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

No. C11 of 2017

RE SENATOR THE HON MATTHEW CANAVAN

Reference under s 376 *Commonwealth Electoral Act* 1918 (Cth)

ANNOTATED

SUBMISSIONS OF SENATOR CANAVAN

Part I: Publication on the internet

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

Part II: Statement of issues

2. The Senate has referred the following questions to this Court:

   (a) whether, by reason of s 44(i) of the Constitution, there is a vacancy in the representation of Queensland in the Senate for the place for which Senator Matthew Canavan was returned;

   (b) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;

   (c) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and

   (d) what, if any, orders should be made as to the costs of these proceedings.

3. The first question in the reference gives rise to the following two issues.

4. The first is whether an Australian citizen who is born in this country, and subsequently has conferred upon him foreign citizenship by retrospective and automatic operation of foreign law, is incapable of being chosen under s 44(i).

5. The second is whether an Australian person upon whom foreign citizenship is conferred in the circumstances described herein was required to take reasonable steps to renounce that foreign citizenship, lest he be incapable of being chosen under s 44(i). If so, a further issue arises of whether Senator Canavan did take such reasonable steps.

Part III: Notice of constitutional matter

6. The Attorney-General of the Commonwealth filed and served notices under s 78 of the *Judiciary Act* 1903 (Cth) on 25 August 2017.

Filed by:
Stokes Moore
PO Box 2020
Springwood Qld 4127

Telephone: (07) 3439 8880
Email: jstokes@stokesmoore.com.au
Ref: James Stokes

Part IV: Statement of facts

7. Matthew James Canavan ("Senator Canavan") was born in Southport, Queensland on 17 December 1980. Senator Canavan's mother, Maria, was born in Ayr, Queensland on 22 October 1955. His father, who had no Italian heritage, was born in Toowoomba, Queensland on 5 August 1959.[1]

8. Senator Canavan's maternal grandparents were born in Italy. Gaetano Zanella (Senator Canavan's maternal grandfather) was born on 1 August 1915 in Lozzo di Cadore, Belluno, Italy. Rosalia Zanella (Senator Canavan's maternal grandmother) was born on 6 December 1920 also in Lozzo di
10 Cadore, Belluno, Italy.[2]

9. Gaetano Zanella was an Italian citizen who migrated to Australia and became naturalised as an Australian citizen on 25 September 1955 before Maria's birth. Rosalia Zanella was an Italian citizen who migrated to Australia and later became naturalised as an Australian citizen on 25 September 1959. Because of the Italian citizenship law in force at the time, Gaetano Zanella and Rosalia Zanella lost their Italian citizenship when they were naturalised as Australian citizens.[3]

10. Prior to 1983, Italian citizenship under the *ius sanguinis* (ie citizenship by descent) passed through the male line only for an unlimited number of
20 generations. Senator Canavan's mother was born less than a month after her father had become naturalised. She was therefore not an Italian citizen at her birth.[4] The same was true of Senator Canavan: he was not an Italian citizen at his birth in 1980, because at that time neither his father nor his mother was an Italian citizen.[5]

11. In 1983, the Italian constitutional court held that the provisions of the Italian citizenship legislation providing for citizenship by descent only through the male line were discriminatory and invalid. The effect of that holding was that all children born after 1 January 1948[6] from a mother who was an Italian citizen at the time when the child was born automatically acquired Italian
30 citizenship.[7]

12. Thus (subject to para 73 of these submissions below) Senator Canavan's mother retrospectively, from her birth in 1955, became an Italian citizen and, as a consequence, so did he, retrospectively from his birth in 1980.

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1 Affidavit of Matthew James Canavan affirmed 7 September 2017 ("Canavan affidavit"), paras 2-3, Exhibit MJC-2. CB vol 2 p 269, 277.

2 Canavan affidavit, paras 6-7. CB vol 2 p 269.

3 Advice on Italian Citizenship Law by Maurizio Delfino and Beniamino Caravita di Torrito ('the Delfino and di Torrito advice'), p 5. CB vol 2 p 315.

4 Delfino and di Torrito advice, p 7. CB vol 2 p 317.

5 Delfino and di Torrito advice, p 8. CB vol 2 p 218.

6 This was the date on which the Italian Constitution commenced.

7 Delfino and di Torrito advice, pp 5, 7. CB vol 2 pp 315, 318.

13. In 2006, Senator Canavan's mother informed him that they could be eligible to obtain Italian citizenship, and asked him and his brother whether they also wished to become Italian citizens. She gave him certain blank documents[8] which he understood to be the paperwork he would need to complete and lodge if he "wished to take up Italian citizenship", but he did not believe that he could be made an Italian citizen without doing so.[9] Senator Canavan at the time decided, and informed his mother, that he did not wish to become an Italian citizen.[10]

14. Senator Canavan's mother then registered herself as an Italian citizen living abroad, listing Senator Canavan as one of her children.[11] The reference to him was included without his knowledge or consent.[12] The document Senator Canavan's mother completed does not purport (a) to seek that any of the children be registered, or (b) to elect to take citizenship on her own behalf or on behalf of her children. The registration, when it took effect, did not have any effect on her or her children's actual citizenship.[13]

15. Senator Canavan was nominated as the second in a group of eight candidates for the Senate in Queensland on 27 May 2016. His nomination was declared on 10 June 2016.[14] At the election held on 2 July 2016, Senator Canavan was the fourth candidate elected for Queensland.[15]

16. On the evening of 18 July 2017, Senator Canavan's mother told him that, in taking steps to register herself as an Italian citizen, she believed she may also have registered him. The next day he commenced taking steps to ascertain the position and to renounce any such Italian citizenship. His renunciation became effective on 8 August 2017.[16]

Part V: Applicable constitutional and statutory provisions

17. The only applicable constitutional provision is s 44 of the Constitution:

Any person who:

(i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; ...

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

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[8] Canavan affidavit, Exhibit MJC-7. CB vol 2 pp 290-294.

[9] Canavan affidavit, para 10. CB vol 2 p 270.

[10] Canavan affidavit, para 11. CB vol 2 p 270.

[11] See Canavan affidavit, Exhibit MJC-8 p 30. CB vol 2 p 299.

[12] Canavan affidavit, para 14. CB vol 2 p 270.

[13] Delfino and di Torrito advice, pp 5, 8. CB vol 2 pp 315, 318.

[14] CB vol 1 p 58 [46]-[48].

[15] CB vol 1 pp 59-60.

[16] Canavan affidavit, paras 14-23. CB vol 2 pp 270-272.

Part VI: Argument

A. Summary of Argument

18. Given the purpose of s 44(i) of the Constitution, the expression "a subject or a citizen of a foreign power" identifies a person who has, as a matter of substance and reality, a relationship of allegiance to a foreign power. Senator Canavan did not have any such relationship with Italy. The reasons for that construction are developed below; Senator Canavan also adopts the submissions of the Attorney-General as to the proper construction of s 44(i).

19. Alternatively, Senator Canavan falls into an established exception to the application of foreign law for the purposes of s 44(i). *Sykes v Cleary*[17] suggests that one exception is where the foreign law purports to confer citizenship on those who have no connection or only a very slender connection with the foreign State. That exception applies here. Senator Canavan at best had only a very slender connection with Italy: he was not born there and at the time of birth neither he nor his parents nor grandparents were Italian citizens. Because the unilateral, retrospective conferral of Italian citizenship on him would have the effect of disqualifying him from being chosen under s 44(i) of the Constitution, public policy requires that such an operation of foreign law should not be recognised. That conclusion is strengthened by the fact that opinion among Italian lawyers differs as to whether the Italian legislation in question did automatically confer citizenship on Senator Canavan.

20. Further, even if those submissions are not accepted, then given the purpose of s 44(i), and the very tenuous nature of the connection described above, Senator Canavan could not reasonably be expected to have taken positive steps to renounce that citizenship until the true factual position, obscure as it was, had been determined. Until that time it was reasonable for him to proceed on the basis of his belief that he was not an Italian citizen. Since he did then renounce his Italian citizenship within days of determining what may have been the true position, he satisfied the requirements of s 44(i) on any view.

B. The historical background to section 44

21. The historical background to s 44(i) supports the construction of the expression "a subject or citizen of a foreign power" as identifying a person who has, as a matter of substance and reality, an allegiance to a foreign power.

22. The roots of paragraph (i) of section 44 run deep in the Anglo-Australian system of representative democracy. Its statutory and common law antecedents have been of as much import in shaping that democratic system as section 44 itself is now.

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[17] (1992) 176 CLR 77 ("*Sykes*").

Early British law and policy

23. In the earliest stages of the parliamentary system there were statutes providing that only persons residing within the area represented by a particular seat in Parliament could be elected thereto.[18] Aliens (being all persons born outside the dominions and ligeance of the Crown[19]) had been adjudged by Parliament to be incapable of sitting from at least as early as 1623.[20]

24. Subsequently, s 3 of the *Act of Settlement* 1701 provided, inter alia, that:

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> "... no person born out of the kingdoms of England, Scotland or Ireland or the dominions thereunto belonging, although he be naturalised or made a denizen (except such as are born of English parents), shall be capable to be of the privy council or a member of either House or Parliament or to enjoy any office or place of trust either civil or military or to have any grant of lands, tenements or hereditaments from the Crown to himself or to any other or others in trust for him."[21]

25. In 1818 it was said that aliens were excluded because they were "ignorant of the laws and customs of the realm, and unable or unlikely to promote the interest of a state to which they are not naturally allied".[22] Similarly the rationale for excluding aliens from voting was that they were persons "who, not being subjects of the British empire, are supposed to feel no interest in its welfare; and therefore are not to be intrusted with" its legislative processes.[23]

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26. Taken together, these matters indicate an early and ongoing constitutional imperative that the representatives of the people should have a real loyalty to those they represent. That imperative was consistent in tenor with a more general aspiration that parliamentary representatives should be independent of extraneous influence, including from the Crown,[24] and not subject to "natural incapacities" such that they could not "exercise a sound discretion, or are so much under the influence of others, that they cannot have a will of their own".[25]

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18 7 Hen V c 1, 23 Hen VI c 14 s 3; cf 14 Geo III c 58; see further *Rogers on Elections* (14th ed, 1885-1886) at 568.

19 *Calvin's Case* (1609) 7 Co Rep 1a [77 ER 377]. See also *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance* (1869) at vii. This later became subject to 7 Anne c 5, which deemed the children of natural-born subjects, born outside the Crown's dominions, to also be natural-born subjects (later again extended to grandchildren under 13 Geo III c 21).

20 *Blackstone's Commentaries* (1826) vol 1 at 162, citing Com Journ 10 Mar 1623, 16 Feb 1625.

21 12 & 13 Wm III c 2. When William III and Mary acceded to the throne, there was a "a jealousy of foreigners and of the followers who would be likely to accompany a foreign monarch to this country": see Cockburn, *Nationality: or the Law Relating to Subjects and Aliens, Considered with a View to Future Legislation* (1869) at 29.

22 Arthur Male, *A Treatise on the Law and Practice of Elections* (1818) at 34.

23 Serjeant Samuel Heywood, *A Digest of the Law Respecting County Elections: From the Issuing of the Writ to its Return* (2nd ed, 1812) at 250.

24 See, eg, as to the antecedents of s 44(iv), *Sykes v Cleary* (1992) 176 CLR 77 at 95. After 1688, "the Commons took active steps to exclude from Parliament persons supposed to be under the influence of the Crown. The subject once agitated, the jealousy of the House of Commons proceeded with energy": *Rogers on Elections* (14th ed, 1885) at 576-577.

25 Heywood, above n 23, at 255. See also at 269 as to the solvency qualifications.

The Canadian and colonial antecedents

27. The actual drafting of s 44(i) traces back to the first constitution of what is now Canada, 31 Geo III c 31 (the *Constitution Act* 1791). Section 8 of that Act provided "that if any Member of the Legislative Councils of either of the said Provinces respectively ... shall take any Oath of Allegiance or Obedience to any foreign Prince or Power; his Seat in such Council shall thereby become vacant". (The references to a foreign "Power" in this context was of course broad enough to encompass the new republics arising both close to England and close to the remaining British North American colonies.)

10 28. The drafting which Inglis Clark drew upon in his 1891 draft Bill, and which is still substantially present in s 44(i), was first developed fully in the *Union Act* 1840 (Imp) s 7 (3 & 4 Vict c 35). That section provided, in relation to the Legislative Council of the Province of Canada, that

> "if any Legislative Councillor of the Province of Canada ... shall take any Oath or make any Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to any Foreign Prince or Power, or shall do, concur in, or adopt any Act whereby he may become a Subject or Citizen of any Foreign State or Power, or whereby he may become entitled to the Rights, Privileges, or Immunities of a Subject or Citizen of any Foreign State or Power... his Seat in such Council shall thereby become vacant."

20 29. Substantially the same provision, with some simplification of language, was continued in s 31 of the *British North America Act* 1867 (Imp), in relation to the Senate of Canada:[26]

> "The Place of a Senator shall become vacant in any of the following Cases: ... (2.) If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power."

30. The positive qualifications required for membership of the Legislative Council and Senate in each case included, in short, being a natural-born or naturalized subject of the Crown.[27] On the face of these provisions, then, persons who
30 were on their appointment already foreign subjects or citizens, or entitled to the rights or privileges thereof, would not have been disqualified.[28]

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26 The Canadian upper house was never an elected body, and so there was never occasion for a disputed returns jurisdiction as such in relation to it. Rather, it always retained jurisdiction over questions with respect to the qualifications of its members, with the sole exception of *Edwards v Attorney-General (Canada)* [1930] AC 124; see especially at 142: "as yet, no concrete case has arisen to which the jurisdiction of the Senate [as to qualifications of a senator etc] could attach". As a result, there is no case law from that jurisdiction shedding light on the construction of the provisions described above.

27 See s 4 of the 1791 Act, s 4 of the 1840 Act and s 23(2) of the 1867 Act. In contrast, for members of the Legislative Assembly and House of Commons respectively, s 27 of the 1840 Act and s 41 of the 1867 Act simply left in place the existing local legislation as to qualifications and disqualifications subject to alteration by further legislation.

28 That may have been subject to a qualification, on a case-by-case basis, as to whether an Act of naturalisation or letters patent of denization deemed the person to have lost, or required the person to relinquish, foreign allegiance. There was nothing in the *Aliens Act 1844* (7 & 8 Vict c 66) which had such an effect generally. There would also be a question as to whether the foreign law provided for nationality to be lost upon naturalization in British dominions.

31. The Canadian provisions were adopted in the Australian colonies[29] and remain substantially in effect.[30] Thus, both before and after the drafting of s 44(i) of the Constitution, the same concerns were perceived in cognate jurisdictions.

Nationality and naturalization in the 19th century

32. The construction of s 44(i) should take account of the evolution of nationality and naturalization law over the course of the 19th century.[31] The 1840 and 1867 Canadian Constitutions were each drafted against a backdrop of continuing problems with respect to cases of dual British and American nationality in particular. British subjects (including those resident in Canada) who were naturalized in the new American republic could not, under British law, lose their allegiance to the Crown. The result was a succession of contentious cases of new-made American citizens being, under British law, charged with treason, or impressed into naval service, or otherwise subject to conflicting duties. These matters were detailed in the 1869 *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance*.[32]

33. In the Report, the Commissioners opined that the old common law doctrine that the allegiance of a natural-born British subject is indelible "is neither reasonable nor convenient" and "is at variance with those principles on which the rights and duties of a subject should be deemed to rest".[33] It was considered

> inexpedient that British law should maintain in theory, or should by foreign nations be supposed to maintain in practice, any obligations which it cannot enforce and ought not to enforce if it could; and it is unfit that a country should remain subject to claims for protection on the part of persons who, so far as in them lies, have severed their connexion with it.[34]

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29 See Attorney-General's submissions at [35].

30 See Attorney-General's submissions at [36]; note that the *Parliament of Queensland Act* 2001 (Qld) s 72(1)(d) applies where "the member takes an oath or makes a declaration or acknowledgement of allegiance, obedience or adherence to, or *becomes an agent of*, a foreign state or power" (emphasis added).

31 Cf *Singh v Commonwealth* (2004) 222 CLR 322.

32 *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance* (1869) ("the Report") at 29-52 (Part IV-Correspondence between the United States and Great Britain): "The questions of naturalization and allegiance have been a fruitful source of controversy between the two countries. Commencing from the first establishment of the American Union, they have continued with unabated vigour until the present day, when the great increase in the number of persons of British birth settled in America has raised them to a position of the utmost importance." See Cockburn, above n 21, at 70-106.

33 See the Report at v.

34 Ibid.

34. Shortly after the 1869 Royal Commission reported, the Lord Chief Justice of England, Sir Alexander Cockburn, commented extensively on the subject-matter of the report and in particular on the degree of disharmony between British nationality law and the laws of foreign countries:

> The conflict between the law of England and that of so many of the leading nations of the world as to the origin of nationality, and the inconvenience to which such conflict may give rise, as well as the inconsistency of our rule as to the immutability of allegiance, at a time when emigration from this country to America is annually taking place on so large a scale, are now so sensibly felt, that an alteration of the law has become inevitable.[35]

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> ... from the variety and conflict of laws thus shown to exist, serious embarrassment and difficulty may arise, on the one hand, to individuals, by their being exposed to conflicting claims on their allegiance as subjects, on the other to Governments, by claims being made on them for protection by individuals desirous of escaping from burdens or liabilities sought to be imposed on them as the subjects of some other State. But the matter becomes far more complicated, and far greater difficulty arises from the practice, in modern times so extensively used, of one State conferring its nationality on the subjects of another ...[36]

35. That having been said, Cockburn CJ also rightly pointed out that the status of dual nationality would not invariably create such problems; an element of reason and pragmatism could be expected to apply within the relationship
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between nation and national:

> Doubtless, in these humane days, if a man, having, under these conflicting laws, both a British and a foreign nationality, had all his life acted as the subject of one of the two countries, no Government would think of visiting him with the consequences of treason for adhering to the country he has habitually treated as his own.[37]

36. The Royal Commission's report led to the *Naturalization Act 1870* (UK), which for the first time provided that a British subject would, upon voluntary naturalization in a foreign country, cease to be a British subject, together with their naturalized children (ss 6, 10(3)).[38] Likewise, a natural-born British subject who at birth became under the law of a foreign state a subject of such
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state was permitted to make a declaration of alienage, thereby ceasing to be a British subject, once of full age and absent disability (s 4). Naturalized aliens were also given full civic rights, including to sit in Parliament (s 7).[39]

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[35] Cockburn, above n 22, at 3.

[36] Cockburn, above n 22, at 26.

[37] Cockburn, above n 22, at 114.

[38] See also Fransman, *British Nationality Law* (3rd ed, 2011) at 138-139.

[39] Issues of naturalisation and dual citizenship remained the subject of active efforts at law reform in 1899-1901: see Great Britain, Parliament, 'Report of the Interdepartmental Committee', *Parliamentary Papers*, 1901 (Cmnd 723) LIX 351. Thus, as with s 51(xix), it is proper to observe that matters of nationality and naturalization were in a continuing state of flux when the Constitution was drafted and adopted. Just as this Court has held that the scope of s 51(xix) should be read as allowing for Parliament to resolve the cross-currents and uncertainties in that body of law (*Singh v Commonwealth* (2004) 222 CLR 322), so also should room be left for Parliament to deal with questions of qualification for Parliament by means of legislation under s 34 of the Constitution. Such legislation could have the practical effect of adding to the scope of the disqualifications under s 44, if Parliament thinks fit.

37. There is no reason in the historical context reviewed above why s 44(i) should be given, or would have been expected to have, a broad effect of disabling any person who was regarded under the law of another country as a national of that country. Rather, the disqualification should address the mischief with which it was concerned, namely, cases in which a real division of allegiance was apt to detract from the performance of the parliamentarian's duties to those they represent.

"Entitlement" to rights of a subject or citizen

38. It is clear, for the reasons given by the Attorney-General,[40] that mere "entitlement" to foreign citizenship is insufficient to engage the disqualification in s 44(i). Similarly, a belief that one is not a foreign citizen, but that one is entitled to obtain foreign citizenship by application, is insufficient to put a prospective parliamentarian on notice of possible foreign citizenship so as to require steps to be taken to renounce it.

39. In different countries, and at different times, persons could owe allegiance and gain protection in different ways and to different extents. For instance, after 1851, naturalized British subjects obtained the status of natural-born subjects only within the Crown's own dominions.[41] A still further attenuated form of allegiance by naturalization which the common law had long acknowledged was denization (or endenisation).[42] A denizen also could not sit in parliament (by s 2 of the *Act of Settlement*), "for that to have a power of making laws it is necessary he should be totally received into the society, which he cannot be without the consent of parliament".[43] Fransman describes the resulting status as a "quasi-British subject status", although notes that the last recorded instance of denization occurred in 1873.[44]

40. In this vein, the review of foreign law undertaken for the purposes of the 1869 Royal Commission revealed a range of different kinds of national status in foreign countries, and different means of both obtaining and losing it. In Austria, for instance, an alien could obtain the rights of citizenship by being named a public functionary.[45] Under Spanish law, a person could be a Spaniard who, without having obtained a certificate of naturalization, had nevertheless acquired a domicile within the Spanish dominions.[46]

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40 Attorney-General's submissions at [56]-[59].

41 See the Report, Appendix at 9.

42 By the exercise of the prerogative (as opposed to by statute) an alien could be placed in a position comparable to that of a natural-born subject for most civic purposes (such as dealing in real estate). But this process of denization was not retrospective and could not change the fact that the denizen had no "inheritable blood": see Cockburn, above n 21, at 28; Matthew Bacon, *A New Abridgment of the Law* (7th ed, 1832) at 169.

43 Bacon, above n 42, at 170.

44 Fransman, above n 38, at 134.

45 See the Report, Appendix at 25.

46 See the Report, Appendix at 28-29.

41. Little wonder, then, that the language of s 7 of the *Union Act* 1840 and its successors extended not just to persons who "do, concur in, or adopt any Act whereby he may become a Subject or Citizen of any Foreign State or Power", but also to those who did any such act, etc, "whereby he may become entitled to the Rights, Privileges, or Immunities of" such a subject or citizen. A strict definition of the term "subject or citizen" alone may have inadvertently omitted some of the kinds of circumstances which could lead to a person owing allegiance to a foreign power. For the provision to achieve its purpose, it was necessary for it to extend to any other act "whereby he may become entitled to the Rights, Privileges, or Immunities of" a subject or citizen. This expression captured circumstances which were qualitatively comparable to taking an oath of allegiance or some other step which gave rise to a real conflict of allegiance. But the fact that a person was "entitled" to take steps which would result in such an allegiance is not qualitatively comparable to having such an allegiance for the purposes of s 44(i).

The drafting of the Constitution

42. Inglis Clark's 1891 draft Bill for the Federation of the Australasian Colonies drew directly upon the *British North America Act* 1867 in framing the qualifications and disqualifications of Senators (cll 21 and 23[47]), notwithstanding that the members of the Australian Senate were to sit only for a term, not for life, and be chosen by the provincial Parliaments, not appointed by the Crown. The same qualifications and disqualifications applied to members of the House of Representatives (cll 33 and 35). The language of s 31 of the 1867 Act was almost precisely adopted in each of cll 23 and 35, although the legal context had evolved in the ways outlined above.

43. In the course of the voyage of the *Lucinda* minor drafting revisions were made so as to apply provisions for disqualification to both Houses together.[48] There were then two consecutive provisions setting out identical circumstances (equivalent to s 44(i), (ii) and (iii)) in which, respectively, (a) a person would be incapable of being chosen or of sitting, and (b) the place of an existing member of either House of Parliament would become vacant. The provisions so drafted, cll 46 and 47, were adopted by the 1891 Convention[49] and remained in that form until the Melbourne session of the Convention in 1898.

44. Early in the Melbourne 1898 session, the then draft cll 45 and 46 were merged into the form now present in ss 44 and 45, whereby the disabling conditions set out in s 44(i) to (v) were together applied to both Houses of Parliament.[50] By 1 March 1898, the drafting of the then cl 45(i) was altered to the final form now present in s 44(i). The words "has taken an oath or made a declaration or

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[47] "The place of a Senator shall become vacant in any of the following cases:- ... II. If he takes an oath or makes a declaration or acknowledgment of allegiance, obedience, or adherence to a foreign Power, or does any act whereby he becomes a subject or citizen, or entitled to the rights or privileges of a subject or citizen of a foreign Power".

[48] See John Williams, *The Australian Constitution: A Documentary History* (2005) at 164, 191-194, 210, 221-222.

[49] See Williams, above n 48, at 444.

[50] See Williams, above n 48, at 822, 868-869.

acknowledgment of" were changed to "is under any acknowledgment of". The words "has done any act whereby he has become a subject or a citizen" were changed to "is a subject or a citizen".[51]

45. The Attorney-General's submissions establish how this change in tense from the past participle to present came about.[52] The drafting changes also reflect the merging of the language of the previous cll 45 and 46. The previous draft of cl 45(i) referred to any person "who has taken" an oath, etc, or "has done" any act, etc; the previous draft of cl 46(i) was engaged "if" a member of Parliament "takes" an oath, or "does" any act. The new form of cl 46(i) simply referred back to "the disabilities mentioned in the last preceding section". The new form of cl 45(i) was drafted so as to capture *both* acts done *before* the point in time at which a person was "chosen" as a member of Parliament (insofar as they remained effective), and those that might be done *after* the person became a member. The use of the present tense combined the two. The language of "doing an act" was unsuited to that economical drafting style.

46. It is therefore reasonable to infer that the language of s 44(i), in referring to a state of affairs in which a person "is" a citizen or subject of a foreign power, was not intended to extend the scope of the disability from being chosen or sitting as a member of Parliament beyond that which had been conveyed more clearly by the earlier drafting—and, indeed, by the Canadian and other colonial provisions on which s 44 was modelled.

47. There is nothing in the Convention Debates to contradict or undermine that inference. The drafting changes described above occurred in committee and any debate concerning them was not transcribed. As the Attorney-General points out, Mr Barton positively disavowed an intention to make substantive changes.[53] On the other hand, there are observations in the Convention Debates which are entirely consistent with the long-established imperative, described above, that members of Parliament should, in discharging their duty to the people, be free from extraneous influence. Mr Barton, for instance, said in 1897 that:

> All the colonial constitutions provide for such matters as these, and it is perhaps right that they should provide for them, for even in the first parliament it would be rather a strange thing to find persons *who had taken oaths of allegiance to foreign powers*, who were undischarged bankrupts or insolvents, or who had been recently attainted of crime, or convicted of felony or infamous crime. Unless you have provisions of this kind, it is quite possible that somebody might take a violent affection for a gaol-bird, and put him into parliament. We do not want that sort of thing. It is one thing not to put limitations on the ordinary freedom of the citizens of the commonwealth. It is another thing to provide against the defilement of parliament... [I]n the case of the first sub-clause it would be the entry of persons into parliament whose very conditions would suggest that their interests were quite different from those of the citizens of the country. Persons *who have taken the oath of allegiance to a foreign power* are not to be classed in the same category as citizens of the country for the purpose of joining in legislation.[54]

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51 See Williams, above n 48, at 868-869.

52 Attorney-General's submissions at [39]-[42].

53 Attorney-General's submissions at [42] n 78.

54 *Official Record of the Debates of the Australasian Federal Convention,* Sydney, 21 September 1897 ("Convention Debates, Sydney"), at 1012-1013 (emphasis added).

48. The prophylactic exclusion from Parliament of persons who might possibly be "insidious enemies of the Commonwealth"[55]—of foreigners who "might get into our parliament, and sell our defence secrets to a foreign power"[56]—was thus the continuation of the same constitutional principles which had guided the common law and the statutes of the UK and its dominions for centuries. The mischief to be addressed was always, and remained, the case in which a person has a relationship giving rise to a real conflict of allegiance, not merely some notional or technical status as a national under the law of a foreign country.[57]

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C. The purpose(s) of section 44

49. In *Re Day (No 2)*[58] this Court interpreted one of the requirements of s 44 in light of its place within the constitutional system of representative and responsible government. A significant feature of the constitutional conception of representative and responsible government is the "duty" of parliamentarians "to act in the public interest", "according to good conscience, uninfluenced by other considerations, especially personal financial considerations" and with a "single-mindedness for the welfare of the community".[59] Section 44 as a whole pursues that objective, and each of its paragraphs individually should be read in the same light.

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50. Consistently with those observations in *Day*, Deane J said in *Sykes v Cleary*:

> [I]n the construction of a constitutional provision such as s. 44, "the purpose it seeks to attain must always be kept in mind". That purpose is essentially to ensure that the composition of the Parliament is appropriate for the discharge in the national interest of its functions as the legislature of a free and independent nation...[60]

51. Deane J went on to describe how paragraph (i) of s 44 pursued that overall purpose; its more specific objective "[was] to prevent persons with foreign loyalties or obligations from being members of the Australian Parliament."[61] His Honour's observations immediately thereafter, as to how the drafting of s 44(i) give effect to that purpose, are entirely consistent with the historical

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55 Convention Debates, Sydney, at 1013 (Mr Barton).

56 Convention Debates, Sydney, at 1014 (Mr Fraser).

57 That s 44(i) is not aimed at such limited forms of allegiance is further confirmed by the exchange in Adelaide, in April 1897, between Mr Glynn, Mr Barton, Mr Gordon and Mr Carruthers (*Official Record of the Debates of the Australasian Federal Convention,* Adelaide, 15 April 1897, at 736). The latter posited the case of a person travelling overseas, and thus becoming subject to that form of "temporary allegiance" which an alien has to the state in whose territory he or she is travelling, and observed that "[s]urely it is never intended" that such a person would become disqualified under s 44(i). The clause was agreed to without further amendment. To observe, as Mr Glynn had done in the same exchange, that a person "cannot have two allegiances" must refer to having rights and obligations of a more substantial quality.

58 (2017) 91 ALJR 518; 343 ALR 181 (*"Day"*).

59 *Day* (2017) 91 ALJR 518; 343 ALR 181 at [49] (Kiefel CJ, Bell and Edelman JJ), citing in part *R v Boston* (1923) 33 CLR 386 at 400 (Isaacs and Rich JJ). See also *Day* at [174]-[179] (Keane J) and [269] (Nettle and Gordon JJ).

60 (1992) 176 CLR 77 at 121.

61 (1992) 176 CLR 77 at 127.

context outlined earlier in these submissions. The particular mischief giving rise to the provisions which became s 44(i) was the case in which a person had consciously decided to assume loyalty to another nation, thereby giving rise to a conflict with that person's loyalty to the Crown and its people in Australia.

52. In the same vein, Brennan J said that s 44(i)

> is concerned to ensure that foreign powers command no allegiance from or obedience by candidates, senators, and members... it is not concerned with the operation of a foreign law that is incapable in fact of creating any sense of duty, or of enforcing any duty, of allegiance or obedience to a foreign power.[62]

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53. Mason CJ, Toohey and McHugh JJ endorsed the proposition that s 44(i) was designed to ensure that 'members of Parliament did not have a split allegiance and were not, as far as possible, subject to any improper influence from foreign governments'.[63]

54. Mason CJ, Toohey and McHugh JJ made this point in light of the fact that "s. 44(i) finds its place in a Constitution which was enacted at a time, like the present, when a high proportion of Australians, though born overseas, had adopted this country as their home."[64] Similarly, Deane J acknowledged that the Constitution governs "a country whose population consisted (by 1900) largely of immigrants or the descendants of immigrants".[65] The evidence before this Court suggests that this proposition remains true.[66] Indeed, the potential public inconvenience, then and now, resulting from disqualification from election of a substantial minority of the population would be a reason to resist a wide construction of s 44(i).

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55. In short, the context and purpose of s 44(i) support the view that the concept of a "citizen or a subject" of a foreign power connotes a person who has, consciously or constructively, a real allegiance to such a foreign power – whether as a result of naturalization or acquiescence to a pre-existing status.

56. An ancillary purpose of s 44 is to ensure certainty and predictability in the electoral process. This point was made in *Re Culleton (No 2)* in relation to s 44(ii),[67] and in *Re Day (No 2)* in relation to s 44(v);[68] but it is capable of application to s 44 generally, by reason of the common temporal element of the section—being disqualifications from "being chosen or of sitting". Thus, a person who has a relevant pecuniary interest within s 44(v) at some stage during the electoral process ought not to be able to be nominated or chosen if it is unclear whether the person will be able to divest that interest before

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[62] (1992) 176 CLR 77 at 113.

[63] (1992) 176 CLR 77 at 107 (quoting from a report by the Senate Standing Committee on Constitutional and Legal Affairs).

[64] (1992) 176 CLR 77 at 107.

[65] (1992) 176 CLR 77 at 121.

[66] Report of Professor Mangan dated 21 September 2017.

[67] (2017) 91 ALJR 311 at 321-322; 341 ALR 1 [57]-[59] (Nettle J).

[68] (2017) 91 ALJR 518 at 535; 343 ALR 181 at [97] (Gageler J).

commencing to sit in Parliament. Likewise, a person who is an "undischarged bankrupt or insolvent" within s 44(iii) at the time of nomination might, or might not, subsequently be discharged; but the people should not be expected to make their choice of candidates in such uncertain circumstances.

57. The circumstances of the present references, taken together, demonstrate the undesirability of a construction of s 44(i) which would be wholly dependent upon the operation of foreign law. The references themselves, in addition to this one inasmuch as it concerns the laws of Italy, address the
10 laws of the United Kingdom, New Zealand, Greece, Cyprus and Canada. The evidence before the Court concerning the laws of various other nations demonstrates that the point Cockburn CJ made in 1869, concerning the cacophony of nationality law across the globe, remains true. The circumstances of this case, moreover, show that a mechanistic operation of s 44(i), wholly dependent upon foreign law, could give rise to retrospective disqualification, by reason of no relevant characteristic of the individual concerned (such as whether an ancestor was naturalized as an Australian citizen before or after the birth of a child[69]). The expert opinion on Italian law provides an excellent example of the lack of certainty which may flow from an
20 unqualified application of foreign law.[70]

58. The facts of an individual case concerning s 44(i) will infrequently be straightforward. But the operation of s 44(i) can produce predictable and certain results if it depends upon a primarily objective analysis of the all the circumstances concerning the connection between the parliamentarian or candidate in question and the relevant foreign power. In the end, it is the constitutional concept of "a subject or a citizen of a foreign power" which the Court must construe and apply. The effect of that expression does not vary according to the legislative whims of foreign powers.

D. *Sykes v Cleary*

30 59. *Sykes v Cleary* ('*Sykes*')[71] involved a challenge to the purported election of Mr Philip Cleary to the House of Representatives. Mr Sykes, who had finished eighth after preferences were distributed, challenged the election was on the ground that Mr Cleary held an office of profit under the Crown within the meaning of s 44(iv) of the Constitution at the time of his nomination. Mr Sykes also challenged the eligibility of the second and third ranking candidates, Mr Kardamitsis and Mr Delacretaz, on the ground that they were citizens of foreign powers under s 44(i) of the Constitution.

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[69] In the present case, had Rosalia Zanella (Senator Canavan's maternal grandmother) become an Australian citizen before rather than after the birth of her daughter Maria, there would have been no suggestion that Senator Canavan ever became an Italian citizen.

[70] See especially Delfino and di Torrito advice at pp 13-14. CB vol 2 pp 323-324.

[71] (1992) 176 CLR 77.

60. By majority,[72] the Court held that Mr Cleary held an office of profit under the Crown and was therefore incapable of being nominated. A differently constituted majority[73] held that Mr Kardamitsis (who was born a Greek citizen) and Mr Delacretaz (who was born a Swiss citizen) were ineligible for election. That was because neither man had taken all reasonable steps to renounce his foreign citizenship before nominating for election to the House of Representatives.[74]

61. Although the reasoning of members of the Court was not entirely uniform, *Sykes* nonetheless supports two propositions regarding the operation of s 44(i) of the Constitution.

62. First, insofar as it may apply in the context of s 44(i) of the Constitution,[75] the common law rule that determination of whether a person is the subject or citizen of a foreign State is *generally* done according to the law of that State[76] must be qualified. It does not apply where a person born as a foreign national has taken all reasonable steps to renounce the foreign nationality before standing for Parliament.[77] In such a case, s 44(i) does not disqualify the person from being elected.

63. Secondly, and relatedly, the requirement to take reasonable steps to renounce foreign nationality is not the only exception to the common law rule. *Sykes* dealt with persons who were citizens of a foreign power at birth and who later became naturalised Australian citizens after migrating to Australia.[78] The Court's emphasis on the need to take all reasonable steps to renounce foreign nationality must be seen in that light. There was no majority in *Sykes* holding that the taking of reasonable steps would be necessary even where foreign citizenship was conferred on Australian citizens unilaterally and without their knowledge.

64. Any suggestion to the contrary would be difficult to reconcile with statements by various members of the Court. For example, Brennan J, who was in the majority, stated:

> If recognition of status, rights or privileges under foreign law would extend the operation of s.44(i) of the Constitution to cases which it was not intended to cover, that section should be construed as requiring recognition of foreign law only in those situations where recognition fulfils the purpose of s.44(1). To take an extreme example, if a foreign power

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[72] Chief Justice Mason and Brennan, Dawson, Toohey, Gaudron and McHugh JJ; Deane J dissenting.

[73] Chief Justice Mason and Brennan, Dawson, Toohey and McHugh JJ; Deane and Gaudron JJ dissenting.

[74] (1992) 176 CLR 77 at 108 (Mason CJ, Toohey and McHugh JJ), 114 (Brennan J), 131-132 (Dawson J).

[75] Senator Canavan adopts the submissions of the Attorney-General at [10]-[15].

[76] *Stoeck v Public Trustee* [1921] 2 Ch 67 at 82; *Oppenheimer v Cattermole* [1976] AC 249 at 261-262 (Lord Hailsham), 267 (Lord Cross), 282 (Lord Salmon); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 649, 673.

[77] (1992) 176 CLR 77 at 107 (Mason CJ, Toohey and McHugh JJ), 113 (Brennan J), 127-128 (Deane J), 131 (Dawson J), 139 (Gaudron J).

[78] Ibid at 83, 84 and 103 (Mason CJ, Toohey and McHugh JJ), 132-133 (Gaudron J).

were mischievously to confer its nationality on members of the Parliament so as to disqualify them all, it would be absurd to recognize the foreign law conferring foreign nationality. Section 44(i) is concerned to ensure that foreign powers command no allegiance from or obedience by candidates, senators and members of the House of Representatives; it is not concerned with the operation of foreign law that is incapable in fact of creating any sense of duty, or of enforcing any duty, of allegiance or obedience to a foreign power. It accords both with public policy and with the proper construction of s.44(i) to deny recognition to foreign law in these situations. If foreign law were recognized in these situations, some Australian citizens would be needlessly deprived of the capacity to seek election to the Parliament and other Australians would be needlessly deprived of the right to choose the disqualified citizens to represent them. However, there are few situations in which a foreign law, conferring foreign nationality or the rights and privileges of a foreign national, is incapable in fact of creating a sense of duty, or is incapable of enforcing a duty, of allegiance or obedience to a foreign power. One such situation does occur when the foreign law, purporting to affect nationality of persons who have had no connection or only a very slender connection with the foreign power, exceeds the jurisdiction recognized by international law.[79]

65. For the last sentence in this passage, his Honour cited as authority the judgment of Lord Cross in *Oppenheimer v Cattermole* ('*Oppenheimer*').[80] *Oppenheimer* involved, in part, a 1941 decree of Nazi Germany providing that a Jew of German nationality who had his usual place of abode abroad at the time thereby lost his nationality. Lord Cross rejected the proposition that determination of nationality of a foreign country "must be answered in the light of the law of that country however inequitable, oppressive or objectionable it may be".[81] His Lordship said:

> "If a foreign country purported to confer the benefit of its protection on and to exact a duty of allegiance from persons who had no connection or only a very slender connection with it our courts would be entitled to pay no regard to such legislation on the ground that the country in question was acting beyond the bounds of any jurisdiction in matters of nationality which international law would recognise."[82]

66. Likewise, Justice Gaudron, who dissented on the facts in *Sykes*, stated:

> There is nothing novel in the proposition that a municipal court may, on grounds of public policy, refuse to apply the law of another country, even in cases where, according to the municipal law, the matter in issue is governed by the law of that other country. Thus, it has been said, for example, that a court will not apply a foreign citizenship law which does not conform with established international norms or which involves gross violation of human rights. And if the question be whether Australian citizenship has been lost or the rights ordinarily attaching to Australian citizenship have been excluded, every consideration of public policy and commonsense tells against the automatic recognition and application of foreign law as the sole determinant of that matter.[83]

67. The authority her Honour cited with respect to 'established international norms' was the same reference to *Oppenheimer* cited by Brennan J.

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79 (1992) 176 CLR 77 at 113 (emphasis added).

80 [1976] AC 249 at 277.

81 [1976] AC 249 at 277, quoting Buckley LJ at [1973] Ch 264, 273.

82 [1976] AC 249 at 277. Lord Cross also referred to a decision of the Second Circuit Court of Appeals in *United States; ex rel Schwarzkopf v Uhl* 137 Fed Rep 2d 898 (1943). In that case, the Second Circuit Court of Appeals refused to recognise that an Austrian had become a German citizen despite Germany's annexation of Austria in 1938.

83 (1992) 176 CLR 77 at 135-136 (emphasis added).

68. Justice Dawson expressly confined his remarks on reasonable steps to cases in which foreign nationality or citizenship had not been 'foisted upon persons against their will'.[84]

69. Justice Deane, who like Gaudron J dissented on the facts, also emphasized that the recognition of foreign law would not be automatic. His Honour put the matter in this way:

> Section 44(i)'s whole purpose is to prevent persons with foreign loyalties or obligations from being members of the Australian Parliament. The first limb of the sub-section (i.e. "is under any acknowledgment of allegiance, obedience, or adherence to a foreign power") involves an element of acceptance or at least acquiescence on the part of the relevant person. In conformity with the purpose of the sub-section, the second limb (i.e. "is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power") should, in my view, be construed as impliedly containing a similar mental element with the result that it applies only to cases where the relevant status, rights or privileges have been sought, accepted, asserted or acquiesced in by the person concerned. <u>The effect of that construction of the sub-section is that an Australian-born citizen is not disqualified by reason of the second limb of s.44(i) unless he or she has established, asserted, accepted, or acquiesced in, the relevant relationship with the foreign power</u>....
>
> Accordingly, and notwithstanding that citizenship of a country is ordinarily a matter determined by the law of that country, the qualifying element which must be read into the second limb of s.44(i) extends not only to the acquisition of the disqualifying relationship by a person who is already an Australian citizen but also to the retention of that relationship by a person who has subsequently become an Australian citizen. A person who becomes an Australian citizen will not be within the second limb of s.44(i) if he or she has done all that can reasonably be expected of him or her to extinguish any former relationship with a foreign country to the extent that it involves the status, rights or privileges referred to in the sub-section.[85]

70. His Honour's reasoning suggests that there will not be any recognition of foreign citizenship law if the rights or privileges of a foreign citizen have not been sought, accepted, asserted or acquiesced in by the person concerned. That is not the same as requiring a person on whom citizenship has been unilaterally conferred by a foreign State to take all reasonable steps to renounce it. That element of establishment, assertion, acceptance or acquiescence is indicative of the essential feature of the constitutional concept of "a subject or a citizen" in the context of s 44(i), namely, the existence of a relationship of allegiance as a matter of substance and reality.

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84 (1992) 176 CLR 77 at 131.

85 (1992) 176 CLR 77 at 127-128 (emphasis added).

E. Application to facts

71. For the reasons given by the Attorney-General,[86] and on the basis of the construction described above, Senator Canavan had no relationship of allegiance with Italy of the kind which was capable of engaging the disqualification in s 44(i). He had not established, asserted, accepted, or acquiesced in the relevant relationship with the foreign power. He never took any steps to register as an Italian citizen, or even to try to "apply" to become one.[87] In fact, it did not occur to him that he might be an Italian citizen until the evening of 18 July 2017, after a conversation with his mother.[88] When the Italian consulate (possibly erroneously) confirmed on 24 July 2017 that he was an Italian citizen, within a matter of days he took steps to renounce that citizenship.[89] He successfully did so on 8 August 2017.[90] He never exercised any of the rights, or discharged any of the responsibilities, of an Italian citizen. He has never even been to Italy. It follows that on the proper construction of s 44(i), Senator Canavan is not disqualified from being chosen as a senator.

72. Alternatively, a similar result follows from the application of the propositions established by *Sykes* as outlined above, specifically the public policy exception to the general rule that citizenship is determined according to the law of the foreign State where the foreign law purports to confer citizenship on those who have no connection or only a very slender connection with the foreign State.[91] That exception applies to this case. If Senator Canavan had any connection with Italy, it was only a very slender one, for all the reasons just given. He was not born there, and at birth he was neither an Italian citizen nor the son (nor even grandson) of an Italian citizen.[92] The unilateral, retrospective conferral of Italian citizenship upon him, stemming from a decision of the Italian constitutional court in 1983, was incapable of creating in him any sense of duty, allegiance or obedience to Italy. That is not surprising, given that Senator Canavan was only two years old when Italian citizenship was conferred on him. Recognition of his Italian citizenship, moreover, would disqualify him from being chosen as a senator in circumstances in which there was never any prospect of the purpose of s 44(i) being undermined.

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[86] Attorney-General's submissions at [83]-[84].

[87] Canavan affidavit, paras 11 and 24. CB vol 2 pp 270, 272.

[88] Canavan affidavit, paras 14 and 24. CB vol 2 pp 270-272.

[89] Canavan affidavit, para 22. CB vol 2 pp 271-272.

[90] Canavan affidavit, para 23. CB vol 2 p 272.

[91] See also *Sue v Hill* (1999) 199 CLR 462 at [175] (Gaudron J) (pointing out that an Australian court may, in some circumstances, refuse to apply foreign law in determining whether a person is or not a citizen of that country); E Fripp, *Nationality and Statelessness in the International Law of Refugee Status*, Hart Publishing, 2016 at [1.139].

[92] Indeed, at his birth his grandparents were no longer Italian citizens and had not been Italian citizens for over 20 years.

73. That conclusion is strengthened by the doubts over whether the Italian citizenship law of 1912 validly conferred Italian citizenship on Senator Canavan at all. The expert opinion of Mr Delfino and Professor di Torrito suggests that the way in which citizenship was purportedly conferred on Senator Canavan—that is, retrospectively, and without his knowledge or assent—may well have violated provisions of the Italian Constitution.[93] Given the already slender connection between Italy and Senator Canavan, that factor reinforces the view that Senator Canavan's Italian citizenship should not be recognised by Australian law.

10 74. Even if (contrary to the submissions above[94]) Senator Canavan had been required to take all reasonable steps to renounce foreign nationality, he did so. It is well established that what constitutes reasonable steps depends on the circumstances. The plurality in *Sykes* observed that what is reasonable "will turn on *the situation of the individual*, the requirements of the foreign law and *the extent of the connexion between the individual and the foreign State*".[95] Moreover, as Dawson J observed:

> What is reasonable will depend upon the circumstances of the case. It will depend on such matters as the requirements of the foreign law for the renunciation of the foreign nationality, the person's knowledge of his foreign nationality and the circumstances in
20 which the foreign nationality was accorded to that person.[96]

75. The same facts as already referred to above indicate that, if this test applies, Senator Canavan did take such reasonable steps. He was less than three years old when Italian citizenship was conferred on him. The legal reasons for this under Italian law were at best obscure. Senator Canavan could not have been expected to have understood that in spite of his grandparents' naturalization; in spite of having been born only an Australian citizen; as a consequence of continental constitutional principles (the proper application of which remains in some doubt, as observed above); and in spite of the need under that foreign law for "paperwork" to be completed, which he understood
30 to be necessary for any such citizenship to become effective, he was nevertheless classified as a citizen under Italian law. In light of those aspects of his situation and his slender connection with Italy, it was not unreasonable that, as stated in paragraph 71 above, it did not occur to Senator Canavan that he might be an Italian citizen until the evening of 18 July 2017.[97] Shortly after receiving the possibly erroneous confirmation that he was an Italian citizen, he took steps to renounce that citizenship.[98] He received confirmation of that renunciation on 8 August 2017.[99] For those reasons, if the reasonable steps test applies, it was satisfied and s 44(i) did not disqualify Senator Canavan.

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93 Delfino and di Torrito advice, pp 13-14. CB vol 2 pp 323-324.

94 Paragraphs 63 to 70.

95 (1992) 176 CLR 77 at 108 (emphasis added).

96 (1992) 176 CLR 77 at 131.

97 Canavan affidavit, paras 14 and 24. CB vol 2 pp 270-272.

98 Canavan affidavit, para 22. CB vol 2 pp 271-272.

99 Canavan affidavit, para 23. CB vol 2 p 272.

Part VII: Orders sought

76. It is submitted that the following answers should be given to the questions referred by the Senate:

    (a) No.

    (b) Does not arise and is unnecessary to answer.

    (c) No further order is required.

    (d) No further order is required.

Part VIII: Estimate of oral argument

77. It is estimated that one and a half to two hours will be required for presentation of oral argument on behalf of Senator Canavan.

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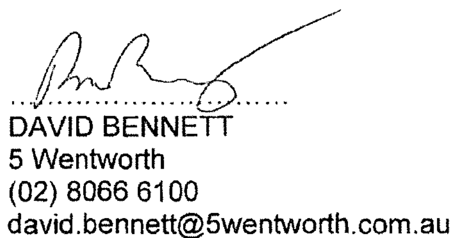
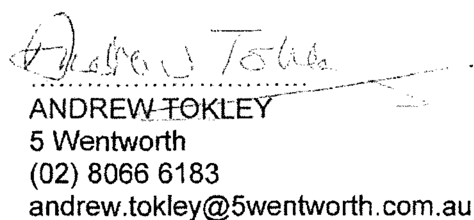
Dated: 28 September 2017

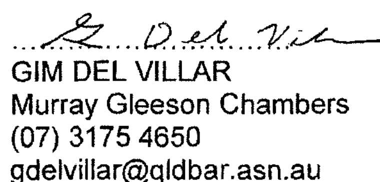


DAVID BENNETT
5 Wentworth
(02) 8066 6100
david.bennett@5wentworth.com.au

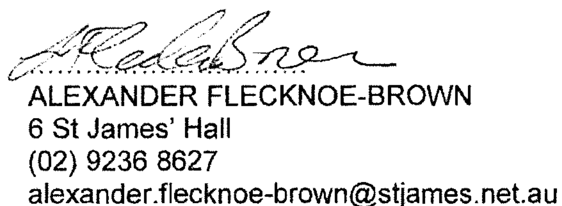


ANDREW TOKLEY
5 Wentworth
(02) 8066 6183
andrew.tokley@5wentworth.com.au

20



GIM DEL VILLAR
Murray Gleeson Chambers
(07) 3175 4650
gdelvillar@qldbar.asn.au



ALEXANDER FLECKNOE-BROWN
6 St James' Hall
(02) 9236 8627
alexander.flecknoe-brown@stjames.net.au