

**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.