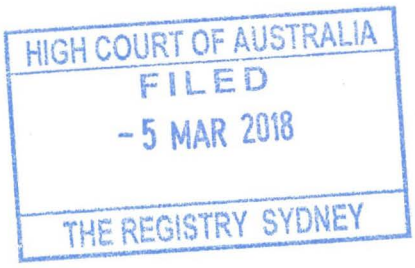
IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

No. C32 of 2017

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



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20 **ANNOTATED SUBMISSIONS OF SENATOR GALLAGHER**

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PART I: Publication

1. This submission is in a form suitable for publication on the internet.

PART II: Statement of Issues

2. On 6 December 2017, the Senate resolved that certain questions respecting a vacancy in the representation of the Australian Capital Territory in the Senate for the place for which Senator Katy Gallagher (**Senator Gallagher**) was returned should be referred to the Court of Disputed Returns.

3. The first question arising in the referral is: whether, by reason of section 44(i) of the Constitution, there is a vacancy in the representation for the Australian Capital Territory in the Senate for the place for which Katy Gallagher was returned.

4. The second question arising is: if the answer to the first question is "yes", by what means and in what manner that vacancy should be filled.

5. For the following reasons, the answer to the first question is "no" and the second question does not fall to be determined.

PART III: Facts

6. The facts on the hearing are contained in the Statement of Agreed Facts (**Agreed Facts**), the expert opinion of Senator Gallagher's expert, Mr Berry (**Berry Opinion**), and the expert opinion of the Attorney-General's expert, Mr Fransman QC (**Fransman Opinion**). A further document outlining areas of contentions between Mr Berry and Mr Fransman has been filed in this proceeding (**Contentions Document**).[1] The Agreed Facts document supersedes two affidavits filed by Senator Gallagher in this proceeding.[2] The only relevant evidence filed on behalf of the Attorney-General is the Fransman Opinion.

7. On 20 April 2016 Senator Gallagher made a declaration of renunciation of her British citizenship[3] and caused for it to be sent, together with accompanying documents, to the UK Home Office (**Home Office**) who received it on 26 April 2016.[4] On 6 May 2016 the Home Office deducted a fee for the service of registering the declaration of renunciation.[5] Each of these steps occurred before the announcement of the election on 8 May 2016 or the issue of the writs on 16 May 2016.[6]

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[1] Annexed to the affidavit of Danielle Gatehouse filed on 12 February 2018: see **[CB tab 8 p 281]**.
[2] See the affidavits of Katherine Ruth Gallagher filed on 22 January 2018 and 9 February 2018.
[3] Agreed Facts at [29]-[31] **[CB tab 7 p 173]**.
[4] Agreed Facts at [33] **[CB tab 7 p 173]**.
[5] Agreed Facts at [34] **[CB tab 7 p 173]**.
[6] Agreed Facts at [21] **[CB tab 7 p 172]**; see also the Writ issued by the Minister for Finance **[CB tab 1 p 5]**.

8. A critical fact elided by paragraph [34] of the Attorney-General's Submissions (**AGWS**) is that it is common ground between the experts that the material provided by Senator Gallagher on 20 April 2016 was "sufficient" there and then to satisfy the requirements imposed by the law of Britain for cessation of her citizenship.[7] The dispute between the experts, discussed in more detail below, is whether as per the Fransman Opinion it merely became "open" to the Secretary at the Home Office (**Secretary**) to determine Senator Gallagher's British citizenship there and then, while at the same time allowing for an indefinite period in which the Secretary could exercise a "wide discretion" to consider the quality of the information provided by Senator Gallagher and, if so minded, ask for further evidence of the matters she had already shown; or whether, as per the Berry Opinion, Senator Gallagher had an entitlement there and then to have her citizenship terminated, enforceable by a mandatory order.[8]

9. On 31 May 2016, Senator Gallagher nominated for the position of ACT Senator.[9] On 2 July 2016 an election was held for the position of ACT Senator.[10] On 2 August 2016 Senator Gallagher was declared duly elected as a Senator.[11]

10. On 20 July 2016, the Home Office requested that Senator Gallagher provide certain original documents which were said to be "required in order to demonstrate to the Secretary of State that [Senator Gallagher was] a British Citizen."[12] In response to the requisition, and on the same day, Senator Gallagher sent originals of her father's birth certificate, her parents' marriage certificate and her own birth certificate to the Home Office (**Additional Documents**).[13] The Additional Documents provided an additional layer of proof of the information that was already shown in the material provided by Senator Gallagher on 20 April 2016, namely further proof that her father was born in England.[14] On 16 August 2016 Senator Gallagher's status as a British citizen ceased.[15]

Part IV: Argument

Summary of argument

11. By no later than 6 May 2016 (when her fee was debited), Senator Gallagher had taken

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[7] Fransman Opinion at [98] and [108] **[CB tab 6 pp 164 and 166]**; Berry Opinion at [11] **[CB tab 3 p 121]**.
[8] Contentions Document **[CB tab 8 p 281]**.
[9] Agreed Facts at [22] **[CB tab 7 p 172]**.
[10] Agreed Facts at [23] **[CB tab 7 p 172]**.
[11] Agreed Facts at [23] **[CB tab 7 p 172]**.
[12] Agreed Facts at [36] **[CB tab 7 pp 174 and 267]**.
[13] Agreed Facts at [39] **[CB tab 7 p 174]**.
[14] Berry Opinion at [11] **[CB tab 3 p 121]**; Fransman Opinion at [106] **[CB tab 6 p 166]**.
[15] Agreed Facts at [42] **[CB tab 7 p 174]**.

every step which, as a matter of British law, was *sufficient* for her renunciation to be effective. As this date was prior to writs being issued or nominations closing, the constitutional imperative is engaged.

12. Alternatively, if, which is denied, British law required Senator Gallagher to take the additional steps of providing the Additional Documents, or of anticipating that that Secretary would requisition them, these were not steps reasonably required by British law and within her power. For that reason also, the constitutional imperative is engaged.

A Response to the Attorney-General's Submissions

13. There are four matters in the Attorney-General's Submissions that require immediate rebuttal before proceeding to Senator Gallagher's primary argument.

14. *First,* it is wrong to suggest at AGWS [7] that Senator Gallagher is advancing a similar argument to that put by various unsuccessful parties in *Re Canavan*[16] in reliance upon *Sykes v Cleary*.[17] The various parties unsuccessfully invoking "reasonable steps" in *Re Canavan* did so in a context where each of them had taken *no step* required by the foreign law to terminate their foreign citizenship at the date the election commenced, i.e. nomination. These parties invoked "reasonable steps" to seek to excuse taking *any steps*, on the basis that they did not have sufficient knowledge that they needed to act. In contrast, Senator Gallagher is the first person this Court has had to rule upon who has in fact taken steps required under the foreign law to renounce her citizenship at the date of nomination; and she seeks to have the steps which she actually took to renounce her foreign citizenship tested against the propositions in paragraph [72] of *Re Canavan*.

15. *Second*, as to paragraph [19] of the AGWS, it is a false reading of the decision in *Re Canavan* to suggest that when this Court had considered the positions of Senators Roberts and Nash it reached a global conclusion that the steps then necessary to renounce British citizenship, which have not changed since, could never attract the "exception" or the "constitutional imperative". The Court, clearly enough, had no need to rule on that question because Senators Roberts and Nash had taken *none* of the steps required by British law.

16. *Third*, as to paragraph [34] of the AGWS, it is a serious elision of the evidence to say

[16] *Re Canavan* (2017) 91 ALJR 1209.
[17] *Sykes v Cleary* (1992) 176 CLR 77; AGWS at [7].

that Senator Gallagher "ultimately complied"[18] with the steps required by British law within a few months of submitting her request for renunciation. The *true* factual position is that, as and from 20 April 2016, Senator Gallagher had made a declaration of renunciation in the prescribed manner required by British law and had provided "information showing"[19] each of the matters specified in British law. By 6 May 2016, all of her documents had been received, and the fee for her request was deducted by the Home Office.[20] Even in the view of the expert propounded by the Attorney-General, the position was as follows:[21]

> *88. In my opinion, Ms Gallagher was entitled to conclude that she was (or may have been) a British citizen because her father was born in the UK, and she was entitled to conclude that her Australian birth certificate was sufficient evidence proving his British citizenship by birth in the UK and proving her relationship to him.*
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> *89. In my opinion, Ms Gallagher was entitled to conclude that a certified copy would suffice... as explained above, the Form RN and the Guide RN did not specify that originals had to be sent or were preferable, and in law and practice it is open to SSHD to accept a certified copy if, in all the circumstances, she considers that a certified copy is sufficient ...*
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> *90. ... I conclude that Ms Gallagher's renunciation was made "in the correct form", in the sense that she complied with the legal requirements: by using the From RN and including a certified copy of her birth certificate showing her fathers' place of birth, she provided "information" capable of satisfying the requirements of s.12 and the secondary legislation. Her supporting evidence was within the scope of the evidence requested by the form and guide. She also paid the mandatory fee ...*
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> *98. ... in my opinion it was <u>open</u> to SSHD to accept the information (including evidence) that Ms Gallagher submitted on 20 April 2016 as sufficient proof that Ms Gallagher was a British citizen by descent.*

17. In the view of Senator Gallagher's expert:[22]

> *10. ... The information supplied was sufficient to determine that her father was a British national by virtue of birth in the UK and that he was married to her mother at the time of Senator Gallagher's birth (her mother's name having been substituted by her father's last name).*
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> *11. In my opinion the information found in the completed Form RN, taken together [sic] the copy of her birth certificate, contained all the information required as a matter of law by the British Nationality Act 1981 and the British Nationality (General) Regulations 2003 to enable the Secretary of State to register the declaration of renunciation ...*
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> *15. ... Strictly, the supply of [the evidence on 20 July 2016] was unnecessary as the British Nationality (General) Regulations 2003 seek information not prescribed forms of evidence ... Senator Gallagher had already supplied the necessary information when she sought renunciation on 20 April 2016 and enclosed copy of her birth certificate with that request.*

18. *Fourth*, the Attorney-General is propounding primarily a test whereby the Court pronounces in a global sense whether the requirements which a particular foreign legal

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[18] AGWS at [34].
[19] See *British Nationality (General) Regulations 2003* (UK), Sch 5 cl 2 **[CB tab 7 p 204-205]**; see also Fransman Opinion at [90] **[CB tab 6 p 162]**.
[20] Agreed Facts at [33] and [34] **[CB tab 7 p 173]**.
[21] Fransman Opinion at [88]-[90] and [98] **[CB tab 6 pp 162-164]**.
[22] Berry Opinion at [11] and [15] **[CB tab 3 p 121-122]**.

system imposes for renunciation of citizenship are "reasonable" or "unreasonable". The Attorney-General suggests that this allows for global conclusions such as those found in paragraphs [34] and [35] of the AGWS that British law in its current form is always and in every respect "reasonable" in the requirements which it imposes for renunciation such that "any person who is a British citizen at the date of nomination is incapable of being chosen as a senator or a member of the House of Representatives". Senator Gallagher submits that this attempt to impose a test, whereby foreign legal systems are globally categorised without any examination of the manner in which the particular person has sought to engage with the requirements of that system for renunciation in the particular case, is inconsistent with the manner in which "reasonable steps" was first identified in *Sykes v Cleary* and with the manner in which it was reconceptualised in *Re Canavan* at [72].

19. Rather than this global approach, what is required by the "constitutional imperative" is a more particular examination of (a) what are the requirements of law imposed by the foreign country in respect to renunciation of citizenship; (b) what steps did the particular person take to satisfy those requirements; (c) in what respects, if any, did the person fail to satisfy those requirements; and (d) taking full account of any such failure, had the person taken all steps that were reasonably required by the foreign law to renounce their citizenship and within his or her power, so as to engage the constitutional imperative within paragraph [72] of *Re Canavan*.

20. The balance of these submissions will proceed in the following order:

    (a) A detailed discussion of the nature of the constitutional imperative (Part B);

    (b) The particular application of the constitutional imperative in the context of the exception identified in paragraph [72] of *Re Canavan* (Part C);

    (c) Application of the correct legal test to the circumstances of Senator Gallagher (Part D); and

    (d) Alternative submissions (Part E).

B The nature of the constitutional imperative

B.1 The constitutional imperative: background

21. The Court held in *Re Canavan* that whether a person is disqualified by reasons of s 44(i) is to be determined with reference to a concept termed "the constitutional imperative". It was stated that:[23]

[23] (2017) 91 ALJR 1209, 1223 [72]

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

22. The operation of *a* constitutional imperative is not unique to s 44(i) of the Constitution. The freedom to communicate on political matters[24] and the freedom to vote[25] are constitutional imperatives. All three of these constitutional imperatives function to preserve the system of representative government provided for by the Constitution. The content and scope of the constitutional imperative in the context of s 44(i) is centrally concerned with one aspect of the larger system, namely the need to preserve *participation* in representative government.

B.2 Scope and content: participation in representative government and temporal matters

23. The form of representative government provided by the Constitution includes not only the representation of electors in a House by a member but also extends to the representative dimension of executive government provided for by the Constitution[26] and reflected in the adopted Westminster system of ministerial accountability. The constitutional imperative is thus a gateway to the highest formal forms of participation in both the executive organ of government and the parliamentary organ of government. *Participation* is not limited to participation as an elected member or commissioned minister; it also extends to the participation in the short time between nomination and return of writs; that is, it extends to election campaigning, which, like the freedom to communicate on political matters and the freedom to vote, is necessary to preserve the form of representative government provided for by the Constitution. Thus, the constitutional imperative operates to guarantee the ability of a candidate to campaign, a member to vote and a minister to decide.

24. The ability of a person in Australia to engage in the above forms of participation in the system of representative government was originally contained in s 34 of the Constitution. Section 34 did not use the language of "citizen". This term was deployed by s 163 of the *Commonwealth Electoral Act 1918* (Cth) (**CEA**), which relevantly displaced s 34 of the Constitution such that it can now be said that a "citizen" has the right to nominate for election to and to sit in a House.[27] This right of a citizen is subject

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[24] *Wotton v Queensland* (2012) 246 CLR 1at 30 per Kiefel J (as her Honour then was).
[25] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182 per Gleeson CJ.
[26] See s 64 of the Constitution and the requirement for Ministers of State to sit in Parliament; see also s 5 and the *Ministers of State Act 1952* (Cth).
[27] CEA, s 163(2).

to the provisions contained in the CEA and the Constitution. The relevant provisions in the CEA are that a citizen must (i) be 18 years old,[28] (ii) be entitled to vote in a House of Representatives election or qualified to become such an elector;[29] and (iii) not be a member of a state or territory parliament.[30] It is also qualified by s 43 (member of one House ineligible for other) and s 44 of the Constitution. Beyond these exceptions, it can be said that a citizen has the right to participate in representative government as a candidate, member or minister.

25. This right of a citizen to participate as a candidate is further informed by the provisions of the Constitution relating to the issuing of writs. In the case of the House of the Representatives, s 32 of the Constitution provides that the Governor-General in Council may cause writs to be issued for a general election of members of the House of Representatives. This is subject only to the qualification at s 28 of the Constitution that the Governor-General dissolve the House every three years. A different constitutional regime governs the issuing of Senate election writs and the timing of Senate elections.[31] The timing of the election of both Houses can be affected by the Governor-General's power to dissolve "the Senate and the House of Representatives simultaneously" pursuant to s 57 of the Constitution. The constitutional condition precedent for a "double dissolution" is also set in s 57 and requires that the Senate rejects or fail to pass a bill twice. Subject to the above provisions, the *temporal element* to a candidate's right to participate in the system of representative government, is ordinarily determined by the decision of the Government when "to go to the polls".

26. The constitutional setting just described is important because of what it reveals about the position in which it places a citizen in during a term of Parliament. The only textual indicator of the issues which may operate on a prospective candidate's mind in relation to whether to stand is the subject matter of a bill which the Senate has twice failed to pass.[32] Beyond this, the Constitution gives no indication as to the issues on which an election may be "fought". The prominence and imminence of an issue can rise and also fall unpredictably. A government can decide to go the polls without

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[28] CEA, s 163(1)(a).
[29] CEA, s 163(1)(c).
[30] CEA, s 164.
[31] See s 12 of the Constitution in relation to the issuing of writs; see also ss 7, 13 (rotation of senators) and ss 42, 43 and 44 of the CEA in relation to senators for a Territory.
[32] At any time following the second failure the Governor-General may dissolve both houses. Unless the dissolution will "take place within six months before the date of the expiry of the House of Representative by effluxion of time": s 57 of the Constitution.

warning. The Constitution, through the system of representative government it provides for, permits a citizen to participate as a candidate in an election whether it, or the issues on which it is fought, are long foreseen or not.

27. It follows that the constitutional imperative must operate without regard for when any particular candidate decided to contest an election as a matter of fact; and without regard to a particular candidate's ability to know or foresee when an election might be called. The only temporal factor that the constitutional imperative recognises is the date a citizen *nominates* and thus becomes *participant*, as a candidate, in representative government for an election which has been called. Further, any enquiry into circumstances prior to nomination cannot go back further than the date on which writs for the election were issued; prior to that issue, there can at best be speculation and prediction about a *possible* election, but no *actual* election which can engage issues of either qualification or disqualification of candidates.

B.3 Scope and content: non-discrimination

28. The constitutional imperative must also be informed by a principle of equality such that it produces the same outcome as between persons who take relevantly the same actions to avoid the "automatic and draconian consequences"[33] of s 44(i). Otherwise, the right of a citizen to participate in representative government is diminished. Take the example of two candidates each of whom holds the same status as a foreign citizen, has identical circumstances, and takes the same actions on the same date to renounce their foreign citizenship. Assume that only one of the candidates is successful in having their renunciation become effective as a matter of foreign law before nominations close. If the constitutional imperative operated so as to render eligible one candidate and ineligible the other, the constitutional imperative would operate in a discriminatory manner inconsistent with the right conferred by s 34 to participate.

B.4 Scope and content: actions of foreign officials

29. The constitutional imperative cannot be made to depend on the actions of foreign officials, particularly those that rest on discretions, degrees of diligence or bureaucratic practices. One of the reasons this is so is because it can produce the discriminatory outcome outlined above. More fundamentally, the constitutional imperative cannot depend on the actions of foreign officials because the Constitution recognises that Australia is an independent and sovereign nation. The system of

[33] *Re Day* (No 2) (2017) 91 ALJR 518, 535 [95] per Gageler J.

government provided for by the Constitution reserves a legitimate but tightly confined domain for foreign processes to affect Australia's system of government. The rule of recognition applied by this court in s 44(i) matters is such an example. However, just as the rule of recognition will not recognise foreign laws which are "exorbitant", so the constitutional imperative cannot recognise the actions, or indeed inactions, of foreign officials. To do so would impermissibly import foreign arbitrariness into a profoundly important dimension of Australia's system of government, namely the composition of the Commonwealth Parliament. It is important that the focus of the constitutional imperative is on a citizen being "prevented by foreign *law* from participation" as distinct from a citizen being "prevented by the actions, or inactions, of a foreign person from participation."

30. The need for the constitutional imperative to be divorced from the exercises of discretion, degrees of diligence and bureaucratic practices of foreign officials is confirmed by reflection upon the legally peculiar position in which the operation of the constitutional imperative places a person. A potential candidate can readily seek advice and act on advice to divest themselves of an interest which would prevent them from being chosen under s 44(iv) (office of profit) or s 44(v) (pecuniary interest). If there was any issue with effecting divestiture, the potential candidate could have recourse to domestic judicial and executive processes. However, a potential candidate who is unable to renounce or unable to determine if they have renounced prior to nomination is in a perilous situation. They cannot receive an advisory opinion from the Court on the issue.[34] Moreover, they would not ordinarily be in a ready position to have recourse to the administrative and legal processes of a foreign country. Contrast this with a person who avoids the operation of s 44(i) on the basis that it cannot be established that they are a citizen of foreign country.[35]

B.5 The constitutional imperative: a summary

31. The preceding discussion yields the following propositions:

    (a) the scope and content of the constitutional imperative is informed by its constitutional setting having regard to its stated function to preserve participation in representative government;

    (b) the constitutional imperative preserves the participation of a candidate, member and minister;

[34] *Re Barrow* (2017) 91 ALJR 1240 per Edelman J.
[35] As was the outcome in Senator Canavan's case: see *Re Canavan* (2017) 91 ALJR 1209, 1225 [86].

(c) the right to participate in representative democracy as a candidate is one which is guaranteed by the Constitution and available to citizens subject only to very limited exceptions;

(d) the constitutional setting of the constitutional imperative includes the arrangements under the Constitution for the calling of elections which places the decisions as to timing of an election outside the knowledge or control of a potential candidate;

(e) the decision to call an election is an inherently political decision which includes the possibility that an election will be called without notice and in the context of issues which can quickly gain and lose prominence;

(f) by force of the preceding propositions:

(i) facts relating to the timing of an individual's decision to participate as a candidate in representative government are irrelevant to whether the constitutional imperative will be engaged;

(ii) the constitutional imperative does not look forward to the possibility of participation during a subsequent election, rather it only operates on participation in an election where writs have issued;

(g) the constitutional imperative should operate so as to avoid outcomes that discriminatory as between persons who have acted identically in relation to s 44(i); and

(h) the constitutional imperative directs attention to compliance with *foreign law*, not exercises of discretion, degrees of diligence or bureaucratic practices of foreign officials.

C The constitutional imperative and the test in *Re Canavan*

C.1 Guidance

32. The above propositions will guide the application of the test for determining if the constitutional imperative is engaged. This test is a follows:[36]

> *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*

33. To date the Court's application of this test has been limited to candidates who have taken *no legally significant steps* towards renunciation as a matter of foreign law.

[36] *Re Canavan* (2017) 91 ALJR 1209, 1223 [72].

Thus:

(a) In *Sykes v Cleary*, Mr Delacretaz did not take the basic step of making a demand for release from Swiss citizenship and was therefore held to possess a s 44(i) disability;[37]

(b) In *Sykes v Cleary,* Mr Kardamitsis did not take the basic step of seeking the approval of the appropriate Greek Minister and was therefore held to possess a s 44(i) disability.[38] The result reached by the Court in relation to Mr Kardamitsis was further explained by the Court in *Re Canavan* who noted that "the application [by Mr Kardamitsis to the relevant Greek Minister] for the favourable exercise of the discretion was a step reasonably open to [Mr Kardamtsis];[39] and

(c) In *Re Roberts*,[40] Mr Roberts took the step of emailing information to an inappropriate authority, without a requisite declaration or prescribed fee which was found to be an ineffective step for the purposes of renunciation of the status of British citizenship.[41] Mr Roberts was subsequently found to have possessed a s 44(i) disability.[42]

34. Nevertheless, even from these brief explorations of the topic, it is apparent that there was a need for a close examination of the manner in which the particular person sought to interact with the requirements of the foreign law affecting him or her.

C.2 Two components of the test

35. Importantly, the test as enunciated by the Court in *Re Canavan* was expressed not as a reasonable steps test but rather as follows: "where it can be demonstrated that the person has taken all steps that are reasonably required...and are within his or her power". The test has two components, a foreign component and a domestic component. The *foreign* component identifies the applicable foreign law and analyses the legal significance under that foreign law of any actions taken by the person. The *domestic* component builds upon the analysis of the foreign component and determines whether, as a matter of Australian law, such actions as the person has taken are sufficient to support a finding that all steps reasonably required have been taken (and therefore whether the constitutional imperative has been engaged).

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[37] (1992) 176 CLR 77, 108 per Mason CJ, Toohey J and McHugh JJ.
[38] (1992) 176 CLR 77, 108 per Mason CJ, Toohey J and McHugh JJ.
[39] (2017) 91 ALJR 1209, 1222-1223 [68].
[40] *Re Roberts* (2017) 91 ALJR 1018.
[41] (2017) 91 ALJR 1018, 1033 [119] per Keane J.
[42] *Re Canavan* (2017) 91 ALJR 1209, 1227 [103].

C.3 The foreign component

36. When the Court determines what the applicable foreign law is, there are potentially three situations that can engage the constitutional imperative. This case raises the third, but for completeness and clarity the first two should be mentioned. First, the Court may determine that a foreign law conferring a foreign citizenship is *exorbitant* and therefore not recognise it at all.[43] Second, the Court may determine that a foreign law that confers citizenship should prima facie be recognised but conclude that the foreign law fails to offer *any* effective legal mechanism permitting renunciation. In such a case the Court should find that foreign law creates an irremediable situation and immediately conclude that the constitutional imperative is engaged without embarking on any analysis of the domestic component. Third, as is the case here, the Court should determine that the foreign law *does* provide a process for renunciation of foreign citizenship. It then becomes necessary for the Court to isolate the renunciation steps required by the foreign law.

37. This process of isolating the foreign law's renunciation steps does not treat as relevant the actions, or inactions, of foreign officials. This is because it is the *foreign law* which is relevant and not the actions of persons acting pursuant to the foreign law. As outlined above, the constitutional imperative, on a proper understanding of the system of representative government provided by the Constitution, must be divorced from the exercises of discretion, degrees of diligence or bureaucratic practices of foreign officials. As such, the process of isolating steps required by foreign law must necessarily disregard the operation of a discretion exercisable by a foreign official or foreign department. If a foreign law requires the exercise of a discretion as a step to effect a renunciation, the Court must not recognise such a law, and therefore not isolate it as a step required by the foreign law.

38. Once the steps required by a foreign law have been isolated, the Court must then turn to the circumstances of a particular person and analyse whether any of the actions of that person holds legal significance in relation to the steps required by a foreign law for renunciation. There are three possible outcomes following this analysis, namely that the person's actions were either (i) wholly insufficient, (ii) partly sufficient or (iii) sufficient. The domestic component has no work to do where a person's actions are wholly insufficient (such as in the case of Mr Delacretz, Mr Kardamitis and Mr Roberts). The domestic component has little work to do in a case such as Senator

[43] *Sykes v Cleary* (1992) 176 CLR 77, 112-113 per Brennan J.

Gallagher's where her actions were sufficient as a matter of foreign law because the domestic component recognises the sufficiency. It is only where a person's actions are partly sufficient that a more thorough analysis of the domestic component is required.

D Application of the correct test to Senator Gallagher

D.1 The foreign component

39. Senator Gallagher's primary argument is that the foreign component of the test supports the conclusion that the legal significance of her actions was *sufficient* as a matter of British law for her renunciation to be effective from no later than 6 May 2016, which was before the writs were issued or nomination occurred. As such, the domestic component of the test need only pick up this conclusion in order to determine that all steps reasonably required were taken (and therefore also determine that the constitutional imperative is engaged). The foreign component in Senator Gallagher's case recognises s 11(1) of the *British Nationality Act 1981* (UK) (**1981 Act**) as the source of Senator Gallagher's status as a British citizen.[44] It also recognises the law relating to the process of renunciation as being, s 12 of the 1981 Act, clauses 8 and 9, Schedule 5 of the *British Nationality (General) Regulations 2003* (**2003 Regulations**) and clause 10 and Schedule 8 of the *Immigration and Nationality (Fees) Regulations 2016* (**2016 Regulations**):[45]

40. The sole step the text of the 1981 Act required Senator Gallagher to take in order to renounce her British citizenship was to make "in the prescribed manner a declaration of renunciation of British citizenship". In order to comply with the legislative requirement to make the declaration in the "prescribed manner" Senator Gallagher was required to take the steps as provided by the 2003 Regulations and the 2016 Regulations. It is convenient to simultaneously isolate the steps required by British law and match them with the Senator Gallagher's potentially legally significant acts:

    (a) on 20 April 2016 Senator Gallagher caused her declaration to be made to the Secretary as required by s 8(a) and 9(e) of the 2003 Regulations;[46]

    (b) Senator Gallagher made her declaration in writing and stated her name, address, date and place of birth as was required by s 5 cl 1 of the 2003 Regulations;[47]

    (c) on 20 April 2016 Senator Gallagher caused her declaration to contain information

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[44] Agreed Facts at [12] **[CB tab 7 p 171]**.
[45] Agreed Facts at [24] **[CB tab 7 p 172]**.
[46] s 8(a) and 9(e) of the *2003 Regulations* **[CB tab 7 p 203]**; see also Agreed Facts at [24(b)] **[CB tab 7 p 172]**; Fransman Opinion at [57] **[CB tab 6 p 153]** and Berry Opinion at [6]-[7] **[CB tab 3 pp 120-121]**.
[47] Sch 5 cl 1 of the *2003 Regulations* **[CB tab 7 p 204]**; see also Agreed Facts at [24(b)] **[CB tab 7 p 172]**; Fransman Opinion at [57] **[CB tab 6 p 153]** and Berry Opinion at [6]-[7] **[CB tab 3 pp 120-121]**.

showing that she:

(i) was a British citizen by providing a certified copy of her original birth certificate which contained information capable of demonstrating that she was a British citizen, namely information showing that her father was born in England, as was required by sch 5 cl 2(b) of the 2003 Regulations;[48]

(ii) was of full age as required by sch 5 cl 2(c) of the 2003 Regulations;[49]

(iii) was of full capacity as required by sch 5 cl 2(d) of the 2003 Regulations;[50]

(iv) would, after the registration of her declaration, have Australian citizenship by providing a certified copy of her Australian passport as was required by sch 5 cl 2(d) of the 2003 Regulations;[51]

(d) on 20 April 2016 Senator Gallagher declared that the particulars in her declaration were true as was required by sch 5 cl 3 of the 2003 Regulations; [52] and

(e) on 20 April 2016 Senator Gallagher caused to be sent to the Home Office an authority to charge her credit card facility as was required by cl 10 and sch 8 of the 2016 Regulations.

41. As at 20 April 2016, all of the above acts held the potential to be significant as a matter of British law. Two further events converted this potential to a reality. First, on 26 April 2016, the Home Office received the renunciation declaration and the enclosed documents. Second, on 6 May 2016, the Home Office, pursuant to the authority conferred by Senator Gallagher, debited her credit facility. Thus, by no later than 6 May 2016 all of the above actions held a particular status under British law. That status, as a matter of concurrence between the experts, is that the information provided by Senator Gallagher was "sufficient" to achieve renunciation.[53]

D.2 The domestic component

42. Senator Gallagher's primary argument is that, as a matter of domestic law, the constitutional imperative is engaged where a potential candidate has at the time of, or within a reasonably expeditious time after, the date of issue of writs but certainly

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[48] Sch 5 cl 2(a) of the *2003 Regulations* **[CB tab 7 p 204]**; see also Agreed Facts at [24(b)] **[CB tab 7 p 172]**; Fransman Opinion at [57] **[CB tab 6 p 153]** and Berry Opinion at [6]-[7] **[CB tab 3 pp 120-121]**.
[49] Sch 5 cl 2(b) of the *2003 Regulations* **[CB tab 7 p 204]**; see also Agreed Facts at [24(b)] **[CB tab 7 p 172]**; Fransman Opinion at [57] **[CB tab 6 p 153]** and Berry Opinion at [6]-[7] **[CB tab 3 pp 120-121]**.
[50] Sch 5 cl 2(c) of the *2003 Regulations* **[CB tab 7 p 205]**; see also Agreed Facts at [24(b)] **[CB tab 7 p 172]**; Fransman Opinion at [57] **[CB tab 6 p 153]** and Berry Opinion at [6]-[7] **[CB tab 3 pp 120-121]**.
[51] Sch 5 cl 2(d) of the *2003 Regulations* **[CB tab 7 p 205]**; see also Agreed Facts at [24(b)] **[CB tab 7 p 172]**; Fransman Opinion at [57] **[CB tab 6 p 153]** and Berry Opinion at [6]-[7] **[CB tab 3 pp 120-121]**.
[52] Sch 5 cl 3 of the *2003 Regulations* **[CB tab 7 p 205]**; see also Agreed Facts at [24(b)] **[CB tab 7 p 172]**; Fransman Opinion at [57] **[CB tab 6 p 153]** and Berry Opinion at [6]-[7] **[CB tab 3 pp 120-121]**.
[53] See extracts above at [16]-[17].

before nomination taken every step which is sufficient as a matter of the foreign law to achieve renunciation. Senator Gallagher satisfies that test, amply so. She had taken all such steps by no later than 6 May 2016, i.e. *before* the writs were even issued.

43. Whether the constitutional imperative is engaged for a potential candidate who achieved the status of "sufficiency" under the foreign law later than Senator Gallagher, for example just before nominations closed, does not arise on the facts of this case; if the question needs to be answered, Senator Gallagher submits that it would be.

44. The Attorney-General is wrong to submit that matters within the power of foreign officials (AGWS [47] to [48]) are relevant to whether the constitutional imperative is engaged. For the reasons given above, the constitutional imperative disregards the stifling and discriminatory effect that recognising exercises of discretion, degrees of diligence or bureaucratic practices of foreign officials could have on participation in representative government. The test propounded in *Re Canavan* reflects this scope of the constitutional imperative by holding as its focus "foreign law" and matters "within the power" of a citizen. The Attorney-General's interpretation of the test wrongly diverts its focus *away* from what is required by foreign law and what is within the power of a citizen; towards what is *not required* by foreign law and what *rests within* the power of a foreign official.

45. Each of the Attorney-General's primary and alternative cases have a particularly unsatisfactory logic where a foreign legal system allows for officials to take months or even years to process applications for renunciation, and in the course of such process exercise discretions to treat two identical applications differently. That, taking the Attorney-Generals' expert at his highest, is the situation with Britain. *First*, Mr Fransman asserts that "it can lawfully take SSHD months or even years to... register a declaration of renunciation."[54] *Secondly*, while there are said to be possibilities for obtaining expedition, there is no requirement under British law for expedition to be granted if urged, and indeed no legal parameters around which certain cases will get expedition over others.[55] *Thirdly*, Mr Fransman's view, a surprising one, is that it would have been lawful for the Secretary to register a renunciation on 6 May 2016 on the basis of the information shown by Senator Gallagher on 6 May 2016, but equally lawful not only to spend two months thinking about the application but to then insist on further evidence failing provision of which her application could have been

[54] Fransman Opinion at [115] **[CB tab 6 p 167]**.
[55] See the relevant law provided at **[CB 176-206]** agreed between the parties: Agreed Facts at [24] **[CB 172]**.

lawfully dismissed.[56] That implies that two British citizens could have received different results to identical applications filed at the identical time.

46. The unsatisfactory logic of the Attorney-General's case is that potential candidates cannot know if they may lawfully take up their prima facie qualification to nominate under section 34 until after all those processes, which are not "within their power" (cf *Re Canavan* at [72]), are exhausted.

47. What will be the practical consequences of the Attorney-General's test? One implication seems to be that potential candidates exposed to such foreign legal systems should engage legal or other agents within the foreign country to press claims for expedition, uncertain as such claims may be. How is the person to know when it has become too late to hold out hope for expedition and give up the quest for nomination? How are political parties to organise orderly nomination processes when everything is placed into such an uncertain foreign flux?

48. A related implication seems to be that potential candidates must press claims for expedition in particular terms; viz pointing out to the British officials how important it is that they be permitted to take up their qualification under section 34 to nominate for an Australian election. There is no evidence that British officials are bound as a matter of British law to regard this as a relevant consideration, or to give it any particular weight over other claims, or to accelerate such applications by any definite time period.

49. So the very real possibility of the Attorney-General's propounded test is discriminatory outcomes; outcomes not "within the power" of the potential candidate; and outcomes offensive to the workings of representative government.

50. There is a further vice in allowing foreign discretions of the type that are said to exist under British law to dictate Australian constitutional outcomes. The Fransman Opinion suggests that with expedition, some applications can be processed within a matter of days.[57] He is not explicit on the parameters of such "Grade One" expedition, but it is not fanciful to think that a plea for expedition in respect to a particular candidate by the Australian Executive Government at the highest level (for example, via the British High Commission) might move a case to near the top of the queue. It would be offensive in the extreme if two candidates in relevantly similar positions end up with different outcomes in terms of ability to stand just because one can take

[56] Fransman Opinion at [98] **[CB tab 6 p 164]**.
[57] Fransman Opinion at [117] **[CB tab 6 p 168]**.

advantage of the services of the Executive Government and the other cannot.

51. Is there any escape from these unsatisfactory outcomes on the Attorney-General's test? Perhaps the ultimate logic is that any British citizen thinking of standing for Parliament must start the process so far in advance of any possible election that he or she can be sure a "final decision" is received before the date of nomination. But what is that advanced date? On Mr Fransman's evidence, one would need to start the process years before to get complete certainty that all discretions and bureaucratic processes could successfully be surmounted. That would turn s 44(i) into an instrument of punishment or oppression. Australian citizenship law permits the holding of dual citizenship. Section 44(i) sits as a practical qualification or exception to the general rule if persons wish to participate as candidates for an election. The Constitution should not be interpreted as to impose an effective duty on persons to make their decisions whether to stand months or years before a potential election, at the cost of forfeiting a foreign citizenship they are otherwise lawfully allowed to continue to hold; especially when, come an actual election, months or years later, there may be reason not to nominate.

52. Recognition of the reality of the party system only strengthens this point. Most but not all candidates must be pre-selected by parties before they can nominate. The Constitution should not sensibly be interpreted to require parties to complete all pre-selection processes months or years before the next possible election.

53. The above submissions focus on the uncertainty, chaos and discriminatory outcomes that the Attorney-General's test would invite, from the perspective of the candidates, and to a supporting extent, their parties. The point is equally strong from the perspective of the electors and the electoral system. There needs to be reasonable certainty that the persons nominating are lawfully able to stand, so votes can be cast meaningfully and the spectre of forced by-elections and Senate recounts can be minimised. A test which hands everything over to the actions, or inactions, of foreign officials only invites more challenges over time.

D.3 The dispute between the experts

54. For the above reasons, Senator Gallagher should succeed, even taking Mr Fransman's evidence at its highest. However, if it matters, there is reason to prefer the view of Mr Berry that the Secretary had a duty under s 12 of the 1981 Act to cause Senator Gallagher's declaration of renunciation to be registered which was enforceable in a court.

55. The dispute between the experts is not solely about the *application* as opposed to *content* of foreign law.[58] The existence of a public law duty and a judicial discretion under British law is a matter that goes to the *content* of British law. The existence of both the duty and the discretion would be the primary issues upon which Senator Gallagher would propose to cross-examine Mr Fransman. Accordingly, if it becomes necessary to resolve the dispute, while the Court is not bound to send the matter to cross-examination of experts, it remains an available option.

56. If the Court is to resolve the dispute itself, and do so now, this Court should be satisfied that a public law duty arose to process Senator Gallagher's renunciation upon receipt of the relevant documents and the deduction of the fee. This is because Mr Berry accepts that a duty exists and because Mr Fransman accepts that "as a matter of law... once a renunciation request is before SSHD, SSHD is under a public law duty to determine the matter."[59] The only dispute is how the public law duty would be determined.

57. The materials that Senator Gallagher would tender to a British court on such an application would be the documents Senator Gallagher sent to the Secretary on 20 April 2016. The Secretary would not (and importantly could not) have any material which was capable of contradicting Senator Gallagher's material. By force of the Secretary "having been satisfied of all facts save for one: whether Ms Gallagher was a British citizen" the only possible issue in dispute would relate to the information concerning whether Senator Gallagher was not a British citizen by reason of a "rare" exception relating to diplomats. In Mr Berry's opinion, a requisition to satisfy the Secretary that the rare diplomatic exception applies is only appropriate where the Secretary has reason to believe that it does apply. The Secretary, on a judicial review application, would not be able to point to any reason why this rare exception might apply; nor is it suggested now that it did apply. The experts themselves agree that the information provided was "sufficient". In these circumstances this Court should find that by no later than 6 May 2016 (when the fee was debited), Senator Gallagher would have been successful in having a court in the UK compel the Secretary to perform the public duty according to law by registering her renunciation.

E Alternative submissions

58. Senator Gallagher's alternate argument proceeds on the basis, which is denied, that

[58] cf AGWS at [51].
[59] Fransman Opinion at [115] **[CB tab 6 p 167]**.

prior to nomination her actions should be regarded as only *partially* sufficient to achieve renunciation. What was the possible "insufficiency"? It would depend on accepting Fransman at his very highest, namely that there is a very large, open-ended discretion that allows the Secretary a period of time, that can be very short or very long, in which to consider an application, and then decide whether or not to make requisitions in search of additional levels of proof of information which has already been supplied. The premise is that British law is so open-ended and discretionary that the Secretary would have been entitled to refuse to register the renunciation unless and until Senator Gallagher met any requisition, even though she had already provided information "sufficient" to satisfy the requirements of British law and the Secretary had no information to contradict her information. On those, rather strained, premises, the "untaken step" was the failure, prior to nomination, to anticipate and comply with *either* all possible permutations of the exercise of the Secretary's discretion *or* more specifically a requisition for the Additional Documents.

59. On no view could it be reasonable to require a potential candidate to anticipate any and every possible permutation of requisition; the only argument could be about the Additional Documents specifically.

60. It is clear from the plurality in *Sykes v Cleary*[60] that evidence of individual circumstances is relevant for determining whether the constitutional imperative is engaged. There is no reason, in principle, why individual circumstances may not extend to a reasonably held subjective belief of a person whether all reasonable steps have been taken. This contrasts to the principled reasons to reject as relevant such evidence for the purposes of whether s 44(i) *prima facie* disqualifies a candidate.[61]

61. Senator Gallagher could not reasonably have been required, at the time of nomination, to anticipate a requisition for the Additional Documents because:

    (a) the provision of the Additional Documents was not a requirement of British law;

    (b) Senator Gallagher completed her declaration of renunciation on the appropriate form provided by the Home Office (**Form RN**). The Form RN did not state that the Additional Documents were required;[62]

    (c) At all material times the Home Office provided guidance on how to complete a

[60] "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": *Sykes v Cleary* (1992) 176 CLR 77, 108.
[61] *Re Canavan* (2017) 91 ALJR 1209, 1220-1221 [54]-[59] and 1223 [71].
[62] A blank copy of the Form RN is at Attachment E to the Agreed Facts **[CB tab 7 p 237]**.

Form RN in the form of "Guide RN" (**Guide RN**)[63]; which Guide did not state that the Additional Documents were required;[64]

(d) By 13 May 2016 (being eighteen days before she nominated and three days before writs were issued) Senator Gallagher reasonably believed, as a result of the deduction of the fee from her bank account on 6 May 2016, that her renunciation declaration had been registered (cf Mr Fransman: "it would be reasonable to infer from that event [the event of the SSH deducting payment] that the registration of the declaration had just been affected or was imminent");[65]

(e) Senator Gallagher did not receive any correspondence from the Home Office until 20 July 2016;[66]

(f) the 2016 Regulations distinguish between fees for "applications", "processes" and "services".[67] The applicable fee for a "registration of a declaration of renunciation of British citizenship under s 12 of the 1981 Act" is categorised as "fee for service", with no mention of possible refund[68]; and

(g) had Senator Gallagher "known that the provision of the [Additional Documents] would have caused her renunciation declaration to be processed immediately she would have included those documents in addition to the documents [she that originally provided on 20 April 2016]".[69]

62. As such the constitutional imperative is engaged.

Part V: Length of oral argument

63. Senator Gallagher estimates that she will require 2 hours for oral argument.

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[63] Agreed Facts at [28] **[CB tab 7 p 173]**.
[64] A copy of the Guide RN is available at Attachment F to the Agreed Facts **[CB tab 7 p 244]**.
[65] Fransman Opinion at [118] **[CB tab 6 p 168]**.
[66] Agreed Facts at [35] **[CB tab 7 p 174]**.
[67] 2016 Regulations cl 10 (a)(i) **[CB tab 7 p 208]**.
[68] 2016 Regulations Table 20, item 20.3.1 **[CB tab 7 p 211]**.
[69] Agreed Facts at [40] **[CB tab 7 p 174]**.