THE AUSTRALIAN

Dual citizenship: this parliament of 'foreigners' is listing

Illustration: Eric Lobbecke

HENRY ERGAS THE AUSTRALIAN 12:00AM November 17, 2017

As braces of bloodhounds scour Parliament House for dual nationals, section 44(i) of the Constitution has crippled the government and, depending on the outcome in the seat of Bennelong, may make Bill Shorten prime minister.

If this is the "certainty and stability" the High Court claims its interpretation of the section will foster, the alternative must have been the apocalypse.

To say that is not to criticise the decision. It would have been utterly improper for the High Court to consider the political ramifications of its verdict in undertaking its task.

To that extent, the court could rightly have taken as its own the motto of Ferdinand I, Holy Roman Emperor from 1558 to 1564: "Fiat justicia, et pereat mundus" — let justice be done, though the world may perish.

But even ignoring the immediate effects, the decision hardly resolves the serious difficulties the section poses.

As the court notes, "section 44(i) is cast in peremptory terms", creating a prohibition that applies regardless of whether the candidate at issue had any knowledge of a possible problem, and regardless too of any actions they may have undertaken to address that problem.

The court nonetheless softened the section's impact by determining in 1992 that a person who had made "reasonable steps" to renounce their other nationality would not be disqualified.

In reaffirming that interpretation, last month's decision grounds it in a "constitutional imperative" that entitles citizens "to participate in the representative government which the Constitution establishes".

Without such a "reasonable steps" test, the court argues, an Australian citizen could "be irremediably prevented by foreign law from participation in representative government", undermining Australia's sovereignty and the democratic character of the Constitution.

In other words, the court's goal has been to reconcile the section's hard and fast prohibition with the "constitutional imperative" of an open and competitive system of parliamentary government.

Given that objective, one might have thought "steps" would be "reasonable" so long as they did not impose a prohibitive burden on potential candidates.

But while neither the recent decision nor its predecessor explain exactly how the "reasonable steps" test should be interpreted, it is clear from those decisions that the burden it imposes could be extraordinarily onerous.

For example, the court held in 1992 that a Mr Kardamitis, who well before unsuccessfully contesting the federal seat of Wills had

surrendered his Greek passport and several times taken oaths of allegiance to the Queen, should have applied to the appropriate Greek minister for the minister to exercise his discretion and annul Kardamitis's Greek nationality.

The recent decision puts the issues in even starker relief. Thus, it takes the court almost four tightly argued pages to consider, on the basis of a detailed — and presumably costly — report from two eminent Italian jurists, whether senator Matthew Canavan is an Italian citizen, only to conclude, without any claim of certainty, that "one cannot be satisfied that Senator Canavan was a citizen of Italy". Equally, the court's discussion of whether senator Nick Xenophon was a British citizen, which consumes five pages of intricate reasoning, required an expert report by a British QC, along with a careful, albeit somewhat inconclusive, consideration by the court of what constitutes citizenship, in which it seems to rediscover, apparently without quite realising it, the notion of "correlativity" of rights and obligations Hegel introduced in the *Philosophy of Right*.

It might be objected that these are extreme instances; unfortunately, they are not.

For example, German nationality law is by no means the world's most complex; yet the Munich publisher CH Beck's highly respected "brief" guide to that law is more than 1500 pages long.

And merely identifying the relevant nationality legislation for the successor states to the Soviet Union, much less the (often unpublished) regulations that typically determine its application, can demand expertise that is completely unavailable here in Australia.

As a result, an Australian citizen, even if born in Australia, could be required by the court's interpretation of the section to incur crippling legal costs to satisfy the "reasonable steps" test before nominating for a contest they might well lose.

Moreover, the extent of those costs would depend entirely on the complexity of that person's ancestry, and on the wisdom or folly their parents, grandparents and even great-grandparents had shown in choosing to be born in countries whose nationality laws are simple, convoluted or frankly impenetrable.

It seems difficult to reconcile this potentially formidable barrier to contesting federal elections with the court's "constitutional imperative" of protecting the ability of Australians to participate in representative government. And the fact the barrier would be much greater for some Australians than others only compounds the concerns.

None of that is to say amending the section would be easy. No doubt, opponents of revising the test would argue that dual citizens — who, on simple taking of an oath, are perfectly eligible to serve as chief justice of Australia or as chief of the Australian Defence Force — pose a security risk: as if (say) the Chinese government would rely on a dual national to infiltrate the Australian parliament.

But while that argument is unconvincing, there is a plausible case that those who govern us should not have easy exit options: if they are determined to sink our ship, the least they can do is commit to sinking with it.

Let them therefore abandon any right to foreign bolt-holes, whether they are earthly paradises or mere portals to hell.

Even so, we must be capable of finding a better way than section 44(i) of aligning a prohibition on escape hatches with the realities of contemporary nationality law. Until we do, the havoc will continue, and the damage to our democracy will too.