

**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 MALCOLM ROBERTS (C14/2017)**

Date referred to Full Court: 24 August 2017

Section 44 of the Constitution provides that any person who has any of certain attributes shall be incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives. Among those attributes are (in s 44(i)) being a subject or a citizen of a foreign power.

Senator Malcolm Roberts was born in India in 1955, to a British father and an Australian mother. In or about 1962 he moved to Australia with his family and in May 1974 he became an Australian citizen.

In August 2016 Senator Roberts was elected as a Senator for Queensland following the general election held on 2 July 2016. On 6 June 2016, two days prior to his nomination as a candidate for the election, he sent an email to three email addresses stating that, although he was confident he was not a British citizen, he immediately renounced any such citizenship.

Senator Roberts was in fact a British citizen by descent, and his email was ineffective as a renunciation of that citizenship. (The email was not sent to the appropriate authority, the Home Office in the United Kingdom, nor was it accompanied by a fee prescribed for the renunciation of British citizenship.)

Senator Roberts lodged a renunciation form and paid the prescribed fee on 2 November 2016 and his British citizenship then ceased on 5 December 2016.

On 24 August 2017 Chief Justice Kiefel, sitting as the Court of Disputed Returns, referred to a Full Court, under s 18 of the *Judiciary Act* 1903 (Cth), the following questions that had been transmitted by the Senate on 10 August 2017 pursuant to s 377 of the *Commonwealth Electoral Act* 1918 (Cth):

- (a) whether by reason of s 44(i) of the Constitution there is a vacancy in the representation of Queensland in the Senate for the place for which Senator Roberts 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.

Chief Justice Kiefel also made orders that Senator Roberts and the Attorney-General of the Commonwealth (“the Attorney-General”) be heard and be deemed to be parties to the reference under s 378 of the *Commonwealth Electoral Act* 1918 (Cth).

A Notice of a Constitutional Matter has been filed by the Attorney-General.

On 21 September 2017 Justice Keane conducted a hearing, in accordance with an order made by Chief Justice Kiefel on 15 September 2017, to resolve certain factual issues in advance of the Full Court's hearing of the referred questions. On 22 September 2017 Justice Keane delivered judgment (*Re Roberts* [2017] HCA 39), finding that Senator Roberts, at the date of his nomination for the Senate, knew that there was at least a real and substantial prospect that prior to May 1974 he had been and remained thereafter a citizen of the United Kingdom. His Honour also found that Senator Roberts could have sought professional advice or could have contacted the United Kingdom High Commission in Canberra prior to his nomination to establish whether he was in fact a British citizen.

The Attorney-General submits that the phrase "is a subject or a citizen ... of a foreign power" in s 44(i) of the Constitution should be construed as referring only to a person who has voluntarily obtained or retained that status. A person who does not know that he or she is, or ever was, a foreign citizen has not voluntarily obtained that status and therefore is not disqualified. Alternatively, where a person became aware that he or she was a foreign citizen (or that there was a prospect of such citizenship) but took all reasonable steps to renounce that citizenship within a reasonable time of becoming aware of it, the person was not disqualified under s 44(i) of the Constitution because he or she did not voluntarily retain that citizenship. The Attorney-General submits that Senator Roberts was disqualified by the operation of s 44(i), as he did not take reasonable steps to make enquiries or to renounce his British citizenship prior to his nomination for the Senate.

Senator Roberts submits that he was not disqualified, as he had believed that he was a citizen only of Australia. It was irrelevant that he had understood there was a prospect he was also a British citizen. Alternatively, even though he suspected that he might hold British citizenship, he took reasonable steps to renounce that citizenship within a reasonable time.