



HIGH COURT OF AUSTRALIA

21 March 2018

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
[2018] HCA 10

Today the High Court sitting as the Court of Disputed Returns published reasons for the answers it gave on 13 February 2018 to questions reserved for its consideration by Nettle J pursuant to s 18 of the *Judiciary Act* 1903 (Cth). Those answers were to the effect that: the vacancy in the representation of South Australia in the Senate for the place for which Ms Skye Kakoschke-Moore was returned on 4 August 2016 should be filled by a special count; the fact that Ms Kakoschke-Moore renounced her British citizenship with effect from 6 December 2017 did not render her capable of being chosen to fill that vacancy; and Mr Timothy Storer should not be excluded from the special count. Nettle J had previously held Ms Kakoschke-Moore incapable of being chosen or of sitting, after the Senate referred to this Court the question whether, by reason of s 44(i) of the Constitution, there was a vacancy in the representation of South Australia in the Senate for the place for which Ms Kakoschke-Moore was returned.

Ms Kakoschke-Moore was a British citizen when she nominated, as a nominee of the Nick Xenophon Team ("NXT"), as a candidate to be elected as a senator for South Australia at the general election held on 2 July 2016. In the group nomination form lodged on behalf of NXT, Ms Kakoschke-Moore was listed as the third of four in the order of candidates, before Mr Storer. Under the *Commonwealth Electoral Act* 1918 (Cth) ("the Act"), the order in which the candidates are listed determines the order in which preferences for "above the line" votes are distributed. Ms Kakoschke-Moore was returned as elected. In November 2017, Ms Kakoschke-Moore resigned her position as senator after receiving confirmation that she was a British citizen. With effect from 6 December 2017, Ms Kakoschke-Moore renounced her British citizenship.

Ms Kakoschke-Moore contended that the vacancy in the representation of South Australia in the Senate for the place for which she had been returned should be filled by this Court declaring her to be elected. Alternatively, Ms Kakoschke-Moore submitted that if a special count were to be conducted: (i) she should not be excluded, as she was no longer a British citizen; and (ii) Mr Storer should be excluded, as he had ceased to be a member of NXT, and the voters' true legal intent was that Ms Kakoschke-Moore be replaced by someone of the same political party.

The High Court unanimously held that because Ms Kakoschke-Moore was incapable of being chosen at the election held on 2 July 2016 she was incapable of being chosen by the special count, the purpose of which is to complete that electoral process. It was held that a special count is part of the electoral process; it is not a separate, new electoral process by which a new choice is to be made. The Court further held that the voters who cast their votes above the line for NXT at the 2 July 2016 election must be taken to have intended that their votes should, if sufficient, elect Mr Storer. 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 election. It was therefore necessary for Mr Storer to be included in the special count in order to ensure that it achieved the true legal intent of the voters.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*