

**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 (C30/2017)**

Date referred to Full Court: 24 January 2018

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 is (in s 44(i)) being a subject or a citizen of a foreign power.

On 6 June 2016 Ms Skye Kakoschke-Moore was nominated as the third of four candidates endorsed by the Nick Xenophon Team for the Senate for the general election held on 2 July 2016. Mr Timothy Raphael Storer was nominated as the fourth of the four candidates endorsed by the NXT. Ms Kakoschke-Moore was returned as a Senator for the State of South Australia after the election; Mr Storer was not. Mr Storer remained a member of the NXT until 3 November 2017, when he was purportedly expelled as a member. He then formally resigned as a member on 6 November 2017.

Ms Kakoschke-Moore was born in Australia in 1985 of a father born in Australia in 1959 and a mother born in Singapore in 1957 who emigrated to Australia in 1970. Ms Kakoschke-Moore's mother was a British citizen otherwise than descent by as her father was serving in the Royal Air Force in Singapore at the time of her [the mother's] birth. Unbeknown to Ms Kakoschke-Moore, at the time of her birth she had automatically become a British citizen by descent as a consequence of the citizenship of her mother. Not having renounced that citizenship she remained a British citizen by descent at the time of her nomination and her subsequent election. On 22 November 2017, after becoming aware that she held United Kingdom citizenship, Ms Kakoschke-Moore submitted her resignation as a Senator in writing to the President of the Senate. (On 30 November 2017 she renounced her United Kingdom citizenship, that renunciation taking effect on 6 December 2017.)

The following questions were transmitted to the High Court by the Senate on 28 November 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 South Australia in the Senate for the place for which Skye Kakoschke-Moore 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.

On 29 November 2017 the High Court published a notice advising that it would sit as the Court of Disputed Returns on 8 December 2017 for the purpose of giving directions as to the hearing and determination of the questions referred by the Senate. The notice invited any person who desired to place any evidence before, or make any submission to, the Court to apply setting out their reasons by 6 December 2017. Submissions were received from five applicants.

On 8 December 2017 Justice Nettle, sitting as the Court of Disputed Returns, considered those submissions and made orders that three of the five applicants be entitled to be heard and be deemed to be parties to the reference under s 378 of the *Commonwealth Electoral Act* 1918 (Cth), namely the Attorney-General of the Commonwealth (“the Attorney-General”), Ms Kakoschke-Moore and Mr Timothy Raphael Storer. Mr Storer was found to be a person interested on the basis that he had polled the highest number of votes after Senator Xenophon (as he then was) on the NXT ‘ticket’ but was not elected and may be found entitled to be elected in Ms Kakoschke-Moore’s place on a special count. Justice Nettle also made an order that the Commonwealth pay the costs of Ms Kakoschke-Moore and Mr Storer of the proceedings.

On 24 January 2018 Justice Nettle answered the first question transmitted by the Senate as follows:

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 Skye Kakoschke-Moore was returned.

The following questions were then reserved for the consideration of the Full Court pursuant to s 18 of the *Judiciary Act*.

- i. Should the vacancy... 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?
- ii. Notwithstanding that until 6 December 2017 Ms Kakoschke-Moore was a British citizen...does the fact that she renounced that citizenship ...render her capable of being chosen to fill the vacancy by means of such a special count?
- iii. If the vacancy is to be filled by such a special count... should Mr Storer be excluded by reason that... he ceased to be a member of the NXT on 6 November 2017?

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

Ms Kakoschke-Moore submits that there is nothing in the Constitution that expressly renders a person, who is an Australian citizen, ineligible to fill a vacancy created in the Senate even if the vacancy was caused by that person’s earlier disability to be chosen. She says that the question is whether now that she is only an Australian citizen, she is, at this time, still necessarily precluded from filling the vacancy resulting from her earlier disqualification (or indeed, from her resignation). Therefore the vacancy should be filled by a special count conducted on the basis that Ms Kakoschke-Moore is not incapable of being chosen, or given that such a special

count was already conducted after *Re Day (No 2)* and the result of it is known, a further count could be dispensed with and a simple declaration made that Ms Kakoschke-Moore is elected.

The Commonwealth Attorney-General submits that the outcome should be a special count conducted on the basis that a vote for Ms Kakoschke-Moore would be counted to the candidate next in the order of the voter's preference; in effect the votes would be counted in favour of Mr Storer rather than Ms Kakoschke-Moore. It is submitted that Ms Kakoschke-Moore's position is untenable: the words "incapable of being chosen" in s 44 refer to the "process of choice" required by ss 7 and 24 of the Constitution and provided for in the *Electoral Act*. Such "process of choice" commences on the date of nomination... until the completion of the electoral process. A special count... is conducted [in such circumstances of a disqualification] for the purposes of ascertaining the "true legal intent of the voters"... that was expressed by polling. It is not a new choice and therefore any indication of a voter's preference for the disqualified candidate is a nullity, and the true legal intent of the voter is to select the next qualified candidate. As to Mr Storer, there is no rule - constitutional, statutory or otherwise - that requires Senators to remain in the party by whom they were nominated. Voters cast their vote in a context where party-political loyalties may change.

Mr Storer also submits that Ms Kakoschke-Moore's arguments should be rejected. Her disqualification on citizenship grounds "endures for all purposes related to the 2016 election." The fact that she chose to resign her place before a reference was made to the High Court does not alter the manner in which that vacancy is to be filled. As to his membership of the NXT, Mr Storer submits that for the purposes of the *Electoral Act*, he had the necessary NXT Party endorsement at the time of the 2016 election. Whether or not he was still a member of a political party, or whether the circumstances of his being expelled from that party were in accordance with that party's rules, are irrelevant for the purposes of that *Act*.

