IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY **NO C 32 OF 2017**

RE SENATOR KATY GALLAGHER
Senate reference under s 376 of the
Commonwealth Electoral Act 1918 (Cth)

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ORAL OUTLINE OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

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PART I PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Principles established by *Re Canavan*

2. Five relevant principles emerge from *Re Canavan* (2017) 91 ALJR 1209.

3. ***First***, s 44(i) should be given its natural and ordinary meaning: **AG [12]**.

   - *Re Canavan* at [19], [27], [47], [48], [52], [57], [61].

4. ***Second***, s 44(i) turns principally on a person's status under foreign law, as it is directed to the rights and obligations under foreign law that are reciprocal upon that status: **AG [13]**.

   - *Re Canavan* at [21], [23], [37]-[38], [71]-[72]. See also [20], [26], [45].

5. ***Third***, a candidate's "reasonable efforts" to comply with s 44(i) are not relevant: **AG [7]-[10]**.

   - *Re Canavan* at [61]. See also [45].

6. ***Fourth***, the exception to the ordinary and natural meaning of s 44(i) arises from the constitutional imperative that Australian citizens not be "irremediably prevented" by foreign law from being elected to the Parliament: **AG [13]-[15]**.

   - *Re Canavan* at [39]-[44], [46], [72].

7. ***Fifth***, the constitutional imperative gives rise to an implied exception to s 44(i) to the extent necessary to prevent Australian citizens from being "irremediably prevented" by foreign law from being elected to the Parliament. Otherwise, s 44(i) operates in accordance with its terms. In deciding whether the exception applies, the question is whether the relevant foreign law, in its terms or operation, makes it impossible, or not reasonably possible, for a person to renounce foreign citizenship. If so, the foreign law will not be recognised to that extent: **AG [16]-[18], [20]**.

   - *Re Canavan* at [72], then [68], [69] (also [44], [46]).

8. English law does not make it impossible, or not reasonably possible, for a person to renounce British citizenship. The exception to s 44(i) is therefore not engaged.

Applying the ordinary meaning of s 44(i), Senator Gallagher was disqualified: **AG [33]-[36]**.

- *Re Canavan* at [69]; CB Tab 7, pp 186, 203-205, 211.

Senator Gallagher's submissions should be rejected

9. ***First***, Senator Gallagher erroneously treats the exception as the rule (Gallagher [21]). This is achieved by (i) focusing on one sentence in [72] of *Re Canavan* and ignoring the balance of the paragraph and the reasons; and (ii) reading [72] as though it were a statutory provision: **Reply [2], [4]**.

10. ***Second***, Senator Gallagher's "constitutional imperative" is unrecognisable from the concept deployed in *Re Canavan.* She does not acknowledge or address the phrase "irremediable prevention". She assumes that the exception is engaged by any foreign law that has the effect that a particular individual cannot run in a particular election (Gallagher [26]). This is inconsistent with s 44(i)-(iv). It is not disqualification, but irremediable disqualification, that is offensive to the constitutional imperative. Moreover, ss 16 and 34 of the Constitution are subject to s 44 and cannot qualify s 44: **Reply [2]-[3]**.

- *Re Day (No 2)* (2017) 91 ALJR 518 at [74].

11. ***Third***, Senator Gallagher's submissions are inconsistent with the recognition given in the authorities to the role of foreign law. The concept of disregarding or refusing to recognise the acts of foreign officials, or foreign laws that depend on such acts, involves a false and flawed dichotomy (Gallagher at [29], [37], [44], [49]). Further, the reasons advanced by Senator Gallagher for doing so are unpersuasive: **Reply [5]-[8]**.

12. ***Fourth***, the Attorney-General's construction is productive of certainty because renunciation is generally required to be complete before nomination. The recognition of acts or decisions of foreign officials cannot reasonably be equated with arbitrary or uncertain decision-making (Gallagher [28], [44], [45], [49]). By contrast, Senator Gallagher's test would be productive of uncertainty. It would leave extensive scope for debate about the "reasonable requirements" of foreign law, and whether all such requirements had been complied with, as the facts of this case demonstrate. Further,

and contrary to recent authority, it would permit foreign citizens to be chosen and sit in the Parliament, potentially for considerable periods of time: **Reply [12]-[13]**.

- *Re Barrow* (2017) 91 ALJR 1240 at [4]-[5], [7]; *Sykes v Cleary* (1992) 176 CLR 77 at 99-100; *Re Canavan* at [59].

Alternatively, Senator Gallagher failed to take all steps reasonably required by British law and within her power to renounce prior to nomination

13. First, Senator Gallagher did not allow sufficient time for her renunciation declaration to be received and processed before the date of nomination or seek expedition: **AG [38]-[48].**

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- CB Tab 7, SOAF [22], [32], [44], [46]-[47]; CB Tab 6, Fransman [117].

14. Second – if the first reason is not sufficient – Senator Gallagher did not provide all the required documentation to the Home Office by the date of nomination. Senator Gallagher's ACT birth certificate does not prove that her father was a British citizen or that her parents were married at the time of her birth. Senator Gallagher reasonably should have provided direct evidence of those matters, in the form of her father's birth and marriage certificates, which were within her possession and power, and which the Guide RN and the Nationality Instructions indicated should be provided: **AG [49]-[56]**.

- CB Tab 7, SOAF [39]-[40], Form RN pp 254-259; Guide RN pp 245-252;

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Nationality Instructions 227-228; Letter from Home Office p 268.

- *Harrison v Secretary of State for the Home Department* [2003] EWCA Civ 432 at [34].

Dated: 14 March 2018

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