ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C15 of 2017

SITTING AS THE COURT OF DISPUTED RETURNS

RE THE HON BARNABY JOYCE MP
Reference under s 376 of the *Commonwealth Electoral Act 1918* (Cth)

ANNOTATED

SUBMISSIONS OF THE HON. BARNABY JOYCE MP

Date of Document: 28 September 2017

Filed on behalf of the Hon Barnaby Joyce MP
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Part I: Publication of submissions

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

Part II: Issues

2. On 15 August 2017, and pursuant to s 376 of the *Commonwealth Electoral Act 1918* (Cth) ("**the Electoral Act**"), the House of Representatives referred certain questions to the High Court of Australia sitting as the Court of Disputed Returns concerning the eligibility of the Hon Barnaby Joyce MP to be chosen, and to sit, as a member of the House of Representatives.[1]

3. The principal issues arising on the reference are:

(a) whether, by reason of s 44(i) of the *Constitution*, Mr Joyce was incapable of being chosen as a member of the House of Representatives. In particular, given Mr Joyce's lack of awareness of his New Zealand citizenship as at the date of his nomination as a candidate for the Electoral Division of New England, did his omission to take any steps to renounce that citizenship prior to that date disqualify him from election to the Commonwealth Parliament?

(b) if the answer to (a) is yes, by what means and in what manner Mr Joyce's vacancy in the House of Representatives should be filled.

Part III: Section 78B Notice

4. The Attorney-General of the Commonwealth has served notices pursuant to s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citations

5. There are no reasons for judgment below.

Part V: Facts

Mr Joyce's background

6. Mr Joyce was born on 17 April 1967 at Tamworth Base Hospital, Tamworth in the State of New South Wales.[2]

7. His mother, Beryl Joyce (née Roche), was born on 22 July 1930 in Gundegai in the State of New South Wales.[3] In contrast, his father, James Joyce was born on 19 January 1924 in Dunedin, New Zealand, and immigrated to Australia in 1947.[4] Mr Joyce was at all relevant times aware that his father had been born in New Zealand.[5]

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[1] CB1307.
[2] Affidavit of Barnaby Thomas Joyce sworn 12 September 2017 ("**Joyce Affidavit**") at [1]; CB 1319.
[3] Joyce Affidavit at [2]; CB 1319.
[4] Joyce Affidavit at [2]; CB 1319.
[5] Joyce Affidavit at [5]; CB 1319.

8. James and Beryl Joyce were married on 24 April 1956.[6]

9. In 1978, James Joyce, upon applying to be a Justice of the Peace, was advised that he was not an Australian citizen. Shortly thereafter, he became an Australian citizen and renounced his New Zealand citizenship.[7] Mr Joyce only became aware of these events relating to his father on or about 11 August 2017.[8]

10. It is not contested that as at the date when he nominated to be a candidate for the office of Member for the Electoral Division of New England at the 2016 federal election, Mr Joyce was a citizen of New Zealand under New Zealand law. There does not appear to be any dispute that:

(a) James Joyce was born a British subject;[9]

(b) he became a New Zealand citizen pursuant to 16(1) of the *British Nationality and New Zealand Citizenship Act 1948* (NZ) ("**the 1948 Act**"), upon the commencement of that statute on 1 January 1949;[10]

(c) Mr Joyce was born a citizen of New Zealand, by virtue of s 7 of the 1948 Act, pursuant to which a person born after the commencement of that Act was a New Zealand citizen by descent if his father was a New Zealand citizen at the time of his birth;[11] and

(d) Mr Joyce's New Zealand citizenship was preserved by the *Citizenship Act 1977* (NZ) ("**the 1977 Act**"), which repealed the 1948 Act;[12] and

(e) given the prospective effect of James Joyce's renunciation of his New Zealand citizenship in 1978, that renunciation did not alter the citizenship status of Mr Joyce under the law of New Zealand.[13]

11. Nonetheless, from the age of about 10, Mr Joyce believed that his father was a citizen of Australia and no other country.[14] Before the age of 10, Mr Joyce had no knowledge that his father was a citizen of New Zealand.[15] And as will become apparent, Mr Joyce was not aware of the possibility that he might have been a citizen of New Zealand until late July 2017, at the earliest.[16]

12. Mr Joyce was elected a Senator for Queensland in 2004. His recollection is that:

(a) when he nominated for election to the Senate in that year, he completed a form which made reference to s 44(i) of the *Constitution*; and

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[6] Joyce Affidavit at [4]; CB 1319.
[7] Affidavit of James Michael Joyce sworn 8 September 2017 ("**James Joyce Affidavit**") at [7]; CB 1337.
[8] Statement of Agreed Facts ("**SOAF**") at [15]; CB 1717.
[9] Memorandum of David Goddard QC dated 12 August 2017 ("**Goddard Opinion**") at [3]; CB 1340.
[10] Goddard Opinion at [4]; CB 1341.
[11] Goddard Opinion at [5]; CB 1341.
[12] Goddard Opinion at [7]; CB 1341.
[13] Goddard Opinion at [11]; CB 1342.
[14] Joyce Affidavit at [7]; CB 1320.
[15] SOAF [11]; CB 1716.
[16] Joyce Affidavit at [14]; CB 1320.

(b) he thought that s 44(i) was not pertinent to him, as he believed that he was a citizen of Australia only.[17]

13. In 2013, Mr Joyce resigned from the Senate and was elected to the House of Representatives as the Member for the Electoral Division of New England at the federal election that year.[18]

The 2016 federal election

14. On 9 May 2016, the Governor-General, at the request of the Prime Minister and by way of proclamation, dissolved the Senate and the House of Representatives, pursuant to s 57 of the *Constitution*.[19]

10 15. On 16 May 2016, the Governor-General issued to the Australian Electoral Commissioner a writ commanding the Electoral Commissioner to cause elections to be made according to law of Members of the House of Representatives, for the Electoral Divisions in the State of New South Wales at the double dissolution election general election to be held on 2 July 2016.[20]

16. On 7 June 2016, the Australian Electoral Officer for New South Wales received a 'Nomination of a Member for the House of Representatives Bulk nomination – endorsed candidate' form from the Registered Officer of the National Party of Australia – NSW, which form was accompanied by a Nomination of a Member of the House of Representatives form signed by Mr Joyce.[21]

20 17. On 10 June 2016, being the day after the close of nominations specified in the writ dated 16 May 2016, Mr Joyce's nomination was declared.[22]

18. At the 2016 federal election, in the Electoral Division of New England:

(a) there were 10 House of Representatives candidates;

(b) there were 95,004 formal votes cast;

(c) on a first preference count, Mr Joyce received 49,673 votes, being 52.29% of the total votes cast;

(d) on a first preference count, Mr Windsor received 27,763 votes, being 29.22% of the total votes cast;

(e) on a two-candidate-preferred ("**TCP**") count, Mr Joyce received 55,595 votes,
30 being 58.52% of the votes cast; and

(f) on a TCP count, Mr Windsor received 39,404 votes, being 41.48% of the votes cast.[23]

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[17] Joyce Affidavit at [13]; CB 1320.
[18] Joyce Affidavit at [12]; CB 1320.
[19] Affidavit of Andrew Kevin Gately affirmed 8 September 2017 ("**Gately Affidavit**") at [44]; CB 57.
[20] Gately Affidavit at [132]; CB 67.
[21] Gately Affidavit at [133]; CB 67-68.
[22] Gately Affidavir at [135]; CB 68.

19. On 15 July 2016, Mr Joyce's election as the Member of the House of Representatives for the Division of New England was declared by the Divisional Returning Officer for that Division.[24]

Events following the 2016 federal election

20. In late July 2017, Mr Joyce's office received media enquiries as to whether he was a dual citizen of Australia and New Zealand. Mr Joyce was not aware of the possibility that he might have been a citizen of New Zealand under the law of New Zealand prior to those enquiries being made.[25]

21. At this time, he directed members of his staff to make enquiries concerning New Zealand citizenship.[26] However, it was not until 10 August 2017, during a discussion with the New Zealand High Commissioner, that Mr Joyce was told that he was a citizen of New Zealand under the law of that country.[27] That was confirmed in a memorandum of advice dated 12 August 2017 which was provided by Mr David Goddard QC.[28]

22. On 12 August 2017, following the receipt of that advice, Mr Joyce attended upon the New Zealand High Commission and completed a Declaration of Renunciation of New Zealand Citizenship. Thereafter, on 14 August 2017, Mr Joyce paid $390.60 to the New Zealand Department of Internal Affairs in order to renounce his New Zealand citizenship.[29]

Part VI: Argument

23. It is no part of the case advanced on behalf of Mr Joyce to suggest either:

    (a) that the phrase "a subject or a citizen ... of a foreign power" in s 44(i) of the *Constitution* is incapable of extending to persons who are foreign citizens by descent; or

    (b) that the operation of s 44(i) in this case is in any way affected by the fact that Mr Joyce's father was born a British subject at a time before the law of New Zealand recognised any such concept as New Zealand citizenship; or

    (c) that an approach different from that described in *Sykes v Cleary*[30] should apply where a question concerning disqualification under s 44(i) arises in relation to a person born in Australia.

24. Indeed, it is submitted that that approach compels an outcome favourable to Mr Joyce on the reference.

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[23] Gately Affdavit at [139]; CB 68.
[24] Gately Affidavit at [137]; CB 68.
[25] Joyce Affidavit at [14]; CB 1320.
[26] Joyce Affidavit at [18]; CB 1321.
[27] Joyce Affidavit at [20]; CB 1321.
[28] Joyce Affidavit at [21]; CB 1322.
[29] Joyce Affidavit at [22]-[23]; CB 1322.
[30] (1992) 176 CLR 77.

25. Before developing that submission further, it should be observed that the grounds for disqualification set out in s 44 of the *Constitution* have "automatic and draconian consequences".[31] In particular, s 44 is to be read in conjunction with:

(a) s 45, pursuant to which if a senator or a member of the House of Representatives becomes subject to any of the disabilities mentioned in s 44, "his place shall thereupon become vacant"; and

(b) s 46, which imposes upon a person disqualified from sitting as a senator or as a member of the House of Representatives a penalty for so sitting.

This last provision is expressed to operate "[u]ntil the Parliament otherwise provides", and Parliament has otherwise provided, in the form of an alternative penalty imposed by s 3 of the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) ("**the Common Informers Act**").

26. It was against the background afforded by these draconian consequences that Deane J, in his dissenting reasons in *Sykes v Cleary*,[32] observed that s 44, being an "overriding disqualification provision", should be construed "as depriving a citizen of the democratic right to seek to participate directly in deliberations and decisions of the national Parliament only to the extent that its words clearly and unambiguously require". In *Re Day (No 2)*,[33] Gageler J remarked – with respect, correctly – that this admonition was not contradicted by the holding of the majority. On the contrary, it provides a salutary guide to the proper construction of s 44(i).

27. Related to this is the question of onus. In the course of dissenting in *Sykes v Cleary*, Gaudron J held that Mr Kardamitsis, whose eligibility to nominate as a candidate for the Electoral Division of Wills was the subject of challenge, "had a right to have any question of his Greek citizenship ... determined on the basis that that citizenship was effectively renounced and that, only if he reasserted it in some way, would the question be answered by reference to Greek law".[34] Her Honour then said that "[g]iven that what is at stake is the right to participate in the democratic process as a member of Parliament – a right ordinarily attaching to citizenship – the onus of establishing that [Mr Kardamitsis had done anything to reassert his Greek citizenship] must lie on the party asserting it".[35]

28. This last proposition may not be amenable to acceptance without qualification, at least in these proceedings. After all, not only did the majority in *Sykes v Cleary* not require proof of reassertion of Mr Kardamitsis' Greek citizenship in order to find that he was disqualified under s 44(i), it must also be borne in mind that these proceedings were commenced by means of a reference by the Senate pursuant to s 376 of the Electoral Act. That being so, these proceedings do not answer the description of ordinary adversarial litigation, notwithstanding the participation of Mr Windsor, such that it may be inapt to speak of one party or another bearing a legal onus of proof. Nonetheless, given that the *Constitution* separately provides for the qualifications of senators and members of the House of Representatives (in ss 16 and 34 respectively)

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[31] *Re Day (No 2)* [2017] HCA 14; (2017) 91 ALJR 518 at 535 [95].
[32] (1992) 176 CLR 77 at 121.
[33] [2017] HCA 14; (2017) 91 ALJR 518 at 535 [96].
[34] (1992) 176 CLR 77 at 138.
[35] *Ibid.*

and the grounds for disqualification set out in s 44, there is some basis for thinking that:

(a) it is for a candidate or member of Parliament to make good his or her satisfaction of the criteria in s 16 or s 34; and

(b) it is for a person contending in favour of disqualification to establish that the one or more of the grounds enumerated in s 44 have been engaged.

Sykes v Cleary

29. Two points should be made at the outset concerning *Sykes v Cleary*. First, it was common to each of the Justices who decided *Sykes v Cleary* that disqualification under s 44(i) does not follow from the mere fact that a candidate for election to the Commonwealth Parliament is a foreign citizen under the law of the relevant foreign power. That is, s 44(i) is not to be given its unqualified literal meaning. Rather, it is the combination of one's foreign citizenship and a failure to take reasonable steps to renounce that foreign citizenship which results in disqualification.[36]

30. In arriving at this conclusion, Mason CJ, Toohey and McHugh JJ were concerned to avoid "the disqualification of Australian citizens on whom there was imposed *involuntarily* by operation of foreign law a continuing foreign nationality, notwithstanding that they had taken reasonable steps to renounce that foreign nationality" (emphasis added).[37] Their Honours thus accorded significance, in the application of s 44(i), to whether the individual's only choice had been in favour of Australian citizenship, and if so, whether he or she had sufficiently acted on that choice. As will be developed below, it does no violence to s 44(i), particularly when understood in the historical setting in which it was drafted, to say:

(a) that it is principally concerned with those who, being dual citizens, choose to maintain – or perhaps more accurately, omit to make a choice renouncing – their foreign nationality; and

(b) that a person will not fail to make a choice renouncing his or her foreign nationality if his or her omission to act is due to a lack of awareness of that foreign nationality.

31. It is worth noting that in describing the purpose of s 44(i), Brennan J remarked that that provision "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".[38] It is difficult to understand how a foreign law could create, in an Australian citizen, a sense of duty of allegiance or obedience to a foreign power in the absence of any effective choice on the part of that citizen to affirm, or at least not to abandon, some form of relationship with the foreign power in question. So much is suggested by his Honour's positing, as an example of a foreign law whose recognition would not fulfil the purpose of s 44(i), a situation in which "a foreign power were

[36] (1992) 176 CLR 77 at 107 per Mason CJ, Toohey and McHugh JJ, 113 per Brennan J, 128 per Deane J, 131 per Dawson, 139 per Gaudron J.
[37] (1992) 176 CLR 77 at 107.
[38] (1992) 176 CLR 77 at 113.

mischievously to confer its nationality on all members of the Parliament so as to disqualify them all".[39]

32. Of course, to emphasise the concept of choice is not necessarily to accede to the view, expressed by Deane J in *Sykes v Cleary*,[40] 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". Merely knowing that one is a foreign citizen and failing to take reasonable steps to renounce that foreign citizenship may be taken, in this area of discourse, as sufficiently evincing the making of a choice to be, or to remain, a foreign citizen, so as to avoid any need to investigate whether one's actual state of mind can be characterised as involving the assertion or acceptance of, or an acquiescence in, a disqualifying relationship with a foreign power.

33. Secondly, it is clear from the reasons of the Justices comprising the majority in *Sykes v Cleary* that in determining what suffices as the taking of reasonable steps to renounce any foreign nationality, regard may, and should, be had to the subjective beliefs of the person in question as to whether her or she is a foreign citizen. Speaking in the context of a naturalised Australian who nonetheless remained a foreign citizen by birth, Mason CJ, Toohey and McHugh JJ remarked that in assessing the reasonableness of the steps, if any, taken by such a person to renounce his or her foreign nationality, "it is relevant to bear in mind that a person who has participated in an Australian naturalization ceremony ... may well believe that, by becoming an Australian citizen, he or she has effectively renounced any foreign nationality".[41]

34. Reference should also be made to the reasons of Dawson J, who remarked that "[w]hat is reasonable will depend upon ... such matters as the requirements of the foreign law for the renunciation of the foreign nationality, *the person's knowledge of his foreign nationality* and the circumstances in which the foreign nationality was accorded to that person" (emphasis added).[42]

35. This is not to say that it is sufficient to avoid disqualification under s 44(i) that a naturalised Australian believes that he or she has effectively renounced any foreign nationality, when that has not in fact occurred under the law of the relevant foreign power. After all:

    (a) a naturalised Australian must be taken to have known that prior to partaking in the naturalisation ceremony, he or she was a foreign citizen, whether by birth or otherwise;

    (b) subject to various qualifications, the question of citizenship is a matter for the law of the relevant foreign country; and

    (c) an Australian naturalisation ceremony does not necessarily entail the engagement of any foreign law.

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[39] *Ibid.*
[40] (1992) 176 CLR 77 at 127.
[41] (1992) 176 CLR 77 at 108.
[42] (1992) 176 CLR 77 at 135.

36. It was for this reason that Mr Kardamitsis' cause in *Sykes v Cleary* was not assisted by the fact that until after his nomination "he did not know ... that he might, according to the laws of Greece, still be a citizen of that country [or] that there were procedures available in Greece by which Greek nationals can terminate their Greek nationality".[43] Given that he was born a Greek national, his belief that he had effectively renounced that nationality by being naturalised in Australia did not, for the purpose of determining whether he had taken reasonable steps to effect such a renunciation, overcome the fact that prior to being naturalised, he had an awareness of his Greek nationality. That is, he knew that there was something to renounce, namely, a status conferred by Greek law, and thus could reasonably be expected to have taken steps to ensure the efficacy, for the purposes of Greek law, of any such renunciation.

37. The position is different in the case of a natural-born Australian citizen who had no awareness that he or she was also the citizen of a foreign power. In particular, it is difficult in such a case to posit circumstances that would nonetheless generate a reasonable expectation that the individual take steps to renounce a foreign nationality of which he or she is unaware.

38. It is no answer to this to suggest that the construction of s 44(i) for which Mr Joyce contends would give that provision a less stringent operation in respect of natural-born Australian citizens than in respect of naturalised Australians. For the reasons already given, the position of the former, particularly where they lack any awareness of a disqualifying relationship between them and a foreign power, is eminently distinguishable from that of the latter. In any event, the *Constitution* itself distinguishes between the natural-born and the naturalised in addressing the qualifications required to sit in the House of Representatives. Specifically, s 34 includes among those qualifications, "[u]ntil the Parliament otherwise provides", that a member "be a subject of the Queen, either natural-born or for at least five years naturalised under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State."

39. It is significant also that Mason CJ, Toohey and McHugh JJ did not see any place in the form of inquiry mandated by s 44(i) for the concept of constructive knowledge or for an investigation into the reasonableness of an individual's belief that by partaking in an Australian naturalisation ceremony, he or she had surrendered any claim to foreign nationality. Instead, the fact of such a belief was but one factor to be considered in determining whether the steps, if any, that had been taken by the candidate in question in renouncing any foreign nationality were reasonable. In a similar fashion, Dawson J, in referring to "the person's knowledge of his foreign nationality", made no mention of what such a person ought reasonably to have known concerning that topic, nor of his or her knowledge of such facts as would prompt enquiries into the possibility of that he or she is a foreign citizen.

40. By parity of reasoning, where an Australian-born dual national did not know of his or her foreign citizenship when nominating for election, it is neither relevant nor appropriate, in assessing his or her eligibility to sit as a senator or a member of the House of Representatives, to consider whether he or she ought reasonably to have known of, or to have made enquiries concerning, that foreign citizenship, whether before or after the close of nominations. Indeed, to permit the deployment, in the

[43] (1992) 176 CLR 77 at 105.

context of s 44(i), of a concept akin to constructive notice would be to advance the bold, if not incongruous, proposition that as a precondition to participating in the democratic process as a member of Parliament, a natural-born Australian who has no knowledge of any disqualifying relationship between him or her and any foreign power should nonetheless investigate a matter of foreign law.

41. It should be emphasised at this point that constructive knowledge of the sort discussed in the preceding paragraph can be distinguished from knowledge of "at least a real and substantial prospect"[44] that one is a citizen of a foreign power. Actual knowledge of a real and substantial prospect of some state of affairs involves a greater degree of knowledge than mere awareness of facts which, without necessarily suggesting such a real and substantial prospect, might nonetheless prompt reasonable inquiries as to the possibility of that state of affairs existing. As will be developed below, and for the reasons given in the submissions of the Attorney-General of the Commonwealth at [85]-[86], there is no scope for any suggestion that as at the date of his nomination for re-election as the member for the Electoral Division of New England in 2016, Mr Joyce knew of "at least a real and substantial prospect" that he was a citizen of New Zealand. That being so, if Mr Joyce's eligibility to sit as a member of the House of Representatives is successfully to be impugned, it must be on the basis that a more attenuated form of knowledge is sufficient to give rise to an expectation that a candidate for election to the Commonwealth take steps to renounce his or her foreign citizenship.

42. The matter may also be approached by having regard to s 45 of the *Constitution*, to which reference has already been made. The inclusion of the word "thereupon" underscores the importance of being able to ascertain when a senator or a member of the House of Representatives becomes subject to the disabilities described in s 44. That importance is buttressed by the circumstance that the penal consequences prescribed in s 46 of the *Constitution* and in the Common Informers Act are measured by reference to the number of days during which one has sat in the Senate or the House of Representatives despite being ineligible to do so.

43. On the construction of s 44(i) favoured by Mr Joyce, in the case of a person already elected to the Senate or the House of Representatives without knowing of any disqualifying relationship with a foreign power, he or she is rendered ineligible to sit in Parliament if, having become aware of the relevant foreign citizenship, he or she fails to take reasonable steps to renounce it. Though allowance must be made for a period in which to take such steps, it is not difficult to identify a point in time – within close proximity to the moment at which the person became apprised of his or her foreign citizenship – when he or she can be found to be disqualified under s 44(i). The making of a determination as to whether a reasonable time has elapsed for an act to have been performed is an everyday task for courts throughout the Commonwealth.

44. The same cannot so readily be said of a test that focuses on the time when he or she was put on sufficient notice of such facts as would reasonably prompt the making of further inquiries as to the possibility of his or her being a foreign citizen. When a person ought reasonably to have commenced such inquiries, and the length of time for which allowance should be made in order to complete those inquiries and then to take reasonable steps to renounce any foreign nationality, are matters about which

[44] *Re Roberts* [2017] HCA 39 at [116].

reasonable minds might differ. They serve to highlight the greater uncertainty that would follow from any injection into the application of s 44(i), as well as s 45 and the provisions of the Common Informers Act, of some concept of constructive notice or constructive knowledge.

45. Of course, it might be said that all such uncertainty might be avoided if s 44(i) were given its unqualified literal meaning, such that simply being a citizen of a foreign power under the law of that foreign power, irrespective of one's knowledge, actual or constructive, is sufficient grounds for disqualification. However, as has already been observed, that course is foreclosed by *Sykes v Cleary*. That being so, the construction of s 44(i) urged in these submissions best preserves certainty for the operation of both that provision and s 45, in cases where a question of foreign citizenship arises in relation to a sitting member of Parliament, particularly one born in Australia.

46. Finally, the purpose of s 44(i) has been said to lie in the avoidance of "split allegiances" among, and improper foreign influence over, those who participate in the deliberations and decisions of the national Parliament.[45] It does nothing to quarantine the Commonwealth Parliament from influence by foreign governments, and indeed it unduly abridges the democratic rights of significant numbers of Australians, to exclude from the ranks of its members persons who lack any actual awareness that they may be citizens of a foreign power. Less still is the purpose of s 44(i) served by attributing to such persons knowledge that they do not have of an allegiance that, so far as they are concerned, they do not owe. That being so, the policy of the law does not readily admit in this area any role for a legal fiction such as constructive knowledge.

47. There may be a question as to whether s 44(i) would operate to disqualify individuals, born in Australia, who:

    (a) wilfully shut their eyes to the obvious fact or possibility of their foreign citizenship; or

    (b) wilfully and recklessly failed to make such inquiries concerning their foreign citizenship as an honest and reasonable person would make.[46]

48. However, this case does not involve any such facts. The result is that that question need not presently be resolved.

Matters of history

49. The Attorney-General, in his submissions at [24]-[40], undertakes a comprehensive survey of matters of history relevant to the construction of s 44(i) of the *Constitution*. It is not proposed in these submissions to repeat that task.

50. Nonetheless, it is appropriate to emphasise various aspects of that history. A convenient starting point in that regard is afforded by the reasons of the plurality in *Singh v The Commonwealth*,[47] in which it was observed that:

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[45] Report by the Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament* (1981) at [2.14].

[46] See the categories of knowledge discussed in *Baden v Société Générale pour Favoriser le Dévelopment du Commerce et du l'Industrie en France SA* [1991] 1 WLR 509 at 575-576; [1992] 4 All ER 161 at 242-243.

(a) "[u]ntil the beginning of the nineteenth century citizenship by birth within the country, regardless of descent, appears to have been the general rule in Europe".[48] This was reflected in the common law rule, originating with *Calvin's Case*,[49] that subject to various exceptions, "any person born within the British Dominions (whatever the nationality of that person's parents) was a natural-born British subject".[50] However, "by the turn of the twentieth century, instead of the rule of country of birth, the rule of descent or blood had become the leading principle in Europe";[51]

(b) there was, by 1869, a general recognition of the "inconvenience" produced by "[t]he conflict between the law of England and that of so many of the leading nations of the world as to the origin of nationality".[52] That inconvenience was compounded by the common law's insistence upon the permanence of the allegiance of a natural-born British subject;

(c) these matters informed the 1869 Report of the Royal Commissioners for Inquiring into the Laws of Naturalisation and Allegiance, the recommendations of which were directed, in part, to reducing "the number of cases in which one who by British law is a British subject is regarded by foreign law as a foreign subject or citizen, and to [obviating], as far as possible, the difficulties and inconveniences arising from such a double allegiance".[53] Amongst other things, the Royal Commissioners recommended the abrogation of the common law rule that the status of a natural-born British subject was indelible. That rule was said to be "at variance with those principles on which the rights and duties of a subject should be deemed to rest" and in conflict with "that freedom of action which is now recognized as most conducive to the general good as well as to individual happiness and prosperity";[54]

(d) in response to the recommendations of the Royal Commission, the *Naturalisation Act 1870* (UK) was enacted. This statute provided for the severance of the allegiance between a British subject and the British Crown by that subject "voluntarily [becoming] naturalized" in a foreign country; and

(e) notwithstanding the recommendation by the Royal Commissioners that the United Kingdom seek to enter into reciprocal arrangements in other countries concerning the recognition of an individual's nationality, it remained the case that "[t]he persons as to whose nationality a difference of legal theory is possible [included] children born of the subjects of one power within the territory of another".[55]

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[47] (2004) 222 CLR 322.
[48] (2004) 222 CLR 322 at 391 [178].
[49] (1609) 7 Co Rep 1a [77 ER 377].
[50] (2004) 222 CLR 322 at 389 [172].
[51] (2004) 222 CLR 322 at 392 [179].
[52] Cockburn, *Nationality: or the Law Relating to Subjects and Aliens, considered with a view to future legislation* (1869, p 3, quoted at (2004) 222 CLR 322 at 392 [180].
[53] *Reports from Commissioners* (1868-1869), vol 14, 607, at p 617, quoted at (2004) 222 CLR 322 at 392 [181].
[54] *Reports from Commissioners* (1868-1869), vol 14, 607, at p 611, quoted at (2004) 222 CLR 322 at 390 [173].
[55] Hall, *A Treatise on International Law*, 4th ed (1895), p 234, quoted at (2004) 222 CLR 322 at 393 [183].

51. Perhaps mindful of these difficulties, Andrew Inglis Clark, in the draft Bill for the Constitution that he circulated prior to the 1891 National Australasian Convention in Sydney, sought to deal with the question of eligibility for election to, and continued membership in, the House of Representatives as follows:[56]

> "33. The qualifications of a Member of the House of Representatives shall be as follows:–
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> I. He shall be of the full age of Twenty-one years, and shall when elected be a resident of the Province for which he is chosen:
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> II. He shall be either a natural-born subject of the Queen, or a subject of the Queen naturalised by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Parliament of one of the said Colonies before the Federation, or of the Federal Parliament after the Federation.
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> ...
>
> 35. The place of a Member of the House of Representatives shall become vacant in any of the following cases:–
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> ...
>
> II. If he takes the oath or makes a declaration or acknowledgment of allegiance, obedience, or adherence to a foreign Power, or does any act whereby he comes a subject or citizen, or entitled to the rights or privileges of a subject or citizen of a foreign Power".

52. Thus, it was not sufficient, in order to be disqualified, that one simply was a citizen of a foreign power; rather, it was necessary that one take positive steps to become such a citizen. That notion found reflection in various succeeding iterations of cl 33 of the Bill drafted by Inglis Clark, including:

(a) cl 46 of the draft Bill adopted by the 1891 Convention;[57]

(b) cl 46 of the draft Bill adopted by the 1897 Convention in Adelaide;[58] and

(c) cl 45 of the draft Bill as amended at the Sydney session of the Australasian Federal Convention in December 1897.[59]

53. It was not until the Melbourne session of the Australasian Federal Convention that cl 45 of the draft Bill was amended, at some point between 20 January and 1 March 1898, so as to disqualify from election to, and membership of, the Senate or the House of Representatives any person who "[i]s under any acknowledgment of allegiance,

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[56] J Williams, *The Australian Constitution: A Documentary History* (2005), p 84.
[57] J Williams, *The Australian Constitution: A Documentary History* (2005), p 300.
[58] J Williams, *The Australian Constitution: A Documentary History* (2005), p 592.
[59] J Williams, *The Australian Constitution: A Documentary History* (2005), p 774.

obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights and privileges of a subject or a citizen of a foreign power".[60] The reasons for this amendment are not explicitly stated in the *Official Record of the Debates of the Australasian Federal Convention* (Melbourne). As the Attorney-General submits at [42], this rather bespeaks an assumption on the part of those in attendance that the new wording did not represent a material alteration to the provision.

54. However, this is not to say that the amended form of cl 45 was in no respect different from its predecessors. The Attorney-General at [42] submits that the amendment sought to ensure that if a person had performed an act by which he or she became a citizen of a foreign power, but then re-acquired British subject status, he or she would not be forever disqualified from serving in Parliament as a result of that previous act. However, it might also be said that the amended form of cl 45 was apt to capture persons who:

(a) having been born with one nationality and then become naturalised subjects of the Queen; or

(b) having been born within the dominions of the Crown to foreign citizens, and thus having inherited foreign citizenship under the law of the relevant foreign power,

knowingly chose to maintain their foreign nationality. Such individuals would not have been disqualified under the form of words in the initial draft prepared by Inglis Clark, given that they had not, on any view, performed acts whereby they *became* citizens of a foreign power. The text that emerged in Melbourne in March 1898 thus recognised, in a manner that its predecessors did not, that it is possible, in a given case, to choose to be, or to remain, a citizen of a foreign power without having to perform any act.

55. Nonetheless, it must be asked whether cl 45, in its amended form, was understood as disqualifying from election to the Commonwealth Parliament those who had made no such choice, and indeed could not so choose, because they did not know that they were citizens of a foreign power under the law of that foreign power. Given that:

(a) the Royal Commission in 1869 had:

(i) rejected any suggestion that "the principles on which the rights and duties of a subject should be deemed to rest" included the unalterable law of nature, as posited in *Calvin's Case*;[61] and

(ii) extolled the virtues of "freedom of action" and "freedom of emigration"; and

(b) the *Naturalisation Act 1870* (UK) had recently made provision for the exercise of individual choice with respect to the termination of one's status as a subject of the British Crown,

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[60] J Williams, *The Australian Constitution: A Documentary History* (2005), p 869.
[61] (1609) 7 Co Rep 1a at 25a [77 ER 377 at 407].

it is difficult to conclude that the words "a subject or a citizen of a foreign power" in s 44(i) were intended or understood to mean anyone other than a person who chose to be, or to remain, a subject or a citizen of a foreign power, irrespective of whether the exercise of that choice involved the performance of some act.

56. It does not detract from this proposition to point to the widespread adoption, as at the date of Federation, of rules conferring citizenship by descent, particularly among those countries that then supplied the largest numbers of immigrants to Australia. That might provide a basis for attributing to the framers of the *Constitution* an awareness of "the difficulties and inconveniences arising from ... a double allegiance", but it does not follow from the fact of that awareness that the framers had determined to treat dual citizenship *simpliciter* as grounds for disqualification from participating in the deliberations and decisions of the Commonwealth Parliament. Indeed, it might be asked how those "difficulties and inconveniences" might be resolved or ameliorated if persons who were elected to Parliament without knowing that they were also foreign citizens were, on the basis of their foreign citizenship alone, disqualified from sitting in Parliament. Certainly that was not the position taken in Sydney in 1891, nor in Adelaide in 1897, nor in Sydney again later that year. It would, in any event, be at odds with the reasoning of all the Justices in *Sykes v Cleary*.

57. To this must be added the fact that the majority of the Royal Commissioners in 1869 had expressed the view that:[62]

> "of the children of foreign parents, born within the dominions of the Crown, a large majority would, if they were called upon to choose, elect British nationality. The balance of convenience, therefore, is in favour of treating them as British subjects unless they disclaim that character, rather than of treating them as aliens unless they claim it. The former course is, of the two, the less likely to inflict needless trouble and disappoint natural expectations.
>
> We do not therefore recommend the abandonment of this rule of the common law, but we are clearly of opinion that it ought not to be, as it now is, absolute and unbending. In the case of children of foreign parentage, it should operate only where a foreign nationality has not been chosen. Where such a choice has been made, it should give way."

58. The *Constitution* was thus drafted and enacted against the background of an understanding or an assumption that in the absence of a choice favouring their foreign nationality, the principal loyalty of those persons who were simultaneously British subjects by reason of birth within the dominions of the Crown and foreign citizens by descent would be to the British Crown. If it be the case that the object of s 44(i) was 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] then why, having regard to the assumption described in the preceding sentence, would the framers have understood an individual as having a split allegiance, as distinct from an allegiance to the Crown of what was then the United Kingdom of Great Britain and

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[62] *Reports from Commissioners* (1868-1869), vol 14, 607, at pp 614-615.
[63] Report by the Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament* (1981) at [2.14].

Ireland, simply because he or she, while born within the British dominions, had foreign citizens for parents? More precisely still, why would the framers have understood such an individual as having a split allegiance where he or she had not merely omitted to make a choice favouring the foreign nationality, but also where he or she had no awareness of that foreign nationality?

59. To speak of choice is to suggest that the criterion for disqualification under s 44(i) involves what Deane J termed a "mental element".[64] Reference has already been made to the penal consequences, provided for in s 46 of the *Constitution* and s 3 of the Common Informers Act, of failing to comply with s 44. The extent to which these penal consequences should inform the construction of s 44 is open to debate.[65] Certainly, neither s 44 nor s 46 makes it a criminal offence to sit in Parliament when one is not eligible to do so, such that there is no occasion for the direct application of the principle that "[w]hen a statute creates and defines an offence only by reference to its external elements, a mental element is usually implied in the definition".[66] Nevertheless, there remains force in Deane J's admonition in *Sykes v Cleary*[67] to which reference was made in paragraph 26 above. That being so, the Court should be slow to adopt a construction of s 44(i), the effect of which would be to disqualify a person, born in Australian, who lacks any awareness that he or she is a foreign citizen. To do so would be to abridge the democratic rights of persons who, on the logic of what was said by the Royal Commissioners in 1869, would be assumed to owe their principal allegiance to the Sovereign of this country.

The position of Mr Joyce

60. The facts in these proceedings disclose that:

(a) Mr Joyce had no awareness of the possibility that he might have been a New Zealand citizen before late July 2017;

(b) the fact of his New Zealand citizenship was not conveyed to him until 10 August 2017, at the earliest; and

(c) by 14 August 2017, he had completed a Declaration of Renunciation of New Zealand Citizenship and paid a fee in connection with that renunciation.

61. It follows then that on the argument advanced above, Mr Joyce:

(a) was not disqualified from sitting as a member of the House of Representatives as at 9 June 2016, being the date of the close of nominations for all Electoral Divisions in New South Wales; and

(b) did not at any point during the current term of the Commonwealth Parliament become subject to the disability mentioned in s 44(i) of the *Constitution.* This is because:

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[64] *Ibid.*
[65] *Re Webster* (1975) 132 CLR 270 at 279; *Re Day (No 2)* [2017] HCA 14; (2017) 91 ALJR 518 at 558-559 [276].
[66] *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 565.
[67] (1992) 176 CLR 77 at 121.

(i) when his New Zealand citizenship was confirmed, first by the New Zealand High Commissioner and then by Mr Goddard QC, he acted with alacrity in taking steps to renounce it; and

(ii) given what is said in paragraphs 27 to 30 of the report of Mr Cooke QC, there can be no doubt that those steps were reasonable, in the *Sykes v Cleary* sense.[68]

62. Specifically, the material before the Court indicates:

(a) that Mr Joyce exercised his right under s 15(1) of the 1977 Act, as a "New Zealand citizen who has attained the age of 18 years and is of full capacity and who is recognised by the law of another country as a citizen of that country", to renounce his New Zealand citizenship; and

(b) that he did so in compliance with reg 8(2) of the *Citizenship Regulations 2002* (NZ), by making a declaration of renunciation of citizenship outside New Zealand "before a New Zealand representative".

63. However, even if questions of constructive knowledge were relevant to the form of inquiry described in *Sykes v Cleary*, it must be recalled that whilst Mr Joyce was at all relevant times aware of his father's having been born in New Zealand, he was, from the age of 10, of the belief that his father was a citizen of Australia only. This was in circumstances where he was not aware, until about 11 August 2017, that in 1978, his father:

(a) had been informed, upon applying to become a Justice of the Peace, that he was not an Australian citizen; and

(b) had renounced his New Zealand citizenship.

64. It should also be emphasised that Mr Joyce's biography discloses little connection to New Zealand beyond the fact that his father was born and grew to adulthood there. He has only ever travelled to New Zealand once, and that was during his childhood, in order to attend the funeral of his paternal grandmother.[69] He has never applied for New Zealand citizenship. He has neither sought nor received welfare benefits from the Government of New Zealand; nor has he ever served in the New Zealand armed forces. He has never voted for the election of any public official in New Zealand, and he has never applied for, nor possessed, a New Zealand passport.[70]

65. In the face of these circumstances and his belief concerning his father's Australian citizenship – one formed in childhood and held until July 2017, at the earliest – mere knowledge that his father had been born in New Zealand cannot be said to have constituted knowledge of circumstances that ought reasonably to have put Mr Joyce on inquiry as the possibility that he might have been a New Zealand citizen.

66. Nor is such knowledge to be attributed to Mr Joyce merely because:

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[68] CB 1354-1355.
[69] Joyce Affidavit at [15]; CB 1321.
[70] Joyce Affidavit at [16]-[17]; CB 1321.

(a) the nomination form required to be completed by candidates for election to the House of Representatives prior to the 2016 federal election required candidates to sign a declaration that they were qualified under the *Constitution* and laws of the Commonwealth to be elected to the Commonwealth Parliament;[71] and

(b) the Candidates' Handbook, to which the nomination form referred, reproduced the terms of s 44(i) and contained a brief discussion of what was termed the "'Foreign allegiance' disqualification".[72]

67. Those documents served merely to draw the attention of prospective candidates to the existence and terms of s 44(i) of the *Constitution*. They did not advert to the possibility that a prospective candidate might be a citizen of a foreign power by descent. Nor, despite the references to *Sykes v Cleary* and *Sue v Hill*[73] in the Candidates' Handbook, did either document indicate to a reader that generally speaking, for the purposes of s 44(i) of the *Constitution*, questions of citizenship would be determined by the law of the foreign power in question.

68. More tellingly still, the nomination form contained a note that "[c]andidates who have any doubts about their eligibility, by virtue of section 44 of the Constitution, are advised to obtain their own legal advice." Similarly, the Candidates' Handbook advised that "[i]f you have any doubts as to your qualifications under the Constitution, the AEC recommends you seek your own legal advice. The AEC does not provide legal advice to prospective candidates."

69. Mr Joyce's evidence is that he was not aware of the possibility that he might have been a New Zealand citizen until late July 2017. He thus had no doubts concerning his eligibility to stand as a candidate for election to the Commonwealth Parliament. Merely reading the nomination form and the Candidates' Handbook would not have put a reasonable person in Mr Joyce's position, with his state of knowledge, on notice of any circumstance that would or should have prompted further inquiry.

70. There is accordingly no basis for a finding of disqualification.

Filling Mr Joyce's vacancy

71. What follows proceeds on the assumption that the Court concludes, contrary to the above, that the place of the Member for New England has become vacant.

72. Pursuant to s 379 of the Electoral Act, the Court has such powers on a reference by the Senate or by the House of Representatives as are conferred by s 360. Those powers include the power to declare an election absolutely void (s 360(1)(vii)) or to "declare any candidate duly elected who was not returned as elected" (s 360(1)(vi)), as an incident of which "the Court can give appropriate directions with respect to the counting or recounting of ballot-papers at an election".[74]

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[71] CB 1724.
[72] CB 1742.
[73] (1999) 199 CLR 462.
[74] *In re Wood* (1988) 167 CLR 145 at 172.

73. In *Free v Kelly*,[75] Brennan CJ remarked that:

> "an election in which a person who is incapable of being chosen is purportedly returned as a member of the Senate or as a member of the House of Representatives will not warrant an order for a special count unless a special count would reflect the voters' true legal intent or, conversely, would not result in distortion of the voters' real intentions".

74. In this case, as in *Sykes v Cleary*,[76] the preferences of the voters in the Electoral Division of New England "were expressed within the framework of a larger field of candidates presented to the voters by reason of the inclusion" of the impugned candidate. Thus, if Mr Joyce's name had not appeared on the ballot paper, the voters' preferences might have been expressed differently. This is particularly because Mr Joyce received a majority of the votes cast on a first-preference count.

75. The possibility of a distortion of the voters' intentions was further explained by Brennan CJ in *Free v Kelly* as follows:[77]

> "If Ms Kelly's first preference ballot-papers were to be distributed so as to be counted to the candidate next in order of the voters' preferences, the order of exclusion of the less-favoured candidates under par (d) of s 274(7) [of the Electoral Act] might well have been altered. That alteration might have affected the identity of the candidate last remaining after the distribution of preferences. In other words, it is impossible to predicate of the election that the person who might be selected in a special count would have been chosen had Ms Kelly not been nominated as a candidate."

76. His Honour went so far as to express tentative agreement with the proposition that except where there are only two candidates standing and the facts which establish the incapacity of the one chosen are known to the electors at the time of the poll, "if the candidate who is returned as an elected member proves to have been incapable of being chosen, the election is necessarily void and a new election must be held".[78]

77. Regard should also be had to the observation by the plurality in *Sykes v Cleary*[79] that unlike in the Senate, the process provided for in the Electoral Act for dealing with a situation in which a candidate for the House of Representatives dies between the declaration of nominations and polling day does not afford any guidance to the conduct of a special count where a candidate is disqualified by s 44 of the *Constitution*.

78. It follows then that if Mr Joyce was disqualified from nominating as a candidate for the Electoral Division of New England at the 2016 federal election, the Court should declare his election absolutely void pursuant to s 360(1)(vii) of the Electoral Act. Section 374 of that statute would then require a new election for the Electoral Division of New England.

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[75] (1996) 185 CLR 296 at 303.
[76] (1992) 176 CLR 77 at 102.
[77] (1996) 185 CLR 296 at 303-304.
[78] (1996) 185 CLR 296 at 304.
[79] (1992) 176 CLR 77 at 102.

Part VII: Applicable provisions

79. Section 44(i) of the *Constitution* relevantly provides:

> "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."

Part VIII: Orders sought

80. For the reasons outlined above, the questions transmitted by the House of Representatives should be answered as follows:

(a) No.

(b) Does not arise.

(c) No further orders or directions are required.

(d) The Commonwealth should pay Mr Joyce's costs of the proceedings. Otherwise, there should be no order as to costs.

Part IX: Estimate of oral argument

81. Mr Joyce estimates that both he and Senator Nash require one and a half hours for the presentation of oral argument.

Date: 28 September 2017

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