SHORT PARTICULARS OF CASES

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IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING SENATOR THE HON MATTHEW CANAVAN (C11/2017)

Date referred to Full Court: 24 August 2017

Section 44 of the Constitution provides that any person who has any of certain attributes shall be incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives. Among those attributes are (in s 44(i)) being a subject or a citizen of a foreign power.

In May 2016 Senator Matthew Canavan was nominated in a group of Queensland candidates for the Senate for the general election held on 2 July 2016. Senator Canavan was then returned as a Senator for Queensland after the election.

Senator Canavan was born in 1980. At that time he was a citizen only of Australia (as were his parents). In 1983 however an Italian Constitutional Court decision in relation to a 1912 Italian statute had the apparent effect that Senator Canavan's mother became an Italian citizen by descent (by virtue of her mother's Italian citizenship), as did her children.

Senator Canavan however remained unaware of his potentially having Italian citizenship until 18 July 2017 (when he was told by his mother that, years earlier, she had included his name in a form used to register herself as an Italian citizen living abroad). The next day, Senator Canavan commenced taking steps to ascertain whether he did in fact hold Italian citizenship. Those steps culminated in his renunciation of Italian citizenship, which took effect on 8 August 2017.

On 24 August 2017 Chief Justice Kiefel, sitting as the Court of Disputed Returns, referred to a Full Court, under s 18 of the *Judiciary Act* 1903 (Cth), the following questions that had been transmitted by the Senate on 9 August 2017 pursuant to s 377 of the *Commonwealth Electoral Act* 1918 (Cth):

(a) whether, by reason of s 44(i) of the Constitution, there is a vacancy in the representation of Queensland in the Senate for the place for which Senator Matthew Canavan was returned;

(b) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;

(c) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and

(d) what, if any, orders should be made as to the costs of these proceedings.

Chief Justice Kiefel also made orders that Senator Canavan and the Attorney-General of the Commonwealth ("the Attorney-General") be heard and be deemed to be parties to the reference under s 378 of the *Commonwealth Electoral Act* 1918 (Cth).

A Notice of a Constitutional Matter has been filed by the Attorney-General.

The Attorney-General submits that the phrase “is a subject or a citizen ... of a foreign power” in s 44(i) of the Constitution should be construed as referring only to a person who has voluntarily obtained or retained that status. A person who does not know that he or she is, or ever was, a foreign citizen has not voluntarily obtained that status and therefore is not disqualified. Alternatively, where a person became aware that he or she was a foreign citizen (or that there was a prospect of such citizenship) but took all reasonable steps to renounce that citizenship within a reasonable time of becoming aware of it, the person was not disqualified under s 44(i) of the Constitution because he or she did not voluntarily retain that citizenship. The Attorney-General submits that Senator Canavan was not incapable of being chosen as a Senator by virtue of s 44(i) of the Constitution, as he did not voluntarily acquire or retain Italian citizenship.

Senator Canavan both adopts the submissions of the Attorney-General and further submits that a conferral of citizenship by a foreign law on a person who has little or no connection with the foreign state ought not be recognised under Australian law.

On 26 September 2017 Chief Justice Kiefel granted Mr Geoffrey Kennett SC leave to appear as amicus to act as a contradictor in law.

Mr Kennett submits that it ought to have occurred to Senator Canavan prior to his nomination that he might hold Italian citizenship, since forms that his mother gave him in 2006 (which he understood to be documents required for taking up Italian citizenship) on their face indicated that they were for Italian citizens residing abroad. Senator Canavan should therefore have enquired and ascertained the position in respect of Italian citizenship at a time earlier than he did.

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING MR SCOTT LUDLAM (C12/2017)

Date referred to Full Court: 24 August 2017

Section 44 of the Constitution provides that any person who has any of certain attributes shall be incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives. Among those attributes are (in s 44(i)) being a subject or a citizen of a foreign power.

As a result of the general election held on 2 July 2016, Mr Scott Ludlam was elected as a Senator for Western Australia the following month. He had been nominated as a candidate in June 2016.

Mr Ludlam had citizenship of New Zealand from the day of his birth in that country in 1970. At the time of his election, Mr Ludlam mistakenly believed that he no longer held such citizenship, on account of his naturalisation as an Australian citizen in April 1989. (He had moved to Australia with his parents in 1978, having not lived in New Zealand since 1973.)

Early in July 2017 Mr Ludlam became aware that he might in fact hold New Zealand citizenship. Such citizenship status was confirmed by the New Zealand High Commission on 10 July 2017. On 14 July 2017 Mr Ludlam gave notice of his resignation as a Senator.

On 24 August 2017 Chief Justice Kiefel, sitting as the Court of Disputed Returns, referred to a Full Court, under s 18 of the *Judiciary Act* 1903 (Cth), the following questions that had been transmitted by the Senate on 9 August 2017 pursuant to s 377 of the *Commonwealth Electoral Act* 1918 (Cth):

(a) whether, by reason of s 44(i) of the Constitution, there is a vacancy in the representation of Western Australia in the Senate for the place for which Senator Ludlam was returned;

(b) if the answer to Question (a) is 'yes', by what means and in what manner that vacancy should be filled;

(c) if the answer to Question (a) is 'no', is there a casual vacancy in the representation of Western Australia in the Senate within the meaning of s 15 of the Constitution; and

(d) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference.

Chief Justice Kiefel also made orders that Mr Ludlam and the Attorney-General of the Commonwealth ("the Attorney-General") be heard and be deemed to be parties to the reference under s 378 of the *Commonwealth Electoral Act* 1918 (Cth).

A Notice of a Constitutional Matter has been filed by the Attorney-General.

The Attorney-General submits that the phrase “is a subject or a citizen ... of a foreign power” in s 44(i) of the Constitution should be construed as referring only to a person who has voluntarily obtained or retained that status. A person who does not know that he (or she) is, or ever was, a foreign citizen has not voluntarily obtained that status and therefore is not disqualified. Alternatively, where a person became aware that he or she was a foreign citizen (or that there was a prospect of such citizenship) but took all reasonable steps to renounce that citizenship within a reasonable time of becoming aware of it, the person was not disqualified under s 44(i) of the Constitution because he or she did not voluntarily retain that citizenship. The Attorney-General submits that Mr Ludlam was incapable of being chosen as a Senator, as he knew at the time of his nomination that he had been born in New Zealand and had failed to take all reasonable steps to renounce the citizenship of New Zealand that he continued to hold.

Mr Ludlam accepts that he did not take all reasonable steps to ascertain and then renounce his status as a citizen of New Zealand, with the result that he was disqualified by s 44(i) from being chosen for, or sitting in, the Senate.

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING MS LARISSA WATERS (C13/2017)

Date referred to Full Court: 24 August 2017

Section 44 of the Constitution provides that any person who has any of certain attributes shall be incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives. Among those attributes are (in s 44(i)) being a subject or a citizen of a foreign power.

Ms Larissa Waters was born in Canada, to Australian parents, in 1977. She then moved to Australia with her parents before her first birthday.

In August 2016 Ms Waters was elected a Senator for Queensland as a result of the general election held on 2 July 2016. She had nominated as a candidate for such a role in June 2016.

Unbeknown to Ms Waters, at the time of her nomination and her subsequent election, she was a citizen of Canada by virtue of her birth in that country. On 18 July 2017, after becoming aware that she held Canadian citizenship, Ms Waters gave notice of her resignation as a Senator. (She later renounced her Canadian citizenship, that renunciation taking effect on 5 August 2017.)

On 24 August 2017 Chief Justice Kiefel, sitting as the Court of Disputed Returns, referred to a Full Court, under s 18 of the *Judiciary Act* 1903 (Cth), the following questions that had been transmitted by the Senate on 9 August 2017 pursuant to s 377 of the *Commonwealth Electoral Act* 1918 (Cth):

(a) whether, by reason of s 44(i) of the Constitution, there is a vacancy in the representation of Queensland in the Senate for the place for which Senator Waters was returned;

(b) if the answer to Question (a) is 'yes', by what means and in what manner that vacancy should be filled;

(c) if the answer to Question (a) is 'no', is there a casual vacancy in the representation of Queensland in the Senate within the meaning of s 15 of the Constitution; and

(d) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference.

Chief Justice Kiefel also made orders that Ms Waters and the Attorney-General of the Commonwealth ("the Attorney-General") be heard and be deemed to be parties to the reference under s 378 of the *Commonwealth Electoral Act* 1918 (Cth).

A Notice of a Constitutional Matter has been filed by the Attorney-General.

The Attorney-General submits that the phrase "is a subject or a citizen ... of a foreign power" in s 44(i) of the Constitution should be construed as referring only

to a person who has voluntarily obtained or retained that status. A person who does not know that he or she is, or ever was, a foreign citizen has not voluntarily obtained that status and therefore is not disqualified. Alternatively, where a person became aware that he or she was a foreign citizen (or that there was a prospect of such citizenship) but took all reasonable steps to renounce that citizenship within a reasonable time of becoming aware of it, the person was not disqualified under s 44(i) of the Constitution because he or she did not voluntarily retain that citizenship. The Attorney-General submits that Ms Waters was not disqualified, as she did not voluntarily obtain or retain Canadian citizenship and she took all reasonable steps to renounce it within a reasonable time after becoming aware of it. Her resignation then created a casual vacancy in the Senate, which should be filled in accordance with s 15 of the Constitution.

Ms Waters however submits that she was disqualified by the operation of s 44(i). Her knowledge of the fact that she was born in Canada should have prompted her to make proper enquiries to ascertain whether she was a citizen of that country. She submits that she had therefore not taken all reasonable steps to renounce the Canadian citizenship that she actually held.

Ms Waters submits that the Senate vacancy created by her disqualification should be filled after a special count of ballot papers from the 2016 election, such a count being conducted by the application of s 273(27) of the *Commonwealth Electoral Act* 1918 (Cth) by analogy (that provision referring to deceased candidates, not disqualified candidates).

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING SENATOR MALCOLM ROBERTS (C14/2017)

Date referred to Full Court: 24 August 2017

Section 44 of the Constitution provides that any person who has any of certain attributes shall be incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives. Among those attributes are (in s 44(i)) being a subject or a citizen of a foreign power.

Senator Malcolm Roberts was born in India in 1955, to a British father and an Australian mother. In or about 1962 he moved to Australia with his family and in May 1974 he became an Australian citizen.

In August 2016 Senator Roberts was elected as a Senator for Queensland following the general election held on 2 July 2016. On 6 June 2016, two days prior to his nomination as a candidate for the election, he sent an email to three email addresses stating that, although he was confident he was not a British citizen, he immediately renounced any such citizenship.

Senator Roberts was in fact a British citizen by descent, and his email was ineffective as a renunciation of that citizenship. (The email was not sent to the appropriate authority, the Home Office in the United Kingdom, nor was it accompanied by a fee prescribed for the renunciation of British citizenship.)

Senator Roberts lodged a renunciation form and paid the prescribed fee on 2 November 2016 and his British citizenship then ceased on 5 December 2016.

On 24 August 2017 Chief Justice Kiefel, sitting as the Court of Disputed Returns, referred to a Full Court, under s 18 of the *Judiciary Act* 1903 (Cth), the following questions that had been transmitted by the Senate on 10 August 2017 pursuant to s 377 of the *Commonwealth Electoral Act* 1918 (Cth):

(a) whether by reason of s 44(i) of the Constitution there is a vacancy in the representation of Queensland in the Senate for the place for which Senator Roberts was returned;

(b) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;

(c) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and

(d) what, if any, orders should be made as to the costs of these proceedings.

Chief Justice Kiefel also made orders that Senator Roberts and the Attorney-General of the Commonwealth ("the Attorney-General") be heard and be deemed to be parties to the reference under s 378 of the *Commonwealth Electoral Act* 1918 (Cth).

A Notice of a Constitutional Matter has been filed by the Attorney-General.

On 21 September 2017 Justice Keane conducted a hearing, in accordance with an order made by Chief Justice Kiefel on 15 September 2017, to resolve certain factual issues in advance of the Full Court's hearing of the referred questions. On 22 September 2017 Justice Keane delivered judgment (*Re Roberts* [2017] HCA 39), finding that Senator Roberts, at the date of his nomination for the Senate, knew that there was at least a real and substantial prospect that prior to May 1974 he had been and remained thereafter a citizen of the United Kingdom. His Honour also found that Senator Roberts could have sought professional advice or could have contacted the United Kingdom High Commission in Canberra prior to his nomination to establish whether he was in fact a British citizen.

The Attorney-General submits that the phrase "is a subject or a citizen ... of a foreign power" in s 44(i) of the Constitution should be construed as referring only to a person who has voluntarily obtained or retained that status. A person who does not know that he or she is, or ever was, a foreign citizen has not voluntarily obtained that status and therefore is not disqualified. Alternatively, where a person became aware that he or she was a foreign citizen (or that there was a prospect of such citizenship) but took all reasonable steps to renounce that citizenship within a reasonable time of becoming aware of it, the person was not disqualified under s 44(i) of the Constitution because he or she did not voluntarily retain that citizenship. The Attorney-General submits that Senator Roberts was disqualified by the operation of s 44(i), as he did not take reasonable steps to make enquiries or to renounce his British citizenship prior to his nomination for the Senate.

Senator Roberts submits that he was not disqualified, as he had believed that he was a citizen only of Australia. It was irrelevant that he had understood there was a prospect he was also a British citizen. Alternatively, even though he suspected that he might hold British citizenship, he took reasonable steps to renounce that citizenship within a reasonable time.

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING THE HON BARNABY JOYCE MP (C15/2017)

Date referred to Full Court: 24 August 2017

Section 44 of the Constitution provides that any person who has any of certain attributes shall be incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives. Among those attributes are (in s 44(i)) being a subject or a citizen of a foreign power.

In June 2016 The Hon Barnaby Joyce MP was nominated as a candidate for the National Party of Australia in the general election to be held on 2 July 2017. Mr Joyce was then elected to the House of Representatives as the Member for New England.

Unbeknown to Mr Joyce, at the time of his nomination he was a New Zealand citizen by descent through his father, James Joyce. James Joyce had immigrated to Australia in 1947 from New Zealand, where he was born a British subject. He became a New Zealand citizen upon the inception of that status in 1949. Under New Zealand law, Barnaby Joyce was a New Zealand citizen upon his birth in Australia in 1967.

Mr Joyce became aware of the possibility that he might have New Zealand citizenship after media enquiries to his office in late July 2017. On 10 August 2017 the New Zealand High Commissioner informed Mr Joyce that he was a citizen of New Zealand under the law of that country. Four days later Mr Joyce completed the steps required to formally renounce his New Zealand citizenship.

On 24 August 2017 Chief Justice Kiefel, sitting as the Court of Disputed Returns, referred to a Full Court, under s 18 of the *Judiciary Act* 1903 (Cth), the following questions that had been transmitted by the House of Representatives on 15 August 2017 pursuant to s 377 of the *Commonwealth Electoral Act* 1918 (Cth):

(a) whether, by reason of s 44(i) of the Constitution, the place of the Member for New England (Mr Joyce) has become vacant;

(b) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;

(c) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and

(d) what, if any, orders should be made as to the costs of these proceedings.

Chief Justice Kiefel also made orders that Mr Joyce, the Attorney-General of the Commonwealth ("the Attorney-General") and Mr Antony Harold Curties Windsor be heard and be deemed to be parties to the reference under s 378 of the *Commonwealth Electoral Act* 1918 (Cth).

A Notice of a Constitutional Matter has been filed by the Attorney-General.

The Attorney-General submits that the phrase “is a subject or a citizen ... of a foreign power” in s 44(i) of the Constitution should be construed as referring only to a person who has voluntarily obtained or retained that status. A person who does not know that he or she is, or ever was, a foreign citizen has not voluntarily obtained that status and therefore is not disqualified. Alternatively, where a person became aware that he or she was a foreign citizen (or that there was a prospect of such citizenship) but took all reasonable steps to renounce that citizenship within a reasonable time of becoming aware of it, the person was not disqualified under s 44(i) of the Constitution because he or she did not voluntarily retain that citizenship. The Attorney-General submits that Mr Joyce was not incapable of being chosen as a Member of the House of Representatives by the operation of s 44(i) of the Constitution, as he did not voluntarily acquire or retain his New Zealand citizenship.

Mr Joyce makes similar submissions and submits that he was not disqualified. This is in circumstances where he was unaware of the possibility that he might be a New Zealand citizen at the time of his nomination as a candidate for the election and that (as a sitting Member) he acted with alacrity to renounce such citizenship once he knew that he had it.

Mr Windsor submits that Mr Joyce was ineligible to be chosen or of sitting as a Member of the House of Representatives, as there is no applicable exception to disqualification by the operation of s 44(i) of the Constitution. Where a person knows that a parent was born in a country other than Australia he or she ought, prior to nominating as a candidate for election to Parliament, make enquiries and then renounce any foreign citizenship held.

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING SENATOR THE HON FIONA NASH (C17/2017)

Date referred to Full Court: 15 September 2017

Section 44 of the Constitution provides that any person who has any of certain attributes shall be incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives. Among those attributes are (in s 44(i)) being a subject or a citizen of a foreign power.

Born in Australia in 1965 to an Australian mother, Senator Fiona Nash acquired British citizenship by descent through her father (who was born in Scotland). As a child however she was told that her elder sisters were both British citizens because they were born in England but that she did not have such citizenship and that her parents had not applied for it on her behalf.

In August 2016 Senator Nash was elected as a Senator for New South Wales, as a result of the general election held on 2 July 2016. At that time (and when she nominated as a candidate, in June 2016) Senator Nash was unaware that she had ever been a British citizen.

On 14 August 2017, immediately after the Hon Barnaby Joyce MP made a statement to the House of Representatives about his potentially being a citizen of New Zealand by descent, Senator Nash enquired of the United Kingdom Home Office as to whether she might be a British citizen. The Home Office confirmed that she was indeed a British citizen by descent. On 17 August 2017 Senator Nash received legal advice confirming that she was a British citizen. She formally renounced that citizenship the next day. On 21 August 2017 Senator Nash's renunciation was confirmed as having been registered (and thereby effective).

On 15 September 2017 Chief Justice Kiefel, sitting as the Court of Disputed Returns, referred to a Full Court, under s 18 of the *Judiciary Act* 1903 (Cth), the following questions that had been transmitted by the Senate on 5 September 2017 pursuant to s 377 of the *Commonwealth Electoral Act* 1918 (Cth):

(a) whether by reason of s 44(i) of the Constitution, there is a vacancy in the representation of New South Wales in the Senate for the place for which Senator Fiona Nash was returned;

(b) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;

(c) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and

(d) what, if any, orders should be made as to the costs of these proceedings.

Chief Justice Kiefel also made orders that Senator Nash and the Attorney-General of the Commonwealth ("the Attorney-General") be heard and be deemed to be parties to the reference under s 378 of the *Commonwealth Electoral Act* 1918 (Cth).

A Notice of a Constitutional Matter has been filed by the Attorney-General.

The Attorney-General submits that the phrase “is a subject or a citizen ... of a foreign power” in s 44(i) of the Constitution should be construed as referring only to a person who has voluntarily obtained or retained that status. A person who does not know that he or she is, or ever was, a foreign citizen has not voluntarily obtained that status and therefore is not disqualified. Alternatively, where a person became aware that he or she was a foreign citizen (or that there was a prospect of such citizenship) but took all reasonable steps to renounce that citizenship within a reasonable time of becoming aware of it, the person was not disqualified under s 44(i) of the Constitution because he or she did not voluntarily retain that citizenship. The Attorney-General submits that Senator Nash was not disqualified, having acquired British citizenship involuntarily and having taken reasonable steps to renounce that citizenship within a reasonable time of becoming aware of it.

Senator Nash makes similar submissions and submits that she was not disqualified. This is in circumstances where she was unaware of the possibility that she might be a British citizen at the time she nominated as an election candidate and she then renounced such citizenship within four days of becoming aware of it.

On 26 September 2017 Chief Justice Kiefel granted Mr Geoffrey Kennett SC leave to appear as amicus to act as a contradictor in law.

Mr Kennett submits that it ought to have occurred to Senator Nash, by the time of her nomination as a candidate for election to the Senate, that her belief that she did not have British citizenship might be incorrect. It was at that time she should have enquired of the United Kingdom Home Office to ascertain whether she was in fact a British citizen.

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING SENATOR NICK XENOPHON (C18/2017)

Date referred to Full Court: 15 September 2017

Section 44 of the Constitution provides that any person who has any of certain attributes shall be incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives. Among those attributes are (in s 44(i)) being a subject or a citizen of a foreign power.

Senator Nick Xenophon was born in Australia in 1959. His mother had been born in Greece and his father in Cyprus. His parents each became Australian citizens during the 1960s.

As an adult, Senator Xenophon considered that both Greece and Cyprus were foreign countries with which he had a connection. In October 2007 (prior to his initial election to the Senate, in November 2007) he wrote to the Embassy of Greece and to the High Commission of Cyprus, renouncing any entitlement to citizenship that he might have with their countries.

Cyprus was a British colony for several decades until attaining independence in 1960. Unbeknown to Senator Xenophon, his father had become a British citizen in 1949, by the operation of British citizenship legislation.

Senator Xenophon became aware of his potentially having British citizenship on either 10 or 11 August 2017. On 18 August 2017 he received confirmation from the United Kingdom Home Office that he was a British citizen by descent. Senator Xenophon then renounced that citizenship, such renunciation taking effect on 30 August 2017.

On 15 September 2017 Chief Justice Kiefel, sitting as the Court of Disputed Returns, referred to a Full Court, under s 18 of the *Judiciary Act* 1903 (Cth), the following questions that had been transmitted by the Senate on 5 September 2017 pursuant to s 377 of the *Commonwealth Electoral Act* 1918 (Cth):

(a) 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 Senator Xenophon was returned;

(b) if the answer to Question (a) is 'yes', by what means and in what manner that vacancy should be filled;

(c) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and

(d) what, if any, orders should be made as to the costs of these proceedings.

Chief Justice Kiefel also made orders that Senator Xenophon and the Attorney-General of the Commonwealth ("the Attorney-General") be heard and be deemed to be parties to the reference under s 378 of the *Commonwealth Electoral Act* 1918 (Cth).

A Notice of a Constitutional Matter has been filed by the Attorney-General.

The Attorney-General submits that the phrase “is a subject or a citizen ... of a foreign power” in s 44(i) of the Constitution should be construed as referring only to a person who has voluntarily obtained or retained that status. A person who does not know that he or she is, or ever was, a foreign citizen has not voluntarily obtained that status and therefore is not disqualified. Alternatively, where a person became aware that he or she was a foreign citizen (or that there was a prospect of such citizenship) but took all reasonable steps to renounce that citizenship within a reasonable time of becoming aware of it, the person was not disqualified under s 44(i) of the Constitution because he or she did not voluntarily retain that citizenship. The Attorney-General submits that Senator Xenophon was not disqualified, having acquired British citizenship involuntarily and having taken reasonable steps to renounce that citizenship within a reasonable time of becoming aware of it.

Senator Xenophon adopts the submissions of the Attorney-General and further submits that his connection with the United Kingdom is so remote that he should not be recognised under Australian law as being a “subject or citizen of a foreign power” within the meaning of s 44(i) of the Constitution.

On 26 September 2017 Chief Justice Kiefel granted Mr Geoffrey Kennett SC leave to appear as amicus to act as a contradictor in law.

Mr Kennett submits that Senator Xenophon ought to have enquired about potential British citizenship at a time earlier than he did, as he had been told by his father that the British were unwelcome occupiers of Cyprus. Senator Xenophon can therefore be taken to have known that Cyprus was a former British colony, a fact that would have prompted a reasonable person to enquire about the possibility of British citizenship.

AUSTRALIAN BUILDING AND CONSTRUCTION COMMISIONER v CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION & ANOR (M65/2017)

Court appealed from:	Full Court of the Federal Court of Australia [2016] FCAFC 184
Date of judgment:	21 December 2016
Date special leave granted:	12 May 2017

The appellant brought proceedings in the Federal Court alleging that the first respondent ("the CFMEU") and the second respondent, Joe Myles, an organiser in the employ of the CFMEU, contravened s 348 of the *Fair Work Act* 2009 (Cth) ("the FW Act") on 16 and 17 May 2013 at a construction site in Maribyrnong. On 13 May 2016, Mortimer J ordered the CFMEU and Myles to pay financial penalties. Her Honour further ordered ("Order 13") that "the first respondent must not directly or indirectly indemnify the second respondent against the penalties … in whole or in part, whether by agreement, or by making a payment to the Commonwealth, or by making any other payment or reimbursement, or howsoever otherwise".

In their appeal to the Full Federal Court (Allsop CJ, North & Jessup JJ) the respondents contended, inter alia, that the court did not have power, under s 545 of the FW Act, to make an order in the terms of Order 13. Section 545 provides as follows:

> (1) The Federal Court … may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.

The Court noted that s 545(1) requires the consideration and making of a choice of what is "appropriate" in the exercise of judicial power upon the satisfaction that someone has contravened or proposes to contravene a civil remedy provision. That consideration and choice must have limits. Such a judgment, and any restrictions or limitations on the choice, would be derived from the text and context of the statute, the nature of judicial power and inhering considerations of legal legitimacy.

The Court further noted that the object of the imposition of a penalty under s 546 of the FW Act was deterrence. The order in question here was made against the union in order that the imposition of the penalty against Myles have more "sting". Such an order was plainly relevant to deterrence. Thus, if it were to be concluded that it was not capable of properly being seen as appropriate, considerations leading to that conclusion had to be derived elsewhere and otherwise. Such considerations derived from two sources: one from the terms and structure of the statute; the other from inhering legal considerations. As to the statute, the power to impose the penalty came from s 546. Order 13 was directed to the effect of the penalty. Just as s 545 could not be used to found an order to pay a monetary sum (in addition to the penalty imposed under s 546) so

it could not be used to increase the effect of the nominal amount. The source of the power to impose a penalty was, and was only, s 546.

That conclusion was reinforced by another legal consideration. The order purported to order a party to refrain from doing an act which was not said to be unlawful and to control how that party used its own property. Such an imposition on the freedom of a person or organisation to conduct his, her or its own affairs, being intimately bound up with the penalty itself, should find its source of power in clear and express words of the statute. How the statute provides for the regulation of industrial relations was a matter for Parliament. The Court concluded that neither s 545(1) of the Act or s 23 of the FC Act was a source of power for Order 13.

The ground of appeal is:

- The Full Court erred in concluding that the Federal Court lacked the power under both s 545 of the *Fair Work Act* 2009 (Cth) and s 23 of the *Federal Court of Australia Act* 1976 (Cth) to make an order that the First Respondent not indemnify the Second Respondent against the penalties he was ordered to pay under s 546 of the *Fair Work Act* 2009 (Cth) for contravening s 348.

DWN042 v. REPUBLIC OF NAURU (M20/2017)

Court appealed from: Supreme Court of Nauru
[2017] NR SC 4

Date of judgment: 7 February 2017

This appeal raises issues of whether Nauru's processes for determination of the Appellant's application for refugee status by the Refugee Status Review Tribunal pursuant to the *Refugees Convention Act 2012* (Nr) ('*the RCA*') breached the principles of natural justice, were unconstitutional because the Appellant was unlawfully detained at the time and whether the High Court has jurisdiction to hear any of the first 3 grounds of the appeal.

The Appellant is a man of Pakistani citizenship who has unsuccessfully applied to the Republic of Nauru for refugee status determination. He left Pakistan in July 2013 and was intercepted by Australian authorities on a boat from Indonesia on 3 August 2013 and transferred to Christmas Island where he was detained. He was transferred to Nauru on a regional processing centre visa on 7 September 2013 where he remains.

On 8 December 2013 the Appellant made an application to Nauru for refugee status determination under the *RCA,* relying on grounds based on his alleged fear of persecution and extortion by the Taliban.

On 17 July 2014 the Secretary of the Nauru Department of Justice and Border Control determined that the Appellant was not a refugee and was not entitled to complementary protection. The Appellant made an application for merits review of that decision to the Tribunal. The Tribunal affirmed the earlier determination on 29 December 2014. It did not accept that the First Appellant had a well-founded fear of persecution in Pakistan on the claimed grounds.

The Appellant then appealed to the Supreme Court of Nauru on points of law comprising the following grounds:

- Whether, in conducting the case in a place where the Appellant was 'unlawfully' detained, there was a breach of natural justice;
- That the hearing was unconstitutional as he was unlawfully detained at the time in breach of s 5 of the Constitution of Nauru which provides an absolute prohibition on deprivation of liberty subject to specified exceptions which in the Appellant's case did not apply as the Appellant had entered Nauru lawfully;
- That the Tribunal had erred in not finding the Appellant entitled to complementary protection; and
- That the Tribunal had erred in relying on an unsigned, unsworn transfer interview form which the Appellant had allegedly disavowed.

On the day of the Supreme Court hearing the Court struck out the first two grounds of appeal on the application of the Respondent Republic of Nauru on the basis that as they related to matters concerning the Constitution of Nauru they

were ‘filed without any basis…did not disclose any cause of action’ and were ‘frivolous and vexatious’.

The Appellant then sought leave to appeal from that interlocutory decision (striking out appeal grounds 1 and 2) from the High Court of Australia pursuant to s 5 of the *Nauru (High Court Appeals) Act* 1976 (Cth). At the hearing of the application for leave on 16 December 2016, the High Court dismissed the application after having sought and been given assurances by the Respondent Republic of Nauru to the effect that the Respondent accepted that the reasoning of the Supreme Court in the interlocutory decision was plainly wrong, and that the Respondent would not seek to rely on that reasoning in any future proceeding or in opposition to an application by the Appellant to reopen the present case to further amend the grounds of appeal.

On 6 February 2017 the Appellant sought to file a Notice of Motion in the Supreme Court of Nauru seeking to reinstate appeal grounds 1 and 2 and an order to ‘open the appeal to further amend the grounds of appeal’. On 7 February 2017 the Supreme Court of Nauru dismissed the appeal and affirmed the Tribunal’s decision. The judgment did not refer to the Appellant’s Notice of Motion.

The grounds of the appeal to the High Court of Australia are essentially the same as those that were before the Supreme Court of Nauru.

In addition there is a preliminary issue raised by the Appellant as to whether the Supreme Court erred in failing to consider the Appellant’s Notice of Motion seeking reinstatement of appeal grounds 1 and 2 in light of the assurances given by the Republic of Nauru to the High Court on 16 December 2016.

The written submissions filed by the Respondent raise the issue of whether the High Court has jurisdiction to hear any of the first 3 grounds of the appeal, given that if they involve the interpretation or effect of the Constitution of Nauru, the appeal is incompetent because of Article 2 of the 6 September 1976 Agreement between the Governments of Australia and Nauru implemented by the *Nauru (High Court Appeals) Act* 1976 (Cth).