

Defending the Dual Citizen Ban

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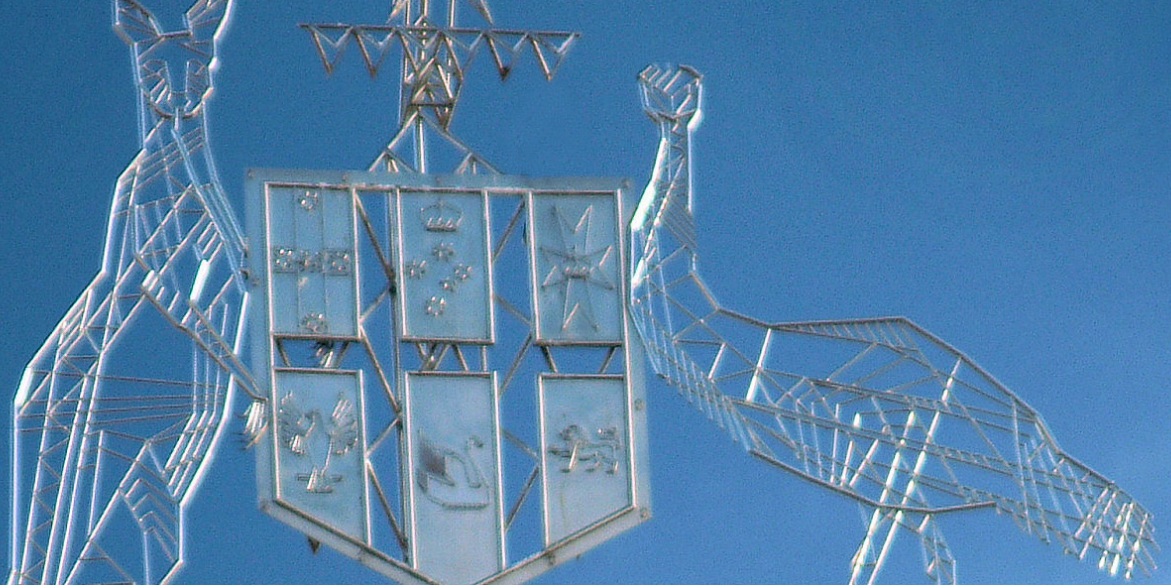
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POLICY Paper 3

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Introduction

On the 14th of July 2017, Greens Senator and Deputy Co-Leader Scott Ludlam called a press conference out of the blue to resign from the Senate.¹ Ludlam announced that because he was born in New Zealand he held dual citizenship and was consequently ineligible to sit in the Australian Senate; and had been so at all times since his election in 2007.

The culprit was section 44(i) of the Constitution, a provision that had periodically raised its head in recent decades to strike down aspiring politicians — but had largely been overlooked since the last outbreak in the late 1990s.

Section 44(i) states that “any person who is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power... shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives”.²

If Ludlam’s announcement was a surprise, what happened next was undoubtedly a shock. Just four days later, Ludlam’s colleague Larissa Waters announced through tears that she too was a dual citizen, having been born in Canada to Australian parents.

In short order, Liberal National Senator Matt Canavan (who stood down as Minister but remained in parliament), One Nation Senator Malcolm Roberts, Nationals Senator Fiona Nash, Senator Nick Xenophon and, most surprisingly, Deputy Prime Minister Barnaby Joyce were all referred to the High Court as potentially ineligible.

While many were confident the court would rule in favour of the politicians, the High Court unanimously found five of the seven were ineligible to have been chosen. It found Senator Canavan was eligible, because it could not be determined if he was a dual citizen, and that Senator Xenophon was eligible because the form of citizenship he held was not citizenship for the purposes of section 44.³

However, the crisis was not yet over. A number of other politicians came forward to announce that they too were dual citizens and were resigning. Liberal Senate President Stephen Parry, Liberal MP John Alexander, Tasmanian independent Senator Jacqui Lambie and NXT Senator Skye Kakoschke-Moore all resigned after *Re Canavan*.

The government sought to resolve the crisis by creating a register that required disclosure of potential citizenship conflicts.

However, this merely led to more cases: Labor MP David Feeney resigned over his citizenship problems and Labor Senator Katy Gallagher was referred to the High Court. When Gallagher too was found ineligible by the High Court, four more politicians also resigned: Labor’s Susan Lamb, Justine Keay, Josh Wilson and Rebekha Sharkie of the recently renamed Centre Alliance (formerly NXT).

To date, six sitting politicians have been found ineligible by the High Court (though two had already resigned by this point) and one prospective sitting politician has been found ineligible. Eight more have resigned. Just two have been cleared by the High Court.

This has led to a challenge to the legitimacy of section 44(i) in particular, with a number of commentators and politicians arguing that the section is anachronistic, frustrates the democratic will of the people and is unworkable in its current form. A report from the Joint Standing Committee on Electoral Matters argued the section should be abolished at a referendum.

This paper will look at how section 44 has been interpreted by the High Court and whether it remains relevant in the modern world. It will also look at proposals for reform and whether there is any merit in modifying or deleting the section through a referendum.

Section 44 (i) is about preventing conflicts of interest

The High Court has delivered four recent judgements on the interpretation of section 44. For the purposes of interpreting section 44(i) in particular two of those judgements, *Re Canavan* and *Re Gallagher*, form a relatively comprehensive explanation of how the law operates.⁴

Re Canavan was the first substantial commentary by the High Court on the issue of section 44(i) in nearly 20 years, with the last major judgements being *Sykes v Cleary* in 1992 and *Sue v Hill* in 1999. The case concerned the eligibility of seven politicians, two of whom had already resigned. Some commentators expected most, if not all, of the seven to be found by the High Court to be eligible. Indeed, when commenting on the situation of one of the seven then Deputy Prime Minister Barnaby Joyce, the Prime Minister famously said Mr Joyce was “qualified to sit in the house and the High Court will so hold.”⁵

In finding five of the seven ineligible, the High Court preferred the approach to the construction of the section most closely aligned with the plain meaning of the text of the section. The Court commented that

“Three alternatives ... were proposed. Each of these alternatives involves a construction that departs substantially from the text. The minimum required by all three approaches was, as Deane J said in dissent in *Sykes v Cleary*, that s 44(i) be construed as “impliedly containing a ... mental element” which informs the acquisition or retention of foreign citizenship.”⁶

The Court looked at the purpose of s 44(i), noting it was designed to ensure that members of parliament don’t have an allegiance to a foreign power, specifically noting Deane J comments in *Sykes v Cleary* that “the whole purpose” of s 44(i) is to “prevent persons with foreign loyalties or obligations from being members of the Australian Parliament.”⁷

It draws a specific distinction between the first limb, which deals with the conduct of the person concerned, and the second limb which “operates to disqualify the candidate whether or not the candidate is, in fact, minded to act upon his or her duty of allegiance.”⁸ The Court, in a passage that encapsulates the excellent logic of the judgement, notes

“It is a substantial departure from the ordinary and natural meaning of the text of the second limb to understand it as commencing: “Any person who: (i) ... knows that he or she is a subject or a citizen ...”⁹

There is little to recommend the arguments pursued on behalf of the dual citizens, other than the fact they would have resolved the citizenship crisis. They would have made section 44(i) so weak that, other than

someone who was actively duplicitous, no one would have been found to breach it.

The strongest argument, aside from claims stemming from the constitutional drafting process, was the rhetorical point that “[y]ou cannot heed a call that you cannot hear and you will not hear the call of another citizenship if you do not know you are a citizen of that other country.”¹⁰ The Court appropriately answered by noting that “the second limb is concerned with the existence of a duty to a foreign power as an aspect of the status of citizenship.”¹¹

A number of commentators felt the decision was “regrettable,” while then Attorney General George Brandis described it as “almost brutal literalism.”¹² However the logic and persuasion of the Court’s argument was impeccable. To have come to any other decision would have been to torture the language of the Constitution to manufacture an outcome in favour of the politicians who were alleged to have breached section 44(i). Indeed, as Professor Blackshield (who argues for the abolition of section 44) said

“the decision was absolutely inevitable ... mainly because of the intractable wording of section 44(i) ... partly because the attempt by the Solicitor-General to soften those words by a mental element led only ... into a chaos of uncertainty and obscurity; but also because ... when you look carefully at the structure of section 44(i), it’s clearly divided into two parts, one dealing with allegiance ... and the other dealing both with being a subject or citizen of a foreign power and having the rights or privileges of such a citizen. The way that those are quite clearly divided ... makes it quite impossible to do what the Solicitor-General tried to do, and that is to transfer from the first category some of the softening mental element into the second category.”¹³

The Court stuck to the same approach in both *Re Nash* (no 2) and *Re Kakoschke-Moore*, making it clear that they would not resolve the crisis by undercutting the provisions of the Constitution.¹⁴ They were right not to do so, indeed it is highly likely that far fewer people would have found fault with the Court’s reasoning in these cases had this been an ordinary statute, which could be amended by parliament.

This is key to understanding much of the political heat over the High Court decision-making process: it is commonly accepted that a referendum on changing or abolishing section 44 would likely be defeated. It is the public’s expected lack of support that leads advocates for change to seek alternative avenues to effectively impose their preferred, globalist, interpretation on the voting public.

These howls of outrage only became louder when the Court handed down the judgement in *Re Gallagher*. In that case the Court explained

“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.”¹⁵

The Court goes on to note that “the Attorney-General’s primary submission is clearly correct.”¹⁶ This effectively demolished the supposed defence of “reasonable efforts” where it was believed to have been ok not to have divested dual citizenship before nomination as long as reasonable efforts had been made to do so.

The Court has rightly established that section 44(i) contains a strict prohibition on dual citizens serving in parliament, subject only to the “constitutional imperative ... that a foreign law operates irremediably to prevent an Australian citizen from participation ... in representative government.”¹⁷ In that case a person can meet the requirements of section 44(i) by taking all reasonable steps to divest themselves of dual citizenship.

Is there a case for reforming section 44 of the Constitution, especially subsection (i)?

Having established clearly and effectively what the law is, the next step is to ask whether there is a case for change. After all, the High Court itself admitted that the current interpretation of section 44(i) might be “harsh”.¹⁸ There are several grounds on which reform is called for, which are neatly summarised in a recent report into section 44 by the Joint Standing Committee on Electoral Matters (hereafter referred to as the Report).¹⁹ Broadly speaking, they can be broken down into two categories: the first that the way section 44(i) is applied is impractical or unduly harsh; the second that the idea of banning dual citizens from parliament itself is undesirable.

Before addressing the substance of these issues, it is necessary to make an observation about the nature of Constitutions. Constitutions are hard to change by design, and are expected to endure through shifting social and political circumstances. They must do so to maintain the confidence of the public for decades — or even longer.

As a result, their rules must be sufficiently certain and broad to cover as unlikely and disparate scenarios such as a foreign spy being elected to parliament and someone forgetting they hadn’t renounced foreign citizenship.

Entrusting a judicial or administrative body to assess a particular individual’s circumstances against the ‘true purpose’ of section 44 may prevent people who pose little or no threat to the country falling foul of a provision. The problem is that this undermines the whole point of constitutional government. The rules have to be the same for everybody or they aren’t rules any more.

Constitutions deal in absolutes: there is no room for subjectivity. The interpretation that will be applied to a particular set of facts must be known at the outset

— in this context, someone in possession of the facts must be able to confidently predict, in advance of an election, whether those standing are in compliance with section 44.

Ambiguity may arise from some facts being unknown or from a particular provision not having been interpreted by the courts — both of which are unsatisfactory, to be sure — but this is different to inherent subjectivity, which is not only unsatisfactory but can ultimately be fatal to the idea of constitutional government.

Difficulty establishing compliance

One main argument for repeal or modification of section 44 is that establishing compliance with subsection (i) is quite difficult. The Report cites Professor George Williams, Dr Sangeetha Pillai and Mr Harry Hobbs, who noted that comprehensively assessing a candidate’s potential disqualification under s. 44 could be “difficult, often expensive, and sometimes impossible.”²⁰

The often-used example is Indigenous Senator Pat Dodson, who has an unknown grandfather who might be Irish; which would render Senator Dodson ineligible, an outcome one Senator described as “patently ridiculous, but it also might be quite persuasive to the public that this is not a fixable problem just by doing paperwork.”²¹

It is worth noting at the outset that the High Court in *Re Canavan* specifically addressed the issue of someone who couldn’t discover whether they are a dual citizen, observing

“the reference by a house of Parliament of a question of disqualification can arise only where the facts which establish the

disqualification have been brought forward in Parliament. In the nature of things, those facts must always have been knowable. A candidate need show no greater diligence in relation to the timely discovery of those facts than the person who has successfully, albeit belatedly, brought them to the attention of the Parliament."²²

This is indeed a good point. If diligent inquiry by someone with the advantage of being directly related to the ancestors in question cannot bring to light any facts which might prove dual citizenship, it is hard to see how someone else will be able to prove it.

Of course, among the 17 Senators and MPs who have been identified as having difficulties under section 44, only one (Matt Canavan) had a factual situation that was complex enough that there was a genuine question as to whether he was actually a citizen. And he was found to be eligible.

It should be conceded that a situation where someone doesn't know whether they are or are not eligible is not the ideal scenario. It would be preferable for all candidates to be certain, or not, as to their eligibility. However in practical terms, if the factual circumstances are unknowable, the outcome is the same. Unless it can be demonstrated that someone is ineligible, they are deemed to be eligible.

The Report makes no attempt to estimate how many people might have factual circumstances where establishing dual citizenship was truly impossible, though it provides some examples where such circumstances may arise. The Report estimates that around 52% of Australian voters "were born overseas or have one or more parents who were born overseas"²³ though it does not follow that all such people are, or were, dual citizens. It certainly does not establish that a significant proportion of them are disenfranchised by a prohibition on dual citizens sitting in parliament.

There is little doubt that some people would need specialist legal advice either to determine their eligibility or, more likely, to identify what steps were necessary to divest themselves of their dual citizenship. For some, the divestment process may take some time.

It is worth questioning whether such an outcome is reasonable. After all, it does impose costs on some who are seeking election that do not arise for others. In practical terms, there are many circumstances that significantly inhibit the ability of citizens to be elected to parliament — not the least of which is the dominance of the two party system, which almost requires someone who wishes to be elected to join a party. Ultimately, those who seek election do not do so from an even footing, and the Constitution should not be drafted in naïve expectation that there can be no resource requirements expected of candidates.

It would also be wrong to conflate temporary obstacles or costs with the constitutional imperative that no foreign law should be able to irremediably prevent an Australian citizen from participation in representative government. It is not the case that section 44(i) permanently disqualifies anyone from standing, the Court specifically argued against that exact fact.

Indeed as the minority in the Report argues "individuals nominating to be elected as a Member of Parliament are taking a serious, deliberate and considered action. Not an action that is done on a whim."²⁴

Instability and uncertainty

The next ground the Report examines is that certain aspects of section 44(i), which have not yet been interpreted by the High Court, may give rise to an ability of some to manipulate election results, particularly where an eligible candidate is elected on preference votes from candidates that are ineligible.

With all due respect to the Joint Standing Committee on Electoral Matters, they are overstating the likely risk. While it may be likely that some ineligible candidates will stand, it does not necessarily follow that ineligible candidates standing would invalidate the election of eligible candidates because:

- a) rarely would the presence of ineligible candidates on the ballot sheet make it impossible to determine the intention of the voters (especially if those candidates are ultimately unsuccessful)
- b) as preferences would continue to flow, the removal of ineligible candidates would be highly unlikely to change the outcome of a recount of votes cast at an election

It is also worth noting that the adoption of optional preferential voting in the Senate should make it even less likely that large volumes of preferences would be diverted simultaneously, something which might make the removal of one candidate more likely to alter the result.

Moreover such an interpretation is unlikely to be preferred by the High Court, as it could indeed render section 44(i) functionally impossible to navigate, especially with respect to a Senate election within excess of 100 candidates.

Two alternatives are more likely, both of which would maintain the integrity of section 44 and would not result in the constant upheaval of election results. The first is that the joint judgement in *Re Wood* addressed these concerns, reflecting negatively on the construction the Report raises:

"The problem of want of qualification arises under the Act if an unqualified candidate is elected, but an election is not avoided if

an unqualified candidate stands. If it were otherwise, the nomination of unqualified candidates would play havoc with the electoral process.”²⁵

The Court in that case specifies that the subsequent preferences of someone voting for an unqualified candidate remain valid:

“An unqualified candidate who has been duly nominated ... is a candidate whose name is properly included on the ballot paper. But in the scrutiny, the indications of preference for a[n] ... unqualified candidate has been held to be invalid. That is no reason for disregarding the other indications of the voter’s preference as invalid. The vote is valid except to the extent that the want of qualification makes the particular indication of preference a nullity.”²⁶

This suggests the fears of the Report are unfounded except to the extent that a recount of the votes demonstrably led to a different outcome, a far rarer occurrence.

The second option is that the Parliament could simply choose not to refer elected candidates to the High Court regarding questions of the ineligibility for unsuccessful candidates. This would limit questions of eligibility to be assessed to those raised by petition under section 353 of the Electoral Act.²⁷ Section 355 states that petitions must be filed within 40 days after the return of the writ for the election, which would substantially shorten the time frame in which someone could potentially interfere with the apparent election results.²⁸

Section 44 frustrates the democratic will of the electorate

Turning then to arguments that section 44 is undesirable: some argue that it may frustrate the democratic will of the people. Provided that there is disclosure of the circumstances surrounding any potential conflicts of interests, some ask why people should be prevented from electing anyone they choose?

There are several answers to this question. The first is that it relies on the electorate effectively operating as an indivisible mass. If the entire country was voting for one person (or party) then you could argue that the voting public have authorised the apparent conflict of interest.

But this is not the case: while every voter has an interest in who gets elected in other parts of the state or country, each electorate votes only for their own representatives. The extent to which a voter can or should have a say in the decision of another electorate is necessarily limited — primarily it should be up to each electorate to pick whomever they want — but it is reasonable for the populace as a whole to agree to a set of ground rules as to who may be elected. This

is how section 44 of the Constitution functions: it sets out these broad ground rules.

In the absence of these rules, one of two things will happen: voters in other electorates may be compelled to accept a politician they feel has no moral right, or lacks basic qualifications, to make laws, and so start to lose trust in democracy; or they will look to other mechanisms to disqualify those people (for example misuse of section 47). Which means that one effect of these ground rules is to limit tyranny by the majority.

Nor is it correct to blithely assume that anyone elected in spite of a conflict of interest has the support of a significant proportion of the voter base. For example, as can be seen in the 2016 double dissolution election, the number of voters needed to meet a quota in a small state like Tasmania was just 26,000 — only 7.5% of those who voted.²⁹

A final answer to the question of seeking voter ‘forgiveness’ for conflicts of interests is that it assumes that all voters have perfect information on potential candidates. This is an unrealistic expectation, as voters are not particularly knowledgeable about politics on average, and many are disengaged.³⁰

Some might argue this is the voters’ fault for not making the effort to understand what they are voting for, but it is equally arguable that a system that relies on an unlikely level of voter engagement is conceptually flawed. If it is correct that most voters would object to bankrupts, convicted criminals, and dual citizens sitting in parliament — and the Report effectively concedes that this is correct — why force them to have to investigate the background of candidates to vote against them?

Multi-cultural character / provision is anachronistic

The second main argument against the conceptual basis of section 44 is that a ban on dual citizens sitting in parliament is anachronistic. There are two possible contexts in which this is typically applied: that a large proportion of Australia’s population are dual citizens, so the potential harm caught by the ban is lessened; and that the concept of citizenship has changed and so the ban on dual citizens means something fundamentally different now than it did when the Constitution was written.

Unfortunately neither argument is persuasive.

It makes sense to deal with the second objection first. The Report notes that:

The Committee heard evidence that while the principles remain relevant, the language used in s. 44 reflected the state of the world in the 1890s, and no longer conforms to societal norms or voter expectations.”³¹

The Report goes on to claim “Citizenship is no longer the most important single marker of allegiance.”³²

It provides no evidence that this is the case, aside from supporting assertions by those in favour of change, and no attempt is made to explain what the most important marker of allegiance is.

With respect to the JSCEM, this approach is misconceived in three respects. First, citizenship is not only about allegiance and rights, but also obligations — for example, compulsory military service — some of which could conceivably conflict with the duties of an Australian parliamentarian.

Moreover even if citizenship is not the most important marker of allegiance (and it is hard to think of a better one), as long as it remains one of the most important markers of allegiance, it should still remain in the Constitution.

It may be, as the Report argues, “it is clear that the link between citizenship and allegiance was stronger and much less complicated in 1901 than it is in 2018.”³³ However, it is hardly the case that it is unimportant. Indeed, the importance of citizenship can be clearly seen by the lengths that some will go to in order to become citizens, and the sheer emotion and joy that can be seen on those who do become Australian citizens.

It is ironic that the Report notes Professor Alex Reilly’s claim that having to give up dual citizenship would be a “strong disincentive” to stand, while simultaneously claiming that citizenship is not that important.³⁴

The Report observes comments from Professor Kim Rubenstein that “renouncing another citizenship doesn’t necessarily mean that there is any change in a person’s emotional connection and attachment to that other country.”³⁵ While this is true, requiring parliamentarians to divest citizenship does send a strong practical and symbolic message about loyalty. It is also undoubtedly true that removing the restriction on dual citizenship would send a message that such conflicts of interest are ok.

Finally, the fact that section 44(i) doesn’t cover the ground in its entirety, and it can be conceded that people may indeed have conflicts of loyalty external to citizenship, doesn’t mean that it doesn’t cover some of the ground. That section 44(i) is imperfect can hardly be sufficient to argue it would be better if no restrictions existed at all.

The point is that even if some dual citizens feel no allegiance to the other country whose citizenship they have, and that country imposes no relevant obligations on that dual citizen, many dual citizens do feel such allegiance, and some countries do impose obligations on citizens that may conflict with the duties of a parliamentarian. These obligations and duties remain inherent to concept of citizenship, and as long as that is true, some form of prohibition on dual citizenship must be maintained.

And if citizenship remains important, the fact that a large percentage of Australians are, or may be, dual citizens arguably makes the need for protection against conflicts of interest more important, not less. Politicians are more likely to have a conflict of interest in 2018 than they did in 1901.

Claims that a restriction on dual citizens serving in parliament is ‘xenophobic’ fundamentally misunderstands the nature of the constitutional restriction and its purpose. Someone born overseas can come to Australia, become a citizen, and (having first divested their dual citizenship) get elected to parliament. Foreign born Australians can (and have) risen to high office in this country.

Moreover, as recent events show, people born in Australia to Australian citizen parents can still be dual citizens.

Those making laws for Australian and Australians should, insofar as possible, have no allegiances to countries other than Australia and bear no obligations to another country. This is true for every Australian regardless of background or colour.

Conclusion

The High Court has provided clear guidance on the meaning of section 44, and delivered a workable interpretation of the ban on dual citizens. It has resisted calls to read subjective elements into section 44(i) in order to keep the current crop of ineligible politicians in their seats. This interpretation is seen as harsh, but is based on sound legal principle and a common sense interpretation of the wording in the section.

Calls to overhaul the Constitution to alter this interpretation are misguided. Claims that large numbers of potential parliamentarians will be deterred from running, or indeed will be incapable of doing so,

are overstated — as are suggestions that the current interpretation of the section will cause significant uncertainty.

There may be some parliamentarians who require legal advice on their eligibility, some may not be able to demonstrate clearly they are eligible, and some may stand despite being ineligible. The probable impact this will have on democracy and democratic participation, and the harm resulting from this, is likely to be far less than could arise from the election of politicians with a significant conflict of interest or loyalty.

It is also on that basis that calls to repeal section 44(i) because it undermines democracy — or is somehow outdated — should be resisted.

For democracy to function as intended, the public must believe that politicians are acting in the public's best interests, not their own or someone else's interests. The appearance of a conflict of interest, even if it does not actually influence the behaviour of an individual, undermines that trust and confidence.

There is little doubt that the concept of citizenship has changed since the drafting of the Constitution. However it remains a practical and symbolic indicator of loyalty. Voters have a right, and an expectation, that those standing for parliament will have allegiance to Australia alone, and would rightfully reject suggestions that dual citizens can make decisions on their behalf.

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Research Publications

Simon Cowan, *Let Money Speak*, Policy Paper 2, The Centre for Independent Studies, Sydney 2018

Robert Carling, *Cutting income tax: can we add the bacon to the hamburger and milkshake tax cuts?* Policy Paper 1, The Centre for Independent Studies, Sydney 2018

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