

High Court to rule on two Labor MPs, but partisan row protects others

Written by Michelle Grattan, Professorial Fellow, University of Canberra

A batch of MPs escaped being sent to the High Court on Wednesday thanks to a stalemate between the government and the opposition over who should be referred.

But the eligibility of two Labor MPs will be considered by the court – Victorian [David Feeney](#) and ACT senator [Katy Gallagher](#)

The opposition failed in an attempt to get a “job lot” of MPs referred that included four Liberals, four from the ALP, and the Nick Xenophon Team’s Rebekha Sharkie.

The ALP motion was supported by all five crossbenchers, resulting in a tied vote of 73-73. The Speaker, Tony Smith, acting in line with parliamentary convention, used his casting vote to defeat the motion.

The government, insisting that none of its MPs should be referred, wanted the members considered individually.

But crossbenchers rejected that argument, seeing it as the government being partisan.

The government said it would continue to talk to the crossbenchers overnight but they are not likely to be swayed before parliament rises this week for the summer recess.

The Labor MPs in the opposition motion were Justine Keay, Josh Wilson, Susan Lamb and Feeney.

The case of Gallagher – who took action to renounce her British citizenship but did not get registration of her renunciation before she nominated for the 2016 election – should provide

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guidance in relation to the three other Labor MPs and Sharkie, who have similar circumstances.

Labor argues that those who had taken reasonable steps to renounce but did not receive their confirmations in time (or, in Lamb's case, at all) are eligible.

Feeney is in a different category from the other Labor MPs – he has not been able to provide evidence that he renounced his British citizenship in 2007, as he says he did. He was referred after the job-lot motion's defeat.

Both Gallagher and Feeney accepted they should be referred. Gallagher, while maintaining her eligibility, told the Senate she was standing aside from her frontbench positions and had asked to be referred to the court, saying her opponents would continue to use the issue.

Labor said the four Liberals – Jason Falinski, Julia Banks, Nola Marino and Alex Hawke – had not provided adequate documentation of their eligibility.

In the run up to the vote, Marino released advice from the Italian consulate saying she was not an Italian citizen.

Falinski produced advice saying that he was not a citizen of the UK, Poland, Russia or Kyrgyzstan. But the letter to Falinski was dated Wednesday and the law firm, Arnold Bloch Leibler, said that "as previously discussed, we cannot conclusively advise on foreign law and recommend that you seek independent advice from foreign law experts".

The crossbenchers were lobbied hard over the motion, including on the floor of the chamber, by both the opposition and the government.

Labor made an unsuccessful attempt to get its motion dealt with before Barnaby Joyce, who has just faced a byelection after the High Court declared him ineligible to sit, returned to the lower house.

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Labor had a temporary majority but did not have enough time. Joyce was sworn in at 1.15pm and his presence in the subsequent debate meant the numbers were tied.

Moving the motion, Manager of Opposition Business Tony Burke said: “The only appropriate way for us to deal with this is to make sure that, wherever there has been serious doubt across the chamber, the High Court becomes the decision-maker rather than the numbers on the floor of this house”.

Arguing for a case-by-case approach, Malcolm Turnbull said that Labor “with not a principle in sight, with not a skerrick of evidence ... wants to send members of the House to the High Court ... without making any case that they are, in fact, dual citizens”.

The Greens’ Adam Bandt said the approach must be “even-handed and non-partisan”. “We think there should be an agreed set of names that go forward from this house.”

Sharkie, appealing for unity, said: “We will hang individually if we don’t hang together”.

Crossbencher Bob Katter told the parliament that none of the MPs should be sent to the High Court.

Labor leader Bill Shorten revealed that he had known for just over a week that Feeney didn’t have the required documents.

“I informed him that he needed to tell the parliament what was happening, and I made it clear to him that there was a deadline of disclosure,” Shorten told reporters.

Feeney has said he is still trying to have the British authorities find documentation that he renounced UK citizenship.

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If Feeney is disqualified, Labor would be at risk of losing his seat of Batman to the Greens. There is doubt over whether he would be the candidate in a byelection.

Shorten did not disguise how angry he is with Feeney. “I am deeply frustrated – that’s a polite way of putting it – that one of my 100 MPs can’t find some of the documents which, to be fair to him, [he] says exist and says he actioned,” Shorten said.

He admitted that if he had been aware of Feeney’s situation he would not have been so definite in his repeated confident statements about the eligibility of all his MPs.

Labor was divided internally over whether it should pursue Josh Frydenberg, whose mother came to Australia stateless: the Burke motion did not include him. The ALP is also not at this point pursuing another of those it has named, Arthur Sinodinos, who is away on sick leave.

Michelle Grattan does not work for, consult, own shares in or receive funding from any company or organization that would benefit from this article, and has disclosed no relevant affiliations beyond their academic appointment.

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