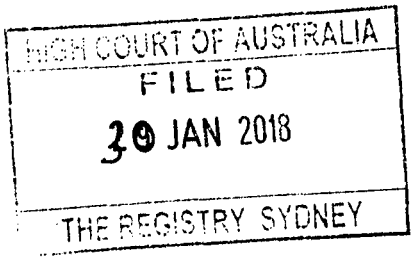
IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

No. C30 of 2017

RE: MS SKYE KAKOSCHKE-MOORE

Reference under s 376 of the
Commonwealth Electoral Act 1918 (Cth)



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ANNOTATED REPLY BY MS KAKOSCHKE-MOORE

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Part I: Internet publication

1. It is certified that this submission is in a form suitable for publication on the internet.

Part II: Reply

2. These submissions focus on the following broad issues:

   (a) At what point does s 44 cease to require that a person who "is" subject to one of the several specified disabilities be incapable of being chosen or of sitting?

   (b) Should *Re Nash (No 2)* be departed from, if it is necessary to do so?

   (c) How does the system of proportional representation now provided for by s 15 of the Constitution provide guidance in the Court's exercise of its powers under Part XXII of the *Commonwealth Electoral Act 1918* (Cth)?

   (d) Would the devolution of NXT's above-the-line and other votes to a person who is no longer associated with NXT amount to a distortion of the voters' intentions, in a system of voting in which group affiliation is the dominant consideration?

Section 44 and the "process of choice"

3. The principal submission Ms Kakoschke-Moore makes is that, as a person who is no longer disqualified from being chosen or sitting, she is able to be counted in any special count (in contrast to a person who is deceased or otherwise permanently unable to be counted again). Six "established propositions" are said to preclude that submission (summarized at Attorney-General's submissions, "AGS", para 9).

4. Of those six propositions, the first five do not answer the point. Each begs the very question Ms Kakoschke-Moore's submission answers: when, having regard to the text, context, history and purpose of s 44, does the Constitution cease to warrant the exclusion of a person in her position from participating in the parliamentary process? The answer is: when the disqualification is lifted, and no later.

5. The second proposition the Attorney-General relies on is that the "process of choice" commences on the date of nomination (as countenanced by *Sykes v Cleary* (1992) 176 CLR 77 at 99-101) and thereafter s 44(i) "applies until the completion of the electoral process" (AGS para 9(b)). However, none of the authorities cited in support of that proposition have gone so far as to hold that the process is *continuous*. It has only been held that the date of nomination is part of the process (although that does deny that disqualifying circumstances then existing may later be cured) and that, where a vacancy is later declared and a special count ordered, the process is not yet complete.

6. The Attorney-General's final proposition is an extension of the second proposition. It is said that the existence of disqualifying circumstances "at any time" during that process renders the person incapable of being chosen to fill a vacancy created by the particular dissolution of Parliament (AGS para 9(f)). The Court has never so held. The Attorney-General's submissions rely on a conflation of discrete points made in several separate authorities, which turned on different facts in any event.

7. The Attorney-General also asserts that the indication of a voter's preference for a disqualified candidate "is a nullity", adopting a word from *In re Wood* (1988) 167 CLR 145 at 165-166 (AGS paras 9(f), 41 and 44). But that language again begs the temporal question. Broad labels like "nullity" obscure a more precise identification of the legal effect of a negative stipulation such as s 44. That is the threshold issue here. *In re Wood* did not say, as there was no occasion to say, that a "nullification" by operation of s 44 was continuous throughout the life of the particular Parliament.

Re Nash (No 2)

8. If, as the Attorney-General submits (AGS para 10), it is necessary to overrule *Re Nash (No 2)*, then (as stated at para 74 of Ms Kakoschke-Moore's submissions in chief) it is respectfully submitted that that should be done.

9. *Re Nash (No 2)*, insofar as it concerns the duration of the "process of choice", does not rest on any principle worked out in a significant succession of cases. Save for *Re Nash (No 2)* itself and the observations in *Sykes v Cleary*, the only authorities to which the Attorney-General points (AGS para 33; cf Mr Storer's submissions at para 32) are *Re Culleton (No 2)* (2017) 91 ALJR 311 at 315 [13] (where it was observed that "[n]o question arises in this case as to the temporal operation of s 44(ii)"), and *Re Canavan* (2017) 91 ALJR 1209 at 1213 [3] (where again it was said that the point made in *Sykes v Cleary*, being the only authority relied upon, was "not disputed by any party"). There was no "working out" of any such principle in these authorities.

10. *In re Wood* (1988) 167 CLR 145 at 164, to which the Attorney-General also refers, notes only that a "Senate election is not completed when an unqualified candidate is returned as elected". So much is not disputed here, but it again begs the question of when a candidate ceases to be "unqualified" and thus is able to be returned. Acknowledging that the earlier "return" of Ms Kakoschke-Moore was ineffective, the return is now to be made afresh, having regard to the votes recorded on polling day, counted for the candidates who are qualified – which includes Ms Kakoschke-Moore.

11. *Re Nash (No 2)* has not been acted on other than in relation to the replacement of Ms Nash herself. It has not otherwise achieved any useful result (beyond highlighting the risks to a political candidate of subsequently accepting government office). It would not achieve any useful result in this case. On the contrary, it would preclude a useful result in circumstances such as this. The useful result to which Ms Kakoschke-Moore's submissions lead is, in short, the rapid curing of circumstances which are otherwise capable of causing serious disruption to the work of the Senate.

12. The construction of s 44(i) adopted in *Re Canavan* is capable of application in highly obscure circumstances, well beyond those in which there is a real likelihood of foreign citizenship interfering in the discharge of parliamentary responsibilities. On the contrary, the processes of Parliament are disrupted by the disqualification of persons who, potentially long after polling day, discover hitherto unknown disqualifying circumstances (e.g. the identity or antecedents of an estranged parent or grandparent; the absence of records of renunciation held by a foreign government; or the true application of foreign law – or a retroactive change in foreign law – which contradicts previous representations from the foreign government, as in this case).

13. Where a person has sought nomination and accepted election in good faith, there is a clear public benefit in allowing the person an opportunity to resign, renounce, and be capable of returning. That allows a quick, cost-effective and long-lasting resolution of the ongoing issues raised by s 44. There is no public benefit in simply ending that person's service in the Senate, and there is a significant public disadvantage in doing so where the replacement Senator will alter the proportional representation of political parties.

The scope and nature of the Court's powers

The cardinal importance of proportional representation

14. AGS paras 49-50 appear, with respect, to misread an aspect of Ms Kakoschke-Moore's submissions concerning s 15 of the Constitution. It is *not* submitted that s 44 is subject to, or controlled by, s 15. Rather, it is submitted that s 15 necessarily informs the exercise of the Court's statutory powers under Part XXII of the Electoral Act, and in particular it informs the terms on which discretionary relief should be granted under ss 360 and 379 thereof. This is a discrete issue from "giving effect to s 44" (cf AGS para 52).

15. The relevance of s 15 is not confined solely to cases where a "casual vacancy" arises, i.e. one to which s 15 actually applies. The provision is of broader importance in that it recognizes the established and essential role of political parties in the constitutional system of representative and responsible government (in perhaps slightly different, but no less important, ways in the Senate as in the House of Representatives). That recognition is a factor in the exercise of judicial power in aid of the electoral process. It is an error of principle not to recognize the essential role of political parties, and the constitutional significance of proportional representation, when exercising the Court's powers under the Electoral Act. As observed in Ms Kakoschke-Moore's submissions in chief (paras 54, 61 and 63), that has been recognized in each of the authorities concerning special counts.[1]

16. The Attorney-General's submissions, and to a lesser extent those of Mr Storer, also fail to recognize the importance here of the fact that the Court is concerned only with how to exercise its own powers, not with what might happen in the purely political context of an election campaign as such, or within the confines of Parliament after a person is duly elected. Those submissions seek to equate the circumstances of this litigation with what might happen if a candidate's or Senator's political affiliations change at one of those other times (see AGS paras 58-59 and 65). That is an error.

17. It is of course true that, if the electorate becomes aware that a person's political allegiances have changed on or before polling day, the votes must be taken to have been affected by that fact. A change in allegiance once a person commences sitting in Parliament is part and parcel of the political process, and is wholly beyond the ken of the Court of Disputed Returns (cf Mr Storer's submissions at para 50). And a change after polling day but before the return of the writs is no different, assuming the person is elected, than what might occur once the person is formally sitting. All of that is appropriate only to the judgment of the people of the Commonwealth.

18. An exercise of judicial power is fundamentally different. In cases like the present, the Court grants relief with a knowledge of circumstances which have occurred neither before polling day nor within the walls of Parliament, but which nevertheless show the consequences of such relief as the Court orders. The construct of the voters' "true legal intent" is the Court's best approximation of what the electorate has willed, in light of the circumstances known to the Court.

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[1] See *In re Wood* (1988) 167 CLR 145 at 165-166; *Re Day (No 2)* (2017) 91 ALJR 311 at 532 [78], 534 [93], 550 [210]-[211]; *Re Canavan* (2017) 91 ALJR 1209 at [138]; also *Sykes v Cleary* (1992) 176 CLR 77 at 102.

19. This construct is not equal to the outcome of the mechanical allocation of votes in descending order of preference (cf AGS para 64) – and nor could it be, since the Court considers the risk of distortion *before* any special count is conducted. Rather, in determining whether a special count *should* be ordered it is necessary to consider larger matters including proportional representation. And it is not a construct used by those administering the scrutiny, or by Parliament. It is used *only* by the Court of Disputed Returns, to ensure that the exercise of judicial power does not intrude upon the democratic process.

Application in relation to Mr Storer

20. There is no reason why events after polling day cannot be taken into account in understanding the electorate's "true legal intent". Indeed, the situation of Ms Hughes in *Re Nash (No 2)* suggests the contrary. The Attorney-General's submission about "expos[ing] the results of elections to manipulation" (AGS para 13) is an extreme hypothetical scenario.

21. The approach for which Ms Kakoschke-Moore contends does not, as Mr Storer submits (para 49), require the Court to embark on an invidious evaluation of political matters such as Mr Storer's positions on particular policies. The only constitutionally relevant fact is that he is no longer a member of NXT, which is not in dispute.

22. Finally, the fact that Mr Storer has ceased to be a member of NXT is not irrelevant simply because the Electoral Act does not concern itself with party membership as such. That fact is relevant because it was the premise upon which he was nominated by NXT (see Ms Kakoschke-Moore's submissions in chief, paras 10-14). The statutory process of nomination, which the Attorney-General and Mr Storer say makes Mr Storer's inclusion in the special count necessary, is thus negated. Thus, it cannot be inferred from Mr Storer's previous nomination that his election now would accord with the voters' true legal intent. The election which would occur is of a member of the NXT, the only person satisfying that test being Ms Kakoschke-Moore.

Dated: 30 January 2018

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