

Eligibility for Election to the Commonwealth Parliament: The Coming-of-Age of Section 44 of the Australian Constitution

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In 2017, Australia played host to ‘the world's most ridiculous constitutional crisis’.ⁱ Section 44 of the *Australian Constitution*, which had been invoked in only a handful of cases to find candidates ineligible to be chosen to sit in the Commonwealth Parliament,ⁱⁱ was suddenly at the forefront of national attention. So was the High Court, sitting as the Court of Disputed Returns, which by the end of 2017 had ruled that 8 of the 10 individuals it had examined were ineligible to have been elected at the 2016 election.ⁱⁱⁱ A further three persons have been referred to the High Court for consideration in 2018, with all three conceding their ineligibility.^{iv} Also, without reference to the Court, John Alexander resigned on the basis of ineligibility. Accordingly, by the end of 2017, it appears that 12 people have been confirmed to be ineligible, out of 226 members of the Parliament. Yet more politicians (and their potential replacements) may still have questions surrounding their eligibility to be resolved in 2018. How did we end up in this remarkable situation?

Section 44 of the Australian Constitution is an apparently simple provision which lists a series of matters that render a person ‘incapable of being chosen or of sitting as a senator or a member of the House of Representatives’. These include:

- (i) Where a person ‘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’;
- (ii) Where a person ‘has been convicted and is under sentence, or subject to be sentenced, for any offence punishable ... by imprisonment for one year or longer’;
- (iii) Being an undischarged bankrupt or insolvent;
- (iv) Holding ‘any office of profit under the Crown’;
- (v) Having ‘any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth’.

Section 44 is intended to reinforce our elected representatives’ ‘duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community’.^v

The decisions in early 2017 that Rodney Culleton and Bob Day were ineligible depended upon sub-ss 44(ii) and (v) respectively.^{vi} The ensuing crisis has predominantly concerned whether s 44(i) renders ineligible dual citizens (that is, persons who are citizens of another nation as well as of Australia).

Variations on three potential approaches to s 44(i) ineligibility were suggested in respect of the seven persons referred to the Court in *Re Canavan*. In essence, they would apply the provision:

- (i) in all cases where a person holds ‘citizenship of a foreign power’ (subject to a limited exception discussed below);^{vii}

- (ii) only where foreign citizenship was voluntarily obtained/chosen, or voluntarily/knowingly retained;^{viii}
- (iii) only where a person had knowledge that would cause a reasonable person in their situation to inquire as to whether they held foreign citizenship.^{ix}

Other than the first alternative, each of these approaches 'departs substantially from the text' of s 44(i),^x by limiting its application to particular sets of circumstances not expressed in the sub-section. In so doing, each draws on the dissenting approach of Deane J in *Skyes v Cleary*, where his Honour expressed the view that s 44(i) should be interpreted as 'impliedly containing a ... mental element'.^{xi}

The unanimous High Court in *Re Canavan* adopted the first approach to the interpretation of s 44(i). Their Honours relied upon the following reasons:

- (i) the text, which deals with 'allegiance, obedience, or adherence' separately from having the status of 'a subject or a citizen' (implying that the first covers situations of voluntary allegiance, whereas the second is broader)^{xii} and which 'is cast in peremptory terms';^{xiii}
- (ii) its purpose, which was said to be 'to ensure "that members of Parliament did not have a split allegiance"',^{xiv} not merely by reference to 'the person's subjective feelings of allegiance',^{xv} but also objectively where the split arises from the existence of a legal 'duty to a foreign power as an aspect of the status of citizenship';^{xvi}
- (iii) its drafting history, which their Honours concluded demonstrated that s 44(i) was not addressed merely to situations where there has been 'an "act" done by a person whereby the person became a ... [foreign] citizen';^{xvii}
- (iv) the consequence of the alternative interpretation, which by introducing a mental element would lead to 'the need for an investigation into the state of mind of a candidate',^{xviii} which would in turn lead to 'uncertainties [which] are apt to undermine stable representative government';^{xix}
- (v) that, although a strict application of s 44(i) might be thought to be harsh, 'nomination for election is manifestly an occasion for serious reflection' by a person as to their eligibility.^{xx}

One unusual aspect of the application of s 44(i) is its reliance on foreign law. As the Court explained in *Re Canavan*:

'Whether a person has the status of ... a citizen of a foreign power necessarily depends upon the law of the foreign power ... because it is only the law of the foreign power that can be the source of the status of citizenship or of the rights and duties involved in that status'.^{xxi}

This should not be a surprise – it is hard to see how it could be otherwise, and this is also consistent with the approach of international law that '[i]t is for each State to determine under its own law who are its nationals'.^{xxii} This is also, practically speaking, why so many people have managed to fall foul of s 44(i) – some nations have relatively generous citizenship laws, such that citizenship can be inherited from a parent (or grandparent) by operation of law, without there being any direct personal involvement of a individual with that country.

This role of foreign law is, however, the subject of the only exception allowed by the High Court. Recognising that there is a 'constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government', the High Court held that s 44(i) would not disqualify a person:

'Where it can be demonstrated that the person has taken all steps that are *reasonably required* by the foreign law to renounce his or her citizenship and within his or her power'.^{xxiii}

This exception did not avail any of the persons found to be ineligible in 2017.

The approach to s 44(i) taken by the unanimous High Court in *Re Canavan* led to findings of ineligibility for five of the seven persons whose situation was considered, as the Court was satisfied they held 'citizenship of a foreign power'. The two persons held to be eligible were found not to hold 'citizenship of a foreign power': the Court concluded that Matthew Canavan was not, in fact, a citizen of Italy;^{xxiv} and that Nick Xenophon was only entitled to a status under UK law known as 'British Overseas Citizenship'^{xxv} which the Court found 'distinctly does not confer the rights or privileges of a citizen as that term is generally understood'.^{xxvi}

The Court subsequently held in *Re Nash [No 2]*^{xxvii} that Hollie Hughes, who would have been elected as a Senator on the special recount of papers held as a result of the ineligibility of Fiona Nash, was also ineligible, this time under s 44(iv). One year after she was *not* elected, Hughes was appointed a part-time member of the Administrative Appeals Tribunal. Thus, from 1 July to 27 October 2017 (when she resigned, within one hour of the Court's ruling that Nash was ineligible), Hughes held an "office of profit under the Crown" within the meaning of s 44(iv).^{xxviii} The issue before the Court was *when* the *process* of 'being chosen' (within the meaning of s 44) concluded, which would determine whether Hughes' position at the Tribunal resulted in her ineligibility.

In *Re Canavan*, the Court had concluded that the process *commenced* at the date of nomination.^{xxix} In *Re Culleton (No 2)*, Kiefel, Bell, Gageler and Keane JJ wrote that the process *continued* 'until the return of the writs for the election, as that is the time at which the electoral process is complete'.^{xxx} *Re Nash [No 2]* clarified that this statement must refer to a *valid* return of the writs, and that the process of 'being chosen' will 'remain constitutionally incomplete until' it results 'in the determination as elected of a person who is qualified to be chosen and not disqualified from being chosen'.^{xxxi} Accordingly, as the process of 'being chosen' had not been completed, Hughes' enjoyment of an 'office of profit under the Crown' (more than a year after the election) rendered her ineligible to be elected in the special count. The Court added, '[I]f it might seem harsh or unduly technical,' that Hughes' acceptance of a position at the Administrative Appeals Tribunal:

'was a voluntary step which she took in circumstances where reference by the Senate to the Court of Disputed Returns of a question concerning whether a vacancy existed in the representation of New South Wales in the Senate by reason of the disqualification or lack of qualification of a senator who had been returned as elected was always a possibility. By choosing to accept the appointment for the future, Ms Hughes forfeited the opportunity to benefit in the future from any special count of the ballot papers that might be directed as a result of such a vacancy being found.'^{xxxii}

The Court's attempt to demonstrate that this result was not harsh or unduly technical is not especially convincing. Its reasons for rejecting the submissions of the Commonwealth and Hughes that the process of 'being chosen' concludes on polling day drew on several unsatisfactory results that such an interpretation would have.^{xxxiii} More than this, however, the fundamental reason for the Court's decision that the process of 'being chosen' was so extensive lies in its acceptance of the point made in *Vardon v O'Loughlin* in 1907 that: 'The election is either valid or invalid. If invalid ... the case is to be treated for all purposes, so far as regards the mode of filling the vacancy, as if the first election had never been completed'.^{xxxiv} So, the Senate election in New South Wales which commenced at the close of nominations on 9 June 2016 (following dissolution of both Houses of the Parliament on 9 May 2016), and reached its zenith on polling day on 2 July 2016, continued at least until Gageler J declared that Jim Molan had been elected as a Senator on 22 December 2017.^{xxxv}

The big question that must now be confronted is whether s 44 of the *Australian Constitution* should be amended – with all the difficulties a constitutional referendum entails – and/or whether other steps should be taken to deal with issues of eligibility? Answering this question must be left for another day. What this note has shown is that the High Court, in its decisions on s 44 in 2017, has demonstrated that it will interpret the provision strictly as it stands. If s 44 has become inappropriate in the modern globalised world, or if it reflects a legitimate concern but deals with it in a manner no longer thought ideal, the High Court has made clear that responding to any need for change is a matter for the Parliament and, ultimately, the Australian people.

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ⁱ David Fickling, 'The World's Most Ridiculous Constitutional Crisis' (Bloomberg) <<https://www.bloomberg.com/view/articles/2017-08-16/australia-faces-the-world-s-most-ridiculous-constitutional-crisis>>.

ⁱⁱ See, eg, *Sykes v Cleary* (1992) 176 CLR 77; *Free v Kelly (No 2)* (1996) 185 CLR 296; *Sue v Hill* (1999) 199 CLR 462. See generally Matthew Stubbs (ed), Jack Richardson, *Australia's Constitutional Government* (LexisNexis, 2016) 78-81.

ⁱⁱⁱ Rodney Culleton (*Re Culleton [No 2]* (2017) 341 ALR 1); Robert Day (*Re Day [No 2]* [2017] HCA 14); Barnaby Joyce, Scott Ludlam, Larissa Waters, Malcolm Roberts, and Fiona Nash (*Re Canavan* [2017] HCA 45); and Hollie Hughes (*Re Nash [No 2]* [2017] HCA 52).

^{iv} Stephen Parry, Jackie Lambie and Skye Kakoschke-Moore (*Re Parry* [2017] HCATrans 254 (8 December 2017)).

^v *R v Boston* (1923) 33 CLR 386, 400 (Isaacs and Rich JJ) (emphasis in original); cited in *Re Day [No 2]* [2017] HCA 14, [49] (Kiefel CJ, Bell and Edelman JJ), [179] (Keane J), [269] (Nettle and Gordon JJ).

^{vi} Associate Professor Stubbs examined these decisions in an article in the July 2017 edition of the *Bulletin*.

^{vii} *Re Canavan* [2017] HCA 45, [13] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

^{viii} *Ibid* [14], [16].

^{ix} *Ibid* [17].

^x *Ibid* [13].

^{xi} (1992) 176 CLR 77, 127.

^{xii} *Re Canavan* [2017] HCA 45, [20]-[23].

^{xiii} *Ibid* [61].

^{xiv} *Ibid* [24], quoting *Sykes v Cleary* (1992) 176 CLR 77, 107 (Mason CJ, Toohey and McHugh JJ).

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- ^{xv} *Re Canavan* [2017] HCA 45, [25].
- ^{xvi} *Ibid* [26], quoting *Sykes v Cleary* (1992) 176 CLR 77, 109-10 (Brennan J).
- ^{xvii} *Re Canavan* [2017] HCA 45, [35].
- ^{xviii} *Ibid* [48].
- ^{xix} *Ibid* [54].
- ^{xx} *Ibid* [60].
- ^{xxi} *Ibid* [37].
- ^{xxii} *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 179 LNTS 89 (entered into force 1 July 1937) art 1.
- ^{xxiii} *Re Canavan* [2017] HCA 45, [72] (emphasis added). Examples of potentially unreasonable requirements are given at [69].
- ^{xxiv} *Ibid* [86].
- ^{xxv} *British Nationality Act 1981* (UK) s 26.
- ^{xxvi} *Re Canavan* [2017] HCA 45, [134].
- ^{xxvii} [2017] HCA 52.
- ^{xxviii} *Ibid* [9] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).
- ^{xxix} *Re Canavan* [2017] HCA 45, [3].
- ^{xxx} [2017] HCA 4, [13].
- ^{xxxi} *Re Nash (No 2)* [2017] HCA 52, [39]
- ^{xxxii} *Ibid* [45].
- ^{xxxiii} *Ibid* [21]-[43].
- ^{xxxiv} *Vardon v O'Loughlin* (1907) 5 CLR 201, 208-09 (Griffith CJ, Barton and Higgins JJ).
- ^{xxxv} *Re Nash* [2017] HCATrans 272.