HIGH COURT OF AUSTRALIA

GAGELER J

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 RODNEY NORMAN CULLETON

Re Culleton
[2017] HCA 3
31 January 2017
C15/2016

ORDER

1. *The summons filed by Senator Culleton on 12 January 2017 is dismissed.*

2. *The costs of the summons are excluded from such order as may be made to the effect that Senator Culleton's costs of the proceeding on the reference be paid by the Commonwealth.*

Representation

P E King with P W Lithgow appearing on behalf of Senator Rodney Norman Culleton (instructed by Maitland Lawyers)

N J Williams SC with B K Lim appearing on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

No appearance for the President of the Senate, Senator the Hon Stephen Parry

CATCHWORDS

Re Culleton

Constitutional law (Cth) – Judicial power – Election of Senator – Validity – Court of Disputed Returns – Power to hear petition – Whether non-judicial – Constitution, Ch III – *Commonwealth Electoral Act* 1918 (Cth), Pt XXII, Div 2.

Practice and procedure – High Court of Australia – Failure to raise argument at hearing – Principles applicable – Validity – *Commonwealth Electoral Act* 1918 (Cth), Pt XXII, Div 2.

Constitution, ss 44(ii), 44(iii), 45, 47.
Commonwealth Electoral Act 1918 (Cth), Pt XXII.

1 GAGELER J. Subject to the Constitution, including the constraints of Ch III of the Constitution, s 51(xxxvi) read with s 47 of the Constitution confers power on the Commonwealth Parliament to make laws with respect to any question respecting the qualification of a Senator or Member of the House of Representatives and any question of a disputed election to either House. The Parliament has exercised that power in the enactment of Pt XXII of the *Commonwealth Electoral Act* 1918 (Cth), under which the High Court, designated by s 354(1) as the Court of Disputed Returns, is conferred with original jurisdiction under s 76(i) of the Constitution. Within Pt XXII, Div 1 is concerned with questions of disputed elections and Div 2 is concerned with questions respecting the qualifications of a Senator or Member of the House of Representatives.

2 The jurisdiction conferred on the Court of Disputed Returns by Div 2 of Pt XXII of the *Commonwealth Electoral Act* is as stated in s 376. That section provides:

> "Any question respecting the qualifications of a Senator or of a Member of the House of Representatives or respecting a vacancy in either House of the Parliament may be referred by resolution to the Court of Disputed Returns by the House in which the question arises and the Court of Disputed Returns shall thereupon have jurisdiction to hear and determine the question."

3 Section 377 provides:

> "When any question is referred to the Court of Disputed Returns under this Part, the President if the question arises in the Senate, or the Speaker if the question arises in the House of Representatives, shall transmit to the Court of Disputed Returns a statement of the question upon which the determination of the Court is desired, together with any proceedings, papers, reports, or documents relating to the question in the possession of the House in which the question arises."

4 Under s 378 the Court of Disputed Returns may allow any person who in its opinion is interested in the determination of any question referred to it to be heard on the hearing of the reference and any person allowed to be heard or so directed to be served is deemed to be a party to the reference.

5 Section 379 provides:

> "On the hearing of any reference under this Part the Court of Disputed Returns shall sit as an open Court and shall have the powers conferred by section 360 so far as they are applicable, and in addition thereto shall have power:

(a) to declare that any person was not qualified to be a Senator or a Member of the House of Representatives;

(b) to declare that any person was not capable of being chosen or of sitting as a Senator or a Member of the House of Representatives; and

(c) to declare that there is a vacancy in the Senate or in the House of Representatives."

6 Section 360, to which s 379 refers, is located within Div 1. Section 360 confers a range of powers on the Court of Disputed Returns. They include "[t]o declare that any person who was returned as elected was not duly elected", "[t]o declare any candidate duly elected who was not returned as elected", and "[t]o declare any election absolutely void".

7 Section 380 provides:

"After the hearing and determination of any reference under this Part the Chief Executive and Principal Registrar of the High Court shall forthwith forward to the Clerk of the House by which the question has been referred a copy of the order or declaration of the Court of Disputed Returns."

8 Section 381 makes certain other provisions of Div 1 applicable to proceedings on a reference to the Court of Disputed Returns under Div 2. Those provisions include s 368, which provides that "[a]ll decisions of the Court shall be final and conclusive and without appeal, and shall not be questioned in any way", and s 374, which provides:

"Effect shall be given to any decision of the Court as follows:

(i) If any person returned is declared not to have been duly elected, the person shall cease to be a Senator or Member of the House of Representatives;

(ii) If any person not returned is declared to have been duly elected, the person may take his or her seat accordingly;

(iii) If any election is declared absolutely void a new election shall be held."

9 The Full Court of the High Court, sitting as the Court of Disputed Returns, held in *In re Wood*[1] that it is open to the Senate under Div 2 of Pt XXII to refer to

---

1 (1988) 167 CLR 145 at 162; [1988] HCA 22.

the Court of Disputed Returns a question respecting a vacancy in the place of a Senator who allegedly lacked the qualifications of a Senator at the time of his election or return or was allegedly then disqualified from being chosen as a Senator, and that the Court has jurisdiction to determine the question referred notwithstanding that it may involve a decision as to whether the Senator was duly elected and whether the purported election of the Senator was void. The Full Court in that case answered questions referred by the Senate to the effect that there was a vacancy in the representation of a State in the Senate for the place for which a named Senator was returned and that the vacancy was able to be filled by the further counting or recounting of ballot papers cast for candidates for election for Senators for that State at the election[2]. Having so answered the questions, the Full Court adjourned the proceeding on the reference, following which Mason CJ in the same proceeding made consequential orders under s 360, first directing the Australian Electoral Officer for the State to undertake further counting and recounting of the ballot-papers cast at the election for the purpose of determining the candidate entitled to be elected to the place for which the named Senator was returned and to report to the Court as to the candidate identified so entitled to be elected, and ultimately declaring the candidate so identified to be duly elected as a Senator for the State for the place for which the named Senator was returned[3].

10 Conformably with the approach in *In re Wood*, the Senate, by resolution dated 7 November 2016, referred a number of questions to the Court of Disputed Returns under Div 2. A statement of the questions on which the determination of the Court was sought was transmitted by the President of the Senate, Senator Parry, in a letter addressed to the Principal Registrar of the High Court on 8 November 2016. In the form in which they were stated in that letter, the questions referred by the Senate were as follows:

> "(a) whether, by reason of s 44(ii) of the Constitution, or for any other reason, there is a vacancy in the representation of Western Australia in the Senate for the place for which Senator Rodney Norman Culleton 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

---

2 (1988) 167 CLR 145 at 169-170.

3 (1988) 167 CLR 145 at 171-172, 175.

(d) what, if any, orders should be made as to the costs of these proceedings."

11 There was also transmitted to the Principal Registrar of the High Court, as evidence of the apparent basis on which the reference was made, an attachment to a letter from the Attorney-General, Senator Brandis QC, to the President of the Senate dated 6 November 2016. The attachment was headed "Statement of Facts - Senator Culleton matter" and was in the following terms:

> "On or about 2 March 2016, Rodney Culleton was, in his absence, convicted in the NSW Local Court in Armidale, of larceny under s 117 of the *Crimes Act 1900* (NSW), which carries a maximum sentence of five years' imprisonment.
>
> On 10 June 2016, he nominated as a candidate for the Senate to represent the State of Western Australia in the Commonwealth Parliament. The polling day for the election was 2 July 2016, and he was on 2 August declared to have been elected.
>
> On or about 8 August 2016, Senator Culleton's conviction for larceny was annulled under the *Crimes (Appeals and Review) Act 2001* (NSW).
>
> On or about 25 October 2016, Senator Culleton pleaded guilty to the charge, and the Magistrate found the charge proven but dismissed it under the *Crimes (Sentencing Procedure) Act 1999* (NSW)."

12 On 21 November 2016, French CJ allowed Senator Culleton and the Attorney-General each to be heard on the reference, by reason of which they were deemed to be parties. Having heard from Senator Culleton and the Attorney-General, his Honour ordered that the reference be referred to a Full Court for hearing. His Honour also made orders which included the following:

> "Question (a) of the questions referred by the Senate to the Court of Disputed Returns on 7 November 2016 shall be read as referring to s 44(ii) only and not any other reason for the vacancy referred to in that paragraph."

13 Section 44(ii) of the Constitution, in so far as is relevant, provides that a person who "has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer … shall be incapable of being chosen or of sitting as a senator".

14 The reference was heard by a Full Court of five Justices on 7 December 2016. At issue in that hearing was the effect, if any, of s 44(ii) on the election to the place for which Senator Culleton was returned as a Senator for Western Australia on 2 August 2016 as a result of his conviction on 2 March 2016 in the

Local Court of New South Wales of an offence for which he was liable when brought before that Court to be sentenced to imprisonment for up to two years, a conviction which the Local Court later annulled by order made on 8 August 2016 under s 8 of the *Crimes (Appeal and Review) Act* 2001 (NSW).

15 At the conclusion of the hearing, the Full Court reserved its decision. In the ordinary course, it might reasonably be expected that the Full Court would deliver its decision by making an order in open court which answers each of the questions referred, and that the Full Court would endeavour to do so before 7 February 2017, the next date on which the Senate is scheduled to meet.

16 On 12 January 2017, Senator Culleton filed a summons in the reference proceeding. In accordance with a timetable set by directions made on 19 January 2017, that summons has been heard by me this morning. As on the hearing by the Full Court of the questions referred, Senator Culleton was represented on the hearing of the summons by Mr Peter King with Mr Peter Lithgow. The Attorney-General was represented by Mr Neil Williams SC with Mr Brendan Lim.

17 The Attorney-General argued for dismissal of the summons. Senator Culleton argued that some of the orders sought by the summons should be made today. He sought directions designed to facilitate the hearing of argument about the making of other orders at a later date.

18 The orders which Senator Culleton seeks by the summons can be divided substantially into two categories. Those two categories are best identified and dealt with separately.

19 The first category of orders is concerned to raise a belated challenge to the jurisdiction of the High Court sitting as the Court of Disputed Returns to hear and determine the questions referred. Senator Culleton seeks a declaration that Div 2 of Pt XXII of the *Commonwealth Electoral Act* is invalid either in whole or to the extent it authorised the referral of the questions which were the subject of the Senate resolution of 7 November 2016. He also seeks an order staying the further conduct of the reference proceeding.

20 By seeking that first category of orders, Senator Culleton in effect applies to reopen the hearing which was concluded before the Full Court on 7 December 2016 to raise a wholly new argument. Reopening to raise a new argument is something not lightly to be done even if the new argument sought to be raised on reopening is constitutional.

21 In *University of Wollongong v Metwally (No 2)*[4], six Justices of the High Court said:

> "It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so."

22 *Metwally (No 2)* was a case in which an application to reopen was made after orders had been pronounced and perfected. The observation applies with somewhat diminished force in a case where a hearing has been conducted by a Full Court of the High Court and where judgment is reserved, but the policy expressed in the observation remains applicable even then.

23 To justify reopening, exceptional circumstances must be shown. Orderly conduct of any proceeding in the High Court requires that all substantial issues be identified in advance of any hearing before the Full Court. The "first duty" of any court always being to be satisfied as to its own jurisdiction, to use the language of Griffith CJ in *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd*[5], if a jurisdictional issue is to be raised at all in this Court, it is of the utmost importance that it be raised at the earliest available opportunity. In the event of an arguable constitutional issue being raised, the procedure of the High Court is also affected by the specific statutory requirement that timely notice is to be given to the Attorney-General of the Commonwealth and the Attorneys-General of each of the States and Territories in accordance with s 78B of the *Judiciary Act* 1903 (Cth).

24 The new argument sought to be raised by Senator Culleton being a constitutional challenge to the jurisdiction of the High Court as the Court of Disputed Returns, I would nevertheless consider it appropriate at least to refer the issue of whether or not to consider that argument to the Full Court if I thought the argument to be sufficiently strong to warrant that course. I do not.

25 The new argument which Senator Culleton seeks to raise is an argument to the effect that conferral of jurisdiction by Div 2 of Pt XXII contravenes Ch III of the Constitution by purporting to confer on the High Court a power to give an advisory opinion in contravention of the limitation on the judicial power of the Commonwealth recognised in *In re Judiciary and Navigation Acts*[6]. The

---

4 (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71; [1985] HCA 28.

5 (1911) 12 CLR 398 at 415; [1911] HCA 31.

6 (1921) 29 CLR 257; [1921] HCA 20.

argument, if sound, would mean that the result in *In re Wood* was wrong and that the orders made in the proceeding on the reference in that case were without jurisdiction.

26 The argument, in my firm opinion, is misconceived. *In re Judiciary and Navigation Acts* does not mean that the judicial power of the Commonwealth can only be exercised in respect of a controversy between parties. It does not mean that the subject-matter of an exercise of the judicial power of the Commonwealth cannot be couched in the form of a question. The joint judgment of five Justices in *Mellifont v Attorney-General (Q)*[7] rather explained the critical passage expressing the holding in *In re Judiciary and Navigation Acts*[8] as containing two critical concepts: "One is the notion of an abstract question of law not involving the right or duty of any body or person; the second is the making of a declaration of law divorced or dissociated from any attempt to administer it".

27 Div 2 of Pt XXII exhibits neither of those problematic characteristics. An answer given by the Court of Disputed Returns to a question referred by the Senate respecting the qualifications of a Senator or a vacancy in the Senate is not an answer to an abstract question of law and is not given in circumstances divorced from an attempt to administer the law as stated in that answer. The answer is determinative of the status of the Senator whose qualifications might be in issue, and of the obligations of those having duties to perform to fill such vacancy as might be determined by such an answer to exist.

28 The questions referred to the Court of Disputed Returns by the Senate on 8 November 2016, if answered adversely to Senator Culleton in the manner for which the Attorney-General contended in the hearing before the Full Court, would conclusively determine that, by reason of s 44(ii), there is a vacancy in the Senate for the place for which Senator Culleton was returned. By those answers, the Full Court would go on in the judicial administration of the law to determine that the vacancy should be filled by a special count of the ballot papers and would reserve any directions necessary to give effect to the conduct of that special count to be made by a single Justice. The answers to the questions, and consequential directions, would not be advisory in the sense condemned in *In re Judiciary and Navigation Acts*, and the contrary is untenable.

29 Section 78B of the *Judiciary Act* does not, in my opinion, prevent me from dismissing so much of the summons as seeks to give effect to Senator Culleton's attempt to raise the constitutional objection to jurisdiction. French J made the point in *Australian Competition and Consumer Commission v C G*

---

7 (1991) 173 CLR 289 at 303; [1991] HCA 53.

8 (1921) 29 CLR 257 at 266-267.

Berbatis Holdings Pty Ltd[9] that s 78B "does not impose on the Court a duty not to proceed pending the issue of a notice no matter how trivial, unarguable or concluded the constitutional point may be". To give rise to the obligation not to proceed without notice a cause pending in court must truly "involve" a matter arising under the Constitution or involving its interpretation. As Toohey J stated in *Re Finlayson; Ex parte Finlayson*[10], in a passage quoted with approval by Gummow, Hayne and Callinan JJ in *Glennan v Commissioner of Taxation*[11], "[I]n terms of s 78B, a cause does not 'involve' a matter arising under the Constitution or involving its interpretation merely because someone asserts that it does". In short, the constitutional point must be real and substantial.

30 Given that Senator Culleton's summons is interlocutory, and important to be dealt with expeditiously, I also incline to the view that s 78B(5) operates to relieve the Court of the strictures of s 78B(1). In my opinion, it is in the interests of justice that the giving by the Full Court of its answers to the questions referred by the Senate not be further delayed.

31 The second category of order which Senator Culleton seeks by his summons of 12 January 2017 arises from events which have occurred since the hearing before the Full Court on 7 December 2016. Those events are as follows.

32 On 23 December 2016, Barker J in the Federal Court ordered that the estate of Senator Culleton be sequestrated under the *Bankruptcy Act* 1966 (Cth). His Honour stayed all proceedings under the sequestration order for a period of 21 days. On 11 January 2017, Senator Culleton filed a Notice of Appeal from the sequestration order to the Full Court of the Federal Court. The appeal was heard by the Full Court of the Federal Court on 27 January 2017 and judgment on the appeal is reserved. Pending the determination of the appeal, all proceedings under the sequestration order have continued to be stayed by successive orders of Dowsett J, Allsop CJ and the Full Court.

33 Section 44(iii) of the Constitution provides that a person who "is an undischarged bankrupt or insolvent ... shall be incapable of being chosen or of sitting as a senator". Section 45 provides that if a Senator becomes subject to such disability, "his place shall thereupon become vacant". Section 21 provides that whenever a vacancy happens in the Senate, the President must notify that vacancy to the Governor of the State in the representation of which the vacancy has happened. Section 15 sets out a mechanism for the filling of a vacancy in the Senate by the Governor of the State or the Houses of Parliament of the State.

---

9 (1999) 95 FCR 292 at 297 [14].

10 (1997) 72 ALJR 73 at 74.

11 (2003) 77 ALJR 1195 at 1197 [14]; 198 ALR 250 at 253; [2003] HCA 31.

34 On 11 January 2017, Senator Parry wrote to Senator Culleton referring to the sequestration order made by Barker J on 23 December 2016 and stating that he was satisfied that the order confirmed Senator Culleton's status as an "undischarged bankrupt" within the meaning of s 44(iii) of the Constitution. He referred to the operation of s 45 and to his obligation under s 21 of the Constitution.

35 On the same day, Senator Parry wrote to the Governor of Western Australia notifying the Governor "that a vacancy has happened in the representation of the State of Western Australia through the disqualification of [Senator Culleton] as a Senator for that State". The letter explained the vacancy as having arisen by operation of ss 44(iii) and 45 of the Constitution. The letter continued:

> "Notwithstanding the disqualification, I also advise Your Excellency that, on 7 November 2016, the Senate referred to the High Court sitting as the Court of Disputed Returns questions about the eligibility of Rodney Norman Culleton to have been chosen as a senator at the election of 2 July 2016 because of another disability in section 44 (s 44(ii) - subject to be sentenced for an offence punishable by imprisonment for one year or longer). The Senate has also asked the Court to determine, if there is a vacancy on this ground, how the vacancy should be filled. The matter has been heard and judgment is awaited.
>
> In view of the questions referred by the Senate to the Court of Disputed Returns, I am unable to advise Your Excellency that the vacancy in the representation of Western Australia is a vacancy to which section 15 of the Constitution applies and which may be filled in accordance with the requirements of that section.
>
> The judgment of the Court of Disputed Returns is expected in the near future. I will write again as soon as I am in a position to provide clarification."

36 On 12 January 2017, correspondence was sent to Senator Culleton from Rachel Callinan, Usher of the Black Rod. Ms Callinan referred to advice she had received from Senator Parry that he had notified a vacancy in the representation of Western Australia, and set out the services her office could provide to assist Senator Culleton in "finalising certain aspects of [his] affairs as a senator". On 24 January 2017 a similar letter was sent to Senator Culleton from the Department of Finance regarding "a number of issues surrounding [his] cessation as Senator", including termination of employment for his employees and arrangements to close down his electorate office. On the same day Ms Margaret Menzel, who is on the staff of Senator Culleton, received email correspondence from the Department of Finance regarding the termination of her employment. Around the same time Senator Culleton also received email correspondence from

the Information Services Division at Parliament House about information technology services provided to outgoing parliamentarians.

37 By reason of those events, all of which can be inferred to flow from Senator Parry having taken the view that ss 44(iii) and 45 of the Constitution have operated in light of the sequestration order made by Barker J on 23 December 2016 to cause Senator Culleton's place to be vacated notwithstanding that the order is the subject of an appeal to the Full Court of the Federal Court and that all proceedings under the sequestration order have been stayed pending the determination of that appeal, Senator Culleton seeks by the summons a number of orders. First, he seeks an order that Senator Parry be joined as a party to the reference proceeding. Next, he seeks orders restraining Senator Parry by his servants and agents from taking steps to oust him from the Senate or deny him his privileges or allowances as a Senator pending determination of whether his seat has become vacant either by the Senate or by the Court of Disputed Returns.

38 What Senator Culleton argues, in substance, is that the question of the operation of ss 44(iii) and 45 of the Constitution in the circumstances which have occurred is a question which s 47 of the Constitution commits exclusively to the Senate subject to any reference by the Senate to the Court of Disputed Returns under Div 2 of Pt XXII of the *Commonwealth Electoral Act*. Senator Parry, he argues, has no jurisdiction to give effect to his own view of the answer to that question. For the purpose of determining whether Senator Culleton is entitled to the orders which he seeks in the summons, I do not find it necessary to form a view on that argument.

39 The jurisdiction of the High Court within which Senator Culleton seeks the orders is the original jurisdiction conferred on it as the Court of Disputed Returns by Div 2 of Pt XXII of the *Commonwealth Electoral Act*. The matter in respect of which the original jurisdiction of the Court is invoked on any referral is defined by reference to the question or questions referred to the Court by the Senate, interpreted as a matter of substance.

40 Senator Culleton submits that the matter in respect of which the original jurisdiction of the Court has been invoked by the referral of questions on 8 November 2016 encompasses whether or not there is currently on any basis a vacancy in the representation of Western Australia in the Senate for the place for which Senator Culleton was returned as elected on 2 August 2016 and, if so, what are the consequences. He relies in part for that argument on the form of Question (a) as transmitted to the Court by Senator Parry on 8 November 2016. I do not accept that submission. Construed against the background of the accompanying statement of facts transmitted to the Court with the questions, the scope of Question (a) as asked by the Senate was, in my opinion, confined to that identified in the order made by French CJ on 21 November 2016.

41 The matter in respect of which the jurisdiction has been invoked by the existing reference from the Senate is relevantly limited to whether there is a vacancy in the representation of Western Australia in the Senate for the place for which Senator Culleton was returned as elected on 2 August 2016 by reason of s 44(ii) of the Constitution having operated in light of his conviction on 2 March 2016 to render him incapable of being chosen or of sitting and, if so, what are the consequences of s 44(ii) having so operated. Whether, by reason of the operation of s 44(iii) of the Constitution, a vacancy occurred on 23 December 2016 in the representation of Western Australia in the Senate for the place for which Senator Culleton was returned is a question which falls outside the matter in respect of which the jurisdiction of the High Court has been invoked in the proceeding in which the summons has been filed.

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.

43 In the result, the summons must be dismissed.

44 That gives rise to a question as to costs. In submissions before the Full Court, the Attorney-General submitted that the appropriate answer to the last of the questions referred by the Senate is that the Commonwealth should pay Senator Culleton's costs. The Attorney-General submitted before me, and I accept, that the costs of the summons are not within the scope of that submission to the Full Court.

45 Senator Culleton having been wholly unsuccessful on the summons, I do not think it an appropriate exercise of discretion that he should have his costs. There will be no order as to costs.

46 The orders I make are as follows:

(1) The summons filed by Senator Culleton on 12 January 2017 is dismissed.

(2) The costs of the summons are excluded from such order as may be made to the effect that Senator Culleton's costs of the proceeding on the reference be paid by the Commonwealth.