IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY **NO C 32 OF 2017**

RE SENATOR KATY GALLAGHER
Senate reference under s 376 of the
Commonwealth Electoral Act 1918 (Cth)

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ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

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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 intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) and is also a party by virtue of orders made by Kiefel CJ on 19 January 2018 pursuant to s 378 of the *Commonwealth Electoral Act 1918* (Cth). Senator Gallagher has given notice under s 78B of the *Judiciary Act*.

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PART III APPLICABLE CONSTITUTIONAL PROVISIONS

3. Section 44 of the Constitution relevantly provides:

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

PART IV ARGUMENT

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SUMMARY

4. This reference principally concerns whether Senator Gallagher was incapable of being chosen as a senator at the 2016 federal election by reason of s 44(i) of the Constitution.

5. It is not in dispute that, at the time of nominating for and being returned as elected in that election, Senator Gallagher was a British citizen. According to the plain meaning of the peremptory terms of s 44(i), she was therefore incapable of being chosen as a senator at that election. The issue is whether the exception to the ordinary operation of s 44(i) that the Court identified in *Re Canavan*[1] applies, such that Senator Gallagher was capable of

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[1] *Re Canavan* (2017) 91 ALJR 1209, 1214 [13].

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being chosen as a senator notwithstanding that she was a British citizen during the process of choice to which s 44(i) refers.

6. In summary, the Attorney-General submits as follows:

   6.1. The exception is co-extensive with the 'constitutional imperative' that a person not be 'irremediably prevented by foreign law from participation in representative government'.[2] That constitutional imperative requires s 44(i) to be read subject to an 'implicit qualification' where the terms or operation of foreign law make it impossible, or not reasonably possible, for a candidate for election to renounce their foreign citizenship. Only in such a case can a candidate avoid the strict operation of s 44(i). In all other cases, both the reasoning in *Re Canavan* and considerations of principle mandate that it is insufficient for a candidate merely to have taken steps to renounce their foreign citizenship: they must actually have divested themselves of their status as a foreign citizen in a way that is effective under foreign law before the commencement of the process of choice during which s 44 applies (**section A below**).

   6.2. British law does not make it impossible, or not reasonably possible, for a person to renounce British citizenship. To the contrary, it provides a straightforward path to do so. It is therefore irrelevant whether or not Senator Gallagher took all steps reasonably required by foreign law to renounce her British citizenship before nomination. She was incapable of being chosen as a senator because, at the time of nomination,[3] she was a citizen of a foreign power (**section B below**).

   6.3. Alternatively, even if it were sufficient for Senator Gallagher to have taken all steps reasonably required by British law to renounce her British citizenship prior to nomination, she did not do so (**section C below**).

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[2] (2017) 91 ALJR 1209, 1223 [72].

[3] '[I]n s 44 the words "shall be incapable of being chosen" refer to the process of being chosen, of which nomination is an essential part. Accordingly, the temporal focus for the purposes of s 44(i) is upon the date of nomination as the date on and after which s 44(i) applies until the completion of the electoral process': *Re Canavan* (2017) 91 ALJR 1209, 1213 [3].

A. THE EXCEPTION TO S 44(i) AND THE CONSTITUTIONAL IMPERATIVE

7. In the course of submissions in *Re Canavan*, various parties relied on references in *Sykes v Cleary*[4] to it being sufficient to avoid disqualification under s 44(i) that a person had taken 'all reasonable steps' to renounce their foreign citizenship prior to nominating for election. It appears that Senator Gallagher advances a similar argument.

8. The Court commenced its reasoning in rejecting those submissions by saying:[5]

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

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9. That passage makes it plain that it is not to the point to ask whether Senator Gallagher made reasonable efforts to comply with s 44(i). The peremptory terms of s 44(i) disqualify a person who possesses the <u>status</u> of a foreign subject or citizen at the time of nomination (as Senator Gallagher plainly did), whether or not the person made reasonable efforts to comply with s 44.[6] That is why s 44(i) may disqualify an Australian citizen who has not sought, is not aware of, and has never had occasion to consider, their foreign nationality.[7]

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10. The quote above is inconsistent with interpreting s 44(i) as allowing a candidate to escape its operation simply by demonstrating that he or she took all reasonable steps to renounce foreign citizenship in the particular circumstances of his or her case (having regard, for example, to the inquiries that they made about the renunciation process, the accuracy of their subjective understanding of the steps that they needed to take, or the evidence to which they reasonably had access having regard to their personal or family circumstances). Properly understood, the exception to the strict operation of s 44(i) that was recognised in *Re Canavan* is much narrower.

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[4] (1992) 176 CLR 77.
[5] (2017) 91 ALJR 1209, 1221 [61]. See also 1218 [39] and 1218-1219 [43]–[45].
[6] (2017) 91 ALJR 1209, 1215-1216 [21], [23], [25] and 1223 [71].
[7] At least in the case of citizenship by descent: (2017) 91 ALJR 1209, 1216 [26] and 1221 [60].

(a) The constitutional imperative

11. In *Re Canavan*,[8] the Court summarised its conclusion as follows:[9]

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

12. The first sentence of the above passage, together with many other parts of the Court's reasons in *Re Canavan*, emphasise that ordinarily a person who has the status of a foreign citizen at the time of nomination is disqualified by s 44(i).

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13. The reason that s 44(i) does not invariably disqualify such a person is that a person's status as a foreign citizen is determined by reference to foreign domestic law.[10] That gives rise to the possibility that, in cases where it is impossible or unreasonably difficult under foreign law for an Australian citizen to divest themselves of their status as a foreign citizen, an Australian citizen would be 'irremediably prevented' by s 44(i) from seeking election to the Federal Parliament.[11]

14. The Court explained that an 'implicit qualification'[12] on the operation of s 44(i) was required to respond to foreign laws of that kind.[13] It emphasised that *Sykes v Cleary* did not stand for the proposition that 'a candidate who could be said to have made a reasonable effort to comply with s 44(i) was thereby exempt from compliance'.[14] Rather, the Court explained that the focus of the concern of the majority in *Sykes v Cleary* was 'upon the impediment posed by foreign law to an Australian citizen securing a release from foreign citizenship notwithstanding reasonable steps on his or her part to sever the foreign attachment' (emphasis added) or, as put by Dawson J, with a construction of

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[8] (2017) 91 ALJR 1209.
[9] (2017) 91 ALJR 1209, 1223 [72].
[10] (2017) 91 ALJR 1209, 1218 [37].
[11] (2017) 91 ALJR 1209, 1223 [72].
[12] (2017) 91 ALJR 1209, 1214 [13].
[13] (2017) 91 ALJR 1209, 1218-1219 [37]-[46].
[14] (2017) 91 ALJR 1209, 1219 [45].

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s 44(i) 'that would unreasonably result in some Australian citizens being irremediably incapable of being elected to either House of the Commonwealth Parliament'.[15] That is, the concern was that a person would be 'irremediably incapable of being elected to either House of the Commonwealth Parliament'.[16]

15. The Court recognised that to give effect to a foreign law of that kind would be contrary to the 'constitutional imperative'[17] that Australian citizens who possess the relevant qualifications are entitled to become senators or members of the House of Representatives. The Court did not suggest that s 44 should be interpreted so as not to place impediments in the path of an Australian citizen who wishes to become a senator or member of the House of Representatives. On the contrary, the very purpose of s 44 is to prevent Australian citizens from being chosen to sit in the Australian Parliament in some circumstances. The 'constitutional imperative' is not to construe s 44(i) in a way that minimises the burden that it imposes on participation in representative government by Australian citizens, but simply to ensure that s 44(i) does not impose insuperable obstacles to such participation.

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16. Accordingly, the constitutional imperative identified in *Re Canavan* requires the ordinary textual meaning of s 44(i) to be limited – by a process of constitutional implication – to the extent necessary to ensure that Australian citizens are not 'irremediably prevented by foreign law from participation in representative government'. The word 'irremediably' means 'not remediable; that does not admit of remedy, cure or correction; incurable, irreparable'.[18] It is used four times, in critical passages in the judgment.[19] The repeated use of that word highlights the narrow intended scope of the exception to the ordinary textual meaning of s 44(i).

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17. A foreign law will 'irremediably prevent' a person from renouncing foreign citizenship if in its terms or operation it make it impossible, or not reasonably possible, for a person to renounce foreign citizenship. That this is the intended meaning of the phrase appears in particular from the example given by the Court of a circumstance in which the

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[15] (2017) 91 ALJR 1209, 1219 [46], citing *Sykes v Cleary* (1992) 176 CLR 77, 131.
[16] (2017) 91 ALJR 1209, 1219 [44].
[17] (2017) 91 ALJR 1209, 1219 [43]. The same phrase is used in 1214 [13] and 1223 [72] (twice).
[18] *Shorter English Oxford Dictionary* (6th edn).
[19] (2017) 91 ALJR 1209, 1218 [43], 1219 [44], 1219 [46] (quoting *Sykes v Cleary*) and 1223 [72].

exception would apply. The Court noted that, in *Sykes v Cleary*, one of the disqualified persons could have, but had not, applied to the Greek government to exercise its discretion to release him from his Greek citizenship. It then continued:[20]

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

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18. It is implicit in the above example that a requirement to perform an act of renunciation within the territory of the foreign power would have to be complied with unless that requirement created a risk to person or property. That emphasises that the exception is not engaged by foreign laws that make renunciation difficult, but only by foreign laws that make it impossible, or not reasonably possible, to renounce foreign citizenship.

19. Significantly, at the conclusion of the quote in paragraph 17 above, the Court noted that none of the references then before the Court concerned laws of that character. As two of the referred persons in *Re Canavan* — Senator Roberts and Senator Nash — were British citizens, it is evident that the Court did not regard the steps then necessary to renounce British citizenship (which have not changed since) as engaging the exception.

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20. The Court's conclusion in paragraph 72 of its reasons (quoted in paragraph 11 above) refers repeatedly to whether the operation of 'foreign law' is contrary to the constitutional imperative, and to an assessment of the steps 'reasonably required by foreign law'. Read in context, the reference to 'foreign law' in the second sentence of paragraph 72 refers to the same foreign laws that are referred to in the first sentence – ie, foreign laws that irremediably prevent Australian citizens from participating in representative government. It is only in the context of those laws that the exception is engaged, such that it is sufficient to avoid disqualification if the person has taken all steps that are reasonably required by the foreign law.

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[20] (2017) 91 ALJR 1209, 1223 [69].

21. In all other cases, s 44(i) operates in accordance with its terms. It is an error to read the second sentence in paragraph 72 as if it supports the existence of an exception to s 44(i) that applies whenever a candidate has taken all reasonable steps to renounce their foreign citizenship, whether or not those steps have been effective to divest the candidate of his or her status under foreign law at the time of nomination. Still less does that sentence support a 'reasonable steps' exception that involves an assessment of matters other than the content of foreign law.

22. If such an exception existed, it would mean that a person who was undoubtedly a foreign citizen at the time of nomination (or, indeed, after taking a seat in Parliament) could escape the plain and ordinary meaning of s 44(i) simply by pointing to the fact that he or she had taken all reasonable steps to renounce foreign citizenship before nominating, even though foreign law plainly did not 'irremediably prevent' the person from renouncing their foreign citizenship in a way that was effective under foreign law, and thereafter participating in representative government. In such a case, the constitutional imperative identified in *Re Canavan* plainly would not justify confining the ordinary meaning of s 44(i). Yet no other justification has been advanced for departing from the ordinary meaning of the constitutional text.

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(b) Additional reasons to confine the scope of the exception to s 44(i)

23. There are four additional reasons why the above submissions concerning the limited nature of the exception to s 44(i) should be accepted.

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24. *First*, the exception is a constitutional implication ('implicit qualification') sourced in the text and structure of the Constitution as a whole.[21] It operates to confine the 'peremptory terms'[22] of s 44(i). As this Court unanimously held in *Lange v Australian Broadcasting Corporation*,[23] in a passage recently cited by this Court in *Plaintiff S195/2016 v Minister for Immigration and Border Protection*,[24] any constitutional

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[21] (2017) 91 ALJR 1209, 1218–1219 [43].

[22] (2017) 91 ALJR 1209, 1221 [61].

[23] (1997) 189 CLR 520, 567. See also *APLA Ltd v LSC (NSW)* (2005) 224 CLR 322, 349 [33] per Gleeson CJ and Heydon J ('necessary'), 358 [56]–[57] per McHugh J ('necessary implication'), 484 [469]–[470] per Callinan J ('necessary'); *MZXOT v Minister for Immigration & Citizenship* (2008) 233 CLR 601, 618 [20], 623 [39], 627 [54] per Gleeson CJ, Gummow and Hayne JJ, 635 [83] per Kirby J, 656 [171] per Heydon, Crennan and Kiefel JJ.

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[24] (2017) 91 ALJR 857, 861 [20].

implication is valid 'only so far as is necessary' to give effect to the textual and structural features which support the implication. Accordingly, any implied qualification to s 44(i) must be limited to what is necessary to give effect to the constitutional imperative that a person not be irremediably precluded from standing for Parliament. Where the terms and operation of foreign law are not such as to make the effective renunciation of foreign citizenship impossible, or not reasonably possible, there is no necessity to qualify the ordinary textual meaning of s 44(i).

25. *Secondly*, a key constitutional value underlying the Court's construction of s 44(i) in *Re Canavan* was the need to promote certainty and stability in the electoral process. As the Court observed, '[s]tability requires certainty as to whether, as from the date of nomination, a candidate for election is indeed capable of being chosen to serve, and of serving, in the Commonwealth Parliament.'[25] Certainty is promoted if a person must ordinarily have ceased to hold the status of a foreign citizen before nomination. By contrast, if a wide view is taken of the exception, such that the process of renunciation is not required to be complete prior to nomination, there is scope for debate (as the facts of this case demonstrate) about whether a candidate had in fact taken all the steps required by foreign law to renounce foreign citizenship. Having a candidate's eligibility turn on the outcome of such a debate is antithetical to certainty as to whether a candidate is capable of being chosen.

26. In *Re Canavan*, the Court recognised that there was force in the proposition that 'the operation of the constitutional guarantee of single-minded loyalty provided by s 44(i) should not be made to depend upon the diligence which a candidate brings to the observance of the provision'.[26] The Court went on to point out that:[27]

> [t]o introduce an issue as to the extent of the knowledge obtained by a candidate and the extent of the candidate's efforts in that regard is to open up conceptual and practical uncertainties in the application of the provision. These uncertainties are apt to undermine stable representative government.

27. Certainty and stability would be similarly undermined if the operation of s 44(i) turns not upon a person's status at the time of nomination, but on whether a candidate has taken

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[25] (2017) 91 ALJR 1209, [48].
[26] (2017) 91 ALJR 1209, 1220 [54].
[27] (2017) 91 ALJR 1209, 1220 [54].

all steps reasonably required by foreign law to renounce foreign citizenship before nominating. That latter approach will involve factual assessments about what a candidate could and should have done in the circumstances, which may turn on disputed questions about the practices of foreign bureaucracies, the practical implementation of foreign laws, and potentially also on what a candidate knew about those foreign practices and laws. So much is evidenced by the kind of factual material included in the Statement of Agreed Facts in this case, upon which Senator Gallagher evidently intends to rely: see esp [40], [44]–[48]. Such inquiries are avoided if, in the ordinary case, renunciation must be complete before a candidate can nominate.

28. Consistently with *Re Canavan*, s 44(i) should if possible be interpreted in a way that promotes certainty and stability. That is achieved if the exception has the narrow scope advanced above, because on that approach it is relevant only in the rare case[28] where foreign law either makes renunciation impossible or imposes unreasonable barriers to renunciation. Further, even when the exception does apply, the scope of the inquiry that it requires is limited. No inquiry into the candidate's knowledge or state of mind is necessary. Instead, the focus is on the foreign law itself, in order to identify any unreasonable requirements of foreign law. The unreasonable requirements having been identified, the only question that remains is whether the candidate had taken all the steps required to comply with the balance of the foreign law (i.e. the reasonable requirements of the foreign law). In that limited context it is necessary to focus on the taking of steps, rather than on the effectiveness of those steps in divesting foreign citizenship, because the premise of the inquiry is that effective renunciation is not reasonably achievable.

29. *Thirdly*, when speaking of the application of s 44(i) to candidates who knew nothing of their foreign citizenship, the Court in *Re Canavan* held that 'the reasonableness of steps taken by way of inquiry to ascertain whether those circumstances exist is immaterial to the operation of s 44(i)'.[29] That is why a candidate who takes all reasonable steps to ascertain whether they are a foreign citizen, but whose inquiries reveal nothing, is nevertheless disqualified by s 44(i) if the candidate turns out to be a foreign citizen. It would be anomalous, and inconsistent with the reasoning in *Re Canavan*, if candidates

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[28] It does not appear that the foreign laws considered by Court since *Sykes v Cleary* would engage the exception.
[29] (2017) 91 ALJR 1209, 1221 [61].

who <u>know</u> they are foreign citizens, and who take reasonable steps to renounce, escape disqualification under s 44(i) if their renunciation is not effective. It would place a person who knows of their foreign citizenship, and who takes reasonable but ineffective steps to renounce it before nominating (such as by submitting a renunciation document only shortly before the date of nomination), in a better position than a person who knows nothing of their foreign citizenship and, as a result, fails to renounce it.

30. *Fourthly*, the confinement of the exception in the manner advanced above does no more than require candidates for the federal Parliament to know and comply with their constitutional obligations. In *Re Canavan*, this Court emphasised that 'nomination for election is manifestly an occasion for serious reflection' on the eligibility of the candidate.[30] Persons who seek election to the federal Parliament must acquaint themselves with and satisfy their constitutional obligations. Except in cases where renunciation is impossible or not reasonably possible, renunciation is always achievable. If achievable, it should be achieved. It is no answer to say: 'I tried'. It would be a 'substantial departure from the ordinary and natural meaning of the text'[31] if reasonable efforts to comply with s 44(i) were to be equated with compliance.

31. In summary, the exception to the ordinary meaning of s 44(i) recognised in *Re Canavan* is <u>not</u> that s 44(i) does not disqualify a person who is a citizen of a foreign country provided that the person has taken all reasonable steps to comply with it, with the particular steps that are reasonable varying depending on the particular circumstances of a candidate. It is only where foreign law makes it impossible, or not reasonably possible, for a person to renounce foreign citizenship that reasonableness is relevant at all. Even then, there is no occasion to evaluate the reasonableness of the efforts made by a candidate to renounce foreign citizenship. Instead, what is required is an assessment of the reasonableness of the <u>foreign law</u>, the question being which of the steps that foreign law requires to be taken in order to renounce foreign citizenship are reasonable. So much was recognised by Edelman J in *Re Barrow*.[32] Where a step required by foreign law to renounce foreign citizenship is <u>unreasonable</u>, the constitutional imperative requires that step to be disregarded, because otherwise the foreign law would result in s 44(i)

[30] (2017) 91 ALJR 1209, 1221 [60]. See also *Re Nash (No 2)* (2017) 92 ALJR 23, 31-32 [45].
[31] (2017) 91 ALJR 1209, [47].
[32] [2017] HCA 47, [8].

irremediably preventing a person from being chosen as a senator or member of the House of Representatives.

32. In all other cases, s 44(i) operates in accordance with its terms to disqualify any person who holds the status of a foreign citizen at the time of nomination.

B. SENATOR GALLAGHER IS NOT WITHIN THE EXCEPTION

33. The undisputed evidence in this case is that, at the time that Senator Gallagher sought to renounce her British citizenship, British law provided that:

    33.1. if a British citizen made a declaration of renunciation in the prescribed manner then the Secretary of State for the Home Department would cause the declaration to be registered;[33]

    33.2. the prescribed manner of making a declaration of renunciation required Senator Gallagher to provide in writing to the Secretary:[34]

        33.2.1. her name, address, and date of birth;

        33.2.2. information showing that she: was a British citizen;[35] was of full age; was of full capacity; and would have some other nationality after the renunciation took effect; and

        33.2.3. a declaration stating that the particulars in the renunciation application were true; and

    33.3. an applicant for renunciation must pay a fee, amounting to £272.00.[36]

34. Those renunciation requirements are not impossible, or unreasonably difficult, to meet. Indeed, Senator Gallagher ultimately complied with them within a few months of submitting her request for renunciation.

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[33] *British Nationality Act 1981* (c. 61), s 12 [**CB tab 7 p 186**]; Report on British Nationality Law, Mr Fransman QC, 13 January 2018 (*Fransman Report*) [53] [**CB tab 6 p152**].

[34] *British Nationality (General) Regulations* 2003, cls 8, 9 and Sch 5 [**CB tab 7 pp 203–205**]; Fransman Report [57] [**CB tab 6 pp 153-154**].

[35] Such as a British passport, or the relevant certificates of birth, adoption, marriage, death or registration necessary to establish a claim to British citizenship: see Nationality Instructions cl 19.5.1 [**CB tab 7 p 227**]; Fransman Report [61] [**CB tab 6 pp 154-155**].

[36] *Immigration and Nationality (Fees) Regulations 2016* (UK), cl 10, Table 20 item 20.3.1 [**CB tab 7 p 211**]. This equated to A$545.14: see Credit Card statement for 1–31 May 2016 [**CB tab 3 p 99**].

35. It follows that, as was implicit in the judgment of the Court concerning Senator Roberts and Senator Nash in *Re Canavan*, British law does not irremediably prevent British citizens from renouncing British citizenship. While British law remains in its current form, the constitutional imperative therefore cannot be engaged with respect to a British citizen. Accordingly, any person who is a British citizen at the date of nomination is incapable of being chosen as a senator or member of the House of Representatives. That is so whether or not such a person made 'reasonable efforts' to comply with s 44(i), because that is 'immaterial to the operation of s 44(i)'.[37]

36. There being no dispute that Senator Gallagher was still a British citizen at the time of her nomination, she was incapable of being chosen as a senator, and there is a vacancy in the Senate for the place for which she was returned.

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C. SENATOR GALLAGHER FAILED TO TAKE ALL STEPS REASONABLY REQUIRED BY BRITISH LAW

37. Alternatively, if it is necessary to determine whether Senator Gallagher took all reasonable steps to renounce her British citizenship prior to nomination, or whether Senator Gallagher had taken all steps that were reasonably required by British law to renounce her citizenship and within her power, for the following reasons the Court should conclude that she did neither.

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(a) Allowing a reasonable time

38. In the case of a foreign law which requires a declaration of renunciation or other instrument to be registered by a foreign government before renunciation is effective, one of the steps which a reasonable person would take in order to comply with s 44(i) by the date of nomination is to commence the renunciation process in sufficient time to ensure that registration occurs before nomination. To fail to leave such time is to fail to take all reasonable steps to conform to the requirements of s 44(i). If it were otherwise, it would be sufficient for a candidate, knowing that their renunciation will take some time to become effective under foreign law, nonetheless to complete the steps necessary to renounce only the day — or the hour — before nomination. Such a person would clearly

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[37] (2017) 91 ALJR 1209, 1221 [61]. See also 1218 [39] and 1218-1219 [43]–[45].

still be a foreign citizen at the time of nomination, and so would contravene the peremptory terms of s 44(i). Yet in such a case it could not be said that any reading down of s 44(i) was necessary to meet the constitutional imperative identified in *Re Canavan*, for foreign law would not pose an irremediable impediment to nomination. It would simply require timely action by the prospective candidate.

39. To treat the exception to s 44(i) as extending to such a case would have unworkable and undesirable consequences of precisely the kind sought to be avoided by the Court's construction of s 44(i) in *Re Canavan*.

40. *First*, it has the potential to generate significant uncertainty both during the election period as to who is qualified to stand for Parliament, and after the election in the composition of Parliament. A candidate might send his or her renunciation papers a week before (or even an hour before) nomination. If those papers turn out to be correct, complete and sufficient, he or she will be capable of being chosen. But whether that is so may not be known until after the election. There would be uncertainty and instability in the composition of the Parliament for an indeterminate time whilst the fate of an attempted renunciation is being determined by officials of a foreign country. There might then be further disputes (as Senator Gallagher's case shows) as to whether the officials of the foreign country processed the renunciation correctly or reasonably.

41. *Secondly*, during the period when the foreign country is processing the renunciation application, the parliamentarian would be able to sit in the Parliament while holding dual citizenship. In *Re Canavan*, the Court said that such a 'state of affairs cannot be reconciled with the purpose of these constitutional guarantees'.[38]

42. *Thirdly*, an approach which permitted a candidate to delay the steps necessary to renounce their foreign citizenship until the moment before nomination would allow — and perhaps even tend to encourage — candidates to delay decisions about renunciation, and be less prompt in getting their qualifications in order prior to an election. Indeed, it can readily be conceived that they might do so in order to reserve for themselves the maximum ability to withdraw any declaration of renunciation, before it is given effect by

[38] (2017) 91 ALJR 1209, 1221 [59].

foreign authorities, if they are not elected, thereby enabling them to keep their foreign citizenship.[39] Indeed, if the candidate had second thoughts, they could choose to withdraw their application for revocation of foreign citizenship and to accept disqualification, which would add 'an additional and unnecessary complication in the making by the electors of their choice'.[40]

(b) Application to the facts

43. The following facts show that Senator Gallagher failed to take all reasonable steps, or all steps reasonably required by British law, to renounce her British citizenship prior to nomination.

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44. Senator Gallagher had been a Senator in the federal Parliament since 26 March 2015, when she was chosen to fill a casual vacancy.[41] It was incumbent upon her at least from this point in time to know and satisfy the constitutional requirements for sitting as a senator in the federal Parliament. Senator Gallagher was subsequently pre-selected as a candidate for the position of ACT senator for the upcoming election on or about 26 May 2015.[42] This renewed her obligation to be aware of and satisfy the constitutional requirements for parliamentary office. Moving to 2016, Senator Gallagher was on notice, from 21 March 2016, that an early double dissolution was a possibility, by reason of the Prime Minister's announcement that he would call an early election if the Parliament failed to pass certain industrial relations bills.[43] At no stage did she take any steps to renounce her British citizenship.

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45. It was not until 20 April 2016 — over a year after she had first sat in Parliament and nearly a year since she was pre-selected as a candidate for the upcoming election — that Senator Gallagher submitted her renunciation declaration to the Home Office. The nomination form by which she nominated as a candidate for election was submitted on

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[39] See, for example, *Re Barrow* [2017] HCA 47, [3]-[6] (Edelman J).
[40] Cf *Sykes v Cleary* (1992) 176 CLR 77, 99-100 (Mason CJ, Toohey and McHugh JJ).

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[41] Statement of Agreed Facts, 3 [16] [**CB tab 7 p 172**].
[42] Statement of Agreed Facts, 3 [17] [**CB tab 7 p 172**].
[43] Statement of Agreed Facts, 3 [18] [**CB tab 7 p 172**].

31 May 2016[44] and nominations closed on 9 June 2016.[45] There was therefore only 41 days between the date Senator Gallagher submitted her renunciation declaration and her nomination, and only 49 clear days before nominations closed. Putting to one side the potential for the declaration that she submitted to be deficient in some respect, that period had to allow for, at the very least, her declaration to be sent from Australia to the United Kingdom (which, at the time, was publicly stated by Australia Post to take a period of 10+ business days[46]) and then to be processed by the Home Office (which it appears involved an average processing time in the order of 55–60 days).[47] In other words, given the date on which Senator Gallagher submitted her renunciation declaration, that declaration would have resulted in her losing her status as a British citizen by the time of her nomination only if it was processed by British authorities substantially faster than the average processing time. And that was so in circumstances where, as noted above, Senator Gallagher ought already to have renounced her British citizenship on several occasions over the previous year.

46. Even putting aside the average processing time information, the publicly available documents revealed that British authorities might take many months to process Senator Gallagher's renunciation application. Thus, the Nationality Instructions, constituting the Home Office policy relevant to renunciation, which were publicly available,[48] contemplated the possibility that declarations might take more than 6 months to process.[49] They also contemplated that declarations could be prioritised where that was necessary to achieve renunciation by a particular date. The Statement of Agreement Facts records (at [44]) that it is possible to have a declaration of renunciation expedited where there is a good reason for this which has been brought to the Home Office's attention. The expert evidence of Mr Fransman QC is that renunciation can be effected within days or even hours where that is so.[50]

[44] Statement of Agreed Facts, 3 [22] [**CB tab 7 p 172**].
[45] Writ dated 16 May 2016 [**CB tab 1 p 5**].
[46] Statement of Agreed Facts, 4 [32] [**CB tab 7 p 173**].
[47] Statement of Agreed Facts, 6 [46]–[47] [**CB tab 7 p 175**].
[48] Fransman Report, 13 [59] [**CB tab 6 p 154**].
[49] Fransman Report, 15-16 [64]–[65] [**CB tab 6 pp 156-157**], quoting Nationality Instructions [19.7] [**CB tab 7 pp 233–235**].
[50] Fransman Report, 27 [117] [**CB tab 6 p 168**].

47. Nonetheless, when Senator Gallagher did complete her declaration for renunciation on 20 April 2016, she did not: (a) undertake any searches to ascertain how long it would take to process her application; (b) make any inquiries into whether it was possible to expedite the registration of that declaration; (c) advise the Home Office that a decision on her declaration needed to be processed urgently; and (d) advise the Home Office that her declaration needed to be registered by a particular date.[51]

48. In circumstances where Senator Gallagher did not make any of these enquiries, let alone take any step to expedite the processing of her declaration, Senator Gallagher failed to take all reasonable steps, or all steps reasonably required, to renounce her foreign citizenship because she failed to take reasonable steps that were available to her to ensure that her renunciation was effective under British law prior to her nomination.

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(c) The dispute between the experts

49. There is a dispute between the parties' experts as to whether, once the Secretary had received the material Senator Gallagher sent to the Home Office on 20 April 2016,[52] the Secretary came under a legally enforceable duty as a matter of English law, compellable by mandamus, to register her declaration of renunciation or whether the Secretary was entitled to seek further information, as occurred in a letter dated 1 July 2016 (received by Senator Gallagher on 20 July 2016).[53] If the Court accepts that the requirement to take all reasonable steps, or all steps reasonably required, to renounce foreign citizenship prior to nomination necessarily entails commencing that process a reasonable time prior to nomination, that dispute falls away because, regardless of whether a duty to register did or did not arise, for the reasons identified in the previous section the declaration was not made a reasonable time prior to nomination.

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50. In any event, for the following reasons, the Court should conclude that the materials which Senator Gallagher provided to the Home Office on 20 April 2016 did <u>not</u> place the Secretary under a legally enforceable duty, as a matter of English law, to register Senator Gallagher's declaration of renunciation.

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[51] Statement of Agreed Facts, 6 [44] and [48] **[CB tab 7 p 174-175]**.
[52] Statement of Agreed Facts, 4 [30] **[CB tab 7 p 173]**.
[53] Statement of Agreed Facts, 5 [36] **[CB tab 7 p 174]**.

51. As a preliminary matter, the Court should feel no inhibition resolving this matter for itself, notwithstanding the conflicting expert opinion and the absence of cross-examination on the point. That is because the conflict is not as to the content of foreign law. Rather, it is as to the application of foreign law to the particular facts (ie, the documents submitted by Senator Gallagher under cover of the 20 April 2016 renunciation declaration). Expert evidence of the latter kind has long been held to be inadmissible.[54] While this Court has not been required authoritatively to determine the correctness of this rule, it is correct as a matter of principle: the proper application of the law to the facts of a particular case is of the essence of the judicial function and it would be 'usurpation of the judicial function' for expert witnesses to perform that role.[55] Even though the Court of Disputed Returns is not bound by the rules of evidence,[56] such that the opinions concerning the application of foreign law can be received by the Court, the point remains that the expert opinions cannot displace the judicial function of applying the foreign law to the facts. The expert evidence can be received and considered as a submission.[57]

52. The reasons given by Mr Fransman QC in his report at [82]–[99] and [108] (**CB tab 6 pp 160–166**) for his view that the Secretary was not under a duty to proceed solely on the material submitted by Senator Gallagher on 20 April 2016 should be preferred to the competing view of Mr Berry at [11]–[22] (**CB tab 3 pp 121–124**). In short, because s 12(1) of the *British Nationality Act 1981* (UK) permitted renunciation only by a 'British citizen' (**CB tab 7 p 186**), no duty could arise until the information provided by Senator Gallagher established, on the balance of probabilities, that she was a British citizen. The Secretary must be allowed a wide measure of discretion as to the level of evidence required, having regard to all the circumstances (including any urgency). However, the Secretary was entitled to require the same level of proof on this point as would be

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[54] Story in his *Commentaries on the Conflict of Laws* (Boston, 1834), §638 (p.528); *Di Sora v Phillipps* (1863) 10 HLC 624, 633, 638-640 [11 ER 1168, 1173, 1174, 1175]; *US Surgical Corp v Hospital Products* (unreported, McLelland J, NSWSC, 19 April 1982); *National Mutual Hold v Sentry Corp* (1989) 22 FCR 209, 226 (Gummow J); *United States Trust Co of New York v Australian & New Zealand Banking Group* (1995) 37 NSWLR 131, 146; *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd [No 6]* (1996) 64 FCR 79, 83-84 (Lindgren J); *Neilson v Overseas Projects Corporation* (2005) 223 CLR 331, 371 [120] (Gummow and Hayne JJ).

[55] *Allstate Life Insurance Co v ANZ Banking Group Ltd (No 33)* (1996) 64 FCR 99, 83E.

[56] *Commonwealth Electoral Act*, s 364 (applicable to this reference by operation of s 381). See also *R v War Pensions Entitlement Appeals Tribunal; Ex parte Bott* (1933) 50 CLR 228, 256 per Evatt J.

[57] *Di Sora v Phillipps* (1863) 10 HLC 624 [11 ER 1168 at 1170]; *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd [No 6]* (1996) 64 FCR 79, 83F.

required in the context of a claim to British citizenship, because certain persons who renounce have an entitlement to resume British citizenship (meaning that, by registering a renunciation, the Secretary effectively concedes that the declarant is entitled to resume that citizenship).

53. As Mr Fransman QC explains, whether Senator Gallagher was a British citizen depended, critically, on the citizenship status of her father by reason of his birth in the United Kingdom. Especially having regard to the potential exceptions to the conferral of British nationality at the time of his birth depending on his parentage, the Secretary was entitled to require, as the Secretary did by letter dated 1 July 2016, that Senator Gallagher provide her father's birth certificate, of which neither the original nor a copy had been provided on 20 April 2016. The certified copy of Senator Gallagher's own birth certificate (**CB tab 7 p 261**) was neither primary evidence concerning the particulars of her father's birth, nor did it contain any particulars of his parentage. Yet that was the only information that Senator Gallagher provided as to her father's citizenship with her application on 20 April 2016, notwithstanding that the Guidance Note issued by the Home Office stated expressly: 'If you have your citizenship or status through descent from a parent or grandparent, you should send documents proving that person's citizenship or status and your relationship to him or her' (**CB tab 7 p 250**). Her father's birth certificate, and the other documents ultimately provided in response to the Secretary's request of 1 July 2016, were in Senator Gallagher's power or possession at the time she submitted her original renunciation declaration on 20 April 2016.[58] Plainly those documents, or certified copies thereof, could have been provided with that declaration.

54. In addition, a further critical question was whether Senator Gallagher's parents were married at the time of her birth. That is because, as explained in Mr Fransman QC's report (at [38]–[40]), and accepted by Mr Berry (at [18]), the relevant provision under which Senator Gallagher first acquired the status of Citizen of the United Kingdom and the Colonies applied only to legitimate children. While the marriage of Senator Gallagher's parents in New Zealand prior to her birth was referred to on the certified copy Australian Capital Territory birth certificate Senator Gallagher submitted on 20 April 2016, that document did not provide primary evidence on this point. Unlike the

[58] Statement of Agreed Facts, 5 [40] [**CB tab 7 p 174**].

particulars of birth, it could not provide primary evidence of the particulars of the marriage of Senator Gallagher's parents many years before, in another country. It was, accordingly, open to the Secretary to require Senator Gallagher to providea document that was primary evidence of the particulars of the marriage, namely the marriage certificate (which, like her father's birth certificate, had not been provided on 20 April 2016 notwithstanding that the document was within Senator Gallagher's power or possession at that time).

55. The manner in which the Secretary acted in relation to the points above was entirely consistent with the Nationality Instructions current at the time [**CB tab 7 pp 215–236**], extracted and described in Mr Fransman QC's report (at [59]–[65] [**CB tab 6 pp 154-157**]). They were (and are) publicly available and set out the policy applicable to Home Office staff. Those Instructions gave examples of the kind of documents necessary to establish British citizenship, including relevant certificates of birth and marriage. They also made clear the measure of discretion open to the Secretary as to the cogency of evidence required: where authorities of another country had given a date by which the declarant must renounce British citizenship '[i]f sufficient evidence of British citizenship has not been submitted, it should not be called for if this will delay registration of the declaration'. As noted above, Senator Gallagher had given no indication to British authorities that her renunciation was required to be processed with any urgency.

56. It follows that, to the extent that it matters, it cannot be said that, upon receipt of the material dispatched by Senator Gallagher on 20 April 2016, the Secretary came under a legally enforceable duty to register her declaration of renunciation. Nor can it be said that, prior to nomination, Senator Gallagher had taken all steps that were reasonably required of her as a matter of British law. There remained the possibility, which eventuated here, that the Secretary would, consistently with British law, seek further information before registering Senator Gallagher's renunciation declaration. Accordingly, even on the view of the exception to the operation of s 44(i) that is most favourable to Senator Gallagher, she was nevertheless incapable of being chosen as a senator.

PART V ORDERS

57. The referred questions (**CB tab 1 p 1**) should be answered as follows:

    (a) There is a vacancy by reason of s 44(i) of the Constitution in the representation for the Australian Capital Territory in the Senate for the place for which Katy Gallagher was returned.

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

    (c) Unnecessary to answer.

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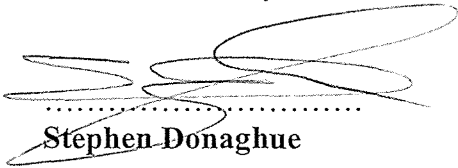
    (d) Unnecessary to answer.[59]

PART VI LENGTH OF ORAL ARGUMENT

58. The Attorney-General estimates that he will require up to 90 minutes for the presentation of oral argument.

Dated: 26 February 2018



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[59] By order made by Kiefel CJ on 19 January 2018, the Commonwealth has been ordered to pay the costs of Senator Gallagher on a party-party basis [**CB tab 5 p 140 [9]**].