IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

NO C11; C12; C13; C14; C15; C17; C18 OF 2017

RE SENATOR THE HON MATTHEW CANAVAN
Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

RE MR SCOTT LUDLAM
Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

RE MS LARISSA WATERS
Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

RE SENATOR MALCOLM ROBERTS
Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

RE THE HON BARNABY JOYCE MP
Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

RE SENATOR THE HON FIONA NASH
Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

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RE SENATOR NICK XENOPHON
Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

Filed on behalf of the Attorney-General of the Commonwealth by:

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PART I PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II BASIS OF INTERVENTION AND LEAVE

2. The Attorney-General of the Commonwealth (**Attorney-General**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) and is also a party by virtue of orders made by Kiefel CJ on 24 August 2017 and on 15 September 2017 pursuant to s 378 of the *Commonwealth Electoral Act 1918* (Cth) (**Electoral Act**). The Attorney-General has given notice under s 78B of the Judiciary Act.

PART III APPLICABLE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

3. 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.

PART IV ARGUMENT

SUMMARY

4. The Senate and the House of Representatives have referred questions respecting the qualifications of Senator the Hon Matthew Canavan, Mr Scott Ludlam, Ms Larissa Waters, Senator Malcolm Roberts, Senator the Hon Fiona Nash, Senator Nick Xenophon and the Hon Barnaby Joyce MP to the Court of Disputed Returns pursuant to s 376 of the Electoral Act.

5. The central legal issue raised by each of the references is the construction of the phrase "is a subject or a citizen ... of a foreign power" in s 44(i) of the Constitution. Depending on the construction of that phrase, and the manner in which it applies to each of the Senators or former Senators and Mr Joyce, questions arise as to consequential steps.

6. In summary, the Attorney-General submits that:

   A. In s 44(i), the phrase "is a subject or a citizen ... of a foreign power" should be construed as referring only to a person who has voluntarily obtained, or retained,

that status. A person who does not know that they are, or ever were, a foreign citizen has not voluntarily obtained that status. A person who becomes aware that he or she is a foreign citizen, or who becomes aware (ie subjectively appreciates) that there is a considerable, serious or sizeable prospect that he or she has that status, voluntarily retains that status unless he or she takes all reasonable steps to renounce it within a reasonable time of becoming so aware.

B. Alternatively, where a person has no knowledge that they are, or ever were, a foreign citizen, the requirement to take "all reasonable steps" to renounce that foreign citizenship does not require the person to take any steps. Taking no steps is reasonable in these circumstances.

C. Applying either approach, Mr Ludlam and Senator Roberts were incapable of being chosen as senators. The resultant vacancies should be filled by a special count. The other referred persons are not disqualified.

A. QUESTION (A): DISQUALIFICATION

7. In each reference, the first question referred to the Court concerns whether the referred person was, as at the date the person was chosen as a Senator or Member of the House of Representatives or thereafter during a Senator's or Member's term, "a subject or a citizen … of a foreign power" for the purpose of s 44(i) of the Constitution.

(a) Summary

8. For the reasons that follow, the text, purpose and context (including the long history of legislative provisions in the British Empire concerning the qualification of foreign citizens to serve in Parliament) of s 44(i) lead to the conclusion that the reference to a person holding the status of "a subject or a citizen … of a foreign power" should be construed as referring only to a person who has voluntarily obtained, or retained, that status. So construed:

(a) Where a person is an Australian citizen by reason of the circumstances of that person's birth (a **natural born Australian citizen**), such a person is disqualified by the relevant limb of s 44(i) only if:

(i) he or she takes an active step to become a citizen of another country;[1] or

[1] The "active step" can be described in various ways, such as where a person "does, concurs in, or adopts any act whereby he may become a subject or citizen" (this being the common formulation in pre-Federation colonial legislation), or as where a person "sought, accepted [or] asserted" foreign citizenship (this being the

(ii) after becoming aware that, according to the law of another country, the person is a citizen of that country (or after becoming aware of the relevant prospect that that is so), he or she fails to take all reasonable steps to renounce that foreign citizenship within a reasonable time (because, unless such steps are taken, the person can properly be said to have voluntarily retained his or her status as a foreign citizen).[2]

By contrast, if foreign citizenship is conferred by a foreign country upon a natural born Australian citizen (whether at birth, or subsequently) without that person's knowledge or consent, he or she is not "a subject or a citizen … of a foreign power" within the meaning of that phrase in s 44(i), because properly construed that phrase refers only to a status that was obtained (or retained) voluntarily.

(b) Where a person is not a natural born Australian citizen, but subsequently becomes an Australian citizen by naturalisation, except in the rare case where the person never knew of their foreign citizenship, he or she is disqualified by the relevant part of s 44(i) unless he or she takes all reasonable steps to renounce that foreign citizenship. That follows because such a person can reasonably be said to have chosen to retain their foreign citizenship if they fail to take all reasonable steps to relinquish it. That reflects the outcome in *Sykes v Cleary* (***Sykes***).[3]

9. As explained below, the construction advanced by the Attorney-General sits harmoniously with the Court's prior consideration of s 44(i) in *Sykes*. But it must be acknowledged that the Court's reasoning in that case, in so far as it related to s 44(i), was not dispositive of the answer to any question in that case, because the election had been declared void by reason of the ineligibility of Mr Cleary pursuant to s 44(iv).[4] In any event, with the exception of the references concerning Mr Ludlam and Senator Roberts, the current references present radically different factual contexts to those at issue in *Sykes*, because they concern the operation of s 44(i) with respect to natural born Australian citizens who had citizenship of a foreign country conferred upon them without their knowledge or consent. For that reason, *Sykes* is informative, but not

formulation used by Deane J in *Sykes* (1992) 176 CLR 77 at 127).

2 Or, to put it differently, to have "acquiesced" in that foreign citizenship: see *Sykes* (1992) 176 CLR 77 at 127 (Deane J).

3 (1992) 176 CLR 77.

4 *Sykes* (1992) 176 CLR 77 at 102 (Mason, Toohey and McHugh JJ), 108 (Brennan J), 130–131 (Dawson J), 132 (Gaudron J). *Sykes* was applied, in a relevantly identical factual scenario to *Sykes*, in *Sue v Hill* (1999) 199 CLR 462 at 486–487 [47] (Gleeson CJ, Gummow and Hayne JJ), but without argument in relation to the application of foreign law or the requirement to take all reasonable steps to renounce foreign citizenship.

dispositive of the matters now before the Court.

(b) Section 44(i) and foreign law

10. Section 44(i) directs attention to whether a person "is a subject or a citizen ... of a foreign power". As was recognised in *Sykes*,[5] foreign law is relevant to whether a person has the status of being a citizen of a foreign power. But foreign law is not determinative. Indeed, in *Sykes* itself this Court unanimously held that, if a foreign citizen who had been naturalised as an Australian citizen had taken all reasonable steps to renounce their foreign citizenship, such a person would not be disqualified by the relevant part of s 44(i) even if they were still a foreign citizen under foreign law.[6] In other words, the fact that a person was a foreign citizen under foreign law did not mean that the person was necessarily disqualified under s 44(i). The decision in *Sykes* establishes that whether a person is a foreign citizen under foreign law is only part of the inquiry that is required in applying s 44(i). Ultimately, it is a matter for Australian and not foreign law whether s 44(i) disqualifies a person from being chosen or from sitting in Parliament.

11. For the reasons explained by Brennan J[7] and Gaudron J,[8] the limited role for foreign law in applying s 44(i) was entirely in accordance with the orthodox approach to the application of foreign law. It reflects the fact that the extent to which foreign law is to be applied by the courts of this country is always a question of Australian law. Thus, in the context of common law choice of law rules, five Justices said in *Regie Nationale Des Usines Renault SA v Zhang*:[9]

> When an Australian court selects a non-Australian lex causae it does so in the application of Australian, not foreign, law. While the content of the rights and duties of the litigants is determined according to that lex causae, it is necessary to recall that the selection of the lex causae is determined by Australian choice of law rules. (emphasis added)

12. There is nothing remarkable about the proposition that foreign law may not be accorded full, or even any, weight within the domestic law system of another country in certain situations. Australia's common law choice of law rules may operate so that, for

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5 (1992) 176 CLR 77 at 105–106 (Mason CJ, Toohey and McHugh JJ), 110, 112 (Brennan J), 127 (Deane J), 131 (Dawson J), 135 (Gaudron J).

6 *Sykes* (1992) 176 CLR 77 at 107–108 (Mason CJ, Toohey and McHugh JJ), 114 (Brennan J), 131–132 (Dawson J).

7 *Sykes* (1992) 176 CLR 77 at 112.

8 *Sykes* (1992) 176 CLR 77 at 135–136.

9 (2002) 210 CLR 491 at 516 [67] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). See also *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 526–527 [39]–[41] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

example, foreign law is not applied to a particular dispute in an Australian court even if, had the dispute been litigated in the courts of a foreign country, foreign law would have applied. That will be so, for instance, where, in the absence of satisfactory proof of the content of foreign law, foreign law is presumed to be the same as local law.[10] Further, the common law has always refused to enforce foreign laws of certain kinds, such as laws of a penal[11] or revenue[12] character, or which otherwise involve the pursuit of foreign governmental interests,[13] or which are contrary to domestic public policy.[14]

13. Further, common law choice of law rules may be displaced by Australian legislation.[15] That is of particular relevance where a case concerns the operation of a statute, for in that context the key issue is always the construction of the statute. If the statute, properly construed, does not give effect to foreign law, that is the end of the matter. It is irrelevant whether the application of the statute produces a result that is different to that which would have been reached if foreign law were applied in accordance with common law choice of law rules.[16]

14. There are various historical examples of domestic courts not recognising foreign citizenship laws. During the First World War, Germans in England who, under German law, had lost their German nationality were nonetheless regarded as "alien[s] whose Sovereign or State is at war with His Majesty".[17] The same kind of approach was applied during the Second World War.[18] Later, in *Oppenheimer v Cattermole*,[19] in the context of provisions concerning double taxation, Lord Cross said that effect would not be given to a purported conferral of citizenship by a foreign country upon a person who had no or only a slender connection with the country or, conversely, a denial of citizenship involving a gross violation of human rights.[20] These cases illustrate that a

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10 See, eg, *Neilson v Overseas Projects Corp of Victoria Ltd* (2005) 223 CLR 331.

11 See, eg, *Banco de Vizcaya v Don Alfonso de Borbon y Austria* [1935] 1 KB 140; *United States of America v Inkley* [1989] 1 QB 255.

12 See, eg, *Government of India v Taylor* [1955] AC 491.

13 See, eg, *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.

14 See, eg, *Kaufman v Gerson* [1904] 1 KB 591 (CA).

15 See, eg, *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418.

16 See, eg, *Old UGC Inc v Industrial Relations Commission of New South Wales* (2006) 225 CLR 274; *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149.

17 *Ex parte Weber* [1916] 1 KB 280 (CA); [1916] 1 AC 421; *R v Superintendent of Vine Street Police Station; Ex parte Liebmann* [1916] 1 KB 268.

18 *R v Home Secretary; Ex parte L* [1945] KB 7; *Lowenthal v Attorney-General* [1948] 1 All ER 295.

19 [1976] AC 249 at 277–278.

20 Lords Hodson and Salmon agreed with this analysis; Lords Pearson and Hailsham disagreed. More recently, in *Bibi v Secretary of State for the Home Department* [1987] Imm AR 340, the Court of Appeal, when construing the *British Nationality Act 1981* (UK), found that a woman had ceased to be a citizen of the United Kingdom and Colonies by virtue of having become a citizen of Mauritius, notwithstanding that Mauritius

reference in the text of a statutory provision to a person being a subject or a citizen of a foreign country need not be resolved on the basis of foreign law, if the policy of the domestic law requires a different approach.

15. Ultimately, the critical question is one of Australian constitutional law. That question gives rise to a basal issue as to the extent to which s 44(i) gives effect to foreign citizenship laws, including laws that confer citizenship on persons without their knowledge or consent. It is a question to be answered by reference to the text, purpose and context of s 44(i), not simply by giving determinative effect to foreign citizenship laws (whatever their content may be).

(c) Text of s 44(i)

16. Section 44(i) has three limbs. The **first limb** refers to any person who "is under any acknowledgment of allegiance, obedience, or adherence to a foreign power". The **second limb** refers to any person who "is a subject or a citizen" of a foreign power. The **third limb** refers to any person who is "entitled to the rights or privileges of a subject or a citizen" of a foreign power.

17. The text of the second limb of s 44(i) — being the limb at issue in these references — is very wide. If construed literally, it would have absurd results. So much was accepted in *Sykes*.[21] For that reason, the critical question in these references cannot be answered simply by focussing on the text of s 44(i), for that text poses, but does not resolve, the question as to the extent to which disqualification turns on the content of foreign citizenship laws.

18. The conclusion that the literal meaning of the text is not controlling is confirmed by the unanimous holding in *Sykes* that s 44(i) does not disqualify a person who has taken all reasonable steps to renounce foreign citizenship. No attempt was made to ground that conclusion in the text of s 44(i). Instead, the Court emphasised the purpose of s 44(i) and sought to confine the literal meaning of the language used in that provision so as to align its operation with its constitutional purpose. As Brennan J put it:[22]

> If recognition of status, rights or privileges under foreign law would extend the operation of s 44(i) of the Constitution to cases which it was not intended to cover, that section should be construed as requiring recognition of foreign law only in those situations where recognition fulfils the purpose of s 44(i).

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refused to recognise her as a citizen of that country. The Court considered that her status as a matter of United Kingdom law did not depend on the refusal of Mauritius to recognise her as a citizen.

[21] *Sykes* (1992) 176 CLR 77 at 113 (Brennan J), 126–127 (Deane J). See also *Singh v Commonwealth* (2004) 222 CLR 322 at 430–431 [308] (Callinan J).

[22] (1992) 176 CLR 77 at 113.

19. That approach is a particular manifestation of an orthodox approach to constitutional construction by which the literal meaning of the constitutional text is confined by the purpose of the provision in which the words appear.[23] As Gageler J recently put it in *Alqudsi v The Queen*, "[t]here is no difficulty in accepting that a constitutional prescription which is expressed in unqualified mandatory terms might be shown in light of its purpose or purposes to have a more confined operation than might be apparent from its language".[24] That very approach was recently applied in the analogous context of s 44(v).[25] Accordingly, it is necessary to focus on the purpose and context (including the drafting history) of s 44(i) in order to identify its legal meaning.

10 **(d) Purpose of s 44(i)**

20. The Court in *Sykes* recognised that the purposes of s 44(i) are: to ensure that members of Parliament do not have "split allegiance"[26] or "ow[e] allegiance or obedience to a foreign power or adher[e] to a foreign power";[27] to ensure that members of Parliament are not "subject to any improper influence from foreign governments";[28] to ensure that "foreign powers command no allegiance from, or obedience by, candidates";[29] and "to prevent persons with foreign loyalties or obligations"[30] from being members of Parliament.

21. Subject to one caveat, all of these purposes support the conclusion that s 44(i) is directed to situations in which a person voluntarily acquires, or retains, foreign
20 citizenship, because it is only in those situations that there is any real prospect of "split allegiance" or "improper influence" of the kind to which the section is directed. It would be to give s 44(i) an operation well beyond its identified purpose for it to disqualify a

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23 See *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 260–262 (Gibbs CJ, Mason and Wilson JJ), 277–280 (Brennan, Deane and Dawson JJ); *Cole v Whitfield* (1988) 165 CLR 360 at 394–395 (the Court); *Street v Queensland Bar Association* (1989) 168 CLR 461 at 490–491 (Mason CJ) ("to allow the section an unlimited scope would give it a reach extending beyond the object which it was designed to serve"), 548 (Dawson J) ("s 117 … must be applied in such a way as to avoid exceeding its evident purpose"); *Alqudsi v The Queen* (2016) 258 CLR 203 at 221–222 [33]–[34] (French CJ), 270–271 [186]–[187] (Nettle and Gordon JJ).

24 (2016) 258 CLR 203 at 253 [125].

25 See, eg, *Re Day (No 2)* (2017) 91 ALJR 518 at 556 [265] (Nettle and Gordon JJ).

26 *Sykes* (1992) 176 CLR 77 at 107 (Mason CJ, Toohey and McHugh JJ), quoting *The Constitutional Qualifications of Members of Parliament*, Report by the Senate Standing Committee on Constitutional and Legal Affairs (1981) at [2.14]. See also at 113 (Brennan J).

27 *Sykes* (1992) 176 CLR 77 at 109 (Brennan J). See also *Official Record of the Convention Debates of the Australasian Federal Conventions* (**Convention Debates**), Adelaide, 15 April 1897, at 736 (Glynn, Barton and Sir George Turner).

28 See *Sykes* (1992) 176 CLR 77 at 107 (Mason CJ, Toohey and McHugh JJ), quoting *The Constitutional Qualifications of Members of Parliament*, Report by the Senate Standing Committee on Constitutional and Legal Affairs (1981) at [2.14]. See also *Convention Debates*, Adelaide, 15 April 1897, at 736.

29 *Sykes* (1992) 176 CLR 77 at 113 (Brennan J).

30 *Sykes* (1992) 176 CLR 77 at 127 (Deane J).

natural born Australian citizen from sitting in the Australian Parliament, simply because a foreign country has conferred citizenship upon that person without their knowledge or consent. In that situation, the fact that a natural born Australian citizen has the status of a foreign citizen under foreign law would say nothing about the allegiance or loyalty of that person.

22. The caveat is the suggestion by Brennan J that a purpose of s 44(i) is to exclude any person who may be subject to obligations to a foreign state under its law (which, of course, may not be voluntary).[31] However, it is respectfully submitted that the existence of such obligations is largely irrelevant to the construction of s 44(i) for at least four reasons. *First*, foreign states have no power unilaterally to enforce obligations arising under their own law on Australian citizens in Australia. *Second*, an obligation imposed by a foreign country is simply a reflex of a legal allegiance recognised by the foreign law system. That is, the obligation is only a further aspect of the foreign law which, as has already been explained, should not be given unqualified effect. *Third*, once a person has taken all reasonable steps to divest themselves of that allegiance, this Court recognised in *Sykes* that they are no longer disqualified by reason of s 44(i), notwithstanding that the taking of those steps may have no effect on any obligations under foreign law. If obligations under foreign law were decisive, the taking of steps that were ineffective under foreign law should be legally irrelevant to the operation of s 44(i). *Finally*, at a practical level, any attempt by a foreign power to enforce obligations allegedly owed by a previously unknowing citizen is most unlikely to be productive of an allegiance. The more likely result will be renunciation.

23. For the above reasons, it should be concluded that the purposes of s 44(i) support the conclusion that it is directed to situations in which a person voluntarily acquires, or retains, foreign citizenship. That submission is consistent with the long history of predecessor provisions to s 44(i), both in the Australian colonies, and more generally throughout the British Empire.

(e) The history of the relationship between citizenship status and parliamentary qualification and disqualification

24. The history of the circumstances in which a person became, remained or ceased to be a British subject (either natural born or naturalised), and the relevance of that status to a person's capacity or incapacity to serve as a parliamentarian, form critical context in interpreting s 44(i). The participants in the Convention Debates were well aware of the

[31] *Sykes* (1992) 176 CLR 77 at 113.

distinction between natural born and naturalised subjects; indeed, they utilised that distinction in s 34 of the Constitution. Similarly, given the collective experience of the participants in the pre-Federation legislatures, the requirements for qualification and disqualification in those legislatures, which provided the model for s 44(i), were well understood. That is important because, under those provisions, parliamentarians were able to serve in all Australian colonial parliaments even if they were foreign citizens by descent. They were disqualified only if they took active steps to become a subject or a citizen of a foreign state. The historical position therefore strongly supports the construction of s 44(i) for which the Attorney-General contends. As Gummow, Kirby and Crennan JJ observed in *Roach v Electoral Commissioner*:[32]

> [A]n understanding of [the Constitution's] text and structure may be assisted by reference to the systems of representative government with which the framers were most familiar as colonial politicians. ... [T]hey help to explain the common assumptions about the subject to which the chosen words might refer over time. ... What was the rationale in [the colonial] constitutions for the disqualification provisions of the kind later found in s 44(ii)?

(i) British subjects and qualification as a parliamentarian in the United Kingdom

25. In 1609, the common law rules for the conferral and acquisition of status as a "subject" were expounded in *Calvin's Case*,[33] in which the Exchequer Chamber recognised the general rule that a person acquired the status of a subject at birth — ie was a "natural born subject" — if the place of the person's birth was, at that time, under the actual dominion of the sovereign. That is, the applicable rule focused almost exclusively on the *jus soli* (there being just two limited exceptions,[34] neither of which has any present relevance). As McHugh J explained in *Singh v Commonwealth*,[35] *Calvin's Case* both stated a general common law rule for the acquisition of the status of a natural born subject and accepted that the status of the subject was "indelible" (one consequence of which was that a subject could not renounce that citizenship in any circumstances, including by becoming a subject or citizen of a foreign power).

26. *Calvin's Case* was concerned with the distinction between natural born subjects and

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[32] (2007) 233 CLR 162 at 188–189 [53]. Note also *Crittenden v Anderson* (unreported, but referred to at (1977) 51 ALJ 171) where, in an electoral petition, Fullagar J treated English constitutional history as informing the interpretation of s 44(i).

[33] (1609) 7 Co Rep 1a; 77 ER 377.

[34] (1) Children of the King's ambassadors and their English wives were recognised as natural born subjects, notwithstanding that they were born outside the sovereign's dominions. (2) Children of enemy aliens born within the sovereign's territory were not regarded as natural born subjects, if at the time of birth the territory in which the child was born was not under the King's ligeance or obedience. See *Calvin's Case* (1609) 7 Co Rep 1a at 1a–b; 77 ER 377 (Coke CJ).

[35] (2004) 222 CLR 322 at 356 [75].

aliens. It was not concerned with the acquisition of British subject status by persons who were not natural born British subjects (ie persons who obtained British subject status by means other than birth). Naturalisation was possible at the time of *Calvin's Case*, but it could occur only by the passage of a naturalisation bill through the Parliament.[36] In addition, an alien could become a denizen as a result of an exercise of the royal prerogative (involving issuing Letters Patent) and thereby acquire many (but not all) of the same rights as a natural born British subject.[37]

27. The *Act of Settlement 1700* (Imp) (**Act of Settlement**)[38] defined the qualifications of members of Parliament in part by reference to a bright line between natural born subjects and those who were naturalised, providing that only the former could serve as parliamentarians (s 3). For that reason, the fact that a person became a "subject" as a result of having been born within the territory of the sovereign has been relevant to a person's qualification to stand for Parliament for over 300 years. It is entirely consistent with that history for birth within Australia to be relevant to the operation of s 44(i).

28. The first major legislative step to liberalise the requirements for naturalisation came in the form of the *Aliens Act 1844* (Imp), which introduced an administrative form of naturalisation. A person who was naturalised did not become a subject, but did become entitled to all of the rights and capacities of a natural born subject except for the right to serve as a Privy Councillor or Member of Parliament.[39] Colonial legislatures were granted a limited form of naturalisation power by the *Naturalisation Act 1847* (Imp), which empowered the colonial legislatures to pass laws, statutes and ordinances of their own "within the respective limits of such colonies or possessions respectively".[40] The colonial legislatures were competent to naturalise only within their own territorial jurisdiction with the result that "a Frenchman naturalized in New Zealand was a British subject there, but a Frenchman in England."[41]

29. By the mid-19th century, the common law rules had "become quite unsuited to the new

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36 Clive Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* (1957) at 34–40.

37 John Salmond, "Citizenship and Allegiance" (1902) 18 *Law Quarterly Review* 49 at 56, also indicating that by 1902 denization was "obsolete in practice".

38 12 & 13 Will III, c 2.

39 *Aliens Act 1844* (Imp), 7 & 8 Vict, c 66, s 6.

40 *Naturalisation Act 1847* (Imp) 10 & 11 Vict, c 83, s 1.

41 Rieko Karatani, *Defining British Citizenship: Empire, Commonwealth and Modern Britain* (2002) at 55. See also David Wishart, "Allegiance and Citizenship as Concepts in Constitutional Law" (1986) 15 *Melbourne University Law Review* 662 at 674–675. See *R v Francis; Ex parte Markwald* [1918] 1 KB 617 for a post-Federation example of the effect of local naturalisation outside Australia.

political and economic conditions of the day".[42] Two significant difficulties had emerged, one of which was conflicting claims to allegiance resulting from the rule that all persons born in territory within the allegiance of the Crown were British subjects, whereas other states claimed allegiance through parentage (*jus sanguinis*).[43] In May 1868, these difficulties led to the establishment of the Royal Commission into naturalisation and allegiance. The Commissioners identified the position that then applied as follows:[44]

> There are two classes of persons who by our law are deemed to be natural-born British subjects:–
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> 1. Those who are such from the fact of their having been born within the dominion of the British Crown;
>
> 2. Those who, though born out of the dominion of the British Crown, are by various general Acts of Parliament declared to be natural-born British subjects.
>
> The allegiance of a natural-born British subject is regarded by the Common Law as indelible.

30. The Royal Commissioners did not consider that the rules for acquisition of natural born status required revision, opining that "of the children of foreign parents, born within the dominions of the Crown, a large majority would, if they were called upon to choose, elect British nationality".[45] They did, however, consider that the rule of indelibility required reform.[46] The solution proposed was that "[i]n the case of children of foreign parentage, it [indelibility] should operate only where a foreign nationality has not been chosen. Where such a choice has been made, it [British subject status] should give way."[47] The recommendations of the 1868 Royal Commission therefore provide an early example of significance being attached not to the mere existence of dual citizenship, but to the choice of foreign nationality over British subject status.

31. The report of the Royal Commissioners led to the *Naturalisation Act 1870* (UK) (**1870 Act**). Section 4 of that Act recognised that persons might be, upon their birth, both a natural born British subject and also a subject of a foreign state under the law of

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42 Sir William Holdsworth, *A History of English Law* (3rd ed, 1944) vol ix at 88–89.

43 Sir William Holdsworth, *A History of English Law* (3rd ed, 1944) vol ix at 89.

44 Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalisation and Allegiance* (1869) [4109] at v.

45 Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalisation and Allegiance* (1869) [4109] at viii.

46 Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalisation and Allegiance* (1869) [4109] at v.

47 Great Britain, *Report of the Royal Commissioners for Inquiring into the Laws of Naturalisation and Allegiance* (1869) [4109] at viii (emphasis added).

that state. That could occur in two ways. First, the person could be born within the dominions of the Crown, and be a British subject for that reason (*jus soli*), while simultaneously becoming a subject of a foreign state under the law of that state by descent (*jus sanguinis*).[48] Alternatively, the person could be born within the territory of another state where subject status turned on the *jus soli*, but also be a British subject by reason of a statutory modification of the common law by which the child of a British subject father became a British subject (for up to two generations of male descendants).[49] In either case, s 4 of the 1870 Act provided that a person could, when of full age, make a declaration of alienage if the person wished to cease to be a British subject. It was not mandatory to make such a declaration, and in the absence of a declaration the person remained both a British subject and a foreign subject or citizen. By contrast, however, if a British subject had "voluntarily become naturalised" in a foreign state, the person ceased to be a British subject.[50]

32. Accordingly, upon the commencement of the 1870 Act, a person who was born a British subject, but who simultaneously became a foreign citizen (including by descent under the law of a foreign country) could sit in the United Kingdom Parliament notwithstanding the dual nationality. Such a person met the criteria for qualification in s 3 of the Act of Settlement, and there was no provision that disqualified a British subject from serving as a Member of Parliament on the basis that the person was also a subject or citizen of another nation.[51] By contrast, a British subject who voluntarily became naturalised as a foreign citizen by reason of some act after his birth could not sit in Parliament, because such a person ceased to be a British subject upon being naturalised in another country and therefore could not satisfy the qualification criteria in the Act of Settlement.

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[48] The possibility of simultaneously becoming a British subject and a French citizen in this way was analysed in John Salmond, "Citizenship and Allegiance" (1902) 18 *Law Quarterly Review* 49 at 54, who argued that in such a case allegiance is due to the English king rather than to France because, being born within the protection of the king of England, that allegiance is "first in order of time". If such a person subsequently travels to France "he will carry with him into France the permanent allegiance already imposed upon him, and the faith which he will then owe to the king of France he will owe saving the faith which he owes to his liege and sovereign lord, the king of England".

[49] *British Nationality Act 1772* (UK) 13 Geo 3, c 21. See also Sir William Blackstone, *Commentaries on the Laws of England* (1765) vol 1 at 366; *Doe d Durore v Jones* [1791] 4 TR at 308; *Pochi v Macphee* (1982) 151 CLR 101, 107–108 (Gibbs CJ).

[50] *Naturalisation Act 1870* (UK) 33 & 34 Vict, c 14, s 6. This was subject to a 2 year transitional regime, whereby a British subject who, before the passing of the Act, had voluntarily been naturalised in a foreign state, and yet was desirous of remaining a British subject, could make a "declaration of British nationality", the effect of which was that the person was deemed to be and have continually been a British subject, except when within the limits of the foreign state in which he had been naturalised.

[51] The disqualifications are set out in Earl of Halsbury (ed), *The Laws of England* (1909) vol xxi at 655–661 [1166]–[1180].

33. As for persons born foreign citizens who were subsequently naturalised as British subjects, prior to 1870 such persons were expressly excluded from serving in Parliament by the Act of Settlement. However, the 1870 Act provided for the naturalisation of aliens resident in the United Kingdom for not less than 5 years and, upon naturalisation, s 7 provided that such persons were entitled to "all political and other rights, powers and privileges ... to which a natural born British subject is entitled".[52] In *R v Speyer*,[53] the English Court of Appeal held that s 7 impliedly repealed s 3 of the Act of Settlement, with the consequence that from 1870 a naturalised subject was capable of sitting in Parliament (irrespective of whether that subject retained foreign citizenship).

(ii) Qualification and disqualification in the Australian colonies

34. The liberalisation of the requirements for parliamentary qualification in England was preceded by developments in the Australian colonies. As early as 1842, both natural born and naturalised subjects of the Queen were qualified to sit in the New South Wales Legislative Council.[54] That position subsequently became uniform throughout the colonies,[55] as well as in Canada[56] and New Zealand.[57]

35. As to disqualification, in the Australian colonies there was no prohibition on dual citizens serving in Parliament. However, there were provisions that operated to render a serving Parliamentarian's seat vacant if the member did, concurred in or adopted an act by which the member may become a subject or a citizen of a foreign power. By the time of Federation, provisions in similar form existed throughout the Australian colonies,[58] as well as in Canada[59] and New Zealand.[60] Typical of their form was s 5 of

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52 *Naturalisation Act 1870* (UK) 33 & 34 Vict, c 14, s 7.

53 [1916] 2 KB 858. See also *British Nationality and Status of Aliens Act 1914* (UK) 4 & 5 Geo 5, c 17, s 3(1).

54 *An Act for the Government of New South Wales and Van Diemen's Land 1842* (Imp) 5 & 6 Vict, c 76, s 8.

55 *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict, c 54, sch 1, ss 2, 10, 11; *Victoria Constitution Act 1855* (Imp) 18 & 19 Vict, c 55, sch 1, ss 4, 11; *South Australia Constitution Act 1856*, 19 & 20 Vict, No 2, ss 5, 14 and 16; *Queensland Constitution Act 1867*, 31 Vict, No 38, s 20; *Constitutional Act of Tasmania 1854*, 18 Vict, No 17, ss 6, 7, 15; *Western Australia Constitution Act 1889*, 52 Vict, No 23, *1890* (Imp) 53 & 54 Vict c 26, s 18.

56 *British North America Act 1867* (Imp) 30 & 31 Vict, c 3, ss 23(2), 41; *Dominion Elections Act*, SC 1874, 37 Vict, c 9, s 20.

57 *Aliens Act 1866* (NZ) s 5.

58 *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict, c 54, sch 1, ss 5 and 24; *Victoria Constitution Act 1855* (Imp) 18 & 19 Vict, c 55 , sch 1 s 24; *South Australia Constitution Act 1856*, 19 & 20 Vict, No 2, ss 12 and 25; *Queensland Constitution Act 1867*, 31 Vict, No 38, s 23; *Constitutional Act of Tasmania 1854*, 18 Vict, No 17, ss 13, 24; *Constitution Acts Amendment Act 1899;* 63 Vict No 19, s 38(4).

59 *British North America Act 1867* (Imp) 30 & 31 Vict, c 3, s 31, where the statutory phrase was "or does an Act whereby he becomes a Subject or Citizen or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power". See, earlier, *Constitutional Act 1791* (Imp) 31 Geo 3, c 31, ss 7, 8; *Union Act 1840* (Imp), 3 & 4 Vict, c 35, s 7.

the *New South Wales Constitution Act 1855*,[61] which provided:

> If any Legislative Councillor shall … take any oath or make any declaration or acknowledgment of allegiance, obedience, or adherence to any Foreign Prince or Power, or shall do, concur in, or adopt any act whereby he may become a subject or citizen of any Foreign State or Power, or whereby he may become entitled to the rights, privileges, or immunities of a subject or citizen of any Foreign State or Power … his seat in such Council shall thereby become vacant. (emphasis added)

36. It follows that, immediately prior to Federation, both natural born and naturalised subjects were qualified to serve in all colonial parliaments throughout Australia, irrespective of whether they were subjects or citizens of any foreign power, provided that they did not "do, concur in, or adopt any Act" to become a subject or citizen of a foreign power while serving in the Parliament. That is still the position with respect to State parliaments.[62]

(f) The drafting history of the second limb of s 44(i)

37. There is no doubt that the Federation-era provisions outlined above were the model for s 44(i). None of these provisions disqualified a person who was a citizen of a foreign power by descent.[63] The disqualification provisions all operated only where a person had taken some positive step towards acquiring the status of being "a subject or a citizen … of a foreign power".

38. The second limb of s 44(i), as included in the 1891 draft of the Constitution, would have disqualified a person who "does any act whereby he becomes a subject or citizen … of a foreign power".[64] The parallel with the colonial legislation, which used the formula "do, concur in, or adopt any act whereby he may become a subject or citizen", is evident. Like the other limbs of s 44(i) (discussed in paras 51 to 59 below), it is clear from the initial draft of the second limb of s 44(i) that it was concerned with whether a person had done "any act" by which the person became a subject or citizen of a foreign power. That language was never criticised. Nevertheless, there were changes to the language between the Sydney drafts (1891) and the Melbourne draft (1898). Thus, the language changed:

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60 *New Zealand Constitution Act 1852* (Imp) 15 & 16 Vict, c 72, ss 36, 50.

61 18 & 19 Vict, c 54, sch 1. Section 26 made similar provision concerning the Legislative Assembly.

62 *Constitution Act 1902* (NSW) s 13A(1)(b); *Parliament of Queensland Act 2001* (Qld) s 72(1)(d); *Constitution Act 1934* (SA) s 31(1)(b)–(c); *Constitution Act 1934* (Tas) s 34(b)–(c); *Constitution Acts Amendment Act 1899* (WA) 63 Vict, No 19, s 38(f). In Victoria, there is no relevant prohibition.

63 That is consistent with the expert report prepared by Professor Philip Joseph dated 12 September 2017 at [59]–[60] (filed by Mr Windsor). [CB1464] See also Michael Pryles, "Nationality Qualifications for Members of Parliament" (1982) 8 *Monash University Law Review* 163 at 172–173.

64 Williams, *The Australian Constitution: A Documentary History* (2005) at 139.

(a) from: "does any act whereby he becomes a subject or citizen ... of a Foreign Power" (First Official Draft of the Constitution Bill, Sydney, 1891);[65]

(b) to: "has done any act whereby he has become a subject or citizen ... of a Foreign Power" (Final Draft, Sydney, 1891);[66]

(c) to: "is a subject or a citizen ... of a foreign power (Melbourne, 1898).[67]

39. As is apparent, it was the change made to the text in Melbourne in 1898 that is critical. At first, it might be thought that the change in language suggests a shift from a focus on the person's acts to a focus on the person's status (whether voluntary or not). However, the drafting history reveals quite a different explanation.[68]

10 40. Early in 1897, the Colonial Office prepared three memoranda on the draft Australian Constitution in the form it took following the Adelaide 1897 Convention: "Suggested Amendments", "Notes on Suggested Amendments" and "Criticisms on the Bill".[69] Relevantly, "Criticisms on the Bill" queried whether "some provision [should] 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".[70] The Colonial Office, apparently anxious not to offend colonial sensibilities, provided the memoranda "for your private and independent consideration" to George Reid, who was then the Premier of New South Wales, when the colonial premiers visited London for the Queen's Jubilee.[71] Upon his return, Reid provided the memoranda to the Drafting
20 Committee, without distributing them more broadly.[72]

41. The suggestions from the memoranda were marked up on an 1897 draft of the Constitution titled "Suggestions and Criticisms of the S/S/C [Secretary of State for the Colonies]".[73] Clause 45 (the predecessor of s 44) bears the mark-up "suppose he returns to his allegiance?" That comment reflected the same concern that had been

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65 Williams, *The Australian Constitution: A Documentary History* (2005) at 139.

66 Williams, *The Australian Constitution: A Documentary History* (2005) at 420.

67 Williams, *The Australian Constitution: A Documentary History* (2005) at 1126.

68 The drafting history may be considered to identify the subject to which the relevant provision was directed: *Cole v Whitfield* (1988) 165 CLR 360 at 385 (the Court); *Wong v Commonwealth* (2009) 236 CLR 573.

69 The covering letter and memoranda are reproduced in Williams, *The Australian Constitution: A Documentary History* (2005) at 714–732.

70 See Williams, *The Australian Constitution: A Documentary History* (2005) at 727.

71 This history, and the covering letter and memoranda, are reproduced in Williams, *The Australian Constitution: A Documentary History* (2005) 712–713. See further B K de Garis, "The Colonial Office and the Commonwealth Constitution Bill" in A W Martin, *Essays in Australian Federation* (1926) at 113.

72 Williams, *The Australian Constitution: A Documentary History* (2005) at 712–713.

73 Reproduced in Williams, *The Australian Constitution: A Documentary History* (2005) at 742.

raised by Mr Gordon at the Convention Debates in Adelaide in 1897, as to whether a person who had previously taken the oath of allegiance to a foreign power, and who was subsequently naturalised in Australia, would be disqualified.[74]

42. Many of the suggestions that were made in the Colonial Office memoranda were "unobtrusively incorporated into the Constitution" during the Sydney 1897 and Melbourne 1898 sessions of the Convention.[75] Indeed, the change in language in the second limb of s 44(i) appears for the first time in the draft Bill prepared by the Drafting Committee on 1 March 1898[76] without any prior debate.[77] Moreover, Barton (who chaired the Drafting Committee) subsequently confirmed that the amendments made by the Drafting Committee were not intended to make any substantive changes that had not been subject to debate.[78] The suggestion from the Colonial Office is the only apparent basis for the change. It was to ensure that a past act would not permanently disqualify a person from being elected to Parliament. That suggests that the change in the tense of the provision was not made to remove the requirement (still found in the first and third limbs of s 44(i), as discussed below) that an act occur whereby a person acquires foreign citizenship, but to ensure that even if such an act had occurred, a person who subsequently re-acquired British subject status would not be forever disqualified from serving in Parliament by reason of the past act.

43. The above history is entirely inconsistent with the proposition that the change to the language made by the Drafting Committee was intended to broaden the class of persons disqualified beyond the settled category that applied at that time in all of the Australian colonies. Indeed, there are multiple references in the Convention Debates that indicate that s 44(i) simply reflected the existing practice in the colonial parliaments.[79] For example, Mr Barton said that "[t]hese limitations having been put in the constitutions of the Australian colonies, and having worked well, and prevented the entry of undesirable persons into parliament, they may well be continued in the constitution we are now framing".[80] Later in the same debate, Mr Douglas said "[a]ll we

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74 *Convention Debates*, Adelaide, 15 April 1897 at 736. See also *Nile v Wood* (1988) 167 CLR 133 at 140 (the Court).

75 B K de Garis, "The Colonial Office and the Commonwealth Constitution Bill" in A W Martin (ed), *Essays in Australian Federation* (1926) at 108; see also 113–114.

76 Williams, *The Australian Constitution: A Documentary History* (2005) at 869.

77 *Convention Debates*, Melbourne, 20 January 1898 to 1 March 1898 at 1–1721.

78 *Convention Debates*, Melbourne, 16 March 1898 at 2439–2440, 2444–2445.

79 *Convention Debates*, Sydney, 21 September 1897 at 1012 (Mr Barton), 1014 (Mr Fraser).

80 *Convention Debates*, Sydney, 21 September 1897 at 1013.

are asked to do here is affirm a law already in our constitution".[81]

44. Had the change in language of s 44(i) been intended to introduce, for the first time in any of the Australian colonies, England, Canada or New Zealand, a disqualification on natural born or naturalised British subjects serving in Parliament simply because they were also citizens of a foreign power by descent, it is inconceivable that such a change would have been made without any discussion. Not only would such a change have been unprecedented, it would have been understood as having the potential to apply to many people who may have wished to serve in the new Australian Parliament.

45. It was well known at the time of Federation that foreign law could confer citizenship by descent upon natural born British subjects (that situation having been addressed in s 4 of the 1870 Act, as discussed above). Thus, writing in 1902, John Salmond said:[82]

> [T]here is no doubt that at the present time a man may be the natural subject of two states at once. This result is brought about, partly by the naturalization of aliens, and partly by the operation of the compromise now accepted in all states between the principle of the *jus soli* and that of the *jus sanguinis*. The son of a Frenchman, if born in England, is by the *jus soli* a British subject, and by the *jus sanguinis* a citizen of France.

Even at the time of Federation the scope for dual citizenship to arise in this way was widespread. *Hall's International Law* summarised the various state practices in 1904, noting that, in France, the *Code Napoleon*:[83]

> provided that a child should follow the nationality of his parents ... In Germany, Austria, Hungary, Belgium, Denmark, Greece, Roumania, Servia, Sweden, Norway, Switzerland, Salvador, and Costa Rica national character follows parentage alone, and all these states claim the children of their subject as being themselves subjects, wherever they may be born.

46. Given the above, it was readily foreseeable at Federation that a child born in Australia to parents with foreign citizenship could, by reason of Australia's *jus soli* approach and a foreign country's *jus sanguinis* approach, be both a natural born British subject and a citizen of a foreign power by descent. That possibility had never been treated as disqualifying a British subject from serving in any Parliament in England, the Australian colonies, Canada or New Zealand. The Court should not hold that s 44(i) radically altered that position unless no other construction is available.

47. The unlikelihood of s 44(i) being intended to apply to British subjects who obtained

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[81] *Convention Debates*, Sydney, 21 September 1897 at 1015.

[82] John Salmond, "Citizenship and Allegiance" (1902) 18 *Law Quarterly Review* 49 at 56. See also John Westlake, *International Law – Part 1 – Peace* (1904) at 221–225.

[83] Edward Hall, *A Treatise on International Law* (5th ed, 1904) at 225–226.

foreign citizenship by descent is further emphasised by the fact that, at the time of Federation, the greater difficulties in communication would have made it particularly difficult to make inquiries as to the law of a foreign country, potentially going back several generations, for the purpose of ascertaining if a person had acquired foreign citizenship by descent, and then to take steps to renounce any such citizenship.

48. The history summarised above would go so far as to support the proposition that s 44(i) should be construed as not applying to foreign citizenship obtained by descent unless there has been some positive act to assert that foreign citizenship. At a minimum, all of the above considerations tend in favour of a construction of s 44(i) which treats its reference to a person having the status of "a subject or a citizen ... of a foreign power" as a reference to a status that a person has voluntarily acquired or retained. That interpretation aligns the operation of the second limb of s 44(i) with its historical antecedents, and with the other limbs of s 44(i) (discussed below). It also aligns the operation of s 44(i) more closely with its purpose, as explained above.

49. As a matter of language, there is no difficulty with construing the text in that way. To treat the reference to a person being "a subject or a citizen ... of a foreign power" as confined to the circumstances where that status is voluntarily obtained or retained is the same kind of constructional exercise as is applied in the case of statutory offences, whereby it is ordinarily implicit that the *actus reus* must be voluntary or willed, even in the absence of any language to that effect.[84]

(g) Contextual support – The first and third limbs of s 44(i)

50. The conclusion that the second limb of s 44(i) is to be construed as the Attorney-General contends is supported by the context provided by the first and third limbs.

(i) The first limb

51. The first limb of s 44(i) is concerned with relationships stemming from a person's conduct. The language used ("is under any acknowledgment of allegiance, obedience, or adherence") derived from English concepts current at Federation, as well as reflecting the language used in the pre-Federation provisions already discussed. In that respect, it is important to recognise that s 44 uses several concepts that can only be identified by reference to legal usage and understanding. Some words have "no meaning other than as technical legal expressions", and with terms of that kind a "knowledge of the law, including legal history, is indispensable to an appreciation of

[84] See, eg, *Dover v Doyle* (2012) 34 VR 295 and the cases cited. This applies to offences where the offending conduct is a status: *Norcock v Bowey* [1966] SASR 250; *Mayer v Marchant* (1973) 5 SASR 567.

their essential characteristics".[85] Thus:

(a) "**Allegiance**" developed from the English feudal system where tenants (liege men) owed a form of allegiance (made by oath of fealty) to the feudal lord (liege lord) or the feudal lord's superior.[86] As the notion developed, there came to be three kinds of Sovereign allegiance recognised, being (i) *natural allegiance* due from those born within the Sovereign's dominions; (ii) *acquired allegiance* obtained by naturalisation or denization;[87] and (iii) *local allegiance* due from aliens as long as they remained within the Sovereign's dominions or retained a passport of the dominion.[88] Quick and Garran recognised each of the three categories, but stated that in 1901 it was "customary ... to restrict the use of the word to the first and second" categories.[89] Two legal consequences attended the fact of allegiance. The *first* was the conferral of protection upon the person, the chief protections being the right to diplomatic protection,[90] the Crown's ability to act as *parens patriae* to wards of court[91] and the inability of the State to rely upon the act of state defence in most circumstances involving its own subjects.[92] The *second* was the imposition of obligations upon the person, that is, "obedience".[93]

(b) "**Obedience**" is a concomitant of allegiance. At its highest level of generality, obedience referred to obedience to the laws of the realm. Most meaningfully, it has historically concerned liability for the offence of treason.[94]

(c) "**Adherence**" is a species of treason recognised since before the original English

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85 *Singh v Commonwealth* (2004) 222 CLR 322 at 332 [10] (Gleeson CJ), quoting *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 93 [24] (Gaudron and Gummow JJ). See also at 430–431 [308] (Callinan J).

86 Sir William Blackstone, *Commentaries on the Laws of England* (1765) vol 1 at 354–355.

87 As to the distinction between naturalisation and denization: "denizens ... could purchase and own land, but only children born after denization could inherit it. On the other hand, naturalized subjects and their children could inherit as well as purchase and own the land. Unlike denization, naturalization could operate retrospectively ... Neither naturalization nor denization, however, conferred the same rights on the naturalized as upon natural-born subjects": Rieko Karatani, *Defining British Citizenship: Empire, Commonwealth and Modern Britain* (2002) at 50.

88 Earl of Halsbury (ed), *The Laws of England* (1909), vol xi at 479 [812].

89 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 491.

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

91 *Re P (GE) (An Infant)* [1965] 1 Ch 568.

92 *Johnstone v Pedlar* [1921] 2 AC 262; *Nissan v Attorney-General* [1970] AC 179.

93 David Wishart, "Allegiance and Citizenship as Concepts in Constitutional Law" (1986) 15 *Melbourne University Law Review* 662 at 688.

94 David Wishart, "Allegiance and Citizenship as Concepts in Constitutional Law" (1986) 15 *Melbourne University Law Review* 662 at 688.

codification of treason by the *Treason Act 1351* (Imp).[95] It "is treason to be adherent to the King's enemies in the realm".[96] A person may be adherent to the Sovereign's enemies by providing aid or comfort in the realm or elsewhere.[97] Only overt acts done with the intent of aiding the Sovereign's enemies[98] or acts that demonstrate fidelity to the enemy (for example, oath-taking or naturalisation during a time of war)[99] will rise to adherence.

52. The historical meaning of these terms directs attention to the kind of "acknowledgment" which engages the first limb of s 44(i). It is not engaged by a mere acknowledgment of admiration or liking for a foreign power, but requires acknowledgment of the kind of loyalty captured by the notions of allegiance, obedience and adherence referred to above. No doubt the precise kinds of acknowledgment which, today, may fall within these concepts are different from those which might have been known at the time of Federation. That is in accordance with orthodox principles of constitutional interpretation.[100] Be that as it may, the significant point for present purposes is that a unifying feature of the first limb of s 44(i) is that it cannot operate absent a positive step of "acknowledgment".

53. The requirement for a positive step to engage the first limb has been recognised by this Court. Thus, in *Nile v Wood*,[101] Brennan, Deane and Toohey JJ said: "It would seem that [the first limb of] s 44(i) relates only to a person who has formally or informally acknowledged allegiance, obedience or adherence to a foreign power and who has not withdrawn or revoked that acknowledgment".

54. The requirement for a positive step is also confirmed by the drafting history. There was a significant change to the language of the first limb between the Sydney draft in 1897 and the Melbourne draft in 1898. The language changed:

    (a) from "Any person [w]ho has taken an oath or made a declaration or

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95 25 Edw 3, Stat 5, cl 2, which was the basis of the charge in *Joyce v DPP* [1946] AC 347.

96 Earl of Halsbury (ed), *The Laws of England* (1909), vol vi at 349 [500]. See, eg, *R v Lynch* [1903] 1 KB 444; *Joyce v DPP* [1946] AC 347.

97 *R v Casement* [1917] 1 KB 98.

98 *R v Ahlers* [1915] 1 KB 616.

99 *R v Lynch* [1903] 1 KB 444.

100 See, eg, *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 511–554 [41]–[49] (McHugh J); *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 493–496 [19]–[23] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

101 (1988) 167 CLR 133 at 140. See also *Sykes* (1992) 176 CLR 77 at 127 (Deane J).

acknowledgment of allegiance, obedience or adherence, to a foreign power";[102]

(b) to "Any person who [i]s under any acknowledgment of allegiance, obedience or adherence to a foreign power".[103]

55. As with the change to the text of the second limb discussed above, the change in the text of the first limb appeared for the first time in the draft Bill prepared by the Drafting Committee on 1 March 1898 without prior debate.[104] It appears to have been directed to a change in the focus of s 44(i) from the existence of a past act, to the present. On the original text, a person's qualification turned on an unalterable past fact: whether they had, in the past, taken an oath or made a declaration of the specified kind. A person who met that disqualifying criterion would be forever disqualified. On the final text, disqualification turned on whether the person was presently "under" the relevant form of acknowledgment. Plainly enough, that change had no effect on the requirement that there be a positive step of some kind.

(ii) The third limb

56. Turning to the third limb of s 44(i), if attention is focused on the current meaning of the language used in that limb, divorced from its historical context, it might be thought to be referring to any person who, although not yet a citizen or subject of a foreign power, would be entitled to become such a citizen on making an application, and thereby obtain the rights or privileges, or perhaps even only some of the rights or privileges, of a subject or citizen. That construction encounters the initial difficulty that the text refers to a person who is "entitled" to the rights and privileges of a subject or a citizen of a foreign power. The language suggests that the third limb is concerned with a present entitlement, rather than a contingent entitlement if an application for naturalisation were to be made to, and accepted by, a foreign power.[105]

57. The latter meaning is confirmed by the legal context in which the third limb was drafted. At the time of Federation, the words used in the third limb had a well understood meaning: they were the words used to refer to persons who had become British subjects by naturalisation. This is seen most clearly in s 7 of the 1870 Act, which provided that, once an alien was granted a certificate of naturalisation, the alien

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[102] Williams, *The Australian Constitution: A Documentary History* (2005) at 868. See further Sarah O'Brien, *Dual Citizenship, Foreign Allegiance and s 44(i) of the Australian Constitution*, Department of the Parliamentary Library (1992) 1.4.1.

[103] Williams, *The Australian Constitution: A Documentary History* (2005) at 1126.

[104] Williams, *The Australian Constitution: A Documentary History* (2005) at 869.

[105] Michael Pryles, "Nationality Qualifications for Members of Parliament" (1982) 8 *Monash University Law Review* 163 at 179.

was "entitled to all political and other rights, powers, and privileges, and ... subject to all obligations to which a natural-Born British subject is entitled or subject in the United Kingdom". Naturalisation was thus technically described as a process by which the naturalised alien became, not a British subject, but a person who was "entitled to" the rights of a British subject. Similar language was used as long ago as a 1350 Act dealing with foreign-born children,[106] and in s 6 of the *Aliens Act 1844* (Imp).[107]

58. Once the historical context is appreciated, the language of the third limb of s 44(i) is readily understood as referring to persons who undergo a process of naturalisation with respect to a foreign power, where under foreign law (as with the 1870 Act) a naturalised person did not become a subject or citizen of the foreign power but was merely given the rights of a subject or citizen.[108]

59. Accordingly, both the first and third limbs of s 44(i) are directed to a status that a person can acquire only by having performed some positive act: the first involving an active "acknowledgment", and the third involving an application for naturalisation. Whilst not decisive, the conclusion that the second limb of s 44(i) likewise refers to a status as "a subject or a citizen ... of a foreign power" that is voluntarily acquired or retained would give a unity of operation to the three limbs of that provision.

(h) Broader constitutional context

60. The construction of s 44(i) for which the Attorney-General contends is likewise consistent with the broader constitutional context.

61. One part of that context is provided by ss 16 and 34 of the Constitution, which provided for the qualifications for Senators and members of the House of Representatives (until Parliament otherwise provided) in terms that distinguished between natural born and naturalised subjects of the Queen. Naturalised subjects were subject to a more demanding demonstration of their loyalty than natural born subjects. Sections 16 and 34 are the Australian equivalents of the Act of Settlement (as impliedly amended by the 1870 Act). They provide context in interpreting s 44, because they represent a recognition, within the text of the Constitution, of the importance historically attached to a person's status as a natural born subject in

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[106] *De Natus Ultra Mare 1350*, 25 Edw III Stat 2: "Shall have and enjoy the same benefits and advantages, to have and bear the inheritance within the same ligeance, as other inheritors in time to come", quoted in David Wishart, "Allegiance and Citizenship as Concepts in Constitutional Law" (1986) 15 *Melbourne University Law Review* 662 at 692.

[107] 7 & 8 Vict, c 66.

[108] Cf *Sykes* (1992) 176 CLR 77 at 110 (Brennan J), whose analysis collapses the first and third limbs.

determining eligibility to be a Member of Parliament. They also contemplate that a person who is naturalised as an Australian would, after meeting the residence requirement in s 34, be eligible to stand for Parliament.[109]

62. Further context is provided by the scheme of Ch I of the Constitution (in which s 44 appears),[110] which provides for the national system of representative and responsible government, including by providing for the orderly and prompt manner in which federal elections should occur.[111] Disqualification under s 44 of the Constitution "impacts irreversibly on the persons disqualified and on the electors whom they have been elected to represent".[112] Such disqualification operates "regardless of whether the Parliament thinks (or seeks to enact), in the context of contemporary circumstances and standards, that that disqualification is unjustified".[113] In those circumstances, s 44(i) should "be construed as depriving a citizen of the democratic right to seek to participate directly in the deliberations and decisions of the national Parliament only to the extent that its words clearly and unambiguously require".[114]

63. Further, disruption to and invalidation of the product of the electoral process is highly damaging to the proper operation of representative and responsible government. The "blunt and limiting" effect of an overriding disqualification provision such as s 44(i) should therefore be limited not only to the disqualification that the provision unambiguously requires, but also by adopting an interpretation which gives the disqualification "the greatest certainty of operation that is consistent with its language and purpose".[115] That is particularly important having regard to the strong public interest in the finality of the electoral process, such that Parliament is able to operate with a stable composition between elections. That public interest is recognised in the

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[109] A link between the sections was recognised during the Convention Debates: eg *Convention Debates*, Adelaide, 15 April 1897 at 736.

[110] *Re Day (No 2)* (2017) 91 ALJR 518 at 557 [269] (Nettle and Gordon JJ).

[111] For example: ss 7, 24 and 28 require that there be regular elections; ss 12 and 32 require that upon dissolution of the Senate or the House of Representatives, writs for elections must issue promptly; s 5 provides that Parliament must be summoned to meet "not later than 30 days after the day appointed for the return of the writs".

[112] *Re Day (No 2)* (2017) 91 ALJR 518 at 535 [96] (Gageler J).

[113] *Sykes* (1992) 176 CLR 77 at 121 (Deane J), quoted with approval in *Re Day (No 2)* (2017) 91 ALJR 518 at 535 [96] (Gageler J).

[114] *Sykes* (1992) 176 CLR 77 at 121 (Deane J), quoted with approval in *Re Day (No 2)* (2017) 91 ALJR 518 at 535 [96] (Gageler J)

[115] *Re Day (No 2)* (2017) 91 ALJR 518 at 535 [97] (Gageler J). See also *Re Culleton (No 2)* (2017) 91 ALJR 311 at 322 [59] (Nettle J); *King v Jones* (1972) 128 CLR 221 at 270–272 (Stephen J); *Rudolphy v Lightfoot* (1999) 197 CLR 500 at 508 [12] (the Court); *Re Berrill's Petition* (1976) 134 CLR 470 at 474 (Stephen J).

strict time limits for electoral petitions imposed by the Electoral Act.[116]

64. An interpretation of s 44(i) that disqualified persons who acquired foreign citizenship by the automatic operation of foreign law would be productive of uncertainty (including as to the composition of the Parliament), as the plethora of references now before the Court demonstrates. It would cause the operation of s 44(i) to turn upon potentially complex issues of fact and foreign law. The very nature of *jus sanguinis* citizenship laws is such that, because they follow a chain of descent, the status of a person at the end of the chain depends on whether the chain has been broken at any point. But ascertaining whether the chain has been broken will require information as to acts done, or not done, by a person's parents or grandparents perhaps decades earlier. It will likewise require inquiries to be made as to the applicable foreign law at multiple past points in time, in order to ascertain the legal effect of actions taken by a person's parents or grandparents.

65. The current references illustrate the difficulties. For example, Senator Canavan's case requires an understanding of the retrospective effect of rulings of the Italian Constitutional Court on longstanding statutes. Senator Xenophon's case illustrates that even when inquiries are made, directed to renouncing foreign citizenship, it is possible in good faith to fail to recognise the possibility that a person is the "beneficiary" of foreign citizenship by reason of the operation of long repealed foreign laws on facts that occurred decades ago. Mr Joyce's case likewise illustrates the potential for reasonable inquiries to generate incorrect information, for his affidavit discloses[117] that, when he first made inquiries as to whether he was a citizen of New Zealand, his staff were advised by the New Zealand High Commission and the New Zealand Department of Internal Affairs that it was necessary to apply in order to become a New Zealand citizen.

66. When the difficulty of the necessary factual and legal inquiries is taken together with the very real prospect that many people considering running for Parliament will not have a sufficient understanding of foreign citizenship laws or of the facts that engage those laws even to consider the need to make inquiries as to foreign citizenship, it is apparent that an interpretation of s 44(i) pursuant to which disqualification turns on the automatic operation of foreign *jus sanguinis* laws is inherently liable to produce both uncertain outcomes, and outcomes that do not align with the purpose of s 44(i). By

[116] Electoral Act, ss 355(e), 358. See also s 363A.

[117] Affidavit of Barnaby Thomas Joyce sworn on 12 September 2017 (**Joyce Affidavit**) at [17]–[20]. [CB 1321-1322]

contrast, an interpretation of s 44(i) that directs attention to whether a person has voluntarily obtained or retained foreign citizenship is clear, and does align with the purpose of that provision. While the operation of s 44(i) would still require some level of factual inquiry, the focus of any such inquiry would be more limited.

(i) Application of the construction to natural born and naturalised Australians

67. The application of the construction for which the Attorney-General contends generally differs as between natural born and naturalised Australians, not for any *a priori* reason but, rather, because of their differing circumstances.

68. In the case of a natural born Australian, upon whom foreign citizenship is conferred without their knowledge or consent, the person's status as a foreign citizen is not voluntary, and the existence of that foreign citizenship is not indicative of split loyalty of the kind to which s 44(i) is directed. As the practice that existed prior to Federation in the United Kingdom, Canada, New Zealand and all Australian colonies demonstrates, the conferral of citizenship in that way does not give rise to a status of the kind to which s 44(i) is directed.

69. By contrast, a person who is naturalised as an Australian citizen will, except in the rare case of a person who is stateless, have possessed foreign citizenship prior to being naturalised. Further, such a person will ordinarily be aware of having held that foreign citizenship, or at least that there was a real and substantial prospect that they did so. In those circumstances, unless the person takes all reasonable steps to renounce their foreign citizenship, their retention of it is properly described as voluntary. That was the situation presented in *Sykes*. It is also the situation presented by the references concerning Mr Ludlam and Senator Roberts. While there may be exceptional cases where a naturalised person is unaware of their previous foreign citizenship, or even of the prospect of such foreign citizenship, no such case is now before the Court.

70. Given the factual context in *Sykes*, that case should be understood as a particular application of the construction of s 44(i) for which the Attorney-General contends. That follows because whether a naturalised Australian citizen has voluntarily retained his or her status as a foreign citizen will ordinarily resolve itself into the question whether the person has taken all reasonable steps to renounce foreign citizenship.

71. If all reasonable steps have been taken by an Australian citizen (whether natural born or naturalised) to renounce foreign citizenship, the fact that those steps have been unsuccessful, or not yet been completed, at the time of the nomination is insufficient to characterise the retention of foreign citizenship as voluntary. To the contrary, the fact

that all reasonable steps have been taken mark it as involuntary and thus outside the scope of s 44(i). In particular, the mere fact that a foreign government has not yet finalised any administrative steps necessary to effect the renunciation of foreign citizenship does not mark it as voluntary. If it did, the capacity of a person to stand for the Australian Parliament would be dependent on the administrative efficiency of a foreign government.

72. In the case of natural born Australian citizens, the requirement to renounce foreign citizenship arises not only if a person knows (ie for certain) about his or her foreign citizenship, but also if he or she knows that there is a considerable, serious or sizeable prospect that he or she has that status under the law of a foreign country (or, to put the same idea differently,[118] that there is "at least a real and substantial prospect" that he or she has that status, that being the formulation that Keane J adopted in making findings concerning Senator Roberts).[119] It is only where a person knows (i.e. subjectively appreciates) that there is a prospect of that kind that a person's failure to take all reasonable steps to confirm or deny the existence of foreign citizenship and, if necessary, to renounce it, marks the retention of foreign citizenship as voluntary.

73. Neither principle, nor the decision of the Court in *Sykes*, requires or warrants any inquiry as to the objective reasonableness of any failure to make inquiries as to foreign citizenship. Arguments that hinge on the existence of facts that it is alleged would put a reasonable person on inquiry as to the possibility of citizenship of a foreign country miss the point. Section 44(i) is directed to avoiding split loyalties, and therefore to the voluntary obtaining or retention of foreign citizenship. It is not concerned with punishing people for honest failures to make inquiries, however objectively reasonable it would have been to make them. Indeed, if it is necessary to conduct an inquiry to find a connection to a foreign state, that illustrates the absence of the vice to which s 44(i) is directed.

74. Of course, if a person is aware of facts that would put a reasonable person on inquiry, but refrains from making such inquiries, that may provide evidence of wilful blindness from which actual knowledge that the person is a foreign citizen (or actual knowledge of the relevant prospect that a person is a foreign citizen) can be inferred — ie found to exist as a matter of fact.[120] Any evidence of awareness of such facts would have to be

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[118] See *Majorstake Ltd v Curtis* [2008] 1 AC 787 at 801 [40] (Baroness Hale); *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at 195-196 (Sheppard J).

[119] *Re Roberts* [2017] HCA 39 at [116]. [CB 1300]

[120] *Giorgianni v The Queen* (1985) 156 CLR 473; *R v Crabbe* (1985) 156 CLR 464 at 470-471 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ); *Pereira v DPP* (1988) 3 ALJR 1.

assessed by a Court as part of all the evidence, which would ordinarily include affidavit evidence concerning the person's knowledge of their foreign citizenship (which, in an appropriate case, could be tested by cross-examination). Having regard to all the evidence, the Court may find that a person has voluntarily retained his or her foreign citizenship (notwithstanding any denial). But that is the issue. It is not whether the person is "on inquiry".

75. Nor is it apt to refer to the maxim that ignorance of the law is no excuse. While that maxim is sometimes applied in a domestic context,[121] within the domestic Australian legal system, foreign law is a question of fact, not a question of law. Even Australian courts are not presumed to have any knowledge of foreign law.[122] If courts of Australia are not presumed to know foreign law, then there can certainly be no presumption that ordinary Australian citizens know foreign law.

B. ALTERNATIVE APPROACH TO QUESTION (A)

76. In the alternative to the approach advanced above, the Attorney-General submits that the approach actually applied in *Sykes* — focussing on whether all reasonable steps have been taken to renounce foreign citizenship — can be applied to the circumstances of a person who acquires Australian citizenship at birth and has no knowledge of the fact of foreign citizenship. In short, in such a case, it is not unreasonable to take no steps to renounce unless, and until, the person becomes aware of his or her foreign citizenship.

77. This conclusion is supported by the reasoning in *Sykes*, where it was accepted that the application of the renunciation test would turn on the circumstances of the particular case.[123] The circumstance that a person is not aware of ever having possessed foreign citizenship is highly relevant to whether that person ought to have taken any steps to renounce that foreign citizenship. Dawson J expressly stated that what was reasonable would depend upon matters including the "person's knowledge of his foreign nationality and the circumstances in which it was accorded to that person".[124]

78. Here, Mr Joyce, Senators Nash, Canavan and Xenophon, and Ms Waters (unlike Senator Roberts and Mr Ludlam) had no knowledge at the time that they nominated

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[121] See, eg, *Ianella v French* (1968) 119 CLR 84 at 113 (Windeyer J); *Ostrowski v Palmer* (2004) 218 CLR 493 at 500–501 [1]–[2] (Gleeson CJ and Kirby J).

[122] *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at 370 [115] (Gummow and Hayne JJ).

[123] *Sykes* (1992) 176 CLR 77 at 108 (Mason CJ, Toohey and McHugh JJ).

[124] *Sykes* (1992) 176 CLR 77 at 131 (Dawson J).

that they ever possessed foreign citizenship. In each case, foreign citizenship was conferred on them by the operation of foreign law of which they were entirely unaware.

79. Further, in *Sykes*, Mason CJ, Toohey and McHugh JJ stated that what was reasonable would turn upon the extent of the connection between the individual and the foreign state of which he or she was alleged to be a subject or a citizen.[125] For the referred persons who had no knowledge of ever possessing foreign citizenship, it cannot be said that they have any real connection with the foreign states of which they discovered they were citizens. Many of them have not even visited the countries of which they are citizens. Accordingly, even simply applying the renunciation test applied in *Sykes*, persons with no knowledge that they possessed foreign citizenship should not be disqualified from being chosen or sitting in Parliament under s 44(i).

C. APPLICATION TO THE FACTS

(a) The federal election

80. On 9 May 2016, the 44th Parliament was dissolved by a simultaneous dissolution of both the Senate and the House of Representatives.[126] On 16 May 2016 the Governors of New South Wales,[127] South Australia,[128] Queensland[129] and the Deputy of the Governor of Western Australia[130] issued writs for the election of 12 senators for each State at the double dissolution election to be held on 2 July 2016. Also on 16 May 2017, the Governor-General issued a writ for the election of members of the House of Representatives for Electoral Divisions within New South Wales for the general election to be held on 2 July 2016.[131] The election was held on 2 July 2016. Between 2 and 5 August 2016 each of the referred persons was returned as duly elected as a Senator or member of the House of Representatives.[132]

(b) Mr Ludlam

81. Mr Ludlam was born in New Zealand in 1970,[133] at which time he became a New

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[125] *Sykes* (1992) 176 CLR 77 at 108 (Mason CJ, Toohey and McHugh JJ).

[126] Affidavit of Andrew Kevin Gately, affirmed 8 September 2017 (**Gately Affidavit**) at 7 [44]. [CB 57]

[127] Exhibit AG-23 to the Gately Affidavit. [CB 176]

[128] Exhibit AG-17 to the Gately Affidavit. [CB 148]

[129] Exhibit AG-3 to the Gately Affidavit. [CB 76]

[130] Exhibit AG-11 to the Gately Affidavit. [CB 120]

[131] Exhibit AG-29 to the Gately Affidavit. [CB 213]

[132] Exhibits AG-10, AG-14, AG-20, AG-28, AG-32 to the Gately Affidavit. [CB 115, 131, 159, 209, 224]

[133] Statement of Facts – Scott Ludlam, 8 August 2017 (**Ludlam Facts**) at [1] (attached to Letter from the President of the Senate, 9 August 2017). [CB 412]

Zealand citizen by birth.[134] He and his family moved to Australia in 1978.[135] In 1989, when he was 19 years old, Mr Ludlam acquired Australian citizenship by naturalisation.[136] He believed that upon naturalisation as an Australian citizen he was exclusively an Australian citizen and that he held no other citizenship.[137] However, that belief was not correct: in order to renounce his New Zealand citizenship, Mr Ludlam was required to take steps under New Zealand law.[138] At the time of his nomination, Mr Ludlam had taken no steps under New Zealand law to renounce his New Zealand citizenship.[139] In circumstances where Mr Ludlam knew that he was born a New Zealand citizen, and was subsequently naturalised as Australian, his failure to take all reasonable steps to renounce his New Zealand citizenship has the consequence that he voluntarily retained his status as a New Zealand citizen. He was therefore incapable of being chosen as a Senator, by operation of s 44(i). In that respect, his situation is indistinguishable from *Sykes*.

(c) Ms Waters

82. Ms Waters was born in Canada in 1977 to two Australian parents.[140] She became an Australian citizen by descent[141] and a Canadian citizen by reason of the place of her birth.[142] Ms Waters' parents, together with Ms Waters, moved to Australia when she was 11 months old.[143] As a natural born Australian citizen, Ms Waters believed all her life that she was an Australian citizen and had no other citizenship.[144] At the time of her nomination, Ms Waters was not aware that she was or had ever been a Canadian citizen.[145] In those circumstances, Ms Waters did not voluntarily acquire or retain her status as a Canadian citizen, and therefore was not disqualified at the time of her nomination by operation of s 44(i). Ms Waters took all reasonable steps to renounce her foreign citizenship within a reasonable time of becoming aware that there was a

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[134] David Goddard QC, *Expert Report on whether Mr Scott Ludlam is a New Zealand Citizen* (6 September 2017) (**Goddard Report re Ludlam**), at 4 [14]. [CB at 419]

[135] Ludlam Facts at [3]. [CB 412]

[136] Ludlam Facts at [4]. [CB 412]

[137] Ludlam Facts at [5]. [CB 412]

[138] Goddard Report re Ludlam at 4 [15]–[20]. [CB 419]

[139] Ludlam Facts at [7]. [CB 412]

[140] Affidavit of Larissa Joy Waters, affirmed 11 September 2017 (**Waters Affidavit**) at [5]. [CB 525]

[141] *Australian Citizenship Act 1948* (Cth) s 11.

[142] Waldman Opinion at 6–7. [CB 551–552]

[143] Waters Affidavit at [7]. [CB 525]

[144] Waters Affidavit at [10], [14], [17]. [CB 525, 526]

[145] Waters Affidavit at [17]. [CB 526]

relevant prospect that she was a Canadian citizen.[146]

(d) Senator Canavan

83. Senator Canavan was born in Queensland, Australia in 1980.[147] At that time, he became an Australian citizen.[148] Both of Senator Canavan's parents were born in Australia,[149] and at the time of his birth both of them were citizens only of Australia. At the time of his birth, Senator Canavan likewise was a citizen only of Australia. However, in 1983, Senator Canavan became an Italian citizen by descent, by reason of an Italian Constitutional Court decision that retroactively invalidated part of a 1912 Italian statute pursuant to which Italian citizenship passed only through the paternal line. By reason of that decision, Italian citizenship passed through both the paternal and the maternal line to any person born after 1 January 1948 (being the date of the commencement of the Constitution with which the 1915 Act was inconsistent).[150] The effect of that decision was that Senator Canavan's mother, who was born in Australia and had lived for 27 years as a sole Australian citizen, became an Italian citizen, and automatically passed that citizenship to her children, including Senator Canavan (then aged 2 years).

84. At the time of his nomination, Senator Canavan was not aware that he was or had ever been an Italian citizen.[151] As a natural born Australian citizen, who acquired Italian citizenship only by descent and not by undertaking any voluntary act (but, instead, by retrospective operation of a court ruling), he did not voluntarily acquire or retain his Italian citizenship, and therefore he was not incapable of being chosen at the time of his nomination by operation of s 44(i). Senator Canavan took all reasonable steps to renounce his foreign citizenship within a reasonable time of becoming aware that there was a relevant prospect that he was an Italian citizen.[152]

(e) The Hon Barnaby Joyce MP

85. Mr Joyce was born in New South Wales on 17 April 1967.[153] At the time of his birth, Mr

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[146] Waters Affidavit at [20]–[24]. [CB 527–528]

[147] Affidavit of Matthew James Canavan, affirmed 7 September 2017 (**Canavan Affidavit**) at [1]. [CB 269]

[148] *Nationality and Australian Citizenship Act 1948* (Cth) s 10 (as at 1980).

[149] Exhibits MJC-2, MJC-3 to the Canavan Affidavit. [CB 276, 278]

[150] Maurizio Delfino and Beniamino Caravito di Toritto, *Advice on Italian Citizenship Law* at 4–7. [CB 314–317]

[151] Canavan Affidavit at [8]–[14]. [CB 270–271]

[152] Canavan Affidavit at [14]–[23]. [CB 270–272]

[153] Joyce Affidavit at [1]. [CB 1319]

Joyce became an Australian citizen[154] and a New Zealand citizen by descent.[155] He acquired that latter status because his father was born in New Zealand as a British subject. While his father left New Zealand and moved to Australia before New Zealand citizenship was created, that status was retrospectively conferred upon him, without his knowledge, by s 16(1) of the *British Nationality and New Zealand Citizenship Act 1948* (NZ).[156] Mr Joyce's father then passed that status to Mr Joyce, notwithstanding his birth in Australia, by reason of s 7 of the same Act.[157]

86. At the time of his nomination, Mr Joyce was not aware that he was or had ever been a New Zealand citizen.[158] As a natural born Australian citizen, who acquired New Zealand citizenship only by descent and not by undertaking any voluntary act, he did not voluntarily acquire or retain his New Zealand citizenship, and therefore he was not incapable of being chosen at the time of his nomination by operation of s 44(i). Mr Joyce took all reasonable steps to renounce his foreign citizenship within a reasonable time of becoming aware that there was a relevant prospect that he was a New Zealand citizen.[159]

(f) Senator Roberts

87. Senator Roberts was born in India in 1955.[160] He was born a citizen of the United Kingdom and Colonies, additionally acquired the right of abode in the UK as of 1 January 1973, and became a British citizen by descent on 1 January 1983.[161] Mr Roberts was naturalised as an Australian citizen in 1974.[162] At the time of his nomination, Mr Roberts knew that he did not become an Australian citizen until 1974; he also knew that there was at least a real and substantial prospect that he had been, and remained, a British citizen.[163] Indeed, it appears that he knew that he had been a British citizen prior to 1974.[164] He had attempted to make inquiries with British

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[154] *Nationality and Citizenship Act 1948* (Cth) s 10 (as at Mr Joyce's birth).

[155] David Goddard QC, *Advice on New Zealand citizenship of person born in Australia* (12 August 2017) (**Goddard Advice re Joyce**) at [2], [5]. [CB 1340-1341]

[156] Goddard Advice re Joyce at [3]–[4] [CB 1340-1341]

[157] Goddard Advice re Joyce at [5]. [CB 1341]

[158] Joyce Affidavit at [14]. [CB 1320]

[159] Joyce Affidavit at [14]–[23]. [CB 1320-1322]

[160] Affidavit of Malcolm Ieuan Roberts sworn 8 September 2017 (**Roberts Affidavit**) at 2 [3.3]. [CB 803]

[161] Laurie Fransman QC, *Report on British Nationality Law* (6 September 2017) (**Fransman Report re Roberts**) at [46]. [CB 1058]

[162] Letter from the President of the Senate, 10 August 2017 attaching Letter dated 26 June 1974 confirming Australian citizenship. [CB 782]

[163] *Re Roberts* [2017] HCA 39 at [116]. [CB 1300]

[164] *Re Roberts* [2017] HCA 39 at [106]. [CB 1298]

authorities to determine whether he was "still a British citizen",[165] but had not completed the Declaration of Renunciation Form or paid the fee necessary to renounce his British citizenship.[166] For numerous reasons, those steps were ineffective.[167] There were additional reasonable steps he could have taken.[168] In those circumstances, he voluntarily retained his British citizenship and was disqualified by operation of s 44(i).

(g) Senator Nash

88. Senator Nash was born in New South Wales on 6 May 1965.[169] At the time of her birth, she became an Australian citizen[170] and a citizen of the United Kingdom and Colonies by descent.[171] She acquired that latter status because her father was born in Scotland as a British subject and he subsequently became a citizen of the United Kingdom and Colonies.[172] He passed that status to Senator Nash notwithstanding her birth in Australia. In 1981, she became a British citizen by descent only by force of s 11(1) of the *British Nationality Act 1981* (UK).[173]

89. At the time of her nomination Senator Nash was not aware that she was or had ever been a British citizen.[174] As a natural born Australian citizen, who acquired British citizenship only by descent and not by undertaking any voluntary act, she did not voluntarily acquire or retain her British citizenship, and therefore she was not incapable of being chosen at the time of her nomination by operation of s 44(i). Senator Nash took all reasonable steps to renounce her foreign citizenship within a reasonable time of becoming aware that there was a relevant prospect that she was a British citizen.[175]

(h) Senator Xenophon

90. Senator Xenophon was born in South Australia on 29 January 1959.[176] At the time of

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165 Exhibit MIR-14 to the Roberts Affidavit. [CB 856]

166 Fransman Report re Roberts at 12–18; cf Exhibit MIR-23 to the Roberts Affidavit. [CB 1059–1065; cf 887]

167 *Re Roberts* [2017] HCA 39 at [82], [97]–[98], [102], [119]. [CB 1292–1293, 1296, 1297, 1301]

168 *Re Roberts* [2017] HCA 39 at [117]–[118]. [CB 1300–1301]

169 Affidavit of Fiona Joy Nash, sworn on 23 September 2017 (**Nash Affidavit**) at [3]. [CB 592]

170 *Nationality and Citizenship Act 1948* (Cth) s 10 (as at Senator Nash's birth).

171 Laurie Fransman QC, *Opinion on British Nationality Law* (16 August 2017) (**Fransman Opinion re Nash**) at [17]. [CB 629]

172 Fransman Opinion re Nash at [9]–[10]. [CB 627–628]

173 Fransman Opinion re Nash at [20]. [CB 630]

174 Nash Affidavit at [22]–[31]. [CB 593–594]

175 Nash Affidavit at [30]–[31]. [CB 594]

176 Affidavit of Nicholas Xenophon, sworn on 19 September 2017 (**Xenophon Affidavit**) at [3]. [CB 654]

his birth, he became an Australian citizen,[177] and a citizen of the United Kingdom and Colonies by descent.[178] He acquired that latter status because his father was born in Cyprus when it was a British colony, and his father thereby became a British subject and later a citizen of the United Kingdom and Colonies.[179] He passed that status to Senator Xenophon when he was born, and Senator Xenophon subsequently became a British Overseas Citizen by force of s 26 of the *British Nationality Act 1981* (UK).[180]

91. At the time of his nomination Senator Xenophon was not aware that he was a British citizen.[181] As a natural born Australian citizen who acquired British citizenship only by descent and not by undertaking any voluntary act, he did not voluntarily acquire or retain his British citizenship, and therefore he was not incapable of being chosen at the time of his nomination by operation of s 44(i). Senator Xenophon took all reasonable steps to renounce his foreign citizenship within a reasonable time of becoming aware that there was a relevant prospect that he was a British citizen.[182]

D. OTHER QUESTIONS

(a) Question (b): By what means should any vacancy be filled

92. The applicable principles relating to the consequences of any finding of disqualification with respect to a Senator were established in *In re Wood*[183] and followed in *Sue v Hill*,[184] *Re Culleton (No 2)*[185] and *Re Day (No 2)*.[186] The Court, on the hearing of a reference under Pt XXII of the Electoral Act, has the powers conferred by s 360 so far as they are applicable (s 379). That includes the power conferred by s 360(vi) to "declare any candidate duly elected who was not returned as elected", which in turn carries with it an incidental power to order a special count.[187]

93. A special count permits a vacancy occasioned by the return of a candidate who was subject to disqualification under s 44 of the Constitution to be filled by giving effect to

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[177] *Nationality and Citizenship Act 1948* (Cth) s 10 (as at the date of Senator Xenophon's birth).

[178] Laurie Fransman QC, *Report on British Nationality Law* (20 September 2017) (**Fransman Report re Xenophon**) at 16 [77(a)]. [CB 747]

[179] Fransman Report re Xenophon at 14 [62]. [CB 745]

[180] Fransman Report re Xenophon at 17 [77](d)]. [CB 748]

[181] Xenophon Affidavit at [16]. [CB 656]

[182] Xenophon Affidavit at [16]–[26]. [CB 656–660]

[183] (1988) 167 CLR 145.

[184] (1999) 199 CLR 462.

[185] *Re Culleton (No 2)* (2017) 91 ALJR 311 at 319 [43] (Kiefel, Bell, Gageler and Keane JJ).

[186] (2017) 91 ALJR 518 at 532 [77]–[80] (Kiefel CJ, Bell and Edelman JJ), 549 [207] (Keane J), 534–535 [93] (Gageler J), 561 [293] (Nettle and Gordon JJ).

[187] *In re Wood* (1988) 167 CLR 145, 172 (Mason CJ).

"the true result of the polling – that is to say, the true legal intent of the voters so far as it is consistent with the Constitution and the [Electoral] Act".[188] Votes indicated for the disqualified candidate should be counted to the candidate next in the order of the voter's preference and the numbers indicating subsequent preferences should be treated as altered accordingly.[189] A special count would not be ordered if the special count would "result in a distortion of the voters' real intentions", as (it has been held) can happen under the different scrutiny rules for the House of Representatives.[190] If a special count would occasion such a distortion, then the Court would declare the election void, with the consequence that a fresh election would be required. If a special count would give effect to the true legal intent of the voters and not result in a distortion of voter intention, then it should be preferred to a fresh election, which would occasion significant costs and inconvenience.

94. In the case of the Senate elections for Mr Ludlam and Senator Roberts, no question of distortion arises. The position is on all fours with the Senate elections considered in *In re Wood*, *Sue v Hill*, *Re Culleton (No 2)* and *Re Day (No 2)*. Furthermore, the fact that the election occurred some time ago means that a special count is to be preferred, because the result of the special count is likely to reflect more closely the true intent of the voters at the time they cast their votes, than would a fresh election conducted some considerable time later.

95. Accordingly, in respect of Mr Ludlam and Senator Roberts, Question (b) should be answered as follows: "The vacancy should be filled by a special count of the ballot papers and any directions necessary to give effect to the conduct of the special count should be made by a single judge." In respect of Ms Waters, since she was not disqualified, her resignation created a casual vacancy, to be filled in accordance with s 15 of the Constitution.

96. The appropriate remedy in the case of Mr Joyce (were he found to be incapable of being chosen) is that the election be declared void, and a by-election should be held.[191] If that is disputed, the issue will be addressed in reply.

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[188] *In re Wood* (1988) 167 CLR 145, 166 (the Court).

[189] *In re Wood* (1988) 167 CLR 145, 166 (the Court). See further *Re Culleton (No 2)* (2017) 91 ALJR 311 at 319 [43] (Kiefel, Bell, Gageler and Keane JJ); *Re Day (No 2)* (2017) 91 ALJR 518 at 532 [80] (Kiefel CJ, Bell and Edelman JJ), 562 [305] (Nettle and Gordon JJ).

[190] *Sykes* (1992) 176 CLR 77, 102 (Mason CJ, Toohey and McHugh JJ); *Free v Kelly* (1996) 185 CLR 296, 302–304 (Brennan CJ). See further *Re Day (No 2)* (2017) 91 ALJR 518 at 532 [77]–[78] (Kiefel CJ, Bell and Edelman JJ), 534–535 [93] (Gageler J), 550 [210] (Keane J), 562–563 [306] (Nettle and Gordon JJ).

[191] *Sykes* (1992) 176 CLR 77, 101–102 (Mason CJ, Toohey and McHugh JJ); *Free v Kelly* (1996) 185 CLR 296 at 303–304 (Brennan CJ).

(b) Question (c): Further directions

97. Question (c) would most appropriately be answered after Questions (a) and (b) have been determined, with the benefit of further submissions by the parties.

(c) Question (d): Costs

98. The Court has already answered Question (d) by ordering that the Commonwealth pay the costs of the referred person on a party-party basis and, in matter C15/2017, the Commonwealth pay the costs of Mr Windsor on a party-party basis.

PART V LENGTH OF ORAL ARGUMENT

99. The Attorney-General estimates that he will require 3 hours for the presentation of oral
10 argument, and a further 30 minutes in reply.

Dated: 26 September 2017

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