ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY **NO C 30 OF 2017**

RE MS SKYE KAKOSCHKE-MOORE
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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Date of this document: 22 January 2018

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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 (**Attorney-General**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) and is also a party by virtue of orders made by Nettle J on 8 December 2017 pursuant to s 378 of the *Commonwealth Electoral Act 1918* (Cth) (**Electoral Act**). The Attorney-General 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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> (i) 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 and privileges of a subject or a citizen of a foreign power; ...
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> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

PART IV ARGUMENT

SUMMARY

4. The Senate has referred questions respecting the qualifications of Ms Skye Kakoschke-Moore to the Court of Disputed Returns pursuant to s 376 of the Electoral Act.

5. Question (a) is whether, by reason of s 44(i) of the Constitution, there is a vacancy in the representation of South Australia in the Senate for the place for which Ms Kakoschke-Moore was returned. Plainly there is such a vacancy, because the election that followed the dissolution of the Senate by the Governor-General on 9 May 2016[1] continues until a candidate is determined in accordance with the process of choice that the Parliament has prescribed in the Electoral Act for the purposes of s 7 of

[1] Affidavit of Timothy John Courtney, affirmed 7 December 2017, at [24] [**CB27**].

the Constitution.[2] The return of Ms Kakoschke-Moore was ineffective to bring that process of choice to an end, because Ms Kakoschke-Moore was a British citizen: at the time that she nominated for the Senate in June 2016; on polling day; at the return of the writs; and for the entire period from the return of the writs until 6 December 2017, that being the day the United Kingdom Home Office registered her Declaration of Renunciation.[3] That Ms Kakoschke-Moore was a British citizen at all those times is supported by an expert opinion filed by Ms Kakoschke-Moore.[4] It is therefore clear that question (a) should be answered "yes".

6. Assuming that the answer to Question (a) is "yes", Question (b) enquires by what means and in what manner the vacancy in the representation of South Australia in the Senate should be filled.

7. By summons filed 7 December 2017, the Attorney-General seeks to have that question answered to the effect that the vacancy be filled by a special count of the ballot papers in accordance with the orders set out in the summons. In particular, that special count would be conducted on the basis that a vote for Ms Kakoschke-Moore would be counted to the candidate next in the order of the voter's preference.[5] The effect of that, in conjunction with s 272(2) of the Electoral Act, would be that after a quota is reached by the candidates occupying the first two positions in the list of grouped candidates below the line for the Nick Xenophon Team (**NXT**), votes cast "above the line" in favour of NXT would be counted in favour of Mr Timothy Storer rather than Ms Kakoschke-Moore.

8. No party to the reference contends that a special count is not appropriate *per se*. However, Ms Kakoschke-Moore contends that, notwithstanding that she was incapable of being chosen as a senator by reason of s 44(i) during (and, indeed, for almost the entire period of) the "process of choice prescribed by the Parliament for the purpose of

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2 *Re Nash (No 2)* (2017) 92 ALJR 23 at 30 [38].

3 See [10], [9]-[22] below.

4 Affidavit of Skye Kakoschke-Moore, affirmed 10 January 2018, at [21] [**CB263**]; Exhibit SKM-5 (Opinion of Mr Adrian Berry) at [22] [**CB289**].

5 Schedule of Directions to the Summons filed 7 December 2017 [**CB 22**].

s 7 of the Constitution"[6], the Court should answer Question (b) to the effect that a special count be conducted on the premise that Ms Kakoschke-Moore was not incapable of being chosen, because she would have renounced her foreign citizenship at the time that the special count was ordered or carried out.

9. Ms Kakoschke-Moore's position is untenable. It is inconsistent with the well-established propositions that:

(a) the words "incapable of being chosen" in s 44 refer to the "process of choice" required by ss 7 and 24 of the Constitution and provided for in the Electoral Act;[7]

(b) the "process of choice" commences with the date of nomination as the date on and after which s 44(i) applies until the completion of the electoral process.[8] It includes, but is not limited to, the "act of choice";[9]

(c) "the processes of choice by electors to which ss 7 and 24 allude and in respect of which s 44 has its central operation encompass legislated processes which facilitate and translate electoral choice in order to determine who is or is not elected as a senator or member of the House of Representatives";[10]

(d) when a person who is unqualified or who is disqualified is returned as elected, the return is defective and there is "a failure by the electors to choose a senator for the place"[11] for which the person was returned, with the result that the election is

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6 *Re Nash (No 2)* (2017) 92 ALJR 23 at 31 [44].

7 *Sykes v Cleary* (1992) 176 CLR 77 at 100 (Mason CJ, Toohey and McHugh JJ); *Re Canavan* (2017) 91 ALJR 1209 at 1213 [3].

8 *Sykes v Cleary* (1992) 176 CLR 77 at 99-101 (Mason CJ, Toohey and McHugh JJ), 108 (Brennan J), 130 (Dawson J), 132 (Gaudron J); *Re Culleton (No 2)* (2017) 91 ALJR 311 at 315 [13] (Kiefel, Bell, Gageler and Keane JJ); *Re Canavan* (2017) 91 ALJR 1209 at 1213 [3]; *Re Nash (No 2)* (2017) 92 ALJR 23 at 30 [38]-[39].

9 *Re Nash (No 2)* (2017) 92 ALJR 23 at 30 [36]; *Sykes v Cleary* (1992) 176 CLR 77 at 99 (Mason CJ, Toohey and McHugh JJ).

10 *Re Nash (No 2)* (2017) 92 ALJR 23 at 30 [35].

11 *In re Wood* (1988) 167 CLR 145 at 164.

"constitutionally incomplete" until it results in the determination as elected of a person who is qualified to be chosen and not disqualified from being chosen; [12]

(e) a special count conducted by analogy with s 273(27) of the Electoral Act following a declaration by the Court of Disputed Returns that an election is void is conducted for the purpose of ascertaining the "true legal intent of the voters so far as it is consistent with the Constitution and the [Electoral] Act"[13] that was expressed by polling. It is not a "new" choice;

(f) where a person is disqualified by reason of s 44 at any time during a particular process of choice (rather than simply at the end of that process), that person is incapable of being chosen to fill the vacancy created by the dissolution of the relevant house of Parliament.[14] Any indication of a voter's preference for that candidate is a nullity, and the true legal intent of the voter is to select the next qualified candidate.[15]

10. It is not possible to distinguish *Re Nash (No 2)*.[16] Acceptance of Ms Kakoschke-Moore's contentions would require the Court to overrule that decision, and also to depart from aspects of the reasoning in *Vardon v O'Loghlin*,[17] *In re Wood*[18] and *Sykes v Cleary*.[19] The usual principles governing when this Court should depart from its previous decisions do not support that course.[20]

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12 *Re Nash (No 2)* (2017) 92 ALJR 23 at 30 [38]-[39]; *In re Wood* (1988) 167 CLR 145 at 164; *Vardon v O'Loghlin* (1907) 5 CLR 201 at 208-209 (Griffith CJ, Barton and Higgins JJ).

13 *In re Wood* (1988) 167 CLR 145 at 165-166; *Sykes v Cleary* (1992) 176 CLR 77 at 102 (Mason CJ, Toohey and McHugh JJ).

14 *Re Nash (No 2)* (2017) 92 ALJR 23; *Sykes v Cleary* (1992) 176 CLR 77.

15 *In re Wood* (1988) 167 CLR 145 at 165-166.

16 (2017) 92 ALJR 23.

17 (1907) 5 CLR 201.

18 (1988) 167 CLR 145.

19 (1992) 176 CLR 77.

20 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554. Kiefel CJ, Bell and Edelman JJ assumed without deciding that those principles applied in *Re Day (No 2)* (2017) 91 ALJR 518 at 528 [45].

11. Further, the outcome sought by Ms Kakoschke-Moore is inconsistent with the result in each of *Re Culleton (No 2)*, *Re Canavan* (in relation to Ms Nash, Ms Waters and Mr Roberts) and *Re Nash (No 2),* all of which involved persons who had divested themselves of the relevant disability under s 44 of the Constitution before the Court determined their disqualification and before the special count was to be conducted.[21] Similarly, at the time of the Court's consideration of *In re Wood*, Mr Wood had become an Australian citizen and was therefore at that time qualified to be elected. Nonetheless, the special count was conducted on the basis that votes for Mr Wood be counted to the candidate next in the order of preference.[22] While it is true that the submission now advanced on behalf of Ms Kakoschke-Moore was not made in the cases just mentioned, that means only that those cases are not authorities against the submission.[23] It does not alter the fact that those cases would have to be accepted as having been wrongly decided.

12. In light of the settled propositions to which reference has been made above, any indication of preference for Ms Kakoschke-Moore cannot be included in the special count to fill the vacancy in the representation of South Australia in the Senate. That vacancy did not arise on Ms Kakoschke-Moore's resignation. It has existed since the dissolution of the Senate. It is to be filled by completing the election that followed that dissolution, by ascertaining the true legal intent of the voters, consistent with the Constitution and the Electoral Act, as expressed through the polling on 2 July 2016.

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21 See *Re Culleton (No 2)* (2017) 91 ALJR 311 at 314 [2]-[3], 315 [14], 319 [44] (Kiefel, Bell, Gageler and Keane JJ); *Re Canavan* (2017) 91 ALJR 1209 at 1226 [96], 1232 [136], [138]; *Re Nash (No 2)* (2017) 92 ALJR 23 at 25-26 [2], [8]. Mr Culleton, Ms Nash, Mr Roberts and Ms Waters were also no longer disqualified at the time the Court answered Question (b) of the questions referred in their respective references, which was in the same terms as Question (b) in the present reference.

22 *In re Wood* (1988) 167 CLR 145 at 173, 175 (Mason CJ). It is noted that the Court expressly did not determine the question whether Mr Wood was incapable of being chosen by virtue of s 44(i), which was not fully argued: at 169. The Court noted that the materials did not indicate whether Mr Wood had renounced his British citizenship: at 155-156.

23 *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13] (Gleeson CJ, Gummow and Heydon JJ).

13. Ms Kakoschke-Moore's submission that the return of Mr Storer would not give effect to the true legal intention of the voters should be rejected. Acceptance of that submission would mean that events that occurred over 16 months after polling day, when Mr Storer either resigned from, or was expelled from, the NXT, somehow altered the true legal intent of the voters, notwithstanding that those votes were cast for a candidate who was, and has at all times remained, qualified to be chosen for and to sit in the Senate. Further, acceptance of that submission would be productive of uncertainty and instability, and would expose the result of elections to manipulation (by, for example, allowing political parties to expel persons who would otherwise be elected to the Senate in order to influence the composition of the Senate).

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14. There will be no distortion of the voters' true legal intentions if Mr Storer is returned as duly elected despite the fact that he is no longer a member of the NXT. Indeed, to assign to Mr Storer the above the line votes for NXT that had previously flowed to Ms Kakoschke-Moore is necessary to give effect to s 272(2) of the Electoral Act. Further, there is no rule — constitutional, statutory or otherwise — that requires senators to remain in the party that endorsed their nomination. If a sitting senator resigns from their party and becomes an independent, they do not thereby vacate their place in the Senate. The position is no different if, after the voters have expressed their intention by voting, a candidate ceases to be a member of the political party that endorsed them prior to the election.

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15. Finally, Ms Kakoschke-Moore's construction of s 44(i) would render that provision substantially meaningless with respect to senators. It would permit a person who was disqualified from being chosen or of sitting in the Senate (whether at the time of nomination, polling day, or thereafter) to retain foreign citizenship unless or until that came publicly to light, but then to avoid the effect of s 44(i) simply by renouncing their citizenship, being included in the special count that followed their disqualification, and therefore automatically being returned to the same place for which they were originally returned.

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RELEVANT FACTS

The 2016 Election

16. NXT is a registered political party. It was registered as a party before the 2016 Election.[24] Ms Kakoschke-Moore was a member of NXT at the time of the 2016 election. Since then she has continually been, and remains, a member of NXT.[25] Mr Storer was a member of NXT at the time of the 2016 election.[26] He ceased to be a member of NXT by no later than 6 November 2017 and has not re-joined NXT.[27]

17. On 9 May 2016, pursuant to s 57 of the Constitution, the Governor-General dissolved the Senate and the House of Representatives.[28]

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18. On 16 May 2016, the Governor of South Australia issued a writ for the election of Senators for South Australia to the Australian Electoral Officer for the State of South Australia (the **AEO**).[29] Pursuant to s 152 of the Electoral Act, the writ fixed the following dates: 23 May 2016 (close of the Rolls); 9 June 2016 (close of nominations); 2 July 2016 (date on which poll is taken); and (not later than) 8 August 2016 (return of the writ).

19. On 6 June 2016, the AEO received a Group Nomination by Registered Officer form for the registered political party Nick Xenophon Team (**the NXT group nomination**). The NXT group nomination listed 4 candidates in the following order:[30] Nick Xenophon; Stirling Griff; Skye Kakoschke-Moore; and Tim Storer.

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24 See Affidavit of Mr Courtney, affirmed 7 December 2017, at [26] [**CB27**].

25 Affidavit of Ms Kakoschke-Moore at [12] [**CB262**].

26 Affidavit of Ms Bonaros, sworn 22 December 2017, at [7] [**CB172**]; Affidavit of Mr Timothy Raphael Storer, sworn 22 December 2017, at [4], [11] [**CB244-245**]

27 Affidavit of Ms Bonaros at [23]-[24], [27] [**CB174-175**]; Affidavit of Mr Storer at [15] [**CB246**].

28 Affidavit of Mr Courtney, affirmed 7 December 2017, at [24] [**CB27**].

29 Writ for Election of Senators at **CB7, 40**; Affidavit of Mr Courtney, affirmed 7 December 2017, at [25] [**CB27**]. See Electoral Act, s 153.

30 Affidavit of Mr Courtney, affirmed 7 December 2017, at [26] [**CB27-28**]; Exhibit TJC-3 [**CB42**]; Affidavit of Timothy John Courtney, affirmed 15 December 2017, at [2]-[3] [**CB158**]; Exhibit TJC-10 [**CB161**].

20. Neither Ms Kakoschke-Moore nor Mr Storer's nominations were rejected under s 172 of the Electoral Act.[31] On 10 June 2016, both nominations were declared.[32]

21. On 2 July 2016, polling day was conducted. On 4 August 2016, the AEO certified, pursuant to s 283(1)(b) of the Electoral Act, the names of the 12 candidates who had been duly elected. The candidates certified by the AEO as duly elected included Nick Xenophon, Stirling Griff and Ms Kakoschke-Moore.[33]

22. On 4 August 2016, a copy of the writ and the South Australian certificate of election were returned to the Governor of South Australia.[34]

23. On 13 April 2017, the AEO for South Australia conducted a special count of the ballot papers cast in the South Australian Senate election in accordance with the orders made by this Court on 11 April 2017 in proceeding C14 of 2016 (concerning Mr Robert Day AO).[35] The successful candidates identified on that special count again included Nick Xenophon, Stirling Griff and Ms Kakoschke-Moore.[36]

Ms Kakoschke-Moore's British citizenship

24. An expert opinion filed by Ms Kakoschke-Moore confirms that, at the time that she nominated for election to the Senate in June 2016, she was a British citizen.[37]

25. On 22 November 2017, Ms Kakoschke-Moore wrote to the President of the Senate tendering her resignation as a senator.[38]

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31 Affidavit Mr Courtney, affirmed 7 December 2017, at [27] [**CB28**].

32 Affidavit of Mr Courtney, affirmed 7 December 2017, at [28] [**CB28**].

33 Affidavit of Mr Courtney, affirmed 7 December 2017, at [35] [**CB28**]; Exhibit TJC-5 [**CB53**].

34 Affidavit of Mr Courtney, affirmed 7 December 2017, at [36] [**CB28–29**]; Exhibit TJC-5 [**CB51**].

35 Affidavit of Mr Courtney, affirmed 7 December 2017, at [45] [**CB30**]. See *Re Day* [2017] HCATrans 85.

36 Affidavit of Mr Courtney, affirmed 7 December 2017, at [46] [**CB30**]; Exhibit TJC-9 [**CB149**].

37 Affidavit of Ms Kakoschke-Moore, affirmed 10 January 2018, at [21] [**CB263**]; Exhibit SKM-5 at [22] [**CB289**].

38 Affidavit of Ms Kakoschke-Moore at [23] [**CB263**]; Exhibit SKM-6 [**CB292**].

26. On 30 November 2017, Ms Kakoschke-Moore applied to renounce her British citizenship.[39] That application was registered on 6 December 2017,[40] at which time Ms Kakoschke-Moore ceased to be a British citizen.

ARGUMENT

Question (a)

27. There is no dispute that, if Question (a) is to be answered, it must be answered that there is a vacancy by reason of s 44(i) of the Constitution in the representation of South Australia in the Senate for the place for which Ms Kakoschke-Moore was returned (Kakoschke-Moore Submissions (**KMS**) [81]).

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28. Ms Kakoschke-Moore submits that the only vacancy that exists at present is a casual vacancy arising by reason of Ms Kakoschke-Moore's resignation and that this vacancy could be filled pursuant to s 15 of the Constitution, such that it may be unnecessary or inappropriate for this Court to answer Question (a) (KMS [17], [81]). That submission should not be accepted.

29. The fact that Ms Kakoschke-Moore purported to resign her position under s 19 of the Constitution before the Senate referred any questions concerning her qualification to this Court has no bearing on whether the Court should answer Question (a). That must be so because whether the vacancy is to be filled pursuant to s 15 of the Constitution, or

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in some other manner (such as by a special count), depends upon whether Ms Kakoschke-Moore was ever validly chosen as a Senator (as only if validly chosen was she capable of resigning, thereby engaging the operation of s 15 of the Constitution).[41]

30. For those reasons, the Court should answer Question (a). It should not refuse to answer that question based merely on Ms Kakoschke-Moore's undeveloped and unsupported assertion that it may not be in the interests of long-term governmental stability to do so.

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39 Affidavit of Ms Kakoschke-Moore at [24] [**CB263**]; Exhibit SKM-7 [**CB294**].

40 Affidavit of Ms Kakoschke-Moore at [25] [**CB264**]; Exhibit SKM-8 [**CB307**].

41 *Vardon v O'Loghlin* (1907) 5 CLR 201 at 208 (Griffith CJ, Barton and Higgins JJ).

Question (b)

31. The issue that arises in relation to Question (b) is whether Ms Kakoschke-Moore is eligible to be included in the special count to determine who should fill the vacancy in the representation of South Australia in the Senate, or whether she should be excluded from that special count on the basis that she is incapable of being chosen to fill that vacancy by reason of s 44(i). The Attorney-General contends that well-established authority points strongly to the conclusion that, as a result of the operation of s 44(i), Ms Kakoschke-Moore cannot be included in the special count.

Section 44(i) and the process of choice

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32. Section 44(i) of the Constitution relevantly provides that any person who is a 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.

33. The words "shall be incapable of being chosen" refer to the "process of being chosen".[42] As this Court has now stated on a number of occasions, the process of choice commences with the date of nomination[43] and continues until the completion of the electoral process.[44]

34. The electoral process includes the scrutiny for which Part XVIII of the Electoral Act provides.[45] That is because "the choice of the people must be made in accordance with

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the Constitution and with the Electoral Act",[46] and these processes are directed towards ensuring that the election was conducted, and the choice of the people occurred, in accordance with those laws.

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42 *Sykes v Cleary* (1992) 176 CLR 77 at 100-101 (Mason CJ, Toohey and McHugh JJ), 108 (Brennan J), 130-131 (Dawson J), 132 (Gaudron J); *Re Canavan* (2017) 91 ALJR 1209 at 1213 [3].

43 *Sykes v Cleary* (1992) 176 CLR 77 at 99-101, 108, 130-131, 132; *Re Culleton (No 2)* (2017) 91 ALJR 311 at 315 [13] (Kiefel, Bell, Gageler and Keane JJ); *Re Canavan* (2017) 91 ALJR 1209 at 1213 [3].

44 *In re Wood* (1988) 167 CLR 145 at 164; *Re Canavan* (2017) 91 ALJR 1209 at 1213 [3]; *Re Culleton (No 2)* (2017) 91 ALJR 311 at 315 [13] (Kiefel, Bell, Gageler and Keane JJ).

30 45 *Australian Electoral Commission v Johnston* (2014) 251 CLR 463 at 490 [80]-[81] (Hayne J); *Re Nash (No 2)* (2017) 92 ALJR 23 at 30 [36].

46 *In re Wood* (1988) 167 CLR 145 at 166.

35. Accordingly, the processes of choice to which s 44 of the Constitution refers (and during which a person cannot possess any of the disqualifying characteristics without thereby becoming "incapable of being chosen") continues until the completion of the legislated processes that give effect to the direct choice of the people that the Constitution requires. In *Re Nash (No 2)*, the Court held that "those legislated processes which facilitate and translate electoral choice remain constitutionally incomplete until such time as they result in the determination as elected of a person who is qualified to be chosen and not disqualified from being chosen as a senator".[47] The Court supported that conclusion by reference to *In re Wood*, the holding in which was said to be captured by the statement that "[a] Senate election is not completed when an unqualified candidate is returned as elected".[48]

36. The consequence of this reasoning in *Re Nash (No 2)* was that Ms Hollie Hughes, being a candidate for election who was not disqualified on either the polling day, or at the time that a special count was to be conducted,[49] was held to be incapable of being chosen because she had been disqualified under s 44(iv) for a short period during the process of choice (meaning before a qualified candidate had been determined to be elected). The reasoning of the Court plainly did not turn on the fact that Ms Hughes held an office of profit for about 45 minutes after the Full Court ordered a special count to fill the place for which Ms Nash had been returned. Ms Kakoschke-Moore's apparent attempt to confine the decision in that way (KMS [64]-[67]) is inconsistent with the clear reasoning of the Court.[50]

37. It follows that, as Ms Kakoschke-Moore was disqualified by s 44(i) not only at the time of nomination and polling, but until a week after her resignation from the Senate on 22 November 2017, her argument that she is nevertheless capable of being chosen to

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47 (2017) 92 ALJR 23 at 30 [39].

48 *Re Nash (No 2)* (2017) 92 ALJR 23 at 30 [39], citing *In re Wood* (1988) 167 CLR 145 at 164.

49 Cf KMS at [68], suggesting that *Re Nash (No 2)* does not mean that past disqualification "infects a part of the electoral process to be undertaken after the disqualification has been removed".

50 *Re Nash (No 2)* (2017) 92 ALJR 23, particularly at 30-31 [38]-[44]. Indeed, the Court referred to the disqualification arising from Ms Hughes choice to accept the AAT appointment. It did not arise from her failure to resign that appointment before the special count was ordered: at 31-32 [45].

fill the vacancy that exists because the legislated processes of choice that were instituted by the Governor of South Australia on 16 May 2016 remain "constitutionally incomplete" cannot be accepted unless *Re Nash (No 2)* is overruled. As mentioned in paragraph 10 above, the argument likewise cannot be accepted unless the Court departs from aspects of the reasoning in *Vardon v O'Loghlin*, *In re Wood* and *Sykes v Cleary*.

A special count is part of the process of ascertaining the true legal intent of the voters

38. In circumstances where a senator who was returned as elected was "incapable of being chosen" by reason of s 44(i), the settled practice of the Court of Disputed Returns is to order that a special count of the ballot papers be conducted "by analogy" with s 273(27) of the Electoral Act.[51] That provision, which applies when a deceased candidate's name is on the ballot paper, provides that a vote in favour of the deceased person is counted to the candidate next in the order of the voter's preference and the numbers indicating subsequent preferences are treated as altered accordingly.[52] By this means, the "true legal intent of the voters so far as it is consistent with the Constitution and the [Electoral] Act [is] ascertained".[53]

39. Quite plainly, a special count conducted in the above manner is not a "new" choice. The choice was made by voters when they cast their votes. The special count cannot reflect any changes in the views of any voter that may have occurred since the votes were cast (whether by reason of anything done by the candidates for whom they voted, their political parties, or otherwise). Although the process of choice may be continuing, during which a disability under s 44 may disqualify a candidate, that process is distinct from a voter's"act of choice", which terminates prior to the end of the process of choice.

40. In that respect, a special count to fill a vacancy in the Senate may be contrasted with a

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51 *In re Wood* (1988) 167 CLR 145 at 165-166; *Re Day (No 2)* (2017) 91 ALJR 518 at 532 [77]-[80] (Kiefel CJ, Bell and Edelman JJ), 534 [93] (Gageler J), 549-550 [206]-[211] (Keane J), 560-563 [291]-[306] (Nettle and Gordon JJ); *Re Culleton (No 2)* (2017) 91 ALJR 311 at 319 [39]-[44] (Kiefel, Bell, Gageler and Keane JJ), 324 [67] (Nettle J); *Re Canavan* (2017) 91 ALJR 1209 at 1232 [138].

52 *In Re Wood* (1988) 167 CLR 145 at 166.

53 *In Re Wood* (1988) 167 CLR 145 at 166.

by-election to fill a seat in the House of Representatives that is left unfilled following the purported election of a person who was incapable of being chosen under s 44. Unlike a special count, the by-election is a new choice, which is made at the time that votes are cast in the by-election. That is the reason a previously disqualified candidate, having divested him or herself of the disqualifying status, can thereafter validly nominate and be chosen as a member of House of Representatives to fill the vacancy occasioned by their own disqualification.

41. Where the Court of Disputed Returns orders a special count, its function is to ascertain the true legal choice that was made at the time that the votes were cast in the original election. That choice can only be made between candidates who were qualified to be chosen and not disqualified from being chosen as senators, for the entire purpose of the poll "is to choose in accordance with the Act the preferred candidates who are qualified to be chosen, but no effect can be given for the purpose of the poll to the placing of a figure against the name of a candidate who is not qualified to be chosen: an indication of a voter's preference for an unqualified candidate is a nullity".[54] Consistently with that statement, in *Sykes*, the plurality summarised the holding in *In re Wood*, in terms the Attorney-General respectfully adopts, as follows:[55]

> *In re Wood* decided that a primary vote for an unqualified candidate does not destroy the voter's indication of his or her subsequent preferences. Although an indication of a voter's preference for an unqualified candidate is a nullity and the indication of preference for that candidate cannot be treated as effective, the ballot paper is not informal. It was held that "[t]he vote is valid except to the extent that the want of qualification makes the particular indication of preference a nullity" and that there is no reason for disregarding the other indications of the voter's preference.

Conclusion: Ms Kakoschke-Moore cannot be included in the special count

42. The existing authorities therefore establish that a special count looks back to the votes cast leading up to and on polling day in order to ascertain the voters' legally effective choice. Two things follow.

43. *First*, as Ms Kakoschke-Moore was incapable of being chosen during part (indeed, almost all) of the same period of choice that is still underway to fill the vacant Senate

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54 *In re Wood* (1988) 167 CLR 145 at 165 (emphasis added).

55 *Sykes v Cleary* (1992) 176 CLR 77 at 101 (Mason CJ, Toohey and McHugh JJ).

place, she cannot be included in the special count as if it were a fresh election taking place after she divested herself of her disqualifying status. That would be akin to holding that Ms Nash, Ms Waters, and Mr Roberts could all have been included in the special counts that followed this Court's ruling in *Re Canavan*. This cannot be reconciled with Ms Kakosche-Moore's submission that "if the person is not incapable of being chosen, it is immaterial whether there is any process of choosing on foot, or whether they were incapable at some earlier time" (KMS [71]).

44. *Secondly*, any preference expressed for Ms Kakoschke-Moore must be treated as a nullity in completing the legislated processes that give effect to the direct choice of the people that the Constitution requires in order to fill the vacancy caused by the dissolution of the Senate on 9 May 2016. A disqualification from being chosen is necessarily a disqualification from being chosen at an election – irrespective of how long it ultimately takes for that election to complete. The period of disqualification is not divisible from or separate to the period of the election; a disqualification operates to preclude a person from being elected at any election that coincides with any period of disqualification.

Ms Kakoschke-Moore's submissions

45. Contrary to the preceding discussion of existing authority, Ms Kakoschke-Moore submits that her position is not governed by authority and seeks to support her position by reference to first principles said to be drawn from the Convention Debates, the text and structure of the Constitution, the terms and application of the Electoral Act and the principle that a special count should not distort the voters' intentions. For the reasons that follow, that appeal to first principles is wholly unpersuasive.

Convention debates (KMS [25]-[38])

46. Ms Kakoschke-Moore submits that the drafting history of the Constitution is consistent with a construction of s 44 that allows for the curing of a disability, such that a person who was disabled by s 44 ceases to be incapable of being chosen or of sitting once the disability is removed.

47. It is unnecessary to resort to the Convention Debates to establish that s 44 of the Constitution has a limited temporal operation, such that the disabilities it imposes can

be removed. For example, it is plain that a person who was a citizen of a foreign power, but who has successfully renounced that status, is not thereafter subject to the disability that s 44(i) imposes. But that says nothing as to whether a divestment of a disability that occurs after voters have cast their votes, being votes that when cast are a nullity to the extent that they reveal a preference for a candidate who is disqualified, can be retrospectively validated once the candidate divests him or herself of the disqualifying status.

48. Ms Kakoschke-Moore points to nothing in the Convention Debates that would support such a radical proposition, which would dramatically undermine the certainty and stability of the electoral process.

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Constitutional text and structure (KMS [39]-[42])

49. Ms Kakoschke-Moore submits that constitutional provisions "concerning the Senate and vacancies" need to be considered in light of the 1977 amendment to s 15 of the Constitution, which is said to have given recognition to the constitutional importance of stability of party representation in the Senate, and to suggest "a desire to constrain the political consequences of whatever statutory voting system exists from time to time" (KMS [41]-[42]). No authorities are cited for these assertions.

50. As Ms Kakoschke-Moore acknowledges (KMS [39]), the Constitution addresses
20 separately qualifications for election to Parliament (ss 16 and 34), disqualifications for election to Parliament (ss 44 and 45) and vacancies arising in the Parliament (ss 15, 19, 20, 20, 33, 45 and 47). No explanation is given as to why the stability of party representation in the Senate (assuming for present purposes that is accepted to be a policy capable of informing the construction of s 15) should inform the construction of a provision such as s 44. As the Court said in *Re Nash (No 2)*, "[t]hat s 44 operates in relation to s 15 does not detract from the central operation of s 44 being in relation to the processes of choice by electors to which ss 7 and 24 allude".[56]

51. Further, it is well-settled that s 15 has no operation in circumstances where the election of a person returned as elected is found to have been void as a result of the person being

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[56] (2017) 92 ALJR 23 at 30 [34].

unqualified, or disqualified.[57] Given the distinct focus and field of operation of ss 15 and 44, there is no reason that s 44 must be construed in a manner that takes account of matters pertaining to party representation.

Terms and application of the Electoral Act (KMS [43]-[48])

52. Ms Kakoschke-Moore contends that the purposes and values evident from the terms of the Constitution inform the exercise of the Court of Disputed Returns' discretionary powers under the Electoral Act (KMS [44]). That submission should be rejected for the reason just addressed because, to the extent that the purposes and values are sought to be derived from s 15, they do not assist in giving effect to s 44.

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53. To the extent that Ms Kakoschke-Moore contends (at [48]) that the Court should exercise its discretionary powers under ss 360 and 379 of the Electoral Act in a manner that would "preserve the system of proportional representation", it must of course do so consistently with the Constitution, and so cannot properly give effect to votes that were cast for candidates disqualified from being chosen by the Constitution itself.

54. Finally, the Electoral Act, which is the mechanism that translates voter choice into an electoral outcome, contemplates a single process of election. That process either ends with a qualified candidate being returned on the writ, or, if a disqualified candidate is returned on the writ, with another qualified candidate "who was not returned as
20 elected" being declared duly elected under s 360(1)(vi) and then taking their seat under s 374(ii). That is the universe of outcomes contemplated by the Electoral Act, and it does not include a second choice within the electoral process in the manner contended for by Ms Kakoschke-Moore. Thus the terms of the Electoral Act also tell against Ms Kakoschke-Moore's submissions.

Distortion of voters' intentions (KMS [75]-[80])

55. Ms Kakoschke-Moore asserts that if she is not included in the special count, it is likely that her preferences will flow to Mr Storer, who is no longer a member of the NXT. So much is not in dispute.

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[57] *Vardon v O'Loghlin* (1907) 5 CLR 201 at 212 (Griffith CJ, Barton and Higgins JJ).

56. Ms Kakoschke-Moore contends that the election of Mr Storer in those circumstances would mean that the true results of the polling would not be realised (KMS [79]). That is not so.

57. Properly analysed, there will be no distortion of the voters' true legal intentions in accordance with the Constitution and the Electoral Act if Mr Storer is declared to be duly elected, despite the fact that he is no longer a member of the political party that endorsed his nomination. Logically, conduct that occurs after voters express their intention by voting cannot be relevant to the intention thereby expressed.

58. In any case, it is not uncommon within the Australian political system for a duly elected senator to resign from the party that endorsed their nomination and to take his or her place in the Senate as an independent, or indeed as an endorsed member of another political party. The consequences of that are political, for a senator who acts in that way is ultimately accountable to the electors for doing so. There is no rule — statutory, constitutional or otherwise — that a candidate endorsed by a party at the election must remain with that party for all, or even any, of the duration of the Parliament for which they are returned. Indeed, the Electoral Act does not even provide for amendment to the ballot paper where a candidate endorsed by a party for election to the Senate formally or informally dissociates from that party before the poll.

59. The scheme erected by the Electoral Act relevantly requires nominations for election to the Senate to be made to the AEO[58] by way of the appropriate prescribed form.[59] Without necessarily being members of the same registered political party, two or more candidates may request that they be grouped together on the ballot paper.[60] The registered officer of a registered political party may, as occurred here,[61] request that the party's name, or an abbreviation of it, be printed on the ballot paper adjacent to the

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58 Electoral Act, s 167(1).

59 Electoral Act, s 166.

60 Electoral Act, s 168.

61 Exhibit TJC-10 **[CB161]**.

name of its endorsed candidates or, in respect of grouped candidate, adjacent to the square printed above the line for the group.[62]

60. A Senate nomination is only valid if, relevantly, the nominee consents to act if elected[63] and the nomination paper is received by the AEO after the issue of the writ and before the hour of nomination.[64] The hour of nomination is noon on the day of nomination.[65] Nominations are declared at noon on the day after the day on which nominations close.[66] If, at that time, the number of candidates nominated is not greater than the number of candidates required to be elected, the AEO must declare the candidates nominated to have been duly elected.[67]

10 61. A candidate may only withdraw his or her consent to act by lodging a notice with the AEO before the hour of nomination.[68] The nomination thereby ceases to have effect.[69] There is no provision that permits a candidate to withdraw his or her nomination after the hour of nomination or to alter the declared nomination,[70] for example by altering the name of the political party that has endorsed the candidate. Similarly, there is no provision that expressly authorises a registered political party or other group to alter a grouping request, for example, by removing the name of a declared candidate. Nor does the Electoral Act otherwise attach any consequences to a candidate ceasing to be a member of the political party that endorsed them.

62. It follows that under the Electoral Act, even if Mr Storer had dissociated, formally or
20 informally, from NXT on the day before polling day, he would have remained a valid

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62 Electoral Act, s 169(1) and (4)(a); see also ss 214, 214A. Party endorsement may be verified by the AEO: s 169B.

63 Electoral Act, s 170(1)(a). See s 171 as to the form of consent to act.

64 Electoral Act, s 170(2)(a)(i).

65 Electoral Act, s 175.

66 Electoral Act, ss 175, 176.

67 Electoral Act, s 179(1)

68 Electoral Act, s 177(1).
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69 Electoral Act, s 177(7)

70 See Exhibit TJC-10 [**CB161**].

candidate capable of election and would have remained grouped with the other NXT candidates. Further, his dissociation would not have resulted in the election failing within the meaning of s 181(2) of the Electoral Act.[71]

63. That consequence is consonant with the legal effect of a valid above the line vote on a ballot paper in a Senate election. A ballot paper with a valid mark above the line is, in its legal effect, a preferential vote for each of the candidates within the selected group. The order of preference is taken to be the order in which the candidates are listed on the ballot paper.[72] Thus, an above the line vote for NXT was, in its legal effect, a preferential vote for each individual candidate listed below the line within that column in the order in which they appeared.

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64. It follows that the act of physically marking a box above the line is of limited significance in ascertaining the true legal intent of the voters. The true legal effect of a vote above the line is supplied by s 272(2) of the Electoral Act. It is telling that Ms Kakoschke-Moore's submissions make no reference to s 272(2).[73]

65. Because candidates for election are not bound to remain endorsed by or associated with any political party at any particular time, voters cast their vote in a context where party-political loyalties may change. There will be no distortion in the voters' true legal intentions, ascertained in accordance with the Constitution and the Electoral Act, if Mr Storer is now declared duly elected. Had Ms Kakoschke-Moore recognised that s 44(i)

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precluded her from being elected to the Senate at an earlier point, it may have been that Mr Storer would have been returned by a special count at a time when he remained a member of NXT. That he ceased to be a member of the NXT before Ms Kakoschke-Moore's disqualification was recognised is of no greater legal consequence than if he had been duly elected as an NXT member and had then altered his political allegiance.

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71 See also s 366 of the Electoral Act, which relevantly provides that the Court is 'not to declare that a person returned as elected was not duly elected, or declare an election void, by reason only that ... there was or was not printed on one or more ballot papers used in the election ... the name ... of a political party' or that an officer failed to comply with s 214 in relation to the election.

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72 Electoral Act, s 272(2). See also *Day v Australian Electoral Officer (SA)* (2016) 90 ALJR 639 at 648 [31]; *Re Day (No 2)* (2017) 91 ALJR 518 at 561 [298] (Nettle and Gordon JJ).

73 See KMS at [45].

PART V LENGTH OF ORAL ARGUMENT

66. The Attorney-General estimates that he will require 1 hour for the presentation of oral argument.

Dated: 22 January 2017

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