

HIGH COURT OF AUSTRALIA

KEANE J

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF
DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE
COMMONWEALTH ELECTORAL ACT 1918 (CTH) CONCERNING
SENATOR MALCOLM ROBERTS

Re Roberts
[2017] HCA 39
22 September 2017
C14/2017

Representation

S B Lloyd SC with J A Arnott appearing as amicus curiae (instructed by Australian Government Solicitor)

C R C Newlinds SC with R J Scheelings appearing on behalf of Senator Malcolm Roberts (instructed by Holman Webb Lawyers)

M P Costello appearing on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

1 KEANE J. Section 44(i) of the Constitution provides that any person who:

"is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power ... shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives."

2 Mr Malcolm Roberts was returned on 5 August 2016 as elected as a senator for the State of Queensland at the general election for the Commonwealth Parliament held on 2 July 2016.

3 On 9 August 2017, the Senate resolved that certain questions concerning the representation of Queensland in the Senate for the place for which Senator Roberts was returned should be referred to the Court of Disputed Returns pursuant to s 376 of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act"). The questions referred to the Court were:

- "(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 Roberts was returned;
- (b) if the answer to question (a) is 'yes', by what means and in what manner that vacancy should be filled;
- (c) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and
- (d) what, if any orders should be made as to the costs of those proceedings."

4 Question (a) arose because documents submitted to the Senate suggested that Senator Roberts was a citizen of the United Kingdom at the time of his election to the Senate¹.

5 These questions have been set down for hearing by the Full Court of the High Court of Australia sitting as the Court of Disputed Returns, together with similar references concerning three other Senators, two former Senators and one member of the House of Representatives, commencing on 10 October 2017.

1 Letter from the President of the Senate to the Principal Registrar of the High Court of Australia, 10 August 2017.

The hearing on 21 September

6 On 24 August 2017, Kiefel CJ made orders to facilitate the hearing and disposition of the present reference, including orders for the filing of affidavits containing the evidence on which Senator Roberts relies in support of a negative answer to question (a). Affidavits were subsequently filed on behalf of Senator Roberts including an affidavit by Senator Roberts himself deposing to his understanding concerning the question of his British citizenship at the times of his nomination and election to the Senate ("the relevant times"). Three of Senator Roberts' family members filed affidavits in support of his eligibility to be chosen and to sit as a Senator: his wife, Mrs Christine Roberts; his brother, Mr Peter Roberts; and his sister, Ms Barbara Roberts.

7 On 14 September 2017, the Attorney-General of the Commonwealth filed submissions seeking, among other things, an urgent hearing in the week commencing 18 September 2017 to allow cross-examination² on the affidavits filed by Senator Roberts in order to allow any necessary findings of fact to be made in sufficient time to allow the parties to file submissions early in the following week (in accordance with the timetable set for all the references). The need for cross-examination was said to arise from the circumstance that the affidavits filed on behalf of Senator Roberts gave rise to issues of fact as to Senator Roberts' knowledge of his British citizenship demonstrated by inconsistencies between Senator Roberts' affidavit and the documents exhibited to it.

8 At a directions hearing on 15 September 2017 before Kiefel CJ, counsel for Senator Roberts agreed to a hearing to resolve factual issues relating to Senator Roberts' state of mind and knowledge³, but added that he would seek to cross-examine the Attorney-General's expert witness on British citizenship, Mr Laurie Fransman QC⁴.

9 Kiefel CJ directed that the cross-examination of any lay or expert witnesses proceed before a single justice on 21 September 2017, with leave being granted to Mr Stephen Lloyd SC to appear as amicus to act as contradictor in relation to the facts, by which orders the present proceeding came about. Her Honour indicated to the parties that any cross-examination of Mr Fransman QC "could only be on the basis of clearly identified contradiction"⁵

2 Cf ss 360(1)(iv) and 379 of the Act.

3 [2017] HCATrans 182 at 4/37-39.

4 [2017] HCATrans 182 at 5/52-57.

5 [2017] HCATrans 182 at 10/278-279.

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between Mr Fransman QC's report and a report to be filed on behalf of Senator Roberts, and subsequently made an order that Senator Roberts file and serve a document by 4 pm on 19 September 2017 that "identif[ies], with precision and in dot point form, the areas of contest, if any", between the parties' expert witness reports⁶.

10 On 18 September 2017, subpoenas were issued to Senator Roberts and to the three family members who had sworn affidavits in support of his case, requiring them to attend the hearing on 21 September 2017.

11 The orders of the Chief Justice contemplated that the present hearing would relate to the facts in relation to Senator Roberts' state of mind and his knowledge of his British citizenship at the relevant times. Mr Lloyd SC sought to expand the issues to include the steps taken by Senator Roberts to understand his citizenship status and to renounce his British citizenship, having regard to the law of the United Kingdom governing the renunciation of British citizenship. The possibility of such an expansion of the issues for this hearing was raised before the Chief Justice on 15 September⁷. Senator Roberts was content to join issue on these further questions save that, through his counsel, he objected to Mr Lloyd SC's attempt to rely upon an affidavit by Ms Rachel Deane, a lawyer from the Australian Government Solicitor who was assisting Mr Lloyd SC.

12 Ms Deane's affidavit dealt, among other things, with inquiries she had made in recent days concerning the likely inefficacy of steps taken by Senator Roberts to ascertain whether he was a British citizen and to renounce that citizenship, and the availability of efficacious steps. Save for the Candidates Handbook and the Nomination Guide for Candidates which were exhibited to Ms Deane's affidavit, Mr Newlinds SC objected to the reception of this evidence on the ground, among others, that because Ms Deane's affidavit had been served only on the day before the hearing, his side had not had an opportunity to check the accuracy of its contents.

13 Ms Deane's affidavit goes to mixed issues of law and fact as to the reasonableness of the steps taken by Senator Roberts to comply with s 44(i) of the Constitution⁸. The resolution of issues of law, or of mixed issues of law and fact, is a matter for the Full Court. Further, the only way to accord Senator Roberts a fair opportunity to counter Ms Deane's evidence would be to grant an adjournment of the hearing; and that, in turn, would endanger the timetable for hearing this reference on 10 October. Because of the compelling

6 Orders made by Kiefel CJ on 15 September 2017, [5].

7 [2017] HCATrans 182 at 10/316-318.

8 Cf *Sykes v Cleary* (1992) 176 CLR 77 at 107, 113, 131.

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public interest in the expeditious determination of the reference, I refused leave to Mr Lloyd SC to read Ms Deane's affidavit in this hearing.

14 Because a further hearing on the facts may be necessary to completely resolve the reference after the Full Court has determined the issues of law that arise, the affidavit of Ms Deane was tendered for identification. In order to obviate the necessity for any further hearing on the facts, Mr Newlinds SC agreed that his side would, by 4.00 pm on Thursday 5 October 2016, notify all parties to this reference whether there are factual matters in Ms Deane's affidavit with which Senator Roberts takes issue⁹.

15 Much of the factual background which bears upon Question (a) in the reference is not controversial. The convenient course is to summarise the affidavit evidence relied upon by Senator Roberts before turning to a discussion of the factual issues for determination at this hearing.

Senator Roberts' affidavit

16 Senator Roberts, in his affidavit, deposed that:

- his father, Mr Ieuan Roberts, was born on 20 October 1923 in Bedlinog, Wales and died on 14 January 2016;
- his mother, Mrs Ethel Roberts, was born on 28 April 1918 in Kidston, Queensland, and died on 4 December 2013;
- in around 1946, his father moved to India to work as a coal mine manager;
- in around 1954, his father travelled to Australia where he met his mother, and they married;
- after an Australian passport was issued to his mother on 28 September 1954, his mother and father returned to India in November 1954 and lived in Disergarh in West Bengal;
- Senator Roberts was born on 3 May 1955 in Disergarh, India;
- his sister, Ms Barbara Roberts, was born on 9 September 1957 in Disergarh, India; and

9 [2017] HCATrans 192 at 17/705-18/765.

5.

- his brother, Mr Peter Roberts, was born on 22 November 1960 in Disergarh, India¹⁰.

17 Senator Roberts deposed that, on 25 May 1955, his father sent a letter to the UK Deputy High Commissioner in Calcutta annexing a form of application to register his birth. In the letter, Senator Roberts' father stated that his understanding was that it was usual for a child's name to be recorded in his mother's passport, and asked for advice on that topic¹¹.

18 The Passport and Record Officer of the UK High Commission in Calcutta wrote back on 1 June 1955, noting that once a fee of Rs. 3 had been paid, the birth would be entered in the Register of Births. On 14 June 1955, another response came from the Passport and Record Officer of the UK High Commission in Calcutta, confirming in the following terms that the process had now been completed:

"I am directed by the Deputy High Commissioner to inform you that the birth of Malcolm Ieuan Roberts has been entered in the High Commissioner's Register of Births, and two certified copies of the entry are enclosed as requested.

The child's name has been included in the High Commissioner's Record of Citizens of the United Kingdom and Colonies"¹².

19 Senator Roberts said that "this material was amongst [his] father's papers" and that he did not "remember reading it prior to the controversy that led to this case"¹³.

20 An entry was made in around June 1955 on his mother's passport by the Australian Trade Commissioner in Calcutta to allow Senator Roberts, then a child, to travel with his mother. The entry states that Senator Roberts "is the child of an Australian citizen but has not acquired Australian citizenship."¹⁴

10 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [3.2]-[3.3], [4.2], [4.3].

11 Exhibit MIR-2 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

12 Exhibit MIR-4 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

13 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [4.7].

14 Exhibit MIR-9 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

21 After the births of Senator Roberts' sister and brother, an endorsement for each of them was also added to their mother's passport, stating in each case that the child "is a British subject by birth but has not acquired Australian citizenship."¹⁵

22 Senator Roberts said that his family moved to Australia in or around 1962¹⁶. In 1973, Senator Roberts finished school. He enrolled in engineering at the University of Newcastle and completed the first year of the degree. In 1974, Senator Roberts transferred to the University of Queensland and resided at Union College¹⁷.

23 On 8 May 1974, Senator Roberts signed a form entitled "Notice of Desire to Become an Australian Citizen". The form gave Senator Roberts' date of birth as 3 May 1955; his place of birth as Disergarh, India; his date of arrival in Australia as October 1962; and his citizenship as "(British) UK+COLS"¹⁸. Senator Roberts said that he had no memory of ever reading or signing this form, but that he recognised the signature on the form as his own. He said that the most likely scenario is that he signed the form because his father told him to, and that he did not read it at all. He said that apart from the signature, none of the handwriting on the form was his, and that he thought it was his sister's handwriting¹⁹.

24 Senator Roberts said that he had no memory of reading the words "(British) UK+COLS", and no memory of ever thinking he was a British citizen. He said that if he had read and understood the form he would have said to his father "but I am an Australian". He said that at that age (19 years), he considered that he was Australian. He said that he would not have intentionally signed any form suggesting that he was not²⁰.

25 On the same day that he signed the "Notice of Desire to Become an Australian Citizen" form, Senator Roberts also signed a form entitled "Application for an Evidentiary Certificate"²¹. His father that same day signed a

15 Exhibit MIR-9 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

16 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [4.9].

17 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [6.1].

18 Exhibit MIR-8 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

19 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [7.2].

20 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [7.3].

21 Exhibit C to Affidavit of Barbara Lynne Roberts filed 8 September 2017.

form evidencing his consent for Senator Roberts' application for Australian citizenship²². Similar applications for citizenship were filled out for each of Senator Roberts' siblings that same day, while an application for citizenship for Senator Roberts' father was filled out a week earlier²³.

26 On 17 May 1974, Senator Roberts' "Notice of Desire to Become an Australian Citizen" form was received by an officer authorised to receive such notices under s 11C of the *Australian Citizenship Act* 1948 (Cth). By reason of that receipt and Senator Roberts being a person to whom Division 1A applied under s 11B of the *Australian Citizenship Act* 1948 (Cth) (which was the case in part because he was a citizen of "United Kingdom and Colonies" within s 7 of that Act), Senator Roberts became an Australian citizen by operation of law (s 11C(1)).

27 Senator Roberts deposed that later that month, his father showed him a document dated 31 May 1974 showing that he was now registered as an Australian citizen. Senator Roberts said that he had a clear recollection of this event, but that he did "not recall attaching any significance to this document at the time"²⁴.

28 On 26 June 1974, the Regional Director of the Department of Immigration wrote to Senator Roberts' father informing him that "the notifications lodged by you and your family to become Australian Citizens have been approved"²⁵.

29 In 1975, Senator Roberts returned to live at home. In 1976, Senator Roberts graduated with a Bachelor of Mining Engineering from University of Queensland²⁶.

30 From 1979, Senator Roberts travelled to and around the United States and Canada and visited relatives in Britain. He was away from Australia for over two years and travelled on an Australian passport²⁷.

22 Annexure to Letter from the President of the Senate to the Principal Registrar of the High Court of Australia, 10 August 2017.

23 Exhibits B, D and E to Affidavit of Barbara Lynne Roberts filed 8 September 2017.

24 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [7.1].

25 Annexure to Letter from the President of the Senate to the Principal Registrar of the High Court of Australia, 10 August 2017.

26 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [6.2], [6.3].

27 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [6.5].

31 In 1990, Senator Roberts married Christine Roberts in Pittsburgh²⁸.
Senator Roberts and Christine Roberts met while studying at the University of
Chicago in 1989²⁹.

32 In February 2016, Senator Hanson met with Senator Roberts and Christine
Roberts at Senator Hanson's home in Ipswich. Senator Hanson told Senator
Roberts that she wanted him to run for Parliament on the One Nation ticket. At
this stage, Senator Roberts did not commit to do so but was genuinely interested
in the prospect of running for elected office³⁰.

33 On 6 April 2016, Senator Hanson called Senator Roberts to discuss further
his interest in running for Senate. Senator Roberts told Senator Hanson that he
would need to discuss the matter with his wife. His wife was overseas at the time
caring for her mother³¹.

34 Following further conversations between Senator Roberts and his wife and
between Senator Roberts and Senator Hanson in late April 2016, Senator Roberts
decided to nominate for Senate³².

35 On 28 April 2016, Senator Roberts went to the office in Albion,
Queensland, of Pauline Hanson's One Nation ("the One Nation party") to collect
the relevant documents for nomination for election as a Senator. He said that
either that evening or the following morning he started to process the party's
Candidate Endorsement Form. Senator Roberts made a declaration pursuant to
the "Oaths Act 1900" on the application for candidate endorsement for the
One Nation party that: "I am aware of, and have met the eligibility requirements
in the Australian Constitution Section 44 if nominating for a federal election".
The application form contained a declaration in the following terms: "I confirm
all the information and particulars set out in the above Application are true and
correct in all respects." The application form was signed by Senator Roberts on
29 April 2016.

36 Senator Roberts deposed:

28 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [5.1]; Affidavit of
Christine Burk Roberts filed 6 September 2017, [2.4].

29 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [6.8]; Affidavit of
Christine Burk Roberts filed 6 September 2017, [2.3].

30 Affidavit of Christine Burk Roberts filed 6 September 2017, [3.2].

31 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [8.1]-[8.2].

32 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [8.3]-[8.6].

"Although I cannot recall the specific time I know I checked the reference to s 44 of the constitution using my copy of the constitution at home. I did not consider that it applied to me as I am an Australian citizen. Nor did I consider that I was a subject or citizen of a foreign power."³³

37 However, Senator Roberts said, when he began on 1 May 2016 to fill out the Australian Electoral Commission's "Form 59 – Nomination of a Senator" ("the Nomination Form"), he decided to verify that he was not a citizen of another country. He said:

"However, as I wanted to be certain that I was being truthful and because I had been born overseas I decided that I had better double-check this aspect of the form before I signed it. I considered it to be an important official form"³⁴.

38 Turning first to the issue of possible Indian citizenship, Senator Roberts said that he recalled that when he travelled to India in 2014 he needed to obtain an Indian visa, and concluded from that that he was not an Indian citizen³⁵.

39 As to the issue of possible British citizenship, Senator Roberts said that he reflected on his childhood memories. He recalled that his father never called him British, and said that given his "pleasantly sarcastic" nature, his father would have gently teased him about being British had his father thought that to be the case. He said that because of this he never suspected that he might be British³⁶.

40 In order to be, as he said, "totally certain", Senator Roberts wrote an email on 1 May 2016 to two email addresses that he found from his research on the Internet – "bcabris2@britaus.net" and "bcabris1@britaus.net" – which he said were "two email addresses at the UK Consulate in Brisbane"³⁷. The subject heading was "Am I still a British citizen?" The email summarised his personal circumstances in the following terms:

"My father Ieuan Roberts was born in Bedlinog Wales on 20th October 1923 and worked in India where I was born on 3rd May 1955.

33 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [9.1].

34 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [9.3].

35 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [9.4].

36 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [9.5]-[9.7].

37 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [9.7]-[9.8].

At the time Dad was a British citizen. My mother and his wife was an Australian citizen.

My birth was registered with London. Around 1973 my father and I and my brother and sister became Australian citizens. Dad died recently but was getting a partial British pension from his younger years working in Wales."³⁸

41 Having recited his personal circumstances, Senator Roberts then said (emphasis in original):

"My inquiry is this: Am I still a British citizen?"

I am NOT seeking British citizenship. If I am still a UK citizen I need to renounce it for compliance with electoral legislation in Australia.

Please advise whether or not I am still a British citizen?

If I am a British citizen, how do I renounce it?"³⁹.

42 On 16 May 2016, the Writ was issued for the election of Senators for Queensland.

43 Senator Roberts handed the completed Nomination Form in to the head office of the One Nation party on 3 June 2016⁴⁰. In the Nomination Form, Senator Roberts stated that he was an Australian citizen by naturalisation and that his Australian citizenship was granted on 17 May 1974. He also stated that he was not by virtue of s 44 of the Constitution incapable of being chosen as a senator and declared that he was qualified under the Constitution to be elected as a senator. It is convenient to note here that the copy of the Nomination Form exhibited to Senator Roberts' affidavit was incomplete in that it omitted the page which excerpted s 44 of the Constitution in full and then stated:

"Candidates who have any doubts about their eligibility, by virtue of section 44 of the Constitution, are advised to obtain their own legal advice.

For further information refer to the Candidates Handbook and the Nomination Guide.

38 Exhibit MIR-12 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

39 Exhibit MIR-12 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

40 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [9.10].

*Answering 'Yes' to the question about eligibility under section 44 of the Constitution asserts eligibility.

If the candidate is an independent Senator, elected as an unendorsed candidate at the previous election, and is not endorsed by a registered political party, the nomination form need only be signed by at least one other person entitled to vote at the election.

Giving false or misleading information is a serious offence.

A nomination form which has not been signed by the candidate cannot be accepted. This form cannot be submitted until after the writ for the election has been issued."

44 Three days after submitting his Nomination Form, and having received no reply to his previous email, Senator Roberts wrote another email on 6 June 2016 to those same two email addresses and a third email address, "australia.enquiries@fco.gov.ukSydney", which he said belonged to the UK High Commission in Canberra, copying his earlier email and saying:

"As there was no reply to my email last month (see below) and although I am confident I am not a British citizen, with this email I renounce any British citizenship should it exist.

If I remained a British citizen after gaining Australian citizenship on 17th May 1974, please accept this email notice renouncing any remnant British citizenship, effective immediately."⁴¹

45 Two days later (8 June 2016), Senator Roberts' Nomination Form was formally lodged by the One Nation party with the Australian Electoral Commission in Brisbane⁴². The Nomination Form contained the following declaration:

"I declare that:

- am [sic] qualified under the Constitution and the laws of the Commonwealth to be elected as a Senator."

46 The deadline for the nomination of senators for Queensland was the following day, 9 June 2016.

41 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [9.12]; Exhibit MIR-14 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

42 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [9.13].

47 Senator Roberts said that "[i]n or around August 2016" his wife became concerned about his citizenship position, and encouraged him to try to obtain written evidence of his position concerning British citizenship. Senator Roberts said that his wife "did extensive Internet searches over the next few days and eventually tracked down the UK Home Office"⁴³. On 10 September 2016, either Senator Roberts or his wife wrote an email to the Home Office, stating (emphasis in original):

"In June 2016 I twice wrote by email to the British consulate in Australia asking for confirmation as to whether I am or am **NOT** a British citizen. As no reply was received, I would be grateful if you please answer my questions below.

I do **NOT** want to become a British citizen or affiliate with Britain in any way and merely wish **to clarify my citizenship/subject/national status.**"⁴⁴

48 The email proceeded to recite Senator Roberts' personal background, and included the statement:

"In 1974 my father and I and my brother and sister became Australian citizens."⁴⁵

49 The email then contained the following inquiries (emphasis in original):

"My inquiry is this: Am I a British citizen, national, subject or UK classification of any kind?"

I am **NOT** seeking British citizenship or affiliation or Visa of any kind.

If I am a British citizen/subject/national/classification how do I renounce it/them?"⁴⁶

50 On 27 September 2016, Senator Roberts received a reply from the UK Home Office, stating "[f]rom the information provided you appear to have a claim to British nationality via descent"⁴⁷. The email provided links to

43 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [10.1]-[10.3].

44 Exhibit MIR-15 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

45 Exhibit MIR-15 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

46 Exhibit MIR-15 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

47 Exhibit MIR-17 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

government webpages setting out the requirements for the renunciation of British citizenship.

51 On 27 September 2016, Senator Roberts or his wife replied to the email from the UK Home Office and stated:

"I will now complete administrative processes linked in your email and thereby more formally renounce any and all claims to British nationality and allegiance.⁴⁸"

52 On 3 October 2016, Senator Roberts or his wife sent a further email to the UK Home Office⁴⁹. The email sought clarification as to which categories Senator Roberts' claim for British nationality fell within and whether he could send certified copies rather than originals.

53 On 5 October 2016, Senator Roberts or Christine Roberts received a reply from the UK Home Office. The email confirmed that it would appear that Senator Roberts had a claim to British citizenship and that to renounce it he must complete the renunciation form and confirm he is an Australian citizen (either with a passport or letter from the High Commission)⁵⁰.

54 On 1 November 2016, Senator Roberts completed the UK Home Office renunciation form, "Form RN". In the form, he stated that he was "maybe" a British citizen⁵¹. His wife went to the post office on 2 November 2016 and posted the form along with the required fee of £272⁵².

55 On 17 November 2016, the UK Home Office sent a letter to Senator Roberts confirming receipt of his renunciation form⁵³. Subsequently, on 5 December 2016, the UK Home Office sent a letter confirming that Senator Roberts had successfully registered as having renounced British citizenship⁵⁴. The letter stated that 5 December 2016 was the date on which Senator Roberts

48 Exhibit MIR-19 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

49 Exhibit MIR-18 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

50 Exhibit MIR-21 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

51 Exhibit MIR-23 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

52 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [10.13].

53 Exhibit MIR-24 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

54 Exhibit MIR-27 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

ceased to be a British citizen under s 12 of the *British Nationality Act 1981 (UK)*⁵⁵.

56 Senator Roberts deposed:

"Had the Australian-based British authorities I initially emailed (twice) responded to my enquiry in the same way as the UK Home Office eventually did or at all, namely, by informing me of the RN form, I would have completed that form and sent it prior to nominating. Their failure to respond delayed the process."⁵⁶

The affidavit of Mrs Christine Roberts

57 Mrs Christine Roberts deposed that she had a vivid memory of when she first met Senator Roberts in September 1989, and that she had thought, after hearing his accent, that he must be English. She said that her very first words to him were "are you English?", which produced an automatic and emphatic "No! I'm Australian!"⁵⁷.

58 Mrs Roberts said that after Senator Roberts had been elected, she received a private Facebook message on 7 August 2016 from a person she had never heard of before, which read (punctuation errors corrected):

"Talk to hubby, Born in Asansol [of which Disergarh is a neighbourhood] what date? When did you become Australian? When did you enter Australia? Blocking me on farcebook [sic] just makes it more likely you will be taken to the Court of Disputed Returns. Look me up. Abbott and Turnbull are going to the court of disputed returns because of my research. Ignore me and we meet in 119 North Quay. To get there the entrance is in Tank Street. I can't threaten you but if you refuse to tell a voter if you comply with our laws, then the voter has no other option"⁵⁸.

59 Mrs Roberts deposed that she considered the message aggressive in tone and even impliedly threatening, and that Senator Roberts turned it over to the Australian Federal Police⁵⁹. She said that because of the message, her interest

55 Exhibit MIR-27 to Affidavit of Malcolm Ieuan Roberts filed 15 September 2017.

56 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017, [10.18].

57 Affidavit of Christine Burk Roberts filed 6 September 2017, [2.3].

58 Annexure A to Affidavit of Christine Burk Roberts filed 6 September 2017.

59 Affidavit of Christine Burk Roberts filed 6 September 2017, [4.3].

was piqued, and that she proceeded to do some research online about Indian nationality. She discovered that if a person voluntarily acquires another nationality, Indian nationality automatically ceases, and accordingly told Senator Roberts that she considered that an issue as to Indian citizenship was "not in play"⁶⁰.

60 Mrs Roberts said she then turned her mind to the issue of British citizenship, saying:

"After this, Malcolm and I discussed the issue properly and I learnt about the emails he had sent prior to the election to British authorities in Australia. After reading those emails, I told Malcolm that he should not be satisfied with not having received any response. I told him that, whatever he might think (and he told me he was satisfied he had done enough), the issue was not closed off to my way of thinking. Throughout the process that follows Malcolm remained very confident that whatever the position should prove to be from the British authority he considered that the matter had been sorted out by his second email to the High Commissioner on 6 June 2016."⁶¹

61 Mrs Roberts said that she then drove the process to "properly resolve the British side of things", and that "Malcolm was happy for me to take charge (in consultation with him) of the process from here on"⁶². That process culminated in the acknowledgement of successful renunciation of British citizenship by the UK Home Office.

The affidavit of Mr Peter Roberts

62 Mr Peter Roberts' affidavit recorded some email exchanges with Mrs Roberts, in which he provided her with copies of Senator Roberts' birth certificate, his father's Australian Citizenship Certificate, and letters from the UK Pension Service confirming that his father was receiving a pension from the UK towards the end of his life. Mr Peter Roberts also said that for his entire life he had considered himself Australian, and only Australian, and that he had no memory of ever thinking that he (Peter) was a British citizen⁶³.

60 Affidavit of Christine Burk Roberts filed 6 September 2017, [4.6].

61 Affidavit of Christine Burk Roberts filed 6 September 2017, [5.1].

62 Affidavit of Christine Burk Roberts filed 6 September 2017, [5.2], [5.4].

63 Affidavit of Peter Nigel Roberts filed 6 September 2017, [1.1].

The affidavit of Ms Barbara Roberts

63 Ms Barbara Roberts' affidavit recorded exchanges between Mrs Christine Roberts and her, subsequent to which Ms Barbara Roberts provided Mrs Christine Roberts with documents that had formerly been in her father's and mother's possession. Ms Barbara Roberts also said that she had always thought that she and her brothers were Australian because their mother said they were, and that her father never said anything to the contrary⁶⁴.

64 Ms Barbara Roberts annexed to her affidavit a copy of her mother's passport, which she said she found when cleaning out her mother's bedroom after her mother was committed to a nursing home in or around July 2012, and which she kept for sentimental reasons⁶⁵.

65 She annexed four applications for Australian citizenship dated 17 May 1974, made in respect of herself, her brother Senator Roberts, her brother Mr Peter Roberts, and her father Mr Ieuan Roberts respectively. She gave evidence that while the handwriting on her father's form was not hers, the handwriting on the other three forms, including that of Senator Roberts, was hers. She said that as she was 16 at the time, it was likely that her mother asked her to complete her, and her brothers', forms by copying what her father had done on his⁶⁶.

66 Finally, Ms Roberts referred to a collection of her father's photos and passports that she found in her father's study when cleaning out her parents' home for renovation in or around January 2014. At that time, her father chose to move to an aged care home. She also gave evidence that her father kept his children's important documents in three separate Regal Lock Clip Files, one for each child, and that her file box contained her birth certificate, her registration in Somerset House (where the General Register Office, which holds birth, death and marriage certificates for England and Wales, was formerly located), school reports, and other official documents. She said that she could not remember precisely when her father gave her the box, but that it may have been in or around the 1980s, possibly in 1982, and no later than 1985⁶⁷.

64 Affidavit of Barbara Lynne Roberts filed 8 September 2017, [4.6].

65 Affidavit of Barbara Lynne Roberts filed 8 September 2017, [4.4].

66 Affidavit of Barbara Lynne Roberts filed 8 September 2017, [5.1]-[5.5].

67 Affidavit of Barbara Lynne Roberts filed 8 September 2017, [6.1]-[6.5].

Senator Roberts' citizenship under the law of the United Kingdom

67 Mr Lloyd SC submitted that Senator Roberts was a citizen of the United Kingdom by descent at the time of his nomination. Senior Counsel for Senator Roberts did not seek to resist that submission⁶⁸ although Senator Roberts, in the course of his cross-examination, was not willing to make that concession himself⁶⁹.

68 For the following reasons, I find that Senator Roberts was a citizen of the United Kingdom by descent at the time of his nomination.

69 What was involved in citizenship of the United Kingdom, and in renouncing that citizenship under the law of the United Kingdom, are questions of foreign law⁷⁰. They fall to be resolved for the purposes of the reference as questions of fact by reference to expert opinion⁷¹.

70 Each of the Attorney-General and Senator Roberts filed a report from a barrister practising in the United Kingdom. In neither case was any question raised as to the expertise of the witness. The Attorney-General's expert witness was Mr Laurie Fransman QC, a barrister practising in London, who was called to the Bar in 1979 and took silk in 2000. He is the author of several texts on British nationality law, including *Fransman's British Nationality Law*⁷². Senator Roberts' expert was Mr Adrian Berry, a barrister practising in London, who was called to the Bar in 1998. He too is the author of several texts on British nationality law, including as a contributor to the textbook compiled by Mr Fransman QC⁷³.

71 Mr Fransman QC was briefed (relevantly) to answer the following three questions:

"Question 1: Did [Senator Roberts] become a British citizen at the time of his birth (or at any later time)?

68 [2017] HCATrans 192 at 20/849-855.

69 [2017] HCATrans 192 at 25/1075-1083, 26/1101-1155, 27/1150, 32/1403.

70 Cf *Sue v Hill* (1999) 199 CLR 462 at 492 [65], 528 [173].

71 *Lazard Brothers & Co v Midland Bank Ltd* [1933] AC 289 at 298; *Buerger v New York Life Assurance Co* (1927) 99 LJKB 93 at 940-941.

72 3rd ed (2011).

73 Annexure to Expert Report of Adrian Berry dated 18 September 2017.

Question 2: If the answer to (1) is 'yes', then: by the law of the United Kingdom, did [Senator Roberts] cease to be a citizen of the United Kingdom at any later time (please specify date, if possible)?

Question 3: What steps are required under United Kingdom law in order to renounce British citizenship? At what point in those steps does citizenship legally cease?"⁷⁴

72 In order to answer those questions, Mr Fransman QC was asked to make a series of factual assumptions, which were based on Senator Roberts' affidavit. However, Mr Fransman QC was cautioned that he should not rely on those assumptions for the purposes of his advice without independently verifying them having regard to Senator Roberts' affidavit⁷⁵.

73 Mr Fransman QC reached the following conclusions, which were not disputed by Mr Berry:

- By virtue of his father's nationality, Senator Roberts was born a "citizen of the UK and colonies", which was the principal form of British nationality from 1 January 1949 to 31 December 1982 inclusive. The fact that his birth was registered with the British High Commission in India was irrelevant⁷⁶;
- On 1 January 1983, the date that the *British Nationality Act 1981* (UK) c 61 ("the BNA") came into force, Senator Roberts became a "British citizen" by descent, which by virtue of the BNA, was thenceforth the principal form of British nationality⁷⁷;
- Subject to the issue of renunciation, nothing that Senator Roberts had done since his birth had affected his status as a British citizen by descent in British nationality law. Specifically, whether Senator Roberts had ever been to the UK or expressed any interest in British nationality was not relevant, nor did the move to Australia, the acquisition of Australian

74 Expert Report of Laurie Fransman QC dated 6 September 2017, 1-2 [6].

75 Expert Report of Laurie Fransman QC dated 6 September 2017, 3 [8].

76 Expert Report of Laurie Fransman QC dated 6 September 2017, 5 [11], 10-11 [42], 11 [46].

77 Expert Report of Laurie Fransman QC dated 6 September 2017, 5-6 [13], 11 [46].

citizenship, or the circumstance that his mother was Australian have any bearing on whether he was a British citizen⁷⁸.

74 It was Mr Fransman QC's opinion, which was not disputed by Mr Berry, that Senator Roberts ceased to be a citizen of the United Kingdom on 5 December 2016, when Senator Roberts' declaration of renunciation was registered.

75 As to the requirements of a valid renunciation, the experts were not entirely *ad idem*.

76 It was common ground between the experts that s 12 of the BNA provided that "[i]f any British citizen of full age and capacity makes in the prescribed manner a declaration of renunciation of British citizenship", then subject to presently irrelevant exceptions, "the Secretary of State shall cause the declaration to be registered". Section 12(2) of the BNA provided that "[o]n the registration of a declaration made in pursuance of this section the person who made it shall cease to be a British citizen."

77 It was common ground between the experts that the moment at which British citizenship is lost is when a declaration of renunciation is registered by the Secretary of State pursuant to s 12(1) of the BNA⁷⁹, which in Senator Roberts' case occurred on 5 December 2016⁸⁰. Accordingly, Senator Roberts remained a British citizen until that date.

78 It was also common ground that the "prescribed manner" of a declaration of renunciation of citizenship was stated by the *British Nationality (General) Regulations 2003*⁸¹ ("the General Regulations"), reg 8 of which provided:

"Any declaration of renunciation of British citizenship, British Overseas citizenship or the status of a British subject shall –

- (a) be made to the appropriate authority specified in regulation 9; and
- (b) satisfy the requirements of Schedule 5".

78 Expert Report of Laurie Fransman QC dated 6 September 2017, 9 [31], 10 [41], 11 [48].

79 Document Identifying Points of Difference between Experts dated 20 September 2017, 1.

80 Exhibit MIR-27 to Affidavit of Malcolm Ieuan Roberts dated 15 September 2017.

81 SI 548/2003.

79 Although initially a point of disagreement between the experts, it was ultimately common ground that, by virtue of reg 9(e) of the General Regulations, the authority to whom Senator Roberts' declaration of renunciation was required to be made was the Secretary of State at the Home Office⁸².

80 It was common ground that the requirements set out in Sched 5 were as follows:

- "1. A declaration shall be made in writing and shall state the name, address, date and place of birth of the declarant.
2. A declaration shall contain information showing that the declarant –
 - (a) is a British citizen, British Overseas citizen or British subject, as the case may be;
 - (b) is of full age or, if not, has been married;
 - (c) is of full capacity;
 - (d) will, after the registration of the declaration, have or acquire some citizenship or nationality other than British citizenship, British Overseas citizenship or British subject status, as the case may be.
3. A declaration shall contain a declaration that the particulars stated therein are true."

81 It was common ground between the experts that the email sent by Senator Roberts to the three email addresses found online on 6 June 2016 was not a declaration of renunciation made in the prescribed manner for the purposes of s 12 of the BNA⁸³. The experts agreed that the declaration made using the Form RN on 2 November 2016 was the first declaration made by Senator Roberts that satisfied all the requirements of s 12.

82 Initially the experts did not agree upon all the reasons why Senator Roberts' email of 6 June 2016 was not a valid declaration of renunciation. It was common ground between them that *one* reason that it was

82 Document Identifying Points of Difference between Experts dated 20 September 2017, 1.

83 Document Identifying Points of Difference between Experts dated 20 September 2017, 1.

not valid was that it was not made to the appropriate authority, that is, the Secretary of State at the Home Office. In Mr Berry's opinion, that was the *only* reason that it was not a valid declaration of renunciation for the purposes of s 12 of the BNA. In Mr Fransman QC's opinion, there were two additional reasons.

83 The first additional reason for invalidity in Mr Fransman QC's opinion was that Senator Roberts' email of 6 June 2016 did not contain a "declaration that the particulars stated therein are true", as required by cl 3 of Sched 5 of the General Regulations⁸⁴. Mr Berry, by contrast, considered that the email of 6 June 2016 did attest to the truth of its contents, because it attached an earlier email of 1 May 2016, which it held out and represented to be true, saying "[p]lease see ancestry, history and other details below". Taken together with the email in its entirety, he said, that was an attestation of truth, no prescribed form of words being required⁸⁵.

84 The second additional reason for invalidity in Mr Fransman QC's opinion was that the email of 6 June 2016 was not accompanied by payment of the application fee of £272. Mr Fransman QC's opinion was that the General Regulations are to be read with the *Immigration and Nationality (Fees) Regulations 2016*⁸⁶ ("the Fees Regulations"), which came into force on 18 March 2016⁸⁷. Regulation 10 of the Fees Regulations gave effect to Sched 8; cl 2 of Sched 8 in turn provided that "Tables 19 and 20 specify the amount of the fees for the specified applications, processes and services relating to nationality"; and lastly, table 20, at Item 20.3.1, specified a fee of £272 for "Registration of a declaration of renunciation of British citizenship under section 12 of the [BNA]".

85 Mr Fransman QC set out the text of reg 14 of the Fees Regulations, which provided:

"Consequences of failing to pay the specified fee

Where these Regulations specify a fee which must accompany an application for the purposes of the 2016 Order, the application is not validly made unless it is accompanied by that fee".

86 In Mr Fransman QC's view, under the Fees Regulations, a fee of £272 had to be paid for a declaration of renunciation to be valid, and for it to be registered

84 Expert Report of Laurie Fransman QC dated 6 September 2017, 18 [79].

85 Expert Report of Adrian Berry dated 18 September 2017, [27(ii)].

86 SI 2016/226.

87 Reg 1(2) of the Fees Regulations.

by the Secretary of State. Mr Fransman QC noted that while the *Immigration and Nationality (Fees) Regulations 2017*⁸⁸ introduced a discretion to accept an application as valid even where a fee has not been paid, this has only been the case since 6 April 2017 by reason of reg 1(2)⁸⁹.

87 Mr Fransman QC said that his understanding of the legislative scheme accorded with an online policy entitled "Nationality Instructions to Staff" ("the Nationality Instructions"), Ch 19 of which was headed "Nationality policy: renunciation of all types of British nationality"⁹⁰. Under the heading "Fee" on page 5 of that document, it states:

"An application must be made on Form RN and include the full fee.

The British Nationality (Fees) Regulations provide that the fee for the registration of a declaration of renunciation shall be payable on submission of the declaration. This means that a declaration of renunciation cannot be registered until the fee has been paid.

...

Where the declaration is not submitted with the full fee you must refuse to register the declaration".

88 Mr Berry, by contrast, did not consider that a fee had to be paid in order for a declaration of renunciation to have been validly made. He said that British nationality legislation concerning fees distinguishes between "applications", "processes" and "services". Each of these were said to fall generally within the umbrella term "functions". Critically, he said, a "declaration of renunciation" was not an "application", but rather, a "service". This was said to be evidenced by the listing of the £272 fee under the heading "20.3 Fees for services in connection with nationality" rather than under the heading "20.1 Fees for applications in connection with nationality"⁹¹.

89 Mr Berry's view was that the distinction between "applications", "processes" and "services" was reflected also in reg 10 of the Fees Regulations, which provided:

88 SI 2017/515.

89 Expert Report of Laurie Fransman QC dated 6 September 2017, 14 [61].

90 Expert Report of Laurie Fransman QC dated 6 September 2017, 14-15 [62]-[63].

91 Expert Report of Adrian Berry dated 18 September 2017, 3 [10]-[12], 7 [20].

23.

"Schedule 8 (nationality) has effect to specify –

- (a) the amount of the fees for –
 - (i) specified applications, processes and services in connection with nationality for the purposes of article 10 of the 2016 Order;
 - (ii) specified applications for certain documents, specified applications for the review of certain applications, or the process of taking a record of an applicant's biometric information for the purposes of article 6 of the 2016 Order; and
- (b) the circumstances in which the fee for arrangement of a citizenship ceremony must be refunded".

90 Since a request for registration of a declaration of renunciation amounted in Mr Berry's view to a request for the provision of a "service", rather than the making of an "application", Mr Berry opined that reg 14 had nothing to say about the validity or otherwise of a declaration of renunciation tendered without payment of the fee⁹². Nor, he said, was there an equivalent sanction elsewhere in the Fees Regulations in respect of "services" or "processes". Mr Berry did not consider that the Nationality Instructions had any bearing on the legal position, as they were no more than practical instructions to the Secretary of State's caseworkers. The result, in Mr Berry's view, was that a request for registration of a declaration of renunciation of British citizenship was not invalid for want of payment of the specified fee⁹³.

91 On this basis, Mr Berry concluded that the email of 6 June 2016 was a "declaration of renunciation" for the purposes of British nationality law, and further, that if the High Commission in Australia had only forwarded the email to the Home Office in the United Kingdom, it would have then been made to the appropriate authority, and would therefore have complied with s 12 of the BNA in every respect⁹⁴.

92 Mr Fransman QC remained of the view that both a declaration of truth and the payment of the fee were also necessary for compliance with s 12 of the BNA.

92 Expert Report of Adrian Berry dated 18 September 2017, [22].

93 Expert Report of Adrian Berry dated 18 September 2017, 8 [23]-[24].

94 Expert Report of Adrian Berry dated 18 September 2017, 12 [29], 13 [35].

93 Mr Fransman QC disagreed with Mr Berry's characterisation of reg 14 of
the Fees Regulations, and considered that the term "application" in that provision
includes a declaration of renunciation⁹⁵.

94 These were the issues in relation to which the experts were
cross-examined at the hearing.

The declaration of truth

95 On the issue between the experts as to whether the email of 6 June 2016
contained a declaration of truth as required by the General Regulations, I prefer
the view of Mr Fransman QC as to the effect of the regulations.

96 Clause 3 of Sched 5 of the General Regulations requires that "a
declaration shall contain a declaration that the particulars stated therein are true".
Mr Berry expressed the opinion that:

"The first use of the term 'declaration' refers to the document as a whole;
the second to the need for representation that its contents are true. The
email of 6 June holds out and represents the content of the email of 1 May
2016 to be true. Absent a requirement for an express form of words, the
statutory requirement is satisfied. It is a representation declaring its
contents to be true."

97 Mr Berry's understanding of the regulation equates the making of the
declaration with the declaration of the truth of its contents. That does not
conform with the language of cl 3 of the regulation, which treats the declaration
of truth required by the regulation as a declaration different from the content of
what is declared. In addition, as Mr Fransman QC observed in his oral evidence,
the evident purpose of the separate requirement of a declaration of truth is to
ensure that the declarant, having made his or her statement, specifically turns his
or her mind to whether the content of the declaration is true. That purpose would
not be served by the understanding urged by Mr Berry.

98 Accordingly, I find that Senator Roberts' email of 6 June 2016 was not apt
to lead to a termination of his British citizenship because it did not contain a
declaration of truth.

The payment of the fee

99 The issue between the experts as to whether the payment of the fee of
£272 was necessary in order for a declaration of renunciation to be valid was

95 Document Identifying Points of Difference between Experts dated 20 September
2017, 2.

resolved in the course of the cross-examination of Mr Fransman QC and Mr Berry. They agreed that the process of renunciation is not effective until the declaration of renunciation has been registered. Both Mr Fransman QC and Mr Berry accepted that the Home Secretary would not be obliged as a matter of law to register, and as a practical matter would not register, a declaration of renunciation without payment of the required fee.

100 The effect of the legislation is not so clearly to the contrary of their common view that I could be confident in declining to accept their (now common) view⁹⁶.

101 And it is readily understandable that, as a matter of policy, the legislation and regulations would insist that payment accompany an application rather than require a renunciation to be acted upon "on credit" with the Home Office left to chase its, now foreign, debtors for payment.

102 Accordingly, I find that Senator Roberts' email of 6 June 2016 was not apt to lead to a termination of his British citizenship because it was not accompanied by the prescribed fee.

What did Senator Roberts know about his citizenship status at the time of his nomination?

103 Mr Lloyd SC submitted that, at the time that Senator Roberts nominated for the Senate, he was aware that he had previously held British citizenship and that there was at least a real and substantial prospect that he continued to hold British citizenship. Mr Newlinds SC submitted that, at that time, Senator Roberts did not believe that he was a British citizen although he suspected that he might be.

104 Senator Roberts turned his mind to the possibility that he was a citizen of the United Kingdom no later than when he completed his Candidate Endorsement Form for the One Nation party. He accepted that he was concerned that he might still be a British citizen although he was astute to minimise the extent of that concern. Nevertheless, his concern was sufficient that he made the enquiries which ensued and his attempts to renounce that British citizenship.

105 In the form of nomination for the Senate which Senator Roberts signed on 3 June 2016, he expressly declared that he was an Australian citizen by naturalisation, the date of the grant of citizenship being 17 May 1974. In addition, his emails of 1 May 2016 and 6 June 2016 each expressly acknowledged that he (and the other members of his family) became Australian

96 Cf *Buerger v New York Life Assurance Co* (1927) 99 LJKB 930 at 940-941.

citizens in May 1974. These are unequivocal statements of his understanding of the objective facts of his citizenship status.

106 One may readily accept that the circumstances of his application for citizenship in May 1974 had not been at the top of his mind for many years when he nominated as a candidate for the Senate in June 2016; but the terms of his email of 1 May 2016, in which his query was whether he was "still" a British citizen, suggests that he was aware that he had been a British citizen prior to that time. That suggestion is confirmed by his acknowledgment in his email of 1 May that he and other members of his family "became Australian citizens" in around 1973. The email of 6 June corrected the date he gained Australian citizenship to "17 May 1974". This correction indicated a familiarity with the papers which recorded his naturalisation as an Australian citizen.

107 It is significant that Senator Roberts did not suggest, either in his affidavit, or in his emails, or in the course of his cross-examination, that he believed that in some way, expressly or impliedly, he renounced his British citizenship when he obtained Australian citizenship by naturalisation. The absence of any such suggestion highlights that there was no rational basis for the belief that he was always and only an Australian citizen. The absence of any rational basis in fact for that belief meant that Senator Roberts was driven to support his position by reliance on his highly subjective appreciation of the importance of commonplace incidents of his familial experience.

108 Mr Lloyd SC cross-examined Senator Roberts extensively on his affidavit. Nothing in Senator Roberts' demeanour during the course of his cross-examination led me to doubt the sincerity with which Senator Roberts sought to defend his position. On the other hand, he had an obvious, and strong, interest in defending the position to which he had committed himself, right or wrong, when he signed his nomination form on 3 June 2016. Importantly, Senator Roberts' "position" was not supported in any significant particular by any documentation contemporaneous with critical events, and his attempts to reconcile statements made by him in documents that he either wrote or signed with his own evidence to contrary effect were speculative or unrealistic. I am not prepared to accept Senator Roberts' subjective appreciation of the effect of his own documents where that appreciation is contrary to an objective understanding of the words used. Similarly, I am not prepared to act upon the subjective appreciation of events in his life by which he seeks to challenge an objective view of the significance of those events.

109 Importantly in this regard, Senator Roberts deposed⁹⁷:

97 Affidavit of Malcolm Ieuan Roberts filed 15 September 2017 at [9.14].

"At the time of my nomination I considered myself Australian and only Australian. This is my sincere belief based upon having grown up in Australia, our family culture and the fact that I had always had an Australian and only an Australian passport. I felt that I had done everything I could think of to rule out any possibility of me unknowingly being a citizen of either India or Britain."

110 During the course of his cross-examination, Senator Roberts referred on several occasions to this evidence as the foundation of his claim to be, and always to have been, an Australian and only an Australian⁹⁸. This evidence is the clearest statement of the basis for Senator Roberts' claim that he was not a British citizen at the date of his nomination. Several points may be made here. First, Senator Roberts equates feelings of Australian self-identification with citizenship, and so confuses notions of how a person sees oneself with an understanding of how one's national community sees an individual who claims to be legally entitled to be accepted as a member of that community. The extent to which Senator Roberts' subjective beliefs and objective reality diverge became apparent when Senator Roberts, pressed by Mr Lloyd SC as to whether "believing that you are an Australian citizen by reason of what is said amongst family members is actually the test for Australian citizenship", answered: "Knowing my father I certainly do."⁹⁹

111 Senator Roberts, as tenaciously as he contended for this highly subjective (and objectively untenable) view of things, was unable to maintain this position. He was forced in the pressure of cross-examination to concede that he understood as at 29 April 2016 that, prior to May 1974, he had not been an Australian citizen because he became a citizen by naturalisation¹⁰⁰.

112 The second point to be made here is that he obtained his own Australian passport in 1979. As a child he had travelled on his mother's passport which included the endorsement that he had not acquired Australian citizenship¹⁰¹.

113 Thirdly, in the course of his cross-examination – and for the first time in his correspondence or evidence – he asserted that he was an Australian citizen by

98 [2017] HCATrans 192 at 27/1155-1164; 28/1200-1221, 49/2159-2182, 52/2301-2306, 53/2339-2355, 56/2489, 57/2544-2549, 67/2995-68/3007, 69/3073-3076, 69/3091-3094, 70/3135-3144, 73/3251-3264 77/3431-3434.

99 [2017] HCATrans 192 at 58/2551-2559.

100 [2017] HCATrans 192 at 50/2214-2216.

101 [2017] HCATrans 192 at 27/1156-1174.

descent from his mother¹⁰². He had no answer when asked why he would not similarly have acquired British citizenship by descent from his father¹⁰³.

114 Fourthly, in the course of his cross-examination – and for the first time in his correspondence or evidence – he sought to assert that before he became an Australian citizen by naturalisation in May 1974, he believed that he was "stateless" having been told this by his sister, Barbara¹⁰⁴. Senator Roberts' sister had no qualifications which might have allowed her to offer authoritative guidance on such a question, and it is of a piece with Senator Roberts' highly subjective view of things that he would offer his sister's untutored observation as a reliable guide to the resolution of this question. Later in the course of his evidence, he made it clear that his sister had said this to him only after he had been elected to the Senate¹⁰⁵, and so, on any view, it could not have been a basis for the belief as to his citizenship as at the date of his nomination for the Senate.

115 As I have said, I am not persuaded that Senator Roberts was not sincere in his tenacious advocacy of the position to which he committed himself by signing his nomination to the Senate on 3 June 2016; but the difficulties in his position to which I have referred test credulity too far to accept his evidence that he was confident that he was not a British citizen at the date of his nomination.

116 I find that Senator Roberts knew that he did not become an Australian citizen until May 1974. I find that, as at the date of his nomination for the Senate, he knew that there was at least a real and substantial prospect that prior to May 1974 he had been and remained thereafter a citizen of the United Kingdom.

What steps could Senator Roberts have taken to understand his citizenship status at the time of his nomination?

117 It is evident from what has already been said that Senator Roberts had access to documents which confirmed that he became an Australian citizen only in May 1974. In addition, he had access to his father's papers which included the registration of his birth with the British Home Office. He could have consulted these documents. As has been noted, it is apparent from his nomination for the Senate and his email of 6 June 2016 that he did refer to some of these papers to inform himself.

102 [2017] HCATrans 192 at 45/2057-2067.

103 [2017] HCATrans 192 at 47/2069-2074.

104 [2017] HCATrans 192 at 34/1455-1460, 39/1684-1687, 71/3173-3174.

105 [2017] HCATrans 192 at 72/3189-3191.

118 Senator Roberts could have sought professional advice on the issue, or he could have communicated by telephone or email with the UK High Commission in Canberra in order to establish his position. He did neither of these things.

What steps did Senator Roberts take to renounce his foreign citizenship before his nomination?

119 The only step arguably taken by Senator Roberts to renounce his foreign citizenship before his nomination was his email of 6 June 2016. Mr Fransman QC and Mr Berry agree that this email could not be effective as a renunciation because it was not sent to the appropriate authority, namely the Home Office in the United Kingdom. In addition, as I have found, this email could not be effective as a renunciation of his UK citizenship because it did not contain a declaration of truth, and it was not accompanied by the prescribed fee.

What further steps (if any) could Senator Roberts have taken to renounce his foreign citizenship before his nomination?

120 Senator Roberts could have made effective inquiries of the British High Commission by which he would have been informed of the steps necessary to renounce his foreign citizenship. He could have obtained and completed a form of renunciation declaration, such as Form RN, and returned it with the required fee to the Home Office as he belatedly did.