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

No C12; C13 OF 2017

RE SCOTT LUDLAM

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

RE LARISSA WATERS

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

SUBMISSIONS FOR SCOTT LUDLAM AND LARISSA WATERS

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Filed on behalf of: Scott Ludlam and Larissa Waters

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I: PUBLICATION

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

II: THE REFERENCES

2. The Senate has referred certain questions (the **Questions**) to the Court under s 376 of the *Commonwealth Electoral Act* 1918 (Cth) (the **Electoral Act**). For the reasons explained in detail below, the Court should answer the Questions as follows:

In respect of Mr Ludlam:

(a) Whether by reason of s 44(i), of the Constitution there is a vacancy in the representation of Western Australia in the Senate for the place for which Senator Ludlam was returned;

Yes.

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

The vacancy should be filled by applying the provisions of s 273(27) of the *Commonwealth Electoral Act* 1918 (Cth) by analogy in conducting a special count of the ballot papers.

(c) If the answer to Question (a) is 'no', is there a casual vacancy in the representation of Western Australia in the Senate within the meaning of s 15 of the Constitution;

Unnecessary to answer.

(d) What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference.

Mr Ludlam's costs of this proceeding should be paid by the Commonwealth.

In respect of Ms Waters:

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

Yes.

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

The vacancy should be filled by applying the provisions of s 273(27) of the *Commonwealth Electoral Act* 1918 (Cth) by analogy in conducting a special count of the ballot papers.

(c) If the answer to Question (a) is 'no', is there a casual vacancy in the representation of Queensland in the Senate within the meaning of s 15 of the Constitution;

Unnecessary to answer.

(d) What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference.

Ms Waters's costs of this proceeding should be paid by the Commonwealth.

3. If the Attorney-General's submissions as to the proper construction of s 44(i) are accepted, contrary to the submissions below, the answers with respect to each of Ms Waters and Mr Ludlam would be as follows:

(a) No;

(b) Unnecessary to answer;

(c) Yes;

(d) Ms Waters's / Mr Ludlam's costs of this proceeding should be paid by the Commonwealth.

III: ARGUMENT

Introduction and summary

4. Upon becoming aware that they held dual citizenship, each of Mr Ludlam and Ms Waters tendered a letter of resignation to the President of the Senate. In doing so they properly complied with the duty imposed by s 44 not to sit when disqualified by reason of being a citizen of a foreign power.

5. For the reasons explained in detail below, each resignation was appropriate. Mr Ludlam and Ms Waters submit that the contrary view, that a person is excused

from compliance with s 44(i) if, in the absence of reasonable enquiries, they are ignorant of their foreign citizenship status, is not supported by the text, context, history or purpose of s 44 or of the Constitution itself.

6. Properly construed, s 44 operates to disqualify 'any person' from being chosen or sitting in Parliament where they are a dual citizen, unless they have taken all reasonable steps to renounce the foreign citizenship. A failure to take such steps would not disqualify them if reasonably diligent enquiries could not have disclosed their dual citizenship status. As an examination of the history and context of s 44 demonstrates, reasonably diligent enquiries must, at a minimum, include enquiries as to foreign citizenship status where a person is on notice by reason of the person's foreign place of birth or the foreign citizenship status of that person's parents or grandparents. There is no reason as a matter of principle to distinguish between Australian citizens who derive their citizenship by birth from those who derive it from descent. Both are comprehended by s 44.

7. If, as a matter of fact, a person cannot know their dual citizenship status, then they could not take reasonable steps to renounce that citizenship, and they would not be disqualified under s 44. However, that is an extreme circumstance that does not arise on the references presently before the Court.

8. The construction of s 44(i) proposed by Mr Ludlam and Ms Waters is simple and provides certainty. The requirements that prospective candidates make diligent enquiries and, if necessary, take steps to renounce foreign citizenship are not onerous. This construction is consistent with the interpretation of the provision in previous High Court authority. The construction does not in any way frustrate the purpose of the provision, but conforms with it.

9. By contrast, the approach propounded by the Attorney-General[1] largely depends upon subjective knowledge[2] of a particular person at a particular time. It carries

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1 Summarised at [6A] and [6B] of the submissions filed on behalf of the Attorney-General,

2 The test of 'voluntariness' is, in fact, a test that depends for its operation on the subjective understanding of the person to whom it applies, see for example the Attorney-General's submissions: [8], [72], [73].

with it the uncertainty of a test that depends upon examination of a person's subjective knowledge. Moreover it purports to limit the operation of s 44(i) *only* to Australian-born citizens who are subjectively aware of the serious prospect of their foreign citizenship,[3] while maintaining the absolute prohibition on naturalised Australians irrespective of their subjective knowledge.[4] The distinction between natural born and naturalised Australians is not supported by the text of s 44(i) which refers only to '[a]ny person'. Such a discriminatory distinction ought to be rejected.

Principles of Interpretation

10 10. While there has been *little sustained unanimity... as to how the Constitution should be interpreted,*[5] a number of propositions can be identified as relevant to the task presently before the Court:

(a) The Constitution is a statute,[6] and as such ordinary principles of statutory construction are the proper starting point in construing it.[7] While those principles of construction are modified in the context of the Constitution as a founding document, it remains 'the *chief and special duty of this Court faithfully to expound and give effect to it according to its own terms, finding the intention from the words of the compact, and upholding it precisely as framed*'[8]

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3 The Attorney-General suggests that it is irrelevant whether they ought to have been aware of that citizenship: Attorney-General's Submissions, [73].

4 Attorney-General's submissions, [8(b)]. This appears to be inconsistent with the generally expressed test in 6A. For reasons explained in these submissions, there should be one test applicable to 'any person' nominating to the Parliament

5 *New South Wales v Commonwealth* (2006) 229 CLR 1, [736] – [737] per Callinan J.

6 It is an imperial statute, as noted by Mason CJ in *ACTV* (1992) 177 CLR 106 at 137-138; albeit that its ongoing authority has been viewed by some as linked to its acceptance by the Australian people over time: *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171 per Deane J.

7 *McGinty v Western Australia* (1996) 186 CLR 140, at 230 per McHugh J; see also *University of Wollongong v Metwally* (1984) 158 CLR 447 at 476-477 per Deane J. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 142 (Knox CJ, Isaacs Rich and Starke JJ).

(b) The political or practical inconvenience of clear wording in the Constitution does not justify a construction that defies the clear words of the text. As Barton J observed in *Tasmania v Commonwealth and Victoria*: *It would be an enormity to hold that a Judge who thinks that a certain course, laid down with apparent clearness in an Act of Parliament, is absurd, may use every means to get rid of that literal meaning which, to the minds of responsible legislators, who were in an equal position to judge of its absurdity, appeared to be reasonable.*[9]

(c) The Debates at the Constitutional Convention are available *for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.*[10] Speculation about material provided to one member of the Convention Debates are not available for any of those purposes.[11] The attempted reliance upon some Colonial Office memoranda[12] of uncertain authorship and narrow distribution (notably not being distributed to the Convention Delegates[13]) is not permissible, particularly in an attempt to identify a particular subjectively intended meaning, and even more so where there is no explicit connection between the documents sought to be relied upon and the intention of the body adopting the final draft Constitution.[14]

11. These principles of construction operate in the context of s 44 such that it ought to be read to give effect to its terms. As the majority of the High Court observed in the *Engineers' Case*, 'if the text is explicit the text is conclusive, alike in what it

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9 *Tasmania v Commonwealth and Victoria* (1904) 1 CLR 329, 346.
10 *Cole v Whitfield* (1988) 165 CLR 360 (***Cole v Whitfield***), at 385 [9].
11 In *Cole v Whitfield*, 385.
12 Attorney-General's Submissions, [40] - [42].
13 Williams, *The Australian Constitution; A Documentary History* (2005) at 712 – 713.
14 In *Cole v Whitfield* the High Court said that the history of a provision could not be relied upon '*...for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have...*' (at 385) See also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; 148 [430] per Heydon J.

directs and what it forbids.'[15] The qualification identified by the majority in *Sykes v Cleary*[16] (***Sykes***) – that a person must take all reasonable steps to renounce foreign citizenship – does no more than reflect the proposition that s 44(i) will not operate perversely. The Attorney-General's approach on the other hand proposes an interpretation that is directly at odds with the words of s 44 insofar as it would apply more narrowly and differentiate between categories of citizens.

Qualification to sit in Parliament

12. The Constitution identifies core qualifications for individuals to sit in Parliament[17] and circumstances that will disqualify them from sitting.[18] Between these two sets of criteria, the pool of potential Parliamentarians is identified.

13. Matters of qualification set out in s 34 are expressed to apply '[u]ntil the Parliament otherwise provides'.[19] Under the requirements originally provided in s 34 of the Constitution, a parliamentarian (among other things) was required to be:

> a subject of the Queen, either natural-born or for at least five years naturalized 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.

Section 34 as drafted contemplated restrictions on persons without the requisite connection to Australia being elected to the Commonwealth Parliament. The legislative power of the Parliament under section 34 is 'subject to the Constitution' and therefore, subject to s 44.[20]

14. The question of disqualification under s 44(i) only arises after a person has met the qualification requirements in ss 16 and 34 (as modified). In the current legislative context, the second limb of s 44(i) only has work to do in relation to

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15 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 150 (Knox CJ, Isaacs Rich and Starke JJ), quoting with approval Lord Loreburn LC for the Privy Council in *Attorney-General for Ontario v Attorney-General for Canada* [1913] AC 571, 583.

16 (1992) 176 CLR 77

17 Section 34 for the House of Representatives and s 16 for Senators.

18 Section 44 applies to both Houses of Parliament.

19 which Parliament has now done by enacting s 163 of the *Electoral Act*.

20 *Day (No 2)* [2017] HCA 14, [74] per Kiefel CJ, Bell and Edelman JJ; contrary to the submissions of the Attorney-General at [61].

dual citizens – that is, persons who are Australian citizens (and thus satisfy ss 16 and 34 as modified by the *Electoral Act*) and also citizens of a foreign power.

15. Unlike ss 16 and 34, the effect of s 44 is not modifiable by Parliament, indicating that the provision provides a 'bright line' disqualification point that is immutable save for the process of amending the Constitution itself.

The text of s 44

16. Section 44(i) is the first subsection of five that concern various aspects of disqualification, the others dealing with criminality, insolvency, office-holding under the Crown and pecuniary interests with the Public Service of the Commonwealth. Taken as a group, these requirements have the common feature that they are concerned with the integrity of parliamentary representation, removal of influence by the executive, and the sovereignty of the Australian polity.

17. The second limb of s 44(i) provides that a person who is a subject or 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. Cases considering s 44(i) to date have dealt with people who *knew* that at some time prior to their nomination for Parliament they held foreign citizenship. Of the persons referred in the present proceedings, Mr Ludlam and Senator Roberts appear to be in that category.[21] Judicial consideration of s 44(i) to date establishes that:

(a) at common law, citizenship is determined by the law of the country conferring it.[22] This applies to the word 'citizenship' as used in s 44 of the Constitution;[23]

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21 *Re Roberts* [2017] HCA 39.

22 *Sykes* (1992) 176 CLR 77, 107 (Mason CJ, Toohey and McHugh JJ); *VSAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 239, [49] (Weinberg J). This is not a situation where foreign law should be given lesser or no weight: contrary to the submissions of the Attorney-General: [12].

23 Albeit that the Court may not give unqualified effect to that status, for example where a person has taken all reasonable steps to comply with the Constitutional obligation in s 44: *Sykes* (1992) 176 CLR 77, 112-14 (Brennan J).

(b) the expression 'foreign power' invites attention to questions of international and domestic sovereignty;[24]

(c) the requirements of s 44 must be satisfied at the time of nomination, being the beginning of the process of 'being chosen';[25] and

(d) there is no room in constitutional requirements like s 44 for contingent qualification.[26]

18. The second limb of s 44(i) stands between two other limbs, namely 'is under any acknowledgment of allegiance, obedience or adherence to a foreign power' and 'is entitled to the rights or privileges of a subject or a citizen of a foreign power'. The word separating each of the limbs is 'or'. It is notable that:

(a) The categories of disqualification are disjunctive, such that one category of disqualification has no necessary bearing on whether a person may be disqualified under another category;

(b) Both the 'acknowledgment of allegiance' limb and the 'rights or privileges' limb disqualify a person because of the effect of a connection with a foreign power. That effect is either because of an allegiance that could be inconsistent with the primary allegiance owed to Australia, or because of the entitlement to rights or privileges which could likewise give rise to a perception of divided allegiance. The citizenship limb on the other hand looks only to the legal status of the prospective Parliamentarian.

(c) The second limb uses the operative verb, 'is' - the third person singular present indicative of the verb 'to be'. Merely being a citizen of a foreign power will be sufficient for a person to be disqualified under the provision.

(d) The approach suggested by the Attorney-General[27] seeking a 'unity of operation' between the three limbs would, in fact, make the citizenship limb coextensive in its operation with the 'acknowledgment of allegiance' limb

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24 *Sue v Hill* (1999) 199 CLR 462, [48] (Gleeson CJ, Gummow and Hayne JJ).

25 *Sykes* (1992) 176 CLR 77, 100 (Mason CJ, Toohey and McHugh JJ); *Free v Kelly* (1996) 185 CLR 296, 301 (Brennan J); *Sue v Hill* (1999) 199 CLR 462, [158] (Gaudron J).

26 *Re Culleton* [No 2] [2017] HCA 4, Nettle J, [57].

27 Attorney-General's Submissions, [59].

and the 'rights or privileges' limb. The Court should prefer an operation that gives each limb work to do.

19. There is no requirement in the text that the person has taken any deliberate or voluntary step to acquire or retain that citizenship, nor is there any requirement for the rights or privileges of citizenship to have been exercised or enjoyed by the person. The disqualification is simply a question of fact: is the person a citizen of a foreign power? If so, that person is incapable of being chosen.[28]

20. It follows that disqualification under the second limb of s 44(i) is an objective test, referable only to the status of a person as a subject or citizen of a foreign power, as determined by the municipal law of the country conferring citizenship. This construction of the text is consistent with the historic context within which s 44 was drafted, and the purpose that it is intended to serve.

The history of s 44

21. At the time of Federation, no country within the British Empire was considered a foreign power for the purposes of s 44(i).[29] Further, Australian citizenship as a distinct status was not introduced until the *Citizenship Act* 1948 was enacted. However, the status of citizenship of a foreign power – understood at the time of the Constitutional Conventions to be a citizen of a power outside the British Empire – was in contemplation in the framing of the Constitution.[30]

22. Furthermore, the acknowledgement that the new federation was a nation largely comprised of and reliant on immigration was a prominent feature of debate at the Constitutional Conventions.[31] It was therefore contemplated at the time of drafting the Constitution that prospective candidates for Parliament might be citizens of

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28 *Re Culleton* [No 2] [2017] HCA 4, Kiefel, Bell, Gageler and Keane JJ, [4], [13].

29 *Sue v Hill* (1999) 199 CLR 462, [159] (Gaudron J).

30 *Australasian Federal Convention Debates,* 2nd session, Sydney, 21 September 1897, 1013-1015.

31 *Official Report of the National Australasian Convention Debates,* Sydney, 1891, 2 April 1891, 607. There are other statements referring to 'foreigners' eventually becoming eligible to sit in parliament, such as the remarks of Mr Cuthbert *Official Report of the National Australasian Convention Debates,* Sydney, 1891, 2 April 1891, 917.

foreign countries, and that the nature of the new federation was that of a nation dependent on immigration.

23. The draft of the Constitution adopted following the 1898 Constitutional Convention was the first to contain the present wording of s 44. The previous drafts following the 1891 Convention and the 1897 Convention both contained a clause (then numbered cl 46) that required a deliberate act on the part of the person to be disqualified.[32] Clause 46(i) of the 1891 draft read:

> Any person:
> (i) Who has taken an oath or made a declaration or acknowledgment of allegiance, obedience, or adherence, to a foreign power, or has done any act whereby he has become 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 member of the Senate or of the House of Representatives 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.

24. The amendment of the text to the present s 44 between the 1897 and 1898 drafts changed a disqualification that required a deliberate act to a disqualification by reference to an objective status. The active requirement of doing *an act whereby he has become a subject or citizen ... of a foreign power* was replaced by the disqualification for anyone who 'is a subject or citizen of a foreign power.' The ubiquity of the 1891 formulation demonstrates a deliberate drafting choice in the final draft that made a stark difference. The submission that the words of the provision do not reflect its intended effect and is the result of an unobtrusive incorporation[33] is based on unfounded speculation[34] and ought to be rejected.[35]

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32 This was consistent with the Constitutions of each of the Pre-Federation Colonies: *NSW Constitution Act 1855* (Imp); 18 & 19; Vict c 54, sch 1, ss 2, 10, 11; *Victoria Constitution Act 1855* (Imp) 18 &19 Vict, c 55, sch 1, ss 4, 11; *South Australia Constitution Act 1856*, 19 & 20 Vic, NO 2, ss 5, 14 and 16; *Queensland Constitution Act 1867*, 31 Vic, No 38, s 20; *Constitutional Act of Tasmania 1854*, 18 Vict, No 17, ss 6, 7, 15; *Western Australia Constitution Act 1889*, 52 Vict, No 23, 1890 (Imp) 53 & 54 Vic c 26 s 18.

33 Attorney-General's submission [42].

34 'Reference to history is not permitted for the purpose of substituting for the meaning of the words used in the Constitution the scope and effect which the framers subjectively intended the Constitution to have' see *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [430] per Heydon J.

25. The decision of the Constitutional Conventions to amend the draft text from the original requirement of a positive act in favour of the objective wording of the current text runs counter to any suggestion that s 44(i) ought to be read to require a positive act of allegiance to a foreign power before a person is rendered incapable of being chosen, and militates against the test being subjective.

26. It was manifest at the time of drafting the Constitution that a disqualification on the basis of foreign citizenship would render a significant proportion of the population ineligible to be chosen or to sit in parliament, until such time as they renounced their foreign citizenship.

10 27. Both at the time of the framing of s 44 and now, citizenship is typically conferred upon a person involuntarily and without their contemporaneous awareness – whether by place of birth, by citizenship of their antecedents, or a combination of both.[36]

28. The legal basis for citizenship understood in the nineteenth century involved the dual concepts of *jus soli*[37] and *jus sanguinis*.[38] The history and development of these concepts was considered in *Singh v Commonwealth of Australia*[39] in the context of s 51(xix) of the Constitution. Generally understood concepts of the identification of and transmission of citizenship status involved:

(a) citizenship arising based on the location of a person's birth,[40]

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35 It has long been recognised that: 'The intention of the enactment is to be gathered from its words. If the words are plain, effect must be given to them': *Tasmania v Commonwealth* (1904) 1 CLR 329, O'Connor J at 359.

36 Naturalisation by contrast, is a deliberate act.

37 'a right acquired by virtue of the soil or place of birth. Under this right, the nationality of a person is determined by the place of birth rather than parentage. Nationality is conferred by the state in which the birth takes place.' As noted in *Singh* at [81].

38 'a right of blood. A right acquired by virtue of lineage. Under this right, the nationality of a person is determined by the nationality of their parents, irrespective of the place of birth' noted in *Singh* at [81].

39 (2004) 222 CLR 322 (***Singh***).

40 Being a status that dates to at least the 13th Century: Singh [31], [60] – [90] per McHugh J, dissenting in the result.

(b) citizenship based on the citizenship status of a person's parents and family lineage.[41]

29. The English common law focused on and adopted the location of a person's birth (*jus soli*), the citizenship status of parents was a well-understood indicator of citizenship status generally[42] but particularly in the non-common law world. In the context in which the Constitution was framed, the non-common law world was the chief source of citizens of a foreign power.

30. It has long been recognised that subjective mistake as to the status of one's citizenship has no effect on the objective fact of that citizenship. The caseload of the federal judiciary provides many instances of individuals who lived their whole lives in the mistaken belief that they were Australian citizens, until the Minister for Immigration took action to remove them from Australia after cancelling their permanent residence visas on character grounds. Neither a person's subjective belief they were an Australian citizen, nor the fact of the person's strong ties to Australia and weak ties to the country of citizenship, prevents the person being dealt with as a non-citizen and subject to removal from Australia.[43] It is difficult to see why a different approach should be applied for the benefit of prospective parliamentarians.

31. The suggestion that criminal law notions of 'mental element' might be analogously implied into s 44(i)[44] is unsupported by authority and does not assist in the interpretation of a non-penal provision. Even if a criminal law concepts were considered, it would not assist the Attorney-General's position; it is common for questions of legal status (eg on a charge of driving while disqualified, whether a person was disqualified from driving) to be subject, on proof of the

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41 Discussed in *Singh*, [69] and in the discussion of *Calvin's Case* (1607) 7 Co Rept 1a at 10a-10b per Coke CJ (77 ER 377 at 388 - 389) referred to in *Singh* at [74].

42 Singh, [99] per McHugh J. While his Honour was in dissent in the decision, this analysis it is submitted, is sound. Referred to in *Koroitamana v Commonwealth* (2006) 227 CLR 31, [31] per Gummow, Hayne and Crennan JJ.

43 For example: *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566.

44 Attorney-General's Submissions, [49].

disqualification, only to such defences as an honest and reasonable mistake of fact.[45]

32. The historical context demonstrates that:

(a) the option of including a requirement of a positive act to trigger the disqualification was considered and discarded by the framers of the *Constitution*;

(b) disqualification was made immune from modification by the Parliament (as distinct from the ss 16 and 34 eligibility criteria[46]); and

(c) at the time that s 44 was included (and since), the transmission of citizenship by place of birth and by family heritage were well understood and orthodox modes by which a person acquired citizenship of a foreign power.[47] Neither of those modes of transmission involves either knowledge or acquiescence.

33. The historical context confirms that the course adopted by Mr Ludlam and Ms Waters in resigning from the Senate was and is appropriate. That historical context is likewise consistent with the purpose of s 44, discussed below.

Purpose

34. Section 44 has a special status because it is protective of matters that are fundamental to the Constitution, being representative and responsible government in a democracy.[48] The integrity of that system requires the government to be

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45 Explained by Dixon J in *Proudman v Dayman* (1941) 67 CLR 536.

46 At the Constitutional Conventions, a proposal to amend the clause that became s 44 to include the qualifying phrase, 'until the Parliament otherwise provides', was formally moved and debated. It was defeated by a vote of 8 to 26: Record of debates of the *Constitutional Conventions*, 21 September 1897, 1028.

47 See [45] and [46] of the Attorney-General's submissions.

48 *Day (No 2)* [2017] HCA 14, [72] per Kiefel CJ, Bell and Edelman JJ (concerning the construction of s 44(v)); the Constitutional intention to provide representative and responsible government is discussed in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ; *Second Australasian Convention*, Adelaide, 1897, the Convention resolved that the purpose of the Constitution was '*to enlarge the powers of self-government of the*

conducted by officers who enjoy the confidence of the people.[49] The obligation that each Parliamentarian be a citizen solely of Australia serves that purpose. Moreover, s 44(i) has a 'blunt and limiting effect on democratic participation' telling in favour of an interpretation which gives the provision the greatest certainty of operation consistent with its language and purpose: parliamentarians and electors are entitled to expect clear and workable standards by which to gauge the constitutional propriety of their affairs.[50] The test advanced by the Attorney-General imports uncertainty and subjectivity[51] because a person's knowledge of their citizenship status will vary with their intelligence and diligence - particularly if one ignores matters that would put a reasonable person on notice of the prospect that they are a citizen of a foreign power.[52]

35. The Attorney-General submits that the purpose of s 44(i) is directed to situations where a person voluntarily acquires or retains foreign citizenship.[53] It has been recognised on the contrary that s 44's purpose includes preventing persons with 'foreign loyalties *or* obligations from being members of the Australian Parliament'.[54] While foreign loyalties may be voluntarily acquired, obligations need not be.

36. The possible threat of obligations owed (or perceived to be owed) to foreign powers was noted by Brennan J who observed in *Sykes* that:

> So long as that duty remains under the foreign law, its enforcement - perhaps extending to foreign military service - is a threatened impediment to the giving of unqualified allegiance to Australia.

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people of Australia' (*Official Report of the National Australasian Convention Debates* (Adelaide), (1897) p 17).

49 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

50 In *Day (No 2)* [2017] HCA 14, Gageler J made similar observations about the operation of s 44(v) at [97].

51 cf the submissions of the Attorney-General, [63].

52 As suggested in the Attorney-General's Submissions, [73].

53 Attorney-General's submissions, [21].

54 *Sykes*,127 per Deane J (emphasis added)

37. The 'threatened impediment' identified by Brennan J encompasses circumstances that go beyond the knowledge of the candidate at the time of nominating for Parliament, becoming manifest only when a country seeks to call upon that citizenship in some way.[55] It is not to the point that the enforcement of obligations may not be productive of allegiance – the citizenship limb operates in respect of a legal status rather than on the basis of allegiance.[56]

38. The status of citizenship, whether or not acknowledged or understood, has a particular effect. It makes the person a member of the polity for a state other than Australia. That is a status that is at odds with status as a Parliamentarian.

39. The disqualification of a person who is a foreign citizen according to the law of the country conferring citizenship is consistent with the purpose of the provision. The provision prevents persons with foreign loyalties and obligations from serving in the Australian Parliament. This is one aspect of the purpose of safeguarding the integrity of parliament and Australian sovereignty, because the potential for the foreign power to call upon a citizen's duty, even if it had never done so in the past and even if the person concerned was hitherto unaware of the citizenship, remains a real possibility.[57] It is wrong as a matter of principle to ignore the existence and effect of foreign law which applies in its own jurisdiction. There is no warrant for 'reading down' s 44, particularly by reference to the consequence that might follow for a particular person.[58]

40. The intention for s 44 to be construed in accordance with its plain meaning is supported by its proximity to s 46, which imposed liability for a penalty on any person declared by the Constitution to be incapable of sitting as a senator or as a member of the House of Representatives for every day on which he so sits. The

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55 A foreign State can enforce obligations arising under their own law on Australian citizens within their territory: (cf submissions of the Attorney-General at [22]). Travelling to foreign countries is a common part of the work of a Parliamentarian.

56 cf submissions of the Attorney-General, [22].

57 Some examples of obligations that may be owed by reason of citizenship at the time of Federation are set out in the evidence filed on behalf of Mr Windsor, including military service (see the affidavit of Ms Fox dated 12 September 2017, annexure MF-1, [8].

58 *Day (No 2)* [2017] HCA 14, [72] per Kiefel CJ, Bell and Edelman JJ.

provision was to apply '[u]ntil the Parliament otherwise provides'.[59] Section 46 of the Constitution effectively deputises each member of the public to identify and bring to light any contravention of s 44. It indicates the seriousness with which the framers of the Constitution viewed the disqualification provision and the public interest in its observance. It works against a construction that the subjective belief of a Parliamentarian ought to be dispositive of their eligibility.

Active acceptance of or acquiescence in citizenship is not required

41. In *Sykes*, all members of the Court found that a dual citizen will be incapable of being chosen by reason of s 44(i) if the person had not taken reasonable steps to renounce the foreign citizenship, although their Honours differed as to what steps would reasonably be required of the respondents.[60]

42. In *Sykes*, Deane J contrasted the position of Australian citizens who subsequently acquired foreign citizenship[61] with the different situation of a person who held foreign citizenship before acquiring Australian citizenship. Persons who obtain foreign citizenship by birth or descent fall into this category. The issue for disqualification in those circumstances, according to Deane J, rests not on the act of acquisition of the foreign citizenship, but on the steps taken to renounce it.[62]

43. In its full context, the judgment of Deane J in *Sykes* holds that a dual citizen will be incapable of being chosen by reason of s 44(i) unless he or she has taken all reasonable steps to renounce the foreign citizenship, given that some foreign states may not recognise renunciation under their own municipal law. It does not support a contention that a dual citizen will only be disqualified under s 44(i) if he or she actively sought the citizenship, was aware of it, or acted upon it by taking any of the benefits conveyed by citizenship.

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59 Which Parliament has done in the *Common Informers (Parliamentary Disqualifications) Act 1975* (the **CI Act**).

60 The Attorney-General seeks to import a gloss on that test by requiring that such steps be taken 'within a reasonable time' - Submissions of the Attorney-General, [6A]. No such criterion was adverted to by the Court. Rather, the time for such steps is prior to nomination, as the start of the process of 'being chosen'.

61 At 127 (footnotes omitted).

62 *Sykes* (1992) 176 CLR 77, 127-8 per Deane J.

Lack of knowledge does not excuse an absence of 'reasonable steps'

44. The Attorney-General submits in the alternative that it cannot be reasonable for a person to take steps to renounce his or her foreign citizenship if he or she was unaware of it.[63] That submission attempts to harness the view of all members of this Court in *Sykes* that reasonable steps to renounce citizenship, even if those steps were not effective in law, would suffice to defeat ineligibility for foreign citizenship under s 44(i).

45. Ignorance or wilful blindness ought not excuse a person from the constraints of the Constitution that would disqualify a more diligent or more perceptive candidate. In complying with obligations under the Constitution, negligence should never produce a more favourable result than diligence. The referrals presently before the Court fall into the category of ignorance or wilful blindness. Prior to nomination, none of the individuals presently referred sought professional advice on the issue of their citizenship, nor asked any foreign embassy to consider their status.[64] There is no principled basis to excuse them from the terms of s 44(i).

46. The 'reasonable steps' test was formulated in different terms by the members of the Court in *Sykes*. Dawson J was the only member of the Court to mention a person's knowledge of his or her citizenship explicitly as a part of the reasonable steps calculus.[65]

47. The contention that a person remains eligible, notwithstanding dual citizenship and failure to renounce foreign citizenship, if he or she did not know of his or her status as a citizen of a foreign power,[66] contains within it a gradation of possibilities. At one end of the spectrum is a person with a lack of knowledge despite being aware of facts that should alert the person that they may have dual citizenship (e.g. knowing that they were born overseas, or that one or more of their parents were born overseas, or that they are of descent from a particular

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63 Submissions of the Attorney-General [6B].
64 See for example the matters considered in *Re Roberts* [2017] HCA 39, [118] per Keane J.
65 *Sykes* (1992) 176 CLR 77, 131-2 (Dawson J).
66 Attorney-General's Submissions, [72].

country), when reasonable enquiries would have revealed the status in question. At the other end is a lack of knowledge where reasonable enquiries had not uncovered the fact of foreign citizenship, or where there was no reason that a reasonable and diligent candidate for election to parliament would have made such enquiries. Mere subjectivity should not be introduced to a test where certainty is required.[67]

48. If compliance with the second limb of s 44(i) only requires the avoidance of reasonable enquiries as to one's citizenship, when one knows facts that ought to prompt such enquiries, then the content of taking 'reasonable steps' to renounce citizenship would in practice be reduced to nothing.

49. If a person is aware of birth in a foreign country, or descent from parents or grandparents with foreign citizenship or born overseas, and the person in fact holds foreign citizenship, then reasonable steps to renounce foreign citizenship involve first taking reasonable steps to enquire whether one holds the citizenship of any foreign country.

50. Mistake as to the status of one's citizenship and whether additional steps were required to give effect to foreign citizenship should not relieve a person from the obligation to make reasonable enquiries. In this respect, the evidence of Ms Waters that she (erroneously) believed she needed to take additional steps to become a Canadian citizen,[68] and the fact that Mr Ludlam (erroneously) believed that upon his naturalisation he was then exclusively an Australian citizen and held no other citizenship[69] amount to an honest but objectively inadequate explanation for a failure to make further enquiries when such enquiries were warranted. (The same may be said for all the other persons the subject of references.) Accordingly, the prompt resignation of Ms Waters and Mr Ludlam upon learning of their mistake was proper.

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67 *Re Culleton* [No 2] [2017] HCA 4, Nettle J, [59] in the context of s 41(ii).

68 Affidavit of Larissa Joy Waters affirmed 4 September 2017, [11]-[13].

69 Statement of facts CB 412 [5].

Conclusion

51. A belief that one is not a citizen of a foreign power ought not absolve a person from compliance with s 44 if one has knowledge of facts that, in the mind of a reasonable person taking a properly diligent approach to the Constitution, ought to call in question that belief, and prompt proper inquiries.

52. It has never been the case that dual citizenship permanently disqualifies a person from being chosen or sitting as a Parliamentarian. The process of surrendering dual citizenship is not onerous, and 'reasonable attempts' to do so are sufficient.

53. It is well established that before seeking nomination for Parliament, a person should take all reasonable steps to renounce their foreign citizenship. Similarly, in this case, before seeking office, a person should take all reasonable steps to ascertain whether or not they *have* any dual citizenship to renounce. What is reasonable will turn on the circumstances of each particular case.

54. Analysis of the steps that will be reasonable in all of the circumstances must occur in the context of the well-understood ways in which citizenship is transmitted.

IV: ANSWERS TO QUESTIONS POSED IN THE REFERRALS OF SCOTT LUDLAM AND LARISSA WATERS

55. Whilst each of Mr Ludlam and Ms Waters were unaware of their foreign citizenship, they knew facts that they accept ought to have prompted further inquiry. Mr Ludlam was born in New Zealand and only obtained Australian citizenship as an adult. That process did not, contrary to his belief, remove his New Zealand citizenship. Ms Waters was at all times an Australian citizen, but was born in Canada, a circumstance which gave her Canadian citizenship, despite her understanding and belief to the contrary.

56. They each held foreign citizenship and, because they had not taken all reasonable steps to ascertain that citizenship status, had not taken all reasonable steps to renounce that citizenship. Accordingly they were disqualified from being chosen or sitting in the Senate by virtue of s 44(i) of the Constitution. Once they became aware of their situation, it was proper for them to resign promptly, as they did.

57. For the foregoing reasons, the questions in the referrals of Mr Ludlam and Ms Waters should be answered in the manner indicated in paragraph 2 of these submissions.

58. Alternatively, if, contrary to this submission, the submissions of the Attorney-General as to the construction of s 44 are accepted[70], then the questions referred should be answered as set out in paragraph 3 of these submissions.

V: LENGTH OF ORAL ARGUMENT

59. It is estimated that 2 hours is required for presentation of oral argument.

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[70] Attorney-General's submissions [6A]