IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY **No. C17 of 2017**

RE THE HON MS FIONA NASH
Reference under s 376 of the Commonwealth Electoral Act 1918 (Cth)

SUBMISSIONS FILED ON BEHALF OF MS HOLLIE HUGHES

Filed on behalf of Ms Hollie Hughes
Harpur Phillips
Suite 6.14, 55 Miller Street
PYRMONT NSW 2009

Date of Document: 13 November 2017
Telephone: (02) 8065 5118
michelle@harpurphillips.com.au
Ref: Michelle Harpur

Part I Publication of Submissions

1. These submissions are in a form suitable to be published on the internet.

Part II Issues

2. The principal issue for determination is whether Ms Hollie Hughes is now incapable of being chosen, and sitting as, a senator, pursuant to s 44(iv) of the Constitution despite being eligible on 2 July 2016 when the people of New South Wales exercised their choice by voting, by reason of the fact that during the period from 1 July 2017 until 27 October 2017, Ms Hughes was a part-time member of the Administrative Appeals Tribunal (the **Tribunal** or **AAT**).

Part III Section 78B Notices

3. The Attorney-General of the Commonwealth has been ordered to serve notices pursuant to s 78B of the *Judiciary Act 1903 (Cth)* (**Judiciary Act**).

Part IV Facts

4. A statement of agreed facts has been filed. The relevant facts are summarised below.

5. On 16 May 2016, the Governor of New South Wales issued to the Australian Electoral Officer for the State of New South Wales (**AEO**) a writ for the election of Senators for that State.

6. On 2 June 2016, Ms Hughes nominated for election to the Senate.

7. On 2 July 2016, a general election was held for the Parliament. Ms Hughes was not elected to the Senate.

8. On 5 August 2016, the AEO returned the writ to the Governor of New South Wales, attaching a certificate listing the names of the 12 candidates who had been duly elected as Senators for New South Wales.

9. On 23 June 2017, Ms Hughes was appointed as a part-time member of the Tribunal by the Attorney-General of the Commonwealth with effect from 1 July 2017.

10. On 27 October 2017 (shortly after 2.15 pm) this Court delivered its reasons in *Re Canavan* HCA [2017] 45, which determined, *inter alia*, that Fiona Nash was

disqualified from being chosen or sitting as a Senator and that the vacancy in the Senate should be filled by a special count of the ballot papers.

11. Immediately following delivery of the judgment in *Re Canavan*, Ms Hughes tendered her resignation from the Tribunal by written notice to the Governor-General. That resignation became effective on the same day.[1]

12. On 2 November 2017, Gageler J ordered the AEO to undertake a special count of the ballot papers to determine the candidate entitled to be elected to the place for which Ms Nash was returned.

13. On 6 November 2017, a special count was conducted. Ms Hughes was identified as the person entitled to take the vacancy in the Senate created by Ms Nash's disqualification.

14. On 7 November 2017, the Attorney-General of the Commonwealth filed a summons with this Court seeking a declaration that Ms Hughes "is duly elected as a senator for the State of New South Wales for the place for which Fiona Nash was returned."

15. On 9 November 2017, Ms Hughes' lawyer filed on her behalf submissions and an affidavit setting out to the Court relevant factual and legal issues in relation to the declaration that was being sought by the Attorney-General of the Commonwealth.

16. On 10 November 2017, Gageler J stated a case pursuant to s 18 of the Judiciary Act for consideration by the Full Court as to whether the order sought by the Attorney-General of the Commonwealth should be made.

Part V Applicable provisions

17. Section 44 of the Constitution relevantly provides:

> "*Any person who:*
>
> *…*
>
> *(iv) holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenue of the*

[1] Section 15(2), *Administrative Appeals Tribunal Act 1975 (Cth).*

Commonwealth ….

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

Part VI Argument

18. It is submitted that, notwithstanding her appointment to the Tribunal, Ms Hughes is not disqualified, by reason of s 44(iv) of the Constitution, from being chosen or of sitting as a senator because her acquisition of the disqualifying attribute occurred after the process of being chosen was completed, and was divested prior to her sitting in the Senate.

Membership of the Tribunal is an "office of profit under the Crown"

19. The meaning of the expression "office of profit under the Crown" is obscure, but it encompasses at least those persons who are "permanently employed by government" or are "permanent officers of the executive government."[2] The various references to "permanent" employment by the plurality in *Sykes v Cleary*[3] should not be understood as elevating this characteristic into a necessary criterion, particularly since the prohibition in s 44(iv) is directed towards "*any* office of profit…". (emphasis added)

20. The AAT, being a statutory tribunal concerned with administrative functions, is a creature of the executive government. Appointment as a member of the AAT is made by the Governor-General[4] acting on, in this case, the advice of the Attorney-General of the Commonwealth. The terms and conditions of office are as determined by the Minister in writing.[5] Upon her appointment, Ms Hughes became entitled to be remunerated in accordance with the Act, with such remuneration determined by the Remuneration Tribunal[6]. Her remuneration and allowances were payable out of the consolidated revenue fund.

21. It is accepted that membership of the Tribunal, being a position of employment by the

---

[2] *Sykes v Cleary* (1992) 176 CLR 77 at 95, 96 and 97.
[3] *Sykes v Cleary* (1992) 176 CLR 77 at 95-96
[4] Section 6(1), *Administrative Appeals Tribunals Act 1975* (Cth).
[5] Section 8(7), *Administrative Appeals Tribunals Act 1975* (Cth).
[6] Section 9(1), *Administrative Appeals Tribunals Act 1975* (Cth).

government, is an office of profit under the Crown to which the prohibition in s 44(iv) of the Constitution is directed. If the conclusion were otherwise, then members of Parliament would be free to accept appointment as members of the Tribunal, a result that would subvert the purpose of s 44(iv). Not only might it be physically impossible to fulfil simultaneously the duties of the two roles in a satisfactory manner, but permitting membership of the AAT to be held by a person, who, as a member of Parliament, is engaged in political controversy, may undermine public confidence in the impartiality of the members of the Tribunal who are required to perform an administrative function in a judicial manner.

22. That Ms Hughes' appointment to the AAT was part-time only, and not permanent, does not alter the characterisation of her appointment as constituting an office of profit under the Crown. The reference in 44(iv) to "any office of profit…" is broad enough to capture Ms Hughes' part-time membership of the Tribunal.

Ms Hughes is not permanently disqualified from being chosen as a senator

23. Occupying an office of profit under the Crown does not permanently disqualify a person from being chosen or of sitting in the Senate. Such a construction is not supported by the text of s 44(iv), which refers in the present tense to "holds any office…", rather than in the past tense to "held any office…". Nor would such a construction be consistent with s 44(i), which does not disbar a former dual citizen from being elected to Parliament, provided the person has divested him or herself of the conflicting allegiance prior to the time of nomination.

24. It is submitted that, other than in the case of a person "attainted of treason" within the meaning of s 44(ii) who might be "irremediably disqualified",[7] it is the possession of a disqualifying attribute at the time of "being chosen" that is relevant to the question of eligibility under s 44(iv). This interpretation is consistent with the observations of Quick and Garran, who noted that s 44 enumerates different kinds of status, which "*while they continue*" render any person incapable of being chosen or of sitting as a

[7] [2017] HCA 45 at [43].

senator or a member.[8] The learned authors further observed "… the continuance of the disqualifying status" makes a person incapable of becoming a senator or a member.[9]

25. Provided that a person has divested him or herself of an office of profit under the Crown prior to the time of "being chosen" or "sitting" as either a member of the House or as a senator, then such a person is not otherwise disqualified under s 44(iv).

The method of choosing senators

26. The Constitution empowers the Federal Parliament to make laws prescribing the method of choosing senators.[10] The method of choosing senators in NSW is prescribed for in the *Commonwealth Electoral Act 1918 (Cth)*.[11] The *Commonwealth Electoral Act* provides that writs for the election of senators for the States shall fix the date for:

a) The close of the Rolls;

b) The nomination;

c) The polling; and

d) The return of the writ.[12]

27. A challenge to the validity of any election or return may be made only by petition addressed to the Court of Disputed Returns and not otherwise.[13] Any such petition must be filed within strict time limits.[14] The challenge to an election or return by way of petition to the Court of Disputed Returns is to be contrasted with a reference to the Court as to the qualifications of a senator or member of the House of Representatives.[15]

---

[8] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (revised ed) (2015), p 563.
[9] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (revised ed) (2015), p 564.
[10] Section 6, Constitution.
[11] Section 6 of the Constitution also empowers a State Parliament to make laws with respect to the method of choosing senators for their state, of which the *Senators Elections Act 1903 (NSW)* is an example. That legislation is not relevantly inconsistent with the *Commonwealth Electoral Act 1918 (Cth)*.
[12] Section 152, *Commonwealth Electoral Act 1918* (Cth).
[13] Section 353(1), *Commonwealth Electoral Act 1918* (Cth).
[14] Section 355(e), *Commonwealth Electoral Act 1918* (Cth).
[15] Section 376, *Commonwealth Electoral Act 1918* (Cth).

Historically, such matters were determined in the house of Parliament to which they related, and not by the Court of Disputed Returns.

28. The question as to the qualification of a senator is not subject to any time limitation and conceivably a reference might be made at any time during the six-year rotation of any particular senator.

Construing s 44(iv)

29. Section 44 provides that any person who falls within paragraph (iv) "shall be incapable of being chosen … as a senator." The section necessarily requires an assessment of a would-be candidate's eligibility by reference to his or her possession of the disqualifying criteria set forth in s 44 at a certain point or points in time.

30. It is submitted that the temporal focus for the purposes of s 44(iv) is the period between the date of nomination[16] and either the close of polling[17] or the return of the writs for the election.[18] Each of these dates are fixed in the writs for elections issued by the Governor-General or State Governors, as the case may be.[19]

31. In *Re Canavan*,[20] the Court, citing *Sykes v Cleary*,[21] stated that the temporal focus for the purposes of s 44(i) applies from the date of nomination until the completion of the electoral process, but did not identify when this process was completed.

32. The temporal focus of s 44(iv) was considered in *Sykes v Cleary*.[22] There, the plurality (Mason CJ, Toohey and McHugh JJ)[23] said that the words "shall be incapable of being chosen" refer to the process of being chosen, of which nomination is an essential part.[24] It is the eligibility of the would-be candidate at the time of nomination that is critical

---

[16] Section 156, *Commonwealth Electoral Act 1918* (Cth).
[17] Section 220(b), (c) and (d), *Commonwealth Electoral Act 1918* (Cth).
[18] Section 283, *Commonwealth Electoral Act 1918* (Cth).
[19] Sections 151 and 152, *Commonwealth Electoral Act 1918* (Cth).
[20] [2017] HCA 45 at [3].
[21] (1992) 176 CLR 77.
[22] (1992) 176 CLR 77.
[23] Brennan, Dawson and Gaudron JJ agreed with the plurality's reasoning concerning s 44(iv) and its application to the first respondent; see (1992) 176 CLR 77 at 108 (Per Brennan J); 130 (per Dawson J) and 132 (per Gaudron J).
[24] *Free v Kelly* (1996) 185 CLR 296 at 301; *Re Culleton (No 2)* (2017) 91 ALJR 311 at 315 [13]; (2017) 341 ALR 1 at 5.

because it is on and from this time, which continues up to and including the day of the poll, when the "process of being chosen" occurs.

33. The plurality rejected a submission that a member was "chosen" when the member is declared to be elected, that is, when the poll is declared. Their Honours said that the declaration of the poll is the announcement of the choice made; it is not the making of the choice.[25] That is why the Court disapproved of the technique of avoiding disqualification under s 44(iv) by resigning from an office of profit before the declaration of the poll. By then, it is too late. The choice of the electorate has been exercised and the process of being chosen has been completed. Importantly, the plurality did not suggest that possession of a disqualifying characteristic at the time of declaring the poll is relevant to the question of eligibility. Again, by then, it would be too late.

34. *Sykes v Cleary*[26] supports a construction of s 44(iv) that focuses upon the period between the date of nomination and the close of polling.

35. In *Re Culleton*, however, the plurality (Kiefel, Bell, Gageler and Keane JJ) held that the process of "being chosen" for the purpose of s 44 ends on the return of the writs for the election.[27] Justice Nettle did not consider it necessary to reconsider the significance of other dates such as the polling day and the day the poll is declared for the purpose of s 44.[28]

36. Since the return of the writs occurs *after* the declaration of the poll,[29] the temporal construction placed upon s 44 by the plurality in *Re Culleton* needs to be read in light of the plurality's reasoning in *Sykes v Cleary*, in which Mason CJ, Toohey and

---

[25] (1992) 176 CLR 77 at 99.
[26] (1992) 176 CLR 77.
[27] *Re Culleton (No 2)* (2017) 91 ALJR 311 at 315 [13], 320-321 [53]; (2017) 341 ALR 1. The return of the writs is a statutory requirement provided for in s 283 of the *Commonwealth Electoral Act 1918* (Cth). As soon as the result of the election has been ascertained, the AEO is required to certify in writing the names of the candidates elected and return the certificate and writ to the Governor of the relevant State.
[28] *Re Culleton (No 2)* (2017) 91 ALJR 311 at 320-321 [53]; (2017) 341 ALR 1.
[29] Sections 283 and 284, *Commonwealth Electoral Act 1918* (Cth).

McHugh JJ said:[30]

> "*The people exercise their choice by voting, so that it is the polling day rather than the day on which the poll is declared that marks the time when a candidate is chosen by the people. Of course, an absentee or postal vote may be cast before the polling day and, in situations of emergency, arrangements may be made for the casting of votes after the polling day. But these characteristics of the polling do not justify the conclusion that the declaration of the poll, which is the formal announcement of the result of the poll, amounts to, or even coincides with, the choosing by the electors of the member for the relevant electoral division. The declaration of the poll is the announcement of the choice made; it is not the making of the choice*." (footnotes omitted)

37. The temporal focus of s 44(iv) should conclude at the close of the polling day as this accords with the plurality's reasoned analysis of the process of 'being chosen' in *Sykes v Cleary*. The question of when the temporal focus of s 44 should conclude was not required to be considered by the Court in *Re Culleton*.

38. Whilst it is arguable that there may be an inconsistency between *Sykes v Cleary* and *Re Culleton*, a concluded view on this question is unnecessary to resolve the issue of Ms Hughes eligibility for the purpose of s 44(iv), as she did not occupy an office of profit at the time of her nomination to the Senate (2 June 2016), or on polling day (2 July 2016) or on the day when the writs were returned (5 August 2016).

39. In these circumstances, it cannot be said that the choice made by the voters at the time of the election was affected or tainted by any potential disqualification on her part. The fact that Ms Hughes's disabling circumstance was acquired <u>after</u> the process of being chosen was completed is therefore irrelevant to the question of whether she is incapable of being chosen as a senator. It is, however, relevant to the question of whether Ms Hughes is capable of "sitting" in the Senate. It is accepted that had Ms Hughes not resigned as a member of the Tribunal prior to the declaration by the Court

[30] (1992) 176 CLR 77 at 99.

of Disputed Returns that she be duly elected,[31] then Ms Hughes would be disqualified by s 44(iv) on the basis that she would be incapable of "sitting" as a senator. The reference to being "incapable of sitting" in s 44(iv) ensures if at any time during the term of a senator they attain a disqualifying characteristic they become disqualified under s 44(iv).[32]

A longer temporal construction of s 44(iv) should not be preferred

40. In *In re Wood*,[33] the Court determined that the election and return of an unqualified candidate are wholly ineffective to fill a vacant Senate place and that an election is not completed, in the "eye of the law", when an unqualified candidate is returned.[34]

41. It may be argued against Ms Hughes that:

a) the process of being chosen extends from the date of nomination until the special count or some other event which post-dates polling day such as the declaration by the Court of who is entitled to fill the Senate vacancy; and

b) her acquisition of a disabling characteristic after the return of the writs ought nevertheless disqualify her on the basis that, by reason of the Court's determination of Ms Nash's ineligibility, the electoral process has not yet been completed.

42. Further, in *Vardon v O'Loghlin* it was held that 'in some cases the adjudication of the Court of Disputed Returns must have a retrospective effect.'[35] If Ms Hughes was validly elected but not returned, she takes her place in the Senate but her term of service runs from the same period as if she had been originally returned.[36] The effect of filling the vacancy previously occupied by an unqualified person by the validly elected candidate is that 'all that happened consequent upon the election which is declared void would be disregarded as if it never happened.[37]

---

[31] Section 360(vi), *Commonwealth Electoral Act 1918* (Cth).
[32] See also s 45, Constitution.
[33] (1988) 167 CLR 145 at 172.
[34] (1988) 167 CLR 145 at 164, 168; *Vardon v O'Loghlin* (1907) 5 CLR 201 at 208.
[35] *Vardon v O'Loghlin* (1907) 5 CLR 201 at 208 per Griffith CJ.
[36] *Vardon v O'Loghlin* (1907) 5 CLR 201 at 208 per Griffith CJ.
[37] *Vardon v O'Loghlin* (1907) 5 CLR 201 at 208 per Griffith CJ.

43. Such an approach is misguided as it does not adequately account for the process of 'choosing' a candidate as explained by the plurality in *Sykes v Cleary*. Whilst the period between nomination and the occurrence of a special count to fill a vacancy is part of the electoral process, once the votes are cast the choice has been made. Neither a re-count nor a special count alters that choice. The special count determines the true intention of the voters **on the day they indicated their vote on the ballot paper**. The voter's choice is valid save only to the extent they expressed a preference for a candidate[38] who was disqualified on the day they indicated their vote on the ballot paper. Ms Hughes was not a disqualified candidate at the time she was chosen by the people as a Senator.

The preferred construction achieves the purpose of s 44(iv)

44. The disqualification of a person who holds an office of profit under the Crown has its origins in the law which developed in England in relation to disqualification of the members of the House of Commons.[39] The exclusion of permanent officers of the executive government from the House was a recognition of the incompatibility holding such an office and membership of the House. [40] There are three factors that are said to give rise to the incompatibility.[41] *First*, performance by a person of the public service duties that are incumbent upon an office of profit under the Crown impair that person's capacity to attend to the duties of a member of the House. *Secondly*, a person holding an office of profit under the Crown may be influenced by the political opinions of the minister of his or her department and accordingly may be unable to exercise, as a member of the House, an impartial judgment in the interests of the electorate. *Thirdly*, membership of the House would detract from the performance of the duties attaching to the office of profit under the Crown.

---

[38] *In Re Wood* (1988) 167 CLR 145 at 166 per the Court.
[39] *Sykes v Cleary* (1992) 176 CLR 77 at 95. The policy of prohibiting members of the legislative branch from occupying positions in the other branches of government also finds recognition in Art I, § 6, cl 2 of the Constitution of the United States of America.
[40] (1992) 176 CLR 77 at 96.
[41] (1992) 176 CLR 77 at 95; See also Report by the Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament* (1981) at [5.9].

45. The construction of s 44(iv) that is advanced by Ms Hughes achieves the purpose of the section being to ensure that no person holding an office of profit under the Crown is capable of being chosen by the electorate to sit in the Senate. By ensuring that the temporal focus of s 44(iv) attaches to the period between nomination and polling day (or the return of the writs), no candidate who holds an office of profit under the Crown would be capable of being chosen by the electorate. As the Court acknowledged in *Re Canavan*,[42] stability requires certainty as to whether, as from the date of nomination, a candidate for election is capable of being chosen to serve in the Parliament.

46. While it may be acknowledged that a construction of s 44(iv) that extends its temporal focus to the time of a special count would also prevent the mischief to which the section is directed, it goes further than achieving the purpose of s 44(iv). Such a construction would unnecessarily operate harshly upon a candidate who: (i) ensures the constitutional propriety of their affairs prior to nominating for election; (ii) having not been elected, accepts an office of profit under the Crown or acquires foreign citizenship; and (iii) subsequently becomes entitled to be elected because a vacancy has arisen and he or she won the next highest number of votes at the election. It would be unfair to the voters who exercised their right to vote on 2 July 2016 to deny to them the eligibility of the candidate to take up his or seat because of a constitutional disqualification acquired after the election in circumstances where he or she was otherwise constitutionally eligible at the time the electorate exercised its choice. Such a construction of s 44(iv) would effectively preclude such a candidate from accepting an office of profit under the Crown for a potential period of up to six years, during which time a potential vacancy in the Senate may arise. Moreover, such a construction does not sufficiently respect the choice of the people. The Court should reject such a construction.

Knowledge is irrelevant to eligibility under s 44(iv)

47. In *Re Canavan*, the Court accepted that a candidate's knowledge of a disqualifying

---

[42] [2017] HCA 45 at [48]; *Re Culleton (No 2)* (2017) 91 ALJR 311 at 321-322 [57]; (2017) 341 ALR 1 at 13; *Re Day (No 2)* (2017) 91 ALJR 518 at 535 [97]; 343 ALR 181 at 201.

circumstance was irrelevant to the question of eligibility under s 44(i).[43] There is no reason why similar reasoning ought not apply to s 44(iv). It is submitted that the fact that Ms Hughes tendered her resignation *after* the Court delivered its judgment in *Re Canavan* (and did so only after she became aware that a Senate vacancy had arisen) is irrelevant to the question of whether she was incapable of being chosen pursuant to s 44(iv). What is important is Ms Hughes's status during the period between nomination and the closing of the polls (to determine if she is incapable of being chosen). As she has not yet commenced 'sitting' as a senator, any time thereafter is, for present purposes, irrelevant.

Conclusion

48. Even though the electoral process may "in the eyes of the law" not be completed because the electorate returned a disqualified candidate, the process of "being chosen", to which s 44(iv) is directed, was completed after the polls were closed on 2 July 2016. The special count that took place on 6 November was no more than a recount of the electorate's votes. The declaration of the poll by the Court is no more than the announcement of the winning candidate. Although both steps are essential parts of the electoral process, neither step involves the making of a choice by the electorate; for that reason, neither step is part of the process of "being chosen" for the purpose of s 44(iv).

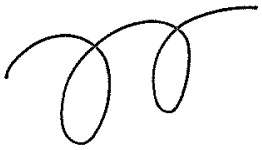
49. The Court should make the declaration sought by the Attorney-General of the Commonwealth. Ms Hughes also seeks an order that the Commonwealth pay her costs of the Summons pursuant to s.360(1)(ix) and (4) of the *Commonwealth Electoral Act 1918*.

[43] [2017] HCA 45 at [47].

Part VII Estimate of Time Required for Oral Submissions

50. Up to one hour will be required by Ms Hughes in oral submissions.

Dated 13 November 2017



……	….....	….....
Arthur Moses SC	**Sam Duggan**	**Phillip Sharp**
New Chambers	Selborne Chambers	New Chambers
moses@newchambers.com.au	sduggan@4selborne.com.au	sharp@newchambers.com.au
T: +61 2 9151 2075	T: +61 2 9236 4943	T: +61 2 9151 2016
F:+61 2 9233 1850	F:+61 2 9233 6469	F:+61 2 9233 1850