SUPPLEMENT TO CHAPTER 17, §4

[17.156A] By May 2018, five more federal parliamentarians (including Feeney and Gallagher) had lost office because they held British citizenship at the time they nominated as candidates for the federal election held on 2 July 2016. In answer to the questions referred to the Court of Disputed Returns by the House of Representatives regarding the position of Feeney under s 44(i), Kiefel CJ (sitting alone) ordered on 23 February 2018 that his seat of Batman was vacant and a by-election should be held. The expert report relied on by the Attorney-General concluded that Feeney was a British citizen by descent. This was not contested by Feeney who, by that time, had ceased to argue against his disqualification and had resigned from Parliament.

[17.156B] Gallagher, by contrast, asserted her eligibility to sit in the Parliament. Her case involved the scope of the 'reasonable steps' exception first identified in *Sykes v Cleary* (1992) 176 CLR 77. Gallagher was returned as a Labor Senator for the Australian Capital Territory after the July 2016 election. A declaration renouncing her British citizenship had been sent to the Home Office of the United Kingdom in April 2016. But on the date of her nomination as a candidate (31 May 2016) she was a British citizen, and remained so until her declaration of renunciation was registered by the Home Office on 16 August 2016. The Court unanimously held that Gallagher was incapable of being chosen or sitting as a Senator and ordered a special count of the votes cast in 2016 to determine who should fill the vacancy. The joint judgment of Kiefel CJ, Bell, Keane, Nettle and Gordon JJ depicted this as an application of the law stated in *Sykes v Cleary* and *Re Canavan* (2017) 349 ALR 534.

[17.156C] In *Re Canavan*, the Court had referred to the finding in *Sykes v Cleary* that Bill Kardamitsis, an unsuccessful candidate at the relevant by-election in 1992, was disqualified because of his failure to take reasonable steps to divest himself of his foreign nationality (see [17.149]). This would have involved Kardamitsis asking a minister in the Greek government to release him from Greek citizenship. By observing, in 2017, that the '**[551]** application for the favourable exercise of the discretion was a step reasonably open to him', the Court in *Re Canavan* arguably implied that the reasonable steps exception was a *general* one available to a person in Kardamitsis's situation and it had been his failure to take that step that had sealed his disqualification. In other words, impliedly the exception set out in *Sykes v Cleary* operated as follows: where a foreign country maintains conditions for renunciation that are not unduly onerous, an Australian citizen holding citizenship of that foreign country can escape disqualification under s 44(i) if he or she takes reasonable steps to achieve that renunciation.

[17.156D] At one point, the leading judgment in *Sykes v Cleary* of Mason CJ, Toohey and McHugh JJ appeared to express this exception in these broad and general terms: '**[107]** it could scarcely have been intended to disqualify an Australian citizen for election to Parliament on account of his or her continuing to possess a foreign nationality, notwithstanding that he or she had taken reasonable steps to renounce that nationality'.

[17.156E] Drawing on words used earlier in the same paragraph in *Sykes v Cleary*, however, it was possible to read the exception as governed by a limiting condition: that the foreign law imposed a continuing foreign nationality on the person. On this view, it was only where that condition applied – where the Australian citizen was irremediably prevented by foreign law from seeking election to the federal Parliament – that a candidate could avail themselves of the reasonable steps exception and escape the literal meaning of s 44(i). If renunciation was not irremediably prevented under foreign law, then renunciation must be fully achieved by the candidate before nomination in order to escape disqualification. Merely advancing towards that result by taking reasonable steps to achieve it would not be sufficient.

[17.156F] In summary, it was ambiguous as to whether the reasonable steps exception from *Sykes v Cleary* was available to all dual citizens or only those facing a foreign law that placed formidable obstacles in the way of renunciation. The Court in *Re Canavan* compounded the ambiguity by the way it summarised the proper construction of s 44(i) in paragraph 72 of the judgment:

Re Canavan; Re Ludlam; Re Waters; Re Roberts (No 2); Re Joyce; Re Nash; Re Xenophon
(2017) 349 ALR 534

> **The Court: [551]** A person who, at the time that he or she nominates for election, retains the status of subject or citizen of a foreign power will be disqualified by reason of s 44(i), except where the operation of the foreign law is contrary to the constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government. 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, the constitutional imperative is engaged.

[17.156G] The first sentence of that paragraph implied that s 44(i) would be relaxed only when the requirements for renunciation were extreme (such as travelling to the country in question when it would involve risks to person or property). The second sentence, however, could be interpreted as a 'reasonable steps' exception applicable to all dual citizens potentially caught by s 44(i). The ambiguity was not resolved by references throughout the judgment to a 'constitutional imperative' underlying s 44(i) that an Australian citizen not be prevented by foreign law from participation in representative government. In *Re Gallagher*, the joint judgment relied on the narrower interpretation of the exception identified in *Sykes v Cleary*.

[17.156H] Gallagher had argued that the fact that she was indisputably a British citizen at the date of nomination was not decisive of her eligibility to sit as a Senator. Rather, she argued, the crucial question was whether she had taken reasonable steps by that time to renounce her citizenship. She submitted that she had, because the declaration had been lodged and received by the Home Office, and the fee had been deducted from her credit card (although she had to submit copies of further documents when requested in July 2016). Aware that the Court might make availability of the reasonable steps exception and/or the constitutional imperative dependent on a high threshold of difficulty in renouncing foreign citizenship, Gallagher also argued that the British government's control over when a renunciation would be registered amounted to an '**[19]** irremediable impediment to her participation in the 2016 election'. At the time, the renunciation process could take more than six months, unless expedited by the Home Office. On the other hand, the Attorney-General contended that Gallagher's case, and indeed the British citizenship law, stood outside the reasonable steps exception. In accepting the Attorney-General's submission, the joint judgment implicitly denied any ambiguity existed about the law in *Sykes v Cleary* and *Re Canavan*.

Re Gallagher
[2018] HCA 17

> **Kiefel CJ, Bell, Keane, Nettle and Gordon JJ: [21]** The principal submission of the Commonwealth Attorney-General is that it is not enough for a candidate merely to have taken steps to renounce his or her foreign citizenship. Unless the relevant foreign law imposes an

irremediable impediment to an effective renunciation, it is necessary that a candidate actually have divested himself or herself of his or her status as a foreign citizen before the commencement of the process of being chosen to which s 44(i) applies. The exception to s 44(i) does not apply to British law because that law does not either in its terms or in its operation render it impossible or not reasonably possible to renounce British citizenship. At the time of her nomination Senator Gallagher remained a foreign citizen and was incapable of being chosen.

[17.156I] In accepting the principal submission of the Commonwealth Attorney-General, the joint judgment quoted paragraph 72 from *Re Canavan* and asserted that the reasonable steps exception applied only where a threshold condition was satisfied, that is where the foreign law irremediably prevented participation in representative government:

> **Kiefel CJ, Bell, Keane, Nettle and Gordon JJ: [26]** It may be observed from this paragraph, and from earlier passages in the reasons in *Re Canavan* [(2017) 349 ALR 534, 539], that for s 44(i) to be read as subject to the exception two circumstances must be present. The first arises from the terms of the constitutional imperative. It is that a foreign law operates irremediably to prevent an Australian citizen from participation. The second is that that person has taken all steps reasonably required by the foreign law which are within his or her power to free himself or herself of the foreign nationality.
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> **[27]** A foreign law will not 'irremediably prevent' an Australian citizen from renouncing his or her citizenship simply by requiring that particular steps be taken to achieve it. For a foreign law to meet the description in *Re Canavan* and *Sykes v Cleary* it must present something of an insurmountable obstacle, such as a requirement with which compliance is not possible. Consistently with the approach taken in *Re Canavan*, the operation of the foreign law and its effect are viewed objectively.
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> **[28]** In *Re Canavan* an example was given of a foreign law which operated in a way that would engage the constitutional imperative. The example was a foreign law which permitted renunciation of foreign citizenship but required foreign citizens to carry out the necessary acts of renunciation in the territory of the foreign power. Compliance with this requirement was not possible because it put the person at risk. So understood, the foreign law would irremediably disqualify the person.
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> **[29]** The operation of such a law was contrasted with one which required a foreign citizen to apply for the favourable exercise of a discretion to permit renunciation of that foreign citizenship. That is a step required by foreign law which is reasonably open to the person and must be taken. It was for this reason that it could not be concluded that in *Sykes v Cleary* Mr Kardamitsis had taken reasonable steps to divest himself of his foreign citizenship …
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> **[30]** Contrary to a submission made by Senator Gallagher, the 'test' for the engagement of the constitutional imperative is not contained in the second sentence of the passage from *Re Canavan* set out above. It is not sufficient that a person in her position has taken all steps reasonably required by the foreign law which are within her or his power for the exception to s 44(i) to apply. The exception stated in *Re Canavan* requires for its operation that a foreign law operate in the way described. The 'foreign law' referred to in the second sentence is the same body of law which operates to irremediably prevent the person's participation, as described in the preceding sentence ...
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> **[32]** It may be added, for completeness, that all steps must be taken even though the foreign law will in any event operate to prevent renunciation being effected. The reason for such a requirement lies in the concerns of s 44(i) about a person's duty or allegiance to the foreign power. In *Sykes v Cleary*, in a passage quoted in *Re Canavan*, Brennan J explained that so long as the duty remained under foreign law it may be seen as an impediment to unqualified allegiance to Australia. It is therefore only after all reasonable steps have been taken under foreign law to renounce the status, and with it the duty, of foreign citizenship that

> it is possible to say that the purpose of s 44(i) would not be fulfilled by recognition of the foreign law. To this may be added, consistently with the objective approach applied in *Re Canavan*, that it is not until it is manifest that a person has done all he or she can towards renunciation that the exception should apply.

[17.156J] In this instance the capacity, in due course, for Gallagher to achieve renunciation under British law, through registration of her declaration by the Home Office, was fatal to her case.

> **Kiefel CJ, Bell, Keane, Nettle and Gordon JJ: [39]** The questions in this reference turn upon one issue: whether British law operated to irremediably prevent an Australian citizen applying for renunciation of his or her British citizenship from ever achieving it. An affirmative answer cannot be given merely because a decision might not be provided in time for a person's nomination. The exception is not engaged by a foreign law which presents an obstacle to a particular individual being able to nominate for a particular election.

[17.156K] Gageler J agreed with the joint judgment and warned that the unpredictability of when elections will be called is a constitutional reality, calling for appropriate vigilance and advance preparation on the part of potential candidates for office. He also sought to explain the implied 'constitutional imperative' by reference to the function served by particular constitutional provisions.

> **Gageler J: [43]** The 'constitutional imperative' recognised in *Re Canavan* is an implied exception to the operation of that disqualification. The implied exception serves the function of ensuring that the disqualification does not operate so rigidly as to undermine the constitutionally prescribed system of representative and responsible government which the disqualification is designed to protect. The centrally informing notion is that an Australian citizen who meets the qualifications for election as a senator or member set by ss 16 and 34 of the Constitution or by a law enacted by the Commonwealth Parliament under s 51(xxxvi) for the purpose of s 34 of the Constitution is not to be permanently disabled from participating in the parliamentary and executive government of Australia by a disqualification in s 44, with the possible exception only of an Australian citizen who 'is attainted of treason' within the meaning of s 44(ii). That centrally informing notion is complemented in its application to s 44(i) by the notion that an arbitrary or intransigent operation of the law of another country cannot be permitted to frustrate the ability of such an Australian citizen to participate in the parliamentary and executive government of Australia.

[17.156L] In a separate judgment, Edelman J also agreed. As a consequence of the Court's decision, three Labor members of the House of Representatives (Justine Keay, Susan Lamb and Josh Wilson) and one from the Centre Alliance (Rebekha Sharkie) resigned from Parliament, prompting four by-elections. All said that they had lodged a declaration renouncing British citizenship before nominating for the 2016 election, but the Home Office of the United Kingdom registered the renunciations after they nominated.

[17.156M] Earlier, in *Alley v Gillespie* [2018] HCA 11, the High Court had disposed of another challenge to the eligibility of a member of the House of Representatives returned at the 2016 election. Dr David Gillespie, the member for Lyne, was alleged to hold a direct or indirect pecuniary interest in an agreement with the Commonwealth public service in contravention of s 44(v) of the Constitution. Unlike *Re Gallagher* and the spate of s 44 matters that preceded it, this matter did not come before the Court through a referral from a house of Parliament pursuant to s 376 of the *Commonwealth Electoral Act 1918* (Cth). Peter Alley, the Labor opponent whom Gillespie defeated at the 2016 election, claimed that Gillespie had sat in Parliament while ineligible to do so and that under the *Common Informers (Parliamentary*

Disqualifications) Act 1975 (Cth) this made Gillespie liable to pay a penalty to any person who sued in the High Court for it (see [17.109]).

[17.156N] The High Court addressed ss 46 (penalty for sitting while disqualified) and 47 (disputed elections) of the Constitution, both of which commence with the proviso 'Until the Parliament otherwise provides', noting that in each case Parliament had done so, in the *Common Informers Act* and sections of the *Commonwealth Electoral Act* respectively. After examining the relationship between those legislative provisions and ss 44, 46 and 47, the High Court concluded that the *Common Informers Act* dealt with the matter of recovering penalties. It did not confer jurisdiction on the Court to deal with the anterior question of liability, the eligibility of Gillespie to sit under s 44(v). Alley had not petitioned the Court to dispute the election result, as provided for under s 353 of the *Commonwealth Electoral Act* (and to which a time limit of 40 days from the return of election writs applied). The House of Representatives had not referred Gillespie's situation to the Court pursuant to s 376 of the *Commonwealth Electoral Act*, nor had it determined the issue itself. In those circumstances, the High Court ordered that Alley's action under the *Common Informers Act* be stayed.