ORIGINAL

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)

10

ANNOTATED SUBMISSIONS OF MS KAKOSCHKE-MOORE

Nick Xenophon & Co Lawyers
653 Lower North East Road
Paradise SA 5075

Telephone: (08) 8336 8888
Fax: (08) 8336 8714
Email: peter@xenlaw.com.au
Ref: Peter Jackson

Part I: Internet publication

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

Part II: Statement of issues

2. The following issues arise on this reference:

   (a) If there is a vacancy in the place Ms Kakoschke-Moore held in the Senate (until she resigned), would a conventional and unconditional "special count" distort the true results of the poll, and disregard the objects of the proportional representation voting system and "above the line" voting mechanism, by electing a person who is no longer a member of the party whose above the line votes and preferences would be overwhelmingly responsible for his election?

   (b) Is a person who was previously disabled by reason of s 44(i), but who is now free of the disability, able to be counted in such a special count?

   (c) Given that, if a special count is ordered on that footing, inevitably the same result would follow, might the Court dispense with a further count and declare that Ms Kakoschke-Moore is duly elected?

Part III: Section 78B notices

3. The Attorney-General of the Commonwealth issued s 78B notices dated 1 December 2017 and filed in this Court on 7 December 2017. Those notices are considered sufficient to give notice of the issues arising as described above.

Part IV: Relevant facts

Ms Kakoschke-Moore's background and the 2016 election

4. Ms Kakoschke-Moore was born in Darwin on 19 December 1985, and was thereby an Australian citizen by birth.[1] Her mother was born on 31 December 1957 in Singapore, while both her parents were serving there in the Royal Air Force. Her maternal grandmother and maternal grandfather were born in 1933 and 1930 respectively, both in the United Kingdom.[2]

---

[1] *Australian Citizenship Act 1948* (Cth) s 10.

[2] Affidavit of Skye Kakoschke-Moore affirmed 21 December 2017, paras 3 to 9: **CB 261-262**. Ms Kakoschke-Moore's father and paternal grandparents were all born in Australia, the grandparents both born in 1920 and thus falling within s 25(1) of the *Nationality and Citizenship Act 1948* (Cth).

5. When Ms Kakoschke-Moore was 11 or 12 years old, and living with her parents in Oman, she and her father were advised by the British embassy that she was not eligible for a British passport because she was not eligible for British citizenship. She thereafter always believed she knew she was only Australian and not British.[3]

6. Ms Kakoschke-Moore entered the Senate as a result of the 2016 federal election. She was at that time, had been since 1 May 2015, and remains, a member of the Nick Xenophon Team party ("NXT").[4] She had been nominated as one of a group of candidates by NXT, and her nomination was not rejected.[5] In the sense of *In Re Wood*, she may thus be described as being properly included on the ballot paper.[6]

10 7. In the 2016 election for the Senate in South Australia, 91.5% of the 1,061,165 formal votes cast, or 970,934, were cast "above the line". Of those above the line votes, the NXT group received 204,505. Ms Kakoschke-Moore was elected on the basis that 99.84% of the votes she received to meet the quota were above the line votes.[7]

8. Ms Kakoschke-Moore received 129 first preference votes cast below the line.[8] It would appear that the first-named candidate in the group, Mr Nick Xenophon, received 25,777 first preference votes cast below the line.[9] The second-named candidate, Mr Stirling Griff, received 103 first preference votes, and the fourth-named candidate, Mr Timothy Storer, received 189 first preference votes.[10] Whereas the first three candidates were elected, Mr Storer was not; he was excluded in counts 227-236
20 (whereas, on count 7, 60,906 votes had been distributed to Ms Kakoschke-Moore after Mr Griff's election).[11]

---

[3] Affidavit of Skye Kakoschke-Moore affirmed 21 December 2017, para 11: **CB 262.**

[4] Affidavit of Skye Kakoschke-Moore affirmed 21 December 2017, paras 12-14: **CB 262.**

[5] Affidavit of Timothy Courtney affirmed 7 December 2017, paras 26-28: **CB 27-28.**

[6] *In re Wood* (1988) 167 CLR 145 at 165.

[7] Affidavit of Timothy Courtney affirmed 7 December 2017, paras 30-31, 37, 39: **CB 28-29.**

[8] Affidavit of Timothy Courtney affirmed 7 December 2017, para 38: **CB 29.**

[9] Affidavit of Timothy Courtney affirmed 7 December 2017, para 37 and Ex TJC-6: **CB 29, 57.** The number of below the line votes is inferred by subtracting the number of above the line votes (per para 37) from the total number of first preference votes shown in Ex TJC-6 (being 230,282).

[10] Affidavit of Timothy Courtney affirmed 7 December 2017, Ex TJC-6: **CB 57.**

[11] Affidavit of Timothy Courtney affirmed 7 December 2017, Ex TJC-6: **CB 62, 102.**

The position of Mr Storer

9. Mr Storer had become a member of NXT on 23 July 2015, and subsequently renewed his membership of the party on or about 12 January 2017. On 3 November 2017, the management committee of NXT resolved to expel Mr Storer from membership of the party. On 6 November 2017, Mr Storer purported to resign from NXT and all associated entities.[12] As a result, Mr Storer ceased to be a member of NXT on either 3 or 6 November 2017 (it matters not which).[13]

10. In 2016, prior to Mr Storer's nomination as a candidate in the NXT group, he and NXT executed a "Deed for Candidates" setting out terms on which he may be endorsed as a candidate for NXT at the next election (i.e. the 2016 election).[14] One of the terms of that Deed was that he must, during the Term of the Deed, remain a member of the party. The Term of the Deed ran from the date of execution of the Deed until, if the Candidate was not elected, "the expiry of 30 days after the date of that Election" or, if he was elected, the date on which the Candidate ceased to be a member of Parliament or a member of the party, whichever is later.[15] The "date of that Election" is not otherwise defined.

11. On 13 October 2017, immediately after the hearing on 10 to 12 October 2017 of the references in *Re Canavan* and others, including *Re Xenophon*, NXT received correspondence from solicitors acting on behalf of Mr Storer.[16]

12. The letter asserted that Mr Storer's position was that, if Senator Xenophon had not been validly elected, then Mr Storer "as the person with the next most number of votes ... would inevitably, and as a matter of law, be declared elected", or else, if and when Senator Xenophon resigned, Mr Storer "would legitimately expect that he is to be named as the candidate to replace Senator Xenophon" under s 15 of the Constitution.[17]

---

[12] Affidavit of Constadina Bonaros affirmed 22 December 2017, para 27 and Ex CB-18 (p 67): **CB 175, 237**.

[13] Affidavit of Constadina Bonaros affirmed 22 December 2017, paras 18 to 28: **CB 174-175**.

[14] Affidavit of Constadina Bonaros affirmed 22 December 2017, paras 6-8: **CB 172-173**.

[15] Affidavit of Constadina Bonaros affirmed 22 December 2017, Ex CB-4 (cll 2.2, 3.1(a)): **CB 188-189**.

[16] Affidavit of Constadina Bonaros affirmed 22 December 2017, para 10 and Ex CB-5: **CB 203**.

[17] Affidavit of Constadina Bonaros affirmed 22 December 2017, Ex CB-5: **CB 203**.

13. After Mr Xenophon resigned from the Senate on 31 October 2017, NXT nominated Mr Rex Patrick to fill the casual vacancy.[18] On 1 November 2017, Mr Storer or his solicitors sought to contact the Premier of South Australia to assert rights in relation to filling the casual vacancy. This and subsequent correspondence led to Mr Storer's departure from NXT on 3 or 6 November 2017.

14. Mr Storer's departure from NXT has legal consequences if his Deed for Candidates is treated as having remained on foot on those dates or subsequently somehow revived, despite the ostensible conclusion of the 2016 election on (arguably) 4 August 2016. That might follow if the "Election" is regarded as not having concluded until any so-called "special count" is completed.[19] On that basis, if Mr Storer is not elected on a special count, the Term of the Deed would continue until 30 days after the declaration of the results. In that event, Mr Storer could be viewed as having breached his obligation to remain a member of NXT at least on the date he purported to resign. But if Mr Storer is elected on a special count, and the Deed is considered to remain on foot, then its term would cease immediately under cl 2.2(a)(ii), because he would no longer be a member of NXT when he is elected. This undercuts his earlier endorsement by NXT on and before polling day.

Ms Kakoschke-Moore's citizenship advice, resignation, and renunciation

15. As a result of this Court's decision on 27 October 2017 in *Re Canavan*,[20] in early November 2017 Ms Kakoschke-Moore became aware that she would be required to provide information to Parliament about her family history, and took steps to contact the British authorities to confirm and better understand why she was, as she then believed, ineligible for British citizenship. It took until 17 November 2017 for advice to be received from the British Home Office. Ms Kakoschke-Moore then immediately took steps to obtain expert advice from Mr Berry of counsel. Late on 21 November 2017, she received his advice that she was a British citizen.[21]

---

[18] Affidavit of Constadina Bonaros affirmed 22 December 2017, paras 11 to 17: **CB 173-174.**

[19] *Re Nash (No 2)* [2017] HCA 52.

[20] (2017) 91 ALJR 1209.

[21] Affidavit of Skye Kakoschke-Moore affirmed 21 December 2017, paras 16 to 21 and Ex SKM-5: **CB 262-263, 284-290.**

16. On 22 November 2017 Ms Kakoschke-Moore resigned from the Senate.[22] In consequence, on 24 November 2017 the President of the Senate wrote to the Governor of South Australia to advise that "a vacancy has happened in the representation of the State of South Australia through the resignation of Senator Skye Kakoschke-Moore".[23] The letter suggests that, upon that resignation occurring, there was set in train the casual vacancy process in s 15 of the Constitution, imposing upon either the Parliament or the Governor of South Australia the constitutional obligation to appoint a person to hold the vacant place.

17. On 27 November 2017, the Senate resolved to refer to this Court the questions the Court is now considering. However, unless and until Question 1 is answered, s 15 of the Constitution remains engaged. It is thus not the case that this Court's answers to Questions 1 and 2 are the only means of filling "the vacancy". Indeed, on one view, Question 1 is based on the false premise that any such "vacancy" must have arisen by reason of s 44(i). Absent a positive answer to Question 1, there is now, and will only ever have been, a "vacancy" by reason of Ms Kakoschke-Moore's resignation, and there will continue to be a non-litigious constitutional process to fill that vacancy. It may be considered that this state of affairs most effectively and efficiently advances the interests of governmental stability in the long term. The Court might therefore consider whether it is necessary or appropriate that Question 1 be answered at all.

18. After her resignation, Ms Kakoschke-Moore took steps to complete a declaration of renunciation of British citizenship. She began preparing the declaration of renunciation form on 22 November 2017 and completed and submitted it on 30 November 2017. On 6 December 2017 she received from the British Home Office a certificate of resignation which was described as being effective on that day.[24] As a result, she is now, and will remain, not incapable of being chosen or of sitting under s 44(i) of the Constitution.

---

[22] Affidavit of Skye Kakoschke-Moore affirmed 21 December 2017, para 23 and Ex SKM-6: **CB 263, 292.**

[23] Letter from the President of the Senate to the Governor of South Australia, 24 November 2017: **CB 11.**

[24] Affidavit of Skye Kakoschke-Moore affirmed 21 December 2017, paras 24-25: **CB 263-264.**

Part VI: Outline of Ms Kakoschke-Moore's submissions

1. Summary of submissions

19. There is nothing in s 44 of the Constitution that expressly renders a person, who is an Australian citizen, ineligible to fill a vacancy created in the Senate even if the vacancy was caused by that person's earlier disability to be chosen. Nor should such preclusion arise implicitly. Rather, the history of the drafting of s 44 and the other relevant considerations which are elaborated upon below, such as giving effect to the true results of the polling, suggest that such a person is eligible to fill such a vacancy.

20. The Constitution gives no direct guidance as to how a vacancy in the Senate is to be filled. But it can be inferred from s 7 and other sections of the Constitution, such as s 15, that in determining how the filling of a vacancy in the Senate should occur, the voters' choices of political parties (or other groups of candidates able to be voted for "above the line") are relevant and important considerations.

21. It will be against that background that Ms Kakoschke-Moore submits, first, that the separate treatment to be found in the Constitution between qualifications, disabilities and vacancies informs the correct approach to deciding questions concerning the filling of vacancies arising in the Senate.

22. Secondly, the filling of a vacancy in the Senate by a candidate who is no longer under a disability would give effect to the true legal intent of the voters, and this Court in exercise of its powers under the *Commonwealth Electoral Act* 1918 (Cth) ("Electoral Act") may so declare. Such a declaration would be more consistent with the provisions of s 15 of the Constitution than to do otherwise.

23. Thirdly, Ms Kakoschke-Moore also submits that the Constitution does not provide or intend that a person, even if previously incapable of being chosen, is necessarily precluded from being eligible to fill a vacancy in the Senate upon a vacancy arising if the person is qualified to do so at that time. Given that disqualifying a person who is an Australian citizen deprives such a person of a right normally shared in common with all other Australian citizens of being eligible to be chosen, the duration of the disability should be no longer than is necessary to achieve its purpose.

24. Fourthly, it is submitted that the decisions of this Court do not preclude this result. To the extent that a decision is considered to stand in the path of such a result, it is respectfully submitted that the same requires reconsideration, as its effect would be to preclude an Australian citizen from participating in the government of the person's own country. Nothing in the Constitution demands such a result.

2. The Convention debates

25. It is submitted that the drafting history of the Constitution is consistent with a construction of s 44 which allows for the curing of a disability, such that a person once disabled by s 44 is no longer ineligible on and from the time the disability is removed.

10 26. The versions of ss 44, 45 and 47 as they appeared in the April 1891 draft Constitution[25] show how the scope and nature of the disability in s 44 was originally conceived. The words now appearing in s 44, "shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives" were followed by the words "until the disability is removed by a grant of a discharge, or the expiration or remission of the sentence, or a pardon, or a release, or otherwise". In other words, the disqualification was not permanent and was capable of being remedied.

27. However, the April 1891 cl 46 did not contain what is now sub-sections 44(iv) or 44 (v) (which were later merged into the section), and the opening words of sub-section 44(i) was expressed in terms of "who has taken" rather than the present "is under".

20 28. So, as at 1891 and up until March 1898, the words "shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives" were present in the predecessors of s 44, and those words were also followed by the words, "until the disability is removed by a grant of a discharge, or the expiration or remission of the sentence, or a pardon, or a release, or otherwise".

29. Things changed in March 1898 when the draft of s 44 was significantly amended. The draft provision (then numbered cl 45) was amalgamated with the then cl 48 (to create s 44(iv)) and the then cl 49 (to create s 44(v)) and the introductory words, "who has taken" in s 45(i) were changed to "is". The words "until the disability is removed by a grant of a discharge, or the expiration or remission of the sentence, or a pardon, or a
30 release, or otherwise" were also removed.[26]

---

[25] Cll 46 and 47: Williams, *The Australian Constitution: A Documentary History* (2005) at 300. See also the final 1891 draft provisions referred to in *Re Canavan* (2017) 91 ALJR 1209 at [29]-[32].

[26] See Williams, *The Australian Constitution: A Documentary History* (2005) at 868-869 and 1126.

30. There are several possible explanations for these changes to s 44, as none appears from the debates themselves.[27]

31. One is that when the tense in subsection (i) was changed from "who has taken" to who "is", the words "until" etc were unnecessary because if a person "is" under a disability that person is at that time necessarily incapable of being chosen, but if the person is not under a disability then such a person is then capable of being chosen.

32. The second possible explanation is that the words "until the disability were removed" etc were omitted because they did not readily apply to all of paragraphs (i) to (v), so it was not appropriate for them to be placed where they were in the clause.

33. The third is that the drafting committee wanted to improve the grammar and scope of operation of the section by using more efficient and emphatic language (by employing the word "is") and amalgamating clauses 46 and 47 with the then s 45 (now s 44).

34. The debates do not reveal any consensus of reasons for the amendments but, for present purposes, what matters is that s 44, unlike s 45, does not explicitly state the consequence of s 44 applying. It does not even state that there will be a "vacancy". Rather, it only disqualifies a candidate from being chosen as a senator or of sitting as a senator. It does not disqualify a qualified candidate from filling a vacancy.

35. By contrast, from 1891 onwards, the predecessors of what is now s 45 provided that, if a person became subject to the disabilities mentioned in s 44, that person's place in the Senate would thereupon become vacant.[28]

36. Moreover, the Convention debates do not reveal whether there was agreement upon the meaning and scope of application of the words "incapable of being chosen" or whether the "disability" was intended to preclude a person from being chosen to fill a "vacancy" only while the disability was present. The words "incapable of being chosen" were inserted in the 1891 draft and have remained.

37. Rather, the concern expressed in the debates was about the election of persons who owed allegiance to another country and who were of suitable moral and ethical standards as political representatives in the new Federation.[29]

---

[27] Cf *Re Canavan* (2017) 91 ALJR 1209 at [33]-[35]. Those observations do not apply to the present issue.

[28] Williams, *The Australian Constitution: A Documentary History* (2005) at 139-141, 300, 420, 508, 775, 1126.

[29] See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 21 September 1897, at 1012-1014.

38. In other words, the drafting history of s 44 reveals that the drafters were concerned with ensuring that persons presently under a "disability" were incapable of being chosen. Their concern was not such as to demand that, once that disability was no longer present, such persons continued to be excluded from filling a vacancy.

3. The text and structure of the Constitution

39. It is apparent from the Constitution itself that it addresses separately the qualifications for election to Parliament from disqualifications ("disabilities") for election and from vacancies arising in the Parliament. Such treatment can be seen in, for example, ss 15 (casual vacancies), 16 (qualifications), 19 (vacancy by resignation), 20 (vacancy by absence), 33 (writs for vacancies), 34 (qualifications), 44 (disabilities) and 45 (disabilities and vacancy), and 47 (vacancies). Consideration may also given, by way of context, to the question of vacancies arising in the circumstances identified in ss 19, 20 and 45 of the Constitution. Each provides for the creation of a vacancy in particular circumstances.

40. Given the nature of elections to the Senate, it seems that the consequence of each of those provisions is to create a vacancy that does not require the issue of a writ – in contrast with s 33 in the case of the House of Representatives. That, however, is more a reflection of the statutory system of voting for the Senate than a requirement of s 7 or any other provision of the Constitution.

41. Of particular relevance is the 1977 amendment to s 15 of the Constitution addressing what is described in the heading to the section as "casual vacancies" – more precisely, cases where "the place of a senator becomes vacant before the expiration of his term of service". The broad effect of the change was to require that when such a vacancy occurs, the vacancy is to be filled by a person from the same political party (whether at a time when the State Parliament is sitting or not). The amendment reflects the fact that voting for the Senate is most often along party lines and that, to give true effect to the voters' intentions, a person of the same political party ought to replace a person whose seat in the Senate is vacated. At a more fundamental level (and having regard to the mischief which led to the amendment), it recognises the constitutional importance of stability of party representation in the Senate.

42. The change in 1977 is of fundamental significance as it not only altered s 15 but also affirmed a change in the nature of representative government in Australia. The other constitutional provisions concerning the Senate and vacancies need to be considered in light of that change. Notwithstanding the continuing development of the provisions of the Electoral Act for voting for candidates for the Senate, the amended form of s 15 suggests a desire to constrain the potential consequences of whatever statutory voting system exists from time to time.

3. The terms and application of the Electoral Act

43. Conformably with the observations about the structure of the Constitution, the Electoral Act treats separately the concepts of qualification (as opposed to disqualification), vacancies and the means of filling a vacancy – as well as the "choice" of candidates at an election. For a person to be *qualified* to be nominated or to be elected, the person must (inter alia) be an Australian citizen (s 163(1)(b)) (being, through s 163(2), a displacement of the requirement initially prescribed in s 34(ii) of the Constitution). A limitation on such qualifications is prescribed by s 164. Ms Kakoschke-Moore is qualified within the terms of ss 163 and 164.

44. As was demonstrated in *Day v Australian Electoral Officer (SA)*,[30] the choice of candidates by the people of Australia in their various electorates is only barely prescribed in ss 7 and 24 of the Constitution. Relevantly, s 9 of the Constitution leaves it to Parliament to prescribe the means of choosing Senators. Such a legislative system is generally amenable to change, and has been changed significantly over the years since federation. It might be that, as in *Day*, little relevant restraint on legislative power can be discerned from Chapter I of the Constitution. However, where there is constructional choice in, or discretion provided for by, the terms of the Electoral Act, the purposes and values evident from the terms of the Constitution ought to be taken into account.[31]

---

[30] (2016) 90 ALJR 639.

[31] Cf, eg, *Re Day (No 2)* (2017) 91 ALJR 518 at 529 [49] (Kiefel CJ, Bell and Edelman JJ; "a duty … to act in the public interest"); *Re Culleton (No 2)* (2017) at [57] (Nettle J; "order and certainty").

45. The present system of voting allows voters to choose to number a box "above the line" as a means of expressing preferences for a group of candidates nominated by a party (s 239(2), ss168-169C), in the order selected by them (if any, under s 168(1)(b)), in circumstances where a party may have its name and logo displayed next to the relevant box above the line (s 169(4)). By means of the "saving provision" in s 269, above the line votes may be made for one group alone, or any number less than six (as well as numbers of six or more). Together, these provisions recognize, and indeed enhance, the importance of party nomination in the process of voting for a system of government in which, as outlined above, party representation and stability are constitutionally recognised considerations.[32]

46. In references such as the present (within Div 2 of Part XXII of the Electoral Act), the Court's remedial powers are as prescribed by s 360, so far as it applies, by means of s 379. Of particular relevance is s 360(1)(vi), which permits a candidate "who was not returned as elected" to be declared duly elected. That is the provision which has also implicitly authorised the judicially fashioned process now styled a "special count". Section 379 additionally prescribes powers to declare that any person "was not qualified" to be a Senator or Member, or "was not capable of being chosen or of sitting", as well as to "declare that there is a vacancy". These, again, are discretionary powers which, together with those prescribed in s 360, may be exercised as appropriate to the "substantial merits and good conscience of each case" (ss 364, 381).

47. Div 2 of Pt XXII applies where there is any "question respecting the qualifications of a Senator or of a Member", or "respecting a vacancy in either House of the Parliament", which is referred to this Court under s 376. That drafting indicates that questions respecting vacancies are not necessarily questions respecting the qualifications of a Senator or Member, and vice versa. One type of question may be referred even if the other is not, and the Court determines all that is necessary to decide the questions referred (notwithstanding that the two categories are not mutually exclusive[33]). In this case, for instance, the Senate has not referred to the Court the question of whether the Parliament or Governor of South Australia have power to act, or else are precluded from acting, under s 15 of the Constitution so as to fill the "vacancy" created by Ms Kakoschke-Moore's resignation.

---

[32] Cf *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 212-214 [75]-[78] (McHugh J).

[33] *In re Wood* (1988) 167 CLR 145 at 160.

48. The process which has become styled a "special count" is of course based not on the terms, context or purpose of one or more of the paragraphs of s 44, but on an analogy to the circumstances of a deceased person,[34] which may not be apt in every case. The mere fact that a "special count" in a particular form or fashion can be ordered does not mean that, in every case, it must be ordered, or should be ordered in the same form or fashion or without conditions or directions. The overriding concern in the exercise of the Court's discretionary powers in ss 360 and 379 is that, in the circumstances of the particular case, the action the Court takes should give effect to the voters' true legal intentions (also an expression which is nowhere stated or defined in the Electoral Act, but rather emerged from *In re Wood*,[35] and the content of which is malleable), in a manner that is harmonious with the requirements and values in the Constitution, and in particular so as to preserve the system of proportional representation.

4. The authorities and "special counts"

49. Of the major authorities that have considered either the disqualification arising by virtue of s 44 or a question of filling a vacancy, none has yet considered the precise circumstances arising in this case.

In Re Wood

50. It is submitted that *In Re Wood*[36] stands for several propositions concerning, first, the jurisdiction to decide questions concerning qualifications and vacancies;[37] second, the powers conferred upon the Court of Dispute Returns in dealing with a vacancy;[38] and third, how the vacancy was to be filled in the circumstances then existing in that case (the material point here). The Court was not concerned with a s 44(i) disqualification so, strictly speaking, it is not a binding precedent.

---

[34] *In re Wood* (1988) 167 CLR 145 at 166.

[35] *In re Wood* (1988) 167 CLR 145 at 166.

[36] (1988) 167 CLR 145.

[37] See (1988) 167 CLR 145 at 160-161.

[38] See (1988) 167 CLR 145 at 162.

51. The Court noted that the United Kingdom courts had recognised that a disability could be removed retrospectively by statute.[39] In *Drinkwater v Deakin*,[40] such a case was explained as one in which a person "duly elected who had been at the time of the election disqualified... [but] before his election could be questioned he had become qualified... and his subsequent qualification by retrospectively restoring his status called into existence the votes which would otherwise have been treated as not given".

52. Ms Kakoschke-Moore does not suggest that such a situation applies here. Rather, she submits that it is indicative of the fact that before federation an exception to disqualification was recognised when a disability was removed and the person concerned could still be elected. It is not the case that one must view the present circumstances only through the prism of whether the election is incomplete, or whether there is a "vacancy". The third way of looking at it is whether a recount ordered by the Court could allow the election of a person who is not incapacitated.

53. The arguments now put to this Court were not put to the Court in *In re Wood*, nor could they be on the facts as found in that case. The lack of qualification that made Mr Wood incapable of being chosen was that he was not an Australian citizen and that disability prevented him from qualified to be elected. There was accordingly no occasion to consider how the scope of s 44 impacted upon the proper relief.

54. In *In Re Wood* a recount was ordered in a Senate election where Senator Wood was found to have lacked the statutory qualification of being an Australian citizen, but the validity of the election as such was otherwise unimpeachable. (Although Senator Wood had applied for Australian citizenship after his election, he did not resign from the Senate before the Court's decision, and nor was there any evidence that he had renounced his British citizenship at any relevant time.) Relevantly, the Court found that to ignore the effect of above the line voting would impermissibly distort the voting process. The Court said (emphasis added):[41]

> The legislative scheme ... for ascertaining the result of the polling in a Senate election is *calculated to reflect the proportionate support of the electors for the respective political parties or groups* from which the candidates for election are drawn. ... For the purposes of the scrunity which may now be conducted [on a further count], a vote for an unqualified candidate is in the same position as a vote for a candidate who has died, and the votes should be treated accordingly. By construing Pt XVIII [of the Electoral Act] in this way, the *true result of the polling* – that is to say, the true legal intent of the voters *so far as it is consistent with the Constitution and the Act* – can be ascertained.

---

[39] (1988) 167 CLR 145 at 164, citing *R v Hawkins* (1808) 10 East 211 [103 ER 755]; *R v Parry* (1811) 14 East 549 [104 ER 712].

[40] (1874) LR 9 CP 626 at 634, referring to *R v Parry* (1811) 14 East 549 [104 ER 712].

[41] (1988) 164 CLR 145 at 165-166.

55. Here, it is submitted that to allocate above the line votes to a person who is no longer a member of the political party whose endorsed candidates were chosen by the relevant voters would equally distort the "true result of the polling". Having regard to the concerns evident in s 15 of the Constitution, the votes should be allocated to a person who is (a) qualified and (b) still a member of the political party in question.

56. Although Ms Kakoschke-Moore was under a disability when the nominations and polling took place, her disability no longer persists. In these circumstances, the *In re Wood* analogy to a deceased candidate fails, on account of the obvious permanence of the latter scenario and the lack of permanence of the former. Consistently with the history and the rationale for disqualifying a candidate who is a dual citizen, no purpose would be served by extending the effect of the past disqualification so as to exclude Ms Kakoschke-Moore from being counted, if a recount is ordered.

Other distinguishable authorities

57. *Blundell v Vardon*[42] may be said to stand for the proposition that a vacancy arising because a person was disqualified was not a vacancy within the meaning of s 15 of the Constitution as it then stood. Although there are parts of the decision that may be applicable to other issues, it is important to bear in mind that s 15 of the Constitution has since been amended, as has the Electoral Act, to address vacancies in the Senate. The matter was decided before any jurisdiction was conferred on the Court to determine questions respecting qualifications and vacancies.[43]

58. *Sykes v Cleary*[44] was principally concerned with a s 44(iv) disqualification, and also with s 44(i) in relation to Mr Delacretaz and Mr Kardamitsis. All members of the Court agreed that s 44(i) was not intended to make ineligible an Australian citizen who had taken all reasonable steps to renounce their foreign citizenship.[45] Implicit in that approach is an understanding that Australian citizens are entitled to participate in their government by being elected by fellow citizens. *Sykes v Cleary* was of course concerned with a House of Representatives election, and the Court did not order a special count but rather declared the election void. The question of how to conduct a special count, where Mr Cleary had later resigned his office of profit, did not arise.[46]

---

[42] (1908) 4 CLR 1463.

[43] Cf *Disputed Elections and Qualifications Act* 1907 (Cth).

[44] (1992) 176 CLR 77.

[45] See *Re Canavan* (2017) 91 ALJR 1209 at [44]-[46], [63]-[68] and the passages there cited.

[46] See (1992) 176 CLR 77 at 94, 102.

59. No issue arose in *Re Culleton (No 2)* about the circumstances in which a special count may or may not be appropriate, or how it should be conducted. In that case, the incapacity which had existed at the time of polling (being one which engaged s 44(ii)) had ceased to exist when the Court heard the reference. However, no submission was put on behalf of Mr Culleton against the Attorney-General's submission in favour of a special count conducted according to the reasoning in *In re Wood*.[47]

60. The circumstances of *Re Day (No 2)* did raise an issue about how a special count should be conducted. A submission was made on behalf of the last remaining candidate who had not been excluded from the count, Ms McEwen, to the effect that the second candidate in Mr Day's Family First party group (Ms Gichuhi) would obtain an unfair advantage, and voter intentions would be distorted, if *above the line* votes which had been cast for the Family First group were counted for Ms Gichuhi.

61. The Court held that (in the plurality's words), "[c]ontrary to that submission, a special count which deprived the above the line Family First voters of their vote would distort voter intentions".[48] Keane J described that effect as a "most serious distortion of the real intentions of many thousands of voters", and had regard to the relative proportion of votes received by Mr Day below and above the line and through second or later preferences. His Honour observed that one cannot treat "the intelligence of one's fellow citizens", in relation to the basis on which above the line votes are cast, in a way which is "inconsistent with the assumption as to the intelligence of the electorate that underpins the provisions of the Electoral Act, and, indeed, the very idea of democracy".[49] The same would apply here, if the voters' choice of candidates endorsed by NXT is not given effect.

62. In *Re Canavan*,[50] it was not disputed by any of the Senators that a special count was the appropriate way of filling a vacancy in the Senate, should one occur. Of the seven persons referred who were the subject of the decisions in *Re Canavan*, only two were in analogous positions to Ms Kakoschke-Moore. Mr Ludlam and Ms Waters had both resigned from the Senate, and at least Ms Waters had renounced her dual citizenship. However, neither put the submission to the Court that is now put.

---

[47] See *Re Culleton (No 2)* (2017) 91 ALJR 311 at [42].

[48] *Re Day (No 2)* (2017) 91 ALJR 518 at 532 [78] (Kiefel CJ, Bell and Edelman JJ); 534 [93] (Gageler J).

[49] *Re Day (No 2)* (2017) 91 ALJR 518 at 550 [210]-[211].

[50] (2017) 91 ALJR 1209.

63. That having been said, the Court concluded that, in each of the references concerning Senators Nash and Roberts and Ms Waters and Mr Ludlam, the special count should be conducted in such a way that "votes cast 'above the line' in favour of the party that nominated the candidate should be counted in favour of the next candidate on that party's list."[51] This again recognizes the common assumption behind above the line voting, namely the significance of the party and its endorsement in the voters' formation of their preferences, which is also evident from the terms of the Electoral Act considered above.

10 *Re Nash (No 2)*

64. In *Re Nash (No 2)*[52] Ms Hughes was disqualified because, at the time the special count was ordered, she was incapable of being chosen because her then circumstances attracted the operation of s 44(iv) of the Constitution "during a period in which the disqualification of Ms Nash from being validly returned as elected meant that the process of choice prescribed by the Parliament for the purpose of s 7 of the Constitution remained incomplete"[53] by virtue of her appointment for seven years to the Administrative Appeals Tribunal, an office of profit under the Crown.

65. The result in *Re Nash (No 2)* is not inconsistent with the course proposed by Ms Kakoschke-Moore for the following reasons.

20 66. At this stage, no special count has been ordered in relation to the place which was held by Ms Kakoschke-Moore until her resignation. Even if, in the Court's discretion, one is now ordered, Ms Kakoschke-Moore is no longer a dual citizen but only an Australian citizen. It may be accepted that the legislated processes for the election remain constitutionally incomplete from the time a vacancy is declared 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.[54] But Ms Kakoschke-Moore will not be disqualified at any time during that period.

---

[51] (2017) 91 ALJR 1209 at [138].

[52] [2017] HCA 52.

[53] [2017] HCA 52 at [44].

[54] [2017] HCA 52 at [39].

67. The period of time which was relevant on the facts in *Re Nash (No 2)* did not include any time extending backwards from the date the special count was ordered. It was not necessary for the Court to hold that any disability within that earlier period was relevant. Nor was it necessary to hold that s 44 applies such that any disability at any moment during that entire period would disqualify the person for the relevant election as a whole.

68. There is no rationale of constitutional principle or public policy to be served by extending the application of the reasoning in *Re Nash (No 2)*, so that a past disqualification equally infects a part of the electoral process to be undertaken after the disqualification has been removed. These are not circumstances in which it can be said, as it was in *Re Nash (No 2)*,[55] that the person in question had voluntarily accepted a disqualifying status and forfeited participation in a later count of the ballot papers. On the contrary, Ms Kakoschke-Moore had voluntarily resigned from the Senate even before this reference was made.

69. The authorities to date have understandably considered whether the words "incapable of being chosen" allude to an *act* of choice or a *process* of being chosen. The authorities have focused upon what is to occur when a person *is* disqualified; they have not considered what is to occur *after* a disqualification is lifted. In cases of the latter kind, like this case, a different focus is required on the words of s 44.

70. Section 44 is framed in the present tense. It applies at any given time in accordance with its terms. Its concern is to provide that, at the present time when there exists any of the circumstances in paragraphs (i) to (v), the person in question is incapable of being chosen or of sitting.

71. Within s 44, the reference to a person being "chosen" is subordinate to the reference to a person being "incapable" by reason of one of s 44(i) to (v). The question posed by s 44 is not "was or is there a process of choosing on foot in some particular time period, and if so was or is the person incapable of being chosen at any time during that period". Rather, the question should be "is the person incapable by reason of one of s 44(i) to (v), and if so is there a process of choosing on foot in which they cannot participate". 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.

---

[55] [2017] HCA 52 at [45].

72. The drafting history set out above indicates that s 44 was intended to have a relatively confined effect, creating a transitory disability that is amenable to cure. For so long as the disability persists, the person cannot "benefit"[56] from the choice of senators or members, in the sense of being chosen or sitting. Once the disability is lifted, the person may be chosen or sit. No more ornate construction should be placed upon the section than that.

73. This construction does not introduce inappropriate uncertainty into the operation of s 44 or the conduct of elections. The circumstances here are different from those of *Re Culleton (No 2)* as there is no question of removal of a disqualification having retrospective effect.[57] Where there is no retrospectivity – but rather, conformably with the purpose of s 44, the inquiry concerns only circumstances presently existing – the operation of s 44 is appropriately certain.

74. The relevant passages in *Re Nash (No 2)*[58] do not deal with these matters. Rather, they assume that the identification of a "process" of choice in the plurality reasoning in *Sykes v Cleary* was to be accepted, and that circumstances existing at any time during the whole of that "process" are relevant to the Court's decision. Rather, the issue in *Re Nash (No 2)* was about whether that "process" was limited by specific "acts". Thus, *Re Nash (No 2)* is distinguishable. However, if it is regarded as having reached a categorical conclusion that s 44 applies to the whole "process" of choice, it is respectfully submitted that the decision should be reopened, and, for the reasons given above, departed from insofar as now otherwise applicable to Ms Kakoschke-Moore.

5. Application to Ms Kakoschke-Moore

75. The question is whether, now that Ms Kakoschke-Moore is only an Australian citizen, she is, at this time, still necessarily precluded from filling the vacancy resulting from her earlier disqualification (or, indeed, from her resignation).

76. Given that there is nothing expressly stated in the Constitution that would disqualify her, Ms Kakoschke-Moore submits that she is not disqualified, and may be counted in any recount, for the reasons given above and those which follow.

---

[56] Cf *Re Nash (No 2)* [2017] HCA 52 at [45].

[57] In fact, such retrospectivity is not foreign to Anglo-Australian electoral law, as *R v Parry* shows: (1811) 14 East 549 [104 ER 712].

[58] [2017] HCA 52 at [31]-[43].

77. The position of Mr Storer will be problematic if a special count is ordered on the footing that Ms Kakoschke-Moore is not to be included in that count. As the next candidate in the NXT group, it appears likely that a very substantial number of the preferences which did flow to Ms Kakoschke-Moore in the original count would instead go to Mr Storer. As at the completion of these submissions there is no definitive evidence to that effect. However, if it is accepted that Mr Storer is at least likely to be the person who would fill the vacancy in such a special count, then it becomes relevant, for the reasons given above, that Mr Storer ceased to be a member of NXT at least on 6 November 2017.

78. Both the provisions of the Constitution, and the provisions of the Electoral Act, considered above establish that party affiliation is at least a part, if not the most significant part, of the true results of polling (or in less precise terms, the true legal intention of the voters). The true results of the polling, or voters' intentions, are after all to be discerned within the framework of those provisions for the purposes of determining what relief this Court should order.

79. Were the Court's orders to result in the election of a person in Mr Storer's position, who is not a member of the party whose affiliation on polling day was obviously a significant element of the voters' preferences, in place of a person who was and remains a member of that party and is otherwise now qualified for election, the true results of the polling would not be realised. The clear probability is that the 91.5% of votes cast above the line in the South Australian Senate election, and the 99.84% of votes which led to the election of Ms Kakoschke-Moore, were based principally on the party affiliation of the candidates and the party's stated policies. The evident intention behind that overwhelming majority of votes would not be respected were those used to elect a person whose party affiliation no longer accords with the voters' understanding and intentions on polling day. The 129 first preference votes below the line for Ms Kakoschke-Moore, and the 189 such votes for Mr Storer, cannot materially alter that conclusion.

80. In contrast to that outcome, the course best suited to the substantial merits and good conscience of this case is that, should there be a recount, there would be included in the count a person who is (a) qualified and (b) still a member of the political party for whose candidates relevant preferences were expressed. That result accords with the analysis set out above of the relevant constitutional and statutory provisions and the limitations of what the authorities to date have held.

Part VII: Orders sought

81. If the Court considers it necessary to answer Question 1, then Ms Kakoschke-Moore proposes the following answers:

    1. There is a vacancy by reason of s 44(i) of the Constiuttion in the representation of South Australia in the Senate for the place for which Ms Skye Kakoschke-Moore was returned.

    2. The vacancy should be filled by a special count of the ballot papers, conducted on the premise that Ms Kakoschke-Moore is not incapable of being chosen. Any directions necessary to give effect to the conduct of the special count should be made by a single Justice.

    3. No further order is necessary.

    4. No further order is necessary.

82. As an alternative to the above answer to question 2, the Court could (given that inevitably the same result would follow as in the last special count conducted after *Re Day (No 2)*, and so it is reasonable to dispense with a further count) simply declare under s 360(1)(vi) of the Electoral Act that Ms Kakoschke-Moore is elected.

Part VIII: Oral argument

83. It is estimated that two and a half hours will be required for presentation of oral argument on Ms Kakoschke-Moore's behalf.

Dated: 15 January 2018

D. F. Jackson
New Chambers
(02) 9151 2009
jacksonqc@newchambers.com.au

A. L. Tokley
5 Wentworth
(02) 8815 9183
andrew.tokley@5wentworth.com

A. K. Flecknoe-Brown
6 St James' Hall
(02) 9237 8627
alexander.flecknoe-brown@stjames.net.au