IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY **NO C17 OF 2017**

RE THE HON MS FIONA NASH
Reference under s 376 of the *Commonwealth Electoral Act 1918* (Cth)

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

Filed on behalf of the Attorney-General of the Commonwealth by:

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PART I PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II BASIS OF INTERVENTION AND LEAVE

2. The Attorney-General of the Commonwealth (**Commonwealth**) has intervened pursuant to s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) and is also a party by virtue of orders made by Kiefel CJ on 15 September 2017 pursuant to s 378 of the *Commonwealth Electoral Act 1918* (Cth) (**Electoral Act**). The Commonwealth has given notice under s 78B of the Judiciary Act.

PART III APPLICABLE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

3. Section 44 of the Constitution relevantly provides:

> Any person who: ...
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> (iv) holds any office of profit under the Crown ...
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> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

4. Section 45 of the Constitution relevantly provides:

> If a senator or member of the House of Representatives:
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> (i) becomes subject to any of the disabilities mentioned in the last preceding section ...
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> his place shall thereupon become vacant.

5. The applicable provisions of the Electoral Act are set out in Annexure A.

PART IV ISSUES

6. The question before the Full Court is whether a declaration should be made that Hollie Hughes (**Ms Hughes**) is duly elected as a senator for the State of New South Wales for the place for which Fiona Nash was returned.

7. A preliminary issue arises as to the effect of a declaration that a person is "duly elected" and the appropriate procedure in circumstances where there is a question as

to the eligibility of a person identified as having been elected by a special count. On that preliminary issue, the Commonwealth submits that:

(a) An order that a person is "duly elected" conveys that, on the facts then known to the Court (including, in a case involving the Senate, the result of a special count), a particular candidate received sufficient votes to be elected.

(b) A declaration of due election says nothing as to whether or not the candidate is in fact constitutionally qualified.

(c) Although the power to make an order that a person is "duly elected" does not determine questions of qualification, the Court has a discretion as to whether to make such an order and may decline to make such an order if it considers there to be a serious question whether a candidate is disqualified.

(d) In such a case, if the Court determines that the person is disqualified, it should, in the exercise of its discretion, decline to declare the person duly elected and instead order a further special count.

(e) Alternatively, if the Court decides not to consider whether the person is qualified, or decides that the person is not disqualified, the Court should declare the person duly elected.

8. In the circumstances of this case, the Commonwealth accepts that it is appropriate for the Court to consider whether Ms Hughes is disqualified by s 44(iv).

9. There is no dispute that Ms Hughes was identified on the special count of the ballots cast at the Senate election for New South Wales as the candidate who should take the place for which Ms Nash was previously returned in the Senate.

10. Whether the Court should declare Ms Hughes duly elected to that place ultimately turns on whether Ms Hughes, having not been certified as elected to the Senate, became incapable of being chosen as a senator when, 11 months after the return of the writ for the election, she accepted appointment as a part time member of the Administrative Appeals Tribunal (**AAT**), that being a position that she immediately resigned upon the Court finding that the place for which Ms Nash was returned was vacant.

11. The Commonwealth submits that Ms Hughes should be declared duly elected as a senator for the State of New South Wales for the place for which Fiona Nash was returned. In summary, this is because:

(a) The process of "being chosen" commences with nomination and concludes at the end of polling day (being the day fixed for polling in the election). That delimitation of the relevant period is consistent with the text of the Constitution, authority, and the values of consistency, certainty and stability that are important to the constitutionally prescribed system of government.

(b) The process of "being chosen" referred to in s 44 of the Constitution differs from broader concept of the "election process". The "election process" involves various steps, including nomination, voting, scrutiny and the declaration of the poll and return of the writs. The electorate's choice is made on polling day. A special count of ballots is not a re-choosing, but simply the proper identification of the electorate's choice made on polling day.

(c) Ms Hughes was appointed to the AAT nearly 12 months after polling day and at a time when she had not been returned as elected to the Senate. It follows that Ms Hughes' appointment — even if to an office of profit under the Crown — was not made at a time that engaged s 44(iv).

12. If the issue is reached, the Commonwealth accepts that appointment as a part-time member of the AAT is an office of profit under the Crown and therefore is capable of engaging ss 44(iv) and 45(i) of the Constitution.

PART V FACTS

13. The question referred to the Full Court is to be determined on the basis of the Agreed Statement of Facts filed on 13 November 2017.

PART VI ARGUMENT

The effect of an order that a candidate is "duly elected"

14. The order sought by the Commonwealth is a declaration that Ms Hughes was "duly elected as a senator for the State of New South Wales for the place for which Fiona Nash was returned". In order to understand whether the Court should make that order, it is necessary first to identify the effect of an order in those terms. It is convenient to

set out the relevant provisions of the Electoral Act and, against that background, to address the matters concerning the text and structure of the Electoral Act that go to the effect of such an order.

15. Parts XIII to XIX of the Electoral Act provide for the conduct of elections: the issue of writs (Part XIII), the nomination of candidates (Part XIV), postal voting (Part XV), pre-poll voting (Part XVA), the polling (Part XVI), the scrutiny (XVIII) and the return of the writs (XIX). The return of the writs is the final stage of an election under the Electoral Act. With respect to Senate elections, s 283 provides that, "as soon as conveniently may be after the result of the election has been ascertained", an Australian Electoral Officer shall declare the result of the election and the names of the candidates elected, certify the names of the candidates elected, attach the certificate to the writ, and then return the writ and that certificate to the Governor of the State in respect of which it was issued, or otherwise to the Governor-General. That enables the Governor of the State to certify the names of the senators chosen for the State pursuant to s 7 of the Constitution.

16. Part XXII of the Electoral Act provides for the manner in which elections and returns, and qualifications and vacancies may be disputed. The validity of an election or return may be disputed by petition (s 353), provided such a petition is filed in the Registry of this Court within 40 days after the return of the writ (s 355(e)). In addition, any question respecting the qualifications of a senator or of a Member of the House of Representatives or respecting a vacancy in either House of the Parliament may be referred by resolution to the Court of Disputed Returns by the House in which the question arises (s 376). Given that a reference under s 376 can be made at any time, if the electoral process includes any period in which such a reference could be made, it would follow that the electoral process either would (or at least may) never conclude during the life of that Parliament.

17. The powers of the Court of Disputed Returns include the powers set out in s 360 of the Electoral Act (which are applicable to the resolution of a reference under s 376 by reason of s 379). Section 360 provides that the Court of Disputed Returns has the power, inter alia, to "declare that any person who was returned as elected was not duly elected" (s 360(1)(v)) and to "declare any candidate duly elected who was not returned as elected" (s 360(1)(vi)). Section 360(2) provides that the Court may exercise all or any of its powers under s 360 on such grounds as the Court in its discretion thinks just and sufficient.

18. Section 374[1] expressly addresses the effect of a declaration that a person was, or was not, "duly elected":

(a) Section 374(i) provides that "[i]f any person returned is declared not to have been duly elected, the person shall cease to be a senator or Member of the House of Representatives";[2] and

(b) Section 374(ii) provides that "[i]f any person not returned is declared to have been duly elected, the person may take his or her seat accordingly".

19. The phrase "duly elected" is not defined in the Electoral Act. The phrase appears in only one other substantive provision in the Act, being s 179, which concerns the circumstances in which a person may be declared duly elected on nomination day.[3]

20. Against that context, an order that a person is "duly elected" should be understood to have the following operation.

21. *First*, an order that a person is "duly elected" conveys that, on the facts then known to the Court (including, in a case involving the Senate, the result of a special count), a particular candidate received sufficient votes to be elected. As Hardie J put it in *Dunbier v Mallam*, speaking of a New South Wales provision that was materially identical to s 360(1)(vi):[4]

> When asked to declare a candidate duly elected who was not returned as elected, the task of the court is to do what the returning officer should, under the statute, have done, and to correct any errors which that officer may have made, where the votes recorded are still traceable and identifiable ... [T]he ultimate exercise is a mathematical one.

22. *Secondly*, once the nature of an order that a candidate is "duly elected" is identified, it is apparent that it is not necessary for the Court to reach any conclusion as to whether a candidate who is identified by a special count as the candidate who should fill a vacancy is qualified under s 44 of the Constitution before the Court can properly declare that candidate "duly elected". That is not necessary because such a declaration says nothing as to whether or not the candidate is qualified (just as a

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1 Section 381 provides that s 374 shall apply to proceedings on a reference pursuant to s 376.

2 Thereby recognising, in the case of a candidate incapable of being chosen by reason of s 44 of the Constitution, "that which the operation of the Constitution itself brought about": *Sue v Hill* (1999) 199 CLR 462 at 484 [38] (Gleeson CJ, Gummow and Hayne JJ).

3 For other provisions in which the phrase appears, see ss 362, 365A and 366.

4 [1971] 2 NSWLR 169 at 172.

declaration by the AEO under s 283 of the Electoral Act says nothing as to whether or not the person declared elected is qualified[5]).

23. The limited effect of a declaration that a candidate is "duly elected" explains why it has been the regular practice of this Court to declare candidates identified as successful pursuant to a special count to be "duly elected" where no issue was raised as to the qualification of the candidate (which is, of course, not to say that no issue could have been raised),[6] where evidence going to the issue was filed too late,[7] or where any issue as to the qualification of the candidate identified on the special count fell outside the terms of the reference from the Senate.[8] In any of those situations, the declaration does not carry with it any immunity from it subsequently being determined that the candidate is disqualified. For example, the fact that Mason CJ declared Ms Irina Dunn "duly elected" in *In re Wood*[9] plainly could not have prevented the question whether she satisfied s 44(i) from subsequently being raised in the Senate or referred to the Court of Disputed Returns (as is particularly clear in circumstances where Mason CJ could not consider that issue as it fell outside the scope of the reference). That emphasises that the legal effect of an order that a candidate is "duly elected" is simply to allow that candidate to "take his or her seat accordingly".[10]

24. If the Senate entertains doubt as to the qualification of a senator who has been declared "duly elected", it is open to the Senate to refer the matter to the Court pursuant to s 376 of the Electoral Act in the ordinary way. In such a case, the Court's prior declaration would not speak to, let alone answer, the questions referred, with the consequence that such a reference would not involve "questioning" the prior declaration contrary to s 368 of the Electoral Act. The effect of that section necessarily depends on what the Court has actually decided. In that regard, there is some analogy with the statutory regime that limited the grounds of judicial review in the Federal Court

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5 *In re Wood* (1988) 167 CLR 145 at 164 (the Court).

6 As occurred in *Sue v Hill* [1999] HCATrans 225 (Gleeson CJ, 2 July 1999); *Re Culleton* [2017] HCATrans 51 (Kiefel CJ and Keane J, 10 March 2017); *Re Waters; Re Roberts* [2017] HCATrans 228 (Gageler J, 10 November 2017). See also *Re Ludlam* [2017] HCATrans 227 (Gageler J, 10 November 2017).

7 *Re Day* [2017] HCATrans 86 (Nettle and Gordon JJ, 19 April 2017).

8 *In re Wood* (1988) 167 CLR 145 at 176 (Mason CJ).

9 (1988) 167 CLR 145 at 176.

10 Electoral Act, s 374(2).

that was considered in *Abebe v Commonwealth*.[11] In that context Kirby J (who was a member of the majority) observed:[12]

> It reads too much into the word "affirming" to suggest that an order of the Federal Court, expressed in such terms, stamps the decision under review with the imprimatur of complete legality on every conceivable basis, whether litigated or not ... Like any court order, that of the Federal Court here in question must be understood in the context, and for the purposes, of the jurisdiction being exercised. As that jurisdiction is confined to particular grounds of review ... the order "affirming" would be so understood. Nothing more would be read into it.

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25. *Thirdly*, although a declaration that a candidate is "duly elected" does not address the qualifications of that candidate, the Court may treat a candidate's qualifications as relevant to how it should exercise its discretion under s 360(2) of the Electoral Act. Accordingly, if the Court orders a special count in resolving a reference pursuant to s 376, and it is concerned that the candidate identified on the special count is not qualified to be chosen as a senator, it is open to the Court in the exercise of its
20 discretion to decline to declare that candidate duly elected until it has first satisfied itself that the candidate is qualified (provided the terms of the reference are wide enough to permit the Court to address that issue[13]). For that reason, the Commonwealth does not dispute the jurisdiction of the Court to determine whether Ms Hughes is disqualified by reason of s 44(iv) of the Constitution.

26. The Commonwealth does, however, submit that in the ordinary course, if the Court
30 finds that there is a vacancy in the Senate, it should order a special count and then declare the candidate identified in that special count to have been "duly elected".[14] That would allow any question as to the qualifications of the candidate who takes his or her seat in consequence of such a declaration to be addressed in the first instance by the Senate.

27. It is only where, as occurred in this case, a person who in the opinion of the Court is
40 interested in the determination of any question on the reference (so as to have become a party under s 378) has filed evidence raising a serious question as to whether the candidate identified on the special count is qualified that the Court should

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11 (1999) 197 CLR 510 at 594 [240].

12 (1999) 197 CLR 510 at 594 [240].

13 As was not the case *In re Wood* (1988) 167 CLR 145 at 176. However, the question referred by the Senate in that case did not include any equivalent to question (c) of the present reference, which
50 asks "What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference?"

14 The appropriateness of making such an order is strongly suggested by *In re Wood* (1988) 167 CLR 145 at 169 (the Court).

consider whether to examine this issue before final orders are made. If it decides to do so and, on such examination, the candidate is found to be disqualified, a further special count should then be ordered, so as to identify the candidate who should be declared "duly elected". If, on the other hand, the candidate is found not to be disqualified, that decision would be conclusive (s 368 of the Electoral Act).

28. Unless the circumstances in which an examination of the qualifications of a candidate selected by a special count is limited in that way, there would be significant scope either for substantial delay in filling vacancies in the Senate or for disruption to the business of this Court with urgent expedited hearings. That follows because, as Nettle and Gordon JJ recognised in *Re Day*, the disqualification of a senator "is a matter of high public importance and it is necessary in the public interest that the issue be resolved and the vacancy thus created by his incapacity be filled so as to create certainty as soon as is reasonably practicable".[15]

The process of "being chosen" as a senator

29. Three principal questions arise in relation to Ms Hughes. It is convenient to address them in the following order. ***First***, whether she held a position as a member of the AAT in a temporal period capable of attracting the operation of s 44(iv) of the Constitution. ***Secondly***, whether the appointment engaged s 45 of the Constitution. ***Thirdly***, whether a position as a part-time member of the AAT is an office of profit under the Crown.

30. There is no suggestion that Ms Hughes held an office of profit under the Crown:

(c) at the time of her nomination on 2 June 2016;[16]

(d) on the polling day on 2 July 2016;[17] or

(e) at the declaration of the poll and return of the writ on 5 August 2016.[18]

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15 *Re Day* [2017] HCATrans 86 (19 April 2017) at lines 831–834 (ex tempore); *Re Culleton (No 2)* (2017) 91 ALJR 311 at 321–322 [57]–[59] (Nettle J). *Sykes v Cleary* (1992) 176 CLR 77 at 100 (Mason CJ, Toohey and McHugh JJ) (***Sykes***); *Re Day (No 2)* (2017) 91 ALJR 518 at 535 [91] (Gageler J); *King v Jones* (1972) 128 CLR 221 at 270-272 (Stephen J); *Rudolphy v Lightfoot* (1999) 197 CLR 500 at 508 [12] (the Court); *Re Berrill's Petition* (1976) 134 CLR 470 at 474 (Stephen J).

16 Agreed Facts at [3].

17 Agreed Facts at [9]-[10].

18 Agreed Facts at [12]

31. The argument that Ms Hughes is disqualified turns on the fact that from 1 July 2017, some 11 months after the declaration of the poll, she was appointed as a member of the AAT, that being a position that she held until 27 October 2017. The amicus contends that this appointment contravened s 44(iv) because:

(a) the process of "being chosen" for the purposes of s 44 includes any process by which the Court of Disputed Returns decides who has been chosen; and

(b) the fact that Ms Hughes' held her appointment to the AAT during the time that the Court of Disputed Returns was seized of this reference was therefore sufficient to attract the operation of s 44(iv) of the Constitution.

32. The Commonwealth submits that the process of "being chosen" commences with nomination and ends at the end of polling day (being the day fixed for polling in the election).[19] That delimitation of the relevant period is consistent with the text of the Constitution, authority, and the values of consistency, certainty and stability that are important to the constitutionally prescribed system of government.

Text and authority

33. It is well established that the words "shall be incapable of being chosen" refer to the "process of being chosen".[20]

34. There is no doubt that the process of choice commences with nomination.[21] It is less clear precisely when the process of choice ends. However, the preferable view is that it ends at the close of the polls in accordance with s 220 of the Electoral Act.

35. In *Sykes*,[22] the Court treated the close of the polls as the relevant time.[23] Thus, Mason CJ, Toohey and McHugh JJ (with whom Brennan, Dawson and Gaudron JJ agreed on this point) observed in *Sykes* that "[t]he people exercise their choice by voting, so that

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19 Electoral Act, s 152(1)(c).

20 *Re Canavan* [2017] HCA 45 at [3] (the Court).

21 *Re Canavan* [2017] HCA 45 at [3] (the Court); *Sykes* (1992) 176 CLR 77 at 100. See also 108 (Brennan J), 130 (Dawson J) and 132 (Gaudron J).

22 (1992) 176 CLR 77.

23 *Sykes* (1992) 176 CLR 77 at 99 (Mason CJ, Toohey and McHugh JJ), 108 (Brennan J), 130 (Dawson J), 132 (Gaudron J); cf 120–125 (Deane J).

it is the polling day rather than the day on which the poll is declared that marks the time when a candidate is chosen by the people".[24]

36. Their Honours supported that conclusion by reference to s 24 of the Constitution, read with ss 7, 30 and 41, which relevantly provide that:

(a) "The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth" (s 24);

(b) "The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting ... as one electorate" (s 7);

(c) "... in the choosing of members [of the House of Representatives] each elector shall vote only once" (s 30);

(d) "No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth" (s 41).

37. In *Re Culleton (No 2)*, the plurality referred with evident approval to the holding in *Sykes* that the words "shall be incapable of being chosen" in s 44 refer to the process of being chosen. The plurality treated *Sykes* as establishing that that process "operates from the date of nominations, as that is the date on which the electoral process begins, until the return of the writs for the election, as that is the time at which the electoral process is complete".[25] However, in the next sentence the Court emphases that "[n]o question arises in this case as to the temporal operation of s 44(ii)." That being so, there is no basis to treat *Re Culleton (No 2)* as marking a departure from the statement in *Sykes* that the process of choice ends on polling day, and not on the declaration of the poll (which, under s 283, immediately precedes the certification of the candidates who were elected and the return of the writs.

38. Similarly, the statement early in the judgment in *Re Canavan*[26] that "the temporal focus for the purposes of s 44(i) is upon the date of nomination as the date on and after

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24 *Sykes* (1992) 176 CLR 77 at 99 (Mason CJ, Toohey and McHugh JJ), 108 (Brennan J), 130 (Dawson J), 132 (Gaudron J); cf 120–125 (Deane J).

25 (2017) 91 ALJR 311 at 315 [13] (Kiefel, Bell, Gageler and Keane JJ).

26 [2017] HCA 45 at [3] (the Court) (emphasis added).

which s 44(i) applies until the completion of the electoral process" does not reflect any intention to depart from the holding in *Sykes*, particularly as all of the references considered in that case focused on the qualification of the candidates at the date of nomination, meaning that the end point of the operation of s 44(i) was not in issue.

39. The "process of being chosen" that is the subject of s 44 of the Constitution is not to be conflated with the broader concept of the "election process" or the "election".[27]

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40. The "electoral process" will necessarily encompass the entirety of the "process of choice" that sets the temporal parameters for the operation of s 44 of the Constitution. But the timeframes of the two processes are not identical and there is no reason to equate one process with the other. The electoral process commences with the issue of the various writs for each House of Parliament and continues during the campaigning period through to the polling day and beyond to the counting of the votes (on and after
20 polling day) and, at least, to the return of the writs. Indeed, *In re Wood* establishes that a Senate election is not complete when an unqualified candidate is returned, meaning that the election may take a very long time.[28]

41. By contrast, the period of choice that defines the temporal boundaries of s 44 is more confined. That period of choice starts later, in that it commences on the date of "nomination", which logically must follow the issuing of the writs for the election. And it
30 ends earlier, as the choice is complete at the last time at which electors may cast their votes. The counting of those votes is not a process of choice, but rather the process by which the choice that has been made is identified. Similarly, the return of the writ (and the declaration of the poll which precedes it) is not a part of the process of choice. Instead, as was pointed out in *Sykes*, "[t]he declaration of the poll is the announcement of the choice made; it is not the making of the choice".[29] In other words, the declaration of the poll is the announcement of the result of a process that is already complete.[30] As
40 that step precedes the return of the writs, it logically follow that the process of choice with which s 44 is concerned is complete prior to the return of the writs.

42. For the above reasons, the better view is that the "process of choice" with which s 44 is concerned ends at the close of the polls under s 220 of the Electoral Act.

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27 Cf *In re Wood* (1988) 167 CLR 145 at 164 (the Court); *Drinkwater v Deakin* (1874) 9 LR CP 626 at
50 637–638, *Re Canavan* [2017] HCA 45 at [3] (the Court).

28 (1988) 167 CLR 145 at 164 (the Court).

29 (1992) 176 CLR 77 at 99.

30 *Sykes* (1992) 176 CLR 77 at 99 (Mason CJ, Toohey and McHugh JJ).

43. However, even if the Court were to hold otherwise, and to equate the period of choice under s 44 with the "electoral process", *Re Culleton (No 2)*[31] establishes that the "electoral process" is complete on the return of the writs. Accordingly, even if the focus is on the date of return of the writs, the process of choice with which s 44 is concerned ended approximately 11 months before Ms Hughes was appointed to the AAT.

44. Neither the "process of choice" nor the "electoral process" includes any period of time when, after the close of the polls (or, alternatively, after the return of the writs), a reference is made to the Court of Disputed Returns. If, following such a reference, the Court of Disputed Returns orders a special count of the ballots cast at a Senate election, that special count does not constitute or signify a re-choosing. Instead, it looks back to the ballots cast prior to the close of the polls, so as to identify correctly (ie, after excluding the disqualified candidate) the choice that was made at that time.

45. A declaration by the Court of Disputed Returns that the candidate identified by the special count has been "duly elected", similar to the declaration of the poll, is simply the formal announcement of the choice made by electors on polling day, corrected to exclude the disqualified candidate. It does not, to adopt the language used in *Sykes*, amount to or even coincide with the choosing of the relevant candidates.[32] For that reason, proceedings in the Court of Disputed Returns, including orders for the conduct of a special count or that declare the result of a special count, do not involve any re-opening of the "period of choice" with which s 44 of the Constitution is concerned.

Consistency, certainty and stability

46. Considerations of certainty and stability favour the conclusion that the "period of choice" with which s 44 of the Constitution is concerned ends with the close of the polls.

47. First, that construction ensures a nationally uniform date for the end of the process. By contrast, the date of the return of the writs may vary between States,[33] and will depend on the vagaries and complications of the count, for example, the number of ballots completed "below the line" and any recounting necessary at each stage of the

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31 (2017) 91 ALJR 311 at 315 [13] (Kiefel, Bell, Gageler and Keane JJ). The concept of the "completion of the electoral process" to which reference is made in *Re Canavan* [2017] HCA 45 at [3] (the Court) must be understood in the same way.

32 *Sykes* (1992) 176 CLR 77 at 99 (Mason CJ, Toohey and McHugh JJ).

33 Electoral Act, s 283.

preference distribution. Differences in the conclusion of the period of "choice" relevant to the operation of s 44 as between States would be a curious and undesirable outcome in respect of a national process with a uniform polling day. And, of course, if the period of choice with which s 44 is concerned is affected by the commencement of proceedings in the Court of Disputed Returns, the date at which that period ends will be inherently indeterminate and unknowable.

48. Secondly, if the Court were to hold that a declaration that a candidate has been "duly elected" has the result of extending the temporal period with which s 44 is concerned, that would inject a conditionality into electoral results that would not be conducive to certainty of result (and would run counter to the purpose of the return of the writs, being to produce an authoritative record of the outcome of an election, which in the Australian constitutional context enables State Governors to certify the results of Senate elections in accordance with s 7 of the Constitution).[34]

49. Moreover, to so hold would serve little, if any, purpose. The s 44(iv) prohibition is principally directed to eliminating or reducing the influence of the executive over members of Parliament.[35] The purpose of s 44 would not be served by extending its prohibition to the circumstance where a candidate for election has been unsuccessful, but subsequently becomes subject to one or other of the disabilities in s 44.

50. Not only would a conclusion that the process of choosing was extended by reason of the Court of Disputed Returns proceeding not serve the purpose of s 44(iv), it would have a capricious result, which would not be consonant with Australian constitutional values or the identifiable objects of the Electoral Act. For example, if the period of choice extends indefinitely after polling day, depending on whether or not the candidates who were returned are qualified, then candidates for election could never be certain that they had ceased to be candidates. As a result, in order to retain the prospect of being duly elected if the successful candidate is disqualified, unsuccessful candidates would have to order their affairs in a way that ensured that they did not contravene s 44. An unreturned candidate could not, for example, choose to serve the Commonwealth in a different way (by taking up a remunerated office: s 44(iv)), and would be potentially deprived of commercial opportunities (by the prohibition on pecuniary interests in agreements: s 44(v)), without losing his or her capacity to be chosen on a recount. Plainly many unsuccessful candidates would not so order their

34 Cf *Re Culleton (No 2)* (2017) 91 ALJR 311 at 321–322 [57] (Nettle J).

35 (1992) 176 CLR 77 at 97 (Mason CJ, Toohey and McHugh JJ).

affairs. As a result, if the successful candidate is subsequently shown not to have been qualified, the true choice of the electors may be frustrated by the fact that the qualified candidates of their choice have become disqualified by reason of decisions that they made on the basis that they had not been elected. That, indeed, is precisely what will have occurred if Ms Hughes is found to be disqualified. To the extent possible, s 44 should be construed so as to minimise the prospect of interference of that kind with the true choice of the voters.

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51. For the above reasons, the words "being chosen" in s 44 of the Constitution refer to the period between nomination and the close of polling under s 220 of the Electoral Act (or alternatively, at the latest, the return of the writs under s 283). That conclusion necessarily means that none of:

(a) the date on which the Senate refers questions to the Court pursuant to s 376 of
20 the Electoral Act; or

(b) the date on which the Court answers a referred question to the effect that there is a vacancy in the Senate; or

(c) the entire period from the opening of nominations until any proceeding in this Court is determined;

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comes within the temporal period of operation of s 44.

52. It follows that Ms Hughes's appointment to the AAT in July 2017 was irrelevant to whether she was capable of "being chosen" within the meaning of s 44 of the Constitution at the July 2016 election.

Ms Hughes has not become subsequently disqualified by s 45

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53. Section 45 of the Constitution relevantly provides that, if a senator becomes subject to any of the disabilities in s 44, his or her place shall thereupon become vacant.

54. If Ms Hughes had attempted to sit in the Parliament whilst still a member of the AAT, she would have become subject to the disability in s 44(iv), and her seat would thereupon have become vacant by reason of s 45 of the Constitution.

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55. However, Ms Hughes cannot become a senator until the Court declares her duly elected. As Ms Hughes has resigned from the AAT on 27 October 2017, and as any

such declaration will necessarily be made at some time in the future, it follows that s 45 can have no operation by reason of Ms Hughes past position as a member of the AAT.

An "office of profit under the Crown"

56. If the Court reaches the issue, the Commonwealth accepts that, from 1 July 2017 to 27 October 2017, Ms Hughes held an "office of profit under the Crown" for the purposes of s 44(iv) of the Constitution. That is so for the following reasons.

"Office of profit under the Crown"

57. The only case in which this Court has given detailed consideration to s 44(iv) is *Sykes*.[36] In that case Mason CJ, Toohey and McHugh JJ (with whom, on this point, Brennan, Dawson and Gaudron JJ agreed[37]), observed that "[t]he meaning of the expression 'office of profit under the Crown' is obscure."[38] That remains true; the Court in *Sykes* did not attempt to define the concept or to provide a list of indicative factors. Nevertheless, four propositions may be extracted from the Court's reasons in *Sykes*.

58. *First*, an "office of profit under the Crown" includes[39] "public servants who are officers of the departments of government", "permanent officers of the executive government", and "*at least* those persons who are permanently employed by government".[40]

59. *Secondly*, the meaning of "office" in s 44(iv) is informed by the mischief to which it is directed, namely eliminating or reducing executive influence of the House or Senate.[41]

60. *Thirdly*, an office will come within s 44(iv) if it is "incompatible" with the duties of a parliamentarian. An office will be incompatible in this context if:[42]

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36 (1992) 176 CLR 77, particularly at 95–97 (Mason CJ, Toohey and McHugh JJ).

37 *Sykes* (1992) 176 CLR 77 at 108 (Brennan J), 130 (Dawson J) and 132 (Gaudron J).

38 *Sykes* (1992) 176 CLR 77 at 95.

39 Cf *Williams v Commonwealth (No 1)* (2012) 248 CLR 156 at 334 [443] (***Williams (No 1)***) per Heydon J who cites *Sykes* for the proposition that it "means a permanent officer of the executive government".

40 *Sykes* (1992) 176 CLR 77 at 95-96 (Mason CJ, Toohey and McHugh JJ) (emphasis added). See also, in relation to the concept of "office", *Wainohu v New South Wales* (2011) 243 CLR 181 at 221 [77] (Gummow, Hayne, Crennan and Bell JJ).

41 *Sykes* (1992) 176 CLR 77 at 97 (Mason CJ, Toohey and McHugh JJ). That is consistent with the recent emphasis given to the purpose of s 44 in *Re Day (No 2)* (2017) 91 ALJR 518 at 527–528 [38]–[42], 528–529 [48], 529 [51]–[52], 531–532 [72], 532 [75] (Kiefel CJ, Bell and Edelman JJ), 535 [97]–[100] (Gageler J), 543–545 [161]–[172] (Keane J).

42 *Sykes* (1992) 176 CLR 77 at 96–97 (Mason CJ, Toohey and McHugh JJ).

(a) performance of the duties of the office would impair the person's capacity to attend to the duties of a parliamentarian;

(b) there is a risk that the officeholder would not bring to bear as a member of Parliament a free and independent judgement (because they share the same political views as their Minister);

(c) membership of Parliament would detract from the performance of the relevant public service duty.

61. *Fourthly*, a permanent public servant who is a teacher holds an office of profit under the Crown. In reaching that conclusion the Court relied on:[43]

(a) the designation of the position as an 'office' in the relevant State legislation;

(b) that a teacher was a permanent employee of the Crown;

(c) the public service duties of a teacher being incompatible with service as a parliamentarian.

62. In *Sykes*, the Court referred in a footnote to the House of Commons *Report from the Select Committee on Offices or Places of Profit under the Crown* (1941), which attached an opinion from a former Attorney-General of the United Kingdom. In that opinion, the Attorney-General expressed the view that:[44]

> In considering whether an office is under the Crown one has to consider who appoints, who controls, who dismisses and the nature of the duties. If the Crown itself has the power of appointment and dismissal, this would raise a presumption that the Crown controls, and that the office is one under the Crown. If, although the Crown appoints, the duties are not duties connected with the public service, the office would not, I think, be an office under the Crown within the Act .. If the duties are duties under and controlled by the Government then the office is, *prima facie*, at any rate, an office under the Crown, and the appointment would normally be made by a Minister or by someone who clearly held an office under the Crown.

63. It is submitted that that passage provides useful guidance in identifying an office of profit under the Crown.

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43 *Sykes* (1992) 176 CLR 77 at 98 (Mason CJ, Toohey and McHugh JJ).

44 *Report from the Select Committee on Offices or Places of Profit under the Crown*, House of Commons (1941) Appendix 1, Third Memorandum by Mr Attorney-General at 136 (emphasis added). That approach is consistent with the limited Australian authorities: see *Bowman v Hood* (1899) 9 QLJ 272 ('the Warrego case'); *Clydesdale v Hughes* (1934) 36 WALR 73.

64. The Convention debates provide some support for giving attention to powers of appointment and dismissal (and thus control). At the 1891 Sydney Convention, Sir Samuel Griffith said of the predecessor of s 44(iv) that its object was "to prevent persons who are dependent for their livelihood upon the government, and who are amenable to its influence, from being members of the legislature".[45] The relevance of the power of appointment was also recognised when Sir Samuel Griffith rejected a suggestion from Sir John Bray that it was necessary to exclude the Speaker of the House of Representatives and the President of the Senate from the operation of s 44(iv), this being said to be unnecessary because those positions were not "under the Crown" (apparently because they were not appointed by the Crown).

65. Further support for the relevance of powers of appointment, dismissal and control is found, by analogy, in the approach this Court has taken to s 75(v) ("officer *of* the Commonwealth") and s 116 ("office ... *under* the Commonwealth"). As to s 75(v), in *R v Murray and Cormie; Ex parte Commonwealth*,[46] Isaacs J[47] and Higgins J[48] considered the following features to be relevant in determining whether a person is an officer of the Commonwealth: who holds the power of appointment, who pays the officer, to whom is the officer responsible, and who is capable of removing the officer? As to s 116, in *Williams (No 1)*, Heydon J (in dissent as to the result, but not in relation to s 116) said:[49]

> The absence of the words "of profit" from s 116 indicates only that s 116 is wider than s 44(iv). Section 116 applies to offices which are not "of profit" as well as those which are. An "office" is a position under constituted authority to which duties are attached. That suggests that an "officer" is a person who holds an office which is in direct relationship with the Commonwealth and to which qualifications may attach before particular appointments can be made or continued ...
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> The Commonwealth has no legal relationship with the "chaplains". It cannot appoint, select, approve or dismiss them. It cannot direct them. The services they provide in a particular school are determined by those who run that school. The provision of those services is overseen by school principals.

Membership of the Administrative Appeals Tribunal is an "office of profit under the Crown"

66. The AAT is established by s 5 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**). Members of the AAT are appointed by the Governor-General for a term of

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45 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 8 April 1891 at 660–661.

46 (1916) 22 CLR 437.

47 (1916) 22 CLR 437 at 452.

48 (1916) 22 CLR 437 at 464.

49 (2012) 248 CLR 156 at 334–335 [444]–[445] (emphasis added).

up to 7 years and can be reappointed.[50] The Governor-General can also terminate a non-judicial member's appointment, albeit only in very limited circumstances (for example, if the member becomes bankrupt[51]), but termination for proved misbehaviour or incapacity must be initiated by Parliament.[52] Further, although the executive government is not free to terminate the appointment of a member *at will*, it does have the capacity to reappoint (or not) a member at the expiry of their term. As to the nature of the duties and the degree of connection with the executive government, while the AAT makes its decisions independently of the Departments whose decisions it reviews, it is itself part of the executive. At least in circumstances where the AAT substitutes its own decision for that of the original decision-maker, it is "only another executive body in an administrative hierarchy."[53]

67. A member of the AAT is paid such remuneration as is determined by the Remuneration Tribunal).[54] In that regard, s 7(10) of the *Remuneration Tribunal Act* 1973 (Cth) should be noted. It provides:

> (10) A member of, or a candidate for election to, either House of the Parliament is not entitled to be paid, and shall not be paid, any remuneration or allowances in respect of his or her holding, or performing the duties of, a public office but he or she shall be reimbursed [expenses reasonably incurred].

68. The above provision may be intended to prevent s 44(iv) from disqualifying a person who holds an office the remuneration for which is specified by the Remuneration Tribunal, by removing the entitlement to "profit" from the office in any period that would engage that section. It is not, however, necessary to determine whether the provision is effective to achieve that result, because on the facts of this case s 7(10) can have had no operation. That follows because Ms Hughes was appointed as a member of the AAT approximately 12 months after she ceased to be a "candidate for election", and at a time when she obviously was not a member of either House of Parliament. The contrary view – being that Ms Hughes remained a "candidate" because Ms Nash's disqualification has revealed that the NSW Senate election was never complete –

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50 AAT Act, ss 6(1) and 8(3)).

51 AAT Act, s 13(2)(a)(i))

52 AAT Act, s 13(1).

53 *Midland Metals Overseas Ltd v Customs* (1991) 30 FCR 87 at 97 (Hill J), adopting the language of Rich and Dixon JJ in *Jolly v Commissioner of Taxation (Cth)* (1935) 53 CLR 206 at 214, where their Honours were speaking of the Taxation Boards of Review. Cf *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17-18 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

54 AAT Act, s 9.

would have the consequence that s 7(10) would operate to deprive Ms Hughes (together with any other person who sought election as a senator for NSW at the 2016 election) of any entitlement to be paid any amount specified by the Remuneration Tribunal for any work performed at any time since the 2016 election. It would have that operation irrespective of whether the person deprived of that entitlement was elected on the special count. That operation of the provision would be so obviously unreasonable that s 7(10) should be construed as referring to periods when a person was a "candidate for election" in fact. If so construed, it plainly has no operation in this case.

69. In circumstances where Ms Hughes' appointment to the AAT was made by the Governor-General on the advice of the executive government, that it was appointment to a remunerated office, that AAT members can (and frequently do) take executive action (in the sense of substituting their own decisions for those of the primary decision-maker), and where there is at least the prospect of performance of the duties of the office conflicting with the proper performance of parliamentary duties, the Commonwealth accepts that Ms Hughes did hold an office of profit under the Crown.

PART VII ESTIMATE OF TIME

70. It is estimated that one hour will be required for the presentation of the oral argument of the Commonwealth.

Dated: 13 November 2017

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