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

No. C15 of 2017

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE COMMONWEALTH ELECTORAL ACT 1918 (CTH) CONCERNING THE HON. BARNABY JOYCE MP

ANNOTATED SUBMISSIONS OF MR ANTONY HAROLD CURTIES WINDSOR

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Part I: Publication

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

Part II: Statement of Issues

2. On 14 August 2017, the House of Representatives resolved to refer to the Court of Disputed Returns, pursuant to s 376 of the *Commonwealth Electoral Act 1918* (Cth) (***Electoral Act***), questions including whether, by reason of s 44(i) of the Constitution, the place of the Member for New England, the Hon. Barnaby Joyce MP (**Mr Joyce**), had become vacant.

3. The first question arising in this referral is: at the time of the nomination of Mr Joyce for, and of his election to, the House of Representatives in 2016, was Mr Joyce incapable of being chosen or of sitting as a member of the House because he was a citizen (or entitled to the rights or privileges of a citizen) of a foreign power, being New Zealand?

4. The second question arising is: if the first question is answered in the affirmative, should there be an order for a special count, rather than for a by-election, for election of the new Member for New England?

5. For the following reasons, and giving due respect to authority, the answer to the first question is "yes", and the answer to the second is that a by-election is required.

Part III: Facts

6. The facts underpinning the reference are set out at [6]-[22] of Mr Joyce's submissions. The most relevant facts are as follows. James Michael Joyce was born in New Zealand on 19 January 1924,[1] as a British subject.[2] Because he was born in New Zealand, he became a New Zealand citizen on 1 January 1949.[3] Mr Joyce, James Joyce's son, was born in Australia on 17 April 1967.[4] Mr Joyce was born a New Zealand citizen (by descent) under New Zealand law[5] and an Australian citizen under Australian law.[6] Neither Mr Joyce's acquisition of New Zealand citizenship by descent nor his Australian citizenship by birth was dependent on registration or other formalities.[7] Mr Joyce was, and remained until on or about 15 August 2017,[8] a New Zealand citizen.[9]

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1 Affidavit of Barnaby Thomas Joyce sworn 12 September 2017 (**Joyce Affidavit**), [2]; CB 1319.
2 David Goddard QC, "New Zealand Citizenship of Person Born in Australia", 12 August 2017 (**Goddard Opinion**), [3]; CB 1340.
3 By reason of the *British Nationality and New Zealand Citizenship Act 1948* (NZ): Goddard Opinion, [3]-[4]; CB 1340-1341.
4 Joyce Affidavit, [1], CB 1319.
5 Goddard Opinion, [5]; CB 1341.
6 By operation of s 10(1) of the *Australian Citizenship Act 1948* (Cth).
7 Goddard Opinion, [6]; CB 1341; *Australian Citizenship Act 1948* (Cth) s 10(1).
8 On and from 1 January 1978, Mr Joyce's New Zealand citizenship was preserved by s 13(1) of the *Citizenship Act 1977* (NZ) (which came into force on that date, and repealed the *British Nationality and New Zealand Citizenship Act 1948* (NZ)): Goddard Opinion, [7]-[8]; CB 1341.
9 Goddard Opinion, [5]-[10]; CB 1340-1342.

Part IV: Argument

Summary of argument

7. Applying the considered reasoning of five Justices in *Sykes v Cleary*, under s 44(i) Mr Joyce was ineligible to be "chosen or of sitting" at all relevant times since his nomination on 7 June 2016, because: New Zealand was a "foreign power"; the question under s 44(i) whether Mr Joyce was a citizen of New Zealand was to be answered by reference to the domestic law of New Zealand, unless a relevant qualification or exception to the operation of s 44(i) applied; Mr Joyce was a New Zealand citizen (on the uncontradicted expert evidence) under New Zealand law; and no relevant qualification or implied exception saved him from disqualification.

Mr Joyce's position is answered by the reasoning of the majority in *Sykes v Cleary*

8. Mr Joyce's situation is not relevantly distinguishable from that of the third respondent in *Sykes v Cleary*, Mr Kardamitsis:

   (a) each was, at all relevant times from birth up until the declaration of the outcome of the relevant election (and after), a citizen under the law of a foreign country – Mr Joyce by descent,[10] Mr Kardamitsis by birth;[11]

   (b) each had knowledge of the primary fact which, under the relevant foreign law, rendered him a citizen of the foreign country – Mr Joyce had knowledge that his father was born in New Zealand,[12] Mr Kardamitsis had knowledge that his own place of birth was Greece;

   (c) neither Mr Joyce[13] nor Mr Kardamitsis[14] had knowledge that those facts operated, under the law of the relevant foreign power, to make him a citizen of that foreign power, and therefore ineligible under s 44(i);

   (d) Mr Joyce[15] and Mr Kardamitsis[16] were both, by virtue of their citizenship, entitled under the law of the foreign power to acquire a passport and to use it to enter the relevant foreign country;

   (e) neither Mr Joyce nor Mr Kardamitsis had taken any steps at the relevant time to renounce his citizenship under the foreign law – Mr Joyce did not take such steps until well after he was elected,[17] Mr Kardamitsis had not taken them by the time of the hearing;[18] and

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10 Goddard Opinion, [5]-[10]; CB 1341-1342.
11 *Sykes v Cleary* (1992) 176 CLR 77 (***Sykes***) at 84 (Case Stated at [27]).
12 Joyce Affidavit, [5]; CB 1319.
13 Joyce Affidavit, [13]-[14]; CB 1320.
14 *Sykes* at 85 (Case Stated at [34]).
15 Francis Cooke QC, "Report on Certain Questions Concerning the Law of New Zealand Relating to Citizenship" (**Cooke Opinion**), [44]; CB 1358.
16 *Sykes* at 85 (Case Stated at [33]).
17 Joyce Affidavit, [22]; CB 1322.
18 *Sykes* at 85 (Case Stated at [33]).

(f) Mr Kardamitsis' lack of awareness of his subsisting Greek citizenship was not regarded as relevant to the requirement that he nonetheless needed to have taken reasonable steps to renounce that citizenship.[19]

9. In *Sykes v Cleary*, five out of seven Justices held, on the facts stated in respect of Mr Kardamitsis, that he was disqualified under s 44(i).[20] They held that s 44(i):

(a) identified the disqualifying condition – citizenship of a foreign power – by reference to the position under the domestic law of the foreign country;[21]

(b) held, as a consequence, that the proper way for a person who held a foreign citizenship to remove that disqualifying condition was to renounce that foreign citizenship effectively under the law of the foreign country *before* standing for Parliament;[22] and

(c) recognised only an implied exception for public policy or necessity: a person who remained a citizen under the law of a foreign country would escape disqualification if, when standing for Parliament, the person had *already* taken all reasonable steps to renounce that citizenship having regard to the laws and procedures of the foreign country, but had not been released from citizenship by that country.[23]

10. The way in which the five Justices dealt with Mr Kardamitsis' position cannot be reconciled with the arguments now put by the Attorney-General or by Mr Joyce. There is no relevant distinction between citizenship acquired by descent and citizenship acquired by birth, and their Honours did not draw any such distinction. Mr Kardamitsis' lack of "knowledge" that he remained a citizen of Greece did not save him (despite Dawson J's express reference to knowledge as a factor in considering whether all reasonable steps have been taken to renounce[24]). Nor was he saved by the lack of any "voluntary act" by him to become a citizen of Greece (his birth in Greece not being any "voluntary act" on his behalf). Nor did the Court impute to him some fictional state of voluntariness or knowledge – contrary to the stated facts – arising at the time of, or subsisting beyond, his Australian naturalisation ceremony. He was held to be disqualified for a simple, objective reason: at the relevant times he was a Greek citizen by birth under the law of Greece, and he had failed to do the things necessary, or take all reasonable steps, to renounce his Greek citizenship in accordance with the laws of Greece. Indeed, on the Attorney-General's argument, contrary to the decision of the five Justices in *Sykes*, Mr Kardamitsis would have been saved from disqualification by his declaration of renunciation at his Australian citizenship ceremony and his corresponding belief that this ended any possibility of dual citizenship.[25]

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19 *Sykes* at 104-105, 108 (Mason CJ, Toohey and McHugh JJ).
20 *Sykes* at 108.7 (Mason CJ, Toohey and McHugh JJ), 114.3 (Brennan J), 132.4 (Dawson J). .
21 *Sykes* at 105-107 (Mason CJ, Toohey and McHugh JJ), 112 (Brennan J), 131 (Dawson J).
22 *Sykes* at 107 (Mason CJ, Toohey and McHugh JJ), 114 (Brennan J), 131 (Dawson J).
23 *Sykes* at 107 (Mason CJ, Toohey and McHugh JJ), 113-114 (Brennan J), 131-132 (Dawson J).
24 *Sykes* at 131.9.
25 *Sykes* at 84-85 (Case Stated at [29] and [34]).

11. Their Honours' reasoning treats the "is" in the second condition in s 44(i) in its literal, grammatical sense. The enquiry is wholly objective: Do the facts at the relevant date mean that, under the law of the foreign country, the person "is" a foreign citizen at that date? As at the date of nominating as a candidate for election and at all relevant dates thereafter, the onus is on a person wishing to take on the privileges and responsibilities of a member of Parliament to ascertain the facts that are relevant to the declaration and statement the person is required to make in the nomination form.[26] Any impediment to the person standing must be effectively disposed of *before* the person represents to the AEC and to the electors, by their nomination, that they are eligible to stand.

10 12. Justice Brennan identified two other possible qualifications. First, there is an exception applying at common law in times of war.[27] And second, s 44(i) might not recognise foreign citizenship imposed in conditions which international law regards as exorbitant (in that they exceed the jurisdiction in matters of nationality that international law would recognise[28]). Neither exception or qualification applied to Mr Kardamitsis or is suggested to apply to Mr Joyce here.

13. The case put by the Attorney-General, and Mr Joyce, is effectively an attempt to resurrect the dissenting reasoning of Deane J in *Sykes v Cleary*. That reasoning allows a single overriding imputed purpose to the whole of s 44(i) to drive the conclusion that its disqualifying effect cannot be triggered, under any limb, unless the putative member of
20 Parliament had done some (presumably voluntary) act whereby he or she has chosen to incur a duty to a foreign power.[29] For Deane J, s 44(i) did not apply to Mr Kardamitsis, because he had not done any voluntary act to take up Greek citizenship, and the various oaths he took to Australia belied any chosen allegiance to Greece. For the Attorney-General or Mr Joyce to succeed, this Court needs to be persuaded to build into s 44(i) what Deane J described as an "implied ... mental element",[30] and thereby to prefer a single dissenting judgment in *Sykes* to the considered reasoning of the five Justices in that case.

14. Strictly, the reasoning in question in *Sykes* may not be regarded as ratio, as the relevant question about Mr Kardamitsis "did not arise".[31] Nevertheless, all seven Justices
30 considered it appropriate to give detailed consideration to his position. The reasoning of the majority thus represents, at the least, considered dicta.

15. The course of reconsidering, and not applying, the reasoning in *Sykes* should not be lightly undertaken, for the reasons identified in *John v Federal Commissioner of Taxation*.[32] Most significantly, the *Sykes* majority's interpretation of s 44(i) was referred to without

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26 See s 166 of the *Electoral Act*, and Forms C, CA, D and DA in Sched 1, and see, for example, Mr Joyce's statement and declaration as at 2 June 2016 at CB 218.

27 *Sykes* at 112.8.

28 *Sykes* at 112.4-7, 113.7, by reference to *Oppenheimer v Cattermole* [1976] AC 249 at 277 (Lord Cross).

29 *Sykes* at 127.5.

30 *Sykes* at 127.4.

31 *Sykes* at 87.1, 140.5.

32 (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ). See also *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151 [134], 155 [147].

disapproval by the High Court in *Sue v Hill*,[33] and other aspects of *Sykes* have been cited by the High Court on at least eleven further occasions (and, of course, by lower courts).[34] In addition, *Sykes*' interpretation of s 44(i) has "been independently acted on in a manner which militate[s] against reconsideration":[35] it has provided a clear organising principle for prospective senators and members of the House of Representatives for approximately 25 years.[36] The "strongly conservative cautionary principle" has not been displaced.[37]

16. If the application of the settled construction of s 44(i) is considered too onerous, the appropriate course is to seek the approval of the people to alter the Constitution, as was recommended in 1981 but never taken up by the Parliament.[38]

17. The submissions of the Attorney-General and Mr Joyce invite the Court to reopen a settled earlier decision to advance propositions which seek to give s 44(i) a predominantly subjective, rather than an objective, operation. Departing from the text of s 44(i), they advocate a construction under which prospective candidates have *no* duty of enquiry concerning their qualifications to stand for Parliament, unless they know, or have reason to believe or suspect (at whatever level the Court rules counts as sufficient "knowledge") foreign citizenship, in which case they risk an allegation that they are now acting "voluntarily", thereby triggering disqualification. The diligent prospective candidate, who discovers foreign citizenship by making appropriate inquiries and taking appropriate advice before ticking the s 44 box on the nomination form, and declaring that the candidate is qualified under the Constitution to be elected, must take all reasonable steps to divest himself or herself of the status described in the plain terms of s 44(i). By contrast, the incurious or careless candidate may stand provided the box is ticked and the declaration made without taking appropriate steps to determine whether s 44(i) applies. If someone later asks questions that provoke an inquiry (as occurred here and to Mr Kardamitsis in *Sykes*), the careless candidate (now elected) claims to be entitled to sit in the Parliament during a "reasonable" period of time in which he or she takes all reasonable steps to renounce; whereas the diligent candidate had to ensure those steps were taken *before* the election. The careless candidate is allowed to sit in Parliament holding, and knowing he or she holds, foreign citizenship (potentially for a significant length of time, if the "reasonable steps" qualification is engaged and entails an

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33 (1999) 199 CLR 462 (***Sue***) at 487 [47], 528-529 [175]-[176]. See also *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 407-408 fn 73 (Gleeson CJ).

34 See, eg, *Langer v The Commonwealth* (1996) 186 CLR 302 at 342-343 fn 85; *Sue* at 505 [103], 523 [158]; *Williams v The Commonwealth* (2012) 248 CLR 156 at 223 [110], 334 [443]; *Murphy v Electoral Commissioner* [2016] HCA 36; (2016) 334 ALR 369 at 439 fn 397; *Re Culleton (No 2)* [2017] HCA 4; (2017) 341 ALR 1 (***Re Culleton***) at 5 [13], 10 [43], 12 [53], 13 [57], 14 [59]; *Re Day (No 2)* [2017] HCA 14; (2017) 343 ALR 181 (***Re Day***) at 196 [71], 201 [96], 203 [107], 221 [204], [207], 234 [276], 239 [303]-[304]. Leave to reopen a different aspect of *Sykes* was refused in *Free v Kelly (No 1)* [1996] HCA 41; (1996) 138 ALR 646.

35 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439.

36 At least in 2016, it was summarised in the Candidates' Handbook to provide guidance to those intending to nominate as to the content of s 44(i): see Statement of Agreed Facts, Annexure E at 14; CB 1742.

37 *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352 [70] (French CJ); see also *Alqudsi v The Queen* (2016) 258 CLR 203 at 235-236 [67] (French CJ).

38 Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament* (1981) at [2.14]-[2.20].

administrative procedure in another country that may take some time for the renunciation steps to be taken or to be effective).

18. Acceptance of that argument would reward the careless, and perpetuate the kind of destabilising situations giving rise to the current seven references. A prospective candidate may see it in their interest not to seek advice or ask questions: "you can be elected as a foreign citizen if you remain in the dark; if investigations by the media or concerned electors reveal that you are a foreign citizen, you can leave it to that point to start to take the reasonable steps to renounce, without losing your seat". The reasoning of the majority in *Sykes* should not be upset in favour of an argument with such damaging consequences for clarity, certainty and rigour in the application of a constitutional provision going to the heart of the composition and due functioning of the Parliament.

19. The following submissions are made if the matter is considered afresh.

Construing the elements of s 44(i)

20. Section 44 as a whole performs a single function (identifying disqualifying conditions for senators and members of the House of Representatives) by five different, but related, sets of criteria. At a high level of generality, they are all directed to similar mischiefs of persons who are subject to the disabilities set out in s 44 being prevented from being chosen or sitting as members of the Australian Parliament. But the scope of each provision must in the end be resolved on its own text.[39]

21. Section 44(i) itself contains three distinct, but related, elements. The elements work together to achieve the overall purpose of s 44(i); but again, they must not be collapsed into each other or elided.[40] In each case, the text identifies a different mechanism for achieving the overall end.

22. The following textual submissions are made on the three discrete elements. Common to all three elements, the words "foreign power", where variously used in s 44(i), bear their ordinary meaning: any sovereign state other than Australia.[41]

23. *First element*: "is under any acknowledgment of allegiance, obedience, or adherence to a foreign power". This element is satisfied where there has in fact been acknowledgment.[42] Allegiance means "the lawful obedience which a subject is bound to render to his sovereign".[43] During the Convention Debates, it was suggested that this element could

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39 *Re Day* at 193 [53] (Kiefel CJ, Bell and Edelman JJ). See also, eg, *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 148-149 (Knox CJ, Isaacs, Rich and Starke JJ); *Singh v The Commonwealth* (2004) 222 CLR 322 (***Singh***) at 330 [6] (Gleeson CJ), 347-348 [51] (McHugh J), 412 [247] (Kirby J).

40 Compare Attorney-General's submissions at [20]-[23]; [68]-[69]; *Sykes* at 127 (Deane J).

41 *Sue* at 524-525 [161]–[163] (Gaudron J).

42 *Sykes* at 109, 110 (Brennan J), compare 127 (Deane J).

43 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) (**Quick and Garran**) §143, see also *Singh* at 351 [61]-[63], 363 [92] (McHugh J). Allegiance was "the test of membership of a political community" in the middle ages: Quick and Garran at §463, and continues to form the centrepiece of one plank of the definition of "alien": at Quick and Garran at §§193-194, see also *Singh* at 350-351 [56]-[58], 352-353 [64]-[65] (McHugh J).

have been satisfied where a person took an oath of allegiance to a foreign power in the context of serving in the military of that power.[44]

24. *Second element*: "is a subject or a citizen ... of a foreign power". The incorporation of both "subject" and "citizen" was to encompass the two principal forms of government at the time of framing: "subject" (stemming from feudal origins) was the appropriate term where the foreign power had a monarch; "citizen" (stemming from classical Greek and Roman origins), where the foreign power was a republic.[45]

25. At the time of framing, the two principal theories according to which nation states conferred citizenship or subject status at birth were: (a) *jus soli* (birth in the territory – which derived primarily from the feudal ties between allegiance and land[46]) and *jus sanguinis* (status of the parents – which derived primarily from the association, especially in Roman law, between kinship and citizenship[47]).[48] The parties agree that it was common at that time for nation states outside the British Empire to confer citizenship or subject status under their domestic laws on each of those bases.[49] In addition, it was well understood that a person could become a citizen or a subject by naturalisation.[50] The parties also agree that at the time of Federation the laws of some nation states outside the British Empire recognised or permitted dual nationality.[51]

26. As the text of s 44(i) makes clear, the second element arises simply from the person holding the *status* of subject or citizen at the time the disqualifying condition falls to be assessed. The existence of this *status* is determined by reference to the domestic law of the country of subjecthood or citizenship.[52] Unlike the first element, the text in which the second element is expressed does not require any specific act (voluntary or otherwise) by the person (although even the first element should be understood as describing objectively determinable criteria referable to a legal status rather than a mere subjective intention[53]). Nor does it require any separate factual or legal consideration whether, by reason of the status in question, the person owes a duty of allegiance to the foreign country. Instead, holding the status at the relevant point in time is *taken to be* conclusive or sufficient proof that the person does owe such a duty of allegiance.[54] At common law, allegiance was

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44 *Official Record of the Debates of the Australasian Federal Convention* (***Convention Debates***), Vol 3, Adelaide, 15 April 1897 at 736.

45 *Sykes* at 109 (Brennan J); *Singh* at 402 fn 339 (Kirby J); Quick and Garran at §463, see also at §144.

46 *Singh* at 351-352 [61]-[63] (McHugh J).

47 See, eg, Salmond, "Citizenship and Allegiance" (1902) 17 *Law Quarterly Review* 270 at 274-275.

48 See, eg, *Singh* at 340-341 [30] (Gleeson CJ), 359 [81] (McHugh J), 391-392 [178]-[179] (Gummow, Hayne and Heydon JJ), 413-414 [250]-[251] (Kirby J).

49 Statement of Agreed Facts, [17]; CB 1717. See further [72] below.

50 See, eg, Constitution, s 51(xix); *Singh* at 363-368 [92]-[106], 375 [126], (McHugh J), 388 [169], 391 [176]-[177], 393-394 [183], 397-398 [197] (Gummow, Heydon and Hayne JJ).

51 Statement of Agreed Facts, [17]; CB 1717. See further [72] below.

52 See *R v Burgess* (1936) 55 CLR 608 at 649 (Latham CJ), 673 (Dixon J); *Chan v Minister for Immigration & Ethnic Affairs* (1983) 49 ALR 593 at 595; *Sykes* at 105-106 (Mason CJ, Toohey and McHugh JJ), 112 (Brennan J), 131 (Dawson J); *Tji v Minister for Immigration and Ethnic Affairs* (1998) 158 ALR 681 at 686; *Sue* at 529 [175] (Gaudron J).

53 See *Singh* at 387 [165] (Gummow, Hayne and Heydon JJ), and on its objective manifestations, see again *Convention Debates*, Vol 3, Adelaide, 15 April 1897 at 736.

54 Compare *Sykes* at 110 (Brennan J); *Singh* at 402 fn 339 (Kirby J).

owed by natural born subjects and by aliens who became subjects by denization or naturalisation: the status of subject was "coincident" with owing allegiance.[55] Other legal systems have adopted a similar rule.[56] In this sense, holding different nationalities entails different allegiances.[57]

27. Leaving aside the complexities of war, only two possible qualifications to the straightforward textual reading of the second element of s 44(i) just described have been recognised.[58] The first is where the foreign country in question has imposed the status of subject or citizen on persons "exorbitantly" (i.e. beyond the jurisdiction recognised at international law). The second is where the person has taken all reasonable steps to renounce the status under the law of the foreign country, but is unable to do so effectively (i.e. as a public policy or necessity exception under Australian law). The text permits of no knowledge, notice or voluntariness requirement in this second element of s 44(i).

28. In summary, on the proper construction of the text, the second limb of s 44(i) disqualifies a person who is at the relevant time a citizen by operation of the municipal law of a foreign power. Where that municipal law confers citizenship on the basis of birth or descent, it will fall comfortably within the limits recognised by international law (and the bases of citizenship well-recognised when s 44(i) was drafted), and will be picked up by s 44(i). Such a person is disqualified unless and until he or she has taken all reasonable steps to renounce that foreign citizenship or subjecthood under that foreign law *before* the person nominates for Parliament. On this construction, Mr Joyce was disqualified.

29. *Third element*: "is ... entitled to the rights or privileges of a subject or a citizen of a foreign power". This element does not require any positive act on the part of the person (that is, it operates like the second element, but unlike the first), and the Convention Debates and at least one contemporaneous secondary source express concern about the operation of the third element for this reason.[59] Nor does the third element entail any knowledge or notice requirement. Unlike the second element, this element does not arise from status alone, but looks to the legal *fact* of the entitlements of the person under the law of the foreign power.[60] The Attorney-General's strained construction of the third element should be rejected; the attempt to confine its application (including as to "citizens") to persons who had undergone a process of naturalisation would constitute a radical reading-down of the text.

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55 *Sykes* at 109 (Brennan J); A V Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (1896) (**Dicey**) at 173, cited in *Singh* at 363 [92], see also at 365 [96] (McHugh J).

56 *Sykes* at 109 (Brennan J).

57 *Sue* at 503 [96] (Gleeson CJ, Gummow and Hayne JJ).

58 The Court should adopt the reasoning of Brennan J in *Sykes* at 112-114 as to the basis for those two exceptions. It may be noted that the public policy basis for the second exception – where a person has taken all reasonable steps to renounce – is consistent with the basis of the recommendation in the 1869 *Report of the Royal Commissioners for Inquiring into the Laws of Naturalisation and Allegiance* that the law be changed to permit natural-born British subjects to renounce allegiance: see *Singh* at 389-390 [173] (Gummow, Hayne and Heydon JJ).

59 *Convention Debates*, Vol 3, Adelaide, 15 April 1897 at 736, see also Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902) 111 fn 1; cf Attorney-General's submissions at [58]-[59].

60 *Joyce v DPP* [1946] AC 347 at 371 (Lord Jowitt LC).

30. If the Attorney-General's construction of the second element be accepted, then Mr Joyce was disqualified by operation of the third element, properly construed. On the uncontradicted expert evidence, he was entitled to the rights and privileges of a citizen, including the rights of entry and abode and to obtain a passport.[61]

The above construction is supported by the purpose and context of s 44(i)

31. Of the majority judgments in *Sykes*, the judgment of Brennan J provides the most detailed analysis as to the purpose (again, at a high level of generality) of s 44(i), being "to ensure that no candidate, senator or member of the House of Representatives owes allegiance or obedience to a foreign power or adheres to a foreign power".[62] As his Honour observed, the second element:

    (a) achieves that purpose by "cover[ing] the case where the duty is reciprocal to the status conferred by the law of a foreign power";[63]

    (b) "covers persons who, by reason of their status as subjects or citizens ... of a foreign power, owe a duty of allegiance or obedience to that foreign power according to the law of the foreign power";[64] and

    (c) in that respect, is consistent with the common law of the United Kingdom (under which the status of a subject was coincident with the owing of allegiance), the treatment of nationals by other legal systems, and international law.[65]

32. Justice Brennan's view of the purpose of s 44(i) supports the construction summarised at [28] above.[66] The second element is engaged where a person "is", at the relevant time, a subject or citizen of a foreign power under the domestic law of that country. Its purpose is to seize upon the duty of allegiance to the foreign power which inheres in that status and to deem it incompatible with the duties of a member of the Australian Parliament. It is the *fact* of that status at the relevant time that matters, not a person's knowledge (in whatever degree) of the status,[67] nor a person's voluntary act of taking up or retaining that status following acquisition of knowledge.

33. The second element achieves its purpose by specifying the status by reason of which allegiance is owed as determinative; not by reference to subjective appreciation or

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61 Cooke Opinion, [34]-[63], [64.2]; CB 1356-1364; Fransman, *British Nationality Law* (2nd Edn, 1998) at [1.1]; [3.2.3].

62 *Sykes* at 109 (Brennan J).

63 *Sykes* at 109 (Brennan J) (emphasis added).

64 *Sykes* at 110 (Brennan J) (emphasis added).

65 *Sykes* at 109-110 (Brennan J).

66 As to the permissibility of considering purpose, in the sense of "the subject to which [constitutional] language was directed", see, eg, *Cole v Whitfield* (1988) 165 CLR 360 at 385 (the Court); *Singh* at 337-338 [21]-[22] (Gleeson CJ), 348 [52] (McHugh J), 385 [159]-[160] (Gummow, Hayne and Heydon JJ), 412-413 [247] (Kirby J), 423-424 [293]-[294] (Callinan J).

67 As Mr Fransman QC stated of British law in his advice about Senator Nash, "[t]he fact that she did not know she is a British citizen or would have renounced it had she known, is irrelevant as a matter of law": at [21]; CB 630. None of the expert evidence before the Court suggests that knowledge plays any role in the status of citizenship under the law of any of the various countries involved in these references.

feelings of allegiance or loyalty.[68] Such latter matters might survive renunciation, or the taking of reasonable steps to renounce, but carry with them no obligations, which arise from the objective fact of citizenship (whether voluntary or automatic).

34. At the time of Federation, it was common for nation states to require their subjects or citizens to perform military service.[69] In an opinion dated 31 January 1911, the then Solicitor-General, Robert Garran, advised that two boys born in Australia were British subjects by birth in British territory, and were required to do military training under s 125 of the *Defence Act 1903-1910* (Cth), despite also being French citizens (presumably by descent), and being required under French law to return to France at the age of 21 to perform military duty there.[70] Even today, a dual national member of Parliament could face legal action on arrival in the foreign country of citizenship, regardless of voluntariness or knowledge. For example, the current DFAT advice on travel to Greece includes the following warning: "Australian/Greek dual national males, or those of Greek descent born outside of Greece, may be subject to compulsory military service and other obligations. There are penalties for non-compliance," and advises such persons to seek Greek consular advice well in advance of travel.[71] A member of Parliament, unknowingly a Greek citizen by descent, who travelled to Greece on official business may well face a concrete conflict of obligations, regardless of their subjective feelings.

35. Further, a dual national of Australia and a foreign country could be liable for treason in that foreign country for conduct engaged in on Australian soil.[72]

36. Justice Brennan's understanding of the purpose of s 44(i) is congruent with the recognition, expressed throughout the Convention Debates, that the purpose of s 44 was

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68 Compare Attorney-General's submissions at [21].

69 As to the US, see Kathleen Sullivan, "Report on Citizenship Law in the United States in 1900" (**Sullivan Report**) at [13]; CB 1555; as to France, see Isabelle Michou, "Memorandum" at [8]; CB 1476; as to New Zealand, see Philip Joseph, "Expert Report on British Subjects in New Zealand in 1900" at [43]-[49] at [43]-[49]; CB 1461-1462. Halleck observed that "[i]n 1864, in the case of one Cole, it was decided by Great Britain that the children of American citizens born in British territory, but being in American territory, could not claim the protection of the British Government to exempt them from American military service": Halleck, *International Law, or Rules Regulating the Intercourse of States in Peace and War, Vol I* (1878) at 376 (footnote text).

70 R R Garran, Opinion No 397, "Dual Nationality: Effect On Liability for Military Training under Commonwealth Law" (31 January 1911). See also R R Garran, Opinion No 431, "Dual Nationality: Status of Person Born in Australia of Alien Parents" (27 September 1911); R R Garran, Opinion No 676, "Dual Nationality: Whether Declaration of Alienage can be made by Person Deemed to have been Naturalized in Commonwealth as Infant Child of Naturalized Person" (6 January 1916); R R Garran, Opinion No 1153, "Dual Nationality: Whether a German under German Law who was also a British Subject under Australian Law was a German National under Treaty of Peace" (27 October 1921).

71 http://smartraveller.gov.au/countries/europe/southern/pages/greece.aspx (updated 9 August 2017, accessed on 2 October 2017).

72 See, eg, *Kawakita v United States*, 343 US 717 (1952) at 732-736. On the District Court's directions, in accordance with the applicable US domestic law, a defence of honest belief that the accused was not a citizen was available, which if successful would result in a lack of treasonable intent (at 732).

to specify status-based categories of "disabilities"[73] which would "prevent[ ] the entry of undesirable persons into parliament", and thereby "protect" the electorate.[74]

37. Section 44 draws bright lines in order to achieve its protective purpose. To that end, it operates on criteria that can be applied by reference to objectively ascertainable facts at the precise points in time that matter (from nomination onwards), and can be adjudicated upon by reference to those same objectively ascertainable facts if later necessary. Like s 44(i), other elements of s 44 turn on a person's legal status or disability, to which subjective knowledge or separate acts or conduct are again irrelevant. For example, a person would be incapable of being chosen under s 44(ii) if he or she had been convicted in absentia, and was subject to be sentenced, for an offence punishable by imprisonment for one year or longer, even if at the time of nomination the person was unaware of their conviction.[75] Similarly, a person would be ineligible to be chosen if he or she had unknowingly become or was an undischarged bankrupt,[76] or had become or was insolvent. Likewise, the knowledge of a person of the disabilities that fall within s 44(iv) or (v) is also irrelevant. Indeed, in *Sykes* itself, the objective fact that Mr Cleary held a permanent position in the teaching service at the date of nomination rendered him ineligible under s 44(iv); no subjective knowledge that he held an "office of profit" was required or found.[77]

38. Section 45 operates to effect the same purpose, at a later point in time. It deals with the case where the candidate is not affected by the disqualifying condition at the time of election, but the condition arises during the life of the Parliament. Section 45 presupposes that s 44 imposes bright line tests: it must be objectively and readily ascertainable, at any and every point in the life of the Parliament, whether a disqualifying condition has come into existence for any given member. For the reasons in [17]-[18] above, the Attorney-General's construction cuts against that purpose.

39. More broadly, an important purpose of the constitutional provisions relating to elections (and, even more broadly, the system of representative government[78]) is "the need for certainty in the electoral process".[79] A construction of ss 44 and 45 that makes it possible to determine whether a person has the relevant status or characteristic on the basis of objectively ascertainable facts on the public record (and with due regard to foreign law) gives effect to that purpose better than one that superimposes a subjective, evaluative or

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73 See Quick and Garran at 490.

74 *Convention Debates*, Vol 2, Sydney, 21 September 1897 at 1013 (emphasis added). Mr Barton then emphasised that the overarching purpose of s 44 was to prevent electors "from being imposed upon by persons" who were under "conditions of which they should rid themselves before they offered themselves for election to any legislative assembly": at 1013. The language of "public protection" was also used during the Melbourne Convention: *Convention Debates*, Vol 5, Melbourne, 7 March 1898 at 1935.

75 Such an example may be extrapolated from *Re Culleton* at 9 [36] (Kiefel, Bell, Gageler and Keane JJ).

76 For example, because bankruptcy had been effected by a notice served in accordance with an order for substituted service: see, eg, *Skalkos v T & S Recoveries Pty Ltd* (2004) 141 FCR 107 at 117 [31] (Sundberg, Finkelstein and Hely JJ).

77 *Sykes* at 97-98, 101 (Mason CJ, Toohey and McHugh JJ), 108 (Brennan J), 130 (Dawson J).

78 *Re Day* at 232 [269].

79 *Re Culleton* at 14 [59] (Nettle J); *Re Day* at 201 [97] (Gageler J).

uncertain test.[80] Certainty is needed for candidates (to determine whether they can properly put themselves forward for consideration), for electors (who are entitled to assume that they are making their choice between a field of eligible candidates), and for the efficacy of the electoral process: the prospect of repeated enquiries into who is properly elected, and the need for special counts or new elections based on the construction of s 44(i) contended for by the Attorney-General and Mr Joyce, should not be encouraged or treated as the norm.

40. The Attorney-General submits that building in a requirement of voluntary acts acknowledging the disqualifying status would enhance certainty. The exact opposite is true. As the "voluntary" test is framed, it depends heavily on knowledge. Knowledge opens up factual enquiries. Which facts have to be known? What degree of knowledge is necessary?[81] It seems the argument embraces actual knowledge and willful blindness, but does not go so far as constructive knowledge. Where are the lines to be drawn?

41. The enquiries at issue in each of the seven references – including the trial of fact concerning Senator Roberts – demonstrate the vagaries and instability of a test premised upon subjective knowledge, as proposed by the Attorney-General. On the propounded test, whether Mr Joyce was qualified to stand does not depend on the application of foreign law to the known fact that his father was born in a foreign country. Rather, it turns on his degree of enquiry about the consequences of, and his interest in, that fact when he declared he was qualified to stand under s 44(i), as well as on accidents of timing as to when the media or third parties brought his attention to that question.

42. The operation of ss 44 and 45, going to the heart of the electoral process and the due composition of the Parliament, should not be made to depend upon these subjectivities and vagaries unless the language compels it. The choice to word the disqualifying condition in the simple language "*is* a subject or citizen... of a foreign power" provides no foundation for such subjectivities and vagaries.

43. The Attorney-General also submits that his approach is necessary because, as some of the present cases illustrate, the enquiry whether a person is or remains a foreign citizen under the relevant foreign law may be complex. That consideration is not compelling for two reasons. First, on the simple construction for which Mr Windsor contends, the question always remains an objective one, capable of answer under the relevant foreign law. In the event of any dispute over the content of foreign law, Courts are familiar with proof of foreign law as a fact. Second, the Attorney-General's approach cannot in any event do away with the enquiry into foreign law, which remains an essential part of the question. What the Attorney-General's approach does is to *add* a subjective factual layer on top of the basic question mandated by the "is" in s 44(i), being: what are the objective facts concerning the person's birth, descent or relevant conduct; and does the law of the foreign

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80 *Re Day* at 201-202 [97]-[100] (Gageler J); cf Attorney-General's submissions at [72].

81 See, eg, *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France* [1992] 4 All ER 161; [1993] 1 WLR 509; *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 163-164 [174]-[177].

country regard those facts as creating the status of citizenship or subjecthood? The additional subjective factual layer adds uncertainty and instability to the test that neither the text nor the purpose of the provision require or permit.

44. Purposive considerations cannot require a construction in which the asserted purpose is substituted for the text by which the framers set out to achieve it.[82] Like s 44(v), s 44(i) has a "special status, because it is protective of matters which are fundamental to the Constitution, namely representative and responsible government in a democracy"; there is no warrant for reading down the clear terms of the provision because of the consequences for the persons who might be disqualified.[83] There is a perfectly acceptable purpose argument – based on the reasoning of Brennan J – which coheres with the constitutional text of s 44(i). It should be preferred to the far looser purpose arguments inspired by Deane J and embraced by the Attorney-General and Mr Joyce, arguments which require radical departures from the text.

45. One final observation on purpose and context is appropriate. The law recognises, in various related contexts, the need for there to be an absence of both *actual and perceived* conflict. Just as s 44(v) is concerned not just to prevent actual conflict of interest, but the appearance of conflict,[84] so is s 44(i) concerned not solely with *actual* allegiance, but also with the *appearance* of allegiance. The sections must therefore be able to be applied on the basis of facts on the public record. They cannot be made to turn on subjective facts knowable only to the person seeking election, or elected.

46. A requirement of *perceived absence* of conflict is apposite to a constitutional requirement, one function of which is to ensure the confidence of electors in the undivided loyalty of candidates. It has been held that combatting a perception of undue influence upon Parliamentarians constitutes a "legitimate end" for the purposes of the implied freedom of political communication.[85] Perception plays a similarly central role in a number of other doctrines within the corpus of public law, including those related to Chapter III (both as regards the *Kable* doctrine[86] and the persona designata doctrine)[87] and the rule

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82 See, eg, *Alqudsi v The Queen* (2016) 258 CLR 203 at 250 [113]-[114] (Kiefel, Bell and Keane JJ), 254 [127] (Gageler J), 266 [173], 268 [178], 271 [187] (Nettle and Gordon JJ); *Re Day* at 201 [98], 202 [100] (Gageler J) and 211-212 [155]-[156] (Keane J) (compare Nettle and Gordon JJ at 231 [265]).

83 *Re Day* at 196 [72], 197 [75].

84 *Re Day* at [181] (Keane J). In *Re Day*, a majority of the Court rejected the Attorney-General's construction, but did not appear to reject the contention that the mischief to which s 44(v) is directed is "the avoidance of actual or perceived conflicts of interest".

85 *McCloy v New South Wales* (2015) 257 CLR 178 at 196-197 [7], [9] (French CJ, Kiefel, Bell and Keane JJ), 249 [186] (Gageler J), 259 [224]-[225] (Nettle J), 290 [344]-[355] (Gordon J).

86 See, eg, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98, 107, 117, 133-134; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29]; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 77 [66], 81 [78]; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 552-553 [10]; *South Australia v Totani* (2010) 242 CLR 1 at 20 [1], 47-48 [69], 49 [71]-[72], 130 [342], 157 [426], 172-173 [480]; *Wainohu v New South Wales* (2011) 243 CLR 181 at 208 [44]; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 71 [67], 106 [182]-[183], 114 [209], 115 [211].

87 See, eg, *Grollo v Palmer* (1995) 184 CLR 348 at 377; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 25-26; *Kable v Director of Public Prosecutions (NSW)* (1996) 189

against apprehended bias.[88] An analogous process of reasoning should be applied to the disabilities set out in ss 44 and 45.

This construction is supported by the drafting history

47. The draft Constitutions prepared by Andrew Inglis Clark and Charles Cameron Kingston prior to the 1891 Sydney Constitutional Convention provided only for the circumstances in which the place of a member of Parliament "shall become vacant".[89] In this submission, we refer to a clause of that kind as a "**vacancy provision**"; s 45 of the Constitution, as enacted, is a vacancy provision.

48. The Clark and Kingston drafts did not provide for the circumstances in which a person was incapable of being chosen. In this part of the submission, we refer to a clause of that kind as an "**eligibility provision**"; s 44 of the Constitution, as enacted, is an eligibility provision.

49. The vacancy provision in the Clark and Kingston drafts included the conditional clause "[i]f he ... does any act whereby he becomes a subject or citizen or entitled to the rights or privileges of a subject or citizen of any foreign power".[90] That requirement for *conduct* resulting in the specified status or entitlement was substantially similar to constitutional and statutory vacancy provisions in force in Australian and other British colonies at the time.[91]

50. Because the vacancy provision dealt with the circumstances in which the place of a person already elected could subsequently become vacant, the conditional clause ("if he does any act whereby he becomes ...") was drafted in the present simple tense. It dealt with conduct that would, if engaged in by a qualified sitting member, then result in his or her disqualification.

51. The 1891 proof was revised to add to the vacancy provision an eligibility provision, entitled "Disqualification".[92] Both clauses were adopted by the Convention in 1891.[93] The drafts presented to the Adelaide and Sydney Conventions of 1897 similarly contained an eligibility provision (cl 45, which would become s 44)[94] and a vacancy provision (cl 46, which would become s 45).[95]

CLR 51 at 117-118; *Wainohu v New South Wales* (2011) 243 CLR 181 at 206 [39], 210-211 [48], 212 [51].

88 See, eg, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345 [7]-[8], 362-363 [80]-[81]; *Isbester v Knox City Council* (2015) 255 CLR 135 at 154-155 [55], [57], 156 [61].

89 John Williams, *The Australian Constitution: A Documentary History* (2005) (**Williams**) at 84, 123.

90 Williams at 84, 123 (emphasis added).

91 See especially *British North America Act 1867* (Imp) (30 Vict, c 3) (Canada) s 31, and more generally, *Union Act 1840* (Imp) (3 & 4 Vict, c 35) (Canada) s 7; *Constitution Act 1852* (Imp) (15 & 16 Vict, c 72) (NZ) ss 36, 50; *Constitution Act 1855* (18 & 19 Vict, c 54) (NSW) ss 5, 26; *Constitution Act 1855* (18 & 19 Vict, c 55) (Vic) s 24; *Constitution Act 1855* (18 Vict, c 17) (Tas) ss 13, 24; *Constitution Act 1855–6* (19 Vict, c 2) (SA) ss 12, 25; *Constitution Act 1867* (31 Vict, c 38) (Qld) s 23 (see also *Legislative Assembly Act 1867* (31 Vict, c 21) s 7); *Constitution Act 1890* (53 & 54 Vict, c 26) (WA) s 29; *Constitution Acts Amendment Act 1999* (63 Vict, c 19) (WA) s 38(4).

92 Williams at 210.

93 Williams at 444 (cll 46 and 47).

94 Williams at 592, 774 (cl 45).

95 Williams at 592, 774 (cl 46).

52. The two clauses differed in a significant respect. The vacancy provision (cl 46) was concerned with identifying conduct that would result in disqualification if engaged in by a sitting member, post-election. The eligibility provision (cl 45) identified characteristics that disqualified a person from being elected. To be disqualified under cl 46, a member would have to *do* something after being elected; to be disqualified from becoming a member under cl 45, a person had only to *be* something at the relevant point in time.

53. For this reason, the conditional clauses in cl 45 were either framed in the present perfect in the case of past disqualifying conduct ("has done any act whereby he has become a subject or a citizen") or in terms of current status ("is an undischarged bankrupt"). Further, cl 45 only applied "until the disability is removed" (in which case the person would no longer have the relevant status).

54. Clause 45(I) was expressed in the same terms by the end of 1897.[96] However, when it was read at the Melbourne Convention on 7 March 1898, cl 45(I) had been amended to assume its current form, applying to "any person who ... is a subject or citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power".[97] The effect of the 1898 amendment was to replace the need for the person to have engaged in *conduct* that had resulted in the status of subject or citizen, with the requirement only that the person *be* a subject or citizen at the relevant point in time.

55. That textual amendment was significant. It must be understood against the backdrop of the common understanding at the time (see [25] above) that:

    (a) citizenship or subject status could arise under the domestic law of a foreign power when well-recognised conditions were met, the most common of which were descent, birth in the territory and naturalisation; and

    (b) while a person could only become a naturalised citizen or subject by conscious conduct, a person could automatically be a citizen or subject from the time of birth under laws based on descent or birth in the territory, and could be a dual citizen as a result.

56. The initial vacancy provision ([47]-[50] above) could only relate to conduct engaged in by a person already elected. A person was qualified to be elected if they were a natural-born or naturalised subject of the Queen and had reached the full age of 21 years. Such a person could only "become" a citizen or subject of a foreign power by doing an act (such as applying for naturalisation, or marrying a foreign-citizen husband), not by descent or birth in the territory.

57. When the eligibility provision was initially drafted ([51] above), it expressed the same concept in the present perfect: the person must have done an act, and as a result have "become" a citizen. The framers should be taken to have understood that this, like the contemporaneous draft of the eligibility provision, would apply to citizenship by naturalisation, but not to automatic citizenship by birth or descent. The expression "has

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96 Williams at 592, 774-775.

97 Williams at 869; *Convention Debates*, Melbourne, Vol 5, 7 March 1898 at 1931.

become a subject or a citizen" would exclude automatic citizenship from birth or from descent alone.

58. Throughout the drafting process, and as enacted, some elements of s 44 are framed by reference to past conduct leading to a current status (for example, "has been convicted and is under sentence"[98]), whereas some are framed by reference solely to current status ("is an undischarged bankrupt"). The drafters amended s 44(i) from the former to the latter grammatical form.

59. When the drafters made that change, they should be taken to have understood that citizenship or subject status could be conferred automatically, in the absence of a voluntary act (most commonly in the case of citizenship acquired at birth by *jus soli* or by *jus sanguinis*). Against that backdrop, the framers should be taken to have understood, and to have "intended", that the wording "is a subject or a citizen ... of a foreign power" would extend the scope of the clause to include persons who had obtained that status automatically under the domestic law of the foreign power by descent or birth in the territory, without there being any requirement that the status be acquired as a result of a voluntary act by or on behalf of the relevant person.

60. Contemporaneously with that textual amendment, the drafters removed the words "until the disability is removed by a grant of a discharge, or the expiration or remission of the sentence, or a pardon, or release, or otherwise".[99] It may reasonably be inferred that by drafting the various elements of s 44 in terms of the present existence of a particular status or "disability", the removed words became unnecessary. If the disability were removed, the disqualifying condition would no longer apply.

61. Significantly, s 45(i) as enacted still uses the expression "becomes", so that the drafters must be understood to have intended that s 45(i) would only operate with the second element of s 44(i) if, after being elected, a person became naturalised, or their citizenship status otherwise changed, which in the usual course would only occur as a result of a voluntary act by or on behalf of the relevant person. On the proper construction of the provisions, s 45(i) could never operate on the basis of citizenship acquired automatically at birth by *jus soli* or by *jus sanguinis*.

62. There is no tension between ss 44(i) and 45(i) in their final forms. The candidate is disqualified from being chosen or sitting unless all reasonable steps to renounce have been taken *before* the election. Section 45(i) is irrelevant to such a person. By contrast, where a person becomes naturalised, or otherwise does an act, which results in foreign citizenship, the person will be caught by s 44(i) (if this occurs before the election, and all reasonable steps have not been taken to renounce) or by s 45(i) (if this occurs after the election).

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98 Section 44(ii).

99 Williams at 774, cf 869. A substantively equivalent amendment had been debated, and rejected, in the Sydney Convention of 1891: *Convention Debates*, Vol 1, Sydney, 3 April 1891 at 655-659.

63. The Attorney-General's arguments (in [24]-[49] of his submissions) about the historical context of s 44(i) should be rejected for the following reasons.

64. First, it appears that the constitutions of the Australian colonies contained vacancy provisions, but not eligibility provisions, directed to the matter of dual allegiance or nationality: cl 45(I) had no equivalent precedent.[100] As explained in [56] above, a vacancy provision can necessarily apply only to conduct by which a qualified person subsequently becomes a foreign subject or citizen. An eligibility provision is quite different: it can be framed by reference simply to the status of citizenship (whether obtained voluntarily or automatically) or framed so as to catch only a subset (for example, citizenship obtained by voluntary conduct). It follows that pre-existing colonial vacancy provisions (and Imperial qualification provisions) shed little or no light on the "intention" of the framers in changing the text of cl 45(I) (the eligibility provision) at the Melbourne Convention.

65. Second, the Attorney-General's submissions seek to impute the "intention" of individuals present during the Conventions to those who adopted the significantly altered text of cl 45(I); that attempt should not be countenanced.[101] The textual amendment indicates "that the first intentions were given up, and that entirely different intentions, to be gathered from the language of the Constitution, are those by which we are to abide".[102]

66. Third, [42] of the Attorney-General's submissions asserts that the drafting change was made to ensure that a person who had acquired foreign citizenship by a voluntary act would not be disqualified from serving in Parliament if they later re-acquired British citizenship status (and, presumably, renounced foreign citizenship). Even if that submission be accepted on the basis of the notes or observations of individuals involved, it provides no basis for artificially reading down the text used to effect that purpose. The text adopted would effect that purpose, but is not confined to it (and cannot be read as if it were).

67. Fourth, the proposition that the significant textual amendment adopted by the framers should be given no effect because it was not the subject of discussion during the Convention Debates is unsupported by authority.[103] In the words used by the plurality in

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100 One pre-Federation example of an eligibility provision directed at dual allegiance is s 7 of the *Constitutional Act 1791* (Imp) (30 Geo III c 31) (Canada), which was confined to having taken an oath of allegiance or obedience to any foreign prince or power, and made no reference to citizen or subject status.

101 Attorney-General's submissions at [40]-[42]; cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 549 [35], 551 [40] (McHugh J); *Eastman v The Queen* (2000) 203 CLR 1 at 46-47 [146]-[147] (McHugh J); *Singh* at 348 [52] (McHugh J); *Work Choices Case* (2006) 229 CLR 1 at 97 [120] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

102 *Tasmania v The Commonwealth* (1904) 1 CLR 329 at 351 (Barton J).

103 The historical record demonstrates that quite significant amendments were made to the Constitution with little or no debate. By way of example, the words "or financial" were added after the word "trading" in s 51(xx) of the Constitution "with next to no debate" in 1897, and s 51(xx) was not further discussed in the Convention Debates after that time: *Work Choices Case* (2006) 229 CLR 1 at 96 [116]-[117]. In Sir Samuel Griffiths' draft Constitution of 1891, s 80 was altered to refer to the "trial of all indictable offences", but this alteration was not discussed at the 1891 Sydney Convention: see, eg, Patapan, "The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia" (1997) 25 *Federal Law Review* 212 (**Patapan**) at 221-222. The phenomenon is not limited to

the *Work Choices Case*, at most, the lack of debate demonstrates that the amendment "was not politically controversial".[104]

This construction is consistent with the understanding of the relevant concepts at the time of Federation

68. The interpretation of s 44(i) propounded above is consistent with the way in which the concepts of "citizen" and "subject" were understood at the time of Federation.

69. Section 44(i) could operate only on persons who were qualified under s 16 or s 34 of the Constitution. It follows that s 44(i) could apply only to a person who was 21 years old, was entitled to vote or qualified to become an elector, had resided in the Commonwealth for three years, and was a subject of the Queen (either natural-born or naturalised for least five years) (see [56] above).

70. The concept of "subjecthood" was well understood at the time of Federation, by reference to British subject status. A person born in an Australian colony, or other British territory, was at common law (subject to specific exceptions[105]) a natural-born "subject of the Queen".[106] Under statutes passed from 1350, a person born to natural-born parents outside of British territory was declared to be a subject, and this was later extended by one further generation.[107] An alien could also acquire British subject status by naturalisation.

71. What meaning would have been conveyed by the expression "[a]ny person who ... is ... a citizen of a foreign power", when used to describe a subject of the Queen who had resided in the Commonwealth for three years? At that time, a person could not become a "citizen" of Britain or any British territory, and there was no meaningful sense in which British law (either common law or statute) could provide any content to the word "citizen".[108] Indeed, the framers considered and rejected a proposal to include a definition of Australian citizenship, or legislative power to confer it, in the Constitution.[109]

72. Nonetheless, the concept of "citizenship" was well understood at the time of Federation. The British common law recognised (as a matter of private international law) that a subject of the Queen could simultaneously be a "citizen" under the foreign domestic law of a republican country.[110] Similarly, under the laws of the US, France and Germany (and

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constitutional amendments: Clark's draft of s 116 of the Constitution "was adopted without discussion until the Melbourne Convention": Patapan at 223.

104 *Work Choices Case* (2006) 229 CLR 1 at 97 [119].

105 *Singh* at 355-356 [73], 364 [94]-[95], 365-366 [99] (McHugh J).

106 See Constitution, ss 34(ii) and 117. See also Quick and Garran at §§132, 193.

107 25 Edw III stat 2, 7 Ann C 5 (1708), 4 Geo II c 21 (1730), 13 Geo III C 21 (1772). See also *De Geer v Stone* (1882) 22 Ch D 243.

108 *Singh* at 364-365 [96] (McHugh J), 430-431 [308], 432 [313] (Callinan J).

109 *Singh* at 341-342 [31] (Gleeson J), 345 [45], 366-367 [102]-[105] (McHugh J), 395-396 [191]-[192] (Gummow, Hayne and Heydon JJ), 422-423 [288]-[292] (Callinan J).

110 See, eg, Joyce submissions at [50]; *In Re Bourgoise* (1889) 41 Ch D 310 at 316-317; Westlake, *A Treatise on Private International Law with Principal Reference to its Practice in England* (3rd ed, 1890) 328-329; Dicey, Rule 21, p 166: "More than one state may claim the allegiance of the same individual, and a man whom English Courts treat as a British subject may, by French Courts, be treated as a French citizen"; *Stoeck v Public Trustee* [1921] 2 Ch 67 at 82; *Kramer v Attorney-General* [1923] AC 528 at 537

many other countries), it was possible for a person to be both a subject of the Queen residing in Australia and a citizen of those countries.[111] Each of those countries, and other republican countries that contributed significant numbers to the overseas-born population of Australia in 1901, conferred citizenship by descent.[112] As noted in [45]-[46] of the Attorney-General's submissions, it was therefore "readily foreseeable at Federation that a child born in Australia to parents with foreign citizenship could, by reason of Australia's *jus soli* approach and a foreign country's *jus sanguinis* approach, be both a natural born British subject and a citizen of a foreign power by descent".

73. It follows that the framers must have intended that the question whether a person was "a citizen of a foreign power" be answered by reference to the domestic law of the foreign power that conferred "citizen" status.

74. The framers should also be taken to have understood that the status of subject or citizen brought with it obligations, as well as rights and privileges.[113] Such an understanding had been ubiquitous since at least *Calvin's Case*,[114] where the Court observed that: (a) "[e]very subject is by his natural ligeance bound to obey and serve his sovereign, &c";[115] (b) under statutes then in force "the subjects of England [were] bound by their ligeance to go with the King, &c. in his wars, as well within the realm as without"; and (c) the status of natural ligeance (the allegiance owed by a natural born subject) appeared in indictments of treason.[116] As to military service and treason, see [34] and [35] above.

This construction is congruent with the international law position

75. This interpretation of s 44(i) is also consistent with the way in which international law approaches questions of nationality.

76. In the *Nottebohm Case*, the International Court of Justice confirmed the existence of a rule of customary international law that "it is for every sovereign State to settle by its own legislation the rules relating to the acquisition of its nationality."[117] *Nottebohm* built upon decisions of the Permanent Court of International Justice in which it had been decided that questions of nationality were essentially ones of municipal law.[118]

(Viscount Cave, with whom Lord Shaw of Dunfermline agreed); *Oppenheimer v Cattermole* [1976] AC 249 at 263-264, 278-279; *Singh* at 392-394 [180]-[184] (Gummow, Hayne and Heydon JJ).

111 See, eg, Professor Patrick Weil, "Report – French Citizenship Laws as of 1900" (**Weil Report**), 2; CB 1523-1524; Dr Herrmann, "Citizenship Law in Germany as at 1900" (**Herrmann Report**), [21]-[26]; CB 1536-1537; Sullivan Report, [11]-[16]; CB 1554-1557.

112 Statement of Agreed Facts, [18]-[19]; CB 1717. See also Weil Report at 1; CB 1522-1523; Herrmann Report at [14]-[17]; CB 1535-1536; Sullivan Report at [9]; CB 1553-1554.

113 This is still universally the case. See, eg, Cooke Opinion at [34]-[63]; CB 1355-1363.

114 *Calvin's Case* (1609) 7 Co Rep 1; 77 ER 377, 386.

115 *Calvin's Case* (1609) 7 Co Rep 1; 77 ER 377, 393.

116 *Calvin's Case* at 383.

117 *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4 at 20. See also *Singh* at 415-416 [257] (Kirby J).

118 *Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion)* [1923] PCIJ (ser B) No. 4; *Acquisition of Polish Nationality (Advisory Opinion)* [1923] PCIJ (ser B) No. 7. See also *Wong Kim Ark* 169 US 649 (1898) at 667-8.

77. That position was later reflected in the *Convention on Certain Questions Resulting to the Conflict of Nationality*,[119] to which Australia is a party. Since the time of Federation, it has been consistently recognised that a corollary of the rule that States can regulate citizenship under their domestic laws is that the application of those laws must be recognised in other States.[120] (As international law recognises the jurisdiction of each State to determine its conditions for citizenship, and requires other States to recognise those laws within limits, it follows that international law permits dual nationality.[121])

78. As Brennan J recognised in *Sykes*, the limited exceptions or qualifications to s 44(i) identified by his Honour also sit comfortably with international law.

Part V: Orders sought

79. If the Court determines that Mr Joyce was not capable of being chosen or of sitting, then the only course, consistent with authority,[122] is for a by-election to be ordered.

Part VI: Length of oral argument

80. Mr Windsor estimates that he will require 2¼ hours for the presentation of oral argument.

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119 (**Hague Convention**), opened for signature 12 April 1930, 179 LNTS 89 (entered into force 1 July 1937), art 1.

120 See, eg, Morse, *A Treatise on Citizenship* (1881) at 29-30. See, subsequently, arts 1 and 2 of the Hague Convention. A draft convention prepared in 1929 refers to material from the 19th century as authority for the proposition that "it is necessary to realise the fact that dual nationality does exist and will continue to exist unless all states will agree to adopt a single rule for nationality at birth": 'The Law of Nationality' (1929) 23 (2) *American Journal of International Law* 13 at 38-9. See also *Kawakita v United States*, 343 US 717 (1952) at 723.

121 *Singh* at 415-416 [257] (Kirby J).

122 *Sykes* at 102 (Mason CJ, Toohey and McHugh JJ), 108 (Brennan J), 130-131 (Dawson J), 132 (Gaudron J); *Free v Kelly* (1996) 185 CLR 296 at 303-304 (Brennan CJ); cf *In Re Wood* (1988) 167 CLR 145 at 165-166 (the Court).