

**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 as amicus 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.