HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON 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 MS SKYE KAKOSCHKE-MOORE

Re Kakoschke-Moore
[2018] HCA 10
Date of Order: 13 February 2018
Date of Publication of Reasons: 21 March 2018
C30/2017

ORDER

The questions reserved for the consideration of the Full Court under s 18 of the Judiciary Act *1903 (Cth) be answered as follows:*

Question (1)

Should the vacancy in the representation of South Australia in the Senate for the place for which Skye Kakoschke-Moore was returned on 4 August 2016 be filled by a special count of the votes cast at the poll on 2 July 2016 or by some other, and if so what, method?

Answer

The vacancy in the representation of South Australia in the Senate for the place for which Skye Kakoschke-Moore was returned on 4 August 2016 should be filled by a special count of the votes cast at the poll on 2 July 2016.

Question (2)

Notwithstanding that as at 2 July 2016 and until on or about 6 December 2017 Skye Kakoschke-Moore was a British citizen, and, therefore, incapable of being chosen as a senator, does the fact that she renounced her British citizenship with effect from on or about 6 December 2017

render her capable of now being chosen to fill the vacancy by means of a special count of the votes cast on 2 July 2016?

Answer

The fact that Skye Kakoschke-Moore renounced her British citizenship with effect from 6 December 2017 does not render her capable of now being chosen to fill that vacancy.

Question (3)

If the vacancy is to be filled by a special count of the votes cast on 2 July 2016, should Timothy Storer be excluded from the special count by reason that, whereas at the time of the poll on 2 July 2016 he stood for election in a group of candidates that was accepted by the Australian Electoral Officer on behalf of the Nick Xenophon Team party, he ceased to be a member of that party on or by 6 November 2017?

Answer

Timothy Storer should not be excluded from the special count.

Representation

D F Jackson QC with A L Tokley SC and A K Flecknoe-Brown appearing on behalf of Ms Kakoschke-Moore (instructed by Nick Xenophon & Co Lawyers)

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

M L Abbott QC with D Agresta appearing on behalf of Mr Storer (instructed by Illes Selley Lawyers)

CATCHWORDS

Re Kakoschke-Moore

Constitutional law (Cth) – Parliamentary elections – Reference to Court of Disputed Returns – Where Ms Skye Kakoschke-Moore and Mr Timothy Storer nominated for election as senator for State of South Australia as nominees of Nick Xenophon Team ("NXT") – Where Ms Kakoschke-Moore listed as third of four in order of NXT candidates, before Mr Storer – Where Ms Kakoschke-Moore returned as elected – Where Ms Kakoschke-Moore was British citizen at time of nomination – Where Ms Kakoschke-Moore subsequently renounced British citizenship – Where Mr Storer ceased to be member of NXT – Where Ms Kakoschke-Moore held incapable of being chosen or of sitting by reason of s 44(i) of Constitution – Whether vacancy in Senate should be filled by declaring Ms Kakoschke-Moore as elected – Whether Ms Kakoschke-Moore should be included in special count – Whether Mr Storer should be excluded from special count.

Words and phrases – "above the line", "electoral choice", "electoral process", "incapable of being chosen or of sitting", "political party", "process of being chosen", "special count", "true legal intent of the voters".

Constitution, ss 15, 44.
Commonwealth Electoral Act 1918 (Cth), ss 162, 166, 168, 169, 181(2), 239, 269, 272, 360(1)(vi), 376.

1 KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ. Ms Skye Kakoschke-Moore was a British citizen when she nominated as a candidate to be elected as a senator for the State of South Australia at the general election held on 2 July 2016 following the dissolution of both houses of Parliament on 9 May of that year. Ms Kakoschke-Moore stood for election as a nominee of the political party known as the Nick Xenophon Team ("NXT"), a political party registered under the *Commonwealth Electoral Act* 1918 (Cth) ("the Act"). On 4 August 2016, she was returned as elected as a senator for South Australia.

2 On 27 November 2017, the Senate resolved, pursuant to s 376 of the Act, to refer to this Court, sitting as the Court of Disputed Returns, the question whether, by reason of s 44(i) of the Constitution (which renders a subject or a citizen of a foreign power incapable of being chosen or of sitting as a senator), there was a vacancy in the representation of South Australia in the Senate for the place for which Ms Kakoschke-Moore was returned. The Senate also resolved to refer to this Court ancillary questions, including one as to how any such vacancy should be filled.

3 On 6 December 2017, Ms Kakoschke-Moore's renunciation of her British citizenship became effective.

4 On 24 January 2018, Ms Kakoschke-Moore was declared by Nettle J to be incapable of being chosen or of sitting by reason of s 44(i) of the Constitution. As a result, three further issues were raised by questions reserved by Nettle J for the consideration of the Full Court pursuant to s 18 of the *Judiciary Act* 1903 (Cth). Those questions were in the following terms:

(1) Should the vacancy in the representation of South Australia in the Senate for the place for which Skye Kakoschke-Moore was returned on 4 August 2016 be filled by a special count of the votes cast at the poll on 2 July 2016 or by some other, and if so what, method?

(2) Notwithstanding that as at 2 July 2016 and until on or about 6 December 2017 Skye Kakoschke-Moore was a British citizen, and, therefore, incapable of being chosen as a senator, does the fact that she renounced her British citizenship with effect from on or about 6 December 2017 render her capable of now being chosen to fill the vacancy by means of a special count of the votes cast on 2 July 2016?

(3) If the vacancy is to be filled by a special count of the votes cast on 2 July 2016, should Timothy Storer be excluded from the special count by reason that, whereas at the time of the poll on 2 July 2016 he stood for election in a group of candidates that was accepted by the Australian Electoral Officer on behalf of the Nick Xenophon Team party, he ceased to be a member of that party on or by 6 November 2017?

5 After the hearing on 13 February 2018, the Court decided unanimously that these questions should be answered as follows:

(1) The vacancy in the representation of South Australia in the Senate for the place for which Skye Kakoschke-Moore was returned on 4 August 2016 should be filled by a special count of the votes cast at the poll on 2 July 2016.

(2) The fact that Skye Kakoschke-Moore renounced her British citizenship with effect from 6 December 2017 does not render her capable of now being chosen to fill that vacancy.

(3) Timothy Storer should not be excluded from the special count.

6 The Court stated that its reasons for these answers would be given at a later time. What follows are those reasons.

Factual background

7 In the group nomination form lodged with the Australian Electoral Commission on behalf of NXT in relation to the general election, Ms Kakoschke-Moore was listed as the third of four in the order of candidates, after Mr Nick Xenophon and Mr Stirling Griff and before Mr Storer. The order in which the candidates were listed determined the receipt of preferences for "above the line" votes because the order of voters' preference is taken to be the order in which the candidates are listed[1].

8 On 3 November 2017, the management committee of NXT resolved to expel Mr Storer from the party. On 6 November 2017, Mr Storer purported to

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1 *Commonwealth Electoral Act* 1918 (Cth), s 272(2).

resign from NXT. Thus, by at least the latter date, Mr Storer had ceased to be a member of NXT.

9 On 22 November 2017, Ms Kakoschke-Moore resigned her position as senator for the State of South Australia. She did so after receiving confirmation from the United Kingdom Home Office and legal advice that she was a British citizen. On 30 November 2017, she submitted a form seeking to renounce her British citizenship. On 6 December 2017, she received confirmation from the Home Office that her renunciation of British citizenship became effective on that date.

10 On 7 December 2017, the Attorney-General of the Commonwealth filed a summons seeking declarations that there is a vacancy by reason of s 44(i) of the Constitution in the representation of South Australia in the Senate for the place for which Ms Kakoschke-Moore was returned, and that that vacancy should be filled by a special count of the ballot papers, with votes for Ms Kakoschke-Moore and Mr Robert Day AO[2] to be counted to the candidate next in order of the voter's preference. The effect of such an order would be that, in the special count, the votes cast above the line for NXT that would have been counted in favour of Ms Kakoschke-Moore would be counted in favour of Mr Storer instead.

11 On 8 December 2017, Nettle J ordered that Ms Kakoschke-Moore, Mr Storer and the Attorney-General of the Commonwealth be allowed to be heard and be deemed to be parties.

Ms Kakoschke-Moore's submissions

12 It is convenient now to summarise the submissions made on behalf of Ms Kakoschke-Moore in relation to each of the questions reserved for this Court's consideration.

Question (1)

13 Ms Kakoschke-Moore submitted that the vacancy in the representation of South Australia in the Senate for the place for which she was returned on 4 August 2016 should be filled, not by a special count, but by this Court

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2 See *Re Day (No 2)* (2017) 91 ALJR 518; 343 ALR 181; [2017] HCA 14.

declaring her to be elected pursuant to s 360(1)(vi) of the Act. If that submission were accepted, it would render answers to Questions (2) and (3) unnecessary.

14 Section 360(1)(vi) of the Act provides that the Court of Disputed Returns may "declare any candidate duly elected who was not returned as elected". There is an obvious difficulty in the way of accepting that this provision is available in this case, in that Ms Kakoschke-Moore was, in fact, returned as elected. That difficulty may be put to one side, however, because Ms Kakoschke-Moore's submission faces a more fundamental difficulty.

15 Ms Kakoschke-Moore argued that while s 44(i) had the effect that she was "incapable of being chosen or of sitting" at the time of the election, she was not barred from now being returned as elected. It was said that because she has now renounced her British citizenship, she is no longer incapable of being chosen. It was argued that disqualification by reason of s 44(i) is not permanent, and that its effect is spent once the disability is overcome.

16 As will be explained, this submission misconceives the effect of disqualification under s 44. Ms Kakoschke-Moore is now eligible to stand for election in the future; but the removal of her disqualification does not operate retrospectively to deem her to have been eligible to be chosen as a senator at the election on 2 July 2016.

Question (2)

17 Alternatively, Ms Kakoschke-Moore submitted that, if a special count is to be ordered, then, as a person who is no longer disqualified from being chosen as a senator, she should not be excluded from the special count. Ms Kakoschke-Moore argued that, if it were necessary to answer Question (2), it should be answered "Yes".

18 It was said that, so long as a candidate for election is not incapable of being chosen at the time the special count is ordered, it is immaterial that he or she was incapable of being chosen at some earlier point in time, and that this approach would best give effect to the true intention of the voters.

19 Ms Kakoschke-Moore argued that this Court's decision in *Re Nash (No 2)*[3] is not decisive against her submission. It was said that in *Re Nash (No 2)* the Court did not need to consider whether s 44 had the effect of disqualifying a person who engaged one of its limbs at some time between nominating as a candidate for the general election and the order for a special count following the election from being included in the special count. It was argued that, in contrast to this Court's decision in *Re Nash (No 2)*, a special count has not yet been ordered in this matter and that, if one were now ordered, Ms Kakoschke-Moore could be included in that count as she is no longer a citizen of the United Kingdom.

20 Ms Kakoschke-Moore also argued that, to the extent that *Re Nash (No 2)* precluded acceptance of her submission, it should be overruled as a decision that proceeded upon a view of the relevant constitutional provisions which was unsound and which had not been worked out in a succession of earlier decisions.

21 As will be explained, this submission too is misconceived. A special count is not a poll of the voters separate from the poll of 2 July 2016; it is only a means of determining the legal effect of that poll. Put differently, the "true legal intent of the voters" of which the Court spoke in *In re Wood*[4] was the true legal intent expressed at the poll held on 2 July 2016. It was Ms Kakoschke-Moore's ineligibility as a candidate in that poll which denied legal effect to the votes cast for her.

Question (3)

22 Ms Kakoschke-Moore argued that Question (3) should be answered "Yes" so that Mr Storer would be excluded from the special count. This result, Ms Kakoschke-Moore contended, would reflect the practical reality that voting for the Senate took place along party lines and the exclusion of Mr Storer from the special count would give effect to the voters' intentions, which could be taken to require that Ms Kakoschke-Moore be replaced by someone of the same political party.

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3 (2017) 92 ALJR 23; 350 ALR 204; [2017] HCA 52.

4 (1988) 167 CLR 145 at 166; [1988] HCA 22.

23 It was argued that the special count process should reflect the voters' true legal intentions in a manner that reflected the values of the Constitution and the Act[5]. In that regard, the importance of party representation was said to be reflected in the Act, through its provision for voters to vote above the line to indicate a preference for a set of candidates nominated by a particular political party.

24 It was argued that the allocation of above the line votes for NXT to Mr Storer, who was no longer a member of the same political party as Ms Kakoschke-Moore, would distort the voters' intentions. In order to avoid that distortion, those votes should instead be allocated to a person who is both qualified and a member of NXT. Including Mr Storer in the special count would be contrary to the voters' intentions, a significant aspect of which was the choice of a political party (by way of above the line voting) rather than a specific candidate. Ms Kakoschke-Moore said that a special count resulting in the declaration of Mr Storer as a senator would distort the voters' intention, which was to vote for NXT. It was said that the appropriate course is to include in the special count only those candidates who are both qualified to be chosen and still members of the political party for whose candidates the voters had expressed their preferences.

25 This aspect of Ms Kakoschke-Moore's argument fails to explain the basis upon which this Court could exclude from the special count a candidate at the election who was duly nominated and was at all times eligible to be chosen. In addition, her argument fails to recognise that the ascertainment of the true legal intention of the voters can proceed only in accordance with the Act.

26 Ms Kakoschke-Moore also sought to rely, by analogy, upon s 15 of the Constitution, as amended in 1977, which has the effect that casual vacancies in the Senate are to be filled by a person of the same political party as the departing senator. As will be explained, that argument is without substance.

Eligibility to be chosen

27 A fundamental misunderstanding lies at the root of Ms Kakoschke-Moore's approach to the determination of Questions (1) and (2).

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5 Citing *In re Wood* (1988) 167 CLR 145 at 165-166.

Her arguments in relation to these questions fail to appreciate that because she was incapable of being chosen at the election held on 2 July 2016, she is incapable of being chosen by the special count, the purpose of which is to complete that electoral process[6].

28 In *Re Nash (No 2)*[7], this Court held that the process of "being chosen" to which s 44 refers is a process of electoral choice that commences at the date of nomination and continues until the completion of the legislated processes for election that facilitate the choice by the people that the Constitution requires. In that case, Kiefel CJ, Bell, Gageler, Keane and Edelman JJ explained[8]:

> "[I]t is the Act which 'establishes the structure by which the choice by the people is to be made'[9]. 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. …
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> 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 determined in accordance with those processes to have been chosen. They are brought to an end only with the declaration of the result

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6 *Re Culleton (No 2)* (2017) 91 ALJR 311 at 319 [39]-[44], 324 [67]; 341 ALR 1 at 10-11, 17; [2017] HCA 4; *Re Day (No 2)* (2017) 91 ALJR 518 at 532 [77]-[80], 534-535 [93], 549-550 [206]-[211], 561 [293]; 343 ALR 181 at 197-198, 201, 221-222, 237; *Re Canavan* (2017) 91 ALJR 1209 at 1232 [138]; 349 ALR 534 at 564; [2017] HCA 45.

7 (2017) 92 ALJR 23 esp at 29 [33]; 350 ALR 204 at 212.

8 (2017) 92 ALJR 23 at 30 [36]-[38]; 350 ALR 204 at 212-213.

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

> 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[10]."

29 The process of choice involved in the election of 2 July 2016, so far as is presently relevant, remains incomplete until the vacancy in the Senate for South Australia which arose on the dissolution of the Senate on 9 May 2016 pursuant to s 57 of the Constitution is filled by the determination that a person who is eligible to be chosen has been elected. Ms Kakoschke-Moore, who was a citizen of a foreign power from the beginning of and during most of this process, is not now able to be included in the special count for the purpose of completing the electoral process, of which nomination is an essential part[11]. Ms Kakoschke-Moore was not eligible to be chosen as a senator at that time; and her candidacy thereafter was without legal effect.

30 A special count is part of the electoral process; it is not some separate, new electoral process by which a new choice is to be made. In *Re Nash (No 2)*, Kiefel CJ, Bell, Gageler, Keane and Edelman JJ explained that[12]:

> "[the] 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."

31 The reference from the Senate to this Court under s 376 of the Act does not mean that this Court is engaged in now making the kind of choice that the Constitution and the Act require to be made by the people. The task of this Court is to ascertain the legally effective choice of the people, given that Ms Kakoschke-Moore's candidacy was legally ineffective.

32 A special count may be contrasted with the holding of a by-election. A by-election involves the casting of new votes following a new nomination as

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

11 *Sykes v Cleary* (1992) 176 CLR 77 at 100; [1992] HCA 60.

12 (2017) 92 ALJR 23 at 30 [39]; 350 ALR 204 at 213.

part of a new electoral process. For that reason, a candidate who had previously been disqualified by reason of s 44 could participate in a by-election provided that he or she had removed the disqualifying attribute by the time the new process of being chosen had commenced.

33 This case is not distinguishable from *Re Nash (No 2)*. In that case, Ms Hughes was appointed to an office of profit under the Crown after Ms Nash was returned as an elected senator for New South Wales at the 2 July 2016 election. The process of choice at the election remained incomplete because the return of Ms Nash was disputed and, in due course, Ms Nash was held to have been ineligible to be chosen as a senator. Ms Hughes resigned her office of profit shortly after the Court ordered that there be a special count to fill the place for which Ms Nash was returned[13]. Ms Hughes' ineligibility to be chosen upon the special count arose because her appointment occurred during the period when the electoral process to fill the vacancy was incomplete. This Court's decision did not turn on Ms Hughes' failure to resign her office of profit under the Crown prior to the making of the order requiring the special count. Rather, it turned upon her having become incapable of being chosen to fill the vacancy in the course of the incomplete process to fill that vacancy by the poll of 2 July 2016[14].

34 The argument for Ms Kakoschke-Moore would have it that the electoral process associated with the poll of 2 July 2016 was complete with the return of Ms Nash as elected. But that return was legally ineffective because Ms Nash's candidacy was legally ineffective. The vacancy in the Senate which arose on 9 May 2016 as a result of the dissolution of both houses of Parliament was not filled by the return of Ms Nash. A new vacancy did not arise when Ms Nash was declared incapable of being chosen. The true position was that the vacancy had not been filled because the 2 July 2016 election to fill that vacancy had not been completed by the return of a candidate capable of being chosen.

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13 (2017) 92 ALJR 23 at 26 [8]; 350 ALR 204 at 206-207.

14 (2017) 92 ALJR 23 at 30-31 [38]-[44]; 350 ALR 204 at 213-214.

35 This Court's decision in *Re Nash (No 2)* applied the view, expressed earlier in *Vardon v O'Loghlin*[15], *In re Wood*[16] and *Sykes v Cleary*[17], that the process of choice mandated by the Constitution and prescribed by the Act begins with nomination[18] and is not concluded until only candidates capable of being chosen are returned as elected. There is no basis for the argument that this Court should overrule *Re Nash (No 2)*. Leave to re-open *Re Nash (No 2)* should be refused.

May Mr Storer be included in the special count?

36 The purpose of a special count is to identify "the true legal intent of the voters"[19] at the general election. The true legal intent of the voters is no more or less than what is apparent from the valid ballots having regard to the relevant provisions of the Act[20].

37 In *In re Wood*[21], Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ said:

> "The purpose of the poll is to choose in accordance with the Act the preferred candidates who are qualified to be chosen, but no effect can be given for the purpose of the poll to the placing of a figure against the name of a candidate who is not qualified to be chosen: an indication of a voter's preference for an unqualified candidate is a nullity. … The vote is

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15 (1907) 5 CLR 201 at 208-209, 213-214; [1907] HCA 69.

16 (1988) 167 CLR 145 at 164.

17 (1992) 176 CLR 77 at 100-101, 108, 130-131.

18 *Free v Kelly* (1996) 185 CLR 296 at 301; [1996] HCA 42.

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

20 *Re Day (No 2)* (2017) 91 ALJR 518 at 549-550 [209]-[211], 561-563 [298]-[306]; 343 ALR 181 at 221-222, 237-239.

21 (1988) 167 CLR 145 at 165-166.

valid except to the extent that the want of qualification makes the particular indication of preference a nullity."

38 The sections of the Act that provide for the nomination of candidates for election to the Senate and the House of Representatives by political parties[22] and for voting for candidates by marking the ballot by reference to the political parties that have nominated them[23] facilitate the choice of candidates. An above the line vote is the expression of a preference for each person within the relevant group of candidates (usually, though not always, comprising the members of a registered political party[24]), in the order in which their names appear on the ballot paper[25].

39 These provisions of the Act do not require that each individual endorsed by a party must maintain his or her affiliation with that party in order to be duly elected. In particular, s 272(2)(b) of the Act provides that each ballot paper of a voter who has voted above the line is taken to have been marked as if each candidate in a preferenced group was placed in an order of preference consecutively, from the candidate whose name on the ballot paper is at the top of the group to the candidate whose name is at the bottom. This provision cannot be read as if it were qualified by the need somehow to ensure that each grouped candidate would remain in the group. Indeed, the Act contains no machinery whereby the maintenance of that relationship might be policed and enforced. The maintenance of that relationship is left by the Act as a matter between the candidate and the party.

40 Under the Act, the circumstance that a nominated candidate ceases to be a member of the party that endorsed him or her has no consequence for the validity of the ballots cast in his or her favour. Nothing in the Constitution or the Act requires that a person qualified to be elected and duly elected must remain affiliated with the party that endorsed him or her before the completion of the

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22 *Commonwealth Electoral Act* 1918 (Cth), ss 162, 166.

23 *Commonwealth Electoral Act* 1918 (Cth), ss 239, 269, 272.

24 *Commonwealth Electoral Act* 1918 (Cth), ss 168, 169(1), 169(4).

25 *Commonwealth Electoral Act* 1918 (Cth), s 272(2).

election, just as there is no requirement that the affiliation must be maintained during the term of the Parliament for which he or she was elected.

41 Those voters who cast their votes above the line for NXT on 2 July 2016 must be taken to have intended that their votes should, if sufficient, elect Mr Storer: that is the effect of the Act. The circumstance that Mr Storer and NXT subsequently fell out with each other has nothing to do with the intention which informed the votes cast at the poll on 2 July 2016. Mr Storer's subsequent expulsion or resignation from NXT could not alter the voters' expression of intention at the poll that he should be elected should their evident preference for Ms Kakoschke-Moore not be capable of being given legal effect. Indeed, if Mr Storer had resigned from NXT before the declaration of the poll, his dissociation from NXT would not have resulted in the election failing within the meaning of s 181(2) of the Act, and, therefore, he would still have been entitled to be duly elected as a candidate who had been duly nominated and was at all times eligible to be chosen as a senator.

42 For those reasons, it is necessary that Mr Storer be included in the special count in order to ensure that it achieves the true legal effect of the voters.

43 Finally, it should be said that s 15 of the Constitution does not assist Ms Kakoschke-Moore's approach to the determination of Question (3), even by analogy. Section 15 provides that where a vacancy has occurred in the place of a senator chosen by the people of a State who was endorsed by a political party at the time he or she was chosen, that senator shall be replaced by a member of that party. If a person so chosen ceases to be a member of that political party before taking his or her seat, he or she shall be deemed not to have been so chosen or appointed and the vacancy shall again be notified.

44 It is readily apparent that s 15 of the Constitution operates only in the case of a senator who has been validly elected in the first place. Section 15 prescribes a process for the filling of a casual vacancy in the Senate in respect of a duly elected senator. That process is entirely different from the completion of the electoral process, with which the present case is concerned. In contrast to such a case, the present reference is concerned with a case where a senator returned as elected was not capable of being chosen and so was not legally chosen at all. In such a case, the filling of the vacancy by reference to the legally effective choice of the people may well lead to the return of a person from a political party different from that of the ineligible candidate.