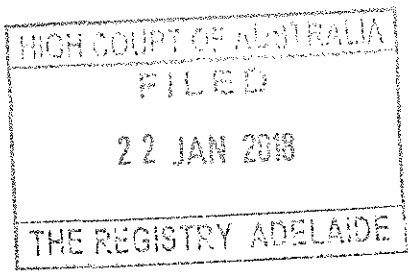
IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

No. C30 of 2017



RE MS SKYE KAKOSCHKE-MOORE
Reference under s 376 of the
Commonwealth Electoral Act 1918 (Cth)

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ANNOTATED SUBMISSIONS OF TIMOTHY RAPHAEL STORER

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ANNOTATED SUBMISSIONS OF TIMOTHY RAPHAEL STORER ("Mr Storer")

Part I: Internet publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of Issues

2. There appears to be no dispute that, at all relevant times prior to the 2016 election, Ms Kakoschke-Moore was disqualified under section 44(i) of the *Constitution* and was therefore not validly returned as elected. As a result, by letter addressed to the President of the Senate she resigned her place on 22 November 2017 citing her dual citizenship as disentitling her from sitting under section 44(i) of the *Constitution*. Accordingly, there is no doubt that there is a current vacancy in the representation of South Australia in the Senate and all parties appear to agree that the vacancy is to be filled after a special count of the votes cast at the 2016 election.

3. The issues raised by this reference are limited to the following:

   3.1. Is there a vacancy in the representation of South Australia in the Senate by reason of section 44(i) of the Commonwealth *Constitution*?

   3.2. On the basis that such a vacancy should be filled by the outcome of a special count of the votes cast at the 2016 election, should that special count exclude Ms Kakoschke-Moore on the grounds of her disqualification and/or resignation?

   3.3. Further, or in the alternative, does the fact that a candidate is disqualified under section 44 of the *Constitution* and chooses to resign her place in the Senate before her qualification status is referred to the Court of Disputed Returns, alter the manner in which such special count should be conducted?

Part III: Section 78B Notice

4. No additional notice in compliance with 78B of the *Judiciary Act 1903* (Cth) is considered necessary given the Notice filed by the Attorney General on 7 December 2017.[1]

Part IV: Relevant Facts

5. On 9 May 2016, the Governor-General, at the request of the Prime Minister and by way of proclamation, simultaneously dissolved the Senate and the House of Representatives, pursuant to s 57 of the *Constitution*.[2]

6. On 16 May 2016, the Governor of South Australia issued to the Australian Electoral Officer for the State of South Australia ("**the AEO**"), a writ for the election of 12 Senators for South Australia (the SA Senate writ).[3] Pursuant to section 152 of the

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[1] **Case Book (CB) at pages 2 – 14.**
[2] Paragraph [24] of the affidavit of Timothy John Courtney filed on 7 December 2017: **CB 27.**
[3] The Writ is reproduced at **CB 7.**

Commonwealth Electoral Act 1918 (Cth) ("**the *Electoral Act***"), the writ fixed the following dates:

6.1. 23 May 2016, for the close of the Rolls;

6.2. 9 June 2016, for the close of nominations;

6.3. 2 July 2016, for the date on which the poll is taken; and

6.4. not later than 8 August 2016, for the return of the writ.

7. On 6 June 2016, the AEO received a Group Nomination by Registered Officer form for the registered political party Nick Xenophon Team (the NXT group nomination).[4]

8. The NXT Group Nomination[5] listed 4 candidates in the following order:

8.1. Nick Xenophon;

8.2. Stirling Griff;

8.3. Skye Kakoschke-Moore; and

8.4. Timothy Storer.

9. Neither Ms Kakoschke-Moore's nor Mr Storer's nominations were rejected under s.172 of the *Electoral Act*.

10. On 10 June 2016, Ms Kakoschke-Moore's and Mr Storer's nominations were declared.[6]

11. On 4 August 2016, the AEO certified, pursuant to s 283(1)(b) of the *Electoral Act*, the following 12 candidates who had been elected (the South Australian certificate of election) in the following order:[7]

11.1.1. Simon BIRMINGHAM	Liberal
11.1.2. Penny WONG	Australian Labor Party
11.1.3. Nick XENOPHON	Nick Xenophon Team
11.1.4. Cory BERNARDI	Liberal
11.1.5. Don FARRELL	Australian Labor Party
11.1.6. Stirling GRIFF	Nick Xenophon Team
11.1.7. Anne RUSTON	Liberal
11.1.8. Alex GALLACHER	Australian Labor Party
11.1.9. David FAWCETT	Liberal
11.1.10. Skye KAKOSCHKE-MOORE	Nick Xenophon Team
11.1.11. Sarah HANSON-YOUNG	The Greens
11.1.12. Bob DAY	Family First

[4] Paragraph [26] of the affidavit of Timothy John Courtney filed on 7 December 2017:**CB 27**.
[5] Exhibit TJC-3 to the affidavit of Timothy John Courtney filed on 7 December 2017: **CB 41-43**.
[6] Paragraph [28] of the affidavit of Timothy John Courtney filed on 7 December 2017: **CB 28**.
[7] Paragraph [35] of the affidavit of Timothy John Courtney filed on 7 December 2017: **CB 28**.

12. On 4 August 2016, a copy of the writ and the South Australian certificate of election were returned to the Governor of South Australia.[8]

13. On 13 April 2017, the AEO for South Australia conducted a special count of the ballot papers cast in the South Australian senate election in accordance with the orders made by this Court on 11 April 2017 in High Court of Australia Action No C14 of 2016.[9] The candidates identified in that special count were, in order of election:

13.1.1. Simon BIRMINGHAM	Liberal
13.1.2. Penny WONG	Australian Labor Party
13.1.3. Nick XENOPHON	Nick Xenophon Team
13.1.4. Cory BERNARDI	Liberal
13.1.5. Don FARRELL	Australian Labor Party
13.1.6. Stirling GRIFF	Nick Xenophon Team
13.1.7. Anne RUSTON	Liberal
13.1.8. Alex GALLACHER	Australian Labor Party
13.1.9. David FAWCETT	Liberal
13.1.10. Sarah HANSON-YOUNG	The Greens
13.1.11. Skye KAKOSCHKE-MOORE	Nick Xenophon Team
13.1.12. Lucy GICHUHI[10]	Family First

Senator Xenophon

14. In November 2007, Senator Xenophon was elected to the Senate for the first time. Senator Xenophon was subsequently re-elected to the Australian Senate on 7 September 2013 and 2 July 2016. At no time prior to either election did it cross his mind that he might have some form of British citizenship by descent arising from the fact that Cyprus, where his father was born, was a British possession at the time of his father's birth.[11]

15. On 12 August 2017, one or more journalists made inquiries of Senator Xenophon's office as to whether Senator Xenophon was a British citizen.[12]

Ms Kakoschke-Moore

16. Ms Kakoschke-Moore's mother was born in Singapore on 31 December 1957. At the time of her birth, both of Ms Kakoschke-Moore's grandparents were serving members of the British Royal Air Force.[13]

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[8] Paragraph 36 of the affidavit of Timothy John Courtney filed on 7 December 2017: **CB 28**.
[9] Paragraphs 43-46 of the affidavit of Timothy John Courtney filed on 7 December 2017: **CB 29-30**. By virtue of this special count having been conducted, and given Ms Kakoschke-Moore's inclusion in it, there is no reason to think that any special count now would produce a different result.
[10] As a result of the special count conducted to fill the vacancy created by the resignation of Mr Bob Day as a Senator.
[11] The facts relevant to Senator Xenophon are reproduced from the decision of this Court in *Re: Canavan & Ors* (2017) 91 ALJR 1209, 1229.
[12] See: *Re: Canavan & Ors* (2017) 91 ALJR 1209, 1230 [123]. There is no evidence from Ms Kakoschke-Moore about whether this was raised with her at that time by former Senator Xenophon. There is also no evidence from former Senator Xenophon about what steps, if any, he took in his capacity as leader of the NXT Party once this was raised in August 2017. See also footnote 18.
[13] Paragraph [4] of the affidavit of Skye Kakoschke-Moore filed on 22 December 2017: **CB 261**.

17. Ms Kakoschke-Moore's maternal grandparents were both born in the United Kingdom.[14]

18. Prior to 1970, Ms Kakoschke-Moore's mother and her grandparents lived in the United Kingdom, then in Singapore, then in the United Kingdom again.[15]

19. Ms Kakoschke-Moore's parents were married on 15 October 1983 in Australia.[16]

20. Ms Kakoschke-Moore was born in Darwin, Australia, on 19 December 1985.[17]

21. In 1997 or 1998, Ms Kakoschke-Moore lived overseas in Oman.[18]

22. On 22 November 2017, Ms Kakoschke-Moore wrote to the President of the Senate tendering her resignation as a Senator. In her letter of resignation ("**the resignation letter**"), Ms Kakoschke-Moore wrote, relevantly:

> "I received confirmation overnight that, pursuant to section 44 of the Constitution, I am dual Australian and British citizen and therefore ineligible to hold office.
>
> Accordingly, I tender my resignation from the Senate, effective immediately."

23. On 28 November 2017, the President of the Senate, pursuant to s 376 of the *Electoral Act*, referred a number of questions for determination arising from the vacancy in the Senate in the place for which Skye Kakoschke-Moore was returned.[19] The resignation letter was tabled in the Senate on 27 November 2017.[20]

Timothy Storer

24. On 23 May 2016, Mr Storer registered as a candidate for a place in the Senate in respect of the 2016 election.[21]

25. Prior to the polls conducted on 2 July 2016, the NXT Party published advertising literature in the community promoting its candidates running for election at the 2016 election.[22]

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[14] Paragraphs [5]-[6] of the affidavit of Skye Kakoschke-Moore filed on 22 December 2017: **CB 261**.
[15] Paragraph [10] of the affidavit of Skye Kakoschke-Moore filed on 22 December 2017: **CB 262**.
[16] Paragraphs [3]-[9] of the affidavit of Skye Kakoschke-Moore filed on 22 December 2017: **CB 261-262**.
[17] Paragraph [3] of the affidavit of Skye Kakoschke-Moore filed on 22 December 2017: **CB 261**.
[18] Paragraph [11] of the affidavit of Skye Kakoschke-Moore filed on 22 December 2017: **CB 262**. There is no evidence of Ms Kakoschke-Moore's citizenship status whilst in Oman, when she moved there, the basis upon which she did so, and when she returned to Australia. There is no evidence from Ms Kakoschke-Moore about what, if any, steps she took in the period from 1997/8 (when she lived in Oman) and November 2017 when she says her British status was confirmed. Similarly there is no evidence of what if any records exist about that status. It is also relevant that there is no evidence filed by Ms Kakoschke-Moore's father who is said to have made the inquiry referred to in paragraph 11 of the Ms Kakoschke-Moore's affidavit and the grounds upon which it was considered appropriate to direct those inquiries to the British embassy. There is also no evidence from Ms Kakoschke-Moore's mother from whom she acquired her citizenship. Further, objection is taken to the assertions in paragraph 11 about Ms Kakoschke-Moore's 'belief' about her state of mind. The degree of uncertainty expressed in that paragraph renders the evidence uncertain and incomplete. See also footnote 12.
[19] **CB 2-14**.
[20] Letter from the President of the Senate dated 28 November 2017: **CB 3 and 12**.
[21] Paragraph [9] of the affidavit of Timothy Raphael Storer filed on 22 December 2017: **CB 245**.
[22] See Exhibit TRS2 to the affidavit of Timothy Raphael Storer: **CB 253**.

26. Mr Storer was not declared returned after the 2016 election but he remained a member of the NXT Party.[23]

27. Mr Storer was a member of the NXT Party at all material times prior to, during and after the 2016 election. He remained a member until 3 November 2017, after he was purportedly expelled as a member.

The Nick Xenophon Team political party

28. NXT is a registered political party.[24] It was registered as a party prior to the 2016 election.

29. Ms Kakoschke-Moore was a member of NXT at the time of the 2016 election. Since then she has continually been, and remains, a member of NXT.

Part V: Outline of Mr Storer's Submissions

Introductory

30. On 4 August 2016, Ms Skye Kakoschke-Moore was returned as having been elected as a Senator for South Australia. However, on 22 November 2017, she resigned that place on the grounds that she was disqualified from being a Senator by virtue of section 44(i) of the *Constitution*.[25] Thereafter, the President of the Senate referred (by letter dated 28 November 2017) questions under section 376 of the Electoral Act to this Court.[26]

31. By virtue of Ms Kakoschke-Moore's resignation on grounds expressly stated to be based on section 44(i) of the *Constitution*, there is no doubt that there is a vacancy in the representation of South Australia in the Senate and that that vacancy must be filled. The only issue raised by this reference is whether Ms Kakoschke-Moore could be included as a candidate in the determination of how that vacancy is to be filled.

32. Mr Storer contends that, because the vacancy happened as a result of the application of section 44(i) of the *Constitution*, the vacancy should be filled in the usual way, namely by a special count of the ballots cast at the 2016 election. This is consistent with the approach taken by this Court in numerous cases including *Sykes v Cleary*,[27] *In Re Wood*,[28] *Re Culleton*[29], *Re Culleton [No 2]*[30], *Re Canavan*;[31] *Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* and *Re Nash [No 2]*.[32]

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[23] Paragraph [12] of the affidavit of Timothy Raphael Storer: **CB 245**.
[24] Paragraph [26] of the affidavit of Timothy John Courtney filed on 7 December 2017: **CB 27**.
[25] Ms Kakoschke-Moore wrote to the President of the Senate in the following terms: "*I received confirmation overnight that, pursuant to section 44 of the Constitution, I am dual Australian and British citizen and therefore ineligible to hold office. Accordingly, I tender my resignation from the Senate, effective immediately.*"
[26] See below, where the questions are set out.
[27] (1992) 176 CLR 77.
[28] (1988) 167 CLR 145.
[29] (2017) 91 ALJR 302.
[30] (2017) 91 ALJR 311.
[31] (2017) 91 ALJR 1209.
[32] (2017) 92 ALJR 23.

33. However, whilst apparently accepting that the special count is the appropriate mechanism to indicate who should fill the vacancy,[33] Ms Kakoschke-Moore contends that, despite being disqualified, she is nevertheless still eligible on the basis of a different interpretation of section 44(i) of the *Constitution.* Notwithstanding that this Court has only very recently pronounced on the proper interpretation of section 44(i) of *Constitution*, there is said to be support for another construction arising from:

33.1. the convention debates;[34] or

33.2. the structure of the *Constitution;*[35] or

33.3. considerations of representative government and party politics.[36]

Ms Kakoschke-Moore submits that these factors call for a very different interpretation of section 44(i) of the *Constitution* and therefore an alternative (and radical) approach to the conduct of the special count. In further support of such an approach, it is said that the facts of this case are not covered by the numerous recent (and some older) decisions of this Court, including *Re Culleton* and *Re Nash (No 2).*

34. Mr Storer submits that these submissions should be rejected. They call into question the approach taken by this court in numerous cases but, that aside, if accepted they would require a different result to have been reached in *Re Culleton, Re Canavan et all* (respecting Senators Ludlam and Waters) and *Re Nash (No 2).*[37] In Mr Storer's submission, the principles developed by this Court, and the procedures for filling vacancies having been "*carefully worked out in a significant succession of cases*",[38] the radical approach of Ms Kakoschke-Moore should not be accepted."

35. Further, Ms Kakoschke-Moore's submissions would require that a vacancy caused by section 44(i) disqualification be filled by the very same candidate whose disqualification caused the vacancy in the first place. Such a conclusion would not only be surprising, but would lead to confusion of principle and a complexity of application in a field of law which requires certainty and clarity. As this Court said in *Re Canavan et al*[39] at [47]-[48]:

> 47. Section 44(i) does not say that it operates only if the candidate knows of the disqualifying circumstance. It is a substantial departure from the ordinary and natural meaning of the text of the second limb to understand it as commencing:

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[33] See paragraph 56 of Ms Kakoschke-Moore's submissions.
[34] This was examined by this Court in numerous cases including *Re Day ; Re Culleton; Re Culleton (No 2)* and *Re Day (No 2).*
[35] This was also examined in *Re Day (No 2)* (2017) 91 ALJR 518.
[36] Another factor examined in *Re Day (No 2).*
[37] In *Re Culleton*, Mr Culleton's conviction had been annulled before the decision of the Court. In *Re Canavan et al*, Mr Ludlam and Ms Waters had already resigned their places in the Senate prior to the references by the President of the Senate to this Court. In respect of *Re Nash (No 2)*, Ms Hughes had resigned her office of profit on the day of the judgment delivered by this Court in *Re Nash*, and prior to the conduct of the special count.
[38] *Re Day (No.2)* (2017) 91 ALJR 518, 528 [47].
[39] *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* (2017) 91 ALJR 1209.

"Any person who:

(i) ... knows that he or she is a subject or a citizen ..."

[48] Further, to accept that proof of knowledge of the foreign citizenship is a condition of the disqualifying effect of s 44(i) would be inimical to the stability of representative government. **Stability requires certainty as to whether, as from the date of nomination, a candidate for election is indeed capable of being chosen to serve, and of serving, in the Commonwealth Parliament. This consideration weighs against an interpretation of s 44(i) which would alter the effect of the ordinary and natural meaning of its text by introducing the need for an investigation into the state of mind of a candidate.** [Emphasis added]

Power and Jurisdiction[40]

36. Section 376 of the *Electoral Act* confers jurisdiction on this Court to determine a question either:

36.1. Respecting the qualifications of a Senator or a member of the House of Representatives; or

36.2. Respecting a vacancy in either House of the Parliament;

if such question is referred by resolution to this Court as a Court of Disputed Returns.

37. In this case, on 28 November 2017, the President of the Senate referred[41] the following questions under section 376 of the *Electoral Act*:

(a) whether by reason of section 44(i) of the Constitution, there is a vacancy in the representation of South Australia in the Senate for the place for which Skye Kakoschke-Moore 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."

38. Section 360 of the *Electoral Act* sets out the powers of this Court sitting as a Court of Disputed Returns.[42] Relevantly, this Court has the power:

38.1. To declare that any person who was returned as elected was not duly elected;[43]

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[40] In respect of the powers and jurisdiction of the Court, the principles are clearly stated in numerous recent decisions of the Court including *Re Day* (2017) 91 ALJR 262 at [11]-[13]; *Re Culleton* (2017) 91 ALJR 302 per Gageler J at 304 [1] – [8]; *Re Nash (No 2)* (2017) 92 ALJR 23, 27 at [16]-[19].

[41] The President's Reference is at **CB 2**.

[42] Noting that section 360 of the *Electoral Act* expresses the enumerated powers therein as inclusive, ie., those powers "*...shall include the following*".

[43] Section 360(1)(v) of the *Electoral Act*. Mr Storer submits that whilst, in the usual case, where the member does not resign their place before the Reference, such an order would be required. However where, as here, the sitting member resigns their place because of section 44(i) disqualification, there would appear to be no utility in such a declaration.

38.2. To declare any candidate duly elected who was not returned as elected.[44]

Accordingly, pursuant to the power given to this Court in Section 360(1)(vi) this Court can order a special count to be conducted, and declare a person duly elected as indicated by the outcome of the special count. On the other hand, Ms Kakoschke-Moore was elected invalidly and, had she not resigned, it would have been open to this Court (as a matter of "*justice and sufficiency*"[45]) to declare that she was not 'duly elected' under section 360(1)(vi) of the Act. It is submitted that as a consequence of her disqualification and subsequent resignation, the power in section 360(1)(v) is not engaged.

39. In other words, it is submitted that neither the power in section 360(1)(v) nor the power in section 360(1)(vi) give this Court power to make orders that a disqualified candidate who was invalidly returned as elected and who has since resigned is now able to be re-elected.

Answers to the Issues Identified in [3]

40. Mr Storer therefore submits that this Court should answer the issues identified in paragraph [3] above as follows:

40.1. **Issue 3.1**: There is a vacancy in the Senate because, as a dual Australian and British citizen, Ms Kakoschke-Moore:

40.1.1. was never validly entitled to nominate for the 2016 election;

40.1.2. was never validly capable of being accepted as a candidate for the 2016 election;

40.1.3. was never validly capable of being returned as elected; and

40.1.4. was never entitled to take a seat in the Senate;

because at all times she was disqualified under section 44 of the *Constitution*;

40.2. **Issue 3.2**: Yes, because Ms Kakoschke-Moore's disqualification on citizenship grounds endures for all purposes related to the 2016 election. It is not open for Ms Kakoschke-Moore (who concedes she was disqualified under section 44(i) of the *Constitution* and who then resigned as a Senator), to be included in a special count because that would defeat the purpose and intent of a special count and would ignore the enduring nature of a section 44(i) disqualification. Further, it is not open for Ms Kakoschke-Moore to be included as a candidate because:

40.2.1. this Court has no power in section 360 of the *Electoral Act* to include Ms Kakoschke-Moore in the special count; and

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[44] Section 360(1)(vi) of the *Electoral Act*. Mr Storer says that such an order should ultimately be made in this case if, and only if, a special count identifies him as the next preferred candidate.

[45] *Sue v Hill* (1999) 199 CLR 462 per Gleeson CJ, Gummow and Hayne JJ at 486 para [44].

40.2.2. even if this Court has such power, it would not order that Ms Kakoschke-Moore be included on the facts of this case.

40.3. **Issue 3.3**: The fact that sitting member of the Senate chooses to resign her place before a reference is made under section 376 of the *Electoral Act* does not alter the manner in which that vacancy is to be filled. The act of resignation, and even any subsequent renunciation, cannot rescue or resolve a section 44(i) disqualification. In *Sykes v Cleary*, Mason CJ, Toohey and McHugh JJ said at 99-100:

> "The interpretation just rejected would, if it were upheld, enable a public servant who falls within par.(iv) in s.44 to avoid disqualification by resigning from the relevant office of profit after the polling day but before the declaration of the poll. The public servant could be nominated and stand for election and, if he or she secured a majority of votes, have an option to resign and be declared elected or not to resign and be disqualified. The adverse consequences this would have for the electoral process are an additional reason for rejecting the suggested interpretation. The inclusion in the list of candidates on polling day of a candidate who may opt for disqualification may well constitute an additional and unnecessary complication in the making by the electors of their choice. Furthermore, it is hardly conducive to certainty and speed in the ascertainment of the result of the election that it should depend upon a decision to be made by a candidate on or after polling day."

41. In addition, the inclusion of Ms Kakoschke-Moore in a special count would contradict the reasoning and result in a line of authority in this Court including *Sykes v Cleary*,[46] *In Re Wood*,[47] *Re Culleton*[48], *Re Culleton [No 2]*[49], *Re Canavan;*[50] *Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* and *Re Nash [No 2]*.[51]

42. The arguments advanced in Ms Kakoschke-Moore's submissions appear to be a variation of what this Court rejected in *In Re Wood*. The argument seems to be that, because this Court has not yet had the opportunity to formally declare her disqualified, this Court should proceed on the basis that she is not disqualified and therefore 'deemed' to have been validly elected. The mere fact that this Court has not yet had an opportunity to consider the matter does not alter the fact Ms Kakoschke-Moore was a dual citizen at all relevant times and that thereby she was and remains disqualified for all purposes related to the 2016 election.

43. This submission also ignores the outcome in *In Re Wood*. As this Court said in that case, the necessary rule preserving the validity of proceedings of the Senate cannot be applied by analogy to enable a disqualified candidate to claim they were validly elected until formally declared otherwise. In *In Re Wood* this Court said, at [14]:

> *"In Vardon v. O'Loghlin [1907] HCA 69; (1907) 5 CLR 201 (at p 208) Griffith C.J., speaking for the Court, said that when the election of a person returned as a senator is invalid –*

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[46] (1992) 176 CLR 77.
[47] (1988) 167 CLR 145.
[48] (2017) 91 ALJR 302.
[49] (2017) 91 ALJR 311.
[50] (2017) 91 ALJR 1209.
[51] (2017) 92 ALJR 23.

> *"the return is regarded ex necessitate as valid for some purposes unless and until it is successfully impeached. Thus the proceedings of the Senate as a House of Parliament are not invalidated by the presence of a senator without title.* ***But the application of this rule is co-extensive with the reason for it. It has no application as between the sitting senator and any other claimant for the place which he has taken, or as between him and the electors, by whom he was not in fact chosen."***
>
> *Or, it might be added,* ***"by whom he could not lawfully have been chosen"****.* [Emphasis added]

44. In short, it is apparent from the totality of Ms Kakoschke-Moore's submissions that the consequence of her submissions would be to create a retrospective fiction about her status as a citizen at relevant times, including the time of nomination,[52] the acceptance of nomination, the lodgment of group nominations and the return of the writ.[53] Further, for the reasons explained in *Sykes v Cleary* it is not open to a disqualified candidate to utilise the special count process by resigning their place and then seeking to be re-elected before this Court has had an opportunity to consider whether they were entitled to it in the first place.

45. In Mr Storer's submission, it follows that the special count should be conducted with both disqualified South Australian candidates, namely Mr Day and Ms Kakoschke-Moore (or any other disqualified candidate) excluded.[54]

True Results and Voter Intention

46. A further difficulty with Ms Kakoschke-Moore submissions is her claim that because she is now "*only an Australian citizen*"[55] unless she is included in the special count, this would "*distort*"[56] the "*true results of the polling*"[57] or "*voters' intentions.*"[58] The submission is misconceived insofar as it suggests that the "*true results of the polling*" means something other than what electors in fact did (i.e. as determined by the scrutiny in Part XXVIII of the *Electoral Act*) at the 2016 election. Secondly, such a submission ignores the fact that Ms Kakoschke-Moore was not legally chosen or capable of being chosen by the electors at the 2016 election. As this Court also said in *In Re Wood:*[59]

> *"Section 16 of the Constitution makes the qualifications prescribed by s.163 of the Act the qualifications "of a senator" and a constitutional requirement that senators possess those qualifications is thus created. The constitutional requirement is not satisfied by a de facto election and return of a candidate who does not possess the prescribed qualifications."*

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[52] In this case, 9 June 2016 and see paragraph [28] of the affidavit of Timothy John Courtney filed on 7 December 2017: **CB 24**.

[53] In this case, 4 August 2016 and see paragraph [36] of the affidavit of Timothy John Courtney filed on 7 December 2017: **CB 28**.

[54] This was the procedure ordered when Senator Gichuhi was elected in the seat which Mr Day formerly occupied and resigned after he became disqualified. On the argument sought to be advanced by Ms Kakoschke-Moore now, that procedure, and the election of Senator Gichuhi would be open to question.

[55] See: paragraph [75] of Ms Kakoschke-Moore submissions filed on 15 January 2017 (**Ms Kakoschke-Moore's submissions**).

[56] See paragraph [55] and [61] of Ms Kakoschke-Moore's submissions.

[57] See paragraph [79] Ms Kakoschke-Moore submissions.

[58] See paragraph [78] of Ms Kakoschke-Moore submissions.

[59] *In Re Wood* (1988) 167 CLR 145 at 162-163.

47. Ms Kakoschke-Moore was not chosen by the electors at the 2016 election because she was never eligible to be nominated.[60] It is not now open to her to suggest that a failure to include her in the special count for the 2016 election would lead to a failure to realise the "*true results of the polling*"[61] in that election. On the contrary, if the special count reveals that the electors chose Mr Storer, as the next candidate on the 'ticket', the inclusion of Ms Kakoschke-Moore as a candidate in the special count would distort the true legal effect of what voters did at the 2016 election.

48. The totality of Ms Kakoschke-Moore's submissions conflate the legal consequences of constitutional disqualification, namely the preclusion from participation in the 2016 election at all, with the unrelated fact that Mr Storer will not be a member of the party for which he received formal endorsement when the special count is conducted.[62] The answer to that submission is provided by the *Electoral Act* which establishes that, for the purposes of the particular election (here, the 2016 election), once accepted by the Commissioner, a candidate's endorsement by a political party is determined, once and for all, as at the close of nominations when the relevant party lodges a group nomination form.[63]

49. Insofar as Ms Kakoschke-Moore's submissions invite this Court to take into account matters which have occurred since the return of the Writ for the 2016 election, such an inquiry is not only irrelevant but also carries the risk that it requires this Court to inquire into political considerations and take into account factors such as party affiliation.

50. As an example, Ms Kakoschke-Moore's submissions raise the possibility that a person could seek to challenge the right of someone in the position of Senator Bernardi to continue to hold his place in the Senate because of his changed political allegiances. Such an application could not succeed because, despite his current political preferences, Senator Bernardi was validly elected at the 2016 election, and has not resigned, and is not otherwise precluded by any constitutional disqualifying factors. As Gageler J said in *Re Culleton*:[64] :

> "[42] I am not satisfied that the orders sought by Senator Culleton are necessary to be made in the reference proceeding to protect the efficacy of any determination or order which might be made in the exercise of the jurisdiction of the High Court that has been invoked by the reference from the Senate. If the Full Court were to determine that, by reason of s 44(ii) of the Constitution, Senator Culleton was disqualified from election at the time he was returned as a Senator on 2 August 2016, the subsequent events would be irrelevant. If the Full Court were to determine that, by reason of s 44(ii) of the Constitution, Senator Culleton was not disqualified from election when so returned as a Senator, nothing that has been done by Senator Parry by reference to subsequent events would affect the efficacy of that determination."

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[60] See: *Re Nash (No. 2)* (2017) 92 ALJR 23.
[61] See paragraph [78]-[79] of Ms Kakoschke-Moore's submissions.
[62] See Exhibit TJC-10 to the Affidavit of Timothy John Courtney filed on 15 December 2017 exhibiting the individual Candidate nominations for Mr Storer and Ms Kakoschke-Moore and the inclusion of both on the Group Nomination Form lodged by the NXT Party: **CB 161-170**.
[63] Here such a form was lodged and a copy is reproduced as Exhibit TJC-3 to the affidavit of Timothy John Courtney: **CB 42- 43**.
[64] (2017) 91 ALJR 302

51. In short, to give legal effect to what the voters did at the 2016 poll, Ms Kakoschke-Moore cannot now be included in a special count.

Time and Other Constraints Imposed by the Electoral Act

52. The provisions of the *Electoral Act* are also directly relevant to these questions. Section 156(1) fixes the day for the close of nominations as not less than 10 days nor more than 27 days after the date of issue of the writ. In this case, the date for the close of nominations was 9 June 2016.[65] At that time, Ms Kakoschke-Moore was a dual Australian and British citizen. Section 162 provides that "*No person shall be capable of being elected as a Senator or a Member of the House of Representatives unless duly nominated.*" Ms Kakoschke-Moore's submission would contradict this provision because she was never "duly nominated".

53. Similar considerations apply to sections 163, 166, 168 and 169(1) of the *Electoral Act* all of which apply to preclude Ms Kakoschke-Moore and any other Australian citizen from seeking inclusion as a candidate now. In short, because she resigned, Ms Kakoschke-Moore is now in no different position from any other person, including a stranger to this action.

Section 168(1) of the Electoral Act: Statutory Deeming of party endorsement

54. For the purposes of the *Electoral Act*, Mr Storer has the relevant NXT Party endorsement because he was a member of the NXT Party at the time of the 2016 election and was included in the group nomination accepted by the Electoral Commissioner.[66] It is not now open to Ms Kakoschke-Moore to submit otherwise given the mandatory terms of section 168(1) of the *Electoral Act.*

55. It is submitted that the expression "*shall be taken to have been*" in section 168(1) of the *Electoral Act* means that the relevant time for the determination of whether a person has an entitlement to receive party preferences is the close of nominations and the close of the polls in respect of that specific election.[67]

56. It also follows that, whether or not a person is still a member of a political party, or whether the circumstances under which a person was expelled from that party were in accordance with that party's rules, are irrelevant for the purposes of the *Electoral Act.* Given that in this case, the basis for the vacancy was disqualification as a consequence of section 44(i) of the *Constitution,* all that matters is whether a candidate was in the past (ie at the time of the acceptance of the Group Nomination[68]) someone endorsed by the relevant party and accepted as such by the Electoral Commission.

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[65] See the Writ which fixes this date: **CB 7**.
[66] Exhibit TJC-3 to the affidavit of Timothy John Courtney filed on 7 December 2017: **CB 41-43**.
[67] Though not necessary to decide in this case, different considerations might apply in the case of the death of candidate at material times as defined by the *Electoral Act*.
[68] See section 173 *Electoral Act*.

Requirements for Nomination

57. The submissions advanced by Ms Kakoschke-Moore would also render meaningless the significance of an end date for the registration[69] and declaration[70] of nominations by the Australian Electoral Officer. It would also mean that there is never an end point to elections or nominations.

Re Culleton and Re Nash (No 2) are not distinguishable and not plainly wrong

58. The case advanced by Ms Kakoschke-Moore is contrary to very recent decisions of this Court in *Re Culleton* and *Re Nash (No 2).* In the latter case, after the place for which Ms Nash was returned became vacant, and before any special count was conducted, Ms Hughes (who was identified by a special count as the next preferred candidate) resigned the office of profit which led to her preclusion from election. Despite that, it was held that she was ineligible regardless of her resignation despite the fact that the disqualification factor had been resolved prior to the special count being conducted. There is no material distinction to be drawn based on the facts of this case.

59. In *Re Culleton (No 2)*,[71] Mr Culleton had a disqualifying conviction and was thereby disqualified from nomination or election despite being returned. Even though that conviction was later annulled, that annulment did not render him not disqualified. The same result must follow in this case. Merely because Ms Kakoschke-Moore renounced her citizenship after the election, that renunciation does not render her retrospectively qualified when she was at all relevant times disqualified.

Part VI:Reply to Part VI of Ms Kakoschke-Moore's Submissions

Summary of Submissions[72]

60. In answer to paragraph [19] of Ms Kakoschke-Moore's submissions, it is not to the point to suggest that section 44 of the *Constitution* does not address the question of eligibility. That provision is about disqualification, not eligibility.

61. It is also obvious that the *Constitution* does not address in detail procedures for the filling of a vacancy; indeed, one would not expect that it would. That function is performed by the *Electoral Act*. The issue is therefore not whether the *Constitution* addresses party affiliation when addressing the filling of vacancies but whether disqualification endures for the entirety of the process of the 2016 election.

62. Paragraph [22] of Ms Kakoschke-Moore's submissions appears to confuse questions about voter intent and party affiliation with the unrelated question of constitutional disqualification. Regardless of whether the intention of the *Constitution* is to import considerations of party affiliation, those considerations cannot inform the proper construction of section 44(i) which deals with disqualification by foreign citizenship. It matters not, therefore, whether a candidate is affiliated with a political party; what matters, for the purposes of

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[69] Section 171 of the *Electoral Act*.
[70] Section 173 of the *Electoral Act*.
[71] (2017) 91 ALJR 311.
[72] Headings adopted from Ms Kakoschke-Moore's submissions.

disqualification, is whether that person with those affiliations also has foreign or dual citizenship and whether those features endured at the time of the commencement of the relevant election process.

63. As for paragraphs [23] and [24] of Ms Kakoschke-Moore's submissions, such an approach would contradict numerous decisions of this Court including: *Sykes v Cleary*,[73] *In Re Wood*,[74] *Re Culleton*[75], *Re Culleton [No 2]*[76], *Re Canavan;*[77] *Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* and *Re Nash [No 2]*.[78] The difficulty for Ms Kakoschke-Moore is demonstrated by the use of the descriptor '*disability*' when in fact what section 44(i) of the *Constitution* is addressing is disqualification. Ms Kakoschke-Moore is seeking to imply a temporal limit on the duration of her disqualification and to assert that the disqualification ceases retrospectively upon renunciation.

'The Convention Debates'

64. In answer to paragraphs [25] – [38] of Ms Kakoschke-Moore's submissions, the facts of this case do not properly raise any relevant ambiguity about the interpretation of section 44 of the *Constitution*. Principally, this is because Ms Kakoschke-Moore resigned her place in the Senate and therefore has rendered such questions otiose in this case.

65. However, in case it is considered relevant, Mr Storer submits that the decision of this Court in *Re Canavan*[79] determined the proper construction of section 44 of the *Constitution*, or at least those parts of it which might have any impact on this case. This Court observed that section 44 was an 'innovation' and yet was accepted as uncontroversial. See *In Re Canavan* at paragraph [35] where the Court said:

> "[35] The drafting history demonstrates that the adoption of s 44(i) in its final form was uncontroversial and that the differences between the text that emerged from the Convention in 1891 and the text that emerged from the Convention in 1898 cannot be attributed to any articulated difference in the mischief sought to be addressed by the disqualification it introduced. What the drafting history fails to demonstrate is that the mischief was exhaustively identified in the earlier reference to disqualification arising as a result of an "act" done by a person whereby the person became a subject or citizen, or entitled to the rights or privileges of a subject or citizen, of a foreign power. The earlier reference to an "act" was obviously drawn from the Imperial and colonial precedents. But the drafting history, beginning in 1891, cannot be treated as indicative of an intention on the part of the framers to cleave particularly closely to those precedents. The precedents were confined to vacating the place of a parliamentarian. Disqualification from being chosen as a parliamentarian was an innovation."

"The Text and Structure of the Constitution"

66. In answer to paragraphs [39] – [42] of Ms Kakoschke-Moore's submissions, Mr Storer submits that the only relevance arising from the structure of the constitutional provisions referred to is that, whilst section 15 was amended in 1977 to import

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[73] (1992) 176 CLR 77.
[74] (1988) 167 CLR 145.
[75] (2017) 91 ALJR 302.
[76] (2017) 91 ALJR 311.
[77] (2017) 91 ALJR 1209.
[78] (2017) 92 ALJR 23.
[79] (2017) 91 ALJR 1209.

questions of party affiliation (to avoid political controversy), the same cannot be said for section 44 of the *Constitution*. Had it been intended that section 44 would operate in the manner contended for now, it would have been open for that provision to have been amended in 1977 at the same time.

67. A further answer is that the alternative construction contended for would necessarily require this Court to inquire into questions concerning party affiliation. Such a conclusion would mean that section 44 of the *Constitution* could be interpreted differently depending on the conduct of the candidate in question.

68. The section 15 procedure only applies in circumstances where the vacating Senator was validly elected and therefore not otherwise disqualified under section 44 of the *Constitution*. A failure to recognise this distinction is what led to the corrective orders made by this Court in *In Re Wood*. There, until corrected by this Court, the Courts below wrongly dealt with a section 44 disqualification case as if it could be resolved by the casual vacancy procedure under section 15 of the *Constitution*. It is submitted that the same error besets the submissions advanced by Ms Kakoschke-Moore now.

69. It is obviously relevant that section 9 of the *Constitution* leaves it to Parliament to prescribe the means for choosing Senators. In this case, it has done so via the *Electoral Act* which must be applied in accordance with its terms, unless and until Parliament provides otherwise. By virtue of Ms Kakoschke-Moore's dual citizenship status at the relevant time, she cannot now avoid the consequences of section 44(i) of the Constitution, or meet the criteria in the *Electoral Act* which are mandatory statutory preconditions to valid eligibility for candidacy at the 2016 election.

The Authorities and 'special counts'

70. If the authorities have not considered the circumstances arising in this case it is because the language of section 44(i) and the provisions of the *Electoral Act* are sufficiently clear. The latter establishes a detailed procedure and set of preconditions which must be satisfied before one could nominate for an election and therefore be capable of becoming elected. At the same time, section 44 of the *Constitution* operates to establish an overriding precondition which must be met in all cases if the relevant candidate is even capable of lodging a nomination.

In Re Wood[80]

71. It is incorrect to suggest that *In Re Wood* did not deal with section 44 disqualification. As noted above, that case concerned a vacancy in the senate wrongly characterised as a casual vacancy. This Court identified the error and corrected the decisions below.

72. Moreover, 'disability' is not 'disqualification'. Disqualification for the purposes of section 44(i) is enduring (at least for the purposes of the election to which it relates), and cannot be deemed to never have existed.

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[80] (1988) 167 CLR 145.

Other distinguishable authorities

73. *Blundell v Vardon*[81]: It is not clear how it is said the decision in *Blundell v Vardon* is relevant to the facts of this case and, even if it is, how it can be said to be distinguishable on the basis explained in paragraph [57] of Ms Kakoschke-Moore's submissions. If anything, the reasoning of Barton J in that case about the significance of a special count supports the approach contended for by Mr Storer in this case.

74. *Sykes v Cleary*[82]: It is submitted that that decision does not assist Ms Kakoschke-Moore given that she is no longer a Senator and resigned her place on 22 November 2017.

75. *Re Culleton (No. 2)*[83]: It is submitted that this case is on all fours with the present case and contrary to the submissions by Ms Kakoschke-Moore. It applies on its facts because Mr Culleton, who had a relevant conviction, was still disqualified despite the conviction being later annulled. The same result must follow in this case. Merely because Ms Kakoschke-Moore renounced her citizenship after the election, that renunciation is not relevant to render her qualified when she was at all relevant times disqualified.

76. *Re Day (No. 2)*[84]: Even allowing for the observations made in paragraph [60] of Ms Kakoschke-Moore's submissions, the factors there referred to were held to be insufficient in that case to preclude the election of Ms Gichuhi and the same applies in the present case.

77. *Re Canavan*[85]: Regardless of whether any of the parties in that case put the submissions now being put by Ms Kakoschke-Moore, there is no proper basis upon which such a submission could have been put. Here, Ms Kakoschke-Moore resigned her place in the Senate because she recognised that she was not qualified and conceded she was not eligible.[86]

78. *Re Nash (No 2)*[87]: It is not clear from paragraph [64] whether it is claimed that Ms Hughes as opposed to Ms Nash was disqualified at the time the Order was made by this Court for a special count. Either way, it does not matter because both were disqualified pursuant to the provisions of section 44(i) of the *Constitution.*

79. The facts of this case do not involve or require "*extending the application of the reasoning in Nash (No. 2)*".[88]

Application to Ms Kakoschke-Moore

80. The issues defined in paragraphs [75] and [76] of Ms Kakoschke-Moore's submissions are incomplete. The question is not whether she is "*only an Australian*

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[81] (1908) 4 CLR 1463.
[82] (1992) 176 CLR 77.
[83] (2017) 91 ALJR 311.
[84] (2017) 91 ALJR 518.
[85] (2017) 91 ALJR 1209.
[86] See The Resignation letter: CB 292.
[87] (2017) 92 ALJR 23.
[88] Ms Kakoschke-Moore's submissions at [68].

citizen", a qualifying precondition, but rather whether, at the relevant times defined by the *Electoral Act*, she held concurrent British citizenship and was thereby disqualified. In other words, *Re Culleton* and *Re Nash (No 2)* establish that it does not matter whether a candidate meets the qualification criteria; what matters is whether they are otherwise disqualified by section 44 of the *Constitution*.

81. There is, of course, some relevance to Ms Kakoschke-Moore's renunciation of her foreign citizenship. It means that she is now not disqualified from nominating for the **next** election if she chooses to do so. This, however, does not mean that she is eligible to be reconsidered for the 2016 election for which she was disqualified and in respect of which she resigned her place.

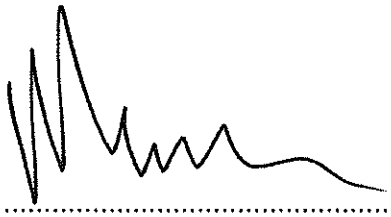
Part VII: Orders Sought

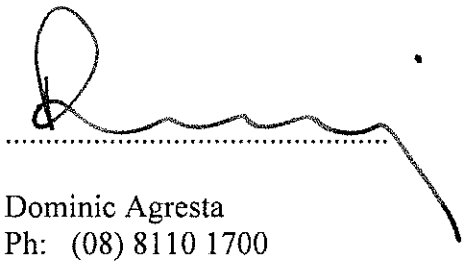
82. Mr Storer submits that there should be orders made in terms of paragraphs [1]- [6] of the summons filed by the Attorney General on 7 December 2017.

Part VIII:

83. It is estimated that 1 - 1½ hours will be required for the presentation of submission in reply on behalf of Mr Storer.

Dated: 22 January 2018





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