



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

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ANNOTATED SUBMISSIONS OF SENATOR MALCOLM ROBERTS

PART I: PUBLICATION

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

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PART II: ISSUES

2. The issues for determination in this reference are:
 - i. At any time between his nomination on 8 June 2016 and his formal renunciation of British citizenship on 2 November 2016, was Senator Roberts a citizen of Britain for the purpose of section 44(i) of the Constitution;
 - ii. What is the appropriate relief should the Court find that section 44(i) does apply to the facts of this reference.

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PART III: CONSTITUTIONAL NOTICE

3. The Attorney-General has given sufficient notice in this proceeding.

PART IV: MATERIAL FACTS

4. It is accepted that Senator Roberts was, pursuant to British law, a citizen of Britain as at the date of his nomination, 8 June 2016.
- 40 5. As at that date, Senator Roberts believed he was an Australian citizen and only an Australian citizen, but was aware there was a real and substantial prospect he might also be a British citizen.¹
6. By 8 June 2016, Senator Roberts had taken steps to ascertain from the British government whether he was in fact a British citizen, and had taken steps to renounce any British citizenship he might have held at that time.

¹ *Re Roberts* [2017] HCA 29 at [116]

7. The steps Senator Roberts had taken to renounce any British citizenship were bona fide, but as at 8 June 2016 had miscarried under British law. He continued to take steps to renounce whatever British citizenship he may have held after his election, and by 2 November 2016 Senator Roberts had done everything he could possibly do to renounce British citizenship under British law, which was accepted by that country as effective on 5 December 2016.

10 8. The essential facts are as found by Keane J at [16]-[66] of his judgment.² Some additional findings are made by Keane J towards the end of his judgment. The factual matters determined by Keane J are accepted. Where additional facts are contended for in these submissions, references to the evidence are provided.

PART V: RELEVANT PROVISIONS

9. The applicable provisions in this reference are to be found in the Constitution and the *Commonwealth Electoral Act 1918* (Cth).

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PART VI: ARGUMENT

Introduction

30 10. Senator Roberts adopts the primary submission of the Attorney General that to be found within s 44(i) is a question of “voluntariness”. What is not accepted is the Attorney’s more specific contention that in respect of a person who is in fact born in Australia, and upon whom foreign citizenship is conferred without their knowledge or consent, such foreign citizenship is not voluntary and therefore the provision is not engaged.

40 11. The Attorney draws a distinction between people he calls “natural born Australians” and a person who is “naturalized as an Australian citizen” and says that as that person would “ordinarily be aware” of having held that foreign citizenship, or at least that there was a real and substantial prospect that they did so, unless that person takes all reasonable steps to renounce their Britain citizenship, their retention of it cannot be described as “voluntary” (submissions of the Attorney General at [8(b)], [68]–[69]). It is not explained why that same ordinary presumption would not apply to people born in Australia who obtain citizenship by dint of one of their parents’ nationalities.

12. Senator Roberts adopts - in principle - the Attorney General’s submissions relating to the following two criteria he discerns in the meaning of s 44(i). The first is a consideration of the person’s relevant subjective state of mind, and the second is, depending on that state of mind, whether “reasonable steps have been taken within a reasonable time”.

² *Re Roberts* [2017] HCA 39

13. The Attorney submits that a person who does not know they were ever a citizen of a foreign country, and for that reason takes no steps to renounce that citizenship, is not disqualified by reason of s 44(i) because either 1) it can be said that the foreign citizenship was not voluntary, or 2) that the taking of no steps in those circumstances is reasonable steps.

14. Such a conclusion ought be rejected, it appears contrary to the holding in *Sykes v Cleary*,³ at least insofar as that case concerned Mr Delacretaz and (especially) Mr Kardamitsis.

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15. Senator Roberts did not know he was a citizen of Great Britain but, sensibly, did appreciate that there was a real prospect he might be. The Attorney submits, without explanation, that level of suspicion amounts to knowledge for the purpose of his preferred construction of s 44(i). He then says in relation to Senator Roberts that he did not take reasonable steps, within a reasonable time, to renounce his British citizenship.

16. Senator Roberts' answer to the Attorney's case against him is as follows:

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a. Firstly, that the essential finding is that he did not know (believe) he was a British citizen at the relevant time.⁴ The fact he appreciated he might be wrong in that regard is irrelevant.

b. Secondly, if suspicion amounts to knowledge, he did take reasonable steps to renounce that citizenship within a reasonable time.

c. Thirdly, that in his case the "reasonable time" is the continuum of time that commenced prior to his date of nomination, ran through the period when he was "chosen", and continued during the period when he was sitting. If the Court should find that that continuum of "reasonable time" expired during his sitting period, then it would follow that he was a person qualified to be elected but that while he was sitting he became disqualified and the vacancy thus created would be treated by this Court as a casual vacancy.

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The Proper Construction of Section 44(i)

17. Whatever the construction of section 44(1), absent extreme, unrealistic and arbitrary citizenship requirements on the part of a foreign power, ignorance of foreign citizenship *per se* must be irrelevant to the operation of the section: *Sykes v Cleary*⁵

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18. This is because a person who, whether due to stupidity, ignorance, willful blindness or reckless disregard simply has not adverted to the possibility of

³ 176 CLR 77 at 103 (Delacretaz) and at 104-5 (Kardamitsis) (plurality explicitly finding that Mr Kardamitsis had no knowledge of any foreign citizenship or of any process of renouncing same)

⁴ *Re Roberts* [2017] HCA 39 at [116] (Keane J finding Senator Roberts was aware there was a "real substantial prospect" he held foreign citizenship at the time of his nomination, that is, that Senator Roberts had a suspicion of foreign citizenship at that time, rather than actual knowledge)

⁵ 176 CLR 77 at 113 (example given by Brennan J an "extreme" conferral of foreign citizenship)

being a citizen of another country at the time “of being chosen” may, while sitting, come to learn that he or she is in fact a citizen of another country.

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19. Subjective understandings or beliefs are by definition mutable, such that a person’s subjective understanding may change during the period from date of nomination to the last day a Member of Parliament sits in a term. Sections 44 and 45 of the Constitution need to be read so as to work harmoniously and be capable of dealing with changing and changeable states of belief.
20. It is a wholly unworkable construction of those provisions for a person’s eligibility to sit in parliament to be dependent on the vagaries of that person’s shifting subjective state of mind from time to time.
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21. All of the other criteria in s 44 are capable of being satisfied objectively. Whilst, for example, it is theoretically possible for a person to have been declared bankrupt but not know about it (because, say, substituted service was obtained by the petitioner), it would be an odd construction to import a subjective test to that provision such that by extension of reasoning total ignorance could be found to qualify the constitutionally disentitling provision.
22. That is not to say there is not a subjective element involved. There is but it must be proved by incontrovertible objective facts, not by bare assertions in affidavits.
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23. Senator Roberts’ case is unique amongst those now before this Court. His subjective belief was that he was only Australian. He however, alone, sensibly appreciated the possibility he might be wrong. The fundamental fact remains he did not know or believe he was anything other than Australian. In that regard, his case is on all fours with the others. The Attorney does not explain why in this case he arbitrarily equates suspicion to knowledge. Imputed knowledge has no place in this area of the law. Like ‘intention’ in criminal law, for the purpose of applying s 44 to a person he or she must be found as a matter of fact to either know or not know foreign citizenship status.
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24. Senator Roberts’ case is stronger than those who profess ignorance and thus did nothing. Senator Roberts’ actions at the time of nomination demonstrate he did not want to be a citizen of any other country. To the extent the Attorney’s submissions ground the construction of s 44(i) in ‘voluntariness’, it is clear Senator Roberts never acquiesced in or accepted British citizenship and to the contrary by 6 June 2016 the objective evidence shows he had turned his mind to the possibility he might hold British citizenship and he sought to reject it.
25. The purpose of s 44(i) is to prevent conflicts in terms of loyalties to Australia. The objective evidence of his actions at the time of nomination demonstrates that Senator Roberts’ subjectively had no conflict of loyalty.

26. A person who has not turned his or her mind to the possibility of an ulterior allegiance can never satisfy that purpose. If he or she has not thought about it, then he or she has not the requisite state of mind. It is always open to that person to find out later and to feel an irresistible ancestral pull, thereupon bifurcating loyalties to Australia and to that other country.
27. The Attorney General accepts that the subjective knowledge of a person can change from time to time. No doubt this is why he said that not only that there is a “reasonable steps” exception, but also that those “reasonable steps” need be taken within a “reasonable time”.
28. This then leaves open the possibility of a person becoming aware they are a foreign citizen (or potentially a foreign citizen) just prior to being “chosen” or else during their term and taking steps to renounce within a “reasonable time” after becoming so aware. On the Attorney General’s construction, the Constitution accepts that there is a period where the conflict is potentially in play but that within that period of “reasonable time” the person will be taking (reasonable) steps to rectify the newly aware situation. That is precisely Senator Roberts’ factual case.
29. Whilst Senator Roberts’ attempt to renounce his British citizenship prior to his nomination was ineffective under British law, its effect for the purpose of s 44(i) was that he satisfied the subjective element of the test identified in the various judgments in *Sykes v Cleary*⁶ and contended for by the Attorney. It cannot be said he voluntarily retained or acquiesced in any British citizenship. Moreover - and this is where his case is stronger than the others - it *can* be said he *positively rejected* the notion of being a British citizen.
30. Before getting to the question of “reasonable steps”, or perhaps acknowledging that the question of “reasonable steps” is in fact bound up in the subjective element of s 44(i), Senator Roberts was not at any time after 8 June disqualified from being chosen.
31. In the alternative, Senator Roberts contends he had taken reasonable steps to renounce his British citizenship by 8 June 2016.
32. Another way of getting to the same result is to accept the Attorney General’s qualifying test of “reasonable steps” within a “reasonable time” and to acknowledge that Senator Roberts did successfully renounce his British citizenship on 5 December 2016 and had done everything he could possibly do to renounce by 2 November 2016. The question is not whether he took reasonable steps, because by 2 November he had done so. The question is whether those steps were taken within a reasonable time. The court should conclude that he satisfies that test and therefore was qualified to be elected and at no time during his term has s 45(i) become engaged. It is of course always open to the Court to conclude that the “reasonable time”

⁶ 176 CLR 77 at 127 (Deane J – “similar mental element”) and at 131 (Dawson J – “the person’s knowledge of his nationality”)

had expired sometime between 5 August and 2 November 2016, the consequence of which was that Senator Roberts was validly elected but subsequently became disqualified. Should the Court so find, in terms of remedy the vacancy thereby created ought to be treated as a casual vacancy.

“Reasonable steps”

- 10 33. It is common ground between the Attorney and Senator Roberts that a reasonable steps test applies. The content of what is reasonable is unclear.
34. In *Sykes v Cleary* the plurality said: “What amounts to the taking of reasonable steps to renounce foreign nationality *must depend upon the circumstances of the particular case*. What is reasonable *will turn on the situation of the individual*, the requirements of the foreign law and the extent of the connection between the individual and the foreign state of which he or she is alleged to be a subject or citizen”.⁷
- 20 35. In that same case, Dean J said: “A person who becomes an Australian citizen will not be within the second limb ... if he or she has done all that can reasonably be expected of him or her to extinguish any former relationship with a foreign country ... ”⁸
36. Dawson J in the same case said: “It will depend upon such matters as the requirements of the foreign law for the renunciation of the foreign nationality, *the person’s knowledge of his foreign nationality* and the circumstances in which the foreign nationality was accorded to that person”.⁹
- 30 37. Gaudron J in that same case said: “The question whether reasonable steps have been taken is a question for Australian law. It may involve some consideration of the content of the law of the country whose citizenship is in question *but the main consideration must be the circumstances of the person concerned*”.¹⁰
38. So it can be seen that there are two matters that need to be considered.
- 40 a. First, what steps did Senator Roberts actually take and the
b. Second, what were his circumstances at the time of taking those steps that are to be considered to determine whether those steps were reasonable for the purpose of s 44(i)

⁷ 176 CLR 77 at 108 [emphasis added]

⁸ 176 CLR 77 at 128

⁹ 176 CLR 77 at 131 [emphasis added]

¹⁰ 176 CLR 77 at 139 [emphasis added].

39. Dealing with these matters in reverse order, the following are the circumstances in which - the findings and evidence show - Senator Roberts took the steps that he did:

- i. That his only connection with Britain was that his father had been born there (CB1276[16]) and that he had travelled there from time to time as a tourist (CB1279[30]).
- 10 ii. That connection can be contrasted with his connection to the United States of America where he had lived and worked for some time, married an American citizen, had children who are American citizens and he was himself partially educated there (CB1279-80).
- iii. He has been a permanent resident of Australia and travelled on an Australian passport (CB1279[30]) at all times since coming to this country from India when he was 7 years of age (CB1278[22]).
- 20 iv. At no time has he ever believed he was a British citizen (CB810[9.14]). The highest that can be said against him is that he had a level of suspicion that he might be (CB1300[116]).
- v. During Senator Roberts' childhood Australians all travelled on British passports and many legitimately considered themselves both to be Australian and British at the same time without drawing any distinction between notions such as citizenship or nationality.¹¹
- 30 vi. Australia and Great Britain have at all times had the same sovereign, and oaths of allegiance are given to that same person albeit in different capacities.
- vii. Senator Roberts was brought up in a household which imbued in him a strong national identity as an Australian and only an Australian (CB808[9.6], 810[9.14], 928[4.2] and 929[4.6]).
- viii. Senator Roberts is not a lawyer let alone a constitutional lawyer.
- 40 ix. Senator Roberts had no prior experience as a politician in any level of government and decided to stand for the senate only in late April 2016 (CB807[8.4] and 919[3.1]).
- x. Senator Roberts' wife, on whom he places great reliance for her assistance, was herself during the period April - August 2016 suffering from a serious illness and had also been spending large amounts of time in the United States looking after her then dying mother (CB919[3.3]).

¹¹Until this Court's decision in *Sue v Hill* 199 CLR 462, the questions whether Australians were also "British" and/or whether Britain was a "foreign power" for the purpose of the Constitution were evolving ones.

- xi. Senator Roberts previously had dealings with the Indian government concerning an application for a visa and had obtained the relevant information by which he dealt with the Indian government by searching the internet (CB809[9.9]).

40. The next matter concerns what steps did Senator Roberts take and when. They are as follows:

- 10 i. Senator Roberts decided to stand for the senate in late April 2016 (CB807[8.6]).
- ii. Shortly after signing his "One Nation Nomination Form" he turned his mind to the question of foreign citizenship and wrote his first email to the British Consulate in Brisbane (CB807-809[9.1]-[9.9]).
- iii. It is to be inferred he obtained the email address from one of the web pages identified by the solicitor for the Attorney General when she made a similar search in recent weeks (CB956[15]).
- 20 iv. To this day there are still multiple operational web pages with the same email addresses for the British Consulate in Brisbane as those that were used by Senator Roberts, and it ought to be inferred that at least those sites - and probably others - existed when Senator Roberts made his internet searches in April - June 2016.
- v. The email addresses used by Senator Roberts when writing that first email were "non-operational" (CB957[23]), which had the effect they did not produce any automatic "bounce back", redirection or other response (CB809[9.11] and 954[7]-[8])).
- 30 vi. By his first email Senator Roberts posed the question "Am I still a British citizen?" (CB851). That is objective evidence probative of Senator Roberts at no time prior to that email having voluntarily accepted or acquiesced to any British citizenship. In context, it is clearly referring to his status prior to him obtaining Australian citizenship in 1974.
- vii. Senator Roberts honestly believed that his email had been sent to an official organ of the British government (CB809[9.9]). It was an analogous organ to the one he had successfully dealt with two years earlier when obtaining a visa from the Indian Government (CB809[9.9]).
- 40 viii. Senator Roberts signed his official nomination form for the Senate election on 3 June 2016 (CB854-855). Over that weekend, he reflected and recalled that he had not received a response to his earlier email (CB809[9.11]).

- ix. On 6 June he sent a further email to the same two addresses as previously, together with a third address said to have been to the High Commission of Great Britain in Canberra (CB851).
- x. Those addresses, or at least the one to the High Commission in Canberra, were obtained - it ought to be inferred - from the VisaHQ¹² website identified by the solicitor for the Attorney General. That website remains operational to this day (CB981-985).
- 10 xi. That VisaHQ website provides reliable information in other respects. For example, the telephone numbers are correct, the street addresses are correct, and a reference to a website is correct (CB956[15]-[16]).
- xii. No response of any type was received by Senator Roberts from any of the addresses to which the second email was sent (CB921[5.1]).
- 20 xiii. That email contains the strongest objective evidence of Senator Roberts' state of mind at the time. That is, that he was still in a state of doubt as to whether he was a British citizen or not but, out of an abundance of caution he was making it clear that *if* he was a British citizen then he renounced such citizenship.
- xiv. That email was ineffective under British law for the simple reason it was not received by any agent of Great Britain. It appears to have literally gone into the ether. If it had been received it would still have been ineffective for three highly technical reasons being (CB1098-1099):
- 30 a) It would still have been sent to the wrong address (albeit that would have been the correct address up to 2012 (CB1292-1293[82])).
- b) No payment of a fee was enclosed (CB1297[102]); and
- c) There was no "declaration of the truth" of the matters contained in the email (CB1296[98]).
- 40 xv. From the time he sent that email, Senator Roberts honestly but wrongly believed that he had done everything he could do to renounce any British citizenship he may have had (CB921[5.1]).
- xvi. The election took place and Senator Roberts was elected (the declaration of the poll was 5 August 2016). He has since taken the oath of allegiance and sat in the Senate of the Parliament of the Commonwealth of Australia as a Senator from Queensland.

¹² <https://united-kingdom.visahq.com.au/embassy/australia/>

- xvii. At all times since his nomination Senator Roberts' state of mind has been that he had resolved such suspicions that he had as to British citizenship by sending the emails and that he was only an Australian citizen (CB921[5.1]).
- xviii. On 7 August (2 days after he was declared a senator), Senator Roberts' wife received an email from a concerned citizen suggesting that Senator Roberts was disqualified from sitting as a senator because he had been born in India and therefore was an Indian citizen (CB920[4.2]).
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- xix. This provoked Mrs Roberts on behalf of her husband to make enquiries of the situation in both India and Britain to, firstly, satisfy themselves that he was in fact a qualified person and, secondly, to obtain documentary evidence of that fact (CB921[5.1]).
- xx. For at least a month in around September 2016 Mrs Roberts was herself undergoing chemotherapy for breast cancer (CB922[5.10]).
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- xxi. Mrs Roberts' efforts resulted in a chain of events which led to Senator Roberts sending a properly completed "RN15" form to the Home Office in London together with the stipulated fee on 2 November 2016 (CB922-923[5.13]).
41. Taking all of the above into account, the court ought to conclude that by 2 November 2016 Senator Roberts had taken all reasonable steps to renounce his British citizenship.
42. The first question is: was the continuum of time in which the process of taking those steps a "reasonable time"; that is, the period from when he first commenced the process on 1 May 2016, to when he sent his declaration of renunciation to the United Kingdom Home Office on 2 November?
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43. Taking into account the particular matters relevant to Senator Roberts' position and circumstances at the time, the court ought to answer that question "yes". That being the case, and accepting the Attorney General's construction of s 44(i), there ought to be a declaration that at the time he was "chosen" and at all times since Senator Roberts has not been disqualified from sitting in the Australian parliament.
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44. In the alternative, the court ought to conclude that as at 8 June 2016 Senator Roberts had taken all reasonable steps to renounce his British citizenship, albeit those steps miscarried under British law. Again, this is a qualitative judgment based on an analysis of what Senator Roberts did, together with an appreciation of his particular circumstances.
45. The court ought to conclude that in those circumstances, and up to that time, the steps Senator Roberts did take are to be seen as reasonable. It would follow that from that point on Senator Roberts has never been a citizen of Britain for the purpose of s 44(i).
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46. The fact that it is easy to identify other steps Senator Roberts could have taken during the period which may or may not have produced a different outcome is not to the point. If there is a reasonable step test then it must be accepted that something less than perfection is contemplated. Otherwise, the question of reasonableness would never arise.

Conclusion

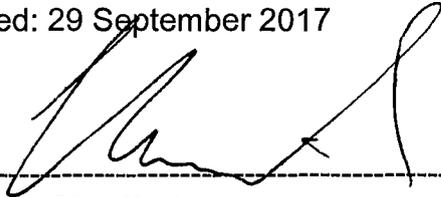
10 47. Senator Robert's case is as follows:

- i. As a matter of fact, his case is indistinguishable from most of the other referents now before the Court, in particular, those of Mr Joyce, Senator Canavan, Senator Waters, Senator Nash and Senator Xenophon. This is because the finding that he understood that there was a real substantial prospect that he was a British citizen is irrelevant to the matter at hand. The question is: what did he believe his citizenship to be. He believed he was Australian and that is the end of the matter.
- 20 ii. The ultimate submission by the Attorney to the effect that people who just do not know they are a citizen of another country and because of that do nothing about it are somehow in a better position vis-a-vis s 44(i) than someone who acknowledges the possibility and honestly tries to reject any other citizenship is as alarming as it is illogical. That submission is to be rejected.
- iii. If that be wrong, a reasonable time for Senator Roberts to take steps to renounce had not expired by 8 June 2016, nor had it expired by 2 November 2016, and thus the same result is achieved.
- 30 iv. If that be wrong, it ought be found that unlike all of the other matters before the Court, Senator Roberts made honest and legitimate attempts to renounce his British citizenship prior to his nomination on 8 June, which steps, albeit ineffective under British law, were sufficient to disengage s 44(i) and thus he has been and remains qualified to sit in the Senate.
- v. Finally, if a reasonable time is found to have expired sometime between the date of his election (5 August 2016) and the date that he had done everything he possibly could do under British law to renounce (2 November) then the proper analysis is that by virtue of s 45 of the Constitution he became disqualified during his tenure while sitting and thus the appropriate relief ought to be that the matter be treated as a casual vacancy, making it a matter for the Queensland parliament as to who is to be appointed to that vacancy.
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PART VII: ESTIMATE OF TIME REQUIRED FOR SUBMISSIONS

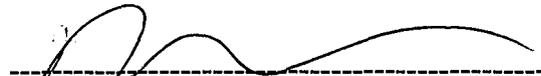
48. Up to 2 hours will be required by Senator Roberts in oral submissions.

Dated: 29 September 2017

A handwritten signature in black ink, appearing to read 'Robert Newlinds', written over a horizontal dashed line.

Robert Newlinds

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A handwritten signature in black ink, appearing to read 'Richard Scheelings', written over a horizontal dashed line.

Richard Scheelings