'Recountbacks' and Section 44 of the Constitution

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The High Court of Australia has caused much political disruption with its interpretation of what factors trigger disqualification of MPs under section 44 of the Australian Constitution, and of the deadline when those disqualifications operate. I argue - with many others - that these factors are unduly wide and sensitive. I also argue, however, that the High Court has taken a more sensible approach to the replacement of unseated Senators, in the common law silences of the Constitution and the Commonwealth Electoral Act, an outcome that follows the logic of Australian electoral law more closely than do the common-law precedents the Court rejected. However, one issue the High Court has not yet settled is whether a 'recountback' can be allowed to unseat an already-elected, not-disqualified candidate - either as one of the 12 elected Senators overall, or as one of the six for each State awarded a long (six-year) term following a double dissolution). Experience from local councils that use STV-PR with countbacks to fill 'proper' vacancies shows that this can occur. The Court was sensitive to the order of election in the 2013 Western Australia Senate challenge; it should be equally sensitive here.

THE ISSUE: THE PROBLEM, AND THE SOLUTION I'M PROPOSING

Section 44 of the Australian Constitution entrenches a list of grounds that disqualify members of the federal House of Representatives and Senate.[1] Most of these grounds seem sensible and familiar to the casual reader: there is nothing in s44 as odd or objectionable as, eg, the USA excluding nationalised citizens from its presidency,[2] the UK before 1829 disqualifying Catholics from its parliament, Argentina before 1994 excluding non-Catholics from its presidency, or Canada requiring that Senators be 'seised or possessed for [their] own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture.'[3] However, the devil lurks in the detail of s44, in some cases dictated by its wording and in other cases the result of interpretive choices made by the High Court of Australia, most notably in 1905, 1987, 1992, 1998 and (most dramatically) 2017-18.[4]

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1 Somewhat confusingly, ss 16 and 34 specify additional criteria but these apply only 'until the Parliament otherwise provides'.

2 Randall Kennedy, 'A Natural Aristocracy?' in William N Eskridge and Sanford Levinson (ed) *Constitutional Stupidities, Constitutional Tragedies* (NYU Press, 1998) 54-56.

3 All these clauses (have) survived only because of the inertia of constitutional entrenchment. No-one drafting a constitution for any UN member nation in 2020 CE would seriously suggest copying any of them.

4 Previously in *Sarina v O'Connor* (1946) and *Crittenden v Anderson* (1950) candidates claimed their victorious Catholic rival owed 'allegiance' to the Vatican as a foreign power, but

At two junctures, the High Court adopted a strict (if not the strictest possible) interpretative choice over a more lenient one. First, in 1905 the High Court held that the 'time' when federal MPs[5] are 'chosen' is the entire period that begins when candidates lodge their nominations and ends only when candidates are finally declared elected.[6] Then, in 1992, the Court again chose the stricter path when interpreting 'foreign allegiance' and 'office of profit under the Crown.' A foreign allegiance need not be voluntarily retained, and an office of profit need not yield any actual profit. The Court chose, if not the most draconian then the second-most-draconian option before it[7] for foreign allegiance, one that gives very little weight to the individual's own knowledge and intention and that makes it impossible to remedy honest mistakes.[8]

Many commenters have argued that the High Court went wrong here. The Court's approach has been unpopular on the Left:

> My mother obviously can't confirm her birthplace with any certainty. Her earliest memories are of crossing countless borders as a refugee. [...] If I were ever elected to a very narrowly divided parliament, though, there would be a good many people with much better resources and motivation than me to solve the mystery of my citizenship. Somewhere, there may be an old Soviet record, or a wartime refugee camp form, or a surviving acquaintance of my grandparents, that could belatedly confirm me as a citizen of one of a potential dozen or so nations, each with its own highly complex and shifting citizenship laws. [...] The Court – which a week earlier struck down Tasmania's vague anti-forestry protest laws because of their 'effect of inhibition or deterrence on the freedom' of political communication – seems entirely blind to the 'significant deterrent effect' its judgement will have on a sizeable fraction of Australians who might otherwise seek to exercise their right to participate in Australia's representative system of government.[9]

While the Constitution does not require federal judges to be free of foreign allegiances (or even to be citizens), it does (since 1977) impose a compulsory retirement age upon them. Analogously, while most people know their own

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these petitions went nowhere and set no precedent. The 2017-18 cases were by far the most dramatic, not only in the number of parliamentarians unseated (fifteen to date, compared to only one at each of the earlier cases, even including the bonus disqualification of two runners-up in *Sykes v Cleary*) but also in catching major-party MHRs and Senators, including the Deputy Prime Minister, whereas the 1987, 1992 and 1998 cases had unseated only minor-party or independent candidates.

5 For brevity, 'MPs' here includes Senators as well as Members of the House of Representatives (MHRs).

6 *Vardon v O'Loghlin* (1907) 5 CLR 201.

7 The only stricter alternative would have been to make compliance impossible, just as naturalised citizens can never (under the current US Constitution) become President no matter what steps they take.

8 Note that I am not talking about overlooking ongoing breaches, but rather breaches that were remedied as soon as they were known.

9 Jeremy Gans, 'Another reason why I won't stand for parliament: The High Court thinks establishing citizenship is straightforward. Our correspondent thinks otherwise,' Inside Story (3 November 2017). http://www.insidestory.org.au/another-reason-why-i-wont-stand-for-parliament/.

date of birth (even if some conceal it),[10] not everyone does. The actor Peter O'Toole did not know if he was born in June or August of 1932, or even in Ireland or England. My adopted cousin, orphaned as a baby during the war in Vietnam, does not know his day or month of birth. Experts can give estimates based on one's bones and teeth, but I suspect our judges would not be happy to have what is supposedly a tenured position dependent on (possibly duelling) expert opinions:

> The irony with the High Court's 'insurmountable obstacle' test is that there is an insurmountable obstacle to its being tested. Before the court can rule on whether a particular country's requirements are insurmountable, a dual citizen from that country must first run for office, be elected, and then be challenged. But what party would risk nominating such a candidate?[11]

> The primary objective of the witch-hunt against some of the ruling elite's most loyal parliamentary servants, on the grounds that they have had 'divided loyalty,' has been to fuel a broader ideological campaign of nationalism and paranoia about 'foreign' influence.[12]

The Court's approach has won support on the Right of politics: 'How many [MPs…] are still making laws for us when they know they're breaking the law by just sitting there?'[13]

> [Y]ou can see the gulf between ordinary Australians who take this nation and its laws and obligations very seriously, and sophisticated internationalist types who seem faintly confused by a 117-year-old document's requirement that Australian politicians actually be provably Australian. […] See how much a 'witch hunt' argument helps you the next time you challenge a speeding ticket.[14]

Mark Steyn criticises the Court from the Right,[15] but more on the basis that Britons, Canadians and New Zealanders are obviously not 'foreign' than Gans'

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10 In 2002, Deborah Bennett-Borlase, Western Australia's first female stipendiary magistrate, was removed from the bench for lying about her date of birth (by 7 years) so she could keep working past the compulsory retirement age of 65: Layla Tucak, 'Magistrate caught hiding her age,' *The Australian* (Sydney) 10 April 2002.

11 Jeremy Gans, 'Anne Aly and the insurmountable obstacle: The High Court has set a new citizenship test for parliamentarians of uncertain status, but who on earth could pass it?' Inside Story (11 May 2018), https://www.insidestory.org.au/anne-aly-and-the-insurmountable-obstacle/; also 'The outer limits: We'll never know whether people like Peter Dutton are eligible to sit in Parliament unless the High Court hears his case,' Inside Story (27 August 2018), https://www.insidestory.org.au/the-outer-limits/.

12 Mike Head, 'High Court disqualifies five MPs, demanding 'single-minded loyalty' to Australia,' World Socialist Web Site (28 October 2017), https://www.wsws.org/en/articles/2017/10/28/high-028.html.

13 Andrew Bolt, 'All MPs Need to Reveal Eligibility,' *Herald-Sun* (Melbourne, 1 November 2017).

14 Tim Blair, 'The Country Feels Different,' *Daily Telegraph* (Sydney, 7 November 2017).

15 'In breezily redefining Section 44 to mean a citizenship that was invented half-a-century after the law was written and whose anomalies and ambiguities persisted for another third-of-a-century after that, the modern High Court was engaging in a characteristic bit of post-colonial hyper-nationalism that has had the paradoxical effect of forcing not only the judges but the entire Australian political system to swear 'allegiance to a foreign power.' It's like instituting Nuremberg racial purity laws and then outsourcing their administration to random bureaucrats around the planet. As the contrasting treatments of Ms Waters and Mr Xenophon

concerns about immigrants who were not subjects of his or her Britannic Majesty.

Others retort 'It's simple: just get your paperwork in order'16 but (i) this is not always a solution, and (ii) it discriminates. Imagine if any average Australian could lose their job if their great-grandfather's nationality were uncovered; the threat of this might even overcome the usual anti-politician Schadenfreude. Moreover, the burden of due diligence is unevenly distributed. It is true that it falls on people of colour,17 but it also falls upon those at the other extreme – 'ten-pound Poms' who arrived more recently but still at a time when any suggestion that the Queen of Britain was not also the Queen of Australia would have been regarded as fanciful.18

In this article, I propose four improvements:

> (i) Clarify terminology: First, we should refer to the 'special count' process crafted by the Court for replacing removed Senate candidates as a 'recountback,' a hybrid of 'recount' and 'countback,' in substitution for both.
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> (ii) Consider intent: Secondly, the High Court could alleviate the harshness of its current precedents by harmonising its readings with other areas of law, especially criminal responsibility and apprehended bias. The latter is especially appropriate if one important goal of laws like s44 is to uphold public confidence.
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> (iii) Narrow the deadline: The Court's strict definition of the grounds of disqualification is exacerbated by the wide time-frame the Court has held these grounds can strike during. Much (not all) of the burden could be alleviated if the Court could be persuaded to reconsider its unnecessarily strict interpretation of 'time chosen.' Particularly because disqualifications of candidates hits ordinary citizens, not only successful professional politicians.
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> (iv) Add a fail-safe to recountbacks: Finally, the High Court was right to specify recountbacks (instead of by-elections for one seat or all seats, or Section 15 appointments) as the replacement method when Senators are disqualified. That much is uncontroversial among academics and politicians, at least within Australia. But I would gloss this by adding that the High Court should also adopt a rule that no already-elected

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demonstrate, non-Australian laws now get to determine whether you're eligible to sit in the Australian Parliament …' Mark Steyn, 'Dual to the Death!' SteynOnline (2 November 2017), https://www.steynonline.com/8232/dual-to-the-death.

16 'Get your birth certificate, work out where your parents were born, check your four grandparents as well and if it involves anywhere other than Australia, tell the foreign country in writing that, for the avoidance of doubt, you renounce any entitlement to citizenship. Then, and only then, nominate for parliament.' Peta Credlin, 'The Turnbull Government is in Crisis,' *Sunday Telegraph* (Sydney, 7 November 2017).

17 Pakistani-Australian comedian Sami Shah joked on Twitter (17 July 2017), https://twitter.com/samishah/status/887171289969860608 that 'PoC know their citizenship all times, in case someone's gonna try deporting us.'

18 That is, at any time before the mid-1970s. Ironically it may be Gough Whitlam who paved the way for Wood and its progeny by having Acts and Letters Patent changed to declare Elizabeth II the 'Queen of Australia': see Gough Whitlam, *The Whitlam Government 1972-1975* (Penguin, 1985), 132.

candidate can be unseated (or demoted to a shorter term) as a result of a different candidate being unseated. This can happen, and has happened, in STV elections: it can be prevented by stipulating an override provision.

(i) CLARIFY TERMINOLOGY

First, some 'rectification of names' is needed.19 In this article I introduce a neologism, 'recountbacks.'20 It combines two terms already used in the media to describe the 'special count' process that the High Court has stipulated for replacing 'removed' Senators.21

There are, properly understood, three different procedures for re-examining ballot-papers cast, and they have different goals and operation:

(a) In the traditional sense, a 'recount' means only that the number of votes for each candidate is re-ascertained more accurately: no candidates are added to the field or removed from it. The common law did not re-examine ballots to fill vacancies. Even when a runner-up was elected by default,22 the ranking of candidates was already established by the original count (or by an earlier recount); the ballots did not need to be re-examined – indeed, they could well have been disposed of, like Papal conclave ballots mixed with straw to give off white smoke, days or months earlier, as long as the original candidates' totals were written down somewhere.

(b) On the other hand, a 'countback' proper is the procedure used in STV-PR systems, such as Tasmania, the ACT and Western Australia (also Malta),23 to replace a duly elected MP who has vacated office. The difference between this and the procedures that replaced Robert Wood, Heather Hill, Fiona Nash and other disqualified Senators is not merely

19 'If language be not in accordance with the truth of things, affairs cannot be carried on to success.' Confucius, *Analects*, Book XIII, Chapter 3, verses 4-7, (James Legge trans, Clarendon Press, 1893).

20 A Google search on 13 October 2018 gave zero matches for 'recountback' as a single word.

21 Also, I refer to disqualified Senators and deceased candidates as being 'removed' rather than as 'vacating,' since the latter wrongly implies that they did once fill the seat, which is not the case.

22 Runners-up won by default in two infamous cases: the 1925 House of Representatives election in Kennedy, where the Labor candidate died shortly before polling day; Michael Kerrisk, 'Dying for an election,' *Labor Herald* (Barton, December 1999) 36-37. This led Parliament in 1928 to introduce supplementary elections for such contingencies; and the 1961 House of Commons by-election in Bristol South-East, where the court held not only that Tony Benn, the highest candidate, was disqualified for inheriting a peerage (even though he never requested a Writ of Summons to take his Lords seat) but also that the runner-up, Malcolm St Clair, should be seated instead: *Re Bristol South-East Parliamentary Election* [1961] 3 All ER 354. Because Benn's ineligibility had been widely publicised (eg, his opponents had posters at every polling booth), his supporters were deemed to have thrown their votes away. (As with Hollie Hughes (see below), the court could not make up its mind as to whether 'your own voluntary decision' should matter or not). Parliament responded by enabling unwilling Lords to disclaim their titles: *Peerage Act 1963* (UK).

23 As opposed to single-member systems (even preferential ones) on the one hand, which almost always replace all vacating members and removed candidates with a fresh election, and non-preferential party-list proportional systems on the other, which typically seat the runner-up from the same party team, without any need to re-examine ballots.

formal. Crucially, the four STV systems cited above all adopt overriding rules to exclude the risk that recounting the ballots among all the candidates minus the vacating MP might inadvertently unseat a sitting MP. In Tasmania, the ACT and Malta this is achieved by re-examining only those ballots that supported the vacating MP at the point in the count when he or she was elected.[24] In effect, these jurisdictions' countbacks are single-seat Alternative Vote races using a subset of the ballots. In Western Australia, by contrast, all ballots are re-examined in a full STV count, but with the overriding proviso that a sitting MLC cannot be eliminated even if he or she happens to have fewest votes.[25]

(c) In contrast to both, the 'recountback' procedure that the High Court fashioned in Wood as a remedy for disqualified Senators-elect – which drew inspiration from the procedure prescribed by Parliament for the analogous event of a Senate candidate dying before polling day[26] – differs from both of the above. Unlike a 'recount' proper, a recountback (i) involves no allegations that ballots were initially counted inaccurately, and (ii) narrows the field of contenders by treating one or more of the candidates as defeated on the first count, ie removing them on the first stage of counting and transferring their ballots to next preferences. But unlike a 'countback' in the strict sense, no candidate has yet officially – or at least finally – been declared elected.

This procedure for replacing a never-qualified Senator is more or less the same as is used if a Senate candidate dies before polling day.[27]

The model for a candidate dying offers a useful template.[28] Of course some differences would need to be accommodated. In most cases it is usually widely known, right away, when a candidate dies in mid-campaign (eg, Robert Kennedy in 1968). A candidate who dies after the term begins is treated as a casual vacancy, whereas even when disqualification is only discovered some time into the term, it may have accrued earlier, before the term began. In other words, it is entirely possible that voters may inadvertently elect, and parliaments may inadvertently seat, a candidate who was already disqualified,

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24 Usually by reaching the quota, but sometimes by surviving to the final count with the highest near-quota if a lot of ballots have exhausted by the end.

25 *Electoral Act 1907* (WA), s 156D(9), inserted by the *Acts Amendment (Electoral Reform) Act 1987* (WA).

26 *Commonwealth Electoral Act 1918* (Cth) s 181, also ss 239(4)(a), 273(27).

27 An analogous provision at State level saw Kelly Vincent replacing the late Paul Collier as the Dignity Party's highest candidate for the South Australian Legislative Council in 2010: Stephen Orr, 'Great Expectations,' *Adelaide Advertiser* (Adelaide) 23 September 2010, https://www.adelaidenow.com.au/ipad/great-expectations/news-story/f8f9653b92eaa8e8663e7d827c0457af.

28 Arguably the rules should be amended to include a candidate who becomes, or is found to be, so seriously injured or unwell that they should retire mid-campaign, at least if the candidate herself either consents or is in no condition to object. Eg, in the 1972 US presidential campaign, Governor George Wallace was left wheelchair-bound after an assassination attempt, and Senator Thomas Eagleton withdrew as Hubert Humphrey's running-mate after it became public that he had undergone shock therapy for depression. On the other hand, even a serious injury need not cause a vacancy. US Representative Gabrielle Giffords was put into a coma by a shooter in January 2011, but her seat was not declared vacant and she resumed service in the House seven months after the shooting.

but it is highly unlikely that a dead candidate would be elected and seated, like the post-mortem trial of Pope Formosus in 897.

However, two Australian examples show this might not always be the case. Donald Mackay had been an endorsed State and federal Liberal candidate in 1973, 1974 and 1976 but was not a candidate when he disappeared in 1977 (his body has never been found). Harold Holt, too, disappeared in a non-election period in 1967, and the search for him continued for several days; but a funeral was held for him five days after he disappeared and the Speaker (unchallenged) issued a writ for a by-election to replace Holt four weeks after his disappearance. In slightly different circumstances, either could well have vanished during an election campaign and the precise date (or even, for that matter, the fact) of their death might be highly indeterminate.

Sometimes officials and other public figures29 who disappear are never found again and can now, years later, be safely presumed dead,30 or may turn up eventually as a corpse.31 But at other times a candidate or official may reappear alive, after absconding AWOL32 or being kidnapped.33

US jurisdictions (which give great weight to fixed election dates and everyone voting on the same day) do not usually re-schedule an election if a candidate dies; most States seem to go ahead with the deceased's name on the ballot, and should it draw enough votes to win, is treated as immediately vacating.34

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29 Officials going missing at any time during their term raise analogous questions to candidates dying or going missing during the election period. I use 'politicians' here to cover both.

30 Eg, New York county judge Joseph Crater, born 1899, disappeared 1930, officially declared dead 1939; British peer Lord Lucan, born 1934, disappeared 1974, officially declared dead 1999. Defining 'politicians' broadly, we cannot leave out US union leader Jimmy Hoffa, born 1913, disappeared 1975, officially declared dead 1982.

31 Eg, Quebec deputy premier Pierre Laporte, kidnapped and killed by the Front de libération du Québec, 1970; Italian premier Aldo Moro, kidnapped and killed by the Red Brigades, 1978.

32 Eg, British MP John Stonehouse, missing for five weeks in 1974 (financial troubles); South Carolina Governor Mark Sanford, missing for six days in 2009 (extramarital affair).

33 Eg, Ingrid Betancourt Pulecio, Columbian presidential candidate, kidnapped by the Revolutionary Armed Forces of Colombia (FARC) 2002, rescued by security forces 2008. One rare case where a polity did legislate to cover MPs or candidates being kidnapped was Ireland, shortly after its civil war: the *Constitution (Amendment No 17) Act 1931*, s25 (repealed 1937), empowered the executive to adjourn the parliament or appoint a replacement for an MP if satisfied that such MP 'has died in consequence, directly or indirectly, of an unlawful act of another person or is prevented by physical incapacity arising [...] from the unlawful act of another person or by unlawful imprisonment or by threats or intimidation from [...] taking part in the sittings of the[ir] House [...].' (Hat-tip to Professor John O'Dowd of University College Dublin). The plot of *Air Force One* (1997) centred on Harrison Ford's President trying to communicate that his plane had been hijacked so that Glenn Close's Vice-President could officially assume command.

34 Eg, when Missouri Senate candidate Mel Carnahan died in a plane crash three weeks before Election Day 2000, the Governor promised to appoint Carnahan's widow Jean to fill the vacancy if the deceased won the election, which he did. By contrast, when Minnesota Senator Paul Wellstone died (also in a plane crash) only 11 days before Election Day 2002, his State party chose another candidate (former Vice-President Walter Mondale) to replace him on the ballot.

On the other hand, a disqualified candidate is a warm body like any other with no flashing orange sign on their back,[35] which is why the Electoral Commission declines – on grounds of its lack of resources de facto and of judicial authority de jure – to inquire into candidates' eligibility when they nominate. The AEC takes the view that it is simpler to let all candidates stand and then let the courts sort out eligibility after someone has been declared the winner. If disqualifications are rare, then this makes sense.

Also, court hearings in the middle of an election campaign are undesirable – time is limited and judges do not want to prejudice public perceptions. Yet they still happen, sometimes ex parte and sometimes inter partes.[36] True, the validity of the outcome can only be challenged by an election petition for that specific electorate, but this does not bar an aggrieved person from seeking other outcomes, eg the fining or even imprisonment of a person responsible for a breach.

Having said that, having a court hearing in mid-campaign is not the only option. True it is if we draw the deadline for disqualification as 'officially declared by a court to be disqualified,' but not if we draw it earlier, ie objectively 'became disqualified' or subjectively 'first knew, or had reason to suspect, that she was disqualified.' In those cases, candidates act 'In the shadow of the law' but the actual hearing can be sorted out later if that candidate does get elected. With a hundred or more Senate candidates per State there is no need to tie up judicial resources on the eligibility of micro-minnows who may poll only single or double figures of first-preference votes.[37]

This is important not just as a matter of jurisprudential nit-picking (of insisting that an unqualified candidate is not a 'vacancy' because he or she never really occupied the seat in the first place) but in very real political terms, because recounting the same ballots among the same candidates (minus only the disqualified nominee(s) could alter the order of elimination and elect a different combination of the remaining, qualified candidates.[38] As explained below, this would be intolerable.

The High Court in 1987 wisely opted for a special count of existing preferences, rejecting claimed alternatives such as a fresh election for all the State's Senate seats (which would be costly, and unfairly onerous on the other, eligible elected candidates) or for that particular seat (which would be disproportional and inconsistent with the tenor of the 1977 amendment of Constitution s15, which abolished Senate by-elections).[39] It had been

35 As Roger N Douglas notes, unlawful decisions 'do not emit flashing lights saying 'flawed: disregard me'.' *Douglas and Jones's Administrative Law* (Federation Press, 4th ed, 2002) 731.
36 *McKenzie v Commonwealth* (1984) 57 ALR 747; *Reeth v Morling* (1988) 83 ALR 667; *Boland v Hughes* (1988) 83 ALR 673.
37 The High Court did decide on two defeated candidates in *Sykes v Cleary*, but only because these were the major parties' nominees and likely to re-nominate in any re-scheduled by-election.
38 This quirk is less visible with single-seat AV because it is only possible to re-elect one incumbent at most.
39 Of course, if the polling itself is extensively compromised, then the Court has no alternative but to order the poll re-run for all seats, as occurred for Senators from South Australia in

established as long ago as 1905 that the s15 procedure did not apply to disqualified candidates, because the position had not yet been validly filled for that term, so no Senator could have 'vacated' it.40 The 1977 amendment, giving parties some veto rights over vacancies won by their endorsed candidates, reinforces this; the party hardly deserves a veto over a seat they have not yet 'won fair and square'.

On the other hand, in *Free v Kelly* (1996) 185 CLR 296, the Court (also correctly) rejected the use of countbacks to replace disqualified House of Representatives candidates. 41 This would certainly hand the seat to a different party, because Australian parties almost never endorse two or more candidates in the same single-seat electorate.

Historically, the Country/National Party practiced multiple endorsement extensively before the 1960s42 but it seems to have died out. Indeed, the Nationals and Liberals in the three biggest States refrain from even endorsing two Coalition candidates, at least when one is a sitting MP. This has been accelerated by the use of optional-preferential AV in the biggest and third-biggest States in the past few decades (NSW since 1981 and Queensland 1992-2015). The last occurrence seems to be Rankin, Queensland in the 1987 federal election.43 Even then, this seemed pointless because the NPA-Q's official how-to-vote advertising ranked one Peter Jorgenson first and Gerard Walsh second, ie did not invite NPA supporters to choose between the two.

Apart from that, there is no Australian jurisdiction I know about whose electoral rules offer a party any advantage for running two (or more) candidates in the same district. By-elections – which are too onerous and non-proportional for multi-seat electorates – have neither defect for single-seat electorates. Even the single, rare example where replacing a vacating candidate by countback might be justified – in those Queensland local councils, such as the City of Brisbane, where a mayor is directly elected at large and the other councillors represent single-seat wards – it is not used. Candidates cannot run for both mayor and councillor at the same time.44 By

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1906-08 and Western Australia in 2013-2014. In the Tasmanian State electorate of Denison in 1979-80, all seven seats were sent to a fresh election after three out of seven MHAs were unseated for campaign spending breaches.

40 *Vardon v O'Loghlin* (1907) 5 CLR 201.

41 South Australian Democrats Senator David Vigor proposed extending countbacks to single-member vacancies: Proportional Representation Society of Australia, 'Threat of Indirect Elections in Victoria,' 68 Quota Notes (December 1992), http://www.prsa.org.au/qn/68.html#section4.

42 Different party branches within the electorate would each nominate their own favourites. Long-serving MPs Joseph Abbott (New England, 1940) and Doug Anthony (Richmond, 1957) first entered Parliament by defeating fellow endorsed Country Party candidates: Paul Davey, *Politics in the Blood: The Anthonys of Richmond* (UNSW Press, 2008) 37-38 and 110-113. Labor seems to have tried this only once: Peter Aimer, 'The Dual Endorsement in the Federal Electorate of Riverina, 1966' (1967) 2(1) *Politics* 32-35.

43 Henry Palaszczuk MLA, 'Effects of Federal Election on Archerfield Electorate,' Queensland Parliamentary Debates (Parliament of Queensland, 15 September 1987), 2570.

44 As a result, Brisbane's mayors have alternated between councillors elected from their own colleagues in mid-term – Frank Sleeman (1976), Roy Harvey (1982), Tim Quinn (2003), Graham Quirk (2012) – and complete outsiders with no previous elected office experience who win the position not just from opposition but with zero prior experience in elected office

contrast, in NSW, Victoria and Tasmania, where local councils are elected by STV-PR, a candidate can run for both mayor and council at the same time; if elected mayor they are eliminated, and their preferences are transferred, at the very start of the council count.45

However, it must be noted that even for the Senate, the special count procedure could possibly give a seat to a different party, even within the same party ticket, as happened with Fiona Nash and Jim Molan. The National Party's annoyance that Nash was replaced by a Liberal seemed to peak when it briefly seemed that Hollie Hughes would be the successor, but was mollified somewhat when Jim Molan eventually took the seat. (Hughes was a centrist 'small-L' Liberal party whereas Molan was more conservative and therefore more acceptable to the Nationals as a second best.)

The High Court also held that, while the (ostensible) election of a disqualified candidate would contaminate an election result, the mere presence of such a candidate on the ballot paper would not (if she lost).46

This is a fair assumption in two situations. Ironically, they are at opposite ends of the spectrum. One extreme is with voluntary voting, as in British or American elections. In theory, only people who know and care about the candidates turn out to vote.47 Even when voluntary voting is preferential (as in Ireland), including on the ballot a candidate who should not really be there also should not change the result.

The other extreme is with compulsory, full-preferential voting, as for the House of Representatives.

But when voters are required by law both (a) to cast a ballot, if they do not want to be fined, and (b) to number a certain minimum number of candidates, if they do not want their ballot thrown away as informal (as opposed to exhausted), then the presence of pseudo-candidates on the ballot may actually serve as 'cannon fodder,' soaking up preferences that should rightly – had the election been conducted perfectly – have gone to other candidates instead.

– Clem Jones (1961), Jim Soorley (1991), Campbell Newman (2012). In the past four decades, only Sallyanne Atkinson was willing to risk all by giving up her position as [then] Alderman to run for mayor.

45 To be fair, even if Queensland law did offer a similar fallback, it is unlikely [m]any candidates would take it. Imagine the negative advertisements: 'Alderman Quink wants to be mayor, but he's having a bob each way by also running for Council as a backup! Voters in his ward won't even know until election night if they'll get Mr Quink or his understudy as their alderman! (etc).'

46 *Re Wood* (1988) 167 CLR 145, at 167; *Sykes v Cleary (No 2)* (1992) 176 CLR 77, at 101-02; Oscar I Roos and Benjamin B Saunders, 'Re Robert John Day AO: Section 44(v) of the Australian Constitution Revisited' (2017) 39(1) *Sydney Law Review* 123.

47 This is not strictly true. Because of various factors – especially social exhortations to 'be a good citizen and vote,' and interest in some but not all national and local elections held on the same day – Britain and the US have found it necessary to replace alphabetical ballot listing with random or rotated order, just as in Australia. The 'donkey vote' is less obvious in non-preferential and/or non-compulsory voting systems but its effects are still felt.

Of course, where the required minimum number of preferences is 1, someone who only liked the One Nation candidate but wanted to avoid being fined for non-voting may have simply lodged a blank ballot. And when full preferences for all candidates are required, that voter would have simply numbered the remaining candidates 1, 2, 3, and 4 instead of 2, 3, 4, and 5, with zero change to the legal outcome.

But when – as for the Senate since 2016, the NSW and Victorian upper houses, the ACT Assembly, and both Houses in Tasmania – a minimum number of preferences is required, greater than one48 – then including an ineligible candidate can distort the result, by depriving other candidates of grudging preferences they might otherwise have received in that candidate's absence.

(ii) CONSIDER INTENT

The High Court has continually rejected attempts to read s44 as requiring intention to acquire foreign allegiance. (The other grounds of disqualification are much harder to get into accidentally). And indeed the wording of the clause does not refer to intent. It is true the Founding Fathers considered an earlier draft that disqualified anyone who had 'done any act whereby' they became 'a subject or citizen of a foreign power' (following the approach of all other Colonies at the time and States since), and apparently rejected it absent-mindedly rather than deliberat[iv]ely.49 But on its own that would weaken, rather than strengthen, the argument for following that interpretation. In the words of the noted jurisprude Cletus the Slack-Jawed Yokel, 'Should have, but did not.'50

However, if we look back from the specific wording and drafting history, it is clear that the overall trajectory of the law is towards focusing on transgressions that are deliberate, substantial or both. Trivial and/or accidental breaches are more likely now to be overlooked. (The two factors normally rise and fall together because if a breach is minor in extent, it is more likely to have been an honest mistake or at least careless rather than deliberate).51 Even reckless disregard may not lead to invalidity where it would work hardship on innocent third parties.52

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48 12 preferences for the Senate, 15 in NSW, 3 for the Tasmanian Legislative Council, and 5 – equal in all cases to the district magnitude – in the other three chambers mentioned.

49 HK Colebatch, 'Electoral democracy and Section 44: a report from the Sargasso Sea,' Inside Story (29 May 2018), http://www.insidestory.org.au/electoral-democracy-and-section-44-a-report-from-the-sargasso-sea/. Drafting history and earlier versions are admissible in construing the Constitution since *Cole v Whitfield* (1988) 165 CLR 360, at 385.

50 Quashing Marge Simpson's objection that she should have specified a limit of one pretzel per customer. Season 8, Episode 11, The Simpsons (1997), https://en.wikipedia.org/wiki/The_Twisted_World_of_Marge_Simpson.

51 Cue Oscar Wilde's Lady Bracknell: 'To lose one parent [...] may be regarded as a misfortune; to lose both looks like carelessness.'

52 In *Clayton v Heffron* (1960) 105 CLR 214, the High Court held that an entrenched requirement that there 'shall' be a joint sitting before a deadlock-breaking referendum did not mean that the complying chamber should be penalised because the other chamber was recalcitrant and boycotted the joint sitting. In *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 456, the High Court sensibly held that an Act barring the ABC from entering contracts over $500,000 without Ministerial approval did not invalidate

This presumption is strong enough that it can change the correct interpretation from a strictly literal one to one with implied exceptions. Ironically, the High Court has already done this when construing s44. After lecturing us on how the words are clear and leave no room for ambiguity, the majority Justices then made an about-face and 'but of course' in the most extreme cases of absurdity: first, when a foreign citizenship is irrevocable according to that country's laws, and secondly if a foreign country were to confer its citizenship rights for the ulterior motive of unseating an Australian politician.

It is nice that the majority did not take literalism to its most absurd conclusion, by insisting on allegiance where renunciation is impossible.53 It is little consolation, though, that successive High Court majorities have gone nearly to that extent by insisting that unknown allegiance still disqualifies even if technically it could have been disclaimed. As Oliver Wendell Holmes Jr noted, in tort law 'a choice that entails a concealed consequence is, as to that consequence, no choice.'54

Maintaining that someone could have easily renounced a foreign allegiance they did not know about, and had no reason to suspect, is true but trivial, akin to observing that I could become a millionaire today by taking five minutes to stop by a newsagent and pick next week's Lotto numbers.

Ironically, any such hostile power would cause maximum havoc by conferring, not a legally irrevocable citizenship – which an Australian MP or candidate could simply ignore – but a citizenship which can be revoked only with great difficulty. 'You must appear in person before the Valyrian Minister for Citizenship, on Valyrian soil, to request release from your Valyrian nationality, on three separate occasions, each not less than six months and not more than eighteen months after the previous occasion' would probably fly under the High Court's radar.55

I am also skeptical that an Australian court would ever venture into the political minefield of judging a foreign government's bona fides. (Something similar was supposedly a limitation on laws implementing treaties under the external affairs power, but actually following through to enforce that would fly

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such contracts, as that would work hardship on an innocent third party who had bargained in good faith. Worse, it could actually advantage a party who ignored legal restrictions, by relieving them from the obligations of contracts they had purportedly entered. Contrast *Pearce v Brooks* [1866] LR 1 Ex 213 a century earlier, where a sex worker who had rented a horse-drawn coach got a windfall exempting from her contractual obligation to pay for repairs to it. The court reasoned, much less sensibly, that prostitution was against public policy so therefore the coach rental agreement was void.

53 Presumably if a foreign power were ever to start conferring its citizenship to wreak havoc on Australian parliamentary ranks, it would simply rinse and repeat every time a Senator or MHR duly renounced to maximise the political carnage. So 'conferred for improper purpose' probably shades into a subset of 'irrevocable,' de facto if not de jure.

54 Oliver Wendell Holmes Jr, *The Common Law* (Little, Brown & Co, 1881), Chapter 3.

55 I am using Valyria, from *Game of Thrones*, as a neutral example.

against almost everything else courts do in this area.56) But the real danger is not so much foreign powers conferring their citizenship rights with the intent of nobbling critics in Australian politics, but rather their doing so with benevolent intentions. Eg, Hungary restored citizenship retrospectively to anyone born in its territory who had been stripped of it by the Nazis in 1939. In almost every other country, this would be an unequivocal benefit. In Australia, however, it presented Josh Frydenberg with a political headache.57 Worse, it may re-emerge every time a country amends its citizenship laws.

The High Court allowed that a really determined and unambiguous attempt to renounce by a candidate must be accepted in Australian law, even if it is not effective in foreign law. This was the Court majority's safety valve for individual responsibility. You might have been born with foreign citizenship rights you did not ask for or even know about; you might have foreign citizenship rights conferred on you against your will and without your asking, by unilateral action of a foreign government; but as long as you can renounce any such foreign citizenship rights, either by doing so successfully under foreign law or by doing so unambiguously (whichever takes less effort), it remains within your control.

But this concern for certainty seems odd given that so many other areas of law depend on 'what did they know and when did they know it?' The offence of insider trading, for example, may see someone jailed based on the precise time at which a court finds the defendant knew that, or was reckless as to whether, certain information was generally available and might materially affect share prices.58 Statutes of limitations typically allow extensions of time where fraud was involved, since a plaintiff cannot be said to have slept on their rights if they were deceived.59 And again, as noted above, the validity of a disqualified MP's Ministerial decisions may depend on exactly the question the High Court deemed too hard for judges to handle in Re Canavan.

Finally, even if you are free to renounce, it only operates prospectively. It may clear you to stand again for the next Parliament but not to continue in the current Parliament. Even if in force for only one day, it still disqualifies you.

The High Court is quite correct that *Re Webster* (1975) 132 CLR 270 was wrongly decided and was far too narrow.60 But the Court has swung too far

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56 *Commonwealth v Tasmania* [1983] 158 CLR 1 (Tasmanian Dams case) per Brennan J at 219, Deane J at 259. Briefly, following *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, it looked as if the Mason Court might have found a way to enforce this 'only treaties entered in good faith' condition effectively, by requiring federal administrative actions to conform to obligations assumed by treaty. However, Teoh was soon overturned by bipartisan political retaliation.

57 Tony Wright, 'Josh Frydenberg caught between monstrous history and an uncertain fate' *Sydney Morning Herald* (Sydney, 3 November 2017).

58 *Corporations Act 2001* (Cth), s 1043L(1)(b); *R v Hannes* [2002] NSWSC 1182; *R v Rivkin* [2004] NSWCCA 7.

59 Eg, *Limitation Act 1969* (NSW), s14(1).

60 Webster 'did not rest on a principle reinforced in successive cases. [...] Chief Justice Barwick's narrow interpretation [...] has long been criticised for interpreting s 44(v) such that it had almost no effect at all. The High Court's embracing of a broader interpretation marks a welcome remedy to these criticisms.' James Morgan, 'Protecting Democratic Integrity: Re Day

the other way, especially in in relation to the allegiance ground of disqualification. (Other grounds like contracting with the Commonwealth are harder to walk into without one's eyes wide open, albeit perhaps clouded with dollar signs). For example, Eddie Obeid, NSW MLC, showed allegiance to a foreign state when in 2004 he took urgent family leave to fly himself (and, allegedly, numerous other family members) to his former home village in Lebanon to campaign and vote in a local election.61 Voting in a foreign election is an unequivocal sign of foreign allegiance.62 Private individuals might – repeat, might – be forgiven if they were invited to vote in a special diaspora electorate;63 but (as with bankruptcy) would-be public officials should be held to a stricter standard.

(iii) NARROW THE DEADLINE:

However, much of the disruption could be minimised by reducing a different axis: by reducing the time-period for which compliance is required, as well as (or at least instead of) reducing the strictness of compliance required.

In 2017, the High Court reiterated its concern for certainty:

> [...] to accept that proof of knowledge of the foreign citizenship is a condition of the disqualifying effect of s 44(i) would be inimical to the stability of representative government. Stability requires certainty as to whether, as from the date of nomination, a candidate for election is indeed capable of being chosen to serve, and of serving, in the Commonwealth Parliament. This consideration weighs against an interpretation of s 44(i) which would alter the effect of the ordinary and natural meaning of its text by introducing the need for an investigation into the state of mind of a candidate. [...]

[No 2] (2017) 343 ALR 181' (2017) 38(1) *Adelaide Law Review* 483, 486 and 491. Barwick (after appointing himself to sit as the Court of Disputed Returns) found that Country Party Senator Jim Webster 'did not use his Senatorial influence to obtain the timber orders. Quite so. But that wasn't the charge. The charge was that the orders had been obtained, supplied, and paid for. Even the Liberals were astounded by this decision. One Senator [...], a one-time Attorney General, said that if Webster was not caught by Section 44(v), nobody could be.' Peter Walsh, 'Sir Garfield Barwick, dishonourable judge,' *Labor Herald* (Barton, October 1997) 8.

61 AAP, 'Obeid denies involvement in Lebanese election', *Sydney Morning Herald* (Sydney, 1 June 2004); AAP, 'Obeid admits involvement with village election,' *Sydney Morning Herald* (Sydney, 3 June 2004). 'Folklore has it Mr Obeid literally brought politics to Matrite. The town did not have a council until he used his influence among Lebanese politicians to add Matrite to the nation's municipalities. The effect of such a move was open to the taps for Matrite to receive $US400,000 every year.' Rami Aysha, 'Eddie Obeid rules, OK, say the villagers of Matrite: Labor's pariah is always welcome in the place he was born,' *Sydney Morning Herald* (Sydney, 4 August 2013).

62 Even in the USA, with a Bill of Rights, the courts have taken this view: *Kennedy v Mendoza-Martinez*, 372 US 144 (1963).

63 James Panichi, 'The diaspora fights back,' Inside Story (4 December 2008), https://insidestory.org.au/the-diaspora-fights-back/, and 'Italy's offshore voters confront an electoral conundrum,' Inside Story (28 February 2018), https://insidestory.org.au/italys-offshore-voters-confront-an-electoral-conundrum/. Ironically, it seems that Senator Matt Canavan's citizenship doubts arose because his mother registered him and herself as Italian overseas citizens so they could vote in this diaspora electorate: Charlie Lewis, 'Did Canavan's mum sign him up for Italian citizenship so he could vote for Berlusconi?' Crikey (28 July 2017), https://www.crikey.com.au/2017/07/28/did-canavans-mum-sign-him-up-for-italian-citizenship-so-he-could-vote-for-berlusconi/.

> The conceptual difficulty may be illustrated by considering the following questions. Does a candidate who has been given advice that he or she is 'probably' a foreign citizen know that he or she is a foreign citizen for the purposes of s 44(i)? Is the position different if the effect of the advice is that there is 'a real and substantial prospect' that the candidate is a foreign citizen? Does a candidate in possession of two conflicting advices on the question know that he or she is a foreign citizen for the purposes of s 44(i) only when the advice that he or she is indeed a foreign citizen is accepted as correct by a court?64

In 1998 I argued that for purposes of Section 15, 'chosen' meant only the voting period.65 I acknowledged briefly that this was not the same as the High Court's reading of 'chosen' in Section 44, but distinguished the two on the ground that Section 44 did not rely on what voters knew and when they knew it. In light of the High Court's newfound resurgence of (already ample) Section 44 cases, this needs further and better particulars.

One can certainly question the reading of individual Section 44 grounds, but

> (1) that interpretation is firmly settled (jurisprudence constante, as the French call it, and backed by a unanimous High Court in all the most recent times);
>
> (2) however harshly individual grounds have been construed ('rights of a foreign citizen' not requiring volition; 'under sentence' can not be retrospectively annulled; 'office of profit under the Crown' includes unpaid leave; etc), the real problem is the wide and unforgiving time-frame, which, as *Re Nash* has shown, can rise from the grave like Glenn Close at the end of *Fatal Attraction*. If the relevant time of 'chosen' were narrowed – to the voting period for Section 15, to the taking-seat time for Section 44 – it would be easier to avoid unseating MPs for trivial and unforeseeable departures.

Section 15 has (fortunately) still never been litigated, whereas Section 44 has been richly litigated. But it will probably happen one day66 and when it does, passions will run high and political players will be tempted to espouse legal interpretations based on immediate self-interest.

So I am making a pre-emptive ambit claim here, trying to get in early to head off the (potentially disastrous but understandable) mistake of thinking that 'chosen' in s15 means the same process and therefore the same time-frame as in s44. I want to corral and quarantine the damage of a too-wide reading of 'chosen' by confining the Section 44 interpretation to that particular section. The word 'chosen' has a different

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64 *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45, , per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ at [48], [56]; Gabrielle Appleby, 'The High Court sticks to the letter of the law on the 'Citizenship Seven',' The Conversation (27 October 2017), https://www.theconversation.com/the-high-court-sticks-to-the-letter-of-the-law-on-the-citizenship-seven-85324.

65 Tom Round, 'Party Endorsement and Senate Vacancies: The Constitution and the Commonwealth Electoral Act' (1998) 7(2) *Griffith Law Review* 297-316.

66 Eg, the Liberal/ National merger in Queensland in 2008 might have provided some s15 fodder if any Liberal or National Senators from that great State vacated office during the 2005-2011 or 2008-2014 half-Senate terms. (This suggestion was made by someone posting or commenting at Larvatus Prodeo, but that blog is now defunct and I cannot source the author with precision).

meaning in Section 15 from Section 44 because it has a different context and purpose where voter knowledge is clearly of primary relevance.67

A candidate may be 'chosen' by one or more individuals at any point during the poll.68 But individuals give myriad different and mutually incompatible choices. To be 'the choice' of 'the people' – this single candidate representing this district, that combination of six names representing that State – only occurs once, after and as a (hopefully direct) result of all the individual choices (preferences, votes) being 'boiled down' to produce a single collective choice (outcome, result).

Whether a prospective parliamentary candidate should be required to relinquish some prior disqualifying factor (a job, an office, some citizenship) depends what that is. At one extreme, it would seem outrageous if a sitting judge could even campaign for Parliament without first resigning from the bench. At the other extreme, I agree with Jeremy Gans that it is also outrageous that an Australian citizen should be forced to abandon their potential citizenship rights (not even necessarily full foreign citizenship), probably forever, just to contest.69

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67 Section 15 stipulates that a political party can only claim rights in relation to a candidate's Senate vacancy if both the party and the candidate publicly represented the candidate as endorsed by the party for the entire 'time when [she] was chosen.'
In 1998-99 I argued this 'time' meant the entire period starting when her nomination was lodged (or, perhaps, accepted) until the time she was finally declared elected. Like most commentators, I pictured this as occurring at most some months after the original Senate poll, with election petitions being lodged very shortly after the result was declared as clearly 'unfinished business' pending the election. Eg, Robert Wood was declared elected in August 1987 and unseated in May 1988 (although Elaine Nile's earlier, unsuccessful challenge had been heard in December 1987); Phil Cleary was declared elected in April 1992 and unseated in November 1992; Heather Hill was declared elected October 1998 and unseated in June 1999.
However, the case of Hollie Hughes brings home dramatically that, for Senators, the 'time… chosen' could extend for nearly seven years after the original poll, due to the Senate's combination of six-year terms, a lame-duck interval that can reach 12 months, and recountbacks to replace dead or disqualified candidates. Whereas if Ms Hughes and Ms Nash had been candidates in a House of Representatives division, Ms Hughes would certainly have resigned her AAT appointment before nominating for the by-election, and this 2018 by-election – not the 2016 double dissolution – would have been the relevant 'time chosen' for qualification purposes.
Even if the timeframe of 'time chosen' is not narrowed for the purposes of s44, it must certainly be narrowed for the purposes of s15 since the latter depends explicitly on what information is available to voters. It would cross the line from 'inconvenient' to 'absurd' to hold that the purpose of s15 as amended in 1977 is any way served by requiring Hollie Hughes to continue being 'represented,' by herself and by the Liberal Party, as an endorsed Liberal candidate after the Senate polls closed on 2 July 2016.
Insisting on endorsement for the entire polling period, even though shorter than what is required to avoid disqualification, still allows a candidate to defect from a party in mid-campaign, continuing to derive electoral advantage from the party label on the ballot paper (like Pauline Hanson in 1996; remembering that the 1977 amendment was drafted before party labels appeared on the ballot) while denying the party any voice in her replacement.
68 Eg, now-Senator Malcolm Roberts persuaded just over six dozen Queenslanders to write a number 1 next to his name: Josh Butler, 'A One Nation Senator Got Elected With Just 77 Personal Votes,' Huffington Post (4 August 2018), https://www.huffingtonpost.com.au/2016/08/04/a-one-nation-senator-got-elected-with-just-77-personal-votes_a_21445406/.
69 As Jeremy Gans (again!) notes, Tasmanian MHR Justine Keay's explanation for not renouncing her British citizenship earlier ('If I don't get elected, I can't get my citizenship back') highlights 'one of the Constitution's cruellest details: its requirement that prospective politicians irrevocably rid themselves of disqualifying attributes – foreign citizenship, jobs in the public service, government business ties – not only before the election results are known, but before they even nominate.' 'The hesitators: The dual citizenship story is far from over –

Public servants are in the middle. Perhaps this reflects a tacit intuition that being a judge already gives someone a lot of not-electorally-accountable power (even if you are not [yet] elected); being a public servant gives them less power but still a great deal; while being a dual citizen does not give them any particular power within the Australian polity and only becomes an issue if they do successfully acquire power by succeeding in their electoral campaign.70

The High Court has held that intention or knowledge by the candidate should not be decisive because that would lead to uncertainty:

> At the conceptual level, questions would necessarily arise as to the nature and extent of the knowledge that is necessary before a candidate, or a sitting member for the purposes of s 45(i), will be held to have failed to take reasonable steps to free himself or herself of foreign citizenship. In this regard, the state of a person's knowledge can be conceived of as a spectrum that ranges from the faintest inkling through to other states of mind such as suspicion, reasonable belief and moral certainty to absolute certainty [50]. If one seeks to determine the point on this spectrum at which knowledge is sufficient for the purposes of ss 44(i) and 45(i), one finds that those provisions offer no guidance in fixing this point. That is hardly surprising given that these provisions do not mention the knowledge of a person or the person's ability to obtain knowledge as a criterion of their operation.
>
> The conceptual difficulty may be illustrated by considering the following questions. Does a candidate who has been given advice that he or she is 'probably' a foreign citizen know that he or she is a foreign citizen for the purposes of s 44(i)? Is the position different if the effect of the advice is that there is 'a real and substantial prospect' that the candidate is a foreign citizen? Does a candidate in possession of two conflicting advices on the question know that he or she is a foreign citizen for the purposes of s 44(i) only when the advice that he or she is indeed a foreign citizen is accepted as correct by a court? 71

However, this is inconsistent with the trajectory of the common law and with recent decisions of the Court itself. The Court has held that statutes should be construed where possible to make both culpability72 and penalty73 proportionate to intent. Indeed, the mens rea requirement is so deeply embedded in the common law, so

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and perhaps it was Barnaby Joyce who hit the nail on the head,' Inside Story (13 November 2017), https://insidestory.org.au/the-hesitators/.

70 This trichotomy reflects that proposed by the House of Representatives Standing Committee on Legal and Constitutional Affairs, Report on Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv) (tabled 25 August 1997): 'One [proposed new constitutional] provision should require a person who holds a judicial office under [...] the Commonwealth or a state or a territory to resign from the office before he or she nominates [... C]ertain other public offices, specified by the Parliament, would be automatically declared vacant if the occupant [...] nominated for election [...]. Under the third provision, certain other public offices, specified by the Parliament, would be automatically declared vacant if the occupant [...] were elected to the Senate or the House of Representatives' (emphasis added).

71 *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]*; *Re Joyce; Re Nash; Re Xenophon* [2017], per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ at [55-56].

72 *Heh Kaw Teh v Commonwealth* (1985) 157 CLR 523.

73 *Sillery v R* (1981) 180 CLR 353.

deeply that it might be held a necessary precondition to the exercise of federal 'judicial power' to imprison for a crime.74

True, this is not a conviction for a crime, but qualification for a public office. But like a criminal conviction, it is relevant as a measurable proxy for character, judgment and impulse control. This is one reason why the Court allowed a safety valve where renunciation was impossible or every difficult. On a strictly literal ground, this is also nowhere found in the text, and it does not offer any more clarity. Its stated rationale was partly mercy for candidates (so no one is excluded for life) and partly collective Australian self-rule (so, to use the often-cited parade of horribles, Beijing could not unseat Bob Brown and other pro-Tibet MPs by unilaterally conferring honorary Chinese citizenship on them; in fact, exactly that could happen, provided Beijing allowed some avenue for renunciation – 'must show up in person at a citizenship office on PRC territory' – and meanwhile the MP would have been unseated).

However, it does not provide clarity; it provides no more mercy for candidates (a certainty of disqualification rather than an uncertain chance); and since, as the Justine Keay and Susan Lamb cases show, foreign bureaucrats' delays in processing renunciations can, if they tick over the crucial deadline for nominations, have the same effect for a particular three- or six-year term as foreign legislators' refusal to allow renunciations at all.75 Political careers are not quite as time-sensitive as Olympic athletes but it is still hard to come back from an enforced 3- or 4-year time-out.

Secondly, by establishing an absolute standard rather than excusing de minimis exceptions, the Court has moved away from its own approach in the closely analogous field of apprehended bias. The Court discarded the absolutist common-law rule that any detectible financial interest whatsoever would disqualify for apprehended bias and held instead that a judge's 'pecuniary or proprietary interest in the outcome of litigation' must be 'not insubstantial.'76

Finally, the Court's own rationale for the most anomalous case, that of Hollie Hughes, emphasised that Ms Hughes had brought these odd legal consequences upon her own head by her own choices:

> Ms Hughes' acceptance in the meantime of appointment to the Administrative Appeals Tribunal, with the entitlement to remuneration which that appointment brought, was understandable. But it was a voluntary step which she took in circumstances where reference by the

74 Hence the repeated references in judicial power cases such as *Chu Kheng Lim* (1992) 176 CLR 1 to 'criminal guilt.'

75 'Ironically, while section 44 was created to protect Australian sovereignty, it has become the case that [...] foreign nations have the power to shape our parliament by potentially limiting who can become a candidate for election.' WA Liberal Senator Linda Reynolds, quoted in Paul Karp and Katharine Murphy, 'Barnaby Joyce and others disqualified for dual citizenship have debts waived: Debts accrued by Joyce and five other parliamentarians included salaries and staff expenses,' The Guardian (Thursday 29 March 2018, 16.24 AEDT), https://www.theguardian.com/australia-news/2018/mar/29/barnaby-joyce-and-others-disqualified-for-dual-citizenship-have-debts-waived. Even the perception of such influence can be damaging: '[...] what is the likelihood that either Malcolm Turnbull or Bill Shorten will take a hard line against the government of Egypt on a policy issue in coming months?' Jeremy Gans, 'Anne Aly and the insurmountable obstacle: The High Court has set a new citizenship test for parliamentarians of uncertain status, but who on earth could pass it?' Inside Story (11 May 2018), https://www.insidestory.org.au/anne-aly-and-the-insurmountable-obstacle/;

76 *Ebner v The Official Trustee in Bankruptcy; Clenae v Australia and New Zealand Banking Group* (2000) 205 CLR 337, per Gleeson CJ, McHugh, Gummow and Hayne JJ at [58]; overruling *Dimes v Grand Junction Canal Proprietors* (1852) 3 HL Cas 759.

> 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.77

So why then is scienter relevant for Hollie Hughes not for Fiona Nash, Scott Ludlam or Barnaby Joyce?

(iv) ADD A FAIL-SAFE TO RECOUNTBACKS TO PREVENT CAIAFA QUIRKS

While the Court was correct to adopt 'special count' as the remedy for a Senate disqualification, it is necessary to stipulate an override to prevent it producing paradoxical results. It has long been demonstrated STV-PR can produce such quirks in theory,78 and one in fact occurred in practice in 2017. Melbourne City Councillor Michael Caiafa – who was qualified to sit, and who had not resigned – was unseated due to a recountback, held six months after the original election, to replace another candidate who had resigned to avoid likely disqualification. Justice Greg Garde, writing for the Victorian Civil and Administrative Tribunal, sympathised with Caiafa as a 'victim of circumstance': 'His conduct has been exemplary. He has done all that an elected councillor can do since he was declared elected'. Even so, Caiafa's term was terminated by 'the actions of another candidate over whom he had no control, and for whom he has no responsibility.'79

Results like this are politically unacceptable, at least where the innocent third-party candidates have already been declared elected and seated. This is partly because they have a legitimate expectation they have relied upon, but also because electoral laws should try as far as possible to close any loopholes that might reward manipulation. No one would, of course, advocate using Tasmania/ ACT/ Maltese-style countbacks (see above) for replacing a candidate who has not yet been duly elected; whatever the merits of countbacks for filling actual vacancies, it makes no sense to divide the electorate into five, six or seven party-'owned' quotas when the whole point of a general or periodic election is to decide how those quotas are distributed among parties and candidates in the first place.80

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77 *Re Nash [No 2]* [2017] HCA 52, per Kiefel CJ, Bell, Gageler, Keane and Edelman JJ at [45].

78 Nicholas Renton, *Guide for Meetings and Organisations* (Thomson Reuters, 8th ed, vol 2, 2005) gives some stylized but mathematically-rigorous proofs of preference orderings that can lead to these anomalies.

79 *Victorian Electoral Commission v Municipal Electoral Tribunal (No 2) (Review and Regulatio*n) [2017] VCAT 375; Aisha Dow, 'City of Melbourne councillor Michael Caiafa loses seat in unprecedented decision,' *The Age* (Melbourne, 14 March 2017).

80 Which is why *Vardon v O'Loghlin* (1907) 5 CLR 201 was defensible at the time. Confined to its immediate facts, it makes sense. Unfortunately its logic has been extended too far. Vardon would have been fine had it just specified a narrower doctrine, ie that the s15 casual vacancy provision does not apply unless and until someone has been validly elected to that position. In other words, 'casual vacancy' should be construed to prevent bootstrapping. It was unnecessary to go further and hold a gratuitously wide definition of 'time chosen.' Vardon is compatible with any reading of 'time chosen' where the candidate is removed at any time before taking their seat and (more importantly) due to factors that arose or accrued before, rather than after, taking their seat. The wide reading of 'time chosen' has the silly side-effect of nullifying an explicit constitutional clause, ie that a half-Senate election can be held 'at any time in the 12 month before' that class of Senators' terms expire on 1 July in the sixth calendar year following their election (or, if chosen at a double dissolution, in the second and fifth calendar years following their election). As the ABC's psephological pundit notes, because an

The West Australian type of countback, however, with all candidates81 re-competing for all seats, has merit since it can be combined with the 'blank slate' approach of a general or periodic election. I contend that it should kick in when – and only when – polls have closed and vote-counting has begun. Before that time, parties and candidates are behind a Rawlsian veil of ignorance about how the voting went, so there is not yet either any reliance or any risk of deliberate manipulation.

The High Court's (and many other common-law courts') own jurisprudence recognises that invalidity can vary greatly according to the stage it is discovered at.

What if the disqualification of a candidate reaches far back in time. The Hollie Hughes case is a particularly striking example. In theory, the disqualified MP received all their pay and emoluments under false pretences, and could legally be required to repay every cent back, from the very beginning. In practice, past debts are usually waived ex gratia by the Finance Minister,82 but this is an executive decision and not judicially dictated. As far as the courts are concerned, every cent from the first day is a potential debt that may be claimed back for the public purse.

But any votes they cast (and even any Acts they helped pass) while sitting as an MP are never invalidated. Common-law courts have consistently held that a legislative body's proceedings are not invalid merely because an ineligible MP participated.83 Courts are particularly reluctant to hold that even obviously (or authoritatively-declared) illegal past actions can disrupt or cast doubt on the validity, not just of individual statutes, but of the entire Parliament itself – whether a breach of s24's nexus ratio,84 or a breach of the s57 preconditions for a double dissolution.85 The court will of course unseat that MP promptly, and will order future Parliaments to keep within the nexus ratio, and will strike down particular Bills invalidly passed at a double dissolution, but it does not declare the current (let alone previous) Parliaments void retrospectively.

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election 'begins' when writs are issued, 'the writ for a half-Senate election cannot be issued before 1 July, and the Commonwealth Electoral Act then makes Saturday 3 August the first possible polling date for a half-Senate election.' Antony Green, 'The First Date for a Half-Senate Election is 3 August,' ABC Election Blog (24 March 2013), http://blogs.abc.net.au/antonygreen/2013/03/the-first-date-for-a-half-senate-election-is-3-august.html. It is, alas, not unknown for a plain constitutional clause to be nullified by judicial interpretation (eg, 'matters arising under any treaty,' s75(i)) or by Westminster convention (eg, that the Governor-General could put to referendum a constitutional alteration proposed by the Senate, as s128 envisages, against the wishes of the Cabinet and the House of Representatives). But this should be avoided. In other areas, such as 'prerogative writs cannot lie against the Crown,' its logic has been overturned by the High Court: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

81 Or, at least, all sitting members plus any defeated candidates who choose to re-nominate. Defeated candidates who have moved on need not be included.

82 Paul Karp and Katharine Murphy, 'Barnaby Joyce and others disqualified for dual citizenship have debts waived: Debts accrued by Joyce and five other parliamentarians included salaries and staff expenses,' The Guardian (Thursday 29 March 2018), https://www.theguardian.com/australia-news/2018/mar/29/barnaby-joyce-and-others-disqualified-for-dual-citizenship-have-debts-waived .This leniency contrasts sharply with the Commonwealth's zealous approach to recovering tax and welfare overpayments from non-politicians, which in turn makes certain that any referendum to lighten s44 will sink like a stone on referendum day.

83 *Simpson v A-G (NZ)* [1955] NZLR 271; *Re Senator Wood* (1988) 167 CLR 145, at 162-63.

84 *Attorney-General (NSW) (Ex rel Mackellar) v Commonwealth* (1977) 139 CLR 527.

85 *Victoria v Commonwealth and Connor* [Petroleum & Minerals Authority Case] (1975) 134 CLR 81.

Ministerial decisions are in an intermediate position: these are only invalidated from the time it became 'notorious' the person might be unqualified. Before that time, they may be protected by the 'de facto officer' doctrine.86

So, to give a highly simplified example, a Minister who last nominated for election as an MHR or Senator on (say) 15 March 2018, who was elected and then sworn in as a parliamentarian and a Minister on 15 July 2018, who was referred by their House (or challenged by a common informer) on 15 November 2018, and who was finally declared disqualified on 15 December 2018, may have up to four different cut-offs. If the person held foreign allegiance, or some other disqualifying ground, on 15 March, that renders everything that followed unlawful. But whether and when these unlawful actions become invalid varies. The candidacy was – in theory – invalid from the very beginning, in theory, but this has few practical effects because all the other deadlines are later. The candidate's receipt of pay, travel allowances and other financial benefits was not invalid until 15 July, when she took her seat. (She may have been sworn in and paid as a Minister before being formally sworn in as an MP). Any decisions she signed off as a Minister will certainly be invalid after 15 December but may be invalid earlier – certainly when her title in office was officially challenged on 15 November, but arguably even earlier if her disqualification had been raised in the media.87 (Although not before 15 October 2018 as she has a three-month grace period to serve as a Minister without being an MP). And any Bills or other motions passed or rejected by that House stay passed or rejected even though an unqualified person sat and voted on them – indeed, even if that Bill had been passed or rejected only by one vote.88

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86 The 'de-facto officer' common-law doctrine 'protects people who rely on acts done in the apparent execution of their office by an officer who appears to be 'clothed with official authority,' even though they may not validly hold that office. It is not aimed at protecting those who invalidly exercise power, but rather those who rely in good faith on the apparent authority of those who publicly exercise power. The doctrine is also relied on to give certainty concerning the validity of acts of persons whose appointment or election may later be challenged. Anne Twomey, 'If High Court decides against ministers with dual citizenship, could their decisions in office be challenged?' The Conversation (18 August 2017), https:/www.theconversation.com/if-high-court-decides-against-ministers-with-dual-citizenship-could-their-decisions-in-office-be-challenged-82688. The Constitution allows a Minister to hold office for three months while not being a member of parliament. The legal advice says that any decision made by Joyce or Nash after three months had lapsed from their appointment as ministers was open to challenge. Michelle Grattan, 'George Brandis suggests Joyce and Nash did not really make their ministerial decisions,' *The Conversation* (30 October 2017), https://www.theconversation.com/george-brandis-suggests-joyce-and-nash-didnt-really-make-their-ministerial-decisions-86524. University of New South Wales law professor George Williams told Guardian Australia: 'There is some uncertainty there.' 'It could be that people will test Ministerial decision-making in court, and there are no clear precedents,' he said. 'These Ministers are bearing a risk that the court might put Ministerial decisions in a different category to parliamentary votes.' Anne Twomey, 'Three reasons why the decisions of Joyce and Nash may be difficult to challenge,' *The Conversation* (31 October 2017), http://www.theconversation.com/three-reasons-why-the-decisions-of-joyce-and-nash-may-be-difficult-to-challenge-86540.

87 While some legal statuses, such as sub judice, only kick in once a legal proceeding is formally initiated, in other cases the courts will take account of broad publicity and social perceptions, eg apprehended bias and prejudicing juries.

88 Contrast the approach courts of disputed returns take regarding popular votes (elections and referenda), where validity depends heavily on whether the irregular votes were numerous enough to change the result. In some cases – Florida in November-December 2000, Western Australia in 2013 – a tiny proportion of votes could be decisive. By contrast, in 2009 Queensland's Supreme Court dismissed a challenge to one State electorate where 14 voters were denied a vote. Because the seat was won by a 74-vote margin, 'none of those 14 irregularities could have affected the outcome.' *Caltabiano v Electoral Commission of*

So, there is precedent for the law saying that not everything done in reliance on something later found unlawful should be retrospectively unravelled. If an initial Senate count, one that includes one or more unqualified candidates, would have elected A, B, C, D, E and F, then the Court should direct that any recount triggered by disqualification of a candidate after voting has begun should not unseat any of those six candidates – unless, of course, those unseated were disqualified. Put another way, sitting MPs should never be excluded in a countback or recountback even if one is lowest in number of votes.89

Even better, Parliament should legislate to explicitly insert this interpretation in the Commonwealth Electoral Act to remove uncertainty. Doing this would certainly be within the Commonwealth's legislative power, even in the face of resurgent judicial activism in electoral matters, because it does not reduce the voting power of any identifiable group.90 Perhaps a new s180A could be inserted immediately after the parallel provision for death of a candidate.

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Queensland & Anor [2009] QSC 294, per Atkinson J at [790]; Amelia Bentley, 'Caltabiano Chatsworth challenge thrown out', *Brisbane Times* (Brisbane, 17 September 2009),.

89 It is theoretically possible that, say, four incumbents and two 'challengers' could each poll around 15% of first preferences in a Senate recountback to replace one disqualified incumbent (where the quota is 14.28%), so that the fifth incumbent (who has not been disqualified) has only 10%. In this case the fifth incumbent should elbow aside whichever of the two newcomers had fewer votes, even though both newcomers are over the quota. But in almost all cases, the failsafe rule would not mean defeating any challenger over the quota but merely tinkering with the order of elimination, and incumbents protected from elimination by the rule would eventually reach the quota in their own right by accumulating second and later preferences.

90 In cases like *Roach v Electoral Commissioner* (2007) 233 CLR 162 and *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

STUDENT SECTION

This part of Canberra Law Review features work by Canberra Law School students and recent graduates.