RE CANAVAN

RE LUDLAM

RE WATERS

RE ROBERTS [NO 2]

RE JOYCE

RE NASH

RE XENOPHON

[2017] HCA 45

IN THE COURT OF DISPUTED RETURNS

HC of A 2017

Oct 10-12, 27 2017

Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ

Constitutional Law (Cth) — Parliamentary elections (Cth) — Capacity to be chosen — Disqualification — Citizen of foreign power — Dual citizenship — Whether knowledge of foreign citizenship required for disqualification — Commonwealth Constitution, s 44(i).

Section 44(i) of the Commonwealth *Constitution* provided that any person who is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power, shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

Held, that proof of an election candidate's knowledge of his or her foreign citizenship, or of facts that might put a candidate on inquiry as to that possibility, is not necessary to disqualify that person from being chosen or sitting as a senator or member.

Per curiam. A person who, at the time that he or she nominates for election, retains the status of subject or citizen of a foreign power will be disqualified by reason of s 44(i), except where the operation of the foreign

law is contrary to the constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government. Where it can be demonstrated that the person has taken all steps that are reasonably required by the foreign law to renounce his or her citizenship and within his or her power, the constitutional imperative is engaged.

Sykes v Cleary (1992) 176 CLR 77, considered.

REFERENCES pursuant to the *Commonwealth Electoral Act 1918* (Cth), s 376.

On 2 July 2016, a general election was held for both Houses of the Commonwealth Parliament. Senator Matthew Canavan, Mr Scott Ludlam, Ms Larissa Waters, Senator Fiona Nash, Senator Nicholas Xenophon, Senator Malcolm Roberts, and Mr Barnaby Joyce MP had nominated as candidates for that election and all were returned as elected. In the case of Mr Ludlam, Ms Waters, and Senator Roberts, each had been born overseas, in New Zealand, Canada, and India, respectively. In the others' case, each had one or more parents or grandparents who had been born overseas. Relevantly, Senator Roberts' father had also been born overseas, in Wales.

In July 2017, a member of the public contacted Mr Ludlam's office to advise that he had reason to believe Mr Ludlam was a citizen of New Zealand as well as Australia. Mr Ludlam made enquiries which confirmed that to be the case, whereupon he resigned his position as Senator for Western Australia. Thereafter, evidence emerged either confirming or suggesting that each of Senator Canavan, Ms Waters, Senator Nash, Senator Xenophon, Senator Roberts and Mr Joyce was also a dual citizen at the time of his or her nomination as a candidate for election. In the case of Ms Waters, she resigned her position as Senator for Queensland upon receiving advice from Canadian authorities as to her Canadian citizenship.

On 8 August 2017, the Senate resolved that certain questions respecting the representation of Queensland in the Senate (regarding Senator Canavan), and concerning a vacancy in the representation of Western Australia and Queensland in the Senate (on account of Mr Ludlam's and Ms Waters' resignations), should be referred to the Court of Disputed Returns. On 9 August 2017, the Senate resolved that certain questions respecting the representation of Queensland in the Senate (regarding Senator Roberts) should be referred to the Court of Disputed Returns. On 14 August 2017, the House of Representatives resolved that certain questions respecting the place of the Member for New England (regarding Mr Joyce) should be referred to the Court of Disputed Returns. On 4 September 2017, the Senate resolved that certain questions respecting the representation of New South Wales and

South Australia in the Senate (regarding Senators Nash and Xenophon) should be referred to the Court of Disputed Returns. Pursuant to s 377 of the *Commonwealth Electoral Act 1918* (Cth), the President of the Senate and the Speaker of the House of Representatives transmitted to the Principal Registrar of the High Court statements of questions upon which the determination of the High Court, sitting as the Court of Disputed Returns, was desired. The questions are substantially stated in the judgment of the Court.

In the case of each reference, except that of Senator Roberts, the person believed that he or she only held Australian citizenship at the time of nomination for election. In the case of Senator Roberts, Mr Stephen Lloyd SC was granted leave to appear as amicus curiae to act as contradictor in relation to the facts and a hearing was directed to be held before a single Justice. Following that hearing, Keane J found that, as at the date of his nomination for election to the Senate, Senator Roberts knew that there was at least a real and substantial prospect that he was a British citizen, on account of his father being Welsh.

Kiefel CJ made orders to the relevant effect that, in each reference, the person the subject of the reference and the Attorney-General for the Commonwealth were deemed to be parties to that reference pursuant to s 378 of the *Commonwealth Electoral Act*. In addition, Kiefel CJ made orders to the relevant effect that, in the reference concerning Mr Joyce, Mr Antony Windsor (who had nominated as an alternative candidate to Mr Joyce at the general election) was deemed to be a party to that reference.

S P Donaghue QC, Solicitor-General for the Commonwealth, (with him *P D Herzfeld*, *M P Costello* and *J D Watson*), for the Attorney-General for the Commonwealth. The facts in the references concerning Senators Canavan, Nash and Xenophon, Ms Waters and Mr Joyce illustrate that, if s 44(i) of the *Constitution* operated to disqualify those parliamentarians, that operation would be far removed from its purpose in addressing split allegiances. It was held in *Sykes v Cleary* that the text of s 44(i) does not have its literal meaning and so does not give unqualified effect to foreign law (1). The status that is referred to in the second limb of s 44(i) is a status of a particular kind, being that of a person who has voluntarily obtained or voluntarily retained foreign citizenship. Neither of the competing interpretations of s 44(i) gives the text its literal meaning. The contradictors accept the existence of qualifications to the operation of s 44(i) that they do not explain by reference to its text. The history of United Kingdom and colonial

(1) (1992) 176 CLR 77 at 107, 113, 127, 131, 137.

provisions demonstrates a long-standing distinction between natural-born and naturalised subjects. [BELL J. Is the relevance of the distinction between them that, on the Attorney-General's argument, in the latter's case they are always on notice of the prior allegiance to another power?] Yes. [He referred to *Singh v The Commonwealth* (2).] From at least the 18th century, it was possible for a natural-born British subject to be a dual citizen by birth, but that did not have any effect on the capacity of such a person to sit in Parliament. In the Australian colonies and, from 1870, in the United Kingdom, naturalised British subjects could sit in Parliament and were not required to renounce foreign citizenship. In the colonies, a natural-born British subject who acquired foreign citizenship by a voluntary act vacated his seat in Parliament. Section 44(i) was expressly modelled on the provisions that concerned acquisition of foreign citizenship by a voluntary act, and which had no effect on dual citizenship by birth. The drafting history of s 44(i) shows that it was modelled on, and had the same purpose as, statutory provisions that were in force in all of the colonies. Under all constitutional drafts prior to 1 March 1898, natural-born British subjects who were dual citizens by birth, and aliens who were naturalised in Australia, would not have been disqualified. There is no evidence that the change to the text made by the drafting committee in March 1898 was intended to extend the operation of s 44(i) to disqualify a class of persons not otherwise disqualified from sitting in the Parliaments of the United Kingdom, Canada, New Zealand or any of the Australian colonies. The use of history and purpose to illuminate and confine the operation of s 44(i) is consistent with settled constitutional principle (3). The contradictors' construction departs radically from the text, when considered in its historical context. It requires the Court to accept that a change to the text made by the drafting committee in March 1898 should be understood as intended to disqualify from serving in Parliament persons with a familiar status, namely, British subjects who were dual citizens by birth, notwithstanding that that status had never previously been treated as incompatible with serving in Parliament, and notwithstanding that no one suggested any such change be made and that the processes of the Convention were inconsistent with substantive changes being made by the drafting committee.

Sykes does not provide a complete exposition of s 44(i). It decided only the matter before it, which involved naturalised Australians who

(2) (2004) 222 CLR 322.

(3) *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 188-194 [53]-[67]; *Re Day [No 2]* (2017) 263 CLR 201 at 213 [14], 213-214 [17]-[21], 216 [29]. 217 [33], 218-219 [39], 250 [173], 266-267 [247], 270-273 [265]-[273].

were born and grew up in foreign countries (4). The Attorney-General's construction is consistent with *Sykes*. It explains how the "all reasonable steps" test is accommodated by the text of s 44(i), there being an obvious relationship between the voluntary retention of foreign citizenship and the taking of all reasonable steps to renounce that status (5). The contradictors' construction is not wholly objective and does not create certainty. *Sykes* mandates an evaluative test in determining whether the qualification on s 44(i) is engaged (6). And foreign law may confer citizenship status on people on the basis of facts outside a reasonable person's knowledge. On the other hand, whether a person has voluntarily obtained or retained foreign citizenship is a question of a kind readily answered by the Court. In cases where foreign citizenship was unknown, the answer will not turn on complex questions of fact or of foreign law. [BELL J. If one looks to history alone, one might read s 44(i) as applying only to foreign citizenship voluntarily obtained. But that hardly sits with the analysis in *Sykes* and the notion of retention.] There is no perfect alignment between the Attorney-General's submission based on voluntary obtaining or retention of foreign citizenship and the historical record, but that record points one to a narrower construction of the provision rather than the more absolutist reach attributed to it by the contradictors. [NETTLE J. Is not the more logical conclusion that *Sykes* was wrong?] The Attorney-General would not dissuade the Court from that conclusion, but nor does he challenge the case. [GORDON J. If *Sykes* were wrong, and one looked only to voluntary acts, then one would not need any knowledge element as is being proposed, and it would suffer none of the complaints about certainty that are put against you.] That is so. A person cannot voluntarily retain foreign citizenship unless the person has actual knowledge that they are a foreign citizen, or actual knowledge of a real and substantial prospect that they are a foreign citizen. Constructive knowledge is not sufficient to disqualify a person under s 44(i), as whether a reasonable person would have had such knowledge is irrelevant to whether the person said to be disqualified has split loyalties. Both Senator Roberts and Mr Ludlam are Australian citizens by naturalisation. Accordingly, on the authority of *Sykes*, both were required to take all reasonable steps to renounce foreign citizenship. Mr Ludlam does not claim to have done so. On the findings of fact made by Keane J, Senator Roberts has failed to do so.

(4) (1992) 176 CLR 77 at 103, 112; see also *Sue v Hill* (1999) 199 CLR 462 at 504-505 [101]-[102].

(5) (1992) 176 CLR 77 at 107-108, 112-113, 127-128, 131, 134-139.

(6) (1992) 176 CLR 77 at 108, 131.

B W Walker SC (with him *G E S Ng*), for Mr Joyce and Senator Nash. *Sykes* should be read as authority for the proposition that a person, having the status of a citizen under the law of a foreign power, is not disqualified under s 44(i) of the *Constitution* from being chosen or sitting as a senator or a member of the House of Representatives if he or she has taken reasonable steps to renounce foreign citizenship. No party seeks to reopen *Sykes* or to argue that it proceeded on a misapprehension as to the purpose of s 44(i). A majority in *Sykes* also recognised that what constitutes reasonable steps depends upon a range of factors, including the knowledge or subjective beliefs of the relevant person as to his or her foreign citizenship status (7). In any event, the reasoning in respect of s 44(i) was no more than helpful judicial advice to those who might stand for the ensuing by-election, as the case itself was immediately concerned with s 44(iv). At issue in this case is whether, where a person is born in Australia and does not know of his or her foreign citizenship, the content of the required reasonable steps reduces to nothing. The only coherent explanation for the adoption of the reasonable steps test is that the phrase "a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power" describes a person who has chosen to adopt or to maintain the status or character of a subject or citizen, or a person entitled to the rights and privileges of a subject or a citizen, of a foreign power under the law of that foreign power. The reasonable steps test thus preserves the eligibility of a person whose choice is in favour of being an Australian citizen only, and who reasonably acts on that choice. As a natural-born Australian who does not know that he or she is also a foreign citizen by descent cannot choose between retaining or renouncing that foreign citizenship, s 44(i) does not disqualify such a person from being chosen. It is circular to contend that such a construction of s 44(i) would reward a candidate who is careless or negligent in making enquiries as to his or her citizenship status under a foreign law. That assumes a duty to make such enquiries or a reasonable expectation that they will be made. And that, in turn, assumes that a lack of knowledge of one's status as a foreign citizen can never afford a basis for resisting disqualification. Moreover, there is no basis for importing the concept of constructive knowledge. If there is no duty or expectation of the kind described then there is simply no occasion to focus on what an impugned candidate ought reasonably to have known concerning his or her foreign citizenship status as at the date of nomination. [GAGELER J. But wilful blindness is sufficient?] Yes, but nothing beyond that.

(7) (1992) 176 CLR 77 at 108, 135.

D M J Bennett QC (with him *A L Tokley* SC, *G J D del Villar* and *A K Flecknoe-Brown*), for Senator Canavan. It is unsettled under Italian law whether conferral of Italian citizenship on Senator Canavan was automatic, regardless of any voluntary act by him. Those doubts undermine the proposition that Senator Canavan was an Italian citizen for the purposes of s 44(i). [KIEFEL CJ. So you invite the Court not to find one way or the other that he held Italian citizenship?] Yes. The onus, to the extent there is one, must lie on the person who says that he held Italian citizenship. If the Court cannot be satisfied of that fact, that is the end of the case. In any event, the retroactive decision of the Italian Constitutional Court, and its dubious effect on Italy's 1912 citizenship law, illustrate the uncertainty inherent in relying on foreign law. Alternatively, where a merely slender connection exists, the conferral of citizenship under the foreign law ought not to be recognised (8). Any construction of s 44(i) which turns on a person's legal status under foreign law inevitably directs attention to the limits on recognition of foreign law. The test proposed by the amicus is therefore unable to avoid reference to evaluative factual matters and is therefore no more certain in its application. Senator Canavan was also not disqualified on either of the approach of the Attorney-General or that of Mr Joyce and Senator Nash, as he believed that he was not an Italian citizen but merely had a right to make an application to obtain Italian citizenship. We adopt the submissions advanced by those parties, both as to the relevance of knowledge of foreign citizenship and the taking of reasonable steps.

A L Tokley SC (with him *H M Heuzenroeder* and *S A McDonald*), for Senator Xenophon. There is a logical distinction between recognising a bestowal of status under foreign law and determining whether what is bestowed comes within s 44(i). An unregistered British Overseas Citizen, which is what Senator Xenophon was, lacks the essential minimum characteristics of a citizen of a foreign power. There is no right of entry, there is no right of residence, there is no general protection of United Kingdom law, and there is no allegiance owed prior to registration. [KIEFEL CJ. That may be contrasted with *Sykes*, where each of the second and third respondents had a right to enter and reside in the foreign country and a right to hold a passport.] Precisely. Senator Xenophon had such attenuated rights and privileges that his status under the United Kingdom law is not caught by the words "a subject or a citizen … of a foreign power". Nor was he entitled to the "rights and privileges of a subject or a citizen".

(8) cf *Sykes v Cleary* (1992) 176 CLR 77 at 107, 113, 127-128, 131, 135-136; *Oppenheimer v Cattermole* [1976] AC 249 at 277.

B E Walters QC (with him *E A Bennett* and *A N P McBeth*), for Mr Ludlam and Ms Waters. A belief that one is not a citizen of a foreign power ought not to absolve a person from compliance with s 44(i) if he or she has knowledge of facts that, in the mind of a reasonable person taking a properly diligent approach to compliance with the *Constitution*, ought to call in question that belief, and prompt proper enquiries. [KIEFEL CJ. How do you insert into the *Constitution* a requirement based upon the mind of a reasonable person and how is the Court to deal with that as it arises in each particular case?] Courts often deal with questions of reasonableness. [KEANE J. But even if it was not reasonable for him or her to know, ultimately it is provable that he or she is a citizen of a foreign power.] And at that point, reasonable steps would be required, but until one has the primary facts which prompt inquiry one is not disqualified. [EDELMAN J. But if the focus is on primary facts, then someone who happened to know they were a foreign citizen, in circumstances where a reasonable person knowing the same relevant primary facts would not know that ultimate fact, may not be caught.] It is a question of what is reasonable in the totality of the situation. Reasonableness of knowing is the concomitant of the reasonable steps to renounce test in *Sykes*. The text of s 44(i) is not unclear or ambiguous. The text of a provision of the *Constitution* is not to be read as subject to limitations that its terms do not require (9). Section 44(i) has a number of purposes, not just that of preventing split allegiances. It is also directed to disqualifying those whose status may make them subject to particular obligations (10), to guarding against the perception of potentially divided loyalty, reinforcing the confidence of the people in the parliamentary process (11), asserting Australian sovereignty (12), and providing certainty in identifying categories of disqualified persons. It is inappropriate to identify only one narrow purpose and then to read down the provision in service of that purpose. Requiring "a subject or a citizen" in the second limb of s 44(i) to apply only where a person holds that status voluntarily would leave that limb with no work to do in the face of the first limb. Clauses in the previous drafts of the *Constitution* envisaged a voluntary assumption of citizenship; departure from that approach must be seen as deliberate and effective. The Attorney-General's use of extrinsic material as to the drafters' intentions is impermissible, particularly for the purpose of preferring rejected draft text to the final text of the *Constitution*. [He

(9) *Sue v Hill* (1999) 199 CLR 462 at 510 [118].
(10) *Sykes v Cleary* (1992) 176 CLR 77 at 109.
(11) cf *Re Day [No 2]* (2017) 263 CLR 201 at 226 [72].
(12) cf *Sue v Hill* (1999) 199 CLR 462 at 487 [48].

referred to *Tasmania v The Commonwealth* (13).] [GAGELER J. Do you say that the interpretative methodology of the Court in that case in 1903 remains the methodology of the Court?] That aspect remains helpful. There is no basis in the *Constitution* for distinguishing between natural-born and naturalised citizens. Section 44(i) disqualifies "any person" who meets the criteria.

R Merkel QC and *J T Gleeson* SC (with them *E M Nekvapil* and *S Zeleznikow*), for Mr Windsor in the reference concerning Mr Joyce.

J T Gleeson SC. *Sykes* decided the following propositions: (1) s 44(i) requires the Court to look to the status conferred on a person by the laws of the foreign power to determine whether he or she is a subject or citizen of it; (2) if a person holds such a status, the ordinary way to overcome the disability of dual allegiance is to renounce effectively the status under foreign law; (3) as s 44(i) asks a question of Australian law, the inquiry permits circumstances, which are dictated by public policy, whereby effect will not be given unqualifiedly to foreign law; (4) the circumstances of non-recognition, which are informed by the limits of international law, concern foreign citizenship laws which are exorbitant or which threaten the integrity of the system of representative and responsible government (either in the manner in which the foreign law confers citizenship or restricts the renunciation of it); and (5) as demonstrated by Mr Kardamitsis' case, a person who has no knowledge he is a foreign citizen or that there are steps available under the foreign law to renounce it, and who takes no such steps, remains a foreign citizen for the purposes of s 44(i). *Sykes* rejected each of a voluntary act test and a real and effective nationality test. Deane J's reasoning in dissent (14) cannot be squared with those of the majority in *Sykes* and should not be accepted. Mr Joyce's position is not relevantly distinguishable from the position of Mr Kardamitsis on the case stated in *Sykes*. Section 34(ii) of the *Constitution* indicates no distinction should be drawn between natural-born and naturalised persons. Section 44(i) should be understood likewise. The purpose of s 44(i) is to ensure no candidate or parliamentarian "owes allegiance or obedience to a foreign power or adheres to a foreign power" (15). It achieves that purpose by "cover[ing] the case where the duty is reciprocal to the status conferred by the law of a foreign power" (16). Allegiance adheres in the status of citizenship irrespective of whether it is known, chosen, or felt.

(13) (1903) 1 CLR 329 at 350-351.
(14) (1992) 176 CLR 77 at 127.
(15) *Sykes v Cleary* (1992) 176 CLR 77 at 109.
(16) *Sykes v Cleary* (1992) 176 CLR 77 at 109.

Common obligations of a subject or citizen include military service obligations which exist regardless of knowledge, and prohibitions on treason. The reasonable steps test in *Sykes* is justified by public policy or necessity, where otherwise the irremediable result would be incapacity of a candidate.

R Merkel QC. The original 1891 drafts of the *Constitution* included a qualification provision and a vacancy provision, based on the numerous British colonial antecedents. In March 1891, the drafters departed from those antecedents by adding a disqualification provision based on the language of the vacancy provision. But those colonial antecedents were drafted in an era preceding the significant changes made to the British law on nationality and allegiance, by the *Naturalization Act 1870* (UK), which implemented certain Royal Commission recommendations. Those recommendations addressed the growing problems created by dual allegiance and the indelibility of the allegiance of the British natural-born subject (17). As a consequence of the statutory changes, the second element in the disqualification clause could only apply in very limited circumstances such as, eg, to a person naturalised first in continental Europe and then in an Australian colony. That element would not have applied to various classes of dual nationals with dual allegiances. The framers would have understood that the pre-1898 draft was almost entirely ineffective in achieving the purpose of ensuring that persons with an allegiance conflicting with that owed to the Queen were incapable of being elected. The draft adopted in 1898 was intended to, and did, achieve that purpose.

G R Kennett SC (with him *B K Lim*), appearing as amicus curiae in the references concerning Senators Canavan, Nash and Xenophon. Properly understood, *Sykes* does not stand for any proposition that the operation of s 44(i) is subject to an exception where the person said to be disqualified has taken whatever steps are reasonable in the circumstances. Rather, whether or not foreign citizenship should be effectively renounced under the law of the country concerned by reasonable steps is a factor that informs the question whether the law of that country is to be applied. Thus, the way in which one avoids results inconsistent with the purposes of s 44(i) is by the operation of the choice of law rule, not by reading words into the text itself. The amicus' proposed construction does not involve the implication of any qualification on the constitutional text. Both the choice of foreign law, and the inherent limits on that choice, are connoted by the words "of a foreign power". Section 44(i)'s purpose resides in the text and structure. It is illegitimate to identify a purported purpose that is

(17) *Singh v The Commonwealth* (2004) 222 CLR 322 at 391-393 [178]-[182].

narrower than the natural meaning of the text, and to seek to apply that stated purpose in lieu of the text, without identifying any competing purpose, or constitutionally recognised value, that requires such reading down (18). The real question is how far s 44(i) goes in pursuing its purpose (19). Read according to its terms, it does so in a stringent fashion, and in a way that promotes certainty of operation, by catching any case in which a parliamentarian could potentially be affected by loyalty to a foreign state, or where a foreign state could call on such a loyalty.

The colonial constitution precedents do not provide assistance as they contained provisions which vacated the seat of an existing parliamentarian who took up another nationality. None included foreign nationality as a disqualification to being chosen. Nor does the drafting history of s 44 provide assistance. In any event, the construction for which the Attorney-General contends does not align with the purpose said to be revealed by that history. The Attorney-General's construction also favours an incurious or obtuse candidate over one who turns his or her mind to the possibility of foreign citizenship. In Senator Canavan's case, it is inapt to refer to there being an onus in relation to his status as an Italian citizen. This is not inter partes litigation: there is no moving party except the Senate, and there is no contradictor on the facts. [GAGELER J. But what is the level of satisfaction the Court needs to arrive at?] One suspects it would be akin to an administrative decision-maker, who needs to be persuaded of a matter.

C R C Newlinds SC (with him *P Kulevski* and *R J Scheelings*), for Senator Roberts. *Sykes* is only explicable on the basis that reasonable steps mean something more than not recognising an exorbitant foreign citizenship law. Senator Roberts was not wilfully blind to learn the truth of his disqualifying status. The finding that there was a real and substantial prospect that he was a foreign citizen cannot be relevant; that is a test of knowledge hitherto unknown to any law where a finding of a state of knowledge is required. The distinction sought to be drawn between natural-born and other Australian citizens ought not to be made; after all, Senator Roberts did not become allegedly disqualified by his birth outside Australia, but by descent from his father.

(18) *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 390 [26]; *Re Day [No 2]* (2017) 263 CLR 201 at 233 [100].

(19) *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 632-633 [40]-[41].

S P Donaghue QC, in reply. The consequence of a literal construction of s 44(i) is that a person who is an Australian citizen by birth and could not reasonably have known he or she was a foreign citizen may be disqualified. [KEANE J. There is something unrealistic about the submission that one could not reasonably have known, given that the Court is sitting now because the facts are knowable and have been established.]

D M J Bennett QC, in reply.

B W Walker SC, in reply.

Cur adv vult

27 October 2017

THE COURT delivered the following judgment: —

1 Section 44 of the *Constitution* relevantly provides:

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

2 Section 45(i) of the *Constitution* provides that if a senator or a member of the House of Representatives "becomes subject to any of the disabilities mentioned in the last preceding section", his or her place "shall thereupon become vacant."

3 It is settled by authority, and not disputed by any party, that in s 44 the words "shall be incapable of being chosen" refer to the process of being chosen, of which nomination is an essential part (20). Accordingly, the temporal focus for the purposes of s 44(i) is upon the date of nomination as the date on and after which s 44(i) applies until the completion of the electoral process.

The proceedings

4 Under the *Commonwealth Electoral Act 1918* (Cth) any question respecting the qualifications of a senator or a member of the House of Representatives, or respecting a vacancy in either house of the Parliament, may be referred by resolution to the Court of Disputed Returns by the house in which the question arises (21). Questions concerning the qualifications of six persons elected as senators at the general election for the Parliament held on 2 July 2016 have been so

(20) *Sykes v Cleary* (1992) 176 CLR 77 at 100-101, 108, 130-131, 132.

(21) *Commonwealth Electoral Act 1918* (Cth), s 376. See also *In re Wood* (1988) 167 CLR 145 at 157-162.

referred. In each case the principal question is whether by reason of s 44(i) of the *Constitution* there is a vacancy in the place for which the person was returned.

5 The references concern the qualifications of Senator the Hon Matthew Canavan, Mr Scott Ludlam, Ms Larissa Waters, Senator Malcolm Roberts, Senator the Hon Fiona Nash and Senator Nick Xenophon in circumstances in which there is material to suggest that each held dual citizenship at the date he or she nominated for election as a senator. The House of Representatives has referred like questions respecting the qualifications of the Hon Barnaby Joyce MP in circumstances in which there is material to suggest that he held dual citizenship at the date of his nomination for election for the Electoral Division of New England.

6 The subject of reference and the Attorney-General of the Commonwealth is in each case deemed to be a party to the reference pursuant to orders made by Kiefel CJ (22). In each reference, Kiefel CJ ordered that the statement of the questions together with all the attachments to the statement transmitted by the President of the Senate or the Speaker of the House of Representatives (as the case may be) (23) is evidence on the hearing of the reference.

7 Mr Kennett SC was appointed amicus curiae to act as contradictor on issues of law in the references concerning Senators Canavan, Nash and Xenophon. Mr Antony Windsor was deemed a party to the reference concerning Mr Joyce MP. Mr Ludlam resigned his seat upon learning that he held dual citizenship. Ms Waters resigned her seat upon learning that she held dual citizenship. They were jointly represented on the hearing of the references.

8 The only reference in which there were any contested issues of fact was that concerning Senator Roberts. Those issues were resolved at a hearing before Keane J (24).

9 The questions referred to this Court, though directed in substance to the same issues, took three different forms. The questions relating to Senators Canavan, Roberts, Nash and Xenophon were as follows:

> "(a) whether, by reason of s 44(i) of the Constitution, there is a vacancy in the representation of [the Senator's State] in the Senate for the place for which [the Senator] was returned;

(22) See *Commonwealth Electoral Act 1918* (Cth), s 378.
(23) See *Commonwealth Electoral Act 1918* (Cth), s 377.
(24) *Re Roberts* (2017) 91 ALJR 1018; 347 ALR 600.

(b) if the answer to question (a) is 'yes', by what means and in what manner that vacancy should be filled;

(c) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and

(d) what, if any, orders should be made as to the costs of these proceedings."

10 The questions relating to Mr Joyce MP, whose reference was the only one to come from the House of Representatives, were nearly identical to those of the four Senators mentioned above, except that question (a) asked "whether, by reason of s 44(i) of the Constitution[,] the place of the Member for New England (Mr Joyce) has become vacant".

11 The questions relating to Mr Ludlam and Ms Waters were in slightly different form, reflecting the circumstance that they both resigned their seats in the Senate prior to the references to this Court concerning them. Those questions were as follows:

"(a) whether by reason of s 44(i) of the Constitution there is a vacancy in the representation of [the former Senator's State] in the Senate for the place for which [the Senator] was returned;

(b) if the answer to Question (a) is 'yes', by what means and in what manner that vacancy should be filled;

(c) if the answer to Question (a) is 'no', is there a casual vacancy in the representation of [the former Senator's State] in the Senate within the meaning of s 15 of the Constitution; and

(d) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference."

12 The principal question turns upon the proper construction of s 44(i) of the *Constitution*.

The competing approaches to the construction of s 44(i)

13 The approach to construction urged by the amicus and on behalf of Mr Windsor gives s 44(i) its textual meaning, subject only to the implicit qualification in s 44(i) that the foreign law conferring foreign citizenship must be consistent with the constitutional imperative underlying that provision, namely, that an Australian citizen not be prevented by foreign law from participation in representative government where it can be demonstrated that the person has taken all steps that are reasonably required by the foreign law to renounce his or her foreign citizenship. Three alternatives to this approach were proposed. Each of these alternatives involves a construction that departs substantially from the text. The minimum required by all three

approaches was, as Deane J said in dissent in *Sykes v Cleary* (25), that s 44(i) be construed as "impliedly containing a … mental element" which informs the acquisition or retention of foreign citizenship.

14 First, the approach of the Attorney-General, adopted by Senators Canavan, Roberts and Xenophon, was that s 44(i) requires that the foreign citizenship be voluntarily obtained or voluntarily retained. The implied element of voluntariness was said to import a requirement that the person know or be wilfully blind about his or her foreign citizenship. At some points in the Attorney-General's submissions it was submitted that awareness of a "considerable, serious or sizeable prospect" or a "real and substantial prospect" of foreign citizenship would be sufficient.

15 This approach was applied by the Attorney-General in a way that drew a distinction between "natural-born" Australians – that is, those who are Australian citizens by the circumstances of their birth – and naturalised Australians. A natural-born Australian would be disqualified if he or she took active steps to become a foreign citizen or, after obtaining the requisite degree of knowledge, failed to take reasonable steps to renounce that citizenship. On the other hand, a naturalised Australian who had not taken all reasonable steps to renounce a foreign citizenship would be deemed to have voluntarily retained that foreign citizenship even if he or she honestly believed that naturalisation had involved renouncing the foreign citizenship. That was said to be because a naturalised Australian citizen could be expected, in the ordinary case, to have the requisite knowledge of his or her pre-existing foreign citizenship.

16 Secondly, the approach urged by Mr Joyce MP and Senator Nash was that s 44(i) requires that foreign citizenship be chosen or maintained. The essence of this approach was knowledge of the foreign citizenship. It was submitted that a person cannot make a choice to retain or renounce any foreign citizenship if he or she has no knowledge of that citizenship. Although the degree of knowledge that was said to apply in this context did not include constructive knowledge, it did include wilful blindness.

17 Thirdly, the approach urged by Mr Ludlam and Ms Waters was that s 44(i) requires that a person be "put on notice". On this approach, the person would be disqualified under s 44(i) if he or she had knowledge of facts that, in the mind of a reasonable person taking a properly diligent approach to compliance with the *Constitution*, ought to call into question the belief that he or she is not a subject or citizen of a foreign power and prompt proper inquiries. Knowledge would include,

(25) (1992) 176 CLR 77 at 127.

at least, knowledge of "primary facts" that would prompt inquiry and, at most, all of the knowledge of the person.

18 By way of a variation on the Attorney-General's principal theme, it was said that s 44(i) applies only to a person who has by voluntary act acquired foreign citizenship, or exercised a right pursuant to the status of foreign citizenship, the latter being a way of describing an overt act of retention of foreign citizenship.

19 The approach urged by the amicus and on behalf of Mr Windsor must be accepted. It adheres most closely to the ordinary and natural meaning of the language of s 44(i). It also accords with the views of a majority of the Justices in *Sykes v Cleary*, the authority of which was accepted by all parties. A consideration of the drafting history of s 44(i) does not warrant a different conclusion. Further, that approach avoids the uncertainty and instability that attend the competing approaches.

The text and structure of s 44(i)

20 As to the text and structure of s 44(i), in *Sykes v Cleary* Brennan J said that "[p]utting acknowledgment of adherence to a foreign power to one side", s 44(i) consists of three categories of disqualification, each of which describes a source of a duty on the part of a candidate for parliamentary office (26):

> "The first category covers the case where such a duty arises from an acknowledgment of the duty by the candidate, senator or member. The second category covers the case where the duty is reciprocal to the status conferred by the law of a foreign power. The third category covers the case where the duty is reciprocal to the rights or privileges conferred by the law of a foreign power.
>
> The second category refers to subjects or citizens of a foreign power – subject being a term appropriate when the foreign power is a monarch of feudal origin; citizen when the foreign power is a republic. …
>
> The third category … covers those who, though not foreign nationals, are under the protection of a foreign power as though they were subjects or citizens of a foreign power."

21 The amicus submitted that s 44(i) has two limbs, not three as was suggested by Brennan J. He contended that the first limb disqualifies a person who "is under any acknowledgment" of the stated kind, and the second limb disqualifies a person who "is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power". In the first limb, the words "under any acknowledgment" capture any "person who has formally or informally acknowledged allegiance, obedience or adherence to a foreign power and who has not

(26) (1992) 176 CLR 77 at 109-110.

withdrawn or revoked that acknowledgment" (27). Within this limb the word "acknowledgment" connotes an act involving an exercise of the will of the person concerned. In contrast, in the second limb of s 44(i), the words "subject", "citizen" and "entitled to the rights" connote a state of affairs involving the existence of a status or of rights under the law of the foreign power (28).

22 There is evident force in the submission of the amicus that s 44(i) consists of only two limbs: the verb "is" is used in s 44(i) only twice, and there is a comma followed by the disjunctive "or" at the end of the first limb but not within the second limb.

23 For present purposes, however, little turns upon this difference between the analysis of Brennan J in *Sykes v Cleary* and that of the amicus; indeed, Brennan J dealt with his "second and third categories" together (29). Each approach highlights the distinction expressly drawn in s 44(i) between a voluntary act of allegiance on the part of the person concerned on the one hand, and a state of affairs existing under foreign law, being the status of subjecthood or citizenship or the existence of the rights or privileges of subjecthood or citizenship, on the other. For the sake of clarity, these reasons will use the two-limb classification adopted by the amicus.

The purpose of s 44(i)

24 In *Sykes v Cleary*, the plurality, comprising Mason CJ, Toohey and McHugh JJ, said that s 44(i) was adopted to ensure "that members of Parliament did not have a split allegiance" (30). Brennan J explained that the purpose of s 44(i) "is to ensure that no candidate, senator or member of the House of Representatives owes allegiance or obedience to a foreign power or adheres to a foreign power." (31) Deane J said that the "whole purpose" of s 44(i) is to "prevent persons with foreign loyalties or obligations from being members of the Australian Parliament." (32)

25 It is evident that the first limb of s 44(i) pursues this purpose by looking to the conduct of the person concerned. The second limb of s 44(i) does not look to conduct manifesting an actual split in the allegiance of the person concerned or the person's subjective feelings

(27) *Nile v Wood* (1987) 167 CLR 133 at 140.
(28) cf *Sykes v Cleary* (1992) 176 CLR 77 at 107, 110, 131.
(29) (1992) 176 CLR 77 at 110.
(30) (1992) 176 CLR 77 at 107, quoting Australia, Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament* (1981), p 10 [2.14].
(31) (1992) 176 CLR 77 at 109.
(32) (1992) 176 CLR 77 at 127.

of allegiance. On the contrary, it operates to disqualify the candidate whether or not the candidate is, in fact, minded to act upon his or her duty of allegiance.

26 In the course of arguing that a candidate cannot be disqualified by the second limb of s 44(i) if he or she does not know that he or she has the status of a foreign citizen, Senior Counsel for Mr Joyce MP and Senator Nash made the rhetorical point that "[y]ou cannot heed a call that you cannot hear and you will not hear the call of another citizenship if you do not know you are a citizen of that other country." The answer to that point is that, as a matter of the ordinary meaning of the second limb of s 44(i), proof of actual allegiance as a state of mind is not required. Rather, as Brennan J explained in *Sykes v Cleary*, the second limb is concerned with the existence of a duty to a foreign power as an aspect of the status of citizenship (33).

The drafting history of s 44(i)

27 The drafting history of s 44(i) does not support identification of a narrower purpose sufficient to constrain the ordinary and natural meaning of the language ultimately chosen.

28 The first official draft of the Constitution Bill prepared for the National Australasian Convention in 1891 contained two identical clauses which provided respectively that the place of a senator and a member of the House of Representatives "shall become vacant … [i]f he takes an oath or makes a declaration or acknowledgement of allegiance, obedience, or adherence to a Foreign Power, or does any act whereby he becomes a subject or citizen, or entitled to the rights or privileges of a subject or citizen of a Foreign Power" (34). The language was derived from the *British North America Act 1840* (Imp) (35) as replicated in the *New Zealand Constitution Act 1852* (Imp) (36) and the *British North America Act 1867* (Imp) (37) and as substantially replicated in the constitutions of each of the Australian colonies which were to become States (38).

29 Within a week of the first official draft, following the voyage of the *Lucinda*, the two clauses were recast to take the form in which the

(33) (1992) 176 CLR 77 at 109-110.

(34) Williams, *The Australian Constitution: A Documentary History* (2005), pp 139, 141.

(35) 3 & 4 Vict c 35, s 7.

(36) 15 & 16 Vict c 72, ss 36, 50.

(37) 30 Vict c 3, s 31(2).

(38) *Constitution Act 1854* (Tas) (18 Vict No 17), ss 13, 24; *New South Wales Constitution Act 1855* (Imp) (18 & 19 Vict c 54), Sch 1, ss 5, 26; *Victoria Constitution Act 1855* (Imp) (18 & 19 Vict c 55), Sch 1, s 24; *Constitution Act 1855-6* (SA), ss 12, 25; *Constitution Act 1867* (Qld) (31 Vict No 38), s 23; *Western Australia Constitution Act 1890* (Imp) (53 & 54 Vict c 26), Sch 1, s 29(3).

predecessors of ss 44(i) and 45(i) came to be adopted without substantial debate in the final draft of the Constitution Bill to emerge from the National Australasian Convention in 1891. The clauses as so recast each applied to both senators and members of the House of Representatives. Departing from the Imperial and colonial precedents, they were no longer confined to vacating places of parliamentarians by reference to acts done by them after election. They extended also to disqualifying for election as parliamentarians persons who had done any of the same acts before election.

30 The first clause, the predecessor of s 44(i), provided (39):

> "Any person … [w]ho has taken an oath or made a declaration or acknowledgment of allegiance, obedience, or adherence to a Foreign Power, or has done any act whereby he has become a subject or citizen or entitled to the rights or privileges of a subject or a citizen of a Foreign Power … shall be incapable of being chosen or of sitting as a Senator or Member of the House of Representatives until the disability is removed by a grant of a discharge … or otherwise."

31 The second clause, the predecessor of s 45(i), provided (40):

> "If a Senator or Member of the House of Representatives … [t]akes an oath or makes a declaration or acknowledgment of allegiance, obedience, or adherence to a Foreign Power, or does any act whereby he becomes a subject or citizen, or entitled to the rights or privileges of a subject or citizen, of a Foreign Power … his place shall thereupon become vacant."

32 The clauses remained in substantially identical form in the successive drafts of the Constitution Bill prepared for and considered and approved by the National Australasian Convention at its Adelaide session in April 1897 (41) and again by the Australasian Federal Convention at its Sydney session in September 1897 (42) when a motion that the words "until parliament otherwise provides" be inserted at the beginning of the predecessor of s 44 was negatived (43).

(39) *Official Report of the National Australasian Convention Debates* (Sydney), 9 April 1891, p 950, cl 46.

(40) *Official Report of the National Australasian Convention Debates* (Sydney), 9 April 1891, p 950, cl 47.

(41) *Official Report of the National Australasian Convention Debates* (Adelaide), 15 April 1897, p 736, 23 April 1897, pp 1211, 1218 and 1228.

(42) *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 21 September 1897, p 1022; Williams, *The Australian Constitution: A Documentary History* (2005), p 765.

(43) *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 21 September 1897, pp 1014-1015.

33 The clauses were then recast to take their final form which became the text of ss 44(i) and 45(i) in the revised version of the Constitution Bill presented soon after the beginning of the Melbourne session of the Australasian Federal Convention in March 1898 (44). That final recasting of the two clauses occurred as part of a large number of amendments prepared by the Convention's drafting committee in the period between the Sydney session and the Melbourne session. Mr Barton, the chairman of the committee, described them as "drafting" amendments not intended to alter the "sense" of the draft as approved by the Convention at the Sydney session (45). The drafting amendments were made after receipt by the drafting committee of confidential memoranda from the Colonial Office commenting on the Constitution Bill in the form approved by the Convention at the Adelaide session. One of those memoranda had raised as a query, in relation to the clause which was the predecessor of s 44(i), "[s]hould not some provision be made for a person who, after he has acknowledged allegiance to a foreign power, has returned to his old allegiance and made himself again a British subject?" (46) Whether or not it is appropriate to have regard to the confidential Colonial Office memorandum, the extent of the redrafting of the predecessors of both ss 44(i) and 45(i) which occurred in the period between the Sydney session and the Melbourne session is such that it cannot adequately be explained as doing no more than responding to that query.

34 When, a few days later, the Australasian Federal Convention came to consider the redrafted clauses in committee of the whole, the redraft of the clause that was to become s 44(i) was agreed to without discussion (47). Turning to s 45(i), Mr Isaacs relevantly commented only that "[v]ery good work ha[d] been done by the committee in the attainment of brevity" (48).

35 The drafting history demonstrates that the adoption of s 44(i) in its final form was uncontroversial and that the differences between the text that emerged from the Convention in 1891 and the text that emerged from the Convention in 1898 cannot be attributed to any articulated difference in the mischief sought to be addressed by the disqualification it introduced. What the drafting history fails to demonstrate is that the mischief was exhaustively identified in the earlier reference to

(44) Williams, *The Australian Constitution: A Documentary History* (2005), p 849.
(45) *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898, p 1915.
(46) Williams, *The Australian Constitution: A Documentary History* (2005), p 727.
(47) *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 7 March 1898, pp 1931-1942.
(48) *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 7 March 1898, p 1942.

disqualification arising as a result of an "act" done by a person whereby the person became a subject or citizen, or entitled to the rights or privileges of a subject or citizen, of a foreign power. The earlier reference to an "act" was obviously drawn from the Imperial and colonial precedents. But the drafting history, beginning in 1891, cannot be treated as indicative of an intention on the part of the framers to cleave particularly closely to those precedents. The precedents were confined to vacating the place of a parliamentarian. Disqualification from being chosen as a parliamentarian was an innovation.

36 There is another aspect of the historical context in which the *Constitution* was drafted which affirmatively supports the wider purpose of s 44(i) which its language suggests. The addition of disqualification under s 44(i) to qualification under s 34 would, at the time of federation, have been redundant unless disqualification under s 44(i) was capable of applying to a person qualified under s 34. Section 34(ii) required, in 1901 and until the Parliament otherwise provided, that a senator or member of the House of Representatives "must be a subject of the Queen". By operation of the *Naturalization Act 1870* (Imp), a subject of the Queen who by voluntary act became a subject or citizen of a foreign state automatically ceased to be a subject of the Queen and was "from and after" that time to "be regarded as an alien" (49). A person who by voluntary act had become a subject or citizen of a foreign state was therefore not qualified under s 34(ii). For the second limb of s 44(i) to add anything to s 34(ii), that limb needed to extend beyond acquisition of the status of a subject or citizen of a foreign power by some voluntary act.

Subject or citizen – the role of foreign law

37 Whether a person has the status of a subject or a citizen of a foreign power necessarily depends upon the law of the foreign power. That is so because it is only the law of the foreign power that can be the source of the status of citizenship or of the rights and duties involved in that status. In *Sykes v Cleary*, Mason CJ, Toohey and McHugh JJ said that "[a]t common law, the question of whether a person is a citizen or national of a particular foreign State is determined according to the law of that foreign State" (50), the common law rule being, in part, a recognition of the principle of international law that "it is for every sovereign State … to settle by its own legislation the rules relating to the acquisition of its nationality" (51). Statements to similar

(49) 33 Vict c 14, s 6.
(50) (1992) 176 CLR 77 at 105-106.
(51) *Nottebohm Case (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJR 4 at 20.

effect were also made in *Sykes v Cleary* by Brennan, Deane, Dawson and Gaudron JJ respectively (52).

38 In *Sue v Hill*, Gleeson CJ, Gummow and Hayne JJ referred with approval to the reasoning of Brennan and Gaudron JJ in *Sykes v Cleary* (53) in confirming the proposition that s 44(i) looks to the relevant foreign law to determine whether a candidate is a foreign citizen (54). In *Sue v Hill*, Gaudron J also accepted the proposition that "the question whether a person is a citizen of a foreign country is, as a general rule, answered by reference to the law of that country." (55) Thus, the majority of the Court in *Sue v Hill* adhered to the position taken on this point in *Sykes v Cleary*.

39 That having been said, all members of the Court in *Sykes v Cleary* accepted that s 44(i) does not contemplate that foreign law can be determinative of the operation of s 44(i) (56). An Australian court will not apply s 44(i) to disqualify by reason of foreign citizenship where to do so would be to undermine the system of representative and responsible government established under the *Constitution*.

40 In this regard, s 16 of the *Constitution* provides: "The qualifications of a senator shall be the same as those of a member of the House of Representatives."

41 Section 34 provides:

> "Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:
>
> (i) he must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen;
>
> (ii) he must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State."

42 Since shortly after federation, Parliament has made provision for the qualification of candidates. Currently, those requirements are set out in s 163 of the *Commonwealth Electoral Act*, pursuant to which an Australian citizen enrolled to vote is qualified to stand for election.

(52) (1992) 176 CLR 77 at 109-112, 127-128, 131, 135.
(53) (1992) 176 CLR 77 at 112-114, 135-136.
(54) (1999) 199 CLR 462 at 486-487 [47].
(55) (1999) 199 CLR 462 at 529 [175].
(56) (1992) 176 CLR 77 at 107-108, 112-113, 126-127, 131-132, 137.

43 It is the evident intention of the *Constitution* that those of the people of the Commonwealth who are qualified to become senators or members of the House of Representatives are not, except perhaps in the case of a person "attainted of treason" within the meaning of s 44(ii), to be irremediably disqualified. They have the entitlement to participate in the representative government which the *Constitution* establishes. In oral argument this was described as the constitutional imperative. The purpose of s 44(i) neither requires nor allows the denial by foreign law of that entitlement.

44 Consistently with that view, the Court in *Sykes v Cleary* recognised that an Australian citizen who is also a citizen of a foreign power will not be prevented from participating in the representative form of government ordained by the *Constitution* by reason of a foreign law which would render an Australian citizen irremediably incapable of being elected to either house of the Commonwealth Parliament (57). In this regard, Mason CJ, Toohey and McHugh JJ said (58):

> "It would be wrong to interpret the constitutional provision in such a way as to disbar an Australian citizen who had taken all reasonable steps to divest himself or herself of any conflicting allegiance … [Section 44(i)] … could scarcely have been intended to disqualify an Australian citizen for election to Parliament on account of his or her continuing to possess a foreign nationality, notwithstanding that he or she had taken reasonable steps to renounce that nationality."

45 It is convenient to note here that their Honours were not suggesting that a candidate who could be said to have made a reasonable effort to comply with s 44(i) was thereby exempt from compliance. As Brennan J explained (59):

> "It is not sufficient … for a person holding dual citizenship to make a unilateral declaration renouncing foreign citizenship when some further step can reasonably be taken which will be effective under the relevant foreign law to release that person from the duty of allegiance or obedience. So long as that duty remains under the foreign law, its enforcement – perhaps extending to foreign military service – is a threatened impediment to the giving of unqualified allegiance to Australia. It is only after all reasonable steps have been taken under the relevant foreign law to renounce the status, rights and privileges carrying the duty of allegiance or obedience and to

(57) (1992) 176 CLR 77 at 131.
(58) (1992) 176 CLR 77 at 107. See also at 113.
(59) (1992) 176 CLR 77 at 113-114.

obtain a release from that duty that it is possible to say that the purpose of s 44(i) would not be fulfilled by recognition of the foreign law."

46 The focus of concern of the majority in *Sykes v Cleary* is upon the impediment posed by foreign law to an Australian citizen securing a release from foreign citizenship notwithstanding reasonable steps on his or her part to sever the foreign attachment. As Dawson J said (60):

> "I agree with Mason CJ, Toohey and McHugh JJ, and with Brennan J, that s 44(i) should not be given a construction that would unreasonably result in some Australian citizens being irremediably incapable of being elected to either House of the Commonwealth Parliament."

Knowledge of foreign citizenship as an element of s 44(i)

47 Section 44(i) does not say that it operates only if the candidate knows of the disqualifying circumstance. It is a substantial departure from the ordinary and natural meaning of the text of the second limb to understand it as commencing:

> "Any person who:
>
> (i) … knows that he or she is a subject or a citizen …"

48 Further, to accept that proof of knowledge of the foreign citizenship is a condition of the disqualifying effect of s 44(i) would be inimical to the stability of representative government. Stability requires certainty as to whether, as from the date of nomination, a candidate for election is indeed capable of being chosen to serve, and of serving, in the Commonwealth Parliament (61). This consideration weighs against an interpretation of s 44(i) which would alter the effect of the ordinary and natural meaning of its text by introducing the need for an investigation into the state of mind of a candidate.

49 The approach urged on behalf of the Attorney-General echoes that of Deane J in *Sykes v Cleary*. Deane J considered that while only the first limb of s 44(i) expressly requires some form of voluntary manifestation of allegiance, the balance of s 44(i) should also be understood as incorporating a mental element so that the provision in its entirety applies "only to cases where the relevant status, rights or privileges have been sought, accepted, asserted or acquiesced in by the person concerned." (62)

50 It had been submitted for Mr Kardamitsis, the third respondent in *Sykes v Cleary*, that "only a person who is presently subject to a

(60) (1992) 176 CLR 77 at 131.

(61) See *Re Culleton [No 2]* (2017) 263 CLR 176 at 194-195 [57]; *Re Day [No 2]* (2017) 263 CLR 201 at 232-233 [97].

(62) (1992) 176 CLR 77 at 127.

continuing allegiance to a foreign power brought about by some voluntary act, or one whose real and effective nationality is foreign, would be disqualified." (63) Deane J accepted the argument that a "qualifying element … must be read into the second limb of s 44(i)" (64). His Honour referred to the qualifying element in relation to a naturalised Australian citizen (65):

> "whose origins lay in, or who has had some past association with, some foreign country which asserts an entitlement to refuse to allow or recognize his or her genuine and unconditional renunciation of past allegiance or citizenship. Accordingly … the qualifying element which must be read into the second limb of s 44(i) extends not only to the acquisition of the disqualifying relationship by a person who is already an Australian citizen but also to the retention of that relationship by a person who has subsequently become an Australian citizen. A person who becomes an Australian citizen will not be within the second limb of s 44(i) if he or she has done all that can reasonably be expected of him or her to extinguish any former relationship with a foreign country to the extent that it involves the status, rights or privileges referred to in the sub-section."

51 Deane J concluded that Mr Kardamitsis, who had publicly renounced his allegiance to any country other than Australia, had "done all that he could reasonably be expected to do for the purposes of the Constitution and laws of this country to renounce and extinguish his Greek nationality and any rights or privileges flowing from it." (66)

52 The approach taken by Deane J draws no support from the text and structure of s 44(i): indeed, Deane J used the first limb of the provision to alter the ordinary and natural meaning of the second. Not only does that approach alter the plain meaning of the second limb of s 44(i), it renders that limb otiose because, so understood, it adds nothing to the first limb in terms of the practical pursuit of the purpose of s 44(i).

53 In addition, the approach of Deane J places naturalised Australian citizens in a position of disadvantage relative to natural-born Australian citizens. A majority in *Sykes v Cleary* did not countenance such a distinction. Mason CJ, Toohey and McHugh JJ expressly adverted to the circumstance that "s 44(i) finds its place in a Constitution which was enacted at a time, like the present, when a high proportion of Australians, though born overseas, had adopted this country as their home" without drawing any distinction between them in terms of the

(63) (1992) 176 CLR 77 at 89.
(64) (1992) 176 CLR 77 at 127-128.
(65) (1992) 176 CLR 77 at 127-128.
(66) (1992) 176 CLR 77 at 129.

application of s 44(i) (67). And neither Brennan J nor Dawson J was disposed to draw any distinction between natural-born Australian citizens and naturalised Australian citizens for the purposes of the application of s 44(i). In this, their Honours were, with respect, clearly correct. The text of s 34 of the *Constitution* draws a distinction between natural-born and naturalised Australians for the purpose of qualifying to be a candidate for election; in contrast, s 44(i) draws no distinction between foreign citizenship by place of birth, by descent or by naturalisation. The absence from the text of s 44(i) of any such distinction cannot be attributed to inadvertence on the part of the framers, both because the concept of citizenship by descent was commonplace at the time of federation, and because of the express provision in s 34 (68).

54 It was submitted on behalf of Mr Windsor that the operation of the constitutional guarantee of single-minded loyalty provided by s 44(i) should not be made to depend upon the diligence which a candidate brings to the observance of the provision. There is force in this submission. To introduce an issue as to the extent of the knowledge obtained by a candidate and the extent of the candidate's efforts in that regard is to open up conceptual and practical uncertainties in the application of the provision. These uncertainties are apt to undermine stable representative government.

55 At the conceptual level, questions would necessarily arise as to the nature and extent of the knowledge that is necessary before a candidate, or a sitting member for the purposes of s 45(i), will be held to have failed to take reasonable steps to free himself or herself of foreign citizenship. In this regard, the state of a person's knowledge can be conceived of as a spectrum that ranges from the faintest inkling through to other states of mind such as suspicion, reasonable belief and moral certainty to absolute certainty (69). If one seeks to determine the point on this spectrum at which knowledge is sufficient for the purposes of ss 44(i) and 45(i), one finds that those provisions offer no guidance in fixing this point. That is hardly surprising given that these provisions do not mention the knowledge of a person or the person's ability to obtain knowledge as a criterion of their operation.

56 The conceptual difficulty may be illustrated by considering the following questions. Does a candidate who has been given advice that

(67) (1992) 176 CLR 77 at 107.

(68) See *Singh v The Commonwealth* (2004) 222 CLR 322 at 340-341 [30], 359 [81], 392 [179], 413-414 [251].

(69) cf *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509 at 575-576; [1992] 4 All ER 161 at 235.

he or she is "probably" a foreign citizen know that he or she is a foreign citizen for the purposes of s 44(i)? Is the position different if the effect of the advice is that there is "a real and substantial prospect" that the candidate is a foreign citizen? Does a candidate in possession of two conflicting advices on the question know that he or she is a foreign citizen for the purposes of s 44(i) only when the advice that he or she is indeed a foreign citizen is accepted as correct by a court?

57 It may be said that the variation on the principal submission of the Attorney-General, with its focus on voluntary acts, has the virtues of eschewing a distinction in principle between natural-born and naturalised Australians and of avoiding the conceptual difficulties associated with interrogating a candidate's knowledge or state of mind. But ultimately the variation in the Attorney-General's approach depends upon the unstable distinction between overt voluntary acts and conscious omissions. The application of the natural and ordinary meaning of s 44(i) serves to avoid the difficulties which attend this unstable distinction.

58 The practical problems involved in applying the standard for which Mr Joyce MP and Senator Nash argue would include the difficulties of proving or disproving a person's state of mind. Not the least of these difficulties would be the regrettable possibility of a want of candour on the part of a candidate or sitting member whose interests are vitally engaged. And during the fact-finding process the entitlement of the member to continue to sit in Parliament would be under a cloud.

59 In addition, on the approach urged on behalf of Mr Joyce MP and Senator Nash, a person who has been elected to Parliament and then discovers that he or she is a foreign citizen is to be allowed a period in which to take reasonable steps to renounce that citizenship before the disqualifying effect of s 44(i) or s 45(i) bites. During that period the person will have, and may well be seen to have, dual citizenship. That state of affairs cannot be reconciled with the purpose of these constitutional guarantees.

60 Finally, while it may be said that it is harsh to apply s 44(i) to disqualify a candidate born in Australia who has never had occasion to consider himself or herself as other than an Australian citizen and exclusively an Australian citizen, nomination for election is manifestly an occasion for serious reflection on this question; the nomination form for candidates for both the Senate and the House of Representatives requires candidates to declare that they are not rendered ineligible by s 44. It is necessary to bear in mind that the reference by a house of Parliament of a question of disqualification can arise only where the facts which establish the disqualification have been brought forward in Parliament. In the nature of things, those facts must always have been knowable. A candidate need show no greater diligence in relation to the

timely discovery of those facts than the person who has successfully, albeit belatedly, brought them to the attention of the Parliament.

Reasonable steps

61 Section 44(i) is not concerned with whether the candidate has been negligent in failing to comply with its requirements. Section 44(i) does not disqualify only those who have not made reasonable efforts to conform to its requirements. Section 44(i) is cast in peremptory terms. Where the personal circumstances of a would-be candidate give rise to disqualification under s 44(i), the reasonableness of steps taken by way of inquiry to ascertain whether those circumstances exist is immaterial to the operation of s 44(i).

62 The reasons of the majority in *Sykes v Cleary* do not support the proposition that a person who is a foreign citizen contravenes the second limb of s 44(i) only if that person actually knows that he or she is a foreign citizen and fails to take reasonable steps available to him or her to divest himself or herself of that status under the foreign law. Nor do the reasons of the majority in *Sykes v Cleary* support the view that a person who is a foreign citizen is not disqualified if, not knowing of that status, he or she fails to take steps to divest himself or herself of that status.

63 Particular reference may be made here to the decision in *Sykes v Cleary* in relation to the second and third respondents, Mr Delacretaz and Mr Kardamitsis, respectively. Mr Delacretaz, who had been born in Switzerland and was a Swiss citizen from that time, had lived in Australia for more than 40 years before the date for nomination for election to the House of Representatives, and was naturalised as an Australian citizen nearly 32 years before that date. When he was naturalised he renounced all allegiance to any sovereign or state of whom or of which he was a subject or citizen (70). Mr Kardamitsis had been born in Greece and from the time of his birth was a Greek citizen. He had lived in Australia for more than 20 years before the date of nomination and he was naturalised more than 17 years before that date. At his naturalisation, he likewise renounced all other allegiance (71).

64 A majority (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ) held that Mr Delacretaz was disqualified by s 44(i) because, as the plurality said, he (72):

> "omitted to make a demand for release from Swiss citizenship which would have been granted automatically as he has no residence in Switzerland and has been an Australian citizen for 32

(70) (1992) 176 CLR 77 at 83.
(71) (1992) 176 CLR 77 at 84.
(72) (1992) 176 CLR 77 at 108. See also at 114, 132.

years. Because he has failed to make such a demand, it cannot be said that he has taken reasonable steps to divest himself of Swiss citizenship and the rights and privileges of such a citizen."

65 The plurality said that Mr Kardamitsis was disqualified by s 44(i) because (73):

> "in the absence of an application for the exercise of the discretion [of the Greek Minister] in favour of releasing [him] from his Greek citizenship, it cannot be said that he has taken reasonable steps to divest himself of Greek citizenship and the rights and privileges of such a citizen."

66 Deane and Gaudron JJ, in separate judgments, would have held that the renunciation of any foreign allegiance at the naturalisation ceremonies of Mr Delacretaz and Mr Kardamitsis was sufficient to take each of them out of the disqualification in s 44(i) (74). It is evident that this view did not commend itself to the other five Justices, who proceeded on the basis that a unilateral renunciation was not sufficient to terminate the status of citizenship under the foreign law.

67 No member of the majority in *Sykes v Cleary* said that a candidate who does not know that he or she is a citizen of a foreign country can be said to take reasonable steps to renounce that citizenship by doing nothing at all in that regard. It is true that Dawson J said that what is reasonable will "depend upon such matters as the requirements of the foreign law for the renunciation of the foreign nationality, the person's knowledge of his foreign nationality and the circumstances in which the foreign nationality was accorded to that person." (75) His Honour may be taken, consistently with the views expressed by the plurality and by Brennan J, with whom he agreed, to have had in mind cases where not only the tenacity but also the inaccessibility of the foreign law was apt practically to prevent an Australian citizen from exercising the choice to participate in the system of representative government established by the *Constitution*. It may be that not all foreign states afford their citizens the levels of assistance in relation to the ascertainment and renunciation of their citizenship that is available from states such as most members of the Commonwealth of Nations. Some foreign states may be unwilling or unable to provide necessary information in relation to the ascertainment and means of renunciation of their citizenship.

68 The plurality in *Sykes v Cleary* said that the steps reasonably available to a candidate to free himself or herself from the ties of foreign citizenship depend on "the situation of the individual, the

(73) (1992) 176 CLR 77 at 108. See also at 114, 132.
(74) (1992) 176 CLR 77 at 128-130, 136-137, 139-140.
(75) (1992) 176 CLR 77 at 131.

requirements of the foreign law and the extent of the connexion between the individual and the foreign State" (76). The circumstance that Mr Kardamitsis had participated in a naturalisation ceremony in which he had expressly renounced his foreign allegiance was not sufficient to justify the conclusion that he had taken reasonable steps to divest himself of his foreign citizenship because under the foreign law he could have applied for the favourable exercise of a discretion by the appropriate Minister of the Greek government to release him from his citizenship. The application for the favourable exercise of the discretion was a step reasonably open to him.

69 Such a step may be contrasted, for example, with a requirement of foreign law that the citizens of the foreign country may renounce their citizenship only by acts of renunciation carried out in the territory of the foreign power. Such a requirement could be ignored by an Australian citizen if his or her presence within that territory could involve risks to person or property. It is not necessary to multiply examples of requirements of foreign law that will not impede the effective choice by an Australian citizen to seek election to the Commonwealth Parliament. It is sufficient to say that in none of the references with which the Court is concerned were candidates confronted by such obstacles to freeing themselves of their foreign ties.

Summary as to the proper construction of s 44(i)

70 The approaches to the construction of s 44(i) urged on behalf of the Attorney-General, Mr Joyce MP and Senator Nash, and Mr Ludlam and Ms Waters are rejected.

71 Section 44(i) operates to render "incapable of being chosen or of sitting" persons who have the status of subject or citizen of a foreign power. Whether a person has the status of foreign subject or citizen is determined by the law of the foreign power in question. Proof of a candidate's knowledge of his or her foreign citizenship status (or of facts that might put a candidate on inquiry as to the possibility that he or she is a foreign citizen) is not necessary to bring about the disqualifying operation of s 44(i).

72 A person who, at the time that he or she nominates for election, retains the status of subject or citizen of a foreign power will be disqualified by reason of s 44(i), except where the operation of the foreign law is contrary to the constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government. Where it can be demonstrated that the person has taken all steps that are reasonably required

(76) (1992) 176 CLR 77 at 108.

by the foreign law to renounce his or her citizenship and within his or her power, the constitutional imperative is engaged.

73 We turn now to consider the application of s 44(i) to the facts of each reference.

Senator the Hon Matthew Canavan

74 Senator Canavan nominated for election as a senator at the general election for the Parliament held on 2 July 2016. At the time, Senator Canavan believed that he was a citizen of Australia and of no other country. Senator Canavan was returned on 5 August 2016 as an elected senator for Queensland. In issue is whether at the date of his nomination Senator Canavan was a citizen of Italy by descent.

75 Senator Canavan was born in Southport, Queensland in 1980. His father was born in Toowoomba, Queensland. His mother, Maria Canavan, was born in Ayr, Queensland in October 1955. Senator Canavan's only link to Italy is through his maternal grandparents, Gaetano and Rosalia Zanella, both of whom were born in Lozzo di Cadore, Belluno, Italy. In 1951 Gaetano and Rosalia Zanella migrated to Australia and each later became an Australian citizen: Gaetano was naturalised in September 1955 and Rosalia was naturalised in September 1959. By becoming Australian citizens, and by making Australia their place of residence, under Italian law Gaetano and Rosalia Zanella ceased to be Italian citizens. When Senator Canavan was born, his parents and grandparents were Australian citizens and only Australian citizens.

76 Senator Canavan has never visited Italy and has never taken any steps to acquire Italian citizenship.

77 Before 2006, it had not occurred to Senator Canavan that he or his siblings might be Italian citizens. Sometime during that year, his mother told him that he was eligible to apply for Italian citizenship and she gave him some documents to complete if he wished to pursue the matter. Senator Canavan did not wish to become an Italian citizen and he did not complete the documents. He was aware that his brother had taken steps to become an Italian citizen and to acquire an Italian passport.

78 On 18 July 2017, Senator Canavan's mother told him that he may have been registered as an Italian citizen as a result of steps that she had taken to become an Italian citizen. The following day Senator Canavan set in train inquiries to determine his citizenship status under Italian law. On 24 July 2017, he was informed by an Italian consular official that he had been registered as an Italian citizen in 2006. The following day Senator Canavan received written confirmation from the Italian Embassy that his name was registered with the Italian Consulate in Brisbane, that the registration had been "requested by your mother

for yourself and for your brother and sister as well" and that his name also appeared in the list of Italians eligible to vote abroad. Senator Canavan was informed that the registration had been received by the Municipality of Lozzo di Cadore on 18 January 2007. A copy of the request was attached to the letter. It is contained in a pro forma document described as "Form for Registration in Register of Italians Resident Abroad – A.I.R.E.". The form provided for the inclusion of information about adult children residing with the registrant. In this section the names and personal details of Senator Canavan's younger sister and brother were set out. In a further section headed "information about married children or who do not reside with you" Senator Canavan's name and personal details were set out. The form was signed by Senator Canavan's mother and dated 15 June 2006.

79 On 31 July 2017, Senator Canavan wrote to the Italian Consulate in Brisbane stating that he was seeking advice on his status and that "[r]egardless of the legitimacy of my Italian citizenship" he wished to renounce any citizenship or registration he had with the Italian government. On 7 August 2017, Senator Canavan attended the Italian Embassy in Canberra and formally renounced any Italian citizenship. The renunciation took effect from 8 August 2017.

80 The evidence of Italian citizenship law is contained in the joint report of Maurizio Delfino and Professor Beniamino Caravita di Toritto ("the joint report"), both of whom are practising Italian lawyers. From the joint report it emerges that Senator Canavan's status, if any, as an Italian citizen does not arise from any step taken by his mother in 2006 but rather from the circumstance that his maternal grandmother had not renounced her Italian citizenship at the date of his mother's birth. At the time of Senator Canavan's mother's birth the fact that her mother was an Italian citizen did not confer Italian citizenship on her. Under a law enacted in 1912 ("the 1912 law") only the child of a father who was an Italian citizen became an Italian citizen by birth. Senator Canavan's mother was born in October 1955, a month after her father was naturalised as an Australian citizen. An Italian citizen who acquired the citizenship of a foreign country and who took up residence in the foreign country automatically lost his or her Italian citizenship. At the time of her birth Senator Canavan's mother was an Australian citizen and only an Australian citizen. When Senator Canavan was born in 1980 he was an Australian citizen and only an Australian citizen.

81 The joint report explains that in 1983 the Italian Constitutional Court declared provisions of the 1912 law unconstitutional to the extent that they operated to deny equal treatment to male and female Italians. From the date of the Constitutional Court's decision and with effect from the date the new Italian Constitution came into force

(1 January 1948), Italian citizenship passed to a child either of whose parents was an Italian citizen. The effect of the decision was that Senator Canavan's mother became an Italian citizen by birth and, on one view, Senator Canavan became an Italian citizen "retroactively" to the date of his birth.

82 Senator Canavan's mother's marriage to his father in 1979 did not affect any right of Italian citizenship arising from the Constitutional Court's decision. At the time, Italian law provided that a female citizen lost her Italian citizenship on marriage to a foreign citizen provided the husband's citizenship was transmitted to the wife. The provision did not apply to Senator Canavan's mother because she was already an Australian citizen when she married an Australian husband. Italian citizenship is currently governed under a law enacted in 1992, which provides that the child of a parent who is an Italian citizen is an Italian citizen by birth.

83 As will appear, there is a question as to whether registration is merely declaratory of the status of citizen or a condition of the grant of the status in the case of citizenship by descent. The authors of the joint report explain that where a person files an application with supporting documents with an Italian Consulate for registration with A.I.R.E., the Consulate liaises with the Italian municipality in which the applicant's ancestor lived in order to establish "a continuous chain of ancestry". The Consulate sends the applicant's birth certificate to the Italian municipality, which registers the applicant. Registration as a citizen is described as a "separate and more rigorous process". The authors of the joint report conclude that Senator Canavan's mother applied for registration with A.I.R.E. in her own interest and that the registration of Senator Canavan and his siblings occurred at the initiative of the Consulate in Brisbane.

84 Registration with A.I.R.E. is distinguished in the joint report from a request for the declaration of Italian citizenship, which is required to follow the steps set out in a circular issued by the Italian Ministry of Foreign Affairs in 1991 ("the circolare"). The authors of the joint report state that "[o]nly after the request made by the individual for the recognition iure sanguinis of the Italian citizenship has been ascertained to be well grounded, may the consulate issue the relevant certificate of citizenship". They observe that it is not known if "the investigation and controls" referred to in the circolare have been carried out. They state that the A.I.R.E. certificate issued by the Mayor of the Municipality of Lozzo di Cadore "should not per se be considered a recognition of Italian citizenship": under the circolare only the interested party, who must be of age, can apply for citizenship.

85 In the concluding section of the joint report, the authors consider whether the issue of a certificate of citizenship is merely declaratory.

They conclude that the more reasonable interpretation of Italian law, in line with the adoption of the "subjective conception of citizenship" under the Italian Constitution, is that the administrative steps described in the circolare (which are expressed to apply to applicants for Italian citizenship arising from events before the commencement of the law of 1992) are matters of substance, amounting to a prerequisite to the "potential" citizenship right being activated.

86 Senator Canavan has not applied for a declaration of Italian citizenship. On the evidence before the Court, one cannot be satisfied that Senator Canavan was a citizen of Italy. The concluding section of the joint report suggests that he was not. Given the potential for Italian citizenship by descent to extend indefinitely – generation after generation – into the public life of an adopted home, one can readily accept that the reasonable view of Italian law is that it requires the taking of the positive steps referred to in the joint report as conditions precedent to citizenship.

87 For these reasons, the first question, namely, whether, by reason of s 44(i) of the *Constitution*, there is a vacancy in the representation of Queensland in the Senate for the place for which Senator Canavan was returned, is answered "no".

Mr Scott Ludlam

88 Mr Ludlam lodged his nomination as a candidate for election to the Senate for Western Australia with the Australian Electoral Commission on 18 May 2016. At the time of his nomination, Mr Ludlam was unaware that he held any citizenship other than Australian citizenship. Mr Ludlam was returned on 2 August 2016 as an elected senator for Western Australia at the general election for the Parliament held on 2 July 2016.

89 In July 2017, Mr Ludlam's office was contacted by Mr John Cameron, who stated that he had reason to believe that Mr Ludlam may be a citizen of New Zealand as well as of Australia. In consequence of this contact, Mr Ludlam made inquiries for the first time as to whether he was a dual citizen. His dual citizenship was confirmed by the New Zealand High Commission on 10 July 2017. On 14 July 2017, Mr Ludlam wrote to the President of the Senate resigning his position as a senator for Western Australia.

90 Mr Ludlam does not dispute that his citizenship of New Zealand, although unknown to him, disqualified him from being chosen or sitting as a senator. The circumstances of his New Zealand citizenship can be briefly stated. Mr Ludlam was born in Palmerston North, New Zealand in January 1970. His parents left New Zealand in 1973. In October 1978 the family arrived in Perth, Western Australia. Mr Ludlam, his brother and his parents were naturalised as Australian

citizens in April 1989. Mr Ludlam believed that upon his naturalisation as an Australian citizen he was exclusively an Australian citizen and that he held no other citizenship.

91 The evidence of New Zealand citizenship law is contained in the report of Mr David Goddard QC, of the New Zealand bar. In summary, at the date of Mr Ludlam's birth, the *British Nationality and New Zealand Citizenship Act 1948* (NZ) ("the 1948 NZ Act") governed citizenship in New Zealand. Subject to exceptions to which it is unnecessary to refer, the 1948 NZ Act provided that every person born in New Zealand after its commencement shall be a citizen of New Zealand by birth. The 1948 NZ Act was repealed by the *Citizenship Act 1977* (NZ) ("the 1977 NZ Act"), which remains in force today. Mr Ludlam's New Zealand citizenship under the 1948 NZ Act was preserved by the 1977 NZ Act. Under the 1977 NZ Act a New Zealand citizen may lose his or her citizenship by renouncing it or, in limited circumstances, by ministerial order. It is not in question that Mr Ludlam had not lost his New Zealand citizenship at the date he nominated for election to the Senate.

92 Mr Ludlam was incapable of being chosen or sitting as a senator under s 44(i) of the *Constitution* and so there is a vacancy in the representation of Western Australia in the Senate for the place for which Mr Ludlam was returned.

Ms Larissa Waters

93 Ms Waters nominated with the Australian Electoral Commission for election as a senator for Queensland on 9 June 2016. At the time, Ms Waters believed that she was solely an Australian citizen. Ms Waters was returned on 5 August 2016 as an elected senator for Queensland at the general election for the Parliament held on 2 July 2016.

94 Ms Waters was born in February 1977 in Winnipeg, Canada to Australian parents who were living in Canada at the time for study and work purposes. Neither was a permanent resident of Canada. Ms Waters' birth was registered with the Australian High Commission in Ottawa in June 1977. It was not in doubt that Ms Waters was an Australian citizen by descent. In January 1978, as an infant aged 11 months, Ms Waters left Canada with her parents, who were returning to live in Australia.

95 Ms Waters has never held a Canadian passport. She has not visited Canada since leaving it in January 1978. She has always considered herself to be an Australian and has never understood that she owes allegiance to any other country. She has not sought or received consular assistance or any other kind of government assistance from Canada and she has not exercised any rights as a Canadian citizen. Her

mother had given her to understand that she would be eligible to apply for Canadian citizenship when she turned 21. On turning 21 in 1998, Ms Waters considered applying for Canadian citizenship but she decided against it.

96 On 14 July 2017, following Mr Ludlam's resignation from the Senate, Ms Waters' father raised with her a concern that her citizenship status may have been affected by her birth in Canada. Ms Waters sought advice from the Clerk of the Senate and from the Canadian authorities. In light of the advice, Ms Waters concluded that she was a Canadian citizen. On 18 July 2017, Ms Waters wrote to the President of the Senate resigning from the Senate with immediate effect. On 27 July 2017, Ms Waters applied to the High Commission of Canada seeking to renounce her Canadian citizenship. On 7 August 2017, Ms Waters received written confirmation from the High Commission of Canada that she had ceased to be a Canadian citizen with effect from 5 August 2017.

97 The evidence of Canadian citizenship law is contained in the report of Mr Lorne Waldman, a practising Canadian lawyer. In summary, at the time of Ms Waters' birth, Canadian citizenship was governed by the *Canadian Citizenship Act*, RSC 1970, c C-19, which, relevantly, provided that a person born after 31 December 1946 is a natural-born Canadian citizen if the person is born in Canada. Canadian-born children of parents having certain diplomatic connections are excepted from the conferral of Canadian citizenship at birth. There is no suggestion that Ms Waters' parents came within that exception. The *Citizenship Act*, SC 1974-75-76, c 108 came into force a week after Ms Waters' birth and does not affect her status as a Canadian citizen. The registration of Ms Waters' birth with the Australian High Commission (77) did not affect her acquisition of Canadian citizenship. The sole basis on which Ms Waters could lose her citizenship from the date of her birth until June 2014 was by way of renunciation. For a closed period between June 2014 and June 2017 there were limited circumstances in which the government of Canada was empowered to revoke the citizenship of persons born in Canada. These provisions have since been revoked with retroactive effect. Ms Waters maintained her Canadian citizenship until her renunciation of it.

98 Ms Waters was incapable of being chosen or sitting as a senator under s 44(i) of the *Constitution*, and so there is a vacancy in the representation of Queensland in the Senate for the place for which Ms Waters was returned.

(77) See *Australian Citizenship Act 1948* (Cth), s 11 (as at 8 February 1977).

Senator Malcolm Roberts

99 Senator Roberts completed the nomination for election as a senator for Queensland on 3 June 2016. He stated that he was an Australian citizen by naturalisation and that he was not by virtue of s 44 of the *Constitution* incapable of being chosen as a senator. Senator Roberts was returned on 5 August 2016 as an elected senator for Queensland at the general election for the Parliament held on 2 July 2016. The Senate resolved to refer questions to this Court concerning whether there is a vacancy in the representation of Queensland for the place for which Senator Roberts was returned following the submission of documents to the Senate that suggested that Senator Roberts was a citizen of the United Kingdom at the date of his nomination.

100 The reference gave rise to some disputed questions of fact. These were determined by Keane J in reasons delivered on 22 September 2017 (78). His Honour summarised the uncontroversial evidence as follows. Senator Roberts' father was born in Wales in 1923. His mother was born in Queensland in 1918. Around 1946, his father moved to India to work as the manager of a coal mine. His father travelled to Australia around 1954 where he met and married Senator Roberts' mother. After an Australian passport was issued to the mother in September 1954, she and the father moved to West Bengal. Senator Roberts was born in Disergarh, West Bengal, India in May 1955 and his name was recorded in the High Commissioner's Record of Citizens of the United Kingdom and Colonies. An entry was made around June 1955 on his mother's passport by the Australian Trade Commissioner in Calcutta to allow Senator Roberts, then a child, to travel with his mother. The entry stated that Senator Roberts "is the child of an Australian citizen but has not acquired Australian citizenship". The Roberts family moved to Australia around 1962. In 1974, Senator Roberts, then a student at the University of Queensland, applied to become an Australian citizen and was naturalised as such on 17 May 1974.

101 Evidence of British citizenship law was given by Mr Laurie Fransman QC, who was called as a witness by the Attorney-General, and by Mr Adrian Berry of Counsel, who was called by Senator Roberts. Each of these barristers practises in the United Kingdom specialising in citizenship law. On the basis of their evidence, Keane J found that Senator Roberts was a citizen of the United Kingdom by descent at the time of his nomination for election as a senator (79). By virtue of his father's nationality, Senator Roberts was born a "citizen of the United Kingdom and Colonies", the principal form of British

(78) *Re Roberts* (2017) 91 ALJR 1018; 347 ALR 600.

(79) *Re Roberts* (2017) 91 ALJR 1018 at 1028 [73]-[74]; 347 ALR 600 at 613-614.

nationality in the period 1 January 1949 to 31 December 1982. On 1 January 1983, the *British Nationality Act 1981* (UK) ("the BNA 1981") came into force and Senator Roberts became a British citizen by descent.

102 Keane J found that Senator Roberts knew that he did not become an Australian citizen until May 1974 and at the date of his nomination for the Senate Senator Roberts knew that there was at least a real and substantial prospect that prior to May 1974 he had been and that he remained thereafter a citizen of the United Kingdom (80). Senator Roberts ceased to be a citizen of the United Kingdom on 5 December 2016, on the registration of his declaration of renunciation of citizenship.

103 Senator Roberts was incapable of being chosen or sitting as a senator under s 44(i) of the *Constitution*, and so there is a vacancy in the representation of Queensland in the Senate for the place for which Senator Roberts was returned.

The Hon Barnaby Joyce MP

104 Mr Joyce MP nominated for election to the House of Representatives as the member for the electorate of New England on 2 June 2016. His election as the member for New England in the general election for the Parliament held on 2 July 2016 was declared on 15 July 2016. In issue is whether Mr Joyce MP was incapable of being chosen as a member of the House of Representatives by reason of being a citizen of New Zealand.

105 Mr Joyce MP was born in April 1967 at Tamworth Base Hospital, Tamworth, New South Wales. His father was born in Dunedin, New Zealand in 1924. His mother was born in Gundagai, New South Wales in 1930. Mr Joyce MP's father came to Australia in 1947, and undertook studies in veterinary science at the University of Sydney. While at the University of Sydney, Mr Joyce MP's father met his mother and they were married in April 1956. Mr Joyce Snr was naturalised as an Australian citizen in 1978. At that time, he also renounced his New Zealand citizenship. Mr Joyce MP has always known that his father was born in New Zealand. He understood that his father had become an Australian citizen in 1978 and was solely an Australian citizen.

106 Mr Joyce MP grew up on a property outside Tamworth, New South Wales. He was educated at schools in New South Wales and at the University of New England, Armidale. He was a member of the Australian Army Reserve between October 1996 and September 2001. He was elected as a senator for Queensland in 2004. In 2013 he

(80) *Re Roberts* (2017) 91 ALJR 1018 at 1033 [116]; 347 ALR 600 at 620.

resigned from the Senate and was elected to the House of Representatives as the member for the electorate of New England at the federal election held that year. When Mr Joyce MP nominated for election to the Senate in 2004, he completed a form which referred to s 44(i) of the *Constitution*. His belief at that time and at the time of nominating for election at the general election held on 2 July 2016 was that s 44(i) had no application to him because he was a citizen of Australia only.

107 In late July 2017, Mr Joyce MP's office received inquiries from the media asking if he was a dual citizen of Australia and New Zealand. Mr Joyce MP had not been aware of the possibility that he held dual citizenship before these inquiries came to his attention. Mr Joyce MP has never applied to become a New Zealand citizen. He has not sought or accepted any privileges as a citizen of New Zealand.

108 On 10 August 2017, Mr Joyce MP met with the New Zealand High Commissioner, who conveyed to him that in the eyes of the New Zealand government he was a citizen of New Zealand by descent. On 12 August 2017, Mr Joyce MP received a memorandum of advice from Mr David Goddard QC, of the New Zealand bar, confirming that under New Zealand law Mr Joyce MP was a citizen of New Zealand by descent. On that day, Mr Joyce MP attended the New Zealand High Commission and completed a declaration of renunciation of New Zealand citizenship.

109 Mr Goddard's advice concerning New Zealand citizenship law as it applies to Mr Joyce MP is part of the evidence on the reference. So, too, is the opinion of Mr Francis Cooke QC, also of the New Zealand bar, who was retained by the solicitors acting for Mr Windsor. Mr Goddard and Mr Cooke are agreed with respect to Mr Joyce MP's status as a citizen of New Zealand from birth until he renounced his citizenship. In summary, the status of "New Zealand citizen" was first provided under the 1948 NZ Act. Relevantly, persons who were British subjects immediately before its commencement and who were born in New Zealand became New Zealand citizens by birth under the 1948 NZ Act. Mr Joyce MP became a New Zealand citizen by descent by virtue of s 7 of the 1948 NZ Act, which provided that a person born after its commencement is a New Zealand citizen by descent if his father was a New Zealand citizen at the time of his birth. Mr Joyce MP's acquisition of New Zealand citizenship by descent did not depend upon registration or other formality.

110 Mr Joyce Snr's renunciation of his New Zealand citizenship in 1978 operated with prospective effect only and did not affect his son's status as a New Zealand citizen. That status could only be lost by renunciation or, in limited circumstances, by ministerial order. Mr Cooke's report describes the main rights enjoyed by New Zealand

citizens under New Zealand law, including to enter and live in New Zealand and to hold a New Zealand passport. He also notes that New Zealand citizens living outside New Zealand are amenable to certain of the offences for which the *Crimes Act 1961* (NZ) provides.

111 At the date of his nomination Mr Joyce MP was incapable of being chosen or sitting as a member of the House of Representatives because he was a citizen of New Zealand; and so the place of the member for New England in the House of Representatives is vacant.

Senator the Hon Fiona Nash

112 Senator Nash nominated for election to the Senate on 1 June 2016. In completing the nomination form, Senator Nash read the text of s 44(i). At the time, she believed that she was a citizen of Australia and of no other country. Senator Nash was returned on 5 August 2016 as a senator for New South Wales at the general election for the Parliament held on 2 July 2016.

113 Senator Nash was born in Sydney in May 1965. Her father, Raemond Morton, was born in East Lothian, Scotland in 1927. Her mother, Joy Hird, was born in Sydney, New South Wales in January 1928. Her mother travelled to the United Kingdom to work as a doctor when she was aged in her 20s. She met Senator Nash's father in London and the two were married in April 1956 in Essex, England. Following the marriage, Senator Nash's older sisters were born in England. Sometime between 1960 and 1962, Senator Nash's family moved to Australia. Her parents divorced in 1973 when she was eight years old. Thereafter Senator Nash was raised by her mother and had little contact with her father until the later years of his life. As a child, Senator Nash was aware that her father was born in Scotland. She was also aware that her sisters were British citizens, having been born in England.

114 Senator Nash was educated in New South Wales and following completion of her studies she worked with her husband in a mixed farming business in Crowther, New South Wales. She was sworn in as a senator for New South Wales on 1 July 2005 and has served as a senator since that time.

115 On 14 August 2017, following Mr Joyce MP's statement to the House of Representatives concerning his citizenship status, Senator Nash sought advice from the United Kingdom Home Office concerning her status. On 14 August 2017, Senator Nash was advised by an official of the Home Office of his view that she was a British citizen. On 17 August 2017, Senator Nash received a copy of the opinion of Mr Laurie Fransman QC, that she was a British citizen. Before 14 August 2017 Senator Nash did not know that she was a British citizen. It was her belief that if she wished to become a British citizen

she would have to apply to have the status conferred on her. Senator Nash has never visited the United Kingdom, nor has she sought or received any privileges from the United Kingdom by reason of her citizenship. On 18 August 2017, Senator Nash completed a declaration renouncing her British citizenship. On 21 August 2017, Senator Nash received confirmation from the Home Office that she is no longer a British citizen.

116 Mr Fransman's advice concerning the law governing British citizenship in its application to Senator Nash forms part of the evidence on the reference. In summary, before 1949, the primary form of British nationality was British subject status. Under the *British Nationality and Status of Aliens Act 1914* (UK) (81), any person born within the King's dominions and allegiance was deemed to be a natural-born British subject. Following the unification of England and Scotland, Scotland formed part of the Crown's dominions and, generally, birth within the Crown's dominions entailed allegiance to the Crown. Senator Nash's father was born within the Crown's dominions and allegiance and was a natural-born British subject. The *British Nationality Act 1948* (UK) (82) ("the BNA 1948") made the primary form of British nationality "citizenship of the United Kingdom and Colonies". On its commencement, Senator Nash's father was reclassified as a citizen of the United Kingdom and colonies. The BNA 1948 distinguished between citizens of the United Kingdom and colonies by descent and otherwise than by descent. Senator Nash's father was a citizen of the United Kingdom and colonies otherwise than by descent. His nationality was unaffected by his marriage to an Australian or his migration to Australia.

117 On 1 January 1973, on the commencement of the *Immigration Act 1971* (UK) ("the IA 1971"), Senator Nash's father, having been a citizen of the United Kingdom and colonies otherwise than by descent, acquired a new status called "patriality", otherwise known as the right of abode in the United Kingdom (83). On 1 January 1983, on the commencement of the BNA 1981, the primary form of British nationality became "British citizenship". At that moment, Senator Nash's father became a British citizen otherwise than by descent (84).

118 As a person who was born a legitimate child outside the United Kingdom and colonies to a father who was a citizen of the United Kingdom and colonies otherwise than by descent, Senator Nash became a citizen of the United Kingdom and colonies by descent at

(81) 4 & 5 Geo 5 c 17.
(82) 11 & 12 Geo 6 c 56.
(83) *Immigration Act 1971* (UK), s 2(1)(a).
(84) See *British Nationality Act 1981* (UK), s 14.

birth (85). On 1 January 1973, on the commencement of the IA 1971, Senator Nash acquired the right of abode in the United Kingdom (86). On 1 January 1983, on the commencement of the BNA 1981, Senator Nash became a British citizen (87).

119 At the date of her nomination as a senator for New South Wales, Senator Nash remained a British citizen, having not renounced that status and not having been deprived of it. Senator Nash was incapable of being chosen or sitting as a senator by reason of s 44(i) of the *Constitution*, and so there is a vacancy in the representation of New South Wales in the Senate for the place for which Senator Nash was returned.

Senator Nick Xenophon

120 Senator Xenophon was returned on 4 August 2016 as a senator for South Australia at the general election for the Parliament held on 2 July 2016.

121 Senator Xenophon has always considered himself to be an Australian. He was born in January 1959 in Toorak Gardens, South Australia. He has resided all his life in Australia and has always been an Australian citizen. He was brought up in a household in which he describes his cultural heritage as Australian of Hellenic descent. He spoke Greek and English at home. He was baptised in the Greek Orthodox faith and regularly attended the Greek Orthodox Church in Norwood, South Australia. His father was born in Cyprus in July 1931. His father emigrated from Cyprus to Australia in 1951 and was naturalised as an Australian citizen in July 1965. Senator Xenophon's mother was born in Greece in January 1928. She emigrated to Australia in 1956 and was naturalised as an Australian citizen in September 1963. At the time of their naturalisation each of Senator Xenophon's parents renounced allegiance to all other foreign sovereigns.

122 In October 1997, Senator Xenophon was elected as a member of the Legislative Council in South Australia. Prior to his first election to the Australian Senate in November 2007, Senator Xenophon considered it prudent, because of his Hellenic background, to renounce any entitlement that he might have to citizenship of Greece or Cyprus. He wrote to the Greek Embassy and the High Commission of Cyprus, in each case renouncing any right of citizenship. It is common ground that Senator Xenophon is not a citizen of either Greece or Cyprus.

(85) *British Nationality Act 1948* (UK), s 5(1).
(86) *Immigration Act 1971* (UK), s 2(1)(b)(i).
(87) *British Nationality Act 1981* (UK), s 11(1).

123 Senator Xenophon was subsequently re-elected to the Australian Senate on 7 September 2013 and 2 July 2016. At no time prior to either election did it cross his mind that he might have some form of British citizenship arising from the fact that Cyprus was a British possession at the time of his father's birth. On 12 August 2017, one or more journalists made inquiries of Senator Xenophon's office as to whether Senator Xenophon was a British citizen. As will appear, Senator Xenophon was a "British overseas citizen" ("BOC") at the date of his nomination for election as a senator for South Australia. On 25 August 2017, Senator Xenophon signed an application to renounce his British overseas citizenship. On 31 August 2017, the United Kingdom Home Office informed Senator Xenophon that he ceased to be a BOC on 30 August 2017.

124 The issue is whether as a BOC Senator Xenophon was incapable of being chosen as a senator because he was "a subject or a citizen of a foreign power" or a person "entitled to the rights or privileges of a subject or a citizen of a foreign power" for the purposes of s 44(i) of the *Constitution*. The answer is that Senator Xenophon was not disqualified under s 44(i). To explain why that is so it is necessary to describe the incidents of British overseas citizenship. These incidents, and the circumstances in which Senator Xenophon came to acquire the status of BOC under United Kingdom law, are explained in a further report by Mr Laurie Fransman QC.

125 As has been noted, before 1949, the principal form of British nationality was British subject status, which generally was acquired by virtue of a sufficiently close connection with the Crown's dominions. In the period 1 January 1949 to 31 December 1982 under the BNA 1948, the principal form of British nationality was citizenship of the United Kingdom and colonies. Generally, this status was acquired by virtue of a sufficiently close connection with the United Kingdom and the remaining British colonies. Citizens of the United Kingdom and colonies were not subject to United Kingdom immigration control at the start of the period, although Mr Fransman explains that some became subject to immigration control from 1962. Under the IA 1971, which came into force on 1 January 1973, only a citizen of the United Kingdom and colonies who had the right of abode in the United Kingdom could continue to enter the United Kingdom freely.

126 From 1 January 1983 to date, British nationality law has been principally governed by the BNA 1981, which created three forms of citizenship: British citizenship; British dependent territories citizenship (later renamed British overseas territories citizenship); and British overseas citizenship. All persons who were citizens of the United Kingdom and colonies were reclassified on the commencement of the BNA 1981 within one of the three categories. Generally, those

reclassified as British citizens were persons who immediately prior to the commencement of the BNA 1981 were citizens of the United Kingdom and colonies with the right of abode in the United Kingdom. Citizens of the United Kingdom and colonies without the right of abode became British dependent territories citizens if their citizenship was derived from connection with a place which remained a British dependent territory. Remaining citizens of the United Kingdom and colonies without the right of abode were automatically reclassified as BOCs. BOCs were persons who prior to the BNA 1981 were citizens of the United Kingdom and colonies by virtue of a connection with a place that had been a British colony but which had attained independence.

127 The island of Cyprus was annexed by Britain in 1914 and remained a British possession in 1931 when Senator Xenophon's father was born. Senator Xenophon's father was born within the King's dominions and allegiance and was deemed to be a natural-born British subject (88). On commencement of the BNA 1948, Senator Xenophon's father was immediately reclassified as a citizen of the United Kingdom and colonies otherwise than by descent (89). The father's status as a citizen of the United Kingdom and colonies without the right of abode was unaffected by his naturalisation as an Australian citizen.

128 Arrangements with respect to nationality were agreed within the framework of the Treaty Concerning the Establishment of the Republic of Cyprus entered on 16 August 1960. Annex D to the treaty, which sets out the arrangements, has the force of law in the United Kingdom by virtue of its inclusion as a Schedule to the British Nationality (Cyprus) Order 1960 (90). Applying the provisions of this Order to Senator Xenophon's father, Mr Fransman advises that the father did not cease to be a citizen of the United Kingdom and colonies otherwise than by descent when Cyprus became independent because he was not ordinarily resident in Cyprus in the five years prior to 16 August 1960. Senator Xenophon's father did not have the right of abode in the United Kingdom under the IA 1971 or at any time before 1983, when British nationality law was again revised. On the commencement of the BNA 1981, Senator Xenophon's father was automatically reclassified as a BOC.

129 At the time of Senator Xenophon's birth in 1959, for the purposes of British nationality law, Australia was an independent Commonwealth country. Under the BNA 1948, citizenship of the United Kingdom and

(88) *British Nationality and Status of Aliens Act 1914* (UK), s 1(1)(a).
(89) *British Nationality Act 1948* (UK), s 12(1)(a).
(90) SI 1960/2215.

colonies passed automatically to the legitimate child of a father who was a citizen of the United Kingdom and colonies otherwise than by descent (91). Therefore, Senator Xenophon became a citizen of the United Kingdom and colonies by descent at birth. Senator Xenophon did not have the right of abode in the United Kingdom under the IA 1971, when that Act came into force on 1 January 1973, and he did not acquire that right after that date. On 1 January 1983, as a citizen of the United Kingdom and colonies without the right of abode in the United Kingdom and without a specified connection with a territory which on that date remained a colony, Senator Xenophon was automatically reclassified as a BOC.

130 Senator Xenophon has not been issued with a BOC passport and has never received British consular protection or other consular services.

131 There is no question that Senator Xenophon was a BOC at the date he nominated for election as a senator for South Australia. While under domestic law British overseas citizenship is treated as a form of British nationality, Mr Fransman explains that it is a residuary form of nationality that differs from British citizenship in important respects: importantly, a BOC does not have the right of abode in the United Kingdom. The right of abode includes the right to enter and to reside in the country of nationality. As Mr Fransman observes, the right of abode is one of the main characteristics of a national under international law.

132 In this regard, unlike a British citizen, a BOC may only enter the United Kingdom by satisfying the requirements of immigration control. It appears that in 2002 British citizenship was extended to include those BOCs who did not possess other citizenship. The extension did not apply to Senator Xenophon, who has at all times possessed Australian citizenship. Senator Xenophon's status, until he renounced it, was that of a BOC having no right of abode in the United Kingdom.

133 A further respect in which Mr Fransman states that the incidents, privileges and obligations of a BOC differ from those of a British citizen is in the nature of the duty of loyalty: a person who is registered as a BOC is not required to pledge loyalty to the United Kingdom. This is by way of contrast with the pledge that is required of a person who is registered as a British citizen. Mr Fransman considers that a BOC does not owe loyalty to the United Kingdom per se but that he or she does owe loyalty or allegiance to Her Majesty the Queen. He does not express a concluded view on whether the allegiance is owed to Her Majesty at large or to Her Majesty in right of the United Kingdom,

(91) *British Nationality Act 1948* (UK), s 5(1).

although he inclines to the latter view. The position with respect to Senator Xenophon is less clear in light of a change in practice. Mr Fransman assumes that the duty of loyalty of a person who became a BOC by reclassification on 1 January 1983, as Senator Xenophon did, is the same as the duty of loyalty of a person who registered as a BOC under the BNA 1981. Mr Fransman considers that, while today an Australian citizen registering as a BOC would be required to take an oath to Her Majesty in right of the United Kingdom, under previous practice this would not have been required because an Australian was already a citizen of a country of which the Queen was Head of State. While the date of the change in practice is not stated, as at the date Senator Xenophon was reclassified it appears that had he applied to be registered as a BOC he would not have been required to take an oath of allegiance to Her Majesty the Queen in right of the United Kingdom. In the event, Senator Xenophon has never applied to be registered as a BOC, nor has he sworn any oath of loyalty or allegiance as a BOC.

134 To observe that British overseas citizenship is a juridical relationship between the individual and the United Kingdom, as Mr Fransman describes it, is not to conclude that it is a relationship which for the purposes of s 44(i) renders the BOC a citizen of a foreign power. No party contended that the fact that the foreign power designates a status as that of "citizen" is determinative without consideration of the rights, privileges and obligations conferred under the law of the foreign power. The status of BOC distinctly does not confer the rights or privileges of a citizen as that term is generally understood: a BOC does not have the right to enter or reside in the United Kingdom. Critically, taking into account the purpose of s 44(i), which is to ensure that members of the Parliament do not have split allegiance, it does not appear that Senator Xenophon's status as a BOC entailed any reciprocal obligation of allegiance to the United Kingdom per se or to Her Majesty the Queen in right of the United Kingdom.

135 For the purposes of s 44(i), Senator Xenophon was not a subject or a citizen of the United Kingdom at the date of his nomination and election as a senator. Nor was he entitled to the rights and privileges of a subject or citizen of the United Kingdom. Accordingly, there is no vacancy in the representation of South Australia in the Senate for the place for which Senator Xenophon was returned.

Filling the vacancies

136 On the proper construction of s 44(i), it operated to render Senator Nash, Senator Roberts, Mr Ludlam, Ms Waters and Mr Joyce MP incapable of being chosen at the 2016 election.

137 In each of the references concerning Senators Nash and Roberts, and Ms Waters and Mr Ludlam, the question arises as to the order that should be made to fill the resulting vacancy in the Senate.

138 In this regard, it was not suggested that the taking of a further poll was necessary; and there is no reason to suppose that a special count of the ballots would "result in a distortion of the voters' real intentions" (92) rather than a reflection of "the true legal intent of the voters so far as it is consistent with the Constitution and the [*Commonwealth Electoral Act*]" (93). Accordingly, in each of those cases, votes cast "above the line" in favour of the party that nominated the candidate should be counted in favour of the next candidate on that party's list.

139 In the reference concerning Mr Joyce MP, it was common ground, and consistent with authority (94), that in the event that Mr Joyce MP was incapable of being chosen as a member of the House of Representatives, the election of Mr Joyce MP was void, and a by-election must be held in order to elect the member for New England.

Conclusions

140 In the reference concerning Senator Canavan, the questions should be answered as follows:

(a) There is no vacancy by reason of s 44(i) of the *Constitution* in the representation of Queensland in the Senate for the place for which Senator the Hon Matthew Canavan was returned.

(b) Does not arise.

(c) No further order is required.

(d) No further order is required.

141 In the reference concerning Mr Ludlam, the questions should be answered as follows:

(a) There is a vacancy by reason of s 44(i) of the *Constitution* in the representation of Western Australia in the Senate for the place for which Mr Scott Ludlam was returned.

(b) The vacancy should be filled by a special count of the ballot papers. Any directions necessary to give effect to the conduct of the special count should be made by a single Justice.

(c) Does not arise.

(d) Unnecessary to answer.

(92) *Sykes v Cleary* (1992) 176 CLR 77 at 102. See also *Free v Kelly* (1996) 185 CLR 296 at 302-304.

(93) *In re Wood* (1988) 167 CLR 145 at 166.

(94) *Sykes v Cleary* (1992) 176 CLR 77 at 102, 108, 130-131, 132; *Free v Kelly* (1996) 185 CLR 296 at 303-304; cf *In re Wood* (1988) 167 CLR 145 at 165-166.

142 In the reference concerning Ms Waters, the questions should be answered as follows:

(a) There is a vacancy by reason of s 44(i) of the *Constitution* in the representation of Queensland in the Senate for the place for which Ms Larissa Waters was returned.

(b) The vacancy should be filled by a special count of the ballot papers. Any directions necessary to give effect to the conduct of the special count should be made by a single Justice.

(c) Does not arise.

(d) Unnecessary to answer.

143 In the reference concerning Senator Roberts, the questions should be answered as follows:

(a) There is a vacancy by reason of s 44(i) of the *Constitution* in the representation of Queensland in the Senate for the place for which Senator Malcolm Roberts was returned.

(b) The vacancy should be filled by a special count of the ballot papers. Any directions necessary to give effect to the conduct of the special count should be made by a single Justice.

(c) Unnecessary to answer.

(d) Unnecessary to answer.

144 In the reference concerning Mr Joyce MP, the questions should be answered as follows:

(a) By reason of s 44(i) of the *Constitution*, the place of the Member for New England, the Hon Barnaby Joyce MP, is vacant.

(b) There should be a by-election for the election of the Member for New England.

(c) Unnecessary to answer.

(d) Unnecessary to answer.

145 In the reference concerning Senator Nash, the questions should be answered as follows:

(a) There is a vacancy by reason of s 44(i) of the *Constitution* in the representation of New South Wales in the Senate for the place for which Senator the Hon Fiona Nash was returned.

(b) The vacancy should be filled by a special count of the ballot papers. Any directions necessary to give effect to the conduct of the special count should be made by a single Justice.

(c) Unnecessary to answer.

(d) Unnecessary to answer.

146 In the reference concerning Senator Xenophon, the questions should be answered as follows:

(a) There is no vacancy by reason of s 44(i) of the *Constitution* in the representation of South Australia in the Senate for the place for which Senator Nick Xenophon was returned.

(b) Does not arise.

(c) No further order is required.

(d) No further order is required.

Matter No C11/2017

The questions referred to the Court of Disputed Returns by the President of the Senate in his letter dated 9 August 2017 be answered as follows:

Question (a) Whether, by reason of s 44(i) of the Constitution, there is a vacancy in the representation of Queensland in the Senate for the place for which Senator [the Hon] Matthew Canavan was returned?

Answer There is no vacancy by reason of s 44(i) of the Constitution in the representation of Queensland in the Senate for the place for which Senator the Hon Matthew Canavan was returned.

Question (b) If the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled?

Answer Does not arise.

Question (c) What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference?

Answer No further order is required.

Question (d) What, if any, orders should be made as to the costs of these proceedings?

Answer No further order is required.

Matter No C12/2017

The questions referred to the Court of Disputed Returns by the President of the Senate in his letter dated 9 August 2017 be answered as follows:

Question (a) Whether by reason of s 44(i) of the Constitution there is a vacancy in

the representation of Western Australia in the Senate for the place for which Senator Ludlam was returned?

Answer *There is a vacancy by reason of s 44(i) of the Constitution in the representation of Western Australia in the Senate for the place for which Mr Scott Ludlam was returned.*

Question (b) *If the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled?*

Answer *The vacancy should be filled by a special count of the ballot papers. Any directions necessary to give effect to the conduct of the special count should be made by a single Justice.*

Question (c) *If the answer to Question (a) is "no", is there a casual vacancy in the representation of Western Australia in the Senate within the meaning of s 15 of the Constitution?*

Answer *Does not arise.*

Question (d) *What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference?*

Answer *Unnecessary to answer.*

Matter No C13/2017

The questions referred to the Court of Disputed Returns by the President of the Senate in his letter dated 9 August 2017 be answered as follows:

Question (a) *Whether by reason of s 44(i)[] of the Constitution there is a vacancy in the representation of Queensland in the Senate for the place for which Senator Waters was returned?*

Answer *There is a vacancy by reason of s 44(i) of the Constitution in the representation of Queensland in the Senate for the place for which Ms Larissa Waters was returned.*

Question (b) *If the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled?*

Answer *The vacancy should be filled by a special count of the ballot papers. Any directions necessary to give effect to the conduct of the special count should be made by a single Justice.*

Question (c) *If the answer to Question (a) is "no", is there a casual vacancy in the representation of Queensland in the Senate within the meaning of s 15 of the Constitution?*

Answer *Does not arise.*

Question (d) *What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference?*

Answer *Unnecessary to answer.*

Matter No C14/2017

The questions referred to the Court of Disputed Returns by the President of the Senate in his letter dated 10 August 2017 be answered as follows:

Question (a) *Whether by reason of s 44(i) of the Constitution there is a vacancy in the representation of Queensland in the Senate for the place for which Senator Roberts was returned?*

Answer *There is a vacancy by reason of s 44(i) of the Constitution in the representation of Queensland in the Senate for the place for which Senator Malcolm Roberts was returned.*

Question (b) *If the answer to question (a) is "yes", by what means and in what manner that vacancy should be filled?*

Answer *The vacancy should be filled by a special count of the ballot papers. Any directions necessary to give effect to the conduct of the special count should be made by a single Justice.*

Question (c) What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference?

Answer Unnecessary to answer.

Question (d) What, if any, orders should be made as to the costs of these proceedings?

Answer Unnecessary to answer.

Matter No C15/2017

The questions referred to the Court of Disputed Returns by the Speaker of the House of Representatives in his letter dated 15 August 2017 be answered as follows:

Question (a) Whether, by reason of s 44(i) of the Constitution[,] the place of the Member for New England (Mr Joyce) has become vacant?

Answer By reason of s 44(i) of the Constitution, the place of the Member for New England, the Hon Barnaby Joyce MP, is vacant.

Question (b) If the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled?

Answer There should be a by-election for the election of the Member for New England.

Question (c) What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference?

Answer Unnecessary to answer.

Question (d) What, if any, orders should be made as to the costs of these proceedings?

Answer Unnecessary to answer.

Matter No C17/2017

The questions referred to the Court of Disputed Returns by the President of the Senate in his letter dated 5 September 2017 be answered as follows:

Question (a) Whether, by reason of s 44(i) of the Constitution, there is a vacancy in the representation of New South

Wales in the Senate for the place for which Senator [the Hon] Fiona Nash was returned?

Answer *There is a vacancy by reason of s 44(i) of the Constitution in the representation of New South Wales in the Senate for the place for which Senator the Hon Fiona Nash was returned.*

Question (b) *If the answer to question (a) is "yes", by what means and in what manner that vacancy should be filled?*

Answer *The vacancy should be filled by a special count of the ballot papers. Any directions necessary to give effect to the conduct of the special count should be made by a single Justice.*

Question (c) *What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference?*

Answer *Unnecessary to answer.*

Question (d) *What, if any, orders should be made as to the costs of these proceedings?*

Answer *Unnecessary to answer.*

Matter No C18/2017

The questions referred to the Court of Disputed Returns by the President of the Senate in his letter dated 5 September 2017 be answered as follows:

Question (a) *Whether by reason of s 44(i) of the Constitution there is a vacancy in the representation of South Australia in the Senate for the place for which Senator Xenophon was returned?*

Answer *There is no vacancy by reason of s 44(i) of the Constitution in the representation of South Australia in the Senate for the place for which Senator Nick Xenophon was returned.*

Question (b) *If the answer to question (a) is "yes", by what means and in what manner that vacancy should be filled?*

Answer Does not arise.

Question (c) What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference?

Answer No further order is required.

Question (d) What, if any, orders should be made as to the costs of these proceedings?

Answer No further order is required.

Solicitor for the Attorney-General and the amicus curiae, *Australian Government Solicitor*.

Solicitors for Senator Canavan, *Stokes Moore*.

Solicitors for Mr Ludlam and Ms Waters, *FitzGerald & Browne*.

Solicitors for Senator Roberts, *Holman Webb Lawyers*.

Solicitors for Mr Joyce, *Everingham Solomons Solicitors* and *MinterEllison*.

Solicitors for Senator Xenophon, *Nick Xenophon & Co Lawyers*.

Solicitors for Mr Windsor, *Quinn Emanuel Urquhart & Sullivan*.

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