the 23rd July 1987 (sic), invalid as being contrary to Section 92 of the Constitution?"

7. The plaintiff continues to pursue his application for special leave to appeal, contending that he has a right to be admitted under the old rules if those rules requiring him to have ceased to practise in other jurisdictions or to have become a resident of Queensland have no valid application to him.

Having regard to the observation of Connolly J. that the plaintiff had, at the time the Supreme Court delivered judgment, otherwise complied with the old rules, it would appear that the plaintiff is entitled to maintain his position provided that the amendments to the rules, with which he has not complied, did not abrogate any rights which he had acquired. Assuming for present purposes the validity of the amendments, the effect of s.20 of the Acts Interpretation Act 1954 (Q) is, unless the contrary intention appears, to preserve any right which had accrued before the amendments were made and also any "legal proceeding, or remedy in respect of any such right". Section 20 speaks of rights under an Act but, under s.5(2) of the Act, unless the contrary intention appears, "Act" extends to include Orders in Council. No contrary intention appears in The Supreme Court Act of 1921 or the rules either to the extension of the meaning of "Act" or to the preservation of the plaintiff's accrued right and his remedy in respect of that right. Accordingly, if the plaintiff is able to establish his right to disregard the rules requiring him to cease practice outside Queensland and take up residence in Queensland, he will have established his entitlement to admission to practise and to appropriate relief. Whilst the rules in their unamended form are no longer of general application, the questions raised by the plaintiff under ss.92 and 117 are of general importance and are not dependent upon the particular form of the relevant rules. I would, therefore, grant special leave to appeal.

8. The argument based upon s.92 hinges upon the fact that the plaintiff wishes to be admitted to practise in Queensland whilst remaining resident in and whilst intending to practise principally in New South Wales. For the purposes of this argument, and of the argument based upon s.117, it was assumed that the effect of the unamended rules was to require the plaintiff to have ceased practice outside Queensland and to have become a resident of Queensland.

9. The plaintiff contends that the rules in question offend s.92 by restricting both freedom of trade and commerce and freedom of intercourse among the States. In both instances the restriction is alleged to be of a protectionist kind, having the purpose and effect of protecting members of the Queensland Bar from interstate competition: see Cole v. Whitfield [1988] HCA 18; (1988) 165 CLR 360, at p 407.

10. So far as trade and commerce are concerned, before reaching any question of protection the plaintiff must first establish that the activities he claims to be restricted, namely, those involved in the practice of a barrister in more than one State, constitute both trade or commerce and trade or commerce of an interstate character.

11. In his submission that the practice of a barrister constitutes trade or commerce, the plaintiff encountered immediate difficulties. Notwithstanding a possible shift in attitudes in these more egalitarian days, it is perfectly plain that at the time the Constitution was framed a distinction was drawn between the recognized professions and trade and commerce. No submission was put to the contrary, despite the tendency nowadays to describe as professional many activities which are of a distinctly commercial character. There can be no doubt that in 1900 a barrister was not regarded as being engaged in trade or commerce. Perhaps it is the perception of elitism in the distinction between trade and the professions which has led to some debasement of the notion of a profession. Nevertheless, the practice of the law, together with divinity and medicine, has traditionally been regarded as professional and was so regarded in 1900.

12. I speak of 1900, the time of federation, because it is in accordance with the meaning given at that time that the limits of the phrase "trade and commerce" must be ascertained. The essential meaning of the Constitution must remain the same, although with the passage of time its words must

be applied to situations which were not envisaged at federation. Expressed in the technical language of the logician, the words have a fixed connotation but their denotation may differ from time to time. That is to say, the attributes which the words signify will not vary, but as time passes new and different things may be seen to possess those attributes sufficiently to justify the application of the words to them.

13. This technical use of the words "connotation" and "denotation" was adopted by John Stuart Mill and is described in his A System of Logic: Ratiocinative and Inductive, (1875), at pp 31-42. It is almost the converse of the popular or etymological use of those words in which "to denote" merely means to signify and "to connote" means to signify in addition. In The Commonwealth v. Tasmania (The Tasmanian Dam Case) [1983] HCA 21; (1983) 158 CLR 1, at pp 302-303, I intentionally used the two words in their popular sense, preferring that to the way in which they are used by the logician. I now doubt the wisdom of having done so. Previous judgments had used the terms in their technical sense more or less consistently for many years and, upon reflection, that usage seems to offer a precision which the popular usage does not. See Attorney-General for N.S.W. v. Brewery Employes Union of N.S.W. (Union Label Case) [1908] HCA 94; (1908) 6 CLR 469, at p 610; Lansell v. Lansell [1964] HCA 42; (1964) 110 CLR 353, at pp 366, 369, 370; Commissioner for Railways (N.S.W.) v. Scott [1959] HCA 29[1959] HCA 29; ; (1959) 102 CLR 392, at p 458; Reg. v. Federal Court of Australia; Ex parte W.A. National Football League [1979] HCA 6; (1979) 143 CLR 190, at pp 233-234; Uebergang v. Australian Wheat Board [1980] HCA 40; (1980) 145 CLR 266, at p 294; Attorney-General (Vict); Ex rel. Black v. The Commonwealth [1981] HCA 2; (1981) 146 CLR 559, at p 578.

14. What matters more than the terminology is the principle which lies behind it and that has never been doubted. It is that the limits within which a constitutional prescription operates do not change, however much changing circumstances may allow it to be applied to new situations. I should, of course, add that to say as much does not necessarily make it any easier to arrive at the limits, or the fixed connotation, of an expression. But in this case it has not been disputed, nor could it be, that the attributes of "trade" and "commerce", signified by their connotation at the time of federation, were not such as to embrace the profession of a barrister. There is nothing in s.92 or its context to suggest that those words were used in anything other than their ordinary sense.

15. The plaintiff's argument was that the meaning of the words "trade" and "commerce" has changed and that the modern conception of trade and commerce is broad enough to embrace the activities of a barrister, even though they were previously regarded as purely professional. As I understand it, this is said to be so for two reasons. First, because the charging of a fee is now sufficient to bring the provision of any service within the description of trade or, at any rate, commerce. Secondly, since in the practice of his profession a barrister may serve trade and commerce, he is himself engaged in trade and commerce. Both of these contentions are, I think, fallacious. In any event, they involve ascribing to the words "trade" and "commerce" in s.92 a new and different meaning - an enlarged connotation - beyond that which they originally bore. Upon any accepted view that is impermissible.

16. Had it been possible to do so, it would, of course, have been open to the plaintiff to argue that the practice of the profession of a barrister since 1900 has so changed in nature as to justify its now being described as trade or commerce in the sense in which those words are used in s.92. But no such argument was put for the obvious reason that, of all the professions, that of a barrister has changed least since federation. There has been no significant difference in the nature of a barrister's practice since then upon which to found such an argument.

17. A barrister has always rendered a fee for his services and that has never been thought to make those services of a commercial rather than a professional kind. A barrister's work is not by reason of its reward deprived of its professional character involving, as it does, the application of special learning and the maintenance of standards imposed, not by the terms of his retainer, but by the nature of his calling. Nor does the fact that a barrister may undertake cases of a commercial nature involve any alteration in the professional quality of his practice. A barrister appearing for or advising a person engaged in trade does not thereby become a trader any more than a barrister engaged in a criminal case becomes a criminal. The essential nature of a barrister's function remains the same whatever the jurisdiction in which he is engaged and does not become clothed with the character of his client's pursuits. True it is that a court's function may be seen as incidental to the trade or commerce of parties who invoke its jurisdiction, as may the exertions of a barrister appearing before it. But it could hardly be questioned that a court is not engaged in trade and commerce even when dealing with cases of a commercial nature.

18. Even if I am wrong in what I have said and it is correct to regard a barrister as being engaged in trade or commerce, I should nevertheless not regard him as being engaged in trade or commerce of an interstate character. To plead a cause in court is to do something which is essentially local. It is not something which it is possible to do across State boundaries. Even if the location in which a case is being argued changes from one State to another, as can now occur quite commonly, the change does not convert the pleading or hearing of the case into traffic of an interstate kind. Nor is advice given by a barrister an interstate dealing even if the advice is given to a person in another State. The giving of advice may involve an interstate communication, which may itself form part of interstate commerce, but that is all. The position is no different if the barrister receives his fee from an interstate source. To adapt the words of Dixon C.J. in Hospital Provident Fund Pty. Ltd. v. State of Victoria [1953] HCA 8; (1953) 87 CLR 1, at p 15, neither the retainer of a barrister nor the performance of his duties contemplates or of its nature involves the movement from one place to another of things tangible or intangible, and certainly not from a place in one State to a place in another.

19. Of course, if a barrister's practice extends beyond one State, he himself may have to cross State boundaries in order to carry out his functions. No doubt his passage will constitute intercourse among the States, but what is done by him upon arrival can scarcely do so. It is he, and not the case which he argues, who travels interstate. If he is precluded from arguing a case in another State, that may remove his motive for crossing the State boundary, but it does not impair his capacity to do so. It can hardly be contended as a general proposition that the restriction of a purely intrastate activity of itself constitutes an interference with the freedom of intercourse of any person from another State who wishes to engage in it.

20. In reliance upon Cole v. Whitfield, it was argued that in a practical sense the relevant rules involved discrimination of a protectionist kind, having both the purpose and effect of protecting Queensland barristers from competition from other States. It was said that this was sufficient to warrant the application of s.92. However, the application of s.92 upon that broad basis would involve a complete disregard of the wording of that section. The trade and commerce of which s.92 ensures freedom is trade and commerce "among the States". If, by its very nature, the activity which is alleged to be trade or commerce is of a purely intrastate character, then any discrimination against classes of persons wishing to engage in that activity will not be discrimination of a kind falling within s.92.

21. But s.92 is not the sole safeguard against discrimination which the Constitution offers. Section

117 is another, aimed as it is at discrimination against a particular class of persons within a State. It is as follows:

> "A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

Reference to the Convention Debates makes it clear enough that the inspiration for s.117 was Art.IV s.2 of the United States Constitution which, so far as is relevant, provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The use of the words "privileges and immunities" occasioned some uncertainties in an Australian context. To overcome this difficulty the provision was recast in a negative form prohibiting the imposition of any disability or discrimination upon the basis of residence in another State. Nevertheless, the fundamental purpose of s.117 is the same as that of Art.IV s.2; Davies and Jones v. The State of Western Australia [1904] HCA 46; (1904) 2 CLR 29, at p 52. That purpose is a federal one, both provisions being designed to ensure that persons from one State are treated in another as citizens of the one nation, not as foreigners: Toomer v. Witsell (1948) 334 US 385, at p 395; Ex parte Nelson (No.2) [1929] HCA 14; (1929) 42 CLR 258, at p 275; Henry v. Boehm [1973] HCA 32; (1973) 128 CLR 482, at p 495. The phrase "subject of the Queen" in s.117 must now be taken to refer to a subject of the Queen in right of Australia and hence to an Australian citizen: Nolan v. Minister for Immigration and Ethnic Affairs [1988] HCA 45[1988] HCA 45; ; (1988) 165 CLR 178, at p 186.

22. Section 117 is unusual in that it is one of the few provisions of the Constitution which speaks in terms of individual freedoms rather than of legislative power. Cf. ss.51(xxxi), 80 and 117. In Davies and Jones v. The State of Western Australia, Griffith C.J. appears to have thought that the effect of s.117 was that Acts should be construed as if they were expressed to be subject to the requirement of the section and thus incapable of being in breach of it. Whether that is the correct approach or whether s.117 invalidates a law passed in contravention of its terms is probably not of practical significance, except perhaps in relation to standing to challenge a particular enactment. Any invalidity would no doubt be confined to the disability or discrimination in question unless the intended operation of the law was dependent upon effect being given to that particular disability or discrimination.

23. Notwithstanding the relative ease with which the broad purpose of s.117 and of Art.IV s.2 can be expressed, the actual language used has given rise to problems of interpretation. It is at this point that the approach adopted in the United States and that adopted in this country have hitherto differed. In the United States the Supreme Court has chosen to give Art.IV s.2 a flexible application having regard to its aim. Here the Court has adopted a somewhat more rigid construction of s.117, paying less regard to the acknowledged purpose of the section than to what was thought to be the meaning of the language which it employs.

24. In Davies and Jones v. The State of Western Australia the Court was concerned with s.86 of the Administration Act 1903 (WA) which imposed probate duty upon the estates of deceased persons. Under that section "in so far as beneficial interests pass to persons bona fide residents of and domiciled in Western Australia" having a specified relationship with the deceased, the rate at which duty was to be assessed was reduced by half. Duty was assessed at the full rate upon property which

passed to a beneficiary who bore a specified relationship to the deceased, but was a resident of and domiciled in Queensland. The duty was paid under protest and the executors sued to recover half the amount claiming that the relevant section was in violation of s.117 of the Constitution.

25. The actual decision in Davies and Jones v. The State of Western Australia was that in the particular instance the real ground of discrimination was domicile and not residence so that there was no basis for the invocation of s.117. In other words, since the beneficiary was not domiciled in Western Australia, duty would not have been assessed at the lesser rate under the Act even if he had been resident in Western Australia. Nevertheless, there is to be found in the judgments, at all events those of Barton and O'Connor JJ., the suggestion that s.117 has no application where a disability or discrimination is subject to some requirement in addition to that of residence. As Barton J. put it at p 47: "It is discrimination on the sole ground of residence outside the legislating State that the Constitution aims at in the 117th section."

26. That approach seems to have been rejected by Griffith C.J. at p 43, where he said of the beneficiary: "Whether, if his legal domicil were in Western Australia instead of in Queensland, he would be entitled to claim the reduction, is a question which it is not necessary to consider." Moreover, it was modified by O'Connor J., at p 53, when he said that "the Constitution does not prohibit a State from conferring special privileges upon those of its own people who, in addition to residence within the State, fulfil some other substantial condition or requirement such as that which is made the condition of the concession allowed in this enactment". The requirement of substance makes it clear that he would not have regarded a merely colourable additional requirement as sufficient to avoid the operation of s.117.

27. However, the word "domiciled" in s.86 of the Administration Act was given a technical construction so as to include a domicile of origin as well as a domicile of choice, thus drawing in the eyes of the Court a real distinction between "bona fide resident" and "domiciled". It was upon this ground that the argument based upon s.117 was rejected. Whether such an approach was unduly restrictive having regard to the ordinary coincidence of domicile and residence, the actual decision in Davies and Jones v. The State of Western Australia does little to establish the scope of s.117.

28. Of more significance is the decision in Henry v. Boehm. In that case, the plaintiff, who was resident in Victoria, relied upon s.117 to contest the validity of the rules regulating the admission of legal practitioners in South Australia. Those rules required a legal practitioner from another State applying for admission to practise in South Australia to "reside for at least three calendar months in the State continuously and immediately preceding the filing of his notice of application for admission". They provided that if such a person was admitted, he was admitted conditionally for one year and was only granted absolute admission if, after conditional admission, "he has continuously resided in the State, and has not pursued any occupation or business other than the proper business of a practitioner". By a majority (Barwick C.J., McTiernan, Menzies and Gibbs JJ., Stephen J. dissenting) it was held that the rules did not infringe s.117.

29. It is, I think, possible to separate several strands of reasoning in the majority judgments. The first is that, notwithstanding the use of the word "reside" in the South Australian rules, they did not require the plaintiff to become resident in South Australia in the sense in which the term "resident in" is used in s.117. The sense in which the words are used in that section is, so it was said, such as to require a degree of permanence not required by the rules. The necessary conclusion of such a line of reasoning was that, since the conditions imposed upon an interstate applicant for admission to practise did not, despite the words used, impose a residence requirement, they did not result in any

disability or discrimination based upon residence within the meaning of s.117.

30. Such an approach is difficult to accept. Whilst s.117 does speak of a disability or discrimination applicable to a person as a resident of a State, there is no reason to suppose that to require the continuous presence of a resident of one State in another State for a substantial period, even though not in any way permanent, as a condition of the enjoyment of some advantage or privilege, may not amount to the application of a disability or discrimination to him. As Stephen J. observed, at p 506, the consequence of such an approach would be that "very lengthy periods of actual residence in that State might be validly imposed upon subjects who retained their permanent residence in other States" in such a way as to seriously detract from the immunity otherwise afforded by s.117.

31. Moreover, such an approach involves the rejection of the view of Griffith C.J., expressed in Davies and Jones v. The State of Western Australia, at p 39, that:

> "The word 'resident' is used in many senses. As used in sec.117 of the Constitution, I think it must be construed distributively, as applying to any kind of residence which a State may attempt to make a basis of discrimination, so that, whatever that kind may be, the fact of residence of the same kind in another State entitles the person of whom it can be predicated to claim the privilege attempted to be conferred by the State law upon its own residents of that class."

An observation of Higgins J. in Australasian Temperance and General Mutual Life Assurance Society Ltd. v. Howe [1922] HCA 50; (1922) 31 CLR 290, at p 329, is also pertinent. There he said that "'Residence' is a mere question of fact; 'citizenship' has legal implications; domicile is an idea of law". And as Stephen J. pointed out in Henry v. Boehm, at p 506, "there is nothing in the words of s.117 which would add to the simple factual concept of residence legal overtones of citizenship or of domicile".

32. Residence may be of different kinds, but if something which may aptly be described as residence in a State is selected by that State as the condition upon which some privilege or advantage is made to depend and if the application of that condition results in the denial of that privilege or advantage to a resident in another State, then prima facie s.117 applies. That, I think, is what Griffith C.J. was saying and, in my opinion, he was correct.

33. The other strand of reasoning which was employed by the majority in Henry v. Boehm was to say that since the rules in question applied equally to all applicants for admission, there was no disability or discrimination applicable to the plaintiff as a resident in Victoria which would not have been equally applicable to residents in South Australia. Strength was thought to be added to this observation by the further observation that there may have been residents in South Australia seeking admission who, had they not been required to do so to comply with the rules, would not necessarily have been continuously present in South Australia during the prescribed period. The rules would, it was said, have applied to those persons in the same way as they applied to the plaintiff in that case.

34. There are two comments which might be made about this view of s.117. The first is that it pays little attention to the way in which the section is expressed. As Stephen J. pointed out with some force, at pp 501- 502, the comparison required by s.117 is not between a resident in one State who complains of a disability or discrimination and residents in the legislating State. The comparison is between the resident in another State who complains and his situation "if he were" resident in the legislating State. It is the hypothetical situation of the complainant in the legislating State which is relevant, not the actual situation of residents in that State. In other words, s.117 is not concerned with whether the requirements of the legislating State apply equally to residents in that State and a resident in another State but with whether any disability imposed upon, or discrimination against, a resident in another State would apply equally to him if he were resident in the legislating State.

35. It is difficult to see how that could have been said of the plaintiff in Henry v. Boehm. He, being a practitioner residing and practising in Victoria was required by the South Australian rules to leave his State of residence to reside continuously in South Australia for three months before becoming eligible to apply for admission in that State and for a further period of one year after conditional admission before being eligible for absolute admission. As Stephen J. observed, at p 502, had the plaintiff been resident in South Australia he would not have been required to "abandon his existing Victorian abode so as to reside continuously in South Australia, first for three months and then for a further twelve months". And it is not to the point that some residents in South Australia may because of the rules have been required to curtail any absence from the State. It was the actual situation of the plaintiff as a resident of Victoria compared with his hypothetical situation as a resident in South Australia which was relevant for the purposes of s.117. As Stephen J. pointed out, at p 507, it was not possible to say precisely what the plaintiff's position would have been had he been resident in South Australia; it was sufficient to say that the rules would have borne "quite differently and less onerously upon him".

36. The second thing which may be said about the view that there is no disability or discrimination within the meaning of s.117 when a condition is applied to residents in the legislating State and non-residents alike, is that it disregards the fact that the one provision may operate in a discriminatory fashion according to the actual situation of the persons to whom it applies. This is a common aspect of discrimination. See Lee Fay v. Vincent [1908] HCA 70; (1908) 7 CLR 389. This is, perhaps, only to repeat in another form what I have already said, but it is plainly the reason why s.117 is cast as it is. To adopt the reasoning of the majority in Henry v. Boehm would be to disregard not only the wording of s.117 but also the purpose which lies behind it.

37. In Henry v. Boehm, at p 489, Barwick C.J. spoke of the relevance of the criterion of operation of a statutory provision in determining whether that provision offends s.117. As I understand his remarks, he was of the view that for s.117 to have any application, residence out of the State must be the criterion of operation of the statutory provision. With respect, in the context of s.117 I find reference to the criterion of operation of a statutory provision to be unhelpful. Of course, for a statutory provision to offend s.117 it must impose a disability upon or discriminate against a resident of a State other than the legislating State, but the test to be applied in determining whether it does so is supplied by s.117 itself. It is whether an individual, being resident in a State, to whom a statutory provision in another State applies a disability or discrimination, would be equally subject to the disability or discrimination if he were resident in that other State. It is that question which determines whether the statutory provision offends s.117 and not whether, in substance or in form, an appropriate criterion of operation can be identified.

38. In Henry v. Boehm, at p 495, Gibbs J. warned that "the precise nature and extent of the

constitutional guarantee which s.117 affords, and of the corresponding restraint on power which it imposes, must depend not upon general theories as to the broad purposes of the provision, but upon the actual language of the section itself." Gibbs J. saw the language of s.117 as giving it a narrow scope whereas, as Stephen J. demonstrated in his dissenting judgment, given its ordinary meaning, the section has a wide scope and reference to purpose is likely to confine rather than expand its application. Stephen J., at p 507, foresaw some of the difficulties flowing from the wider interpretation of the section when he referred to problems such as the right to vote at State elections, a right which is commonly and understandably subjected to some kind of a residential qualification. Another example is the right to participate in a State welfare scheme, particularly one financed by State taxes, where a residential qualification is reasonable and its imposition does nothing to impede the essential purpose of the section. Stephen J. preferred to leave such problems to another day, but it is instructive in attempting to envisage the scope of s.117 to turn to the experience of the United States in relation to the privileges and immunities clause.

39. As I understand the effect of the cases there, it is not every privilege or immunity under State law which is protected by Art.IV s.2. It extends only to rights of a fundamental kind and does not secure special rights conferred by a State. Furthermore, to withhold enjoyment of a privilege or immunity enjoyed in another State does not offend if there is substantial reason for doing so which does not involve treating a citizen of the first State other than as a citizen of the same nation. As was said in Toomer v. Witsell (1948) 334 US 385, at p 396:

> "Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures."

There is thus in the United States a two-tiered approach. In order to apply Art.IV s.2, it is necessary to ask first whether the right in question is one to which the clause applies and not a special right. Secondly, it must be determined whether the clause is inapplicable under the "substantial reason" test. See Baldwin v. Fish and Game Commission of Montana [1978] USSC 82[1978] USSC 82; ; (1978) 436 US 371; Hicklin v. Orbeck [1978] USSC 128; (1978) 437 US 518. The way in which this approach works in practice is well illustrated by the decision in Supreme Court of New Hampshire v. Piper [1985] USSC 49; (1985) 470 US 274, which involved problems not unlike those involved in the case before us.

40. In that case the respondent had been denied admission to the New Hampshire Bar on the ground that she did not reside in New Hampshire. She was otherwise qualified for admission. It was held by a majority of the Supreme Court, Rehnquist J. dissenting, that the rule which denied the respondent admission violated the privileges and immunities clause. First, the Court held that the right to practise law was not a special, but a basic, right to which Art.IV s.2 did apply. Next it rejected a submission that there were substantial reasons for the discrimination. The reasons which had been put forward were that non-residents would be less likely to become, and remain, familiar with local rules and procedures and would be less likely to behave ethically, be available for court proceedings and to do pro bono and other volunteer work within the State. It was held by the majority that a non-resident lawyer would be able to meet the standards of the local profession notwithstanding his non-residence. See also Supreme Court of Virginia v. Friedman (1988) 101 LEd. 2d 56; Barnard v. Thorstenn (1989) 57 LW 4316.

41. Just as it became apparent in the United States that Art.IV s.2 could not have an unconfined application, so it is apparent that s.117, given the meaning preferred by Stephen J., must be applied in such a way as to avoid exceeding its evident purpose. The language of s.117 may make the exercise somewhat easier because, at least in some instances, the differential treatment of a citizen from one State in another may not amount to the imposition of a disability or discrimination. Where a residential qualification is, for example, a common condition of the exercise of some right, such as the right to vote in State elections, the requirement can scarcely be described as a disability or discrimination except in a narrow or technical sense. Moreover, the very nature of the subject matter which is being regulated in a case such as that requires organization upon the basis of State residence because the purpose for which votes are cast is to elect persons to represent the residents of a State in the State legislature.

42. No doubt there will be cases in which it will be more difficult to determine whether differential treatment amounts to a disability or discrimination within the meaning of s.117 and guidance must then be found in the purpose of the section. But it should be borne in mind that that purpose does not deny the separate responsibilities of the States which, together with the Commonwealth, make up the Australian federation. It does not require the uniformity of laws throughout the land. It does, however, require the States, and perhaps the Commonwealth, to recognize in the discharge of their responsibilities that there is but one nation and that the citizens of that nation carry their citizenship with them from State to State. To this end, s.117 does not permit a citizen to be subjected in a State to any disability or discrimination the basis of which is, not the ordinary and proper administration of the affairs of that State, but his residence in another State. In other words, in order to escape s.117, the true purpose and effect of differential treatment must be capable of being seen as other than to impose a disability upon the residents of other States or to subject them to discrimination. There can, I think, be no more precise expression of the limits of s.117 and the adoption of one formula or another in the end only poses the same question. No doubt the limits will properly emerge with greater precision upon a case by case basis.

43. It will be apparent that I find the conclusion reached by Stephen J. in Henry v. Boehm preferable to that of the majority. The plaintiff here sought to reopen the decisions in both Davies and Jones v. The State of Western Australia and Henry v. Boehm. As I have already indicated, I do not think that Davies and Jones v. The State of Western Australia, confined to the decision and the essential reasoning which led to it, constitutes any obstacle in deciding this case in the manner which I would prefer. However, it is clear that for the plaintiff to succeed it is necessary that Henry v. Boehm be overruled. That is not to be done lightly, but it is a decision which has stood for a relatively short time, it does not embody any principle carefully worked out in a significant succession of cases and

it is not a unanimous decision. The considerations adverted to in John v. Commissioner of Taxation [1989] HCA 5; (1989) 63 ALJR 166, at p 174 [1989] HCA 5; ; 83 ALR 606, at pp 620-621, are either not present or do not stand in the way of reopening the previous decision. Moreover, the interpretation of the Constitution is involved and, whilst precedent has a part to play, ultimately it is the Constitution itself, and not authority, which must provide the answer: Richardson v. Forestry Commission [1988] HCA 10; (1988) 164 CLR 261, at pp 321-322. I would, therefore, overrule the decision in Henry v. Boehm.

44. It remains then to consider how the application of s.117, properly construed, affects the position of the plaintiff. Those rules governing admission to practise in Queensland which required him to take up residence in Queensland and to cease to practise in his home State, clearly subjected the plaintiff to a disability or discrimination which would not have been equally applicable to him if he had been resident in Queensland. If he had applied for admission otherwise than in reliance upon a previous admission, it seems that those requirements would not have applied to him at all. If, as a Queensland resident, he had applied in reliance upon a previous admission, both requirements would have applied, but they would have operated on him in a significantly less onerous way.

45. Nor do I think that it could be said that the disability or discrimination to which the plaintiff was subjected lay outside the purpose of s.117. The responsibility for the regulation of the admission of persons to practise in Queensland, including persons resident in another State, lay with the State. Clearly such regulation might include conditions designed to ensure that persons resident in another State were sufficiently qualified. Such conditions, even if different from or in addition to those required of persons resident in Queensland, would be unlikely to subject a resident in another State to a disability or discrimination within the meaning of s.117 if they were genuinely directed towards the maintenance of proper professional and ethical standards. However, in my view, the requirements imposed upon the plaintiff by the rules that he reside in Queensland and cease to practise elsewhere were requirements of a different kind. Having regard to the manner in which the practice of the profession of a barrister is carried on in Australia and the manner in which it is regulated in other States, neither of those requirements can, in my view, have borne any material relationship to the proper regulation of admission to practise in Queensland. They amounted to a disability or discrimination upon the basis of residence within the meaning of s.117. The reasons advanced to justify the rule in question in Supreme Court of New Hampshire v. Piper have as little force in this case as they were found to have in that decision. I know of no additional reasons which could be advanced.

46. It follows that, in my view, the plaintiff is entitled to succeed in his appeal against the decision of the Full Court of the Supreme Court of Queensland. The plaintiff's application for admission should be remitted to that Court to be reconsidered upon the basis that the rules purporting to require the plaintiff to reside in Queensland and to cease practice elsewhere had no valid application to him.

47. The issues in the stated case remain alive, although somewhat less pointedly for the plaintiff in the light of these reasons. However, the questions were argued and it is convenient to answer them. To my mind the requirement that the plaintiff should have the intention of practising principally in Queensland and the requirement that the plaintiff should practise principally in Queensland after admission can have no valid application to him for the same reasons as I have given in relation to the requirements in question under the old rules. On the other hand, I do not think that the provision for conditional admission and the requirement that the plaintiff not pursue any occupation or business other than that proper for a barrister can be said to lie outside the area of proper regulation

of the profession. I would answer the first question by saying that, in so far as the rules require an intention upon the part of the plaintiff to practise principally in Queensland, and in so far as they require him to practise principally in Queensland upon being admitted conditionally or thereafter, they have no valid application to the plaintiff. I would answer the second question in the negative.

TOOHEY J. The relevant facts and the material provisions of the Rules of Court relating to the admission of barristers to practice in the Supreme Court of Queensland appear in the judgments of other members of the Court. Unless unavoidable, I shall not repeat those facts or those provisions.

2. As with other members of the Court, I am able to dispose of the appeal (I agree, for the reasons given by Mason C.J., that there should be a grant of special leave to appeal) and of the stated case by reference only to s.117 of the Constitution. It is therefore unnecessary to consider the implications of s.92 of the Constitution.

3. I come immediately to the argument based on s.117 which reads:

> " A subject of the Queen, resident in any
> State, shall not be subject in any other
> State to any disability or discrimination
> which would not be equally applicable to him
> if he were a subject of the Queen resident
> in such other State."

Mr Street is a subject of the Queen, resident in New South Wales. By reason of s.117, he is protected in Queensland from any disability or discrimination which would not be equally applicable to him if he were resident in that State.

4. In Henry v. Boehm [1973] HCA 32; (1973) 128 CLR 482, at p 487, Barwick C.J. observed:

> " Whilst it might have been thought that
> such a provision in the Constitution as
> s.117 would be a substantial aid to the
> unity of citizenship throughout Australia it
> is expressed in precise and narrow terms
> representing a compromise of competing views
> amongst those responsible for the drafting
> of the Constitution."

To determine in what sense s.117 represented a compromise, it is profitable to consider the shape taken by that provision of the Constitution during the course of its gestation. To borrow the language of this Court in Cole v. Whitfield [1988] HCA 18[1988] HCA 18; ; (1988) 165 CLR 360, at p 385:

> " Reference to the history of (the section)
> may be made, not for the purpose of
> substituting for the meaning of the words
> used the scope and effect - if such could be
> established - which the founding fathers
> subjectively intended the section to have,
> but for the purpose of identifying the

contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged."

5. A discussion of the history of s.117 may be found in Quick and Garran, The Annotated Constitution of the Australian Commonwealth, (1901), pp 953-961. Chapter V, cl.17 of the Commonwealth Bill of 1891 was in these terms: "A State shall not make or enforce any law abridging any privilege or immunity of citizens of other States of the Commonwealth, nor shall a State deny to any person, within its jurisdiction, the equal protection of the laws." Quick and Garran, at p 955, say: "Sec.117 of the present Constitution represents the modest outcome of an attempt on the part of the Convention of 1898 to improve the work of 1891, and to establish a status capable of being designated 'Federal citizenship.'"

6. At the Adelaide Session in 1897 the 1891 proposal was adopted but at the Melbourne Session in 1898 various amendments were proposed and in some cases carried. One amendment involved the substitution of the expression "disability or discrimination" for "privilege or immunity". This amendment, together with other changes adopted by the framers of the Australian Constitution, meant that, in its final form, s.117 varied considerably from the two clauses in the Constitution of the United States on which the 1891 proposal had been modelled. Those clauses read: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" (Art.IV s.2); and "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens in the United States; nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws" (Fourteenth Amendment, s.1).

7. In the course of argument in Davies and Jones v. The State of Western Australia [1904] HCA 46; (1904) 2 CLR 29, at p 36, O'Connor J. observed: "Sec.117 prevents a disability being imposed; it does not grant a privilege." Whether a disability or discrimination exists is a matter of substance, not of form: Davies and Jones, at pp 37-38, 45, 48. Although the wording of s.117 that was eventually decided upon did not entitle residents to "carry" privileges from one State to another, it did entitle interstate residents to the same treatment as intrastate residents in the sense of protecting them against unjustifiable disability or discrimination. Prima facie, at least, such an entitlement would appear no less capable of amounting to a significant constitutional guarantee than the American provisions, although more will need to be said of this later.

8. Another amendment adopted during the 1898 debates involved the deletion of references to the laws and acts of the State, and the insertion of wording which, on its face, does not so limit the scope of s.117. For the purposes of this appeal, it is not necessary to decide whether any disability or discrimination imposed through the acts of others than the States are unconstitutional by reason of s.117. Likewise, in the context of this appeal, I speak of the laws of the State; but this is for reasons of convenience and does not foreclose any later argument as to the scope of s.117.

9. One other amendment, which is here of particular significance, was the disappearance of the term "citizen" from s.117. That word had acquired varying connotations, first in ancient Greece, then in the Roman Republic. In the Middle Ages, during the period of monarchies, another term developed to indicate the relationship between the members of a community who owed personal duty to a single sovereign. That term was "subject". The framers of the Constitution of the United States

deliberately chose the word "citizen", in order to express the idea of membership in a new federal community.

10. When the framers of the Australian Constitution met at the end of the nineteenth century, the term "citizen" carried a distinctly republican flavour. In Australasian Temperance and General Mutual Life Assurance Society Ltd. v. Howe [1922] HCA 50; (1922) 31 CLR 290, at p 327, Higgins J. observed of s.75 of the Constitution in relation to the judicial power in the Constitution of the United States:

> "As Rousseau pointed out, in a note to his Contrat Social, the title of 'citizens' is not applied to the subjects of a prince, not even to British subjects. Our Constitution has substituted 'residents' for 'citizens', avoiding the republican implication (see sec.117 which uses the expression 'a subject of the Queen, resident in any State')."

During the Convention Debates in 1898 Barton urged that "it is far better not to import the word 'citizen' here if we can deal with it by a term well known in the constitutional relations of the empire between the Queen and her subjects" (Australasian Federal Convention Debates, (1898), vol.V, p 1787). O'Connor commented: "If, instead of the word 'citizen,' we use the words 'Every subject of the Queen resident in a state,' it really means the same thing." (Convention Debates, (1898), vol.V, p 1795).

11. The significance of the debate that took place during the Conventions is that s.117 was seen, not as placing emphasis on residence, but rather as ensuring that there would be no discrimination against those from other States. The formulation that was decided upon did not impinge upon the integrity of the States in their dealings with their own residents; but it was concerned to ensure that non-residents were entitled to the same treatment. In this context, it is of note that the section was directed, not at a person who was a resident of a State, thereby suggesting a particular status, but at a person resident in a State, a more prosaic reference. Although O'Connor suggested that the reference to "subject of the Queen resident in a state" is a composite expression for which the word "citizen" may be readily substituted, questions arise as to what precisely the latter term encompasses. "Subject of the Queen" is now to be understood as referring to the Queen in right of Australia: Nolan v. Minister for Immigration and Ethnic Affairs [1988] HCA 45; (1988) 165 CLR 178, at p 186. Whether a person living in Australia, but not a natural born or naturalized Australian citizen, is entitled to the protection accorded by s.117 is a matter to be considered when the occasion arises.

12. To return to the observation of Barwick C.J. in Henry v. Boehm, it is true that in its terminology s.117 is the product of compromise. But there is nothing to suggest that it represented any compromise of the principle that Australia was to be a commonwealth in which the law was to apply equally to all its citizens: see Detmold, The Australian Commonwealth, (1985), p 77. The section was referred to by the Privy Council in James v. The Commonwealth (1936) 55 CLR 1, at pp 43-44, as "a constitutional guarantee of (the) ... equal right of all residents in all States". Clearly there would be some State laws which, by their very nature, would apply only to those resident within a particular State. But the laws were to apply equally in that they were not to discriminate against those who did not reside in the law-making State.

13. Once s.117 is seen as a constitutional guarantee of equal rights for all citizens, there is little justification for giving the terms "disability" and "discrimination" some narrow or technical meaning, particularly as the section is "broad and general in its terms": see Jumbunna Coal Mine, No Liability v. Victorian Coal Miners' Association (1908) 6 CLR 309, per O'Connor J. at pp 367-368. No definition is required and none is likely to prove satisfactory for all circumstances. "Disability" has about it the notion of incapacity, whether to acquire a position, qualification, right or privilege, though that is not to say that its meaning is necessarily so confined. "Discrimination" ordinarily suggests a detriment to a person not borne by other members of the relevant community or group; again, no definition is thereby intended. It may be easier to conclude that the effect of a law is to subject a person to a disability than to conclude that its effect is to subject him or her to a discrimination for, in the latter case, problems may arise in identifying the group with which the comparison is to be made. In the case of s.117, the basis of comparison is marked out so that one can ask (in the case of alleged disability) whether an interstate resident suffers an incapacity to acquire a relevant position, qualification, right or privilege that the person would not be equally subject to if resident intrastate. And (in the case of alleged discrimination) one can ask whether an interstate resident suffers a detriment or disadvantage that he or she would not equally suffer if resident intrastate. It must be kept in mind, however, that the comparison to be made is not with other residents; the comparison is with reference to the individual in question so that what the section is concerned with is differences that appear once that comparison is made. They are differences that relate to the individual in the particular situations of which the section speaks, not differences relating to the individual as compared with some group to which he or she may or may not belong. Not all differences that become apparent through such a comparison will constitute a disability or discrimination for the purposes of s.117; more will be said of this later.

14. Two decisions of this Court were relied upon in answer to Mr Street's challenge to the Rules of Court -
Davies and Jones and Henry v. Boehm. Although Davies and Jones is the earlier in time, it is convenient to begin with Henry v. Boehm, the circumstances of which are much closer to the case now before the Court.

15. The facts of Henry v. Boehm appear in the judgments of other members of the Court. It is enough to say that Rules of Court governing admission as a practitioner of the Supreme Court of South Australia required that an applicant, previously admitted elsewhere, reside in South Australia for at least three months prior to application. That particular rule was expressed not to apply to an applicant who ordinarily resided and was domiciled in South Australia. Henry was a person admitted to practice as a barrister and solicitor of the Supreme Court of Victoria and resided in that State. The Rules further provided that a person previously admitted elsewhere would be admitted conditionally for one year and would thereafter be granted absolute admission if during that period he had resided continuously in South Australia.

16. By majority (Barwick C.J., McTiernan, Menzies and Gibbs JJ., Stephen J. dissenting) the Court held that the rules in question did not infringe s.117. In the view of Barwick C.J. (with whom McTiernan J. agreed), at p.490: "the rules do not lay any disability or discrimination upon the plaintiff because he is a resident of Victoria. ... the plaintiff is not ... subjected by the rules to any disability or discrimination which would not equally apply to him if he were a resident of South Australia."

17. Although s.117 speaks of being "resident in any State" and being "resident in such other State", judgments in Henry v. Boehm speak also of a person being a resident of a State. The reference

appears in the context of determining the degree of permanency of residence required by s.117. Thus, Barwick C.J. observed, at pp 489-490:

> "... s.117 seems to be built on the concept that by reason of some degree of permanence of residence a subject of the Queen has become and is qualified for the purposes of this section as a 'resident in any State'. ... I do not accept the view that a person who happens at any moment to reside in a State is therefore for that reason a resident of that State. Section 117 appears to be dealing with the case of a person who not being a resident of the legislating State, is present in it. ... the plaintiff, a resident of Victoria, would not cease to be resident in Victoria within the meaning of that description in s.117 if he resided in South Australia merely for the purposes of his admission as a practitioner in that State."

Menzies J. spoke to like effect, at pp 492-493. Gibbs J., at p 497, thought that "resident" in s.117 "connotes some idea of permanence".

18. There is no difficulty in giving to the term "resident" in s.117 a notion of permanence so long as undue emphasis is not placed on residence itself as the basis for attracting the operation of the section. The consequences of such an emphasis can be seen in Henry v. Boehm, where the only disability imposed by the Rules was one which required residence in South Australia for two specific periods of time, three months and twelve months. The majority were of the view that the particular rules did not discriminate against Henry's permanent residence in Victoria as those rules did not preclude the continuation of that residence. On this approach, short-term residency requirements are not prohibited by s.117.

19. But, with respect, that approach does not make the comparison which s.117 demands. The question was not whether the section discriminated against Henry's residence in Victoria but whether, if he were resident in South Australia, any disability or discrimination arising from the Rules would be equally applicable to him. In answer, it is true that if Henry had been resident in South Australia the requirement of three months continuous residence prior to conditional admission and twelve months continuous residence thereafter would have applied to him if it be assumed that he retained his Victorian domicile and sought admission on the basis of admission in Victoria. Such was the result of the comparison made by Barwick C.J., and the other members of the Court constituting the majority, between Henry as a resident of Victoria and Henry as a resident of South Australia. But as Stephen J. observed, at pp 501-502:

> "the process of comparison which the section calls for must be undertaken, the plaintiff's actual situation must be contrasted with a hypothetical one which

> differs from actuality only because it assumes the plaintiff to be a resident of South Australia; in making the comparison called for by s.117 no departure from actuality is to be made other than this one, relating to the plaintiff's residence. Being thus resident in South Australia but having previously been admitted to practice in Victoria, his position when wishing to use that qualification in order to gain admission to practice in South Australia is to be contrasted with his position as it is in fact."

20. When that comparison is made, the obvious difference between the two situations, as Stephen J. pointed out at p 502, is that if Henry were already resident in South Australia "he would not have to abandon his existing Victorian abode so as to reside continuously in South Australia, first for three months and then for a further twelve months". Henry would be living in South Australia and ordinarily he would be in that State for the period of three months prior to application and for the period of twelve months during conditional admission. There would be no disadvantage, or only a slight disadvantage, by reason of the Rules of Court, if he were already resident in South Australia; there was a substantial disability because he happened to be living in Victoria.

21. In answer to this sort of argument, the majority in Henry v. Boehm adverted to the possibility that residents in South Australia need not be continuously physically present in that State. It was argued that in such circumstances the residency requirements would work a disadvantage equal to that imposed on Henry. Stephen J., at p 503, dealt with this contention that the residence required by the Rules of Court "is of a different quality from that residence to which s.117 refers, the latter involving a concept of permanence, such as is involved in the acquisition of a domicile of choice, but not requiring that continuity of physical presence which the Admission Rules call for". His Honour continued:

> "If this were so then the making of the relevant comparison ... would not necessarily reveal the imposition upon the plaintiff of any disadvantage imposed by reference to residence because if, for the purposes of that section, the plaintiff were to be thought of as a resident in South Australia that residence would not necessarily produce automatic compliance with the residence requirements of the rules. A resident in South Australia in such a s.117 sense might in fact frequently be absent from that State for long periods at a time; were he, in those circumstances, required by the rules continuously to reside in that State for the relevant three and twelve months' periods he might be said to

be subjected to a disadvantage no less than
that suffered by a Victorian resident."

It is true that such a transient resident may none the less be regarded as resident in South Australia. But the factual circumstances which may amount to a sufficient nexus to constitute residence in a State are many and varied. It is not to the point to enquire as to the position of other persons resident in South Australia and seeking admission to practice by reason of their admission elsewhere. The comparison required by s.117 is, as Stephen J. noted at p 502, "between the plaintiff's situation as it is in fact and as it would be were he a resident of South Australia" (though in terms of the section, the comparison is between the plaintiff's situation as it is in fact and as it would be were he resident in South Australia). It may be conceded that the need to defer interstate or overseas visits over fifteen months is inconvenient, but it is not equal to the inconvenience consequent upon leaving one's home for that period. It may also be conceded that a requirement of continuous physical presence in a State may prove equally burdensome to a resident who normally spends long periods outside that State, and a person who is resident interstate. But, in the absence of any evidence that Henry had spent long periods out of the State in which he was, in fact, resident, this possibility was not relevant to the comparison called for by s.117.

22. If Henry were resident in South Australia instead of Victoria, there was no reason to suppose that he would not ordinarily have been resident there during the required periods. Therefore the requirements of continuous residence would not bear on him in the way they bore on him as resident in Victoria. Resident in Victoria, he had no alternative if he wished to be admitted in South Australia but to live there for the requisite periods at the cost of leaving his home for those times. Such a cost would not be demanded of Henry had he been resident in South Australia.

23. While the rules granted exemption in the case of a person who was ordinarily both resident and domiciled in South Australia (the headnote errs in the use of the disjunctive), that should not have excluded the operation of s.117. It is not necessary for the law complained of to single out interstate residence as the basis for the disability or discrimination. That is not what s.117 says, either expressly or by implication. The section operates wherever the effect of a law is to subject an interstate resident to a disability or discrimination to which that person would not be subject as an intrastate resident. And that, I think, is all that is meant by "equally applicable".

24. In Henry v. Boehm the plaintiff was unable to apply for admission as a practitioner in South Australia without abandoning his home. To that extent he was under a disadvantage he would not have been under had he resided in South Australia. Section 117 therefore should have operated so as to make him immune from the rules imposing that disadvantage on him.

25. In the broad terms in which the preceding paragraph of these reasons is couched, s.117 does not appear to have any limits. It seems to insist upon equality of treatment in all matters. This is because, in Henry v. Boehm, no argument appears to have been directed to showing that whilst Henry may have been subject to a disadvantage that would not apply had he been resident in South Australia, such a disadvantage was justifiable. Therefore, on the argument in that case, it followed that any disadvantage that was not "equally applicable" amounted to a disability or discrimination for the purposes of s.117. But if so understood, "real difficulties may be experienced in seeking to apply the concepts involved in s.117" (Stephen J. in Henry v. Boehm, at p 507). In particular, the federal system contemplated by the Constitution assumes that, subject to the Constitution, the States will legislate for their peace, order and good government: see generally Union Steamship Co. of Australia Pty. Ltd. v. King [1988] HCA 55; (1988) 166 CLR 1. Indeed the Constitution itself

contemplates an electoral system in which senators for one State will be chosen by the people of that State (s.7) and, impliedly at least, that members of the House of Representatives in each State will be chosen by the people of that State (s.30). It is inconceivable that a State Parliament may not exclude from the qualifications of its electors those who reside outside the State, without offending s.117.

26. To say this, however, is not to indicate the limits of s.117. The circumstances of the case now before the Court do not require that these limits be spelt out and it would be unwise to attempt such an exercise. But underlying the section is the notion to which reference has already been made that Australia is a commonwealth and its laws are to apply equally to all its citizens. The section operates by force of its terms; its limits are to be found in the implications to be drawn from the Constitution, in particular the capacity of the States to regulate their own affairs within a federal system. Some laws will of necessity affect those who reside in a State differently from the way they affect those who reside elsewhere. It does not follow that there is a disability or discrimination within s.117, particularly if the difference is a natural consequence of legislation aimed at protecting the legitimate interests of the "State community". Time will see the working out of the limits of the section.

27. The approach of the United States Supreme Court to Art.IV s.2 does not offer a safe guide to the operation of s.117. An entitlement to "all the privileges and immunities of citizens in the several States" lends itself more readily to fundamental rights, that is, to those privileges and immunities "bearing upon the vitality of the Nation as a single entity" (Baldwin v. Montana Fish & Game Commission [1978] USSC 82[1978] USSC 82; ; (1978) 436 US 371, at p 383) than does the language of s.117. Likewise, the two-tiered approach taken in the United States which asks first whether the privilege or immunity is a fundamental right and then asks whether the discrimination against non-residents can be supported on the grounds that there is a substantial reason for the difference in treatment and that the discrimination bears a substantial relationship to the State's objective (see Supreme Court of New Hampshire v. Piper [1985] USSC 49[1985] USSC 49; ; (1985) 470 US 274, at p 284) does not find a ready place in the language of s.117. But even on the approach taken in the United States, "the state powers entrusted to lawyers do not 'involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens' (of the relevant State)" (Piper, at p 283).

28. The conclusions I have reached regarding the operation of s.117 cannot stand with the view of the majority in Henry v. Boehm. The reasons why that decision should be overruled appear in judgments of other members of the Court. I do not wish to add to what is said there; it is enough to say that to overrule Henry v. Boehm is consistent with what this Court said in John v. Commissioner of Taxation [1989] HCA 5; (1989) 63 ALJR 166, at p 174; [1989] HCA 5[1989] HCA 5; ; 83 ALR 606, at p 620.

29. Once Henry v. Boehm is overruled, Davies and Jones does not stand in the way of the conclusions I have reached. That decision concerned a provision in the Administration Act 1903 of Western Australia which imposed duty on estates with a proviso that, in the case of beneficial interests passing to persons bona fide residents of and domiciled in Western Australia and in a particular relationship to the deceased, duty was calculated so as to charge only one-half of what would otherwise be the rate applicable. In the view of the Court the real ground of discrimination prescribed by the provision of the Administration Act was domicile and not residence, hence s.117 of the Constitution had no application. The beneficiary in question was both domiciled and resident out of Western Australia. A differentiation based solely on residence would undoubtedly have fallen

foul of s.117 but unless a differentiation based solely on domicile were considered to be effectively differentiation on the basis of residence and hence to suffer the same fate, there would be no assistance to the beneficiary. In the view of the Court, domicile and residence being different concepts, the legislation discriminated on the basis of domicile and was not in conflict with s.117.

30. Certainly some of the reasoning in Davies and Jones is at odds with the reasoning of members of the Court in the present case. But it would only be necessary to overrule that decision if the requirements of residence and principal practice in the Rules of Court now under consideration were considered to be effectively a dual requirement. However, principal practice may fairly be regarded as incidental to residence in a State, and Mr Street's circumstances do not indicate otherwise. So I do not regard the Rules as imposing any dual requirement. Therefore it is not necessary to overrule Davies and Jones in order to accede to Mr Street's argument.

31. As to the matter now before the Court, the relevant Rules of Court, before and after the amendments of 2 July 1987, are set out in the judgment of Mason C.J. As to the construction of the Rules before the 1987 amendments, there is a line of authority in Queensland which implies into the Rules, more particularly into Form 10 as prescribed by the Rules, requirements that an applicant for admission be or intend forthwith to cease to practise elsewhere and to become a resident of Queensland: see In re Holmes (1944) QWN 33; Re Sweeney (1976) Qd R 296. Those decisions were accepted by the Full Court of the Supreme Court of Queensland in the judgment from which Mr Street seeks special leave to appeal to this Court.

32. At first sight, it seems strange that such important requirements as ceasing to have a principal practice outside Queensland and taking up residence in that State should be found, not in the Supreme Court Act 1921 (Q), nor in a particular r.of Court, but in a form to which one of the Rules refers in general terms. As Griffith C.J. commented in Perpetual Executors and Trustees Association of Australia Ltd. v. Hosken [1912] HCA 31; (1912) 14 CLR 286, at p 289, though in a different context: "Forms of this sort ... are good servants but bad masters, a proposition which is sometimes - too often indeed - forgotten." The requirements under attack appear only in Form 10 and have no greater authority than a rule which states that "the matters set out in Form 10" are to be included in an affidavit. Can those requirements be regarded as mandatory where there is nothing in r.38 or any other rules pointing to their existence and nature? Although the Rules in question were made in 1975, rules relating to the admission of barristers and solicitors made as early as 4 June 1866 had provided that no person shall be admitted to practice in the Supreme Court of Queensland unless he "shall satisfy the Court that he intends to reside and practise in Queensland" (r.2). The history of relevant rules appears in the judgment of W.B. Campbell J. in Re Sweeney, at pp 303-310.

33. In the circumstances, there can be no doubt that Form 10 was intended to reflect requirements of long standing. This Court would be slow to disturb the meaning and operation attached by the Supreme Court of Queensland to Form 10. I prefer to rest my decision on the grounds that form the substance of this appeal and of the case stated.

34. In the matter now before the Court, Mr Street's actual situation (resident in New South Wales) is to be contrasted with the hypothetical situation (resident in Queensland). When that is done it is apparent that he, as resident in New South Wales, suffers a disadvantage that he would not suffer if he were resident in Queensland. As the Rules of Court in Queensland stood before July 1987, if Mr Street had been resident in that State and had sought admission to practice on the strength of his admission as a barrister in New South Wales, he would have been bound to reside in Queensland and have his principal practice in that State. But he would not have been required to leave his home

in New South Wales and take up residence in Queensland for those periods. That was the effect of r.15 as it previously stood.

35. As the Rules now stand, an intention to practise principally in Queensland remains a requirement of admission although it is specified in r.15B as well as Form 10(6). r.15B is couched in terms that, once a period of twelve months has passed after conditional admission, admission becomes absolute and, it would appear, no intention to practise principally or at all in Queensland is thereafter required of the barrister. Nevertheless the effect of r.15B is that, in order to be admitted to practice in Queensland, Mr Street must for all practical purposes abandon his practice in New South Wales for a year.

36. Arguably, such a requirement would be "equally applicable" to Mr Street if it be assumed that he resided in Queensland but had his principal practice in New South Wales. While this may be true, it is not to the point. As stated earlier, "resident in a State" is a more prosaic reference than "resident of a State"; generally, principal practice (place of work) is incidental to residence in a State. Mr Street, in fact, both resides and has his principal practice in New South Wales. The defendants in the special case have not pointed to any ground of disqualification from the Bar that would have been applicable to Mr Street had he been resident in Queensland, other than the Rules under attack. In making the comparison called for by s.117, there is, therefore, no reason to suppose that if Mr Street were resident in Queensland he would not also have had his principal practice there.

37. This is not to beg the question, for the question is not whether Mr Street would be admitted to the Bar in Queensland but for his residence in New South Wales. Rather, the question is whether the Rules impose a disability or discrimination which would not be equally applicable to Mr Street had he been resident in Queensland instead of New South Wales. The comparison called for by s.117 cannot be dependent upon the sort of entitlement that is being impeded. Just as it cannot be doubted that, in making the comparison called for by s.117, the Court would make the assumption that the applicant resides in the legislating State even though it may be the right to be so resident that was being effectively impeded, so too, when a disability or discrimination impedes the right to work, the Court is entitled to assume that the applicant would work in the legislating State, so long as that work may be fairly regarded as incidental to his or her residence in that State.

38. On this analysis, Mr Street would be required to abandon his practice in New South Wales only as a resident in New South Wales. He thereby suffers a disadvantage to which he would not be subject if he were resident in Queensland. The factual question whether he would be able to reside in New South Wales and practise in Queensland does not arise.

39. The operation of s.117 does not diminish the ability of the Bar of Queensland to maintain its proper professional standards. The Rules of Court with which we are concerned relate to a person who has been already "duly admitted" as a barrister-at-law in New South Wales; that person's qualification to practise as a barrister has already been established. The earlier requirement in the Rules of residence and principal practice and the current requirement of an intention to practise principally in Queensland (an intention limited to a period of twelve months) do not serve to ensure additional skills and experience for the work of a barrister that cannot otherwise be acquired. It is true that the members of any Bar gain from the corporate life of the Bar and their membership of and participation in their professional association. But they also gain from a healthy admixture of barristers who practise principally in other States. So too does the community. Many factors now operate towards a national legal profession - reciprocity of admission between States, the right of appearance in federal courts (Judiciary Act 1903 (Cth), s.55A) and the procedures for cross-vesting

(Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) and comparable State legislation) are but examples. Of course, that is not to say that the professional activities of barristers do not call for regulation within the State in which they are admitted. And that regulation may affect differently those who reside and practise outside the State. But those activities may be regulated without requiring barristers to take up residence in or practise principally within that State. That is why such requirements are properly considered to be a disability or discrimination for the purposes of s.117. It is of interest that the United States Supreme Court has taken a similar approach to comparable questions in that country: Piper and Barnard v. Thorstenn (1989) 57 LW 4316.

40. I agree with the orders proposed by the Chief Justice.

GAUDRON J. Mr Street is a subject of the Queen resident in New South Wales and a barrister of the Supreme Courts of New South Wales, Victoria, South Australia and the Australian Capital Territory. He desires to be admitted as a barrister of the Supreme Court of Queensland. He seeks special leave to appeal from a decision of the Full Court of Queensland, given on 22 May 1987, by which he was refused admission and also brings proceedings in the original jurisdiction of this Court challenging the validity of the Rules Relating to the Admission of Barristers of the Supreme Court of Queensland ("the Rules") as subsequently amended by the Governor in Council on 2 July 1987. In the latter proceedings a case has been stated pursuant to s.18 of the Judiciary Act 1903 (Cth). In each case the argument on behalf of Mr Street was made by reference to ss.92 and 117 of the Constitution. In both cases I have reached a view based on s.117 which renders it unnecessary to consider the argument made by reference to s.92.

2. The relevant facts and the provisions of the Rules as at 22 May 1987 and as amended on 2 July 1987 are set out in the judgment of Mason C.J. I agree with Mason C.J., for the reasons that his Honour gives, that, notwithstanding the subsequent amendment of the Rules, Mr Street should be granted special leave to appeal from the decision of the Full Court. The Rules as at 22 May 1987

3. Mr Street's application for admission was based on prior admission in another jurisdiction as allowed by r.15(d)(4) and he was thus required by r.38(d) to include in his affidavit "the matters set out in Form 10". Given the express reference in r.38(d) to "the matters set out in Form 10", the requirements inherent in Form 10 must be regarded as requirements authorized by the Rules. The relevant requirements inherent in Form 10, as laid down in Re Sweeney (1976) Qd R 296 and applied by the Full Court in refusing Mr Street's application for admission, were that Mr Street should take up residence in Queensland and should cease to practise as a barrister elsewhere. Specifically, the requirements inherent in Form 10 were not satisfied by Mr Street in that, in the words of Connolly J. in the Full Court, "he intend(ed) to continue as a resident of New South Wales and (had) not ceased to practise and (did) not intend to cease to practise as a barrister (in) his State of residence".

The Amended Rules

4. By virtue of the amendments made to the Rules on 2 July 1987 a person seeking admission on the basis of prior admission in another jurisdiction, as allowed by r.15(d)(3), (4) or (5), is now required by r.15(e) (which requirement is repeated in Form 10 as amended) to have "the intention of practising principally in Queensland". Additionally, r.15B allows only for the conditional admission of a person who relies on a prior admission in another jurisdiction. By r.15B(2) absolute admission may be granted after one year upon satisfying "the court that, since his conditional admission and until the date of the application for the order absolute, he has practised principally in Queensland and has not pursued any occupation or business other than that proper for a barrister".

5. It is possible that, in the case of a person entered in the Register of Practitioners kept in the Registry of this Court pursuant to ss.55C of the Judiciary Act and conditionally admitted as a barrister of the Supreme Court of Queensland, the requirement in r.15B that he or she should practise principally in Queensland might conflict with the exercise of the entitlement to practise in any federal court and the exercise of the right of audience in a court of a State in a matter of federal jurisdiction as conferred by s.55B of the Judiciary Act. However, that issue was not raised in argument and need not be explored. Section 117 of the Constitution: The ambit of its protection

6. Section 117 of the Constitution provides:

> "A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

7. Section 117 was considered by this Court in Davies and Jones v. The State of Western Australia [1904] HCA 46; (1904) 2 CLR 29 and in Henry v. Boehm [1973] HCA 32; (1973) 128 CLR 482. Without going to the detail of those cases it is, I think, permissible to observe that they do not reflect recent developments within the field of anti-discrimination law which have led to an understanding that discrimination may be constituted by acts or decisions having a discriminatory effect or disparate impact (indirect discrimination) as well as by acts or decisions based on discriminatory considerations (direct discrimination). These developments may be seen in legislative provisions such as those contained in the Sex Discrimination Act 1984 (Cth), s.5, the Anti-Discrimination Act 1977 (NSW), s.7, the Equal Opportunity Act 1984 (Vic), s.17, and the Sex Discrimination Act 1975 (UK), s.1. Similar developments have taken place in the United States of America and Canada in the process of interpretation and application of legislative provisions proscribing discrimination "because of" particular characteristics. See Griggs v. Duke Power Co. [1971] USSC 46; (1971) 401 US 424, at p 431; Albemarle Paper Co. v. Moody (1975) 422 US 405; Ontario Human Rights Commission v. Simpsons-Sears Ltd 1985 CanLII 18 (SCC)1985 CanLII 18 (SCC); ; (1985) 2 SCR 536.

8. There is a particular subtlety in the language of s.117 in that its focus is entirely on the individual. It does not direct a comparison between classes or groups, as do some legislative provisions directed to the elimination of discrimination. Instead, it directs a comparison between the actual position of the person invoking s.117 and the position he or she would enjoy if resident in the State where he or she claims to be subject to a disability or discrimination.

9. The individual focus of the language of s.117 and the comparison required in consequence of that focus was made explicit by Stephen J. in his dissenting judgment in Henry v. Boehm (at p 501) in these terms:

> "(T)he plaintiff's actual situation must be contrasted with a hypothetical one which differs from actuality only because it assumes the plaintiff to be a resident of South Australia; in making the comparison called for by s.117 no departure from

actuality is to be made other than this one,
relating to the plaintiff's residence".

10. Although Stephen J. was in dissent in Henry v. Boehm, I do not understand that dissent to relate to the process of comparison directed by s.117. In that case each Justice engaged in the process of comparison identified by Stephen J., albeit that concentration on formal operation rather than practical effect led to a result different from that reached by his Honour. See per Barwick C.J. (with whom McTiernan J. agreed) at p 490, per Menzies J. at p 493 and per Gibbs J. at p 498. And, notwithstanding that the issue was stated in somewhat different terms in the judgments in Davies and Jones, it seems that the same process of comparison was undertaken in that case. Thus, although Griffith C.J. (at p.43) identified the issue as one of "discrimination as between residents of Western Australia and others", his Honour's finding that the protection of s.117 was not invoked proceeded from the dual requirement of residence and domicile, such that a hypothetical alteration of residence, standing alone, would not carry with it an entitlement to the benefit of the reduction claimed. So too, Barton J. (at p 47), although stating that "(i)t is discrimination on the sole ground of residence outside the legislating State that the Constitution aims at in the 117th section", decided the matter on the basis that "(m)ere residence in Western Australia does not give any of its inhabitants a better right to resist the higher rate of duty than Mr Davies has, residing as he does in Queensland." And O'Connor J. (at p 49) expressed the issue in terms very like those of Stephen J. in Henry v. Boehm saying that "there may be a disability or discrimination, the imposition of which would be legal, that is to say a disability or discrimination which would be equally applicable to the person complaining if he were a resident of the State complained against".

11. On my understanding of Davies and Jones and Henry v. Boehm those cases compel the conclusion that the comparison required by s.117 is one which involves the exercise, with its focus on the individual, identified by Stephen J. in Henry v. Boehm. However, that having been said, it becomes necessary to consider the proposition, as expressed by Barton J. in Davies and Jones (at p 47), that the discrimination to which s.117 is directed is "discrimination on the sole ground of residence outside the legislating State". That proposition was accepted as correct by all Justices in Henry v. Boehm. See per Barwick C.J. at pp 488 and 490, per Menzies J. at p 493, per Gibbs J. at p 496 and per Stephen J. at pp 499 and 506. I should add, by way of aside, that there is nothing in the language of s.117 to indicate that its protection is confined to discrimination by a legislating State: the section is directed to discrimination in a State in which the person invoking the protection of s.117 is not resident.

12. The expression "discrimination on the sole ground of residence" suggests that residence in another State should be the criterion of differential treatment before the protection of s.117 is invoked. In terms which reflect modern discrimination jurisprudence, it suggests that s.117 operates on direct discrimination but not on indirect discrimination or discrimination which is revealed by the disparate impact of the matter in complaint. In Henry v. Boehm Menzies J. (at p 491) expressly confined the protection of s.117 to direct discrimination saying "(i)t is the operation of the law to which attention must be paid, not to the remoter consequence of complying with the law that operates uniformly regardless of the State in which a person happens to be resident at a particular time." And the considerations taken into account in the process of comparison undertaken in Davies and Jones and by the majority in Henry v. Boehm is explicable only on the basis that the protection of s.117 was seen as confined to direct discrimination. Indeed, a major point of dissent in the judgment of Stephen J. in Henry v. Boehm is that his Honour looked at "(t)he practical effect of (the) requirements of residence in South Australia" (p.501).

13. It is not easy to reconcile the idea that s.117 operates only on discrimination which results from the application of a residential criterion with the process of comparison identified by Stephen J. in Henry v. Boehm and so clearly directed by the language of the section. If s.117 affords protection only against direct discrimination, the issue in a case involving a challenged law could as easily be resolved by reference to the terms of the law. The process of comparison directed by s.117 would, if undertaken, be purely formal. And, notwithstanding that the focus of s.117 is entirely on the individual, the position of the individual would not be examined.

14. The idea that s.117 only affords protection against discrimination which results from the application of a residence criterion is closely related to the "criterion of liability" and the "criterion of operation" tests previously applied in relation to ss.90 and 92 of the Constitution.

15. The "criterion of liability" has ceased to command universal respect as a test determinative of the operation of the prohibition contained in s.90 of the Constitution. See Philip Morris Ltd. v. Commissioner of Business Franchises [1989] HCA 38; (1989) 63 ALJR 520, at pp 534-535[1989] HCA 38[1989] HCA 38; ; ; 87 ALR 193, at pp 217-220, per Brennan J. The "criterion of operation" was discarded as a test relevant to the freedom guaranteed by s.92 in Cole v. Whitfield [1988] HCA 18; (1988) 165 CLR 360. In that case it was said (at p 401) that "(t)he emphasis on the legal operation of the law gave rise to a concern that the way was open to circumvention by means of legislative device." A "criterion of discrimination" test in relation to s.117 generates the same concern.

16. It is now accepted that in the interpretation and application of the Constitution, particularly its guarantees of freedom and the prohibitions by which those freedoms are secured, regard should be had to substance rather than form: see Cole v. Whitfield, at p 401; North Eastern Dairy Co. Ltd v. Dairy Industry Authority of N.S.W. [1975] HCA 45; (1975) 134 CLR 559, at pp 606-607; Hematite Petroleum Pty Ltd v. Victoria (1983) 151 CLR 599, at p 630; Gosford Meats Pty Ltd v. New South Wales [1985] HCA 5; (1985) 155 CLR 368, at pp 383-384. To limit the operation of s.117 to different treatment which results from the application of a residential criterion would be to confine that guarantee by reference to formal considerations and to deprive it of substantive operation.

17. The above considerations lead me to conclude that the protection of s.117 extends to indirect discrimination or different treatment which is revealed by the disparate impact of the matter in complaint. In so far as Davies and Jones and Henry v. Boehm decide otherwise, for the reasons given in this case by Mason C.J. by reference to the decision in John v. Commissioner of Taxation [1989] HCA 5; (1989) 63 ALJR 166, at p 174[1989] HCA 5[1989] HCA 5; ; ; 83 ALR 606, at p 620, I consider that those decisions should no longer be followed. Section 117: Limits to "disability or discrimination"

18. In Henry v. Boehm, Gibbs J. (at p 495) questioned whether s.117 "would prohibit a State from according a special privilege, such as free hospital treatment or free education, to its own residents, who, perhaps, through the taxes they paid to the State were assisting to augment the funds which served to pay the cost of providing the privilege". Similarly, Stephen J. (at p 507) noted, by reference to the "privileges and immunities" clause of Art.IV of the United States Constitution, that real difficulties might be experienced in the application of s.117 to "the exercise of rights of franchise at State elections". The difficulties identified by Gibbs and Stephen JJ. indicate that there are limits to the protection of s.117. Similar considerations have resulted in the "privileges and immunities" clause in the U.S. Constitution being construed as applicable only to those rights identified as "basic rights". See Baldwin v. Montana Fish and Game Commission [1978] USSC

82[1978] USSC 82; ; (1978) 436 US 371.

19. In Cole v. Whitfield this Court acknowledged the significance of the object of s.92 to its construction and application. However, as the Court noted (at p.394), the task with which it was confronted was "to construe the unexpressed". Were the same task involved in the construction of s.117 it would, in my view, be necessary to have regard to its federal purpose. And in that process it might well be necessary to identify, define or limit the rights attracting its protection in a manner similar to that adopted in relation to the "privileges and immunities" clause of the U.S. Constitution. However, the words of s.117 themselves indicate its purpose and effect, namely, protection against disability or discrimination which would not be equally applicable if the person invoking its protection were resident in the State in which he or she is subject to that disability or discrimination. The limits to the protection afforded by s.117 are, in my view, to be ascertained by reference to the expression "disability or discrimination" rather than by identification of interests pertaining to national unity or by reference to the federal object attending s.117.

20. Although in its primary sense "discrimination" refers to the process of differentiating between persons or things possessing different properties, in legal usage it signifies the process by which different treatment is accorded to persons or things by reference to considerations which are irrelevant to the object to be attained. The primary sense of the word is "discrimination between"; the legal sense is "discrimination against".

21. Where protection is given by anti-discrimination legislation, the legislation usually proceeds by reference to an unexpressed declaration that certain characteristics are irrelevant within the areas in which discrimination is proscribed. Even so, the legislation frequently allows for an exception in cases where the characteristic has a relevant bearing on the matter in issue. Thus, for example, the Anti-Discrimination Act 1977 (NSW), whilst proscribing discrimination in employment on the grounds of race and sex, allows in ss.14 and 31 that discrimination is not unlawful if sex or race is a genuine occupational qualification.

22. The framework of anti-discrimination legislation has, to a considerable extent, shaped our understanding of what is involved in discrimination. Because most anti-discrimination legislation tends to proceed by reference to an unexpressed declaration that a particular characteristic is irrelevant it is largely unnecessary to note that discrimination is confined to different treatment that is not appropriate to a relevant difference. It is often equally unnecessary to note that, if there is a relevant difference, a failure to accord different treatment appropriate to that difference also constitutes discrimination.

23. The importance of a relevant difference was noted by Judge Tanaka in the South West Africa Cases (Second Phase) (1966) ICJR 6, at pp 305-306, in these terms:

> "... the principle of equality before the law ... means ... relative equality, namely the principle to treat equally what are equal and unequally what are unequal. ... To treat unequal matters differently according to their inequality is not only permitted but required. The issue is whether the difference exists."

Similarly, the European Court of Justice said in Re Electric Refrigerators (1963) 2 CMLR 289, at p 312:

"Material discrimination would consist in
treating either similar situations
differently or different situations
identically."

24. In State of West Bengal v. Anwar Ali (1952) 39 AIR(SC) 75, SR Das J (at p 93) said in relation to Art.14 of the Indian Constitution which guarantees equality before the law and the equal protection of the law:

> "All persons are not, by nature, attainment
> or circumstances, equal and the varying needs
> of different classes of persons often require
> separate treatment and, therefore, the
> protecting clause has been construed as a
> guarantee against discrimination amongst
> equals only and not as taking away from the
> State the power to classify persons for the
> purpose of legislation."

His Honour then went on to note that two requirements are necessary to avoid the prohibition against discrimination, namely,

"(1) that the classification must be founded
on an intelligible differentia which
distinguishes those that are grouped together
from others and (2) that that differentia
must have a rational relation to the object
sought to be achieved by the Act. The
differentia which is the basis of the
classification and the object of the Act are
distinct things and what is necessary is that
there must be a nexus between them."

25. The reference to "disability" in s.117 must be construed in the context of the expression "disability or discrimination". Just as the legal concept of discrimination does not extend to different treatment appropriate to a relevant difference, so too, the absence of a right or entitlement does not constitute a disability if the right or entitlement is appropriate to a relevant difference.

26. There are a number of circumstances in which residence may be a relevant difference justifying different treatment. It is sufficient to note one. Within our federal framework it is the status of being a "subject of the Queen" (those words being understood to refer to a subject of the Queen in right of Australia: see Nolan v. Minister for Immigration and Ethnic Affairs [1988] HCA 45; (1988) 165 CLR 178, at p 186) and residence within a State which together signify membership of the body politic constituting that State. That membership carries with it rights to participate in the political processes of the State. Thus, in so far as a law of a State selects residence within the State as the criterion for conferral of rights to participate in its political processes, the law selects a characteristic

signifying a relevant difference. And the same may be true of a law conferring a special benefit by virtue of membership of the body politic constituting the State, especially if that benefit is funded by taxes levied against its members.

27. The more difficult question is whether, there being a relevant difference, the different treatment accorded to that difference is appropriate to it. Although I have expressed the issue in terms of the appropriateness of the different treatment, it seems to me that the considerations thereby raised are similar to those which arise in application of the "privileges and immunities" clause of the U.S. Constitution. In Toomer v. Witsell (1948) 334 US 385, at p 396, the relevant enquiry in relation to the "privileges and immunities" clause was identified as one "concerned with whether (reasons for discrimination) do exist and whether the degree of discrimination bears a close relation to them". Similarly, in Supreme Court of New Hampshire v. Piper [1985] USSC 49; (1985) 470 US 274, Powell J., delivering the opinion of the Court, said (at p 284) that "(t)he Clause does not preclude discrimination against nonresidents where: (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective" and added that "(i)n deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means". It may be observed of these passages that the word "discrimination" appears to be used to signify different treatment, but the enquiry directed is, in essence, an enquiry whether different treatment is appropriate to an identified and relevant difference.

28. The question whether different treatment assigned by reason of a relevant difference is appropriate to that difference is one which is peculiarly apt to attract different answers according to the alternatives available at different times. It is also a question which, as the U.S. Supreme Court recognized in Supreme Court of Virginia v. Friedman (1988) 101 L Ed 2d 59, at p 66, cannot be answered by the dictation of "specific legislative choices to the State". It may also be a question the answer to which will sometimes depend on whom the persuasive burden is placed. The significance of the burden of proof and related concepts in the field of discrimination may be seen in cases such as Griggs v. Duke Power Co., Dothard v. Rawlinson [1977] USSC 143[1977] USSC 143; ; (1977) 433 US 321 and Wards Cove Packing Company Inc. v. Atonio (1989) 57 LW 4583 and is discussed in Ontario Human Rights v. Simpsons-Sears Ltd. The issue in the present case may be approached by a means which does not involve any consideration of the allocation of a persuasive burden. The question of appropriateness may be answered by reference to the test applied to determine the validity of legislation enacted to secure a constitutional purpose, namely, whether it is reasonably capable of being seen as appropriate and adapted to that purpose. See The Commonwealth v. Tasmania (The Tasmanian Dam Case) [1983] HCA 21[1983] HCA 21; ; (1983) 158 CLR 1, at pp 130-132, 172, 232, 259-261; Richardson v. Forestry Commission [1988] HCA 10 ; (1988) 164 CLR 261, at pp 289, 300, 311-312, 336, 344-346. For present purposes the issue may be expressed as whether the different treatment is reasonably capable of being seen as appropriate and adapted to a relevant difference. Application of s.117 to the Present Cases

29. The Rules, both as at 22 May 1987 and as amended on 2 July 1987, proceed by reference to the different qualifications which may found admission to practice as a barrister in Queensland. A distinction is drawn, on the one hand, between a qualification obtained by passing or being deemed to pass all stages as required by the Rules, by obtaining a degree in law at a Queensland University or an approved Australian University, or by obtaining a specified degree at the Queensland Institute of Technology (r.15(d)(1), (2) and (7)) and, on the other hand, a qualification obtained by admission within another jurisdiction as allowed in r.15(d)(3), (4) or (5). That is a relevant distinction in so far as a qualification obtained in Queensland or at an approved University may be expected to signify a

greater knowledge of the laws of Queensland than would a qualification leading to admission in another State, Territory or country. Different treatment, if appropriate to that difference, would not constitute discrimination.

30. For different treatment to be seen as appropriate or adapted to a disparity in knowledge of an identified subject matter it must be seen as directed to imparting, requiring the acquisition of, or examining knowledge of that subject matter. It may be that residence in Queensland or location of one's practice principally in Queensland would, in the long run, bring in train a knowledge of the laws of Queensland. But the issue relevant to admission to practice is that of sufficiency of knowledge to practise, not the acquisition of knowledge through practice. Neither a change of residence to Queensland nor cessation of practice elsewhere (as required by the Rules as at 22 May 1987) would work an instantaneous acquisition of knowledge of the laws of Queensland. And, as the acquisition of knowledge depends on factors which vary from individual to individual, the location of practice principally in Queensland for the period following conditional admission (as required by the amended Rules) might or might not lead to the acquisition of a sufficient knowledge of the laws of Queensland. To the extent that it did, such knowledge would flow, not from the location of practice, but from the utilization of learning opportunities. In these circumstances the Rules as at 22 May 1987, so far as they require residence in Queensland and cessation of practice elsewhere, and the Rules as amended, so far as they require an intention to practise principally in Queensland and require a person conditionally admitted as a barrister to practise principally in Queensland, are necessarily to be seen as ill adapted and inappropriate to any disparity in knowledge of the laws of Queensland. They thus constitute discrimination. It is unnecessary to consider whether conditional admission otherwise amounts to discrimination for, if it does, it would be equally applicable were Mr Street resident in Queensland.

31. Mr Street is entitled to invoke the protection of s.117 if the discrimination effected by the Rules "would not be equally applicable to him ... if he were ... resident in (Queensland)". The effect on Mr Street of the Rules as at 22 May 1987 when he was refused admission by the Full Court was quite different from the effect that they would have had were he then resident in Queensland. If he had then been resident in Queensland he would not have been required either to change his State of residence or to cease to practise as a barrister in his State of residence. Similarly, the amended Rules have a different effect upon Mr Street from that which they would have if he were resident in Queensland. Were he resident in Queensland he would not be required either to have the intention of practising principally or to practise principally in a State in which he is not resident.

32. Mr Street is entitled to invoke the protection of s.117 both in relation to his application for admission pursuant to the Rules as they stood before amendment on 2 July 1987 and in relation to any fresh application that may be made pursuant to the Rules as then amended. I would allow the appeal, set aside the order of the Full Court of the Supreme Court refusing the application for admission as a barrister and remit the matter to that Court for determination according to law. I would answer the questions in the stated case in the manner proposed in the judgment of Deane J.

McHUGH J. Mr Alexander Whistler Street, a member of the Bar of New South Wales, applies for special leave to appeal against a judgment of the Full Court of the Supreme Court of Queensland (Re Street (1988) 2 Qd R 209) which dismissed his application for admission to the Bar of Queensland. He contends that the Full Court erred in holding that, although he was in all other respects qualified to be admitted as a barrister in Queensland, he could not be admitted because he intended to continue to be a resident of New South Wales and had not ceased and did not intend to cease to practise as a barrister in that State. The question in the application for special leave to

appeal is whether, by reason of s.92 or s.117 of the Constitution or both, rr.15(d)(4) and 38 of the Rules Relating to the Admission of Barristers of the Supreme Court of Queensland ("the Rules") were unconstitutional in so far as they required a resident of New South Wales to cease practice in that State and become a resident of Queensland as a condition of admission to practice as a barrister.

2. On 2 July 1987, the day before Mr Street's application for special leave was set down for hearing in this Court, the Rules were amended by the Governor in Council ("the amended Rules"). The amendment substituted for the implied requirement of residence in and the express requirement of cessation of practice outside Queensland the requirement that an applicant for admission must intend to practise principally in Queensland. Subsequently, Mr Street filed a statement of claim challenging the validity of the amended Rules in so far as they apply to him. Pursuant to s.18 of the Judiciary Act 1903 (Cth), a case was stated and was heard concurrently with the applications for special leave to appeal. Mr Street contends that the timing and form of the amendment to the Rules demonstrate that they are a "colourable evasion of the State's constitutional obligation". But in any event he contends that, by reason of s.92 or s.117 of the Constitution or both, the amended Rules are of no force or effect in so far as they require, as a condition of admission, an undertaking from him to practise principally in Queensland.

3. In my opinion Mr Street is correct in contending that, by reason of s.117 of the Constitution, the Rules could not lawfully require him, as a condition of admission, to cease practice in New South Wales and to reside in Queensland. Nor can the amended Rules require him to practise principally in Queensland. In the circumstances it is unnecessary to express any opinion as to whether s.92 also supports the contentions of Mr Street.The Background

4. Since 6 August 1982 Mr Street has carried on practice as a barrister, principally in the State of New South Wales. He is also admitted to practice in the Australian Capital Territory, South Australia and Victoria. If he is admitted to practice as a barrister in Queensland, he wishes to remain a resident of and to practise principally in New South Wales.

5. Rule 17 of the Rules provided that a person was not entitled to be admitted as a barrister until he had received the Certificate of the Barristers' Board in Form 1. Form 1 certified that the applicant had complied with the Rules. Rule 38 provided that every person seeking admission as a barrister should, if he "relies upon a previous admission", include in his affidavit the matters which were set out in Form 10. In his application, Mr Street relied upon a "previous admission" (r.15(d)(4)).

6. Form 10 required the applicant to swear an affidavit. At the time of Mr Street's application before the Full Court, pars (6) and (7) of Form 10 required the applicant to swear:

> "(6) That I ceased to practise as a barrister
> in (here set forth the dates when the
> applicant ceased to practise in the
> various Courts to which he has been
> admitted, and the nature of his
> employment hereafter.)
> (7) That I arrived on the day of ,
> 19 , in the State of Queensland."

7. In Re Sweeney (1976) Qd R 296 the Full Court of the Supreme Court of Queensland held (at pp 299, 310) that the effect of r.38 and Form 10 was that it was a condition of admission as a barrister

in Queensland for a person admitted elsewhere that he or she take up residence in Queensland and cease to practise as a barrister elsewhere.

8. Paragraphs (6) and (7) of Form 10 were repealed on 2 July 1987. A new par (6) required the applicant to swear:

> "It is my intention to practise principally
> in the State of Queensland commencing on
> (here set forth any relevant date)."

9. Rules 15(e) and 15B were also added on 2 July 1987. Rule 15(e) provides that an applicant relying on, inter alia, a New South Wales admission must have "the intention of practising principally in Queensland". Rule 15B provides that such an applicant should in the first place be admitted conditionally for a period of one year. After the expiration of the one year period, the applicant can be granted absolute admission if he or she has practised principally in Queensland since conditional admission.

10. The Barristers' Board did not issue Mr Street with a Certificate in Form 1 to the Rules. But in the Full Court, Connolly J. said (at p 210) that Mr Street was "in all respects qualified to be admitted as a barrister in Queensland, save that he intends to continue as a resident of New South Wales and has not ceased to practise and does not intend to cease to practise as a barrister (in) his State of residence". Accordingly, it seems clear that, but for the failure of Mr Street to give the undertaking required by par (6) of Form 10 before its amendment and to comply with the implied obligation to reside in Queensland, the Full Court would have admitted him to practice as a barrister in Queensland. If, by reason of s.117, this undertaking and obligation could not be lawfully required of him, the case would appear to be one for the grant of special leave. The question whether, by reason of s.117 of the Constitution, a barrister in the position of Mr Street is entitled to admission in Queensland is one of general importance in respect of which special leave to appeal would ordinarily be granted.

11. However, the respondents contend that, because of the amendments to the Rules on 2 July 1987, the case is not one in which it is appropriate to grant special leave to appeal against the judgment of the Full Court. Accordingly, the first question in the application for special leave to appeal is to determine the effect of the amendments to the Rules made on 2 July 1987 and whether they apply retrospectively to the application of Mr Street.

12. Section 20 of the Acts Interpretation Act 1954 (Q) provides:

> "Where any Act repeals or amends or has
> repealed or amended wholly or in part any
> former Act ... then, unless the contrary
> intention appears, such repeal or amendment
> ... shall not -
> ...
> (c) Affect any right, interest, title,
> power, or privilege created, acquired,
> accrued, established, or exercisable, or
> any status or capacity existing, prior
> to such repeal or amendment ...

> and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced ... as if the repealing or amending Act had not been passed ..."

Section 5(2) provides that in any Act (which includes the Acts Interpretation Act) every reference to any other Act where the context admits and unless the contrary intention appears is to include a reference "to all Proclamations, Orders in Council, regulations, rules, by-laws, and ordinances, if any, made under that other Act". Hence, s.20 of the Acts Interpretation Act is applicable to both the Supreme Court Act 1921 (Q) which is the enactment under which the Rules were made and to the Rules themselves, for there is nothing in them which suggests a "contrary intention". Accordingly, the Rules made on 2 July 1987, although imposing a new requirement on an applicant for admission and repealing some of the old requirements, did not affect any rights which Mr Street had under the Rules before they were amended.

13. Having regard to what was said in the Full Court concerning Mr Street's qualifications for admission, it seems plain that, but for his intention to reside and to practise principally in New South Wales, he would have a "right" to be admitted to the Queensland Bar. If, by reason of s.117 of the Constitution, the Rules could not lawfully require him, as a condition of admission, to give up his residence and practice in New South Wales, he is entitled to admission in Queensland. Consequently, the amendments to the Rules made on 2 July 1987 are not a ground for refusing Mr Street special leave to appeal against the judgment of the Full Court. Special leave to appeal should be granted.The Appeal

14. Section 117 of the Constitution enacts:

> "A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

15. The Full Court held (at p 210) in the present case that the decision of this Court in Henry v. Boehm [1973] HCA 32; (1973) 128 CLR 482 was "binding authority that a residential requirement for admission to the practice of a profession does not contravene s.117". Mr Bennett QC, who appeared for Mr Street, submitted that the Full Court erred in regarding itself as bound by the decision in Henry v. Boehm. It becomes necessary, therefore, to determine what Henry v. Boehm decided and whether the decision in that case is consistent with the protection given to an interstate resident by s.117 of the Constitution.

16. In Henry v. Boehm the plaintiff, who was admitted as a barrister and solicitor in Victoria, applied for admission to practice in South Australia. Supreme Court Admission Rule 27(1) provided that an applicant, previously admitted elsewhere, should reside "for at least three calendar months in the State continuously and immediately preceding the filing of his notice of application". However, r.27(1) did not apply to an applicant who satisfied the Board of Examiners that he "ordinarily resides in and is domiciled in this State": r.27(2). Rule 28 provided that an applicant previously admitted elsewhere should be admitted conditionally only for a period of one year but that he might be granted absolute admission if he satisfied the Court that, since the date of his conditional

admission, he had "continuously resided in the State" and had not pursued any occupation or business other than the proper business of a practitioner. This Court, by majority, held that these Rules did not offend s.117 of the Constitution.

17. The majority (Barwick C.J., McTiernan, Menzies and Gibbs JJ.) reached its conclusion on two grounds. First, the Rules applied equally to residents of South Australia relying on a "previously admitted" qualification. Hence, the plaintiff would be liable to observe in South Australia exactly the same provisions if he were a resident of South Australia: Barwick C.J. at pp 486-487, McTiernan J. at p 490, Menzies J. at p 491, Gibbs J. at pp 497-498. Secondly, the concept of "residing" in the Supreme Court Admission Rules was not the same as the concept of "resident" in s.117 of the Constitution. An applicant for admission in South Australia could comply with rr.27 and 28 without giving up his interstate residence. Consequently, there was no disability or discrimination based on residence within the meaning of s.117: Barwick C.J. at pp 489-490, McTiernan J. at p 490, Menzies J. at pp 492-493, Gibbs J. at p 498.

18. At back of these conclusions were three wider conclusions about s.117. First, a law only offends s.117 if the disability or discrimination is based solely on residence: Barwick C.J. at p 488, McTiernan J. at p 490, Menzies J. at p 493, Gibbs J. at p 496. Secondly, the concept of residence to which s.117 is directed involves a degree of permanence: Barwick C.J. at p 487, McTiernan J. at p 490, Menzies J. at p 491, Gibbs J. at pp 496-497. Thirdly, regard can only be had to the legal operation of the impugned provision and not to its factual consequences: Barwick C.J. at p 489, McTiernan J. at p 490, Menzies J. at p 491.

19. Whatever the nature of the disability or discrimination to which the interstate resident is subject, s.117 does not assist him or her unless the disability or discrimination is imposed or created on the ground of interstate residence and is decisive in denying equality of treatment to him or her. A State law which provides that a person cannot be admitted to practice in that State if (a) she is a woman, or (b) an interstate resident, discriminates against an interstate woman resident in three different ways. It discriminates against her on the ground of sex so far as interstate men are concerned, on the ground of residence so far as the State's women are concerned, and on the grounds of sex and residence so far as the State's men are concerned. But s.117 does not assist her claim for admission because one form of discrimination (refusal of admission on the ground of sex) would be equally applicable to her if she were a resident of the State. Hence, the only disabilities or discriminations which offend s.117 are those which are the result of interstate residence: those which apply to or against interstate residents but not to or against State residents who are in identical circumstances.

20. Section 117 does not say, however, that the offending law must select residence as the criterion of disability or discrimination. The section requires that a subject of the Queen resident in any State "shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State". But in the language of modern anti-discrimination law, a law may have a discriminatory operation or a discriminatory impact. A person resident in another State may be subject to disability or discrimination on the ground of his residence not only from the direct operation of a law but also from its factual impact.

21. In Cole v. Whitfield [1988] HCA 18; (1988) 165 CLR 360, this Court said (at p 399) that the "concept of discrimination in its application to interstate trade and commerce necessarily embraces factual discrimination as well as legal operation". The Court went on to say (at p 399) that a law discriminates against interstate trade "if the law on its face subjects that trade or commerce to a

disability or disadvantage or if the factual operation of the law produces such a result". There is no reason why the terms "discrimination" and "disability" in s.117 should be given a meaning which excludes disability or discrimination arising from the factual operation of the law. If the interstate resident is subject to a disability or discrimination because of his residence, it cannot matter whether that result is produced because the law selects interstate residence as the basis of discrimination or the imposition of the disability, or because the law selects some other criterion which operates so as to give rise in fact to a disability or discrimination on the ground of interstate residence. Discrimination can arise just as readily from a law which treats as equals those who are different as it can from a law which treats differently those whose circumstances are not materially different: Griggs v. Duke Power Co. [1971] USSC 46[1971] USSC 46; ; (1971) 401 US 424, at p 431; Ontario Human Rights Commission v. Simpsons-Sears Limited 1985 CanLII 18 (SCC); (1985) 2 SCR. 536, at p 549; Bhinder v. Canadian National Railway Company (1985) 2 SCR 561, at p 586.

22. The majority in Henry v. Boehm held that the plaintiff was not subject to discrimination because the Supreme Court Admission Rules applied equally to residents of South Australia. But a requirement or condition imposed uniformly on and "applying equally" to residents and interstate residents may nevertheless subject an interstate resident to a disability or discrimination on the ground of interstate residence. What applies equally may be discriminatory because its impact is unequal. To confine "disability" and "discrimination" in s.117 to the consequences of the legal application of the enactment in question and to ignore its factual impact on the interstate resident is to reduce a great constitutional protection to a mere matter of form. Moreover, as Stephen J. pointed out (at p 502) in his dissent in Henry v. Boehm, the position of South Australian residents in that case was irrelevant. What s.117 requires is a comparison between the actual position of the interstate resident and his hypothetical position as a resident in the legislating State. If a law operates so that an interstate resident would be worse off by reason of his residence than he would be if he were a resident in the State in question, s.117 will prevent the law operating to his detriment. In my opinion, the majority judges in Henry v. Boehm were in error in holding that a law which applies equally to residents and non-residents does not discriminate for the purpose of s.117.

23. But what is "discrimination" for the purpose of s.117? The concept frequently involves the notion of unjustified differentiation: Deputy Federal Commissioner of Taxation (N.S.W.) v. WR Moran Pty. Ltd. [1939] HCA 27; (1939) 61 CLR 735, at p 764; Belgian Linguistic Case (No.2) [1968] ECHR 3; (1968) 1 EHRR 252, at p 293; Simpsons-Sears, at p 549. On this view a justifiable differentiation which is based on or is the result of interstate residence would not be "discrimination". In s.117, however, "discrimination" seems to mean the act of distinguishing or treating differently irrespective of whether the distinction or different treatment can be justified. Two considerations point to this conclusion. The first is the presence of the word "disability" which in the context of s.117 must have the second meaning attributed to it in the Oxford English Dictionary, 2nd ed. (1989): "Incapacity in the eye of the law, or created by the law; a restriction framed to prevent any person or class of persons from sharing in duties or privileges which would otherwise be open to them; legal disqualification". There is no ground for holding that "disability" in s.117 means an "unjustifiable" or "unreasonable" disability. It would be incongruous, therefore, to give "discrimination" in s.117 an interpretation which leads to the result that the imposition of differential treatment which is justifiable is outside the section but the imposition of a disability which is justifiable is within the section. Indeed, in many cases a restriction might be classified as both a disability and a discrimination. The presence of "disability" in s.117, therefore, is a powerful reason for not confining "discrimination" to "unjust", "undue" or "unreasonable" discrimination. Secondly, the term "discrimination" is also used in s.102 of the Constitution which provides: "The Parliament may ... forbid, as to the railways, any ...

discrimination by any State ... if such ... discrimination is undue and unreasonable ..." In that context, "discrimination" means differential treatment. This gives some limited support for the proposition that in s.117 "discrimination" also means differential treatment. Moreover, by s.51(ii) the Parliament is given power to make laws with respect to "Taxation; but so as not to discriminate between States or parts of States". The Court has held that in that paragraph "discriminate" means "treat differently": Cameron v. Deputy Federal Commissioner of Taxation [1923] HCA 4[1923] HCA 4; ; (1923) 32 CLR 68, at pp 72, 76, 78, 79, 80. Accordingly, in s.117 "discrimination" should be interpreted to mean differential treatment whether arising from the legal application or the factual impact of the law.

24. Despite the width of its language, however, s.117 was not intended as a human rights charter for interstate residents. It does not prohibit a State from subjecting an interstate resident to disabilities or discriminations to which State residents in identical circumstances are subject. Indeed, as the Convention Debates show, the desire of Western Australia to continue to discriminate against Asian persons was the reason the words "to him" were inserted in s.117. Moreover, although s.117 leaves the words "disability" or "discrimination" at large and does not identify their subject-matter, the "structural logic" of the Constitution indicates that there are some subject-matters in respect of which an interstate resident is not entitled to equality of treatment with State residents in identical circumstances. The object of s.117 was to make federation fully effective by ensuring that subjects of the Queen who were residents of Australia and in comparable circumstances received equality of treatment within the boundaries of any State. But the existence of a federal system of government, composed of a union of independent States each continuing to govern its own people, necessarily requires the conclusion that some subject-matters are the concern only of the people of each State. And since the residents of a State and its people are basically interchangeable concepts, it follows that laws dealing with these particular subject-matters may exclude interstate residents from participation either generally or subject to conditions. The exclusion of these subject-matters from the scope of s.117 is the necessary consequence of a federal system in which each State exercises independent powers and functions within its territory for the peace, order and good government of that territory.

25. Matters which are the concern only of a State and its people and are not within the scope of s.117 would seem to include the franchise, the qualifications and conditions for holding public office in the State, and conduct which threatens the safety of the State or its people. No doubt there are other subject-matters which are also outside the reach of s.117. But since all exceptions to the terms of that section arise by necessary implication from the assumptions and structure of the Constitution, they must be confined to the extent of the need for them. The question is not whether a particular subject-matter serves the object of s.117; it is whether, by necessary implication, the matter is so exclusively the concern of the State and its people that an interstate resident is not entitled to equality of treatment in respect of it.

26. It follows from the foregoing analysis that the current approach of the U.S. Supreme Court to the Privileges and Immunities Clause (Art.IV s.2) of the U.S. Constitution, which provided the inspiration for what became s.117 of the Constitution, is of limited assistance in determining the scope of s.117. Article IV s.2 provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States". The Supreme Court has held that, for the purpose of analysis in most cases, the terms "resident" and "citizen" are essentially interchangeable: Austin v. New Hampshire [1975] USSC 54; (1975) 420 US 656, at p 662, fn.8; Hicklin v. Orbeck [1978] USSC 128[1978] USSC 128; ; (1978) 437 US 518, at p 524, fn.8. Despite the terms of the Privileges and Immunities Clause, however, the Supreme Court has held that it does

not prevent differential treatment when there are valid reasons for that treatment: Toomer v. Witsell (1948) 334 US 385, at p 396. The clause applies only to those "privileges" and "immunities" which bear "upon the vitality of the Nation as a single entity": Baldwin v. Montana Fish and Game Commission [1978] USSC 82; (1978) 436 US 371, at p 383; Supreme Court of New Hampshire v. Piper [1985] USSC 49[1985] USSC 49; ; (1985) 470 US 274, at p 279. Moreover, even if a particular activity is one of the "privileges" or "immunities" to which the clause applies (a "fundamental" privilege or immunity), a State may still discriminate against an interstate resident in respect of that activity if (a) there is a substantial reason for the difference in treatment, and (b) the discrimination bears a substantial relationship to the State's objective: Toomer v. Witsell, at p 396; Hicklin v. Orbeck, at pp 525-526; Supreme Court of New Hampshire v. Piper, at p 284.

27. The "two-step inquiry" (United Building and Construction Trades Council v. Mayor of Camden [1984] USSC 25; (1984) 465 US 208, at p 219) which the Privileges and Immunities Clause mandates has no counterpart in s.117. Section 117 is not concerned to inquire whether the subject-matter of the disability or discrimination bears "upon the vitality of the Nation as a single entity", or whether there is a substantial reason for the disability or discrimination, or whether the disability or discrimination bears a substantial relationship to the State's objective. Unless by necessary implication, drawn from the assumptions and structure of the Constitution, the subject-matter of the disability or discrimination is outside the scope of s.117, that section focuses on the position of the individual interstate resident in relation to the disability or discrimination. Would it be equally applicable to him if he were resident in the State concerned?

28. Subject-matters which are within the protection of the Privileges and Immunities Clause are a fortiori within s.117; but many subject-matters falling outside the protection of that clause may be within the very different wording of s.117. The point is well illustrated by the leading case of Baldwin. There the Supreme Court held (at p 388) that a statutory licence scheme in relation to elk-hunting which required non- residents to pay licence fees at a substantially higher rate than State residents and to purchase a special licence did not come "within the purview of the Privileges and Immunities Clause". The Court said (at p 388) that since elk-hunting in Montana by non-residents was a recreation and a sport, equality in access to Montana elk was "not basic to the maintenance or well-being of the Union". However, it seems clear that a similar scheme, enacted by an Australian State, would be held to subject an interstate resident to a "discrimination which would not be equally applicable to him if he were ... resident in such other State". Hence, the basic approach of the U.S. Supreme Court to the Privileges and Immunities Clause is opposed to what s.117 requires. United States cases on that clause are of assistance only in so far as, by decision, they illustrate activities which are "within the purview" of the clause.

29. Significantly for the present case however, the U.S. Supreme Court has concluded "that the right to practice law is protected by the Privileges and Immunities Clause": Supreme Court of New Hampshire v. Piper, at p 283. In that case the Supreme Court of New Hampshire offered several justifications for its refusal to admit non-residents to practice in that State. They were that non-residents "would be less likely (i) to become, and remain, familiar with local rules and procedures; (ii) to behave ethically; (iii) to be available for court proceedings; and (iv) to do pro bono and other volunteer work in the State" (at p 285). The U.S. Supreme Court held that none of these reasons met the test of "substantiality" and the means chosen did not bear the necessary relationship to the State's objectives. State Rules precluding the admission of interstate practitioners on residency grounds have also been struck down by the Supreme Court in subsequent cases: Barnard v. Thorstenn (1989) 57 LW 4316; Frazier v. Heebe (1987) 482 US 641; Supreme Court of Virginia v. Friedman (1988) 101 L Ed 2d 56.

30. It should be apparent from the foregoing analysis that I consider the basic reasoning process and the actual decision in Henry v. Boehm to be erroneous. In addition, I think that the majority were in error in that case in holding that "resident in" in s.117 meant "permanent resident in". No doubt the concept of "resident" in s.117 requires more than presence in a State. But I do not see any constitutional purpose in reading it restrictively to mean "permanent resident". The words are "resident in", not "resident of". "Resident" is a word with a number of shades of meaning. In a legal document, its precise meaning will usually depend more upon context than on the dictionary definition. Nevertheless, when used as a noun, it will prima facie refer to a person who resides permanently in a place: Australasian Temperance and General Mutual Life Assurance Society Ltd. v. Howe [1922] HCA 50; (1922) 31 CLR 290, at p 295. When used as an adjective, however, as it is in s.117, some lesser connection than permanence with a place may make a person "resident in" that place. In Davies and Jones v. The State of Western Australia [1904] HCA 46; (1904) 2 CLR 29 Griffith C.J. said (at p 39):

> "The word 'resident' is used in many senses. As used in sec.117 of the Constitution, I think it must be construed distributively, as applying to any kind of residence which a State may attempt to make a basis of discrimination, so that, whatever that kind may be, the fact of residence of the same kind in another State entitles the person of whom it can be predicated to claim the privilege attempted to be conferred by the State law upon its own residents of that class."

In Henry v. Boehm, Stephen J. was of the same view. So am I.

31. Hence I think that the majority in Henry v. Boehm were in error in holding that a law cannot subject an interstate resident to any relevant disability or discrimination if it applies equally to State and interstate residents and in holding that "resident" meant permanently resident.

32. Further, contrary to the decision in Henry v. Boehm, I think that the plaintiff was subjected to a disability or discrimination on the ground of his Victorian residence. As argument in that case was limited to the application to the plaintiff of s.27(1), it was unnecessary for the Court to consider the operation of s.27(2). Accordingly, in the discussion which follows, I deal only with s.27(1). The reason that the plaintiff could not obtain admission in South Australia was that, without leaving Victoria, he could not establish that he had resided continuously in South Australia for three months. On the assumption that the plaintiff had been continuously resident in Victoria for three months, he was subjected in South Australia to a disability or discrimination (refusal of admission for not continuously residing in South Australia for three months) which would not have been equally applicable to him if he had resided in South Australia. When s.117 poses the question whether the disability or discrimination would have been equally applicable to him "if he were ... resident in such other State", the hypothesis of being a resident in that other State must include more than the bare legal conclusion of being a resident in that other State. The hypothesis of being a resident in the other State requires, in my opinion, the transfer of the actual indicia of his interstate residence (e.g. living in a home continuously for many years). The notional change of residence, therefore, requires the notional change of the material facts which make up his interstate residence. To

establish that under the South Australian rules the plaintiff was treated less equally than he would have been if he were a resident of South Australia, it was necessary to show that as a resident of that State he would have fulfilled the requirements of its rules. That required proof that he would have complied with the three-month condition. He would provide that proof by showing that as part of his Victorian residence he had lived there continuously for three months.

33. I prefer the above approach to the comparison exercise to the approach taken by Stephen J. in Henry v. Boehm. His Honour saw (at p 507) the disability or discrimination as the disadvantage to the plaintiff in having to leave his established home and live continuously in South Australia for the relevant period to qualify for admission. This was a disadvantage to which the plaintiff would not be subject if he were resident in South Australia. One difficulty with this approach to s.117, however, is that the plaintiff would be actually better off than he would be as the hypothetical South Australian resident if, for example, while remaining a resident in Victoria, he had been overseas for the three months preceding the date on which he filed for admission. To obtain the equality which is the object of s.117, the plaintiff must surely be required to reside continuously for a three-month period in his own State. The plaintiff in Henry v. Boehm sought a declaration inter alia that r.27(1) was invalid to the extent that it applied to him. But if the condition of three months continuous residence was applicable to him, any declaration would have to take account of that condition. And since s.117 does not place an interstate resident in a better position than he would be as a State resident, compliance with the condition was essential. But this problem was not addressed by Stephen J. in his analysis. Nevertheless, I think that the decision of his Honour that the plaintiff could successfully rely on s.117 was correct.

34. I think that the Court should take the exceptional, but not unprecedented, step of overruling Henry v. Boehm. The decision and essential parts of its reasoning are erroneous; it does not rest upon a principle carefully worked out in a significant succession of cases; there was a dissenting judgment; and the decision has not been independently acted upon in a manner which militates against reconsideration. These are all matters which make it proper to overrule the case: see John v. Commissioner of Taxation [1989] HCA 5; (1989) 63 ALJR 166, at p 174[1989] HCA 5[1989] HCA 5; ; ; 83 ALR 606, at p 620. Moreover, the doctrine of stare decisis has less force in constitutional cases than in other cases: Parliament cannot legislate to overturn an erroneous constitutional decision: Queensland v. The Commonwealth [1977] HCA 60; (1977) 139 CLR 585. But most importantly, the decision, if followed, will greatly reduce the scope of a great constitutional protection for the residents of this country. In these circumstances, I think that it is proper for the Court to overrule Henry v. Boehm.

35. Apart from a brief reference to the judgment of Griffith C.J., I have not referred to Davies and Jones v. Western Australia. However, neither the actual decision nor its ratio decidendi seems to me to have any bearing on the present appeal. It is, therefore, unnecessary to come to any conclusion as to whether it was correctly decided or whether all the statements in the judgments in that case were correct.

36. Nothing concerning the practice of law in Queensland provides any ground for concluding that, by necessary implication from the assumptions and structure of the Constitution, the practice of law is outside the scope of s.117. Indeed, many considerations point to the practice of law in Queensland, as in other States, as a subject-matter which is of national and not purely local concern. It is a matter of national importance that, if they wish, interstate residents should have the services of legal practitioners from their own State when conducting litigation in the courts of another State. It is a matter of national importance that, if they wish, State residents should be able to utilise the

services of interstate practitioners in conducting litigation in courts of their State. The practice of law also plays an increasingly important part in the national economy and contributes to maintaining the single economic region which is a prime object of federation. There is no ground for concluding that the right to practise law is excluded from the protection given by s.117.

37. It remains only to consider whether the requirements of the Rules concerning residence in and cessation of practice outside Queensland subjected Mr Street to a disability or discrimination which would not be equally applicable to him if he were resident in Queensland. This requires, as Stephen J. pointed out in his dissent in Henry v. Boehm (at p 501), a comparison between Mr Street's actual situation and a hypothetical situation which differs from his actual situation only by assuming that he is a resident of Queensland. When that comparison is made, it is readily seen that Mr Street was treated differently on the ground of his New South Wales residence because, unlike his position as a hypothetical Queensland resident, he could not be admitted to practice in Queensland without giving up his residence and his practice in the State where he resides. According to the Full Court's interpretation of the Rules, residence in Queensland was an implied condition of admission. And the effect of par (6) of Form 10 was that, to obtain admission in Queensland, Mr Street was required to abandon his practice in the State in which he was resident. If he were resident in Queensland, he would not be required to give up either his residence or his practice in the State where he resided. Hence, he was subject to discrimination (refusal of admission unless he abandoned his practice and his residence) which would not be equally applicable to him if he were resident in Queensland.

38. The appeal should be allowed. The order of the Full Court of the Supreme Court should be set aside. The matter should be remitted to that Court so that an order can be made for Mr Street's admission.

The Stated Case

39. In my opinion the amended Rules also subject Mr Street to a disability or discrimination which would not be equally applicable to him if he were a resident of Queensland. If Mr Street were a Queensland resident, he would not be refused admission because he wished to practise principally in the State where he resided. However, the practical impact on him of the amended Rules is that, if he wishes to practise principally in Queensland, he must abandon his present New South Wales residence and reside in Queensland. Although in form the amended Rules require Mr Street as a hypothetical Queensland resident and as an actual New South Wales resident to practise principally in Queensland, the factual impact of the amended Rules is that Mr Street as a resident of New South Wales can only comply with them by abandoning his New South Wales residence. Hence, the factual effect of the amended Rules is that he must abandon his New South Wales residence. As a hypothetical Queensland resident, he would not be required to abandon his residence to practise principally in the State of his residence.

40. Question 1 in the stated case should be answered to the effect that r.15(e), Form 10 par (6) and r.15B, in so far as they require him to have an intention to practise principally in Queensland and to practise principally in Queensland during the period between conditional and absolute admission, do not apply to Mr Street if he makes a further application for admission. It is unnecessary to answer Question 2.

ORDER

ORDER IN MATTER No. B45 OF 1987

Application for special leave to leave granted.

Appeal allowed.

Set aside the order of the Full Court of the Supreme Court of Queensland.

Remit the matter to the Supreme Court of Queensland for the making of orders in accordance with the judgment of this Court.

No order as to costs.

ORDER IN MATTER NO. B32 OF 1988

Answer the questions in the stated case as follows:

1. Are the Rules of the Court relating to the

admission of Barristers of the Supreme Court of Queensland, as amended by Order in Council dated (2) July 1987, invalid as being contrary to Section 117 of the Constitution?

Answer: Rule 15(e), par.(6) of Form 10 and Rule

15B(2) are inapplicable to the plaintiff to the extent that they would require him, on any fresh application for admission, to have an intention of practising principally in Queensland or so to practice during the period between conditional and absolute admission.

2. Are the Rules of the Court relating to the

admission of Barristers of the Supreme Court of Queensland, as amended by Order in Council dated (2) July 1987, invalid as being contrary to Section 92 of the Constitution?

Answer: Unnecessary to answer.

No order as to costs.

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