HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE AND EDELMAN 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 THE HON MS FIONA NASH

Re Nash [No 2]
[2017] HCA 52
Date of Order: 15 November 2017
Date of Publication of Reasons: 6 December 2017
C17/2017

ORDER

1. *The summons filed on 7 November 2017 for a declaration that Ms Hollie Hughes is duly elected as a senator for the State of New South Wales for the place for which Ms Fiona Nash was returned is dismissed.*

2. *The Commonwealth is to pay Ms Hughes' costs.*

Representation

S P Donaghue QC, Solicitor-General of the Commonwealth with M P Costello and J D Watson appearing on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

A R Moses SC with S J P Duggan and P G Sharp appearing on behalf of Ms Hughes (instructed by Harpur Phillips)

G R Kennett SC with B K Lim appearing as amicus curiae (instructed by Australian Government Solicitor)

No appearance for the Hon Ms Nash

CATCHWORDS

Re Nash [No 2]

Constitutional law (Cth) – Parliamentary elections – Reference to Court of Disputed Returns – Where Court held there was a vacancy in representation of New South Wales in Senate – Where Court made directions for special count of ballot papers to fill vacancy – Where orders sought following special count that Ms Hollie Hughes be declared elected as senator to fill vacancy – Where Ms Hughes nominated for election to Senate at 2016 general election – Where Ms Hughes not declared elected following polling for 2016 general election – Where Ms Hughes appointed to Administrative Appeals Tribunal one year after 2016 general election – Where Ms Hughes resigned from that position upon Court holding there was a vacancy in representation of New South Wales in Senate – Where that position was "office of profit under the Crown" within meaning of s 44(iv) of Constitution – Whether holding position for that period rendered Ms Hughes "incapable of being chosen" as a senator under s 44(iv) of Constitution.

Constitutional law (Cth) – Parliamentary elections – Reference to Court of Disputed Returns – Jurisdiction of Court to determine whether a person sought to be declared elected to fill a vacancy is disqualified under s 44 of Constitution.

Words and phrases – "electoral choice", "electoral process", "hiatus", "incapable of being chosen", "nomination", "office of profit under the Crown", "polling", "process of being chosen", "scrutiny", "special count", "vacancy".

Constitution, ss 7, 10, 12, 13, 15, 24, 30, 31, 41, 44, 44(i), 44(iv), 45, 45(i), 51(xxxvi).
Administrative Appeals Tribunal Act 1975 (Cth), s 15(1).
Commonwealth Electoral Act 1918 (Cth), ss 102(4), 152, 152(1)(a), 152(1)(b), 152(1)(c), 152(1)(d), 155, 156(1), 157, 159, 167(1), 170(2)(a)(i), 175(1), 175(2), 176(1), 177(1), 220, 283(1), 360, 360(1)(vi), 374(ii), 376, 378, 379.
Remuneration Tribunal Act 1973 (Cth), s 7.

1 KIEFEL CJ, BELL, GAGELER, KEANE AND EDELMAN JJ. On 27 October 2017, the Full Court of this Court sitting as the Court of Disputed Returns answered questions referred to it pursuant to resolutions of the Senate and the House of Representatives under s 376 of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act")[1]. One of the references from the Senate concerned the Hon Ms Fiona Nash. The answers given to the questions referred in that reference included answers to the effect that, by reason of s 44(i) of the Constitution, there was a vacancy in the representation of New South Wales in the Senate for the place for which Ms Nash was returned and that the vacancy should be filled by a special count of the ballot papers with any directions necessary to give effect to the conduct of that special count being made by a single Justice.

2 On 2 November 2017, Gageler J made directions necessary to facilitate the conduct of such a special count. A special count was conducted in accordance with those directions on 6 November 2017. The candidate ascertained by that special count to be entitled to be elected to the place left unfilled by the ineligibility of Ms Nash was Ms Hollie Hughes.

3 By summons dated 7 November 2017, the Attorney-General of the Commonwealth sought from the Court an order that Ms Hughes be declared duly elected as a senator for the State of New South Wales for the place for which Ms Nash was returned. The summons was served on Ms Hughes and on Mr Kennett SC, who retained his appointment as amicus curiae.

4 In anticipation of the return of that summons, an affidavit was filed on behalf of Ms Hughes. The affidavit contained evidence which raised an issue as to whether Ms Hughes was herself disqualified from being elected as a senator by reason of having been rendered "incapable of being chosen" by operation of s 44(iv) of the Constitution.

5 That issue having been so raised, Gageler J on 10 November 2017 allowed Ms Hughes to be heard on the summons with the consequence that Ms Hughes was deemed to be a party to the reference by operation of s 378 of the Act. His Honour went on to state the question of whether the order sought in the summons should be made for the consideration of the Full Court pursuant to s 18 of the *Judiciary Act* 1903 (Cth).

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1 *Re Canavan* (2017) 91 ALJR 1209; [2017] HCA 45.

6 The hearing of the question stated occurred before the Full Court as presently constituted on 15 November 2017. The Full Court at the conclusion of the hearing answered the question stated in the negative, dismissed the summons and ordered that Ms Hughes' costs be paid by the Commonwealth.

7 These are the reasons for the dismissal of the summons.

Ms Hughes' office of profit

8 The affidavit filed on behalf of Ms Hughes was supplemented at the hearing of the question stated for the consideration of the Full Court by a statement of agreed facts. The affidavit and statement of agreed facts revealed that on 15 June 2017 Ms Hughes was appointed to the position of a part-time member of the Administrative Appeals Tribunal for a period of seven years commencing on 1 July 2017. The affidavit and statement of agreed facts further revealed that Ms Hughes resigned from that position pursuant to s 15(1) of the *Administrative Appeals Tribunal Act* 1975 (Cth) with effect from 27 October 2017. She did so by letter of resignation which she transmitted to the Governor-General by email some 45 minutes after the Full Court on that day gave its answers to the effect that there was a vacancy in the representation of New South Wales in the Senate which should be filled by a special count.

9 Members, including part-time members, of the Administrative Appeals Tribunal are entitled to remuneration in accordance with determinations made under s 7 of the *Remuneration Tribunal Act* 1973 (Cth). There could be, and was, no dispute that the position Ms Hughes held during the period between 1 July and 27 October 2017 answered the description of an "office of profit under the Crown" within the meaning of s 44(iv) of the Constitution.

The issue of timing

10 The issue which divided the Attorney-General and Ms Hughes on the one hand from Mr Kennett on the other on the hearing of the question stated for the consideration of the Full Court was one of timing. The issue was whether holding that disqualifying office during the discrete period between 1 July and 27 October 2017 was enough to render Ms Hughes "incapable of being chosen" as a senator in the election at which Ms Nash had been returned.

11 The election to the Senate for the State of New South Wales at which Ms Nash and Ms Hughes both stood as candidates followed the simultaneous dissolution of the Senate and the House of Representatives by the Governor-General on 9 May 2016.

12 Pursuant to s 12 of the Constitution, the Governor of New South Wales caused the writ for the election to be issued on 16 May 2016. As required by the Act[2], the writ for the election fixed four dates. The first was the date for the close of the roll of electors for the State[3], which was required to be the date seven days after the date of the writ[4], following which a person was not to be added to the roll until after the close of the poll for the election[5]. The date fixed by the writ for the close of the roll was accordingly 23 May 2016. The second was the date for the nomination[6], which was required to be a date between 10 and 27 days from the date of the writ[7], by noon on which nominations of candidates for election were to be made in nomination papers submitted to the Australian Electoral Officer for the State[8] and any nominations earlier submitted would be able to be withdrawn[9], and at noon on the day following which the Australian Electoral Officer was to declare each candidate whose nomination had not been rejected[10]. The date fixed by the writ for the nomination was 9 June 2016. The third date fixed by the writ was the date for the polling[11], which was required to be a date between 23 and 31 days after the date of the nomination[12], on which polling places were to be open to electors desiring to vote[13]. The date so fixed for the polling was 2 July 2016.

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2 Section 152 of the Act.

3 Section 152(1)(a) of the Act.

4 Section 155 of the Act.

5 Section 102(4) of the Act.

6 Section 152(1)(b) of the Act.

7 Section 156(1) of the Act.

8 Sections 167(1), 170(2)(a)(i) and 175(1) of the Act.

9 Section 177(1) of the Act.

10 Sections 175(2) and 176(1) of the Act.

11 Section 152(1)(c) of the Act.

12 Section 157 of the Act.

13 Section 220 of the Act.

13 The last of the dates fixed by the writ issued by the Governor on 16 May 2016 was the date for the return of the writ[14] following the scrutiny to ascertain the result of the polling for which Pt XVIII of the Act provides, which date was required to be not more than 100 days after the date of the issue of the writ[15]. Fixing the date for the return of the writ had the effect of setting an outer limit for compliance with the requirement that the Australian Electoral Officer, "as soon as conveniently may be after the result of the election has been ascertained"[16], "declare the result of the election and the names of the candidates elected"[17], certify the names of the candidates elected in a certificate attached to the writ[18] and then return the writ to the Governor[19]. The date so fixed for the return of the writ was 8 August 2016.

14 Following the issue of the writ, Ms Hughes was nominated for election in a nomination paper received by the Australian Electoral Officer for the State of New South Wales on 3 June 2016. The Australian Electoral Officer declared her nomination, together with that of each other candidate for the election, on 10 June 2016. Following polling, which took place between 8:00am and 6:00pm on 2 July 2016, and the subsequent ascertainment of the result of polling by scrutiny, the Australian Electoral Officer on 4 August 2016 made a declaration of the result of the election and the names of the candidates elected, which included Ms Nash. A copy of the writ, attaching a certificate certifying the names of those candidates, was returned to the Governor on 5 August 2016.

15 The resolution of the Senate which referred the questions concerning Ms Nash to the Court of Disputed Returns did not occur until 4 September 2017. The President of the Senate transmitted a statement of the questions to the Court of Disputed Returns the following day.

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14 Section 152(1)(d) of the Act.

15 Section 159 of the Act.

16 Section 283(1) of the Act.

17 Section 283(1)(a) of the Act.

18 Section 283(1)(b) of the Act.

19 Section 283(1)(c)(i) of the Act.

Jurisdiction to determine whether Ms Hughes was incapable of being chosen

16 The "first duty" of this Court, as of any other court, is to be satisfied that it has jurisdiction[20]. The "matter" in respect of which this Court sitting as the Court of Disputed Returns has jurisdiction by operation of s 376 of the Act is defined by the scope of the reference[21]. For the purpose of exercising that jurisdiction, the Court has the powers that are conferred on it by s 379. Those powers include the powers conferred by s 360 "so far as they are applicable". The powers so conferred fall to be exercised by the Court if and to the extent that the exercise of one or more of them is appropriate to the resolution of the matter in respect of which the Court has jurisdiction.

17 The matter defined by the questions transmitted to the Court by the President of the Senate expressly encompasses a question as to the means by which and the manner in which the vacancy for the place for which Ms Nash was returned should be filled. The Full Court having already determined that the vacancy should be filled by a special count, the power conferred by s 360(1)(vi) "[t]o declare any candidate duly elected who was not returned as elected" is applicable to give effect to the outcome of the special count which the Full Court has determined should occur, and the making of an order in the exercise of that power is appropriate finally to resolve the matter that has been referred.

18 No exploration of the nature or incidents of an order made under s 360(1)(vi) of the Act is warranted in the current circumstances beyond recognising that a declaration of a person who was not returned as elected as duly elected has the specific statutory consequence of entitling that person to "take his or her seat accordingly"[22]. It is unthinkable that the Court would accede to a request for the making of a declaration having that statutory consequence in respect of a person without determining an issue squarely raised by the facts before it as to whether the statutory consequence when applied to that person was constitutionally prohibited.

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20 *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 at 415; [1911] HCA 31; *Re Culleton* (2017) 91 ALJR 302 at 306-307 [23]; 340 ALR 550 at 555; [2017] HCA 3.

21 *In re Wood* (1988) 167 CLR 145 at 157; [1988] HCA 22; *Re Culleton* (2017) 91 ALJR 302 at 309 [39]; 340 ALR 550 at 558.

22 Section 374(ii) of the Act.

19 The particular declaration sought by the Attorney-General in the summons filed following the special count which had then been conducted would have given Ms Hughes a statutory entitlement to take the seat in the Senate for the vacant place for which Ms Nash was returned. The issue of whether Ms Hughes was herself "incapable of being chosen" as a senator having been squarely raised by the evidence adduced on the summons and having been fully exposed by the statement of agreed facts, it was incumbent on the Court to determine that issue in the exercise of the jurisdiction conferred on it in consequence of the reference in order to resolve the matter defined by that reference.

Resolving the issue of timing

20 The Full Court prefaced its reasons for the answers it gave on 27 October 2017 by noting that "[i]t is settled by authority, and not disputed by any party, that in s 44 the words 'shall be incapable of being chosen' refer to the process of being chosen, of which nomination is an essential part"[23]. The authority to which the Full Court then referred was *Sykes v Cleary*[24].

21 The Attorney-General, with the support of Ms Hughes, argued that *Sykes v Cleary* is properly understood as having held that the date of polling is the end-point of the process of being chosen. *Sykes v Cleary* cannot be so read.

22 The question which for present purposes was relevantly at issue in *Sykes v Cleary* concerned the effect of s 44(iv) on the election to the House of Representatives of Mr Cleary, who was found to have held an office of profit under the Crown at the dates of nomination and of polling but who had resigned from that office during the period of scrutiny before the date on which the result of the election was declared and the certified writ was returned. The conclusion of the majority of the Full Court, as reflected in the formal answers to questions reserved for its consideration, was that Mr Cleary was not duly elected[25].

23 In reasoning to that conclusion, Mason CJ, Toohey and McHugh JJ, with whom Brennan, Dawson and Gaudron JJ relevantly agreed, considered and rejected an argument, advanced on behalf of the then Attorney-General with the support of Mr Cleary, to the effect that a member or senator is "chosen" within

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23 *Re Canavan* (2017) 91 ALJR 1209 at 1213 [3].

24 (1992) 176 CLR 77 at 100-101, 108, 130-131, 132; [1992] HCA 60.

25 (1992) 176 CLR 77 at 140.

the meaning of s 44 only when declared to be elected[26]. Their Honours identified the question for decision as whether the reference in s 44 to "being chosen" is to "the act of choice" or to "the process of being chosen"[27]. The answer they gave was that the reference is "to the process of being chosen, of which nomination is an essential part"[28].

24 Before giving that answer, their Honours observed that the alternative of confining "being chosen" to the act of choice would in any event not have availed Mr Cleary. That was because ss 7, 24, 30 and 41 of the Constitution implied that "[t]he people exercise their choice by voting" with the consequence that, if it had been correct to confine "being chosen" to the act of choice, the relevant act would be the act of voting rather than the act of declaration which was "the formal announcement of the result of the poll" or "the announcement of the choice made"[29]. Contrary to the argument of the Attorney-General and Ms Hughes in the present case, it is not possible to infer from that observation any conclusion that the process of being chosen ends with polling. That was not the burden of the observation and no question was raised in *Sykes v Cleary* as to when the process of being chosen ends.

25 Subsequently, in *Free v Kelly*[30], Brennan CJ cited *Sykes v Cleary* for the proposition, which was uncontroversial in that case and sufficient for the purposes of its resolution, that "the time of her nomination as a candidate ... is the relevant time for determining whether a person is incapable of being chosen on any of the grounds specified in s 44".

26 More recently, in *Re Culleton (No 2)*[31], Kiefel, Bell, Gageler and Keane JJ stated:

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26 (1992) 176 CLR 77 at 99.

27 (1992) 176 CLR 77 at 99.

28 (1992) 176 CLR 77 at 100.

29 (1992) 176 CLR 77 at 99.

30 (1996) 185 CLR 296 at 301; [1996] HCA 42.

31 (2017) 91 ALJR 311 at 315 [13]; 341 ALR 1 at 5; [2017] HCA 4 (footnote omitted).

> "In *Sykes v Cleary*, 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."

27 That statement was made with the express qualification that no question arose in that case as to the temporal operation of s 44. That was noted to be because, if Senator Culleton was incapable of being chosen by reason of the circumstances which gave rise to the reference in that case, as their Honours went on to conclude that he was, "that disability persisted during the whole of the period from the time of nomination to the return of the writs for the election"[32]. The remaining member of the Court, Nettle J, similarly noted that it was unnecessary in that case to consider the significance, for the purpose of s 44, of dates other than the date of nomination[33].

28 The question of the temporal end-point of what in *Sykes v Cleary* was identified as "the process of being chosen", during which a disqualification under s 44 takes effect, must therefore be accepted to be one which has been left unanswered by binding authority. The question now falls to be resolved at the level of principle by reference to the text and structure of the Constitution having due regard to the course of its interpretation.

29 Omitting its final paragraph, which operates only to qualify s 44(iv), s 44 of the Constitution provides in full:

> "Any person who:
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> (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
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> (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

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32 (2017) 91 ALJR 311 at 315 [13]; 341 ALR 1 at 5.

33 (2017) 91 ALJR 311 at 321 [53]; 341 ALR 1 at 12.

(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."

30 The section must be read in context with s 45(i), which provides:

"If a senator or member of the House of Representatives:

(i) becomes subject to any of the disabilities mentioned in the last preceding section; ...

...

his place shall thereupon become vacant."

31 Mr Kennett argued that the Attorney-General's equation of the end-point of what was identified in *Sykes v Cleary* as "the process of being chosen" with what was identified in the same case as "the act of choice" would have the potential to result in a hiatus in that a person who became subject to a disability mentioned in s 44 after polling but before being returned as a senator or member of the House of Representatives would not have been prevented by that section from being chosen but would be prevented by that section from sitting. Such difficulty as might be thought to inhere in the potential for such a hiatus is put in perspective, however, when it is recognised that an election to fill places in the Senate is permitted by s 13 of the Constitution to occur at any time up to a year before those places become vacant. Whatever the end-point of the process of being chosen, it is inevitable that there will be some period of time between the day on which the process of being chosen ends and the day on which the person chosen is first due to take the place for which he or she was chosen during which period a disqualification might arise as a result of which the person, although chosen, would be prevented by s 44 from sitting.

32 The solution to the potential hiatus is found, as the Attorney-General submitted, in s 45(i) operating to vacate the place of the person chosen. There is no gap between the operation of s 44 and the operation of s 45(i). The inter-relationship between them is rather as explained by Quick and Garran in their commentary on s 45(i)[34]:

> "The disqualifying event mentioned in [s 45(i)] is the acquirement of any of the kinds of status enumerated in the preceding section. If such status existed at the time of the election, the person affected is not a senator or a member; he is dealt with under the preceding section. But if, after becoming a senator or a member, he 'becomes subject to' the disability, *eo instanti* his seat is vacated under this section."

33 Whatever the end-point of the process of being chosen to which s 44 refers, a person has become a senator or member of the House of Representatives within the meaning of s 45 once that end-point is reached. If the person thereafter becomes subject to a disability mentioned in s 44, not only does s 44 operate to prevent the person from sitting but s 45(i) operates to vacate his or her place. Section 45(i) has that operation even if the person has not yet taken his or her seat for the place for which he or she was chosen and, by reason of becoming subject to the disability, is prevented by s 44 from ever doing so.

34 Mr Kennett also pointed out that the process of "being chosen" to which s 44 refers encompasses the process of choice by the Houses of a State Parliament or by a State Governor which s 15 of the Constitution prescribes as the method of filling a casual vacancy in the Senate. That is true, but for present purposes unimportant. That s 44 operates in relation to s 15 does not detract from the central operation of s 44 being in relation to the processes of choice by electors to which ss 7 and 24 allude in mandating respectively that "[t]he Senate shall be composed of senators for each State, directly chosen by the people of the State" and that "[t]he House of Representatives shall be composed of members directly chosen by the people of the Commonwealth".

35 What is important for present purposes is that the processes of choice by electors to which ss 7 and 24 allude, subject to limitations expressed in and implied by those and other provisions of the Constitution which do not now need to be explored, are processes prescription of which is committed by s 51(xxxvi)

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34 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 494.

read with ss 10 and 31 of the Constitution to the Parliament. To recognise the centrality of electoral choice to such processes as might permissibly be prescribed by the Parliament is not inconsistent with recognising that the processes of choice by electors to which ss 7 and 24 allude and in respect of which s 44 has its central operation encompass legislated processes which facilitate and translate electoral choice in order to determine who is or is not elected as a senator or member of the House of Representatives.

36 Importantly, it is the Act which "establishes the structure by which the choice by the people is to be made"[35]. The legislated processes which, under the Act, facilitate and translate electoral choice in order to determine who is or is not chosen by the people as a senator or member do not end with polling. They critically include the scrutiny for which Pt XVIII of the Act elaborately provides. That point was emphasised by Hayne J in *Australian Electoral Commission v Johnston*[36]. Expounding "the constitutional purposes pursued by the Act", his Honour said[37]:

> "Direct choice by the people is effected only by taking account of the choices expressed by 'the people'. If some of the choices expressed by the people are not taken into account in the determinative scrutiny, there is at least the possibility that the result determined does not give effect to the choice which the people sought to make."

37 The exposition continued[38]:

> "'Choice' bears two faces. It refers to an elector's act of choosing. ... But it also refers to those who are chosen. Direct choice by the people requires that the lawful expression of every voter's choice is taken into account in determining who has been chosen."

38 The processes of choice which the Parliament has prescribed in the Act for the purposes of ss 7 and 24 of the Constitution continue until a candidate is

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35 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at 1052 [119]; 334 ALR 369 at 400; [2016] HCA 36.

36 (2014) 251 CLR 463; [2014] HCA 5.

37 (2014) 251 CLR 463 at 490 [80].

38 (2014) 251 CLR 463 at 490 [81] (emphasis deleted, footnote omitted).

determined in accordance with those processes to have been chosen. They are brought to an end only with the declaration of the result of the election and of the names of the candidates elected, after which certification of those names and return of the writ is a formality[39].

39 Nor is recognising the centrality of electoral choice to the processes of choice prescribed by the Parliament for the purposes of ss 7 and 24 of the Constitution inconsistent with recognising that those legislated processes which facilitate and translate electoral choice remain constitutionally incomplete until such time as they result in the determination as elected of a person who is qualified to be chosen and not disqualified from being chosen as a senator or member of the House of Representatives. So much was accepted in *In re Wood*[40], where Senator Wood's lack of qualification under s 16 of the Constitution, quite independently of what at least since *Sue v Hill*[41] would be recognised as his disqualification by operation of s 44(i) of the Constitution, was unanimously held by the Full Court of this Court sitting as the Court of Disputed Returns on a reference from the Senate to have resulted in his election and return having been "wholly ineffective to fill a vacant Senate place", the election having been "void" and the return "defective", with the consequence that there had been "a failure by the electors to choose a senator for the place" which Senator Wood had in fact been returned to fill. The relevant holding is captured in the statement that "[a] Senate election is not completed when an unqualified candidate is returned as elected"[42].

40 That aspect of the decision in *In re Wood* was not novel. As the Court explained[43], it involved nothing more than an application of the principle stated in *Vardon v O'Loghlin*[44], the first case to have come before this Court sitting as the Court of Disputed Returns on a reference from the Senate. The reference in

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39 *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 at 1059 [183]; 334 ALR 369 at 409.

40 (1988) 167 CLR 145 at 164.

41 (1999) 199 CLR 462; [1999] HCA 30.

42 *In re Wood* (1988) 167 CLR 145 at 164.

43 (1988) 167 CLR 145 at 164.

44 (1907) 5 CLR 201; [1907] HCA 69.

Vardon v O'Loghlin followed on from the declaration made by Barton J, sitting alone as the Court of Disputed Returns, in *Blundell v Vardon*[45] to the effect that the election of Mr Vardon to a place in the Senate for the State of South Australia was void[46]. The question raised by the reference was whether the later purported appointment of Senator O'Loghlin to fill that vacancy under s 15 of the Constitution by the Houses of Parliament of the State of South Australia was valid. The Court held that it was not: there was no choice capable of being made under s 15 of the Constitution because the choice required to be made for the purpose of s 7 of the Constitution had not been completed.

41 Griffith CJ, Barton and Higgins JJ framed the determinative question in *Vardon v O'Loghlin* as follows[47]:

> "The question for our decision is whether, for the purpose of determining how the vacancy declared by the Court of Disputed Returns is to be filled, the choice, which has been declared by that Court to be invalid, is to be regarded as no choice at all, ie, as a failure to choose, or as a choice which is valid for all purposes until declared invalid, so that the same consequences follow as if the first election had been valid."

42 The gravamen of the answer their Honours then gave, with the concurrence of Isaacs J, was expressed in the following explanation of principle[48]:

> "The election is either valid or invalid. If invalid, the reason of the invalidity is not material so far as regards its consequences. We think it follows that, upon the avoidance of the election itself by the Court of Disputed Returns, the case is to be treated for all purposes, so far as regards the mode of filling the vacancy, as if the first election had never been completed, unless there is something in the Constitution to lead to a contrary conclusion."

Nothing in the Constitution was found to lead to a contrary conclusion.

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45 (1907) 4 CLR 1463; [1907] HCA 75.

46 See Sawer, *Australian Federal Politics and Law 1901-1929*, (1956) at 80-82.

47 (1907) 5 CLR 201 at 208.

48 (1907) 5 CLR 201 at 208-209.

43 Acceptance of the principle in *Vardon v O'Loghlin*, as applied in *In re Wood*, underlay the answer given by the Full Court on 27 October 2017 that the vacancy in the representation of New South Wales in the Senate for the place for which Ms Nash was returned should be filled by a special count of the ballot papers[49]. That is to say, understanding that the process of choice under s 7 of the Constitution has not been completed in respect of the place in the Senate for which Ms Nash was returned underpinned the very procedure on which the Attorney-General relied in seeking the order that Ms Hughes be declared duly elected.

Ms Hughes was disqualified

44 Ms Hughes was disqualified by operation of s 44(iv) of the Constitution from being elected as a senator for the State of New South Wales for the place for which Ms Nash was returned because Ms Hughes held an office of profit under the Crown during a period in which the disqualification of Ms Nash from being validly returned as elected meant that the process of choice prescribed by the Parliament for the purpose of s 7 of the Constitution remained incomplete. By reason of Ms Hughes' disqualification, the Attorney-General's summons seeking an order that she be declared duly elected as a senator was dismissed.

45 Lest it might seem harsh or unduly technical, this result needs to be understood in context. The issue of whether Ms Hughes was ineligible to be chosen arose only as an incident of the ultimate determination of questions concerning the existence of a vacancy in the representation of New South Wales in the Senate for the place for which Ms Nash was returned which the Senate resolved to refer to the Court of Disputed Returns some 13 months after Ms Nash was in fact returned. Ms Hughes' acceptance in the meantime of appointment to the Administrative Appeals Tribunal, with the entitlement to remuneration which that appointment brought, was understandable. But it was a voluntary step which she took in circumstances where reference by the Senate to the Court of Disputed Returns of a question concerning whether a vacancy existed in the representation of New South Wales in the Senate by reason of the disqualification or lack of qualification of a senator who had been returned as elected was always a possibility. By choosing to accept the appointment for the future, Ms Hughes forfeited the opportunity to benefit in the future from any special count of the ballot papers that might be directed as a result of such a vacancy being found.

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49 *Re Canavan* (2017) 91 ALJR 1209 at 1232 [138].