IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY **No C18 of 2017**

RE: SENATOR NICHOLAS XENOPHON

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

SUBMISSIONS OF SENATOR XENOPHON

Part I: Certification

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

Part II: Issues

2. The issues in the proceedings are fixed by the questions referred to this Court by the Senate under s 376 of the *Commonwealth Electoral Act 1918* (Cth), namely:
   (a) whether, by reason of s 44(i) of the Constitution there is a vacancy in the representation of South Australia in the Senate for the place for which Senator Xenophon was returned;
   (b) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;
   (c) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and
   (d) what, if any, orders should be made as to the costs of these proceedings.

3. The following issues arise from these questions:
   3.1. ***Issue 1: Section 44(i) applies only to a person who has voluntarily obtained, or retained, the status of a subject or a citizen of a foreign power***
      (a) Does s 44(i) only apply to disqualify a person who has voluntarily obtained, or retained, the status of a citizen of subject of a foreign power?

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(b) Alternatively, is the slender connection between Senator Xenophon and the United Kingdom (**UK**), by which British Overseas Citizenship (**BOC**) status was bestowed upon him by descent, according to the law of the UK, such that he was not incapable of being chosen or sitting as a senator?

3.2. ***Issue 2: A person with only an unknown foreign citizenship due to a slender connection with a foreign power need take no steps to renounce it***

In circumstances particular to Senator Xenophon, did he act reasonably in taking no steps to renounce his BOC status earlier and was the consequence that he was not incapable of being chosen or sitting as a senator?

3.3. ***Issue 3: British Overseas Citizenship is so attenuated as to be outside the scope of s 44(i)***

Is the attenuated nature of BOC status, in the circumstances applicable to Senator Xenophon, such that Senator Xenophon is not a *"citizen or subject of a foreign power"* for the purposes of s 44(i) of the Constitution?

3.4. ***Issue 4: Consequences of being incapable of being chosen by reason of s 44(i)***

If Senator Xenophon was incapable of being chosen as a senator by reason of s 44(i), how should the resulting vacancy be filled?

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

4. Consideration has been given to compliance with s 78B of the *Judiciary Act 1903* (Cth). The issues raised are within the scope of the notice issued by the Attorney-General for the Commonwealth.

Part IV: Material facts

5. Senator Xenophon was born on 29 January 1959 at the Burnside Memorial Hospital in Toorak Gardens, South Australia.[1] He has always considered his only allegiance, to the exclusion of all other foreign sovereigns, is to the Commonwealth of Australia.[2] He has

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[1] Affidavit of Senator Xenophon sworn 19 September 2017, **JCB7:42 (Xenophon Affidavit)**, [3], Ex NX1.

[2] Xenophon Affidavit, [4], [11].

always been a citizen and resident of Australia.[3] By reason of his Australian citizenship, Senator Xenophon is and always has been under an acknowledgement of allegiance, obedience and adherence to the Commonwealth of Australia.

6. He has held Australian passports, and in applying for passports has identified that he was/is an Australian citizen without dual citizenship.[4] After his election as a member of the South Australian Legislative Council Senator Xenophon swore an oath of allegiance before the Governor of South Australia.[5]

7. Senator Xenophon's family were, and identified as, Australians of Hellenic descent and heritage. He grew up speaking English and Greek, which was often spoken in his immediate family, especially with his maternal grandparents. Senator Xenophon engaged in many activities common to Australians of Hellenic descent, such as attending after-hours Greek language school, and joining family celebrations in relation to events of significance for Greece and Cyprus. He was baptised in the Greek Orthodox Church, Prophet Elias, at Norwood, South Australia.[6] At no time did Senator Xenophon's parents or family make reference to the fact that his father was or had ever been a citizen of the United Kingdom and Colonies.[7]

8. Senator Xenophon's father had been a resident of Cyprus before emigration to Australia in 1951, and became an Australian citizen by naturalisation in 1965.[8]

9. Prior to his first election to the Senate on 24 November 2007, Senator Xenophon specifically turned his mind to renouncing any entitlement to dual citizenship he might have. In particular, he identified both Greece and Cyprus as countries with which he had a connection and thus as countries in respect of which he might conceivably hold dual citizenship.[9] He is not and never has been either a citizen of Greece or of Cyprus.[10]

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3 Senator Xenophon became an Australian citizen *"by birth"* pursuant to s 10 of the *Nationality and Citizenship Act 1948-1958* (Cth).

4 Xenophon Affidavit, [5]-[6], Ex NX2 (note questions concerning citizenship of another country left blank, or ticked *"no"*, in accordance with his then belief).

5 Xenophon Affidavit, [14].

6 Xenophon Affidavit, [7], [9]-[10].

7 Xenophon Affidavit, [13].

8 Xenophon Affidavit, [12.1], [12.7].

9 Xenophon Affidavit, [15], [17].

10 **JCB7:44** (Statement of Agreed Facts).

10. At no time prior to any of the elections when Senator Xenophon was returned as a senator for the State of South Australia (on 24 November 2007, 7 September 2013 and 2 July 2016),[11] did it cross his mind that he might have any form of British citizenship by reason of the fact that his father had been a resident of Cyprus, and that Cyprus was a British possession and colony until 16 August 1960.[12]

11. At the time Senator Xenophon turned his mind to renouncing any dual citizenship he may have had, he was unaware of, and his mind did not turn to, the fact that Cyprus had attained independence from the UK when he was an infant.[13] During family discussions about Greece and Cyprus when he was growing up, he was made aware that Cyprus was a separate country, but Senator Xenophon did not have it in mind (then or subsequently) that independence was granted after Senator Xenophon was born and after his father had emigrated to Australia.[14] The first time he became aware that he might hold some form of British nationality was just prior to 12 August 2017.[15]

12. Senator Xenophon has never made any application, written or verbal, to become a British citizen of any kind.[16] His parents took no steps to register him for any form of British citizenship.[17] He has never to his knowledge done any act, made any statement, or acted in any manner, which would place him under any acknowledgement of allegiance, obedience or adherence to the UK.[18] In relation to the UK, he has neither sought nor accepted any of the entitlements, privileges or rights which might ordinarily be associated with nationality or citizenship.[19]

13. On 20 September 2017, Mr Fransman QC, an expert in British nationality law, produced a Report (**Fransman Report**), in relation to Senator Xenophon's status under UK law.

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[11] Xenophon Affidavit, [15].

[12] Xenophon Affidavit, [16].

[13] Xenophon Affidavit, [3], [16], [18].

[14] Xenophon Affidavit, [16], [18].

[15] Xenophon Affidavit, [19].

[16] Xenophon Affidavit, [20].

[17] Xenophon Affidavit, [12.10].

[18] Xenophon Affidavit, [4].

[19] Xenophon Affidavit, [21]. The matters specifically addressed in Senator Xenophon's affidavit are (a) a British passport; (b) social security benefits from the government of the UK; (c) medical benefits from the government of the UK; (d) membership of the British armed services; (e) to vote in any elections of public officials in the UK; (f) to stand for any public office in the UK; and (g) consular assistance from the government of the UK.

In summary, that report concluded as follows:

13.1. By s 1 of the *British Nationality and Status of Aliens Act 1914* (UK), Senator Xenophon's father was born a natural-born British subject, because when he was born on 13 July 1931 in Cyprus, when that island was within the dominion of the Crown of the United Kingdom, having been annexed on 5 November 1914.[20]

13.2. On 1 January 1949, by operation of ss 4 and 12 of the *British Nationality Act 1948* (UK), Senator Xenophon's father became a citizen of the United Kingdom and Colonies (**CUKC**) by reason of birth (or *"otherwise than by descent"*).[21]

13.3. When Senator Xenophon was born, because his father was a CUKC otherwise than by descent, s 5 of the *British Nationality Act 1948* (UK) operated so as to confer on Senator Xenophon the status of a CUKC by descent.[22]

13.4. When Cyprus gained independence from the UK on 16 August 1960, Annex D of the *British Nationality (Cyprus) Order 1960* (SI 1960/2215), operated in such a way that neither Senator Xenophon nor his father was deprived of CUKC status, because neither of them was residing in Cyprus at that time, Senator Xenophon's father having by then emigrated to Australia, and Senator Xenophon having been born and having always resided in Australia.[23]

13.5. When the *Immigration Act 1971* (UK) came into force on 1 January 1973, it did not confer on Senator Xenophon a right of abode in the UK, as he had not resided there for the five year period preceding 1 January 1973.[24]

13.6. When it came into operation on 1 January 1983, the *British Nationality Act 1981* (UK) automatically operated to designate Senator Xenophon as a BOC, because he did not have a right of abode in the UK.[25]

13.7. The purpose of BOC is to give from a British legal perspective a *"residuary form of British nationality"* to those pre-1983 CUKCs who did not become full British Citizens or British Dependent Territories Citizens, rather than completely

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[20] Fransman Report, [22]-[23] – note *"2014"* should be *"1914"*.

[21] Fransman Report, [26]-[32].

[22] Fransman Report, [63]-[72].

[23] Fransman Report, [34]-[54], [73]-[74].

[24] Fransman Report, [75].

[25] Fransman Report, [76]-[77].

depriving such persons of British nationality (and thus, potentially, of any nationality). BOC status can be renounced but generally cannot be transmitted to children by birth or descent.[26]

13.8. BOC is, from the perspective of the law of the UK, a juridical relationship between the individual and the UK, denoting *"a historical link to a territory that was within 'the UK and colonies' but is no longer"*.[27]

13.9. In principle the UK assumes responsibility for BOCs in its relations with other sovereign states, including to give consular assistance.[28]

13.10. Where a BOC is issued a BOC passport it is issued by or on behalf of the United Kingdom of Great Britain and Northern Ireland, and not the relevant British overseas territory or state.[29]

13.11. A BOC has no right of abode in the UK, and no automatic right of either entry or residence. A BOC can only enter the UK by satisfying the requirements of immigration control. Accordingly, BOC status lacks *"one of the main characteristics of a national in international law"*. It is unclear whether this means that BOCs are not recognised as British nationals in international law, or whether BOCs are to be regarded as British nationals whose treatment by the UK violates international law by failing to provide the right to enter the territory of the UK, being a basic human right recognised by international law as an incident of nationality.[30]

13.12. A BOC with no other citizenship or nationality (ie, unlike Senator Xenophon) has been entitled to register for full British citizenship since 30 April 2003.[31]

13.13. It is also possible for BOCs to register with UK authorities. To do so, a person is required to make a citizenship oath (but not a pledge), affirming allegiance to the Queen in right of the United Kingdom (not Australia), but not to the UK *per se*. The Fransman Report *"assumes"* without opining that the duty of loyalty and allegiance is the same for an unregistered BOC who has taken no action to

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[26] Fransman Report, [95].

[27] Fransman Report, [110].

[28] Fransman Report, [109]-[112].

[29] Fransman Report, [111].

[30] Fransman Report, [113]-[117].

become a BOC.[32]

13.14. If a BOC is unaware of that status, it is unclear (*"may or may not be possible"*) whether they can commit a criminal offence of disloyalty to the UK, but there is a statutory power to deprive them of their BOC status, based upon misconduct.[33]

13.15. A BOC is not a national of the UK for the purposes of European Union (**EU**) law, and BOCs do not receive concomitant rights of free movement in the territory of EU member states.[34]

14. On each occasion when Senator Xenophon was returned as a senator for South Australia, he in fact (unbeknownst to him[35]) had the status of a BOC under the law of the UK.[36] Upon being informed that he may have that status, and on the advice of counsel, in August 2017 he renounced that status,[37] and ceased to be a BOC under the law of the UK on 31 August 2017.[38]

Part V: Argument

Contentions advanced by Senator Xenophon

15. Senator Xenophon advances the following contentions:

15.1. The expression *"is a subject or a citizen ... of a foreign power"* in s 44(i) of the Constitution should be construed as referring only to a person who has voluntarily obtained, or retained, that status, and Senator Xenophon is not such a person.

15.2. Further and in the alternative, a person who does not in fact know that, according to the law of another country, they are a citizen or subject of a foreign power, and who is not aware of facts that would put a reasonable person in their position and with their state of knowledge on notice that they held that status, will have acted reasonably and will not be disqualified by reason of s 44(i), providing they

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[31] Fransman Report, [115].

[32] Fransman Report, [119]-[121], [128].

[33] Fransman Report, [130].

[34] Fransman Report, [136]-[137].

[35] Xenophon Affidavit, [16], [18]-[19].

[36] Fransman Report, [77(d)], [83].

[37] Xenophon Affidavit, [23], Ex NX6.

take all reasonable steps to renounce foreign citizenship within a reasonable time after becoming aware of their status, or of facts which would put a reasonable person in their position on notice that they held that status. Senator Xenophon acted reasonably at all times, and renounced his BOC status as soon as reasonably practicable after becoming aware of facts which would put a reasonable person in his position on notice that he may be a BOC.

15.3. Further and in the alternative, the rights and privileges associated with BOC status which Senator Xenophon held, as a matter of UK law, are so attenuated that his holding that status is not to be regarded as making him *"a subject or citizen of a foreign power"* within the meaning of s 44(i) of the Constitution.

15.4. If, contrary to the above contentions, Senator Xenophon was incapable of being chosen as a senator by reason of s 44(i) of the Constitution, his position should be filled as a by a special count of the ballot papers.

16. If any of the first three contentions is resolved in Senator Xenophon's favour, it follows that he was not disqualified by s 44(i) from being chosen or sitting as a senator. Accordingly, the first three issues are advanced as alternatives in the order submitted, and, to the extent that they are not inconsistent *inter se*, are advanced cumulatively.

Issue 1: Section 44(i) applies only to a person who has voluntarily obtained, or retained, the status of a subject or a citizen of a foreign power

17. Senator Xenophon adopts [7]-[75] and [90]-[91][39] of the written submissions of the Attorney-General for the Commonwealth. In relation to [73], Senator Xenophon submits in the alternative that, even if an inquiry as to objective reasonableness were appropriate, for the reasons advanced below in relation to issue 2, Senator Xenophon's circumstances were not such as to put a reasonable person in his position (including his actual state of knowledge) on notice that he may hold some form of British nationality. Senator Xenophon's submissions in relation to issue 2 are therefore premised upon needing to meet this higher standard. Senator Xenophon also adopts [21]-[70] of the written submissions of Senator Canavan in action no C11 of 2017. The following

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[38] Fransman Report, [83].

[39] It is noted that in [91] of the Attorney-General's written submissions Senator Xenophon is referred to as a *"British citizen"* and as having *"British citizenship"*. These descriptions are inaccurate.

additional submissions are made that are relevant to Senator Xenophon's particular position.

18. Senator Xenophon's connection with the relevant foreign power (the UK) is even more remote than in the ordinary case of an Australian citizen who is a subject or citizen of a foreign power only by descent. In particular:

18.1. Senator Xenophon acquired CUKC status under the law of the UK, without his knowledge, when he was born *in Australia*, by reason of the fact that his father held the status of a CUKC under UK law.

18.2. Senator Xenophon has no other relevant connection with the UK than that his father had the status of a CUKC according to UK law.

18.3. Senator Xenophon's father himself was a CUKC under UK law only because he had been born in Cyprus at a time when it was a Crown colony of the UK. Senator Xenophon's father had no (other) connection with the UK itself.

18.4. When Cyprus gained independence in 1960 — when Senator Xenophon was one year old — he retained his status as a CUKC only by reason of the most adventitious of circumstances. The *British Nationality (Cyprus) Order 1960* (SI 1960/2215), which generally removed the CUKC status of Cypriots, did not have that operation in Senator Xenophon's case, not because of any connection he or his father had with the UK but because Senator Xenophon was resident *in Australia*.[40]

18.5. At the time when Senator Xenophon was born and acquired CUKC status, and at all times when he had CUKC status according to UK law, he was not disqualified from being chosen as a senator by s 44(i) of the Constitution, because the UK was not, at that time, a *"foreign power"* for the purposes of that section.[41] To the contrary, the UK was originally the antithesis of a *"foreign power"*[42] and it is only otherwise by reason of relatively recent changes that took

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[40] *British Nationality (Cyprus) Order 1960* (UK) (SI 1960/2215), Art 1(2); Treaty Concerning the Establishment of the Republic of Cyprus, Annex D, s 3, sub-par (2)(j); Fransman Report at [34]-[54] and [73]-[75]; Xenophon Affidavit at [22.2].

[41] *Sue v Hill* (1999) 199 CLR 462 at [59], [65]) and [173]. See also *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at [25]. Note that Australian law still provided that every Australian citizen had the status of a British subject until 1 May 1987: see *Australian Citizenship Act 1969* (Cth), s 6; *Sue v Hill* at [171]; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [153].

[42] The Constitution itself bears this out by references to *"under the Crown of the United Kingdom of Great Britain and Ireland"* in the recitals; to royal succession *"in the sovereignty of the United Kingdom"* in covering clause 2; to

place as a consequence of developments that occurred outside the law courts, allowing the Constitution to be read in a new light,[43] and that require that constitutional norms must now to be traced to Australian sources.[44]

18.6. Senator Xenophon's CUKC status was later converted, without his knowledge, into BOC status. This occurred by the unilateral operation of UK law, upon the enactment of the *British Nationality Act 1981* (UK).

18.7. When Senator Xenophon became a BOC by operation of UK law in 1981, that did not make him a subject of citizen of a foreign power.

18.8. Assuming (contrary to the contention developed at in relation to Issue 3 below) that BOC status is relevantly citizenship of a foreign power for the purpose of s 44(i), Senator Xenophon *became* a subject or citizen of a foreign power by an unnoticed (and unnoticeable[45]) process of constitutional evolution which had occurred at least by the commencement of the *Australia Act 1986* (Cth). Thus the originally benign status accorded to Senator Xenophon without his knowledge by the law of the UK has called into question his qualification to sit as a senator.

18.9. Finally, as the evidence referred to in [13.13] above demonstrates, it is unclear whether the fact that Senator Xenophon was not *"registered"* as a BOC means he owed no duty of loyalty to the Queen in right of the UK. It is submitted that

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"British ships" in covering clause 5; and to a *"subject of the Queen ... under the law of the United Kingdom"* as part of a qualification to be elected to the House of Representatives before parliament otherwise provided, in s 34(ii). It is also the tenor of the convention debates, with some examples being: On the last day of the Melbourne Conference, on 14 February 1890, at p 111-112 a Loyal Address to the Crown referred to *"a great Australian ... Nation under the Crown of Great Britain ..."* and Dr Cockburn in seconding the adoption of the Address hoped that *"by that union a Jewel of unprecedented lustre will be added to the traditions of the Crown of the British Empire ..."*; On 5 March 1891 at the Sydney Convention, at p 86 Sir Alfred Deakin argued in favour of setting out *"the explicit claim to possess and exercise all the rights and privileges of citizens of the British empire ..."*; On 10 March 1891, at p 185 Mr Dibbs stated *"We are a portion of the British Crown, joined together by the most solemn ties and obligations; and we have to bear the brunt of any misfortune which may fall upon us in connection with any attack upon our shores by reason of our enemies being the common enemies of England. We have already made certain provision, partially of a federal character, to assist the Imperial Government in the protection of our shores from without; ..."*; On 2 April 1891 at p 609, Mr Cuthbert said that a foreigner, even if naturalised, stood in a different and implicitly lesser position from a British subject; At the Adelaide Convention on 31 March 1897, at p 353, Mr Howe stated *"We must remember that we have a population now in Australasia of nearly 4,000,000 souls – a population greater than America had when she was driven by the idiotic bungling on the part of the King and his Ministers to fight for and gain her independence. We have no such cause – and under the British crown we never shall. At the present moment we have Australasia enjoying greater liberties under our Constitution than the people of the great American Union have under theirs, and not only that, but we are bound by the crimson thread of kinship to one of the greatest nations the world has ever seen."*; Interestingly on 21 February 1898 at the Melbourne Convention, at p 1203, Sir John Forrest asked during a tariff debate whether Great Britain was a *"foreign country"*, to which Sir Edward Braddon's response of *"[f]oreign compared with the colonies of Australasia"* was met with Forrest's retort *"Not a bit of it"*.

[43] *New South Wales v The Commonwealth* (2006) 229 CLR 1 at [193]; *Victoria v The Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353 at 396-397.

[44] *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at [66], referring explicitly to *Sue v Hill* (1999) 199 CLR 462.

the better view is that a BOC owes no such a duty in the absence of registration, because a pre-existing allegiance *qua* unregistered BOC would render the process of requiring an oath to establish allegiance upon registration superfluous.[46]

19. It is submitted that, as a matter of fact and legal effect, Senator Xenophon's connection with the UK is thus so remote that the domestic law of Australia will not recognise his status as a BOC as rendering him *"subject or citizen of a foreign power"* within the meaning of s 44(i), thus overcoming the disqualifying effect (whether or not that is so for all Australian citizens who hold foreign citizenship only by descent).

10 ***Issue 2: A person with only an unknown foreign citizenship due to a slender connection with a foreign power need take no steps to renounce it***

20. There is no authority which addresses how s 44(i) applies to a person who is unaware they are a subject or citizen of a foreign power. In *Sue v Hill*, Ms Hill knew that she was a British subject and citizen.[47] In *Sykes v Cleary* the Court considered the position of two candidates, both of whom had been naturalised as Australian citizens and knew they had been citizens of a foreign power.

21. It was in this context that the majority in *Sykes* concluded that a person who held dual citizenship would not be disqualified by s 44(i) from being chosen as a senator or member of the House of Representatives, provided they had taken *"reasonable steps to*
20 *renounce that nationality"*.[48] It is clear that the Mason CJ, Toohey and McHugh JJ, at least, used the expression *"reasonable steps"* interchangeably with *"all reasonable steps"*.[49] This was treated as involving an inquiry as to what would reasonably be expected of a reasonable person in the position of the candidate.[50]

22. Mason CJ, Toohey and McHugh JJ decided that what amounted to taking reasonable steps would *"depend upon the circumstances of the particular case"* including the

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[45] cp *Sue v Hill* (1999) 199 CLR 462 at [291].

[46] This clearly differs from taking an oath with respect to fulfilling the obligations of a particular public office.

[47] (1999) 199 CLR 462 at [102]-[104].

[48] *Sykes v Cleary* (1992) 176 CLR 77 at 107-108; see also at 128, 131 and 139.

[49] (1992) 176 CLR 77 at 107-108.

[50] (1992) 176 CLR 77 at 107-108, 128, 131 and 139.

"situation of the individual" and the *"extent of the connection"*[51] with the foreign state. Their Honours thus contemplated that what, if anything, would need to be done by a person with dual citizenship to avoid disqualification under s 44(i) would vary from case to case. Given the facts of *Sykes*, it is unsurprising that their Honours did not directly address the situation of a person who was unaware that they held, or had ever held, foreign citizenship. However, the *"situation of the individual"* must include the state of the individual's knowledge as to whether they were or had been a citizen of a foreign power, and might also include his or her knowledge as to matters that would put a reasonable person on notice that they may be a citizen of a foreign power.

10 23. This was made explicit by Dawson J, who, as a member of the majority, observed that the circumstances by which the issue of renunciation should be adjudged included *"the person's knowledge of his foreign nationality and the circumstances in which the foreign nationality was accorded to that person"*.[52] This statement recognises that there may be circumstances where, because of a want of knowledge, or because of the circumstances in which foreign nationality was conferred on a particular person, it may be reasonable to take no step to renounce it.

24. It is submitted that, where a person *does not in fact know* that they are a citizen of a foreign power then — at least where the person is *not aware of facts which would put a reasonable person in their position, and with their particular state of knowledge, on*
20 *notice* that, according to foreign law, they are a citizen a foreign power — that person is not required by s 44(i) to take any steps to renounce that citizenship.

25. This is no more than the logical extension or extrapolation of the *"reasonable steps"* requirement to a person who (reasonably) does not know that they hold foreign citizenship.

26. Likewise, once a person becomes aware that foreign law accords them the status of a citizen — or, perhaps, becomes aware of facts that would put a reasonable person on notice that the law of a foreign country may accord them that status — they will satisfy the requirement to take *"reasonable steps"* to renounce that citizenship if they take reasonable steps to renounce within a reasonable time after becoming aware of the

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[51] *Sykes v Cleary* (1992) 176 CLR 77 at 108.

[52] *Sykes v Cleary* (1992) 176 CLR 77 at 131.

relevant fact or facts.

27. The requirement to act reasonably, or take *"all reasonable steps"*, must, in an appropriate case such as this one, be satisfied by the person taking no steps because no posited step is a reasonable one (at least until the person becomes aware of their status). This conclusion is supported by the following considerations of principle.

28. *First*, s 44 forms part of a Constitution cast in broad and general terms, intended to apply to varying conditions which the development of our community must involve, and such general terms should be interpreted as governed by discerned constitutional objects and purposes.[53] The object and purpose of se 44(i) was *"designed to ensure"* that *"members of Parliament did not have a split allegiance and were not, as far as possible, subject to any improper influence from foreign governments"*. The *"whole purpose"* of s 44(i) *"is to prevent persons with foreign loyalties or obligations from being members of the Australian Parliament"*.[54]

29. A person who does not in fact know (and is not reasonably on notice) that they are a foreign national cannot be under any *"split allegiance"* by reason of a status imposed on them without their knowledge by the law of an unknown foreign power. Brennan J observed in Sykes that s 44 is *"not concerned with the operation of a foreign law that is incapable in fact of creating any sense of duty, or in enforcing any duty, of allegiance or obedience to a foreign power"*.[55] If s 44 is not concerned with a *known* but unwanted and inextinguishable allegiance claimed by a foreign law, *a fortiori* it is not concerned with an *unknown* and unwanted allegiance claimed by a foreign law.

30. *Secondly*, in other areas of law where reasonableness constitutes the touchstone, it is

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[53] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [19]; *Eastman v The Queen* (2000) 203 CLR 1 at [134]-[139]; *McGinty v Western Australia* (1996) 186 CLR 140 at 221; *Commonwealth v Tasmania (Tasmanian Dam case)* (1983) 158 CLR 1 at 127-128; *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 197 at 313-314; *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 68; *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 282; *Worthing v Rowell Muston Pty Ltd* (1970) 123 CLR 89 at 96; *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226; *New South Wales v The Commonwealth (Bank case)* (1948) 76 CLR 1 at 332-333; *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81; *Australian Tramways Employees Assoc v Prahran and Malvern Tramway Trust* (1913) 17 CLR 680 at 701 and 711; *Jumbunna Coal Mine NL v Victorian Coal Miners' Assoc* (1908) 6 CLR 309 at 367-368.

[54] *Sykes v Cleary* (1992) 176 CLR 77 at 107 and 127 (the former reference quoting with apparent approval from *The Constitutional Qualifications of Members of Parliament*, Report by the Senate standing Committee on Constitutional and Legal Affairs (1981), at [2.14]). The purpose of ensuring allegiance is consonant with Art 2, s 1 of the United States' Constitution (the *"natural born Citizen"* clause), which was interpreted in *Lynch v Clarke* 1 Sand Ch 583 at 663 (1844) as ensuring that those seeking office as President were *"born within the dominions and allegiance of the United States"*.

[55] (1992) 176 CLR 77 at 113.

also recognised that, in certain circumstances, a duty to act reasonably may be discharged by the taking of no steps at all. For example, in *Vairy v Wyong Shire Council*, Hayne J said of the duty of care owed in the tort of negligence:[56]

> The inquiry into breach, although made after the accident, must attempt to answer what response a reasonable person, confronted with a foreseeable risk of injury, would have made to that risk. And one of the possible answers to that inquiry must be "nothing".

31. *Thirdly,* a *narrower* construction of s 44(i), such that its disqualifying effect is applicable only where disqualification would serve the mischief to which it was directed (which supports the notion that *"no steps"* may constitute *"reasonable steps"*) is implied by other aspects of its textual and structural setting. These include the following:

    31.1. The arguments about certainty in [64]-[66] of the written submissions of the Attorney-General for the Commonwealth.

    31.2. The position of s 44 as part of the structure of representative government. It is the requirement in s 7 of the Constitution that there be a *"true choice"*[57] in the election of senators. That choice is enhanced by encouraging without impediment candidacy from a wide potential field of competent persons, which would be undermined if s 44(i) were held to disqualify potential candidates beyond the mischief which it is concerned to address.

    31.3. The mischief of split allegiance, to which s 44(i) is directed, is also addressed by the requirement in s 42 of and Schedule 1 of the Constitution, which require an oath of loyalty from members of Parliament, which further alleviates any need to read s 44(i) broadly.

    31.4. Similarly, ss 7 and 24 imply freedom of political communication. The fact that any asserted lack of allegiance can be tested in an election campaign itself, at the ballot, and by other political means, also tells against a broad reading of s 44(i).

32. The submission above that a lack of knowledge had the effect that taking *"no steps"* discharged an obligation to take *"reasonable steps"*, is reinforced when combined with the slenderness of Senator Xenophon's connection with the UK as identified in [18]

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[56] (2005) 223 CLR 422 at [124]. See also *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound (No 2))* [1967] 1 AC 617 at 642; *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 45-46; *New South Wales v Fahy* (2007) 232 CLR 486 at [7]. [58]. and [123].

above, given that that indicium was recognised in *Sykes* as also bearing on the content of the *"reasonable steps"* requirement.[58]

33. In all the circumstances it was reasonable for Senator Xenophon to take no steps in respect of his BOC status until he was first put on notice, in August 2017, that he *may* hold that status, at which time he took all reasonable steps, as quickly as reasonably practicable, to renounce that status.

34. Having become aware of the possibility that, according to UK law, he had the status of a BOC, Senator Xenophon took not only reasonable, but prompt and effective, steps to renounce that status. He remains, and has at all times remained, capable of sitting as a senator for the purposes of s 44(i).

Issue 3 British Overseas Citizenship is so attenuated as to be outside the scope of s 44(i)

35. If the submissions as to voluntary acquisition and slender connection are not accepted,[59] Senator Xenophon contends that he, as an unregistered BOC, has such attenuated rights and privileges, even under the law of the UK, that he falls outside the scope of s 44(i). For a consideration of this argument the words *"citizen"* and *"subject"* are *"constitutional expressions"*[60] and must be construed as part of the municipal law of Australia,[61] to ascertain their defining characteristics or minimum content (**minimum content**).

36. In addressing the scope of minimum content it is noteworthy that s 44(i) is the only provision of the Constitution that refers to the concept of citizenship, whether of a foreign power or otherwise. In other contexts, the Constitution uses the terminology of *"the people"*;[62] *"subjects of the Queen"*;[63] and *"the electors"*.[64]

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[57] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

[58] *Sykes v Cleary* (1992) 176 CLR 77 at 108 (*"What is reasonable will turn on the situation of the individual, the requirements of the foreign law and the extent of the connexion between the individual and the foreign State of which he or she is alleged to be a subject or citizen"*).

[59] For the reasons submitted above in relation to issue 2, a merely slender connection with a foreign power will usually mean that a person is outside the scope of s 44(i). It will be a rare situation, therefore, that an attenuated form of juridical status referred to by the law of a foreign power as a *"citizenship"*, but which may not be citizenship as referred to in s 44(i), will either be sought by a person who is then a candidate election to Parliament, or will be voluntarily acquired by that person, in the sense referred to in the Commonwealth Attorney-General's submissions.

[60] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 141; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [18].

[61] *Sykes v Cleary* (1992) 176 CLR 77 at 110.

[62] Constitution, ss 3, 5, 7, 15, 24, 25, 53, 89 and 105, and covering clauses 3 and 5.

37. While different views have been expressed, concerning the existence[65] and content[66] of a constitutionalised notion of citizenship or constitutional nationality[67] with respect to Australian citizens, it is *non constat* that the content of such a notion (if it exists) would apply to the words *"citizen"* or *"subject"* when used in relation to a foreign power.

38. The meanings of *"citizen"* and *"subject"* are informed by the other limbs of s 44(i). In the context of the related words *"allegiance, obedience, or adherence"* (as fully discussed in the Commonwealth Attorney-General's submissions at [51]), a concept of reciprocity of loyalty must necessarily be present as part of the minimum content.

39. Further, it is clear from the phrase *"entitled to the rights or privileges of a subject or citizen of a foreign power"* that s 44(i) contemplates the statuses of *"citizen"* and *"subject"* as carrying with them certain, albeit unspecified, rights or privileges. This is supported in addition by the drafting choice not to use the word *"alien"*. Alienage merely entailed as its central characteristic owing obligations of allegiance to a foreign sovereign and does not necessarily carry with it an additional requirement that rights and privileges (of any description) be bestowed by the foreign power.[68] If rights and privileges were not an essential feature of the concepts employed in s 44(i), the obvious choice in drafting would have been to replicate the terminology in s 51(xix) of the Constitution. (This observation also, of course, supports the construction of s 44(i) advanced by the Attorney-General for the Commonwealth.)

40. The rights and privileges attaching to the status of *"subject"* or *"citizen" simpliciter* are the same as referred to by the subsequent phrase *"rights or privileges of a subject or citizen"* because this delineates persons who are not foreign nationals but *are* afforded

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[63] Constitution, ss 34(ii) and 117.

[64] Constitution, s 128.

[65] McHugh J in *Hwang v The Commonwealth* (2005) 80 ALJR 125 at [11], considered that the phrase *"people of the Commonwealth"* derived from a constitutional notion of Australian citizenship; and McHugh J and Callinan JJ were of the view that there was no legislative power to remove citizenship in certain circumstances, in *Singh v The Commonwealth* (2004) 222 CLR 322 at [140], [317] and [322].

[66] For example, rights to access the seat of government, sea ports, treasury, land and revenue offices, the courts of justice, and rights of movement and due participation in the activities of the nation: *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 108, 109 and 113; also the right of entry and residence for a citizen: *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 469.

[67] *Koroitamana v The Commonwealth* (2006) 227 CLR 31 at [56].

[68] *Singh v The Commonwealth* (2004) 222 CLR 322 at [201].

the protection of a foreign power *as though* they were subjects or citizens.[69]

41. Once it is accepted that the status of *"subject or citizen of a foreign power"* must imply the existence of (unspecified) rights and privileges, an identification of the minimum content of those rights and privileges invites attention to the rights and privileges generally attaching to the statuses of *"subject"* and *"citizen"* at the time of federation.

42. The Report of Professor John Mangan[70] attaches research by Senator Canavan, which identifies that while 23 percent of Australians were born overseas at the time of federation,[71] just 3.6 per cent were born in countries that were *"not part of Australia for the purposes of qualifying for citizenship"*.[72] Further, Annexure C of Senator Canavan's research identifies that with the exception of populations of Germans (38,352) and Chinese (29,907) by birth, the overwhelming clusters of the nearly 3.8 million population were born as follows: Australia (2,908,303 (not including Aboriginal persons)), New Zealand (25,788), England and Wales (393,321), Scotland (101,753) and Ireland (184,085). The cumulative numbers for persons born in other parts of the British Empire, the United States, and the significant countries in Europe, imply that the kinds of *"rights"* and *"privileges"* that the founding fathers must have had in mind,[73] were, at least primarily, those ultimately deriving from the British, and to an extent European, legal systems.

43. By the time of federation, common notions of a citizenship had been adopted in the United States, which derived from seventeenth and eighteenth century views about *Magna Carta*. Royal charters granted to promoters of settlements in Britain's American colonies always included a provision declaring to the effect that all persons, *"being our subjects"* inhabiting the colony, and their children born there, would *"... have and enjoy all liberties, franchises and immunities within any of our other dominions to all intents and purposes as if they had been abiding and born within this our realm of England or*

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[69] *Sykes v Cleary* (1992) 176 CLR 77 at 110. See also the written submissions of the Attorney-General for the Commonwealth at [56]-[58].

[70] **JCB2:8**.

[71] This had fallen from 32 percent in 1891.

[72] Senator Canavan's research, annexed to the Mangan Report: *The Heritage of the Australian Population Over Time*, p 1.

[73] It was a British concept that the liberties derived by reason of being a subject, were implied by a *"birth right"* to the liberties guaranteed by the common law: BH McPherson, *Reception of English Law Abroad*, Supreme Court of Qld Library, 2007, at pp 234 *et seq*. In the Melbourne Convention on 2 March 1898, Mr Symon at p 1764 stated, *"we ought not, under this Constitution, to hand over our birth right as citizens to anybody, Federal Parliament or any one else ..."*.

any other of our ... dominions".[74] At or soon after independence most of the American states adopted these *Magna Carta* style safeguards in their constitutions and organic laws. These ideas were adopted around the British Empire, as well as in the United States.[75]

44. Central to the concept of the privileges of a subject or citizen, were rights of due process of law from Ch 29 of *Magna Carta* as well as he Six Statutes.[76] While variation existed, the rights and privileges contained, as a minimum content, rights not to be subject to deprivation of liberty or property without due process of law.

45. Further, being a citizen or subject axiomatically entails a right of entry into the territory of the sovereign state, both in the British legal tradition, and in international law. So much is implied by the relationship between the subject and the Crown, or citizen and sovereign state, based upon reciprocal duties of allegiance and protection, the latter of which ordinarily cannot be discharged by removing the citizen or subject from their homeland.[77] The vulnerability of an alien to merely conditional entry or residence, and to expulsion, both in the British legal tradition and in international law,[78] is the antithesis which proves its obverse.

46. A BOC such as Senator Xenophon lacks the essential characteristics of rights of entry and residence: see [13.8] to [13.15] above. An unregistered BOC also lacks (or at least does not clearly enjoy) the reciprocity of allegiance and protection. The issuance of a passport to a non-citizen of the UK, requiring registration of a BOC, is both exceptional and a precondition to the entitlement to receive consular protection from the government of the UK.[79] Being resident outside the United Kingdom and Northern Ireland, generally UK law did not apply to Senator Xenophon. Thus at no time did Senator Xenophon enjoy, even under UK law, rights reflecting the minimum content of what it

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[74] BH McPherson, *Reception of English Law Abroad*, Supreme Court of Qld Library, 2007, at pp 208-209.

[75] BH McPherson, *Reception of English Law Abroad*, Supreme Court of Qld Library, 2007, at pp 215-216.

[76] The relevant legislation is, as noted by McPherson, set out in *Adler v District Court of NSW* (1990) 19 NSWLR 317 at 347-348.

[77] While in dissent on other grounds, a powerful collection of authority supporting this proposition is identified by Lord Bingham of Cornhill in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453 at [70]. While in the context of Australian citizenship, see also *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 469; cp *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518 at 580.

[78] *Robtelmes v Brenan* (1906) 4 CLR 395 at 400.

[79] JM Jones, *British Nationality Law*, Rev Ed, 1956 Clarendon, at 191.

was to be a *"subject or citizen of a foreign power"*. He enjoyed no right of entry and residence, no duty of allegiance, and no protection due from the UK government, at least without registration. Nor was he generally subjugated to the laws of the UK in his day to day life.

47. In consequence, Senator Xenophon was not, by reason of his status as an unregistered BOC, a *"subject or citizen of a foreign power"* within the meaning of s 44(i).

Issue 4: Consequences if Senator Xenophon was incapable of being chosen as a senator

48. Senator Xenophon adopts [92]-[93] of the written submissions of the Attorney-General for the Commonwealth. In the event that he is incapable of being chosen or sitting as a senator, there is no suggestion that there would be any distortion of voters' intentions such as to void the election. In the event that the *amicus* contends that there would be distortion, these matters will be dealt with in a reply.

Part VI: Relevant provisions

49. The applicable constitutional provision is s 44(i) of the Constitution, which provides:

> **Disqualification**
>
> Any person who:
>
> (i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; ...
>
> ...
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

Part VII: Orders Sought

50. It is respectfully submitted that the questions in the reference by the Senate be answered as follows:

Question (a): No, there is no vacancy in the representation of South Australia in the Senate for the place for which Senator Xenophon was returned.

Question (b): Unnecessary to answer.

Question (c): Unnecessary to answer.

Question (d): No order is required, as Kiefel J has ordered that the Commonwealth should pay Senator Xenophon's costs of the proceedings on a party-party basis.

51. In the alternative, if the answer to question (a) is *"yes"*, then question (b) should be answered as follows:

Question (b): The vacancy should be filled by a special count of the ballot papers. Any directions necessary to give effect to the conduct of the special count should be made by a single justice.

Part VIII: Length of oral argument

52. It is estimated that 40 minutes to an hour will be required for the presentation of Senator Xenophon's argument, with 10 minutes in reply.

per .....

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