HIGH COURT OF AUSTRALIA

KIEFEL, BELL, GAGELER, KEANE AND NETTLE JJ

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 [No 2]
[2017] HCA 4
3 February 2017
C15/2016

ORDER

The questions referred to the Court of Disputed Returns by the President of the Senate in his letter dated 8 November 2016, as amended by orders made by French CJ on 21 November 2016, be answered as follows:

Question (a)

Whether, by reason of s 44(ii) of the Constitution, there is a vacancy in the representation of Western Australia in the Senate for the place for which Senator Rodney Norman Culleton was returned?

Answer

By reason of s 44(ii) of the Constitution, there is a vacancy in the representation of Western Australia in the Senate for the place for which Senator Rodney Norman Culleton was returned.

Question (b)

If the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled?

Answer

The vacancy should be filled by a special count of the ballot papers. Any directions necessary to give effect to the conduct of the special count should be made by a single Justice.

Question (c)

What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference?

Answer

Unnecessary to answer.

Question (d)

What, if any, orders should be made as to the costs of these proceedings?

Answer

Senator Culleton's costs of the proceedings should be paid by the Commonwealth save for costs excluded from this order by an order of a Judge.

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 C L Lenehan and B K Lim appearing on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

CATCHWORDS

Re Culleton [No 2]

Parliamentary elections (Cth) – Senate – Reference to Court of Disputed Returns – Where at date of nomination person convicted of offence punishable by term of imprisonment for one year or longer – Where person liable to be sentenced – Where person elected as Senator – Where conviction subsequently annulled – Whether annulment of conviction of retrospective effect – Whether person incapable of being chosen as Senator under s 44(ii) of Constitution – Whether vacancy should be filled by special count of ballot papers.

Words and phrases – "annulment", "convicted and is under sentence, or subject to be sentenced", "incapable of being chosen", "retrospective effect", "special count", "void ab initio".

Constitution, s 44(ii).
Commonwealth Electoral Act 1918 (Cth), ss 364, 376.
Crimes Act 1900 (NSW), s 117.
Crimes (Appeal and Review) Act 2001 (NSW), ss 4, 8, 9, 10.
Crimes (Sentencing Procedure) Act 1999 (NSW), ss 10, 25.

1 KIEFEL, BELL, GAGELER AND KEANE JJ. Section 44(ii) of the Constitution relevantly provides:

> "Any person who:
>
> …
>
> (ii) … 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 ...".

2 On the return of the writ for the election of Senators for the State of Western Australia in 2016, Rodney Norman Culleton was noted as elected and he has since sat as a Senator. On 2 March 2016, prior to his nomination for election and before polling day for the election, Senator Culleton was convicted, in his absence, in the Local Court of New South Wales, of the offence of larceny. He was then liable to be sentenced to imprisonment for a maximum term of two years[1] when he was brought before that Court[2]. The Local Court subsequently granted an annulment of the conviction[3], proceeded to deal with the matter afresh[4], found Senator Culleton guilty of the offence, on his own plea, but dismissed the charge without proceeding to conviction[5].

3 The President of the Senate has referred to this Court, in its capacity as the Court of Disputed Returns, a question[6] whether, by virtue of s 44(ii) of the Constitution, there is a vacancy in the representation of Western Australia in the Senate for the place for which Senator Culleton was returned. In the

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1 *Crimes Act* 1900 (NSW), s 117; *Criminal Procedure Act* 1986 (NSW), s 268(1A).

2 *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 25(1) and (2).

3 *Crimes (Appeal and Review) Act* 2001 (NSW), s 8.

4 *Crimes (Appeal and Review) Act* 2001 (NSW), s 9(2).

5 *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 10(1)(a).

6 *Commonwealth Electoral Act* 1918 (Cth), s 376.

circumstances outlined above, the issue is whether Senator Culleton's conviction had the effect of disqualifying him from being elected as a Senator.

4 In the reasons which follow, it will be explained that Senator Culleton was a person who had been convicted and was subject to be sentenced for an offence punishable by imprisonment for one year or longer at the date of the 2016 election. That was so, both as a matter of fact and as a matter of law. The subsequent annulment of the conviction had no effect on that state of affairs. It follows from s 44(ii) that Senator Culleton was "incapable of being chosen" as a Senator. In the result, there is a vacancy in the representation of Western Australia in the Senate for the place for which Senator Culleton was returned.

The circumstances which gave rise to the reference

5 On 2 March 2016 Senator Culleton was convicted, in his absence, in the Local Court of New South Wales at Armidale of the offence of larceny. The larceny was committed on 11 April 2014. Under s 117 of the *Crimes Act* 1900 (NSW) ("the Crimes Act"), the offence of larceny is punishable by imprisonment for a period of up to five years; but where the value of the property in respect of which the offence is charged does not exceed $5,000, the maximum term of imprisonment that the Local Court may impose is two years[7]. The offence of which Senator Culleton was convicted concerned property of a value less than $2,000. Accordingly, he was liable to imprisonment for a maximum term of two years.

6 Under s 25(1)(a) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the CSP Act"), a sentence of imprisonment may not be imposed upon an "absent offender"[8]. Section 25(2) of the CSP Act provides that the Local Court may issue a warrant for the offender's arrest for the purpose of having the offender brought before the Local Court for sentencing. Such a warrant may issue at any time after the Local Court convicts an absent offender for an offence. On 2 March 2016, the Local Court, having convicted Senator Culleton of larceny, issued a warrant for his arrest in order to have him brought to the Court for sentencing.

7 On 16 May 2016, the Deputy of his Excellency the Governor of Western Australia caused a writ to be issued for the election of 12 Senators for the State to serve in the Senate of the Parliament of the Commonwealth. Rodney Norman

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7 *Criminal Procedure Act* 1986 (NSW), s 268(1) and (1A), Sched 1, Table 2, item 3.

8 Defined in *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 25(4).

Culleton was nominated as a candidate in a group nomination for Pauline Hanson's One Nation party. Polling day for the election was 2 July 2016.

8 On 2 August 2016, the Australian Electoral Officer for the State of Western Australia returned the writ for the election certifying the names of the 12 Senators elected, in order of their election. Senator Culleton was noted as elected in the 11th place. In accordance with s 7 of the Constitution, the Governor of Western Australia certified to the Governor-General the names of the chosen Senators.

9 The warrant issued by the Local Court on 2 March 2016 was executed on 8 August 2016, on which date the Local Court granted an annulment of Senator Culleton's conviction pursuant to s 8 of the *Crimes (Appeal and Review) Act* 2001 (NSW) ("the Appeal and Review Act"). On 25 October 2016, the Local Court found Senator Culleton guilty of an offence against s 117 of the Crimes Act on his own plea but, pursuant to s 10(1)(a) of the CSP Act, without proceeding to conviction, dismissed the charge. Section 10(2) provides that the Court may make such an order if it is satisfied that it is inexpedient to inflict any punishment on the person, or that it is expedient to release the person on a good behaviour bond. Senator Culleton was ordered to pay compensation in the sum of $322.85 to the complainant.

The reference

10 The question identified at the outset of these reasons was referred to the Court by the President of the Senate by letter dated 8 November 2016 addressed to the Chief Executive and Principal Registrar of the Court. An affirmative answer to that question gives rise to a further question as to how that vacancy should be filled. Questions were also referred as to what directions should be made by the Court in order to hear and finally dispose of the reference, and as to what orders should be made as to the costs of these proceedings. The jurisdiction of this Court to entertain the reference from the Senate was not in question in the hearing before this Court[9].

11 By orders made on 21 November 2016, French CJ made directions for the reference to be referred to a Full Court for hearing in the December sittings of the Court.

12 At the hearing of this matter, submissions were made on behalf of the Attorney-General of the Commonwealth in favour of an affirmative answer to the

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9 See *In re Wood* (1988) 167 CLR 145 at 157-162; [1988] HCA 22.

question of whether there is a vacancy in the Senate. Senator Culleton was represented in the proceedings and made submissions in favour of a negative answer to the principal question. The Commonwealth agreed to pay Senator Culleton's costs of the proceedings in this Court in any event.

Incapable of being chosen?

13 In *Sykes v Cleary*[10], it was held that the words "shall be incapable of being chosen" in s 44 refer to the process of being chosen: a process which operates from the date of nominations, as that is the date on which the electoral process begins, until the return of the writs for the election, as that is the time at which the electoral process is complete. No question arises in this case as to the temporal operation of s 44(ii). If Senator Culleton was incapable of being chosen by reason of the circumstances which gave rise to the reference to this Court, that disability persisted during the whole of the period from the time of nomination to the return of the writs for the election.

14 A broad submission was advanced on behalf of the Attorney-General to the effect that the mere fact of the conviction, pursuant to which Senator Culleton was liable to be sentenced to a term of imprisonment of one year or longer, which was current at the date of the election, was sufficient to engage the disqualifying effect of s 44(ii) of the Constitution, even if the conviction were to be nullified retrospectively. The Attorney-General also advanced a narrower submission to the effect that the annulment effected under the Appeal and Review Act on 8 August 2016 operated only prospectively and so the conviction was not avoided ab initio. Because the Attorney-General's narrower submission is correct, it is unnecessary to deal further with the broader submission.

15 At the time at which the question as to Senator Culleton's eligibility to be chosen fell to be determined, he was, in fact, a person who had been "convicted and … subject to be sentenced". That was the case even though the point was not taken at the time by anyone with an interest in the question. Senator Culleton argues that even if he was, as a matter of fact, a person who had been "convicted and … subject to be sentenced" at the time of the election, he was not, as a matter of law, incapable of being chosen by the electorate by reason of s 44(ii). In this regard, three submissions were advanced on his behalf. The first was that he was not convicted and *sentenced* at any time during the electoral process. Secondly, it was said that he was not a person who was "convicted" within the meaning of s 44(ii) because his conviction was annulled with retrospective effect after the

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10 (1992) 176 CLR 77 at 99-101, 108, 130, 132; [1992] HCA 60.

electoral choice of the people of Western Australia was made, so that in the eye of the law it did not exist at that time. Thirdly, it was said that he was not "subject to be sentenced ... for any offence punishable … by imprisonment" at any time during the electoral process.

Not convicted and sentenced

16 Counsel for Senator Culleton put at the forefront of his argument the submission that, because Senator Culleton had at no time actually been sentenced to imprisonment for the offence of larceny, s 44(ii) of the Constitution had no application to him. This submission was based upon a misunderstanding of what was said in *Nile v Wood*[11]. Further, the submission treats s 44(ii) as if the words "or subject to be sentenced", which appear after the words "and is under sentence", have no operation.

17 In *Nile v Wood*, Brennan, Deane and Toohey JJ made it clear that a conviction alone is not sufficient to disqualify a candidate under s 44(ii). Their Honours said[12]:

> "It is not conviction of an offence per se of which s 44(ii) of the Constitution speaks. The disqualification operates on a person who has been convicted of an offence punishable by imprisonment for one year or more *and* is under sentence or subject to be sentenced for that offence. The references to conviction and sentence are clearly conjunctive … This is so as a matter of construction of the language used in s 44(ii)."

18 The argument for Senator Culleton seized upon the sentence which followed in their Honours' reasons:

> "And it is apparent that it was the intention of the framers of the Constitution that the disqualification under this paragraph should operate only while the person was under sentence: see Quick & Garran, *Annotated Constitution of the Australian Commonwealth* (1901), pp 490, 492; *Official Report of the National Australasian Convention Debates*, Sydney (1891), pp 655-659."

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11 (1987) 167 CLR 133 at 139; [1987] HCA 62.

12 (1987) 167 CLR 133 at 139 (emphasis in original).

19 In Quick and Garran's *The Annotated Constitution of the Australian Commonwealth*[13], the only relevant discussion of s 44(ii) proceeds under the rubric "Or has been Convicted, and is Under Sentence for any Offence". No mention is made of the additional words in s 44(ii) "or subject to be sentenced". The argument proceeds that because those words are not mentioned, either by Quick and Garran or in *Nile v Wood*, they are no more than a reiteration of the words "under sentence".

20 It may be accepted that Quick and Garran's reference to s 44(ii) is not complete. That omission was not relevant to the decision in *Nile v Wood*, which concerned a deficiency in an election petition, in that it failed to allege that Senator Wood had been convicted of an offence punishable by imprisonment for one year or more *and* was under sentence for that offence. No question arose in that case about whether Senator Wood was "subject to be sentenced".

21 It was not suggested by the Court in *Nile v Wood* that although s 44(ii) expressly refers to the case of a person who "has been convicted and is … subject to be sentenced", in truth it applies only to a person who "has been convicted and is under sentence". It is apparent from the passage from their Honours' reasons which is set out above that their Honours did not treat the words "subject to be sentenced" as simply a repetition of the words "is under sentence". Counsel for Senator Culleton was obliged to accept that, on his contention, "under sentence, or subject to be sentenced" in s 44(ii) should be read as meaning under sentence "or having been sentenced being subject to sentence". Section 44(ii) cannot sensibly be read in that way.

22 It is evident from the terms of s 44(ii) that the framers of the Constitution were concerned to ensure that not only should a person who has already been sentenced to a term of imprisonment of one year or longer be disqualified from being chosen or from sitting as a Senator; so too should a person who is able to be so sentenced. The circumstance sought to be guarded against was that such a person might not be able to sit and should for that reason not be able to be chosen.

The effect of the annulment

23 Senator Culleton submitted that the effect of the annulment on 8 August 2016 was to render the conviction void ab initio, and restore the status quo ante.

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13 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 492.

Senator Culleton made reference to the retrospective effect of annulment in other areas of the law. For example, in family law, the dissolution of a marriage involves the setting aside of the marriage prospectively, whereas the annulment of a marriage means that, in some respects, the marriage is treated as never having occurred[14].

24 The submissions made on behalf of Senator Culleton also adverted to dictionary meanings of the term "annulment", but those definitions indicate only that the term may refer to more than one effect. For example, in *The Oxford Companion to Law*[15], it is said that "[i]f a judicial proceeding is annulled it is deprived of effect and rendered inoperative, either retrospectively or prospectively." And in Sweet's *A Dictionary of English Law*[16], it is said:

> "To annul a judicial proceeding is to deprive it of its operation, either retrospectively or only as to future transactions. Thus, annulling an adjudication in bankruptcy puts an end to the proceedings, without invalidating any acts previously done by the trustee or the Court, and makes the property of the bankrupt revert to him, unless the Court otherwise orders." (footnote omitted)

25 Whether an annulment operates retrospectively or prospectively inevitably depends upon the statutory context in which the term is used. The argument for Senator Culleton ignores the terms of the Appeal and Review Act as they inform the meaning of annulment in s 10(1) of that Act.

26 Under the Appeal and Review Act, the Local Court is empowered to review certain of its own decisions. Section 4(1) contemplates the making of an "application for annulment" of a conviction made by the Local Court sitting at the place where the original Local Court proceedings were held. Under s 4(2)(a), such an application must be made within two years of the conviction being made: evidently, if such an application is not made within that period, the conviction may stand.

27 Under s 8(2)(c), the Local Court must grant an annulment if it is satisfied that, "having regard to the circumstances of the case, it is in the interests of justice to do so." Section 9(2)(a) provides that if the decision is made to annul

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14 *Fowke v Fowke* [1938] Ch 774 at 779.

15 Walker, *The Oxford Companion to Law*, (1980) at 66.

16 Sweet, *A Dictionary of English Law*, (1882) at 49.

the relevant conviction, the Local Court must "deal with the original matter afresh"; and s 9(3) provides that the Local Court "is to deal with the original matter as if no conviction … had been previously made". As McHugh J said in *Re Macks; Ex parte Saint*[17], the phrase "as if" serves to introduce a fiction or a hypothetical contrast: "It deems something to be what it is not or compares it with what it is not." Section 9(3) thus requires the Local Court to proceed upon the fiction that a conviction has not been made, because, in truth, the conviction was not a nullity from the beginning.

28 Section 10(1) of the Appeal and Review Act provides that "[o]n being annulled, a conviction … ceases to have effect and any enforcement action previously taken is to be reversed." This provision states the extent to which the annulment may affect the legal position established by the conviction. The annulment of the conviction was not apt to expunge the legal rights and obligations arising from it, save in relation to the future and in the reversal of things done under it. The provisions of the Appeal and Review Act to which reference has been made indicate that a conviction is annulled only for the future: these provisions do not purport to operate retroactively to deny legal effect to a conviction from the time that it was recorded.

29 To say, as s 10(1) does, that the conviction "ceases to have effect" is to acknowledge that it has been in effect to that point[18]. Further, to say that "enforcement action … is to be reversed" is to leave the legal state of affairs previously established by the conviction unaffected, save for the actual reversal of any action taken by way of enforcement against the defendant. One may illustrate this point by hypothesising an action for malicious prosecution against the prosecutor. In an action for malicious prosecution, the plaintiff must ordinarily prove that the prosecution ended in his or her favour[19]. Speaking generally, this ingredient of the cause of action could not be established where a conviction was recorded[20]. Of course, in the present case, this element of the cause of action might not be established for the further reason that Senator Culleton was, by his own plea, ultimately shown to be guilty of the

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17 (2000) 204 CLR 158 at 203 [115]; [2000] HCA 62.

18 See *Attorney-General (Q) v Australian Industrial Relations Commission* (2002) 213 CLR 485 at 493 [12], 505 [53]; [2002] HCA 42.

19 *Basebé v Matthews* (1867) LR 2 CP 684; *Davis v Gell* (1924) 35 CLR 275 at 289; [1924] HCA 56; *Stimac v Nicol* [1942] VLR 66.

20 *Everett v Ribbands* [1952] 2 QB 198 at 200, 201-202, 206.

offence charged. But the point for present purposes is that, at the date of the 2016 election, the conviction recorded against Senator Culleton was legally in effect and that position was not altered by the annulment because the effect of s 10 is that an annulment under the Appeal and Review Act does not purport retrospectively to treat the conviction as if it had never occurred. This case presents another example of what Windeyer J described in *Cobiac v Liddy*[21] when he said that, by the exercise of a power to set aside a conviction, "the court holds that the accused was not lawfully convicted and that the conviction ought not to stand, not that there never was in fact a conviction."

30 Senator Culleton sought to rely upon this Court's decision in *Commissioner for Railways (NSW) v Cavanough*[22], where it was said that if a conviction is set aside on appeal, the conviction is void ab initio and the holder of an office "cannot be deemed to have vacated his office" by reason of the conviction. However, that case was concerned with the effect of an order made upon an appeal, setting aside a conviction which was deemed to have the effect of vacating an office of employment. It has nothing to say about the operation of an annulment of a conviction under the Appeal and Review Act.

31 In the course of argument, counsel for Senator Culleton also adverted to the possibility that the original conviction had been procured by procedural unfairness or fraud or other circumstances which would warrant the conclusion that it was always and entirely a legal nullity. The factual basis for such an argument was not established. In addition, these possibilities are not consistent with the circumstance that Senator Culleton sought and obtained relief under the Appeal and Review Act on the basis that the conviction of 2 March 2016 was truly a conviction.

Subject to be sentenced for any offence punishable by imprisonment

32 Senator Culleton submitted that, even if the annulment did not operate retrospectively, he was not "subject to be sentenced ... for any offence punishable … by imprisonment for one year or longer" at the time of the 2016 election. On behalf of Senator Culleton, it was argued that because Senator Culleton was convicted in absentia, the effect of s 25(1)(a) of the CSP Act was that the Local Court could not make an order imposing a sentence of imprisonment on him because he was an "absent offender".

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21 (1969) 119 CLR 257 at 272; [1969] HCA 26.

22 (1935) 53 CLR 220 at 224; [1935] HCA 45.

33 The argument advanced on Senator Culleton's behalf proceeds on the erroneous assumption that because Senator Culleton was convicted in his absence, he acquired the status of an absent offender, an incident of which status was immunity from imprisonment. This argument cannot be accepted.

34 Section 25(4) of the CSP Act provides that in s 25, the term "absent offender" means "an offender who is being dealt with in his or her absence." The use of the present tense indicates that whether or not a person is an absent offender for the purposes of s 25(1)(a) depends on whether the person is absent when being dealt with by the court.

35 Whether or not Senator Culleton was, at any time, an absent offender depended on whether the court was dealing with him in his absence. Once he was present in court, whether in answer to the warrant issued for that purpose or otherwise, he was no longer an absent offender, and a punishment of imprisonment might lawfully be imposed on him.

36 While Senator Culleton was not liable to be sentenced to imprisonment in his absence immediately upon the conviction being recorded on 2 March 2016, once the warrant issued on that day for his arrest, the processes of the law pursuant to which he might lawfully be sentenced to imprisonment were set in train. If those processes took their course, he would be present when sentenced, and so might lawfully be sentenced to a term of imprisonment without offending s 25(1)(a) of the CSP Act. It is not correct to say that at the time of the 2016 election he was not "subject to be sentenced".

Section 364

37 Senator Culleton relied on s 364 of the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act"), which provides that the Court of Disputed Returns, on a reference from the President of the Senate[23], "shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities". He sought to argue that, by reason of the delay attending the reference and the circumstance that his conviction was a matter of public record, "good conscience" required that this Court decline to answer the question as to whether his seat was vacant.

38 This Court is obliged by s 376 of the Electoral Act to determine the matter referred to it. Section 364 does not provide any basis for avoiding that

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23 See *Commonwealth Electoral Act* 1918 (Cth), ss 377, 381.

obligation. It is a procedural provision which, as was said in *Sue v Hill*[24] by Gleeson CJ, Gummow and Hayne JJ, does "not exonerate the Court from the application of substantive rules of law". In the same case, McHugh J described[25] s 364 as "ancillary" to the specific powers conferred by the Electoral Act to allow an election to be set aside.

The consequences of a vacancy

39 The conclusion that Senator Culleton was incapable of being chosen raises for determination by this Court the question as to the order which should be made to fill the resulting vacancy in the Senate.

40 The Attorney-General submitted that, if this Court were to hold that Senator Culleton was disqualified from being chosen by reason of s 44(ii) of the Constitution, the vacancy should be filled by a special count of the ballot papers and that any directions necessary to give effect to the conduct of the special count should be made by a single Justice.

41 The Attorney-General submitted that this Court, on the hearing of a reference under Pt XXII of the Electoral Act, has the power to "declare any candidate duly elected who was not returned as elected"[26], and that that power carries with it an incidental power to order a special count[27].

42 Senator Culleton did not contest the submissions put on behalf of the Attorney-General upon this question.

43 It is not necessary to order the taking of a further poll, whether for the unfilled place in the Senate or for all 12 Senators for Western Australia. It was said by this Court in *In re Wood*[28] that "an election is not avoided if an unqualified candidate stands" because if it were otherwise "the nomination of unqualified candidates would play havoc with the electoral process". There is no suggestion that the presence of Senator Culleton's name on the ballot paper has

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24 (1999) 199 CLR 462 at 485 [42]; [1999] HCA 30.

25 *Sue v Hill* (1999) 199 CLR 462 at 548 [224].

26 *Commonwealth Electoral Act* 1918 (Cth), s 360(1)(vi); see also s 379.

27 *In re Wood* (1988) 167 CLR 145 at 172.

28 (1988) 167 CLR 145 at 167.

falsified the declared choice of the people of the State for any of the other 11 candidates who were declared to be elected. There is no reason to suppose that a special count would "result in a distortion of the voters' real intentions"[29], rather than a reflection of "the true legal intent of the voters so far as it is consistent with the Constitution and [the Electoral Act]"[30].

44 Since Senator Culleton was incapable of being chosen as a Senator for Western Australia, the votes actually cast in favour of the party of which he was an endorsed candidate should be counted in favour of the next candidate on that list, at least so far as votes "above the line" for Pauline Hanson's One Nation party are concerned. There is no reason to suppose that the votes cast "above the line" in favour of that group were not intended to flow to the next individual nominee of Pauline Hanson's One Nation party in the event that Senator Culleton was not capable of being elected. The evidence established that 96.04 per cent of the votes received by Senator Culleton were votes for Pauline Hanson's One Nation party. A special count would not distort the true legal intent of the voters.

Conclusion

45 The questions referred to the Court were[31]:

(a) whether, by reason of s 44(ii) of the Constitution, 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

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

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29 *Sykes v Cleary* (1992) 176 CLR 77 at 102; *Free v Kelly* (1996) 185 CLR 296 at 302-304; [1996] HCA 42.

30 *In re Wood* (1988) 167 CLR 145 at 166.

31 Question (a) was amended by orders made by French CJ on 21 November 2016.

46 These questions should be answered as follows:

(a) By reason of s 44(ii) of the Constitution, 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) The vacancy should be filled by a special count of the ballot papers. Any directions necessary to give effect to the conduct of the special count should be made by a single Justice.

(c) Unnecessary to answer.

(d) Senator Culleton's costs of the proceedings should be paid by the Commonwealth save for costs excluded from this order by an order of a Judge.

47 NETTLE J. I agree with the plurality that the questions referred to the Court in its capacity as the Court of Disputed Returns should be answered as they propose. My reasons, however, are in some respects different from theirs.

Relevant constitutional and other legislative provisions

48 Section 44 of the Constitution relevantly provides:

"**Disqualification**

Any person who:

(i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or

(ii) is attainted of treason, or 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; or

(iii) is an undischarged bankrupt or insolvent; or

(iv) holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; or

(v) has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons;

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives."

49 Section 4 of the *Crimes (Appeal and Review) Act* 2001 (NSW) ("the Appeal and Review Act") relevantly provides that, if a defendant has been convicted of an offence by the Local Court[32] in circumstances where the defendant was not in appearance before the court when the conviction was made,

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32 See *Crimes (Appeal and Review) Act* 2001 (NSW), s 3(1) definition of "Local Court".

the defendant may apply within two years thereafter for an annulment of his or her conviction.

50 Section 8(2) of the Appeal and Review Act relevantly provides that the Local Court must grant such an application for annulment if satisfied that the defendant was not aware of the original Local Court proceedings until after they were completed; the defendant was hindered by accident, illness, misadventure or other cause from taking action in relation to the proceedings; or, having regard to the circumstances of the case, it is in the interests of justice to do so.

51 Section 9 of the Appeal and Review Act relevantly provides that, if the Local Court decides to annul a conviction, it must deal with the original matter afresh (either immediately or at a later date), and that, in doing so, it is to deal with the matter "as if no conviction ... had been previously made".

52 Section 10(1) of the Appeal and Review Act relevantly provides that, "[o]n being annulled, a conviction ... ceases to have effect".

The point in time to which s 44 of the Constitution is directed

53 As was established in *Sykes v Cleary*[33], the words "shall be incapable of being chosen" which appear at the conclusion of the above quoted text of s 44 of the Constitution "refer to the process of being chosen, of which nomination is an essential part". Hence, as Brennan CJ later observed in *Free v Kelly*[34], if a candidate for election is not qualified for election at the time of nomination, he or she is incapable of being chosen. In the present case it is unnecessary to reconsider the significance, for the purpose of s 44, of other dates, such as the polling day and the day the poll is declared[35].

54 As is recorded in the statement of facts in the plurality's reasons in this case, at the date of his nomination, Mr Culleton stood convicted of larceny but he remained to be sentenced. The maximum penalty that the Local Court could impose on Mr Culleton was two years' imprisonment or 20 penalty units or

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33 (1992) 176 CLR 77 at 100 per Mason CJ, Toohey and McHugh JJ (Brennan J agreeing at 108, Dawson J agreeing at 130, Gaudron J agreeing at 132); [1992] HCA 60.

34 (1996) 185 CLR 296 at 301; [1996] HCA 42.

35 See *Sykes v Cleary* (1992) 176 CLR 77 at 99-101 per Mason CJ, Toohey and McHugh JJ (Brennan J agreeing at 108, Dawson J agreeing at 130, Gaudron J agreeing at 132), cf at 120-125 per Deane J.

both[36]. Consequently, looking at the matter as at the date of nomination, it appears that Mr Culleton was, by reason of his conviction and the operation of s 44(ii) of the Constitution, incapable of being chosen as a senator. Mr Culleton disputes that he was "subject to be sentenced" within the meaning of s 44(ii) of the Constitution. As will be explained later in these reasons, however, that objection is misconceived.

55 The real question is whether, in view of the subsequent annulment of Mr Culleton's conviction, he should now be regarded as having been capable of being chosen as a senator at the date of his nomination. More precisely, was the effect of the annulment that, for the purposes of s 44(ii) of the Constitution, it is as if there never were a conviction? Or does the annulment mean only that, although the conviction ceased to exist upon annulment, it must still be regarded for the purposes of s 44(ii) of the Constitution as having been in existence at the date of nomination? That depends as much on the correct construction of s 44(ii) of the Constitution as upon the meaning of ss 4, 8, 9 and 10 of the Appeal and Review Act.

The correct construction of s 44(ii) of the Constitution

56 There are two ways in which s 44(ii) of the Constitution might conceivably be construed. One is to read s 44(ii) as applying to the fact of a conviction, and so to a conviction regardless of whether it is subsequently annulled – whether prospectively or retrospectively – pursuant to provisions like those of the Appeal and Review Act. The other is to construe s 44(ii) as applying only to a conviction that is not subsequently annulled.

57 The better view is that s 44(ii) is directed to a conviction in fact regardless of whether it is subsequently annulled. Historically, that accords with the circumstance that at the time of Federation, and until each Australian jurisdiction adopted legislation modelled on the *Criminal Appeal Act* 1907 (UK), there were only very limited mechanisms for annulment of conviction and appeal against conviction[37]. Thus, for the framers of the Constitution, a conviction in fact was, and by and large would remain, a conviction. Furthermore, at the time of

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36 *Crimes Act* 1900 (NSW), s 117 read with *Criminal Procedure Act* 1986 (NSW), s 268, Sched 1, Table 2, Pt 2, item 3.

37 See *Conway v The Queen* (2002) 209 CLR 203 at 208-216 [7]-[25] per Gaudron ACJ, McHugh, Hayne and Callinan JJ; [2002] HCA 2; *R v Gee* (2003) 212 CLR 230 at 261 [88] per Kirby J; [2003] HCA 12; Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900*, (2002) at 253-255, 325; Mildren, *The Appellate Jurisdiction of the Courts in Australia*, (2015) at 1-3; McClellan and Beshara, *A Matter of Fact: The Origins and History of the NSW Court of Criminal Appeal*, (2013) at 3-5.

Federation, colonial and imperial legislation required a candidate to be nominated by a specified number of electors[38]; and, although, as was observed in *Sykes v Cleary*[39], electoral statutes have only so much to say about constitutional provisions like s 44, the framers of the Constitution may be presumed to have been well aware of such requirements. Similar provision was later made in the *Commonwealth Electoral Act* 1902 (Cth)[40] and continues today[41], albeit side by side with an alternative procedure[42]. There is no room in requirements of that kind for contingent qualification. They demand certainty that, at the date of nomination, a nominee is capable of being chosen. Their existence at the time of the Constitution's framing is consistent with the conclusion that the framers intended no less.

58 Equally, although the Constitution is not limited in its application to what existed at the time of Federation and is to be construed according to the "continued life and progress of the community"[43], nothing has occurred since Federation that suggests that the current denotation[44] or current understanding of

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38 See *Constitution Act Amendment Act* 1890 (Vic), s 220 (re-enacting *Electoral Act* 1865 (Vic), s 83); *Parliamentary Electorates and Elections Act* 1893 (NSW), s 65(II); *Electoral Code* 1896 (SA), s 95; *Electoral Act* 1896 (Tas), s 89; *Electoral Act* 1899 (WA), s 81.

39 (1992) 176 CLR 77 at 100-101 per Mason CJ, Toohey and McHugh JJ (Brennan J agreeing at 108, Dawson J agreeing at 130, Gaudron J agreeing at 132), 124-125 per Deane J.

40 See, originally, *Commonwealth Electoral Act* 1902 (Cth), s 99(b). See also *Commonwealth Electoral Act* 1918 (Cth), s 71(b) (as made).

41 *Commonwealth Electoral Act* 1918, s 166(1)(b)(i).

42 *Commonwealth Electoral Act* 1918, s 166(1)(b)(ii).

43 *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 413 per Isaacs J; [1926] HCA 8.

44 *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 267 per Windeyer J; [1959] HCA 47; *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 233-234 per Mason J; [1979] HCA 6; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 537-538 per Dawson J; [1989] HCA 53. See Stellios, *Zines's The High Court and the Constitution*, 6th ed (2015) at 23-31.

the concept[45] of s 44(ii) is any different from what it would have been at the time of Federation.

59 Now, as at the time of Federation, the need for certainty in the electoral process makes it highly desirable that, if a person is convicted of a relevant offence, he or she should forthwith cease to be eligible for election, or, if already elected, should cease to be capable of sitting, until and unless the conviction is quashed or annulled or the sentence is spent[46]. If it were otherwise, there could be long periods following conviction of a relevant offence until an appeal or application for annulment is finally heard and determined in which it would be impossible to say whether the person so convicted is or is not eligible to be elected, or is or is not eligible to continue to sit as a senator or member of the House of Representatives. If the framers of the Constitution had foreseen that a process of annulment might bring about that possibility it is inherently unlikely that they would have intended that to be the result. The disqualification imposed by s 44(ii) must be read in light of the system of representative and responsible government established by the text and structure of the Constitution[47]. An understanding of s 44(ii) as requiring order and certainty in the electoral process accords with that system[48].

The effect of annulment

60 In case that were not so, it was contended on behalf of the Attorney-General of the Commonwealth that the effect of s 10(1) of the Appeal and Review Act is wholly prospective and, therefore, that, at the date of his nomination, Mr Culleton was convicted both in fact and for all legal purposes. In the Attorney's submission, that is the necessary consequence of s 10(1) conditioning the decretal clause "a conviction ... ceases to have effect" on the anterior temporal clause "[o]n being annulled". It was also said to be consistent

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45 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 552 [43] per McHugh J; [1999] HCA 27.

46 Cf *Attorney-General v Jones* [2000] QB 66 at 74.

47 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557-559; [1997] HCA 25.

48 See and compare *Sykes v Cleary* (1992) 176 CLR 77 at 100 per Mason CJ, Toohey and McHugh JJ (Brennan J agreeing at 108, Dawson J agreeing at 130, Gaudron J agreeing at 132); *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at 1040 [41] per French CJ and Bell J, 1045 [73]-[74] per Kiefel J, 1050 [104] per Gageler J, 1059-1060 [184]-[185] per Keane J, 1071-1072 [250] per Nettle J, 1083 [326] per Gordon J; 334 ALR 369 at 382-383, 390, 397, 409-410, 425-426, 440; [2016] HCA 36.

with and confirmed by the requirement imposed by s 9(3) that, where a conviction is annulled, the Local Court is to deal with the original matter *as if* no conviction had been previously made. In the Attorney's submission, the words "as if no conviction ... had been previously made" signify a statutory fiction[49] and, according to the principle that a statutory deeming provision is to be construed narrowly to achieve the object of its enactment[50], the annulment is retrospective solely for the purpose of Local Court procedure with which s 9 is concerned. There is no room for any further degree of retrospectivity.

61 Those submissions should not be accepted in the unqualified terms in which they were stated. Although the expressions "[o]n being annulled" and "ceases to have effect" connote a sense of prospectiveness, it is apparent that the provision is retrospective in at least one sense. If it were not, a person whose conviction has been annulled would continue to be classified as a person who has been convicted for the purposes of assessing the person's convict status in future. The preferable view is that, despite a conviction ceasing to have effect only upon annulment, the annulment has retrospective operation to the extent that a person's convict status in relation to events occurring *after* annulment is that he or she is not to be regarded as having been convicted. Hence, if nomination in this case had not occurred until after the annulment of Mr Culleton's conviction, he would have had the capacity to nominate even if, at the date of his nomination, the charge of larceny remained pending. In the terms of s 9(3), it would be "as if no conviction ... had been previously made".

62 It should be accepted, however, that, since the necessary implication of a conviction ceasing to have effect upon annulment is that the conviction continues to have effect until and unless it is annulled, a conviction that is susceptible to annulment under the Appeal and Review Act continues to have effect up to the date of annulment[51]. It should also be accepted that, since a conviction that is susceptible to annulment under the Appeal and Review Act continues to have

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49 See and compare *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 203 [115] per McHugh J; [2000] HCA 62; *Loizos v Carlton and United Breweries Ltd* (1994) 94 NTR 31 at 32 per Kearney J. See generally *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 at 65-67 per Windeyer J; [1970] HCA 63.

50 *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at 696 per Griffith CJ; [1909] HCA 67; *Wellington Capital Ltd v Australian Securities and Investments Commission* (2014) 254 CLR 288 at 314 [51] per Gageler J; [2014] HCA 43; *Commissioner of Taxation v Comber* (1986) 10 FCR 88 at 96 per Fisher J; *Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337 at 348 [29].

51 See and compare *Cobiac v Liddy* (1969) 119 CLR 257 at 272 per Windeyer J; [1969] HCA 26.

effect up to the date of annulment, it remains determinative of the convicted person's convict status in relation to events occurring up to that point.

63 In that respect, an analogy may be drawn to a marriage that was susceptible to annulment under s 21 of the now repealed *Matrimonial Causes Act* 1959 (Cth). Such a marriage was voidable[52] as opposed to void[53] and so, until and unless the marriage had been annulled, it operated as a valid marriage determinative of the marital status of the parties. Neither party to the marriage was free to re-marry before the marriage was annulled, and, if either did so, it appears that the purported re-marriage was and remained a bigamous marriage[54] notwithstanding the subsequent annulment of the prior marriage. Logically, it is the same here. Up to the point of its annulment, Mr Culleton's conviction was voidable, not void. Consequently, until it was annulled, it remained a valid conviction determinative of his convict status for the purposes of s 44(ii). It follows that, at the time of his nomination, he was not capable of being chosen as a senator, notwithstanding the later annulment of his conviction.

Subject to be sentenced

64 It remains to deal with Mr Culleton's contention that he was not "subject to be sentenced" at the date of nomination. The essence of the argument was that s 44(ii) operates only if and after a sentence of more than 12 months' imprisonment has been imposed and that, because Mr Culleton was not sentenced until after he was elected, he was capable of nominating and being elected. Counsel for Mr Culleton stated that the argument was based on the following observation of Brennan, Deane and Toohey JJ in *Nile v Wood*[55]:

> "it is apparent that it was the intention of the framers of the Constitution that the disqualification under [s 44(ii)] should operate only while the person was under sentence: see Quick & Garran, *Annotated Constitution of the Australian Commonwealth* (1901), pp 490, 492".

65 The argument is unsound. As closer attention to *Nile v Wood* reveals, the statement that it was intended that the disqualification should operate "only while the person was under sentence" was calculated in context to convey that the disqualification was intended to operate only while the person is under sentence

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52 *Matrimonial Causes Act* 1959 (Cth), s 51(1).

53 Cf *Matrimonial Causes Act*, s 18(1).

54 See and compare *R v Jacobs* (1826) 1 Mood 140 [168 ER 1217]; *Fowke v Fowke* [1938] Ch 774 at 779; *R v Gould* [1968] 2 QB 65 at 70.

55 (1987) 167 CLR 133 at 139; [1987] HCA 62.

or subject to sentence. So much is apparent from the statement, only a few lines before the cited passage, that[56]: "[t]he disqualification operates on a person who has been convicted of an offence punishable by imprisonment for one year or more and is under sentence or subject to be sentenced for that offence". It is also confirmed by one of the passages from Quick and Garran to which their Honours referred, which relevantly is as follows[57]:

> "*Attainder or Conviction.*—In the Commonwealth Bill of 1891, the provision was that a person 'attainted of treason, or convicted of felony or any infamous crime' should be incapable 'until the disability is removed by ... the expiration or remission of the sentence, or a pardon, or release, or otherwise.' In Committee, Mr Wrixon objected to the express provision that an ex-convict might be a member of Parliament, and proposed to make the disqualification permanent; but this was negatived by 27 votes to 9. At the Sydney session, 1897, Mr Barton mentioned a suggestion by Sir Samuel Griffith to substitute more precise terms for 'felony or other infamous crime.' Accordingly at the Melbourne session, before the first report and after the fourth report, the provision was altered to its present form." (ellipsis in original, references to Convention Debates omitted)

66 Plainly, the purpose of s 44(ii) was to disqualify a person convicted of any offence for which the maximum penalty is a term of imprisonment of one year or more if the person either has been sentenced and is still to complete the sentence, and so is "under sentence", or remains to be sentenced, and so is "subject to be sentenced".

Section 364 of the *Commonwealth Electoral Act* 1918 (Cth) and the consequences of a vacancy

67 Finally, I agree with the reasons of the plurality with respect to the operation of s 364 of the *Commonwealth Electoral Act* and also with respect to the consequences of a vacancy.

Conclusion

68 The questions should be answered as proposed by the plurality.

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56 *Nile v Wood* (1987) 167 CLR 133 at 139 (emphasis omitted).

57 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 490.