



HIGH COURT OF AUSTRALIA

6 December 2017

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 MS FIONA NASH

[2017] HCA 52

On 27 October 2017, the High Court sitting as the Court of Disputed Returns answered questions referred to it by the Senate under s 376 of the *Commonwealth Electoral Act* 1918 ("the Act") concerning the Hon Ms Fiona Nash. The answers given to the questions referred in that reference included answers to the effect that, by reason of s 44(i) of the Constitution, there was a vacancy in the representation of New South Wales in the Senate for the place for which Ms Nash was returned and that the vacancy should be filled by a special count of the ballot papers.

The candidate ascertained by the special count to be entitled to be elected to the place left unfilled by Ms Nash was Ms Hollie Hughes. By summons dated 7 November 2017, the Attorney-General of the Commonwealth sought an order that Ms Hughes be declared duly elected for that place. An affidavit was filed on behalf of Ms Hughes which raised an issue as to whether Ms Hughes was disqualified from being elected by reason of having been rendered "incapable of being chosen" by operation of s 44(iv) of the Constitution. The question of whether the order sought in the summons should be made was referred to the Full Court for consideration. On 15 November 2017, the High Court answered the question in the negative and dismissed the summons. Today the High Court published unanimous reasons for making those orders.

On 15 June 2017, Ms Hughes was appointed as a part-time member of the Administrative Appeals Tribunal ("the Tribunal") for a period of seven years commencing on 1 July 2017. She resigned from that position on 27 October 2017. There was no dispute that the position Ms Hughes held between 1 July and 27 October 2017 answered the description of an "office of profit under the Crown" within the meaning of s 44(iv) of the Constitution. The issue before the Court was whether holding that office during the discrete period between 1 July and 27 October 2017 rendered Ms Hughes "incapable of being chosen" as a senator.

The Court held that the position held by Ms Hughes rendered her "incapable of being chosen" under s 44(iv). Those words refer to the process of being chosen. The Court held that it is the Act which establishes the structure by which the choice by the people is to be made and the processes established by the Act do not end with polling. They are brought to an end only with the declaration of the result of the election and of the names of the candidates elected and they are not completed when an unqualified candidate is returned. Therefore, Ms Hughes was disqualified by operation of s 44(iv) of the Constitution from being elected as a senator for the State of New South Wales for the place for which Ms Nash was returned. Ms Hughes was disqualified because she held an office of profit under the Crown during a period in which Ms Nash's disqualification meant that the process of choice prescribed by the Parliament for the purpose of s 7 of the Constitution remained incomplete.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*