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

No. C17 of 2017

Re The Hon Ms Fiona Nash

Reference under s 376 of the *Commonwealth Electoral Act 1918* (Cth)

SUBMISSIONS OF THE AMICI CURIAE

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I Internet Publication

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

II Basis of Appearance

2. Pursuant to leave granted by Kiefel CJ on 26 September 2017, Senior Counsel appears as amicus curiae to act as a contradictor in law.

III Applicable Provisions

3. Section 44 of the Constitution relevantly provides that "Any person who ... holds any office of profit under the Crown ... shall be incapable of being chosen or of sitting as a senator..."

IV Argument

SUMMARY

4. The order sought by the Commonwealth Attorney-General in his summons filed on 7 November 2017 depends upon a construction of s 44 of the Constitution that would both fragment the process of "being chosen", contrary to the text of the section, and undermine bedrock principles of responsible government, contrary to the structure and purpose of the section and, indeed, the whole of the Constitution. Those principles of responsible government militate against a construction of s 44(iv) that would permit the holder of an office of profit under the Crown to enter the very continuing Parliament to which he or she was accountable in the prior capacity.

5. We advance three propositions. ***First***, it is necessary for the Court to determine Ms Hughes' eligibility, because the question cannot later be considered adequately or perhaps at all. ***Second***, a part-time member of the Administrative Appeals Tribunal (**AAT**) is a person who holds an office of profit under the Crown within the meaning of s 44. ***Third***, the process of "being chosen" extends continuously from the date of nomination until the electoral process concludes by the election of persons not incapable of being chosen. Alternatively, the process of being chosen includes the process by which the Senate refers to the Court of Disputed Returns, and the Court of Disputed Returns answers, questions concerning whether there is a vacancy in the Senate and how it ought to be filled as well as the actual filling of the vacancy.

FIRST PROPOSITION: NECESSARY, OR AT LEAST DESIRABLE, TO DETERMINE ELIGIBILITY

6. We understand that the Attorney-General does not submit that the Court should not determine the question of Ms Hughes' eligibility before deciding whether she should be declared duly elected. However, against the possibility that the Court requires persuasion of the appropriateness of that course, we make the following submissions.

7. If the Court were to declare Ms Hughes duly elected, the opportunities to raise any question concerning her eligibility, if those opportunities exist at all, would be much more limited than those which exist where a candidate is declared immediately after the poll. For this reason the Court should not make the declaration unless it is satisfied that Ms Hughes is eligible, at least to the extent of dealing with any issue that arises on facts properly before it.

No electoral petition under Div 1 of Pt XXII

8. One potential mechanism for challenging the qualifications of a senator is an electoral petition under Div 1 of Pt XXII of the *Commonwealth Electoral Act 1918* (Cth) (**CEA**). Parliament has conferred wide standing on candidates and electors to bring a petition (s 355(c)), but has imposed strict time limits on doing so (s 355(e)) which have long passed in the present case. Therefore, if Ms Hughes were to be declared duly elected now, she would enjoy an immunity from challenge compared to a candidate declared elected in the usual way. This circumstance is sufficient reason for the Court to determine the question of Ms Hughes' eligibility as part of the present reference.

9. The reasons in support of the Court determining the question of Ms Hughes' eligibility are amplified by the circumstance that there may be *no* opportunity at all for the question to be considered at a later time.

No determination by the Senate itself

10. While the Constitution initially provided for any question respecting the qualification of a senator to be determined by the Senate, the Parliament has since provided otherwise, as s 47 expressly contemplated it might. It is therefore at least doubtful that s 47 permits the Senate to determine such a question for itself. Current Senate practice appears to acknowledge that the Senate has no role to play in the determination of

such questions: *Odgers' Australian Senate Practice*, 14th ed (2016), pp.172-174; contra *House of Representatives Practice*, 6th ed (2012), p.135.

No common informer suit

11. Another potential mechanism for challenging the qualifications of a senator is an action brought under the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth). Whether that mechanism is available to determine the qualifications of a member of Parliament has not been authoritatively decided: see *Sue v Hill* (1999) 199 CLR 462 at [240]-[245] (McHugh J). The question is the subject of a proceeding to be heard by the Full Court on 12 December 2017: Matter No. S190/2017, Alley v. Gillespie. It appears that the Attorney-General's position in that matter may be that the mechanism is *not* available: *Alley v Gillespie* [2017] HCATrans 168 at lines 88-89 (Mr Lenehan), referring to "the possible jurisdictional issue". There is therefore real and substantial doubt whether a person declared duly elected by the Court could be subject to challenge in this way.

No Senate reference under Div 2 of Pt XXII

12. The remaining potential mechanism for raising any question concerning the qualifications of a senator is a reference of the question from the Senate to the Court of Disputed Returns under Div 2 of Pt XXII of the CEA. A declaration in a reference that a person is duly elected may preclude a further reference on the qualifications of that person.

13. Once a question is referred, the Court of Disputed Returns "shall thereupon have jurisdiction to hear and determine the question": s 376. The meaning of "Court of Disputed Returns" is affected by s 354(1), which provides that "The High Court shall be the Court of Disputed Returns..." Consistently with that prescription, the Court of Disputed Returns hearing a reference from the Senate is, constitutionally speaking, the High Court exercising additional original jurisdiction conferred under s 76 of the Constitution: *Sue v Hill* (1999) 199 CLR 462 at [28]-[30] (Gleeson CJ, Gummow and Hayne JJ), [130] (Gaudron J). When it "hear[s] and determine[s]" a question, it does so in the exercise of judicial power attracting normal principles of preclusion. The preclusive force of a determination under s 376 and order pursuant to s 360(1)(vi), is reinforced and strengthened by ss 368 and 374(ii), as applied by s 381, of the CEA. Section 374(ii) gives effect to the Court's declaration by providing that the person

declared duly elected "may take his or her seat accordingly". Section 368 provides that all decisions of the Court "shall be final and conclusive and without appeal, and shall not be questioned in any way".

14. *Waygood v James* (1869) LR 4 CP 361 concerned the effect of a decision upon a trial of an election petition where the applicable statute provided, similarly to s 368 of the CEA, that "such determination shall be final to all intents and purposes". Montague Smith J said that it was "exceedingly difficult to say after this express enactment that the determination of the judge, that Mr James was duly elected, can be in any way impugned ... The decision given on such inquiry is a decision *in rem*, and the intention of the act is expressed in very plain terms, that the determination of the judge upon it shall be final, and put an end to all further investigation into the election": at 369-371. Brett J said similarly that the determination that Mr James was duly elected "is a judgment upon the status of the person originally elected and is binding against all the world" and that the express provision for finality of the decision showed that the judgment "is not only to be binding as between the parties, but it is to be binding upon the House of Commons": at 372.

15. In 1907, the then Attorney-General, Littleton Groom, relied upon *Waygood v James* in his opinion to the effect that the decision of the Court of Disputed Returns in *Blundell v Vardon* (1907) 4 CLR 1463 was final and unaffected by the subsequent discovery that certain voting papers had not been, as was believed, destroyed: *Opinions of the Attorney-General of the Commonwealth 1901-14*, Opinion No. 291.

16. Consistently with that opinion, the present Attorney-General accepted in *Re Day*, when moving for a declaration that the person identified in the special count conducted pursuant to orders made in that case was duly elected, that it was "at least arguable that it would be difficult, if not impossible, to challenge [the] declaration of the Court" and that any argument against the person's eligibility "would appropriately be made" in answering a question in that reference that was in identical terms to Question (c) in the present reference, namely, "what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference": *Re Day* [2017] HCATrans 86 (19 April 2017) at lines 388-396. The relevant question in that case, Question (d), is set out in *Re Day (No 2)* (2017) 91 ALJR 518; (2017) 343 ALR 181; [2017] HCA 14 at [1].

17. The reason why the Court in that case did not consider the question of eligibility was that the party seeking to agitate that question had delayed in gathering the evidence necessary for the case to be heard, in circumstances where the Attorney-General himself had raised the issue some months earlier: *Re Day* [2017] HCATrans 86 at lines 810-818 and 851-863. That distinguishes *Re Day* from present circumstances both because the Attorney-General never raised any issue about Ms Hughes and because the necessary evidence was promptly adduced by Ms Hughes herself.

18. Under s 376 of the CEA, it is for the Senate to resolve upon the terms of the question that is to be referred to the Court. The terms of the question so referred delimit the jurisdiction that the Court "thereupon" has. The terms of the question so referred therefore also delimit the scope of what can be decided by the Court in the exercise of that jurisdiction and what may therefore be precluded from further consideration. To put the point another way, in the context of a reference under s 376, identifying the justiciable controversy or matter will require close attention to the terms of the question referred: Cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [139] (Gummow and Hayne JJ). Even then, "matter[s] of impression and of practical judgment" may bear upon identification of the scope of the matter: *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [140] (Gummow and Hayne JJ); *Fencott v Muller* (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan and Deane JJ).

19. In *In re Wood* (1988) 167 CLR 145 at 176, Mason CJ said that a challenge to the eligibility of the candidate identified in the special count in that case as being entitled to be declared duly elected was not within the terms of the reference in that case. That may suggest an acceptance that it is possible for the Court to declare a person duly elected without necessarily adjudicating any dispute about the person's qualifications for election (and hence without foreclosing later proceedings on that issue). But whether that is so will turn from case to case upon the terms of the question actually referred by the Senate. The questions referred in *In Re Wood* were materially narrower than those in the present case. They were, relevantly, whether there was a vacancy and, if so, "whether such vacancy may be filled by the further counting or recounting of ballot papers": *In Re Wood* (1988) 167 CLR 145 at 170. In contrast, the breadth of Question (c) in the present reference is sufficient to encompass the eligibility of the person identified by the special count, at least where the facts before the Court raise a question about eligibility. It therefore cannot be said with any

certainty that the order sought by the Attorney-General, if made, will not preclude the Senate from referring the question of Ms Hughes' eligibility to the Court.

No impediment to determination by the Court now

20. Finally, because Ms Hughes has appeared and placed before the Court facts raising a question about her eligibility, and because we have assumed the role of legal contradictor in the proceeding, there is no practical impediment to the Court resolving the question raised. It may be thought to be in the public interest for the question to be determined now, rather than hanging over Ms Hughes as she takes her seat.

Conclusion

21. For these reasons, it is necessary and desirable that the Court resolve the question of whether Ms Hughes is incapable of being chosen as a senator by reason of s 44(iv) of the Constitution.

SECOND PROPOSITION: OFFICE OF PROFIT UNDER THE CROWN

22. No restricted meaning should be given to the notion of an office of profit under the Crown: *Sykes v Cleary* (1992) 176 CLR 77 at 97 (Mason CJ, Toohey and McHugh JJ). Brennan J (at 108), Dawson J (at 130) and Gaudron J (at 132) relevantly agreed with Mason CJ, Toohey and McHugh JJ in relation to the construction and application of s 44(iv) and references hereafter will be to the plurality reasons only. Membership of the AAT is within the literal meaning of that phrase: it is an office which carries an entitlement to remuneration, to which appointment is made by the Governor-General, and which involves making decisions under statute as part of the executive arm of government.

23. The content of the concept is informed by the purposes the disqualification serves. Those purposes, as explained in *Sykes v Cleary*, include protecting against the impairment of a person's ability to fulfil either or both of his or her duties as a parliamentarian and as an office-holder (at 95-96). They also include both the protection of Parliament from the influence of the executive (at 95), and the protection of the public interest by excluding certain office-holders from "active and public participation in party politics" to ensure the political neutrality of the office (at 96). All of these considerations point to membership of the AAT, including part-time membership, being an office of profit under the Crown.

Incompatibility

24. It is inconceivable that a person could fulfil his or her duties as even a part-time member of the AAT simultaneously with his or her duties as a parliamentarian. Section 11 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) provides that an AAT member cannot undertake conflicting paid employment. The question of constitutional principle must, of course, be answered independently of this statutory provision, but the statutory provision informs an appreciation of the nature of the office in question and highlights the incompatibility of that office with membership of Parliament.

Executive influence

25. The duty of impartiality attaching to membership of the AAT, coupled with the independent determination of remuneration (s 9 of the AAT Act) and limited grounds on which appointment may be terminated (s 13 of the AAT Act), might suggest that there is a lower risk of executive influence in the case of an AAT member sitting in Parliament. There is, however, still an unacceptable risk. AAT members hold office for limited terms and are eligible for re-appointment: s 8 of the AAT Act. Apart from remuneration and termination dealt with in Part II of the AAT Act, AAT members hold office on terms and conditions determined by the Minister: s 8(7) of the AAT Act.

Political neutrality

26. The concern expressed in *Sykes v Cleary* about the political neutrality of the public service is even more acute in the case of AAT members, who are required faithfully and "impartially" to perform the duties of the office: s 10B and Sched 2 of the AAT Act. Those duties include, of course, reviewing government decisions.

Part-time appointment

27. An office of profit need not be a full-time office to attract the disqualification under s 44(iv). Indeed, s 44(iv) can be seen to be *primarily* concerned with part-time office holders who would otherwise have time to sit in Parliament.

Conclusion

28. For these reasons, a part-time appointment to the AAT is an office of profit under the Crown within the meaning of s 44(iv).

THIRD PROPOSITION: INCAPABLE OF "BEING CHOSEN"

29. We explain the preferred construction of the words "being chosen" by reference to the text, including the temporal and ambulatory connotations of the words, and by reference to structural and purposive considerations, principally the requirements of responsible government, but also subsidiary considerations about executive control of the composition of the Parliament and the proper conduct of a reference under s 376 of the CEA.

30. We then apply the construction to the agreed facts to show that Ms Hughes is incapable of being chosen as a senator.

Constitutional text: "being chosen"

Temporal connotation

31. The language of "being chosen" in s 44 refers to "the process of being chosen" and has a temporally extended connotation: *Sykes v Cleary* (1992) 176 CLR 77 at 100. An election "is not a single-day event but a process commenced by the issuing of the writs and concluded by their return", which must mean *effective* return, so that what is encompassed is "all the steps involved in between, to ensure that the sovereign citizenry are able to make a free, informed, peaceful, efficient and prompt choice of their legislators": *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027; (2016) 334 ALR 369; [2016] HCA 36 at [183] (Keane J). The "temporal focus for the purposes of s 44[] is upon the date of nomination as the date on and after which s 44[] applies until the completion of the electoral process": *Re Canavan* [2017] HCA 45 at [3] (The Court). Where a person who is incapable of being chosen is declared elected in the poll, the electoral process has not been completed: "the place has not been filled in the eye of the law for he lacked the qualifications to be elected" and the unfilled place "can be filled by completing the election after a recount of the ballot papers": *In Re Wood* (1988) 167 CLR 145 at 168 (The Court). An election, "in the eye of the law", thus remains uncompleted until the place is filled by a person who is not incapable of being chosen.

32. There is a single and continuous electoral process with which the process of "being chosen" referred to in s 44 is coterminous. If there were not, then significant uncertainty could be precipitated in circumstances such as the present when a vacancy is required to be filled. For example, what if Ms Hughes had not yet resigned? What

if the person identified by a special count was in the process of renouncing a foreign citizenship, or being sentenced, or being discharged from bankruptcy, or divesting himself or herself of a prohibited pecuniary interest? Is the relevant cut-off time the moment of the declaration that the person is duly elected? Is it the moment when the summons seeking that declaration is moved upon? Is it the report of the special count? Is it the physical carrying out of the special count, including the point at which any choice under ss 273 and 274 of the CEA is to be exercised? Or is it the order that there be a special count? Is it the determination that a vacancy exists and needs to be filled? Or is it the reference of the question whether there is a vacancy and how it should be filled? And if it is the reference of the question, is it the date of the resolution to refer the question under s 376 of the CEA or is it the date of the transmission of the reference under s 377 of the CEA, noting that those dates might (as in the present case) be different?

33. In truth, the infinite fragmentation of the electoral process into its many constituent steps, carried out by multiple actors in the scheme, is neither required nor permitted. The words "being chosen" refer to the entire process, as indeed the consistent statements of the Court in *In Re Wood*, and then *Sykes v Cleary*, and most recently *Re Canavan*, as referred to above, all contemplate.

Ambulatory connotation

34. Consistent with its temporally extended connotation, the language of "being chosen" also has an ambulatory connotation, in that it refers at different times to different manifestations of the process of choosing for which provision is made under the Constitution and under legislation that is expressly contemplated by the Constitution. There is no reason to think that the word "chosen" has a different meaning in different provisions of the Constitution, and there is therefore a "direct[] link[]" between the language of s 44 and s 7: *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027; (2016) 334 ALR 369; [2016] HCA 36 at [317] (Gordon J). There is the same direct link between s 44 and s 15.

35. The overarching process, provided for in s 7, has as its end point the composition of the Senate by senators directly chosen by the people of the State. That overarching process extends to include the expressly "contemplate[d] legislative action" to carry it into effect: *McCloy v New South Wales* (2015) 257 CLR 178 at [42] (French CJ,

Kiefel, Bell and Keane JJ); *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027; (2016) 334 ALR 369; [2016] HCA 36 at [158] (Keane J). By section 9, the Constitution confers power on the Parliament to make laws prescribing the method of choosing senators. "Method" is "a constitutional term to be construed broadly allowing for more than one way of indicating choice within a single uniform system": *Day v Australian Electoral Officer for the State of South Australia* (2016) 90 ALJR 639; (2016) 331 ALR 386; [2016] HCA 20 at [44] (The Court). The reference to "being chosen" in s 44, insofar as it covers the choice by the people mandated by s 7, should be construed as extending to cover the validly prescribed method of choice expressly contemplated by s 9.

36. Equally, ss 47 and 51(xxxvi) of the Constitution contemplated that the Parliament would have power to make laws with respect to any question respecting the qualification of a senator or respecting a vacancy in the Senate. To the extent that that legislative power authorises prescription of a method for choosing a senator to fill a vacancy in the Senate, the words "being chosen" in s 44 are apt to refer also to that choice.

37. A second and distinctive manifestation of the process of choosing, as provided for in s 15 of the Constitution (both at Federation and since that section was altered in 1977), is the choice by the Houses of Parliament of the State of a person to hold the place of a senator which becomes vacant before the expiration of the term of service. Emphasising the careful use of the word "chosen" in that section is the repeated juxtaposition of the process of "choosing" by the State Parliament with temporary "appointment" by the Governor when the Parliament is not in session.

38. The intersection of ss 15 and 44 makes clear that the reference to "being chosen" in s 44 cannot be limited to being chosen by the people, or to a particular stage in the process by which the choice of the electors is effected. Once that is appreciated, there is no textual reason why the reference to being chosen in s 44 should not apply to all forms of institutional choice that may be prescribed in order to implement the constitutional design for choice by the people, including choice by or in accordance with the orders of the Court of Disputed Returns.

39. In this regard, it is relevant to note that the prescribed method of choice is not exhausted by the casting of ballot papers on or around polling day. That is, it would

not be correct to say that once the polling is concluded, the relevant choice has already been made and all that remains is to ascertain that choice. In particular, the rules for the scrutiny of votes contemplate situations in which there is, in effect, a tie between two candidates at some decision-point in the process of vote-counting. In these situations, provision is made for choice by the Australian Electoral Officer for the relevant State (in the case of Senate elections) or the Divisional Returning Officer (in the case of House of Representatives elections): see ss 273(17), 273(22), 273(31)(b), 274(7AB) and 274(9) of the CEA; cf s 274(9C) of the CEA. The provisions in s 273 for resolving ties must be observed in any computerised scrutiny under s 273A: s 273A(5). These rules applied to the special count conducted in this case by reason of the orders made by Gageler J on 2 November 2017 on the Attorney-General's application. They were in fact engaged: Affidavit of Warwick James Austin affirmed on 6 November 2017 at [9].

Constitutional structure and purpose: parliamentary control of the executive

40. The principles of responsible government are "part of the fabric on which the written words of the Constitution are superimposed": *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393 at 413 (Isaacs J). Those principles "encompass the means by which Parliament brings the Executive to account so that the Executive's primary responsibility in its prosecution of government is owed to Parliament": *Egan v Willis* (1998) 195 CLR 424 at [42] (Gaudron, Gummow and Hayne JJ). Parliament's concomitant constitutional responsibility is to scrutinize Ministers for their own conduct and that of their departments. These principles of responsible government "can be discerned in numerous constitutional requirements": *Williams v Commonwealth* (2012) 248 CLR 156 at [509] (Crennan J). That is because the Constitution is "permeated through and through with [its] spirit": *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 147 (Knox CJ, Isaacs, Rich and Starke JJ).

41. The principles can be discerned in, among other provisions, s 44. In *Re Day (No 2)* (2017) 91 ALJR 518; (2017) 343 ALR 181; [2017] HCA 14 at [50], Kiefel CJ, Bell and Edelman JJ referred to the likelihood that the intrusion of personal financial interests proscribed by s 44(v) would render "difficult or even ineffective"

Parliament's "important functions to question and criticise government on behalf of the people and to secure accountability of government activity".

42. Similarly, s 44(iv) is directed to eliminating or reducing the "principal mischief" of executive influence over Parliament: *Sykes v Cleary* (1992) 176 CLR 77 at 97. There are grave risks to responsible government, both real and perceived, in permitting the holder of an office of profit under the Crown to shed that office and enter the very Parliament — that is, the ongoing Parliament not yet dissolved — to which they were themselves accountable. The risks arise in relation to entering the Parliament as a result of a court-ordered special count (as in this case), but also in relation to entering the Parliament as a result of a casual vacancy (although it is not necessary to decide that point in this case).

43. There is both a real and a perceived risk that the former holder of an office of profit under the Crown, at least if they have resigned only during the life of the Parliament that they seek to enter, will be insufficiently independent to discharge the bedrock responsibility of supervising the executive. The proper discharge of their constitutional responsibilities will require them fearlessly to "question and criticise government on behalf of the people" and to "watch and control the government [by] throw[ing] the light of publicity on its acts": *Egan v Willis* (1998) 195 CLR 424 at [42] (Gaudron, Gummow and Hayne JJ). They will have to exercise this vigorous level of scrutiny and discipline over individuals who were previously their colleagues and perhaps even their bureaucratic superiors. Indeed, perhaps the clearest illustration of the risk is the spectre of a person formerly answerable to a Minister (say a departmental employee or even a ministerial adviser) entering the ongoing Parliament and thereby being required and expected to supervise that same Minister.

44. The mere perception that such a person might be incapable of discharging his or her responsibilities with all necessary vigour is corrosive of the principles of responsible government. Section 44(iv) does not permit it.

45. The risks are not confined to the public service or to "statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature": *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561 (The Court). Take, for example, the AAT, which is "not linked into the chain of responsibility from Minister to government to parliament": *Re Drake*

and Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 634 at 644 (Brennan J). Nonetheless, AAT members can be removed from office by the Governor-General upon an address from each House of Parliament: s 13 of the AAT Act. AAT members are, in that somewhat attenuated sense, subordinate to, accountable to, and supervised by the Parliament. A former member of the AAT who enters Parliament will be required to exercise that high constitutional responsibility over his or her former colleagues and possibly senior colleagues.

46. Of course, allowance must be made for the competing requirement, inherent in the system of representative and responsible government and reflected especially in ss 16 and 34, that there be wide opportunity for participation in Parliament: that is, the "constitutional imperative" that no qualified person be "irremediably disqualified" (except perhaps if attainted by treason): *Re Canavan* [2017] HCA 45 at [13], [19], [43], [72] (The Court). It would be inconsistent with that constitutional imperative to insist that no person who had ever held an office of profit under the Crown could enter Parliament, and s 44 does not so provide. That constitutional imperative is reconciled to the competing imperatives of responsible government by the words "being chosen", which refer to the process of being chosen *for a particular Parliament*. The periodic dissolution of the Houses of Parliament, as required by ss 7, 12 and 28 of the Constitution, is the mechanism by which the two imperatives are balanced and reconciled. Thus, the informed choice of the people in the electoral process permits the former holder of an office of profit to enter the Parliament despite the risks adverted to above. In circumstances such as the present, however, the people do not have the opportunity to exercise their choice informed by any knowledge of the candidate's holding of an office of profit under the Crown.

47. The foregoing considerations of responsible government have salience in this case in at least two respects. First, they point to the preferred construction of the words "being chosen" as referring to a continuous process of being chosen that might well extend throughout the life of a Parliament and that encompasses the filling of vacancies that might be declared (as by the Court) or that might arise (as casual vacancies). Secondly, they answer arguments that might be put to the effect that it would be a harsh outcome for a person, who did not know that they should have been elected, to be disqualified by reason of them having accepted an office of profit before the error was identified. Section 44 is concerned with systemically important

constitutional structures and principles which transcend the personal interests of individual members or candidates. In truth, there is no injustice in closing any revolving door sought to be opened between the Executive and the Parliament.

48. For completeness we observe that the considerations of responsible government are most clearly engaged by paragraphs (iv) and (v) of the s44, and not as obviously engaged by paragraphs (i), (ii) and (iii). However, the words "being chosen" must be construed in a way that is appropriate for them to operate in relation to all of the paragraphs in s 44, including (iv) and (v). There is nothing in the text or subject-matter, scope or purpose of paragraphs (i), (ii) and (iii) which suggest that the construction we propose is not appropriate or is unworkable in connection with those disqualifications. On the other hand, the construction seemingly advanced by the Attorney-General is inconsistent with the purposes of paragraphs (iv) and (v).

Other purposive considerations

49. Another reason to treat any period of the Court of Disputed Returns' consideration of a reference from the Senate (or a petition) as part of the process of "being chosen" is that the executive could wield influence over its officers during that period in an attempt to control the ultimate composition of Parliament. For example, imagine that after an election the executive government were to appoint multiple unsuccessful candidates to offices of profit under the Crown. While the Court of Disputed Returns is seized of a reference (or a petition) that might result in a special count being conducted, the executive government could influence its officers to resign or not to resign (by inducements or otherwise) and thereby influence which candidates become and which do not become eligible to fill any vacancy that may result from the court proceedings. That vice does not arise on our construction of s 44.

50. A further consideration is that interested persons, including electors in an appropriate case, may be allowed to be heard on the hearing of a reference: s 378 of the CEA. It would be undesirable for the eligibility of any candidates who might fill a vacancy declared by the Court to be contingent upon their possible future decisions to resign from an office of profit. The Court, and persons who might be entitled to be heard, should not have to proceed in a reference from Parliament in the shadow of candidates who "may opt for disqualification": cf *Sykes v Cleary* (1992) 176 CLR 77 at 100. This consideration applies in relation to all the paragraphs of s 44.

Application to the facts

51. On our construction of s 44, Ms Hughes held an office of profit under the Crown during the course of the process of choosing Senators for New South Wales with which this reference is concerned. She is therefore "incapable of being chosen", within the meaning of s 44, by that process.

52. If, contrary to our primary submission that the process of being chosen is a single and continuous process, there can be discrete periods of time in which the process is engaged or not engaged, then we submit that Ms Hughes is incapable of being chosen by reason of having held an office of profit under the Crown on and between the following dates:

(a) 4 and 5 September 2017, being the dates on which the Senate resolved to refer to the Court, and then transmitted to the Court, questions concerning the vacancy in the place for which Ms Nash was returned; or

(b) 27 October 2017, being the date on which the Court determined that there was a vacancy and that the vacancy should be filled by a special count of the ballot papers.

53. In relation to 27 October 2017, it is common ground that Ms Hughes tendered her resignation on that day after the Court's decision was announced: Statement of Agreed Facts at [20]-[21]. The effect of s 15(2) of the AAT Act is that Ms Hughes' resignation took effect "on the day" of 27 October 2017. No special provision is made for the time at which, on that day, the resignation is taken to have been effective (as, for example, there is special provision in the *Acts Interpretation Act 1901* (Cth) for the commencement of a statute "at the start" of the day on which it commences (s 3) and for the attainment of a particular age "at the commencement" of the birthday (s 37A)). In the absence of any such special provision, there is no reason to treat the resignation as anything other than having been effected after the Court's decision.

CONCLUSION

54. For the foregoing reasons, Ms Hughes is incapable of being declared duly elected as a senator.

V Orders Sought

55. The question stated for the consideration of the Full Court should be answered as follows:

Question:

Should the order sought by the Attorney-General of the Commonwealth in the summons filed on 7 November 2017 be made?

Answer:

No.

VI Estimate of Time

10 56. We seek up to 1½ hours for the presentation of oral argument.

Date: 13 November 2017

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Amici Curiae