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

Nos. C11 of 2017
C17 of 2017
C18 of 2017

Re Senator the Hon Matthew Canavan

Re Senator the Hon Fiona Nash

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Re Senator Nick Xenophon

References under s 376 of the *Commonwealth Electoral Act 1918* (Cth)

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ANNOTATED SUBMISSIONS OF THE AMICI CURIAE

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I Internet Publication

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

II Basis of Appearance

2. Pursuant to leave granted by Kiefel CJ on 26 September 2017, Senior Counsel appears as amicus curiae to act as a contradictor in law in References C11/2017 (Senator Canavan), C17/2017 (Senator Nash), and C18/2017 (Senator Xenophon).

III Applicable Provisions

3. Section 44 of the Constitution provides relevantly:

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

IV Argument

SUMMARY

4. **Construction of s 44(i)**: A person is "a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power", within the meaning of s 44(i) of the Constitution, if the person has one or more of those statuses according to such law of the relevant foreign power as an Australian court will recognise for the purposes of s 44(i). Non-recognition of foreign law would occur rarely. An Australian court, necessarily guided by public policy considerations, would not lightly refuse to recognise a foreign citizenship law unless it were so repugnant to the policy of Australian law, or so capricious in its operation, as to warrant non-recognition. Section 44(i) is therefore concerned with the *status* of citizenship, howsoever conferred or acquired, and is not confined to citizenship acquired or retained by a voluntary act.

5. **Disqualification**: At the time of their respective nominations in 2016, each of Senators Canavan, Nash and Xenophon had a status proscribed by s 44(i). Each was therefore ineligible to be chosen or to sit as a senator and there are therefore vacancies in the representation of Queensland, New South Wales and South Australia in the Senate for the places for which each Senator respectively was returned. There is no reason not to recognise the relevant laws of Italy and the United Kingdom under which the Senators had the proscribed status at the time of their nominations.

6. **Disqualification on their own construction**: Alternatively, even if s 44(i) is confined to citizenship acquired or retained by a voluntary act, each Senator should be treated as having voluntarily retained their foreign citizenship at the relevant time by virtue

of their constructive knowledge of that status arising in each case from actual knowledge of at least circumstances which would put an honest and reasonable person on inquiry.

7. These submissions will address in turn the construction of s 44(i) and the application to the facts of the competing constructions advanced.

CONSTRUCTION OF SECTION 44(i)

8. We start with our positive case as to the preferred construction of s 44(i), identifying the textual, purposive, and precedential foundation for that construction. We then explain why the alternative construction advanced in the submissions of the Commonwealth Attorney-General (**Commonwealth**) (**CS**) and the Senators should not be accepted, by reference to text and purpose, but also the unworkability of the construction, and the indeterminacy of the historical materials relied upon. We then address the subsidiary interpretive consideration of the capacity of the competing constructions to avoid absurd consequences.

Preferred construction

Text

9. Section 44(i) has two limbs (not three).[1] The first limb disqualifies a person who "is under any acknowledgement" of the stated kind. The second limb disqualifies a person who "is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power". That there are two and not three limbs is indicated by the presence of the verb "is" only twice (and the absence of any verb from the so-called third limb), and the placement of the comma between the two limbs (and the absence of any comma before the so-called third limb).[2]

10. In the first limb, the words "under any acknowledgement" capture any "person who has formally or informally acknowledged allegiance, obedience or adherence to a foreign power and who has not withdrawn or revoked that acknowledgement".[3] The nominalisation of the verb, "acknowledge", connotes a voluntary act or at least an active state of mind on the part of the person concerned.

11. In the second limb, in contrast, the words "subject", "citizen" and "entitled to the rights..." connote kinds of legal status (in the case of the entitlement, a functional rather than formal status arising from an equivalence of rights). The words "of a foreign power" connote that the legal status is to be determined according to the law of the relevant foreign power, because "at common law, as in international law, [such status] is to be determined according to the law of the foreign State concerned".[4] That

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[1] Contrary to CS [16] as to which see below at [26].

[2] See also *Sykes v Cleary* (1992) 176 CLR 77 at 110 (Brennan J, treating the "second and third categories" together), 127 (Deane J, describing two limbs).

[3] *Nile v Wood* (1988) 167 CLR 133 at 140 (Brennan, Deane and Toohey JJ).

[4] *Sykes v Cleary* (1992) 176 CLR 77 at 107 (Mason CJ, Toohey and McHugh JJ); see also at 110 (Brennan J), 131 (Dawson J).

conclusion is reinforced by the fact that the closing words of the second limb look beyond any abstract question of nationality, to the existence and content of rights or privileges.

12. The incorporation of foreign law, however, simultaneously connotes what is inherent in any choice of law context—that it is always for an Australian court to decide whether any particular foreign law will not be recognised, including on grounds of public policy.[5]

Three purposes

13. Purposive construction involves identification of both: (1) the relevant constitutional purpose or purposes; and (2) the means and the extent of the pursuit of those purposes. As to identification of purpose, constitutional purposes (like statutory purposes) are not ascertained independently of the Constitution itself by the "making of some *a priori* assumption", but rather "reside[] in its text and structure".[6] As to identification of the extent and means of pursuing the purpose, the Constitution (even more so than statutes) "rarely pursues a single purpose at all costs", so the relevant inquiry is not "what was the purpose or object underlying the [provision]?", but rather, "how far does the [provision] go in pursuit of that purpose or object?"[7]. Relatedly, the "extent of the disqualification and the purpose of the disqualification [ought not to be] run too much together. The latter properly informs the former, but should not take its place".[8]

14. The disqualification of foreign citizens clearly serves a purpose of ensuring the undivided allegiance of parliamentarians, consistent with "the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community".[9] It also serves two other purposes: a second and closely related constitutional purpose of avoiding the risk or appearance of divided allegiances; and a third and complementary constitutional purpose of achieving certainty in the electoral process and ease of application of s 44.

15. As to the first purpose, of ensuring undivided allegiance, the second limb of s 44(i) reflects the circumstance that a duty of allegiance or obedience is typically the reciprocal of the *status* of citizenship (however called), irrespective of a person's subjective state of mind. Nationality determines that the person on whom it is

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[5] *Sykes v Cleary* (1992) 176 CLR 77 at 112 (Brennan J), 135 (Gaudron J). See also *Regie Nationale Des Usines Renault SA v Zhang* (2002) 210 CLR 491 at [67] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

[6] *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [26] (French CJ and Hayne J); *Deal v Koddakathanath* (2016) 258 CLR 281 at [37] (French CJ, Kiefel, Bell and Nettle JJ).

[7] *Construction Forestry Mining & Energy Union v Mammoet* (2013) 248 CLR 619 at [40]-[41] (Crennan, Kiefel, Bell, Gageler and Keane JJ).

[8] *Re Day (No 2)* (2017) 91 ALJR 518 at [100] (Gageler J).

[9] *Re Day (No 2)* (2017) 91 ALJR 518 at [49] (Kiefel CJ, Bell and Edelman JJ), [179] (Keane J), [269] (Nettle and Gordon JJ); *R v Boston* (1923) 33 CLR 386 at 400.

conferred "enjoys the rights and is bound by [its] obligations".[10] In the context of s 44, attaching disqualification to the mere status of foreign citizenship serves the purpose of undivided allegiance by capturing those under obligations of allegiance irrespective of any "acknowledgement" by them that would attract the first limb.

16. It should not be thought that the *status* of citizenship overreaches very far or at all beyond the class of persons who in fact owe allegiance: "there are few situations in which a foreign law, conferring foreign nationality ... is incapable in fact of creating a sense of duty, or is incapable of enforcing a duty, of allegiance or obedience to a foreign power".[11] To the extent if any that a disqualification based on that status may be over-inclusive when measured against the first purpose, it is not objectionably so. First, it is only a contingent over-inclusiveness because a person can always renounce the proscribed status. The disqualification therefore has no real "blunt and limiting effect on democratic participation".[12] Secondly, given the "special status" of s 44 as "protective of matters which are fundamental to the Constitution, namely representative and responsible government in a democracy",[13] it is unsurprising that the purpose of avoiding divided allegiance would be pursued to its full extent and perhaps erring on the side of caution.

17. As to the second and related purpose: in the constitutionally prescribed system of representative and responsible government, even the *risk* or *appearance* of divided allegiance is apt to corrode the relationship of fidelity and trust between parliamentarians and electors. A parliamentarian's mere status as a foreign citizen will typically be discoverable by electors, even if the parliamentarian's subjective allegiances are not, and is therefore apt to give rise to the problematic risk or appearance. This is not to import into the application of s 44(i) any evaluative or impressionistic consideration of appearances or perceptions of divided loyalty. That would be inappropriate.[14] It is simply to identify that avoiding the risk or appearance of divided loyalty is a purpose that is pursued by the hard-edged second limb of s 44(i) and explains in part *why* the hard-edged construction is appropriate.

18. As to the third purpose of certainty and ease of application: even if the foregoing submissions as to purpose are not accepted, it would be wrong to assume that s 44(i) must be read down to conform to a sole purpose of ensuring undivided allegiance. The two limbs of s 44(i) disclose that the undivided allegiance of parliamentarians is not the only purpose served by the provision. If it were the only purpose, then the first limb, which encompasses all actual acknowledgements, would be a sufficient statement of the relevant disqualification (especially if, *ex hypothesi*, the mere status

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[10] *Liechtenstein v Guatemala* [1955] ICJ Rep 4 at 20.

[11] *Sykes v Cleary* (1992) 176 CLR 77 at 113 (Brennan J).

[12] *Re Day (No 2)* (2017) 91 ALJR 518 at [97] (Gageler J).

[13] *Re Day (No 2)* (2017) 91 ALJR 518 at [72] (Kiefel CJ, Bell and Edelman JJ).

[14] *Re Day (No 2)* (2017) 91 ALJR 518 at [53] (Kiefel CJ, Bell and Edelman JJ), [100] (Gageler J), [155]-[156] (Keane J), [263] (Nettle and Gordon JJ).

of foreign citizenship does not give rise to problems of divided allegiance). The second limb would be superfluous. Constitutional text, like statutory text, is not lightly to be treated as "superfluous, void or insignificant".[15]

19. The second limb performs important work in service of certainty in the electoral process and ease of application of s 44(i). Assessing a person's subjective allegiance may involve intensely factual inquiries, about inherently opaque mental states, that are not conducive to the definite ascertainment of the person's eligibility to be chosen or to sit as a parliamentarian. And it is central to the scheme of representative and responsible government that "tolerably clear and workable standards" are exposed not only to candidates, but also to their electors.[16]

20. The second limb of s 44(i) expounds a *per se* manifestation of the principle expounded in the first limb. A person who falls within the second limb is disqualified, whether or not they subjectively acknowledge any allegiance, obedience, or adherence to the foreign power. There is a consonance with s 44(v) as explained in *Re Day (No 2)* by Keane J, who said that there was considerable force in a submission that s 44(v) "*assumes* that when its terms are contravened there will be a risk of influence ... or a risk of potential conflict – there is no additional requirement that there *in fact* be a real (objective) risk of influence or conflict".[17] *Per se* rules are frequently enacted in service of certainty and relative ease of application. Speeding is illegal because it is dangerous, but the law does not countenance inquiry into whether a particular driver is very skilled and therefore capable of driving safely at greater speed than others; the *per se* prohibition against speeding serves not only the purpose of safety but also that of certainty and ease of application.[18]

Precedent

21. Our construction is supported by the *ratio decidendi* of *Sue v Hill* and the considered *obiter dicta* of a majority of the Court in *Sykes v Cleary*.

22. It was a necessary step in the reasoning of the majority in *Sue v Hill* that "[i]n construing s 44(i) of the Constitution, the Court should apply the classification given to [the individual] under [foreign] law", at least in the circumstances of the applicable law of the United Kingdom considered in that case.[19] To import into the second limb of s 44(i) a requirement for a voluntary step would be inconsistent with the holding that that limb is concerned with classification under foreign law, because, as is

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[15] *Wilkie v Commonwealth* [2017] HCA 40 at [146] (The Court), citing *Commonwealth v Baume* (1905) 2 CLR 405 at 414, quoted in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71].

[16] *Re Day (No 2)* (2017) 91 ALJR 518 at [97] (Gageler J).

[17] *Re Day (No 2)* (2017) 91 ALJR 518 at [155]-[156] (Keane J).

[18] See *Federal Trade Commission v Superior Court Trial Lawyers Association*, 493 US 411 (1990) at 433-434 (Stevens J, with whom Rehnquist CJ, White, O'Connor, Scalia and Kennedy JJ agreed).

[19] *Sue v Hill* (1999) 199 CLR 462 at [47] (Gleeson CJ, Gummow and Hayne JJ). See also at [177] (Gaudron J).

manifest, the citizenship laws of very many foreign legal systems have no such requirement for a voluntary step.

23. In *Sykes v Cleary*, the Court expressly considered the position under s 44(i) where citizenship was "imposed involuntarily".[20] Only Deane J, dissenting on this issue, would have implied a mental element confining s 44(i) to cases in which the relevant status was "sought, accepted, asserted or acquiesced in".[21] Mason CJ, Toohey and McHugh JJ clearly considered that involuntary imposition would result in disqualification (hence the need to make allowance for the person taking "all reasonable steps to divest himself or herself" of the status). Brennan J likewise considered that the second limb of s 44(i) covered the case of a duty of allegiance that is "reciprocal to the status" (or functional status) "conferred by the law of a foreign power".[22]

24. As to the result of the reasoning on s 44(i), Mr Delacretaz and Mr Kardamitsis were disqualified because they had not taken the relevant steps under foreign law to renounce their status effectively. That was despite their subjective belief that they had renounced their foreign citizenships and no longer owed any foreign allegiance.[23]

Construction advanced by the Commonwealth and the Senators should not be accepted

Anti-textual

25. The construction advanced by the Commonwealth and adopted by the Senators would insert into s 44(i) words that are not there. A limitation of the disqualification to cases of voluntary acquisition or retention of citizenship finds no textual basis in the second limb of s 44(i). It would result in that limb substantially duplicating the first limb of s 44(i).

26. At CS [50]-[59], the Commonwealth seeks to derive support from the first and so-called "third" limbs of s 44(i). It is here important to correct the Commonwealth's error in asserting the existence of three rather than two limbs in s 44(i) (see above at [9]). The first limb requires a voluntary act. The second does not, because it is concerned with legal status. That difference between the two limbs gives each distinctive work to do. The text requires that each limb be given its own sphere of operation, not, as the Commonwealth in effect submits, that the limbs be collapsed. Any rhetorical appeal in the notion that the "second" limb must conform to the "other two" limbs vanishes when the provision is read according to its terms, which articulate not three limbs of a single genus, but two complementary limbs of distinctive connotation.

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[20] *Sykes v Cleary* (1992) 176 CLR 77 at 107 (Mason CJ, Toohey and McHugh JJ), 113 (Brennan J), 127 (Deane J dissenting), 131 (Dawson J), 137 (Gaudron J dissenting).

[21] *Sykes v Cleary* (1992) 176 CLR 77 at 127.

[22] *Sykes v Cleary* (1992) 176 CLR 77 at 109.

[23] *Sykes v Cleary* (1992) 176 CLR 77 at 108 (Mason CJ, Toohey and McHugh JJ), 112 (Brennan J).

27. Furthermore, contrary to CS [58], it is of no significance that, under British law at the time of Federation, an alien could become "entitled to the rights and privileges" of a British subject only by the voluntary act of naturalisation. The significance of the so-called "third limb" is that there was recognised a category of legal status which might fall short of "subject or citizen" but which nonetheless might have as one of its incidents the kind of duty of allegiance or obedience that the framers were concerned to proscribe. Foreign law would not necessarily have been the same as British law in requiring a voluntary act to attain the lesser, but nonetheless proscribed, legal status. The second limb (including the so-called "third" limb) is concerned with the status itself, and not with the particular way in which that status was acquired, especially under the law of the United Kingdom, which was not a "foreign power" at the time of Federation and therefore could not have engaged s 44(i).[24]

Anti-purposive and unworkable

28. In the absence of a textual footing for its construction, the Commonwealth resorts to the principle that an unqualified mandatory prescription may need to be given a confined operation in light of its purpose or purposes (CS [19]).[25] The principle is sound, but depends for its application on a correct identification of the purpose or purposes of the provision. The Commonwealth adopts an unduly narrow view of the purposes served by s 44(i). It asserts four purposes, although they are in reality just different expressions of one purpose, namely, undivided allegiance (CS [20]).

29. The Commonwealth overlooks the distinctive ways in which the second limb, unencumbered by the asserted gloss of voluntariness, advances the purpose of ensuring undivided allegiance (see above at [15]). And the submissions pay scant regard to the other purposes of s 44 (see above at [13]-[20]). As a result, the Commonwealth's construction suffers from the defects: of making an *a priori* assumption that one identified purpose is the only purpose, instead of identifying the multiple purposes from the text and structure itself; and of assuming that the provision pursues that one purpose at all costs, without having regard to other purposes, particularly certainty and ease of application.

30. Senator Canavan acknowledges the purpose of certainty, but then attacks a straw-man construction which is "wholly dependent upon the operation of foreign law" (Canavan [56]-[57]). We do not suggest that s 44(i) be "wholly dependent" on foreign law, because an Australian court can decline to recognise "legislative whims". But Australian courts should, as a matter of comity in an international legal order (not to mention as a matter of Australian and international law), give due recognition to foreign laws.

31. The contrariety between the Commonwealth's construction and the purposes of certainty and ease of application can be demonstrated by the unworkability of the

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[24] *Sue v Hill* (1999) 199 CLR 462 at [159] (Gaudron J).

[25] *Alqudsi v The Queen* (2016) 258 CLR 203 at [125] (Gageler J).

standard that the Commonwealth's construction involves. It is unworkable, having regard to the high degree of certainty that s 44 demands, because it depends upon intense factual inquiry including into subjective states of mind.

32. The Commonwealth submits (CS [64]) that its construction would avoid the operation of s 44(i) "turn[ing] upon potentially complex issues of fact and foreign law". That is not so. On any view of s 44(i), foreign law will be relevant and perhaps determinative. It could only be avoided if the meaning of "subject or citizen" were divorced entirely from foreign law and made to depend only upon the character of acts done by the individual concerned, irrespective of the efficacy of those acts under the foreign law. No party advances such a construction.

33. Further, the difficulty of ascertaining foreign law can be overstated. Even though a question of foreign citizenship turns on the content of foreign law, the question will be often be able to be answered sufficiently for *nomination* purposes by a simple enquiry of an embassy, without any need for detailed factual investigation (which is what happened in these cases, as to which see below at [43]). In a contested *curial* context, of course, foreign law would need to be proved as a fact, but that would need to be done on either construction.

34. What distinguishes our construction from the Commonwealth's construction is not the necessity to inquire into foreign law, but the necessity to make *further inquiries* about matters *in addition to* foreign law.

35. On our construction, the inquiry into foreign law is the *only* inquiry (subject to the overriding legal question, likely to be engaged only in very rare cases, of whether there is a reason not to recognise the particular foreign law).

36. On the Commonwealth's construction, in marked contrast, there is required in addition several potentially complex factual inquiries. Senator Canavan describes the task as an analysis of "all the circumstances concerning the connection between the parliamentarian in question and the relevant foreign power" (Canavan [58]). The inquiries would include:

    (a) did the person acquire the citizenship voluntarily?
    (b) if not, did they know that they had foreign citizenship?
    (c) if so, when did they know?
    (d) what, if any, steps did they take to renounce it?
    (e) what, if any, other steps could they have taken?
    (f) when did they take the steps that they did?
    (g) could they have taken those steps earlier than they did?

37. The imported notion of "knowledge" devolves into still further complex factual inquiries:

    (a) did they have actual, subjective knowledge of the foreign citizenship?
    (b) if not, were they aware of a prospect that they were a foreign citizen?

(c) to this end, what facts did they know and should those facts have alerted them to the prospect, or put them on inquiry as to the prospect?

(d) was the prospect "considerable, serious or sizeable"?

38. Indeed "knowledge" itself is an indeterminate or variable legal concept capable of encompassing at least the following five categories: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable person; and (v) knowledge of circumstances which would put an honest and reasonable person on inquiry.[26]

39. The Commonwealth submits that only actual knowledge—proved or inferred according to principles expounded in criminal law cases (see CS [74])—will suffice. Why that would be so is not explained. It is true that the Constitution contemplates a penalty for sitting while disqualified (s 46). But in *Re Day (No 2)*, the Court rejected a submission that the penal consequences which might follow for a person who is disqualified provided any reason to read s 44(v) narrowly.[27] The same must be true of s 44(i). It is therefore difficult to see why constructive notice, of the "on inquiry" kind, should not suffice.

40. The larger point is that the Constitution itself provides little if any guidance as to the kind of "knowledge" that would be relevant to the meaning of "subject or citizen". For example, neither the Constitution itself nor the Commonwealth's submissions suggest any coherent reason why the cases of Senators Canavan, Nash and Xenophon (who did not know of their foreign citizenship) are to be distinguished from that of Mr Ludlam (who did not know that he had remained a citizen of New Zealand (**CB 412** [5]; CS [81])) or that of Mr Kardamitsis.[28] That lack of guidance rather indicates that the concept of knowledge has *no role* to play in comprehending the meaning of "subject or citizen".

41. Further, all of these inquiries into quite subtle and possibly opaque features of the impugned parliamentarian's actions and state of mind are to be made in circumstances where—as Senator Nash submits at [25]/Joyce [27]-[28]—the person alleging disqualification might bear the onus of proof. That speaks against the operation of s 44(i) turning on the kind of inquiries that the Commonwealth and Senators would introduce. So too does the prospect that the eligibility of a member of the national Parliament may turn on the evidence he or she chooses to adduce and the presence or absence of interested parties who might test or contradict that evidence.

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[26] *Baden v SG Développement du Commerce SA* [1992] 4 All ER 161 at 235, 242-243; *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [174].

[27] *Re Day (No 2)* (2017) 91 ALJR 518 at [72] (Kiefel CJ, Bell and Edelman JJ), [98] (Gageler J), [276] (Nettle and Gordon JJ).

[28] *Sykes v Cleary* (1992) 176 CLR 77 at 103-105.

42. At CS [62]ff, the Commonwealth submits that the current references in the Court illustrate difficulties that attend the recognition of foreign citizenship laws that operate automatically even absent a voluntary act. That submission should be rejected. All that the current references illustrate is the difficulty that is occasioned when individuals who wish to sit in Parliament do not make *any* inquiries about relevant foreign citizenships,[29] despite the electoral process requiring them to make a solemn declaration that they are not disqualified, which solemn declaration each of the Senators made (**CB 82, CB 154, CB 183**).

43. In fact, the current references illustrate *just how easily* the affected Senators were able to ascertain their foreign citizenship status and take steps to renounce it when they turned their minds to it. Senator Canavan's inquiry of the Italian Embassy on a Thursday elicited a response by Monday confirming his citizenship (**CB 271** [16]-[17]). His renunciation took effect the day after he visited the Embassy to formally renounce it (**CB 272** [23]). Senator Nash found out she was a British subject on the same day that she asked the question (**CB 593-594** [22]-[23]). Her renunciation was confirmed one business day after she completed the relevant form (**CB 594** [30]-[31]). Senator Xenophon ascertained his status within a day of asking (**CB 690-694**) and his renunciation was confirmed the day after his form was received (**CB 696-699**).

44. There is no true inconvenience in insisting upon an exacting standard of attention to potential constitutional disqualifications by those who seek to sit in Parliament. The Commonwealth's construction would create a structural incentive in favour of prospective parliamentarians remaining ignorant of possible foreign citizenships.

Not required by history

45. Interesting as the Commonwealth's exegesis of the historical antecedents to s 44(i) is, it is of limited to no relevance to the resolution of the present question of construction (CS [24]-[49]).

46. The essential burden of the Commonwealth's historical case is two-fold:

(a) ***First***, the Commonwealth argues that around the time of Federation, dual citizens by descent could sit in the British and colonial parliaments, and only those who took a voluntary step towards foreign citizenship were disqualified or lost their seat (CS [25]-[36]). It seems to be said that this circumstance explains some common assumption about the subject matter of s 44(i) in the sense described by Gummow, Kirby and Crennan JJ in *Roach v Electoral Commissioner* (CS [24]);[30]

(b) ***Secondly***, the Commonwealth points to drafts of s 44(i), which provided for disqualification of a person who "does any act" whereby he becomes a foreign

[29] Senator Xenophon made inquiries about some foreign citizenships, but not the relevant one.

[30] (2007) 233 CLR 162 at [53].

citizen, and argues that the meaning of the enacted text did not change from the meaning of the unenacted drafts.

47. As to the first aspect: in relation to the British antecedents, the inability of someone who had taken a voluntary step to acquire foreign citizenship to *be chosen* to sit in the Parliament arose only after 1870 as a result of ss 4 and 6 of the *Naturalisation Act 1870* (UK), which reversed the common law rule of indelibility and permitted British subjects to, in effect, renounce their British nationality by a declaration of alienage in favour of their second citizenship (s 4) or a voluntary naturalisation (s 6).[31] When a person took one of those voluntary steps, it resulted in the renunciation of British nationality. It was the resulting lack of British nationality which deprived the person of one of the requisite *qualifications* to sit in parliament. That has little to do with any assumptions underlying the *disqualifications* in s 44. The nationality *qualification* was dealt with, at least initially, by ss 16 and 34 of the Constitution.

48. In relation to the colonial antecedents, none of the constitutions referred to by the Commonwealth stipulated allegiance to a foreign power (whether acquired voluntarily or not) as a *disqualification for election* to their legislatures. All of them included naturalised subjects of the Queen among those capable of being chosen. The colonial constitutions did specify steps by which a person might voluntarily undertake allegiance to a foreign power (or acquire the rights of a citizen) as events which would *vacate the seat* of an existing member.[32] It is easy to see why a voluntary act of that kind, on the part of a person who had undertaken to serve as a parliamentarian, might be viewed differently from a pre-existing foreign citizenship.

49. The 1870 Act and the discussion that surrounded it make it very likely that the framers were aware of dual citizenship[33] and, in particular, citizenship being conferred by foreign powers according to descent. That awareness speaks against the broad expression of s 44(i) being unintended or accidental.

50. Moreover, from its earliest drafts, the Constitution departed from the model of the colonial constitutions by specifying the prior acquisition of foreign citizenship as an *ex ante* disqualification for election (as distinct from an event causing the vacation of

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[31] See the discussion in *Singh v Commonwealth* (2004) 222 CLR 322 at [173]-[175] (Gummow, Hayne and Heydon JJ).

[32] *Union Act 1840* (Imp) 3 & 4 Vict, c 35, s 7 (Canada) (**Cth Bundle Tab 29**); *New Zealand Constitution Act 1852* (Imp) 15 & 16 Vict, c 72, ss 36 and 50 (**Cth Bundle Tab 30**); *Constitutional Act of Tasmania 1854*, 18 Vict, No 17, ss 15 and 24 (**Cth Bundle Tab 21**); *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict, c 54, Sch 1, ss 5 and 26 (**Cth Bundle Tab 22**); *Victoria Constitution Act 1855* (Imp) 18 & 19 Vict, c 55, Sch 1, s 24 (**Cth Bundle Tab 23**); *South Australia Constitution Act 1856*, 19 & 20 Vict, No 2, ss 12 and 25 (**Cth Bundle Tab 24**); *Queensland Constitution Act 1867*, 31 Vict, No 38, s 23 (**Cth Bundle Tab 25**); *British North America Act 1867* (Imp) 30 & 31 Vict, c 3, s 31 (**Cth Bundle Tab 31**); *Western Australia Constitution Act 1890* (Imp) 53 & 54 Vict, c 26, s 29 (**Cth Bundle Tab 26**); First Draft of the Constitution 1891, ss 18 and 25 (**Cth Bundle Tab 1**).

[33] See further *Convention Debates*, Adelaide 15 April 1897 at 736.

a seat). That detracts further from the utility of the colonial antecedents as aids to the construction of that disqualification. On any construction, s 44(i) was novel.

51. As to the second aspect: this is not a case in which the earlier drafts of the Constitution show the sense in which a word in the text as enacted must have been intended to be used. For example, in the *Incorporation Case* the Court looked to drafts of s 51(xx) to ascertain that the word "formed" had been used with a particular and consistent meaning throughout the drafts.[34] If that permissible approach were deployed here, it would show that the words "subject" and "citizen" were used throughout the drafting history in a consistent sense: as referring to a kind of legal status. The early drafts referred to obtaining that status by doing an act; the enacted text refers to the status alone.

52. The Commonwealth in this case seeks to imply the meaning of the *deleted* words back into the provision, and thereby attribute to the framers *different* uses of the words "subject" and "citizen" in the draft and in the enacted text. That is an unlikely conclusion, contrary to normal linguistic expectations.

53. The proposition that the change of words adopted in the course of drafting s 44(i) did not effect any change in meaning can be made good only if the Court acts upon statements made by Mr Barton in the Convention Debates which the Commonwealth submits "confirmed that the amendments made by the Drafting Committee were not intended to make any substantive changes that had not been subject to debate" (CS [42]).

54. Recourse to the Convention Debates for that purpose is impermissible. The history of a clause, including the debates, is relevant "for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement toward federation"; it cannot be used "for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have".[35] Any individual subjective intention, "if it could be established, would not be relevant, because it would not advance any legitimate process of reasoning to a conclusion about the meaning of the text".[36]

55. The statement of Mr Barton is very clearly a statement of his subjective intention (and perhaps also his subjective belief as to the subjective intentions of others on the drafting committee). It is irrelevant to the construction of the enacted text.

56. If one *were* permitted to look at what Mr Barton thought, it is not pellucid that he thought what the Commonwealth now attributes to him (CS [42]). He said:[37]

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[34] *New South Wales v Commonwealth* (1990) 169 CLR 482 at 501-503 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ).

[35] *Cole v Whitfield* (1988) 165 CLR 360 at 385.

[36] *Singh v Commonwealth* (2004) 222 CLR 322 at [21] (Gleeson CJ).

[37] *Convention Debates*, Melbourne, 16 March 1898 at 2439-2440.

> I think I am right in stating, exercising my memory at short notice, that there has been only one amendment in substance ... In everything else, while honourable members may sometimes think the Drafting Committee have freely interpreted the instructions given to them, they will nevertheless find that either the meaning of the amendment is plain upon a comparison of it with the Bill as it stood before, or they will find when there is any apparent difference that the questions asked and answered and the explanations given in debate have accounted for the difference ...
>
> (emphasis added)

57. The underlined passages suggest that Mr Barton was not entirely sure himself. And they suggest, in any event, that such changes as were made were in one of two categories: "plain upon a comparison" or "accounted for" in debate. It would be unsafe to simply assume that the change to s 44(i) was not thought by any members to be "plain".

58. The uncertainty is buttressed by a second statement of Mr Barton on the same day, also invoked by the Commonwealth (CS [42]), that the drafting committee "was not conscious of having altered the sense or the intention of the committee".[38] He made this statement in the context of a debate about the true character of the 400 amendments made by the drafting committee. Mr Symon was calling for the amendments to be considered seriatim, so that members could satisfy themselves of each change. Barton resisted that laborious course. Underlying Mr Symon's concern was the fear that "if any mistake is made now, it must remain for all time"—that was a sentiment infused with the orthodoxy, from which the Commonwealth would now depart, that the Constitution is to be interpreted according to the words used and not according to the subjective intentions of the framers.

Avoiding absurd consequences

59. The construction of a disqualification provision such as s 44(i) should not be "tested by reference to extreme examples and distorting possibilities".[39] Remote and unlikely eventualities will not ordinarily provide sufficient reason to strain the otherwise natural and ordinary meaning of a text, because the distortion thereby occasioned to the provision in its everyday operation is worse than the potential problem that may or may not arise. At the same time, a construction that would produce absurd results, and not only in extreme and unlikely scenarios, is unlikely to have been intended and therefore should not be preferred where another construction is available.

60. There are some potentially absurd results that a constitutionally acceptable construction of s 44(i) should avoid if possible. Importantly, the proper identification of consequences in that category does not proceed from a freestanding normative assessment of what the Constitution should provide, nor from idiosyncratic notions of

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[38] *Convention Debates*, Melbourne, 16 March 1898 at 2444.

[39] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [46] (Gleeson CJ, in the different but, it is submitted, analogous context of the validity of the conferral of a statutory power).

fairness and justice. The consequences to be avoided are pointed to by the Constitution itself: the scheme for representative and responsible government contemplates and depends upon wide participation by Australian citizens. No citizen should be "irremediably incapable"[40] of exercising the democratic right to seek to participate in Parliament.[41] Thus, in the scheme of s 44: a convicted offender is able to serve out his or her sentence (para (ii)); a bankrupt can be discharged (para (iii)); a holder of an office of profit can resign (para (iv)); and prohibited pecuniary interests can be divested (para (v)). The constitutionally absurd result of irremediable incapacity might arise in the context of s 44(i) if, for example:

(a) under foreign law it is *impossible* to renounce foreign citizenship (including because of a refusal by the foreign power to exercise a discretion) or renunciation is made dependent upon taking steps that are manifestly *unreasonable*;

(b) a foreign citizenship is *unknowable* (as distinct from merely unknown), perhaps because of a secret or retrospective law;

(c) under foreign law, citizenship is conferred involuntarily and immediately upon a *sitting* member of Parliament, perhaps mischievously but perhaps not, so as to engage the automatic vacation of his or her seat by operation of s 45(i).

61. None of the truly absurd consequences that can be imagined requires any distortion of the natural and ordinary meaning of the text of s 44(i). Because the incorporation of foreign law in s 44(i) carries with it the power of an Australian court to decide whether and to what extent to recognise foreign law, truly absurd results can always be avoided.

62. In the case of *impossible renunciation*, the court would not recognise a foreign law to the extent that it rendered renunciation impossible or dependent upon the taking of steps that were unreasonable. This is the true rationale of the reasonable steps test articulated in *Sykes v Cleary*. That test should not be understood as introducing into s 44(i) routine inquiries into whether a person's ineffective attempts to renounce citizenship were reasonable. The test is properly understood as an "escape hatch" for circumstances where, despite doing everything that could reasonably be done, effective renunciation has not occurred by reason of some feature of the foreign law.[42] It operates by qualifying the recognition of the foreign law, not by introducing an overriding test of reasonableness for the operation of s 44(i).

63. The case of *unknowable citizenships* would only arise in practice if the citizenship *became knowable* after the person's nomination, or even after their election. The

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[40] *Sykes v Cleary* (1992) 176 CLR 77 at 131 (Dawson J).

[41] *Sykes v Cleary* (1992) 176 CLR 77 at 121 (Deane J); *Re Day (No 2)* (2017) 91 ALJR 518 at [96] (Gageler J).

[42] See *Sykes v Cleary* (1992) 176 CLR 77 at 107 (Mason CJ, Toohey and McHugh JJ). See also at 113 (Brennan J), 131.5 ("irremediably incapable"), 131-132 (Dawson J); see further at 127.8 (Deane J, dissenting).

constitutional absurdity lies in the inability of the person to remedy their incapacity. It is the same absurdity that would attend the conferral of citizenship upon a *sitting member*. The Commonwealth's construction deals well with this precise absurdity (because it is peculiarly calculated to save sitting members who have recently discovered their foreign citizenships). But our construction can readily address the absurdity through the capacity of the court to decline to recognise a foreign law. Having regard to the constitutional principle that no one should be "irremediably incapable" of sitting in Parliament, these would be among the rare cases where a court would be justified in declining to recognise the *immediate* operation of the foreign law, so that a sitting member had an opportunity to renounce the citizenship.

64. This remote possibility does not need to be resolved in this case and should not drive the construction of s 44(i) in circumstances where neither of the competing constructions is committed to embracing the absurd result.

65. The larger point is that any absurd results that can be imagined under s 44(i) arise not from s 44 but from the virtually unlimited possibilities of foreign law. And, as Gaudron J put it, "the solution is not to be found in reading down s 44(i): rather, it lies in examination of the circumstances in which foreign law should be applied to determine questions arising under the sub-section".[43]

APPLICATION OF SECTION 44(i) TO THE FACTS

On the preferred construction of section 44(i)

Senator Canavan

66. On the date of his nomination (13 May 2016), Senator Canavan was a citizen of Italy and had done nothing to renounce that citizenship (**CB 318**).

67. There is no reason why the Court should decline to apply the Italian law of matrilineal descent. The decision of the Italian Constitutional Court in 1983 established the true position at law (**CB 315**) and did not "retrospectively" confer Italian citizenship on Senator Canavan (cf Canavan [4], [19], [72]); and, in any event, no relevant surprise was thereby occasioned in the circumstances of this case. Senator Canavan's Italian citizenship has been discoverable for over 30 years. To complain about the retroactive operation of the law is far too delicate a submission in those circumstances. It is not as though the foreign citizenship was conferred after or even very soon before the date of nomination. At or prior to his nomination, Senator Canavan could easily have ascertained his status under Italian law.

Senator Nash

68. On the date of her nomination (1 June 2016), Senator Nash was a British subject and had done nothing to renounce that status (**CB 616**). There is no reason to decline to recognise British citizenship law.

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[43] *Sykes v Cleary* (1992) 176 CLR 77 at 137.

Senator Xenophon

69. On the date of his nomination (1 June 2016), Senator Xenophon was a British Overseas Citizen (**BOC**) and had done nothing to renounce that status (**CB 750** [90]). There is no reason to decline to recognise British citizenship law.

70. The status of BOC is proscribed by s 44(i). Contrary to Xenophon [35]-[47], the status is within the connotation of "a subject or a citizen" or, alternatively, "entitled to the rights or privileges of a subject or a citizen".

71. Nationality and alienage were matters "of lively controversy in Britain during the latter part of the nineteenth century"[44] and "on which there were changing and developing policies".[45] The words "subject" and "citizen" in s 44 must therefore be construed with "[]sufficient allowance for the dynamism which, even in 1900, was inherent in any understanding of the terms".[46] That dynamism is compounded by the necessary recourse to *foreign* law to identify the statuses that are denoted from time to time by the words of s 44(i). It is for the law of the foreign power to identify categories of citizenship or functional citizenship. It may be accepted that an Australian court might decline to recognise a category of citizenship that exceeded the jurisdiction recognised by international law.[47]

72. The functional status recognised within the second limb of s 44(i) by the words "entitled to the rights or privileges etc" was explained by Brennan J as covering "those who, though not foreign nationals, are under the protection of a foreign power as though they were subjects or citizens of the foreign power".[48] As explained above at [27], the words recognised that foreign powers might have lesser categories of "citizenship" akin to the British description of naturalised subjects.

73. The evidence of Mr Fransmann QC explains the nature of BOC (**CB 750-751** [93]-[96], **CB 752-760** [102]-[137]). The determinative evidence is that "British domestic law regards British Overseas citizenship as a form of British nationality" (**CB 752** [104]) and a BOC "does owe loyalty ('allegiance') to Her Majesty the Queen" in right of the UK (**CB 756** [121], **CB 757** [124]-[126]). That allegiance, and recognition under the relevant foreign law, suffices to bring BOC within the scope of the proscription in s 44(i). That a BOC is "probably" also a British national in international law tends to bolster that view (**CB 758** [131]).

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[44] *Singh v Commonwealth* (2004) 222 CLR 322 at [176] (Gummow, Hayne and Heydon JJ).

[45] *Singh v Commmonwealth* (2004) 222 CLR 322 at [30] (Gleeson CJ).

[46] *Grain Pool of WA v Commonwealth* (2000) 202 CLR 479 at [23] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [5] (Gleeson CJ), [34] (Gaudron and Gummow JJ), [165] (Hayne J).

[47] *Sykes v Cleary* (1992) 176 CLR 77 at 109 (Brennan J).

[48] *Sykes v Cleary* (1992) 176 CLR 77 at 110 (Brennan J).

Reasonable steps?

74. Senator Canavan ([74]) and Senator Xenophon ([24]), and perhaps Senator Nash ([25], [31]/Joyce [29]-[30]), submit that they have taken all reasonable steps to renounce their foreign citizenship because, in the absence of any knowledge of their foreign citizenship status, it was reasonable to do nothing.

75. That submission proceeds on a misreading of *Sykes v Cleary* (and is inconsistent with the conclusion on the relevant point in that case). As submitted above at [62], the "reasonable steps" test is not an overriding gloss on the words of s 44(i). Rather, it marks a limit of the recognition that will be given by an Australian court to foreign citizenship laws, to ensure that no individual is irremediably ineligible to sit in Parliament owing to the impossibility or lack of reasonable possibility to renounce a foreign citizenship. That is why, in the conclusion on the point in *Sykes v Cleary*, Mr Delacretaz and Mr Kardamitsis were held not to have taken reasonable steps, even though they believed that they were not foreign nationals. Renunciation by Senator Canavan, Senator Nash and Senator Xenophon was not only possible under the applicable foreign laws but remarkably easy.

On the alternative construction of section 44(i) — actual knowledge

76. If the Court accepts the construction of s 44(i) advanced by the Commonwealth and the Senators, in which *actual knowledge* is required, then we are bound to accept that Senators Canavan, Nash and Xenophon are not disqualified.

77. That conclusion is compelled by the unchallenged evidence of each Senator that he or she was unaware of the relevant foreign citizenship: **CB 272** [24] (Senator Canavan); **CB 594** [26]-[27] (Senator Nash); **CB 657** [16]-[18] (Senator Xenophon). As contradictors only in law, we have no role in challenging that evidence.

78. The Commonwealth's submission that the fact-intensive element of knowledge that it seeks to introduce into s 44(i) "would have to be 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)" (CS [74]) rings somewhat hollow in a case where there is no contradictor in fact and therefore no opportunity to submit that there should be drawn from evidence of knowledge of certain surrounding facts an inference of actual knowledge of foreign citizenship, contrary to a sworn denial.

On the alternative construction of section 44(i) — constructive knowledge

79. However, if s 44(i) can be engaged by *constructive knowledge* arising from knowledge of circumstances which would put an honest and reasonable person on an inquiry that would have revealed the true facts (such constructive knowledge falling short of an inferred actual knowledge that would need in fairness to be put to a witness) then we submit that each of the Senators is disqualified.

Senator Canavan

80. Senator Canavan knew the following facts before the date of his nomination:

(a) His maternal grandparents had been Italian nationals (**CB 270** [9]);

(b) He recalls that his mother informed him that he was "eligible to obtain" Italian citizenship (**CB 270** [9]), but he cannot recall exactly how she said she came by that information (**CB 270** [9]). In light of the Senator's understandably imperfect recollection of this conversation in 2006, and in light of the true position being that he was not merely "eligible to obtain" but had in fact obtained Italian citizenship, it is possible that the Senator's mother told him not that he was "eligible to become" but that he "was" an Italian citizen. The evidence has not been explored with Senator Canavan or his mother.

(c) The conversation with the Senator's mother also involved the Senator's brother (**CB 270** [9]);

(d) In 2007 or 2008, the Senator learned that his brother "did take steps to acquire" Italian citizenship and an Italian passport (**CB 270** [12]). The Senator does not say whether he knows what those steps were. It would appear from the fact of automatic citizenship that the Senator's brother, who is "legally qualified" (**CB 270** [13]), may have known at the time that he obtained his citizenship automatically. The evidence has not been explored with the Senator or his brother.

(e) His mother gave him certain documents in 2006 (**CB 270** [10]). The documents on their face disclosed that they were for Italian citizens to complete: "All Italian citizens residing abroad must register in the AIRE in order to access consular services and therefore it is very important that you complete this form" (**CB 290**); "Form for registration in register of Italians resident abroad – AIRE" (**CB 290**). Senator Canavan does not say whether he read the documents or not.

81. Senator Canavan was "aware of the constitutional implications which would have followed from holding dual citizenship" (**CB 270** [13]). He signed a solemn declaration that he was not a foreign citizen (**CB 82**). The fact of his Italian citizenship could have been very easily ascertained by an enquiry of the Italian embassy of the kind in fact made in July 2017 (**CB 271** [15]-[17]). Notwithstanding Senator Canavan's evidence that it never occurred to him that he might be an Italian citizen (**CB 272** [24]), it ought to have occurred to him. He had knowledge of circumstances which would put an honest and reasonable person on inquiry, which would have revealed the true facts.

Senator Nash

82. Senator Nash knew the following facts before the date of her nomination:

(a) Her father was born in Scotland (**CB 593** [12]);

(b) Her sisters were born in England and were British citizens (**CB 593** [12]);

(c) Her parents told her that her sisters were British citizens because they were born in England and that she would need to apply to become a British citizen (**CB 594** [27]).

83. Senator Nash was aware of British citizenship in her immediate family, including her father and her sisters. Her mother, who is a doctor and not apparently legally trained, told her, in effect, that she was not a British citizen. The Senator appears to have accepted this and made no inquiries about her status, notwithstanding being required to sign a solemn declaration that she was not a foreign national (**CB 183**). Her status as a British national could have been ascertained very easily by an enquiry of the UK Home Office of the kind in fact made in August 2017 (**CB 593-594** [22]-[23]).

84. Notwithstanding Senator Nash's evidence that she believed that she held only Australian citizenship (**CB 594** [26]), it ought to have occurred to her that her belief might be incorrect. She had knowledge of circumstances which would put an honest and reasonable person on inquiry, which would have revealed the true facts.

Senator Xenophon

85. Senator Xenophon specifically turned his mind to the issue of renouncing any foreign citizenship before his first election to the Australian Senate (**CB 657** [17]).

86. The Senator made no inquiries about potential British citizenship because, he says, he was "unaware of, and [his] mind did not turn to, the fact that Cyprus had attained her status as an independent nation from the United Kingdom when [he] was an infant" (**CB 657** [18]).

87. The Senator did know, however, that Cyprus was a former British colony. He says that his father's views about Britain, "as expressed to [him] from time to time", were somewhat negative because "the British were unwelcome occupiers of Cyprus and he supported the independence movement" (**CB 656** [13]).

88. That fact would have put an honest and reasonable person on inquiry about possible British nationality and the inquiry would have revealed the true facts.

Concluding observation

89. The foregoing factual analysis (made briefer than it might otherwise have been by the absence of any factual contest or cross-examination of the witnesses by any person with an interest in factual contradiction) demonstrates the problem in the construction advanced by the Commonwealth and the Senators. A construction under which constitutional eligibility to sit in Parliament turns on factual analysis of this kind is to be avoided. Such factual contingencies are apt to render the operation of s 44 uncertain and difficult to administer, with no real countervailing benefit.

90. The only benefit of the Commonwealth's construction is that disqualification will be avoided by certain individuals who could very easily have ascertained their disqualification and equally easily taken steps to relieve themselves of it. That is not a benefit that warrants the long-term distortion of s 44(i) that the Commonwealth's construction would occasion.

V Orders Sought

91. For the foregoing reasons, the amici submit that in each reference Question (a) should be answered "Yes". Question (b) should be answered in the manner proposed by the Commonwealth in relation to Mr Ludlam and Senator Roberts so as to cause a special count of the ballot papers: CS [92]-[95]. We do not contradict the answers proposed by the Commonwealth to Questions (c) and (d).

VI Estimate of Time

92. We seek up to 2 hours for the presentation of oral argument.

Date: 3 October 2017

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