IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY **NO C14 OF 2016**

RE ROBERT JOHN DAY

Reference under s 376 *Commonwealth Electoral Act 1918* (Cth)

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

AMENDED FOLLOWING JUDGMENT OF GORDON J IN *RE DAY* [2017] HCA 2

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PART I PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PARTS II AND III BASIS OF INTERVENTION AND LEAVE

2. The Attorney-General of the Commonwealth (**Attorney-General**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) and is also a party by virtue of orders made by French CJ on 21 November 2016 pursuant to s 378 of the *Commonwealth Electoral Act 1918* (Cth) (**Electoral Act**). The Attorney-General has given notice under s 78B of the *Judiciary Act 1903* (Cth) and does not consider further notice is required.

PART IV APPLICABLE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

3. Section 44(v) of the Constitution provides:

> Any person who:
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> ...
>
> (v) has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons;
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> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

PART V ARGUMENT

Summary

4. The disqualification for which s 44(v) provides protects the freedom and independence of the Parliament by guarding against the real risk of influence or perceived influence over Parliamentarians arising from agreements to which the executive is party, whether the risk arises from the potential conduct of the executive itself or from the potential for Parliamentarians to prefer their private interests. The high constitutional purpose served by s 44(v) points to an ample construction of the section, encompassing: "agreements", in the sense of agreements, arrangements and understandings, with the Public Service which includes at least the departments of State for which s 64 of the Constitution provides; and interests in such an agreement, whether direct or indirect, that give rise to an expectation of a monetary gain or loss that is not remote or insubstantial.

5. Mr Day had an interest of the prohibited kind in a lease agreement between the owner of his electorate office premises and the Commonwealth, represented by a Division within the Department of Finance, as lessee. The owner was incorporated for the purpose of purchasing the electorate office premises from the trustee company of Mr Day's family trust, which had Mr Day, his spouse and children among the beneficiaries. The trustee company loaned the owner the purchase price and ~~expected repayments to be made from rental payments to be paid by the Commonwealth (into a bank account controlled by Mr Day)~~ there was an arrangement by which the owner would collect the rental allowance provided by the government and

pass the rent back to Mr Day's family trust. The trustee company continued to service a bank loan formerly secured by a mortgage over the electorate office premises. The premises continued to be used to secure loans made by NAB to companies associated with Mr Day. Mr Day, as a beneficiary of the family trust, and also as guarantor of the trustee company's obligations under the bank loan and of the loans made by NAB to companies associated with him, had an expectation of a monetary gain or loss that was not remote or insubstantial arising out of the existence of the lease or alternatively arising out of the things done or contemplated to be done in performance of the lease.

Facts

6. The parties have agreed facts that the Attorney-General submits are sufficient to answer the referred questions~~, although those facts may be supplemented or further contextualised by material produced on subpoena, and by oral evidence. At the time of filing these submissions, there remains a question whether any further facts may be agreed or found and, if so, what if any effect those facts have on the answers to the referred questions. The Attorney-General may need to supplement these submissions, by leave, to deal with any such matters. The presently agreed facts are fully set out in the~~: Areas of Factual Agreement between the Parties (**AF**) (CB 426-437). Gordon J found further facts in the "Facts Judgment" (**FJ**): *Re Day* [2017] HCA 2.

7. Mr Day commenced a term as a Senator for South Australia on 1 July 2014 (AF [2]). Following the simultaneous dissolution of both Houses of Parliament on 9 May 2016, Mr Day nominated for election as a Senator for South Australia and, following the election held on 2 July 2016, was declared as elected to the Senate (AF [69]-[77]).

8. From April 2015, Mr Day used portions of premises at 77 Fullarton Road, Kent Town SA (**77 Fullarton Road**) as his electorate office (AF [6], [36]). The Commonwealth, represented by the Ministerial and Parliamentary Services Division, Corporate and Parliamentary Services Group of the Department of Finance, leased 77 Fullarton Road for that purpose. A memorandum of lease was executed on 1 December 2015 with a commencement date of 1 July 2015 (AF [40]-[41]).

9. The lessor owner of 77 Fullarton Road was Fullarton Investments Pty Ltd (**Fullarton Investments**) (AF [40]) as trustee for the Fullarton Road Trust. From late 2013, Mr Day believed that the Commonwealth was likely to be unwilling to lease 77 Fullarton Road while Mr Day, or an entity he owned, owned the fee simple: FJ [189]. Fullarton Investments was incorporated on 16 December 2013 for the express purpose of purchasing 77 Fullarton Road (AF [6], [65.1]). It purchased 77 Fullarton Road from B&B Day Pty Ltd (**B&B Day**) in 2014. The agreement for the sale and purchase of 77 Fullarton Road was executed on 24 April 2014 with a recorded purchase price of $2.1 million (AF [14]). A memorandum of transfer was executed on 4 September 2014 and registered on 11 November 2014 (AF [25], [29]). The recorded consideration for the transfer was $2.1 million (AF [25]).

10. B&B Day was and remains the trustee of the Day Family Trust. Until 30 June 2014, Mr Day was the sole director and shareholder of B&B Day; after 30 June 2014, Mr Day's wife, Bronwyn Esther Day, was the sole appointed director and shareholder (AF [3]-[5]). B&B Day held 77 Fullarton Road as trustee for the Day Family Trust (AF [6]). Mr Day, Mrs Day, and members of their family, were and remain the beneficiaries of the Day Family Trust (AF [3]; CB 29-30 (cl 2)).

11. On 2 January 2014, NAB approved a loan facility in favour of B&B Day as trustee for the Day Family Trust to a limit of $1.6 million with interest for a term of five years (AF [8]). The security for the loan included a registered mortgage over 77 Fullarton Road (AF [8]). In addition, Mr and Mrs Day gave a guarantee and indemnity for $2 million for the performance by B&B Day of its obligations under the loan (AF [8]).

12. On 11 November 2014, when the memorandum of transfer was registered, NAB discharged the mortgage over 77 Fullarton Road granted by B&B Day and a new mortgage was registered over 77 Fullarton Road showing Fullarton Investments as the mortgagor (AF [30]). The new mortgage secured loans made by NAB to companies associated with Mr Day (FJ [118(3)]; [148]). Under the terms of the loan facility in favour of B&B Day, B&B Day remained liable to make payments to NAB (AF [31]). It can be inferred that the obligations under the guarantee and indemnity given by Mr and Mrs Day were not altered.

13. The lease provided for annual rent of $66,540 (AF [41]) to be paid monthly by the Commonwealth to "the account nominated by" Fullarton Investments: Cl 9 and item 10 of the Schedule: CB 141-142, CB 174. On 12 June 2015, Mr Day as 'representative' of Fullarton Investments sent to the Commonwealth's leasing manager, DTZ, a completed "Vendor Information" form recording Mr Day as the relevant contact and nominating a bank account in the name of "Fullarton Nominees" for the receipt of rent (AF [37]). Fullarton Nominees is a business name owned by Mr Day and has been described by Mr Day as the "owner" of the bank account into which payments were to be made (AF [37], [65.2], [65.3]; CB 242-243). Mr Day in fact owned the bank account: FJ [124(7)].

14. The lease also gave the Commonwealth one further option to renew for a term of six years: Cl 6 and item 18 of the Schedule: CB 139-140, CB 175.

15. The sale of 77 Fullarton Road by B&B Day to Fullarton Investments was apparently facilitated by a vendor finance agreement by which B&B Day loaned to Fullarton Investments the purchase price of $2.1 million (AF [34], [50]-[53]). There was, from no later than ~~4 September 2014~~ 16 December 2013, an ~~agreement or understanding~~ arrangement between B&B Day as trustee for the Day Family Trust and Fullarton Investments as trustee for the Fullarton Road Trust that Fullarton Investments as trustee for the Fullarton Road Trust would ~~make repayments to B&B Day as trustee for the Day Family Trust from rent received from the Commonwealth~~ "hold [77 Fullarton Road], it would collect the rental allowance provided by the government and it would then pass the rent back to the Day Family Trust" (FJ [97(5)];

cf AF [81]). This arrangement was implemented, including by the execution of the lease to the Commonwealth (FJ [108]), it subsisted at the relevant time (FJ [111]) and was acted upon by Mr Day and Fullarton Investments, and there is nothing to suggest that it would not have continued (FJ [124]).

16. In an email dated 25 January 2016, in answer to a request by the Department of Finance for evidence of rental payments in respect of the premises, Mr Day provided the following explanation of the arrangement or understanding (AF [50]):

> In 2014 I sold the property to Fullarton Investments Pty Ltd on a vendor finance basis. I retained the NAB loan. Fullarton Investments was to receive rent from the Commonwealth and then make vendor finance payments to me using those funds. No rent, no vendor finance payments.

17. The Commonwealth made no rental payments under the lease (AF [58]). Mr Day said that he paid the "rent" "out of [his] salary" (AF [47]), by which he appears to have meant that he personally covered the financial liabilities that he otherwise expected to be met out of rental payments by the Commonwealth pursuant to the lease, namely repayments to the NAB.

18. For the year ended 30 June 2015, the only assets of Fullarton Investments as trustee for the Fullarton Road Trust were $10 cash and 77 Fullarton Road (AF [54]). In that year, Fullarton Investments' only income was $10,000 in rent (not from the Commonwealth) (AF [58], [82]; FJ [249]). In an email dated 26 August 2016, in response to a series of questions from Special Minister of State Ryan, Mr Day said (AF [65.6]):

> If the department does not pay rent to Fullarton Investments Pty Ltd, Fullarton Investments Pty Ltd does not have the ability to service the vendor finance payments.

Construction of section 44(v)

19. The purpose of s 44(v) is to secure the independence of Parliament against the risk of influence, or the perception of influence, upon Parliamentarians arising out of arrangements to which the executive government is party. The influence guarded against might manifest in the form of influence, or the perception thereof, from the executive itself (by virtue of its position as a party to the agreement) or it might manifest in the form of influence, or the perception thereof, from a conflict between a Parliamentarian's private financial interest in an agreement and his or her constitutional parliamentary duty to pursue the public interest. Either way, such influence impairs the intended operation of the constitutionally mandated system of representative and responsible government. As Dixon J recognised in the *Communist Party Case*: "Forms of government may need protection from dangers likely to arise from within the institutions to be protected".[1]

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1 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 187.

20. The reasoning of Barwick CJ in *Re Webster*[2] (***Webster***) was, with respect, incorrect insofar as his Honour suggested that the purpose of s 44(v) was only to secure the independence of the Parliament from the executive.[3] A proper understanding of s 44(v) in light of the place of s 44(v) in the constitutional scheme, and the text, purpose, and history of the provision, is that it protects the body politic from the influence that may arise more generally from such arrangements, whether that influence be from the executive itself or whether it arises from a conflict between a Parliamentarian's duty and his or her financial interests.

21. That said, for reasons developed below, Mr Day would have been disqualified pursuant to s 44(v) even if the Court applied *Webster*.

Constitutional scheme

22. The Commonwealth Constitution entrenches what Professor Harrison Moore described as a "great underlying principle" that the rights of individuals are "sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power".[4] Section 44(v) serves and is to be construed conformably with that principle.

23. The Court's exposition of the principle illustrates the critical link between the system of representative *and* responsible government prescribed by Chs I and II of the Constitution, and the choices made by electors.[5] It is by those choices that the Parliament of the Commonwealth is constituted: ss 7 and 24. Those same choices indirectly determine the composition of the Executive Government of the Commonwealth: ss 64 and 67 (read with s 51(xxxvi)). Electoral choice represents the "principal constraint on the constitutional exercise by the Parliament of the legislative power of the Commonwealth, and on the lawful exercise by Ministers and officers within their departments of the executive power of the Commonwealth".[6]

24. By mandating those systemic features, the Constitution channels, and entrenches, the "sovereign power residing in the people, exercised by the representatives".[7] One indispensible aspect of that system and that exercise of sovereignty is the implied freedom of political communication.[8] It points to

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2 (1975) 132 CLR 270.

3 See (1975) 132 CLR 270 at 277-279.

4 WH Moore, *The Constitution of the Commonwealth of Australia* (1902, John Murray) at 329.

5 See especially *Australian Capital Television Pty Limited v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 136, 139-140 (Mason CJ); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 558, 559 (the Court).

6 *McCloy v New South Wales* (2015) 89 ALJR 857 (***McCloy***) at 881 [111] (Gageler J).

7 See *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions NSW***) at 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), referring to *ACTV* (1992) 177 CLR 106 at 137-138 (Mason CJ); see also *McCloy* (2015) 89 ALJR 857 at 898 [215] (Nettle J).

8 See eg *Unions NSW* (2013) 252 CLR 530 at 571 [104] (Keane J) ("political communication within the federation is free in order to ensure the political sovereignty of the people of the Commonwealth, who are required to make the political choices necessary for the government of the federation and the alteration of the *Constitution* itself").

a matter of present importance: the exercise of the freedom includes an opportunity for the people to "influence the elected representatives".[9] On the other side of the coin, as Mason CJ observed in *ACTV*, those who exercise governmental power under the Constitution "have a responsibility to take account of the views of the people on whose behalf they act".[10] Chief Justice Mason related that observation to Sir Harrison Moore's "great underlying principle", and observed that absent freedom of communication representative government would fail to achieve its purpose, "namely, government by the people through their elected representatives":

> government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative.[11]

25. It was recognised in *McCloy* that the influence of political donations can have a corrosive effect upon the discharge of Parliamentarians' responsibilities to take account of the interests of those whom they govern.[12] And the same is true of the personal pecuniary interests of Parliamentarians, which, if allowed to compete with the interests of the governed, may equally "cynically turn public debate into a cloak for bartering away the public interest".[13]

26. That "responsibility" to take account of the views or interests of the governed is an aspect of a wider duty to act freely in the public interest. Just as it is recognised that the government owes "constitutional obligations to act in the public interest", which obligations are facilitated by public service legislation,[14] so the Parliament and its members are under an obligation to act freely in the public interest, which obligation is facilitated by the Constitution itself. The "fundamental obligation" of a Parliamentarian is "the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community".[15] At an early stage, and anticipating the cautionary words of Mason CJ in *ACTV*, Isaacs J noted that without such an obligation – which his Honour understood to extend to a "duty in watching on behalf of the public all the acts of the Executive" – responsible government would "be but a name".[16] His Honour later

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9 *ACTV* (1992) 177 CLR 106 at 138 (Mason CJ). See also *McCloy* (2015) 89 ALJR 857 at 898 [216] (Nettle J); *Unions NSW* (2013) 252 CLR 530 at 549-550 [23]-[24], 551 [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 556 [45] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

10 *ACTV* (1992) 177 CLR 106 at 138. See also at 159 (Brennan J), 232-233 (McHugh J).

11 *ACTV* (1992) 177 CLR 106 at 139.

12 *McCloy* (2015) 89 ALJR 857 at 868 [36] (French CJ, Kiefel, Bell and Keane JJ), 890 [167], 893 [181] (Gageler J), 900 [224]-[227] (Nettle J), 915 [322]-[323], 918 [344] (Gordon J).

13 *ACTV* (1992) 177 CLR 106 at 159 (Brennan J), quoted in *McCloy* (2015) 89 ALJR 857 at 900 [225] (Nettle J).

14 *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163 at 181 [34] (Gummow, Hayne, Heydon and Kiefel JJ), citing *McManus v Scott-Charlton* (1996) 70 FCR 16 at 24 (Finn J).

15 *R v Boston* (1923) 33 CLR 386 at 400 (Isaacs and Rich JJ), quoted in *McCloy* (2015) 89 ALJR 857 at 890-891 [171] (Gageler J).

16 *Wilkinson v Osborne* (1915) 21 CLR 89 at 98-99. His Honour observed in *Horne v Barber* (1920) 27 CLR 494 at 500 that enforcement of the obligation is ultimately a matter for the "judgment of electors."

explained that the "whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses", lies in each Parliamentarian's performance of a duty of "watching on behalf of the general community the conduct of the Executive".[17]

27. Section 44(v), alike with ss 44(i), 44(iv) and 45(iii), is addressed to this high constitutional purpose of faithful and single-minded service. It seeks to maintain the features of responsiveness, "true" representation, and action only in the public interest, by eliminating certain forms of influence upon Parliamentarians. The object is to ensure that the representatives do not prefer their own interests,[18] or other extraneous interests, to the interests of those whom they represent — to the "public interest" properly so called. It thereby reflects the design of the framers captured in Sir Isaac Isaacs' speech as a delegate at the Adelaide Convention where he said, in reference to ss 44(v) and 45(iii):

> The public are interested in seeing and ensuring, so far as it is possible to ensure it, that no member of Parliament shall for his own personal profit allow his judgment to be warped in the slightest when he is called upon to decide on questions of public moment.[19]

28. His Honour elaborated in *Horne v Barber*:

> [T]he law will not sanction or support the creation of any position of a member of Parliament where his own personal interest may lead him to act prejudicially to the public interest by weakening (to say the least of it) his sense of obligation of due watchfulness, criticism, and censure of the Administration.[20]

29. Like Mason CJ in *ACTV*, Sir Isaac sought to relate those matters to the responsibilities or duties of the representatives:

> We should be careful to do all that is possible to separate the personal interests of a public man from the exercise of his public duty. We should bear in mind that it is not only important to secure that so far as we can in actual fact, but in every way possible, we should prevent any appearance of the contrary being exercised.[21]

30. The concern for "appearance" was not cosmetic: it is to be seen to have been a concern to ensure confidence in the constitutionally prescribed system.

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17 *Horne v Barber* (1920) 27 CLR 494 at 500, quoted by Gageler J in *McCloy* at 890 [170].

18 See eg *McCloy* (2015) 89 ALJR 857 at 900 [225] (Nettle J), referring to *ACTV* (1992) 177 CLR 106 at 138 (Mason CJ) and 159 (Brennan J).

19 *Official Record of the Debates of the Australasian Federal Convention* (***Convention Debates***), Adelaide, 21 April 1897 at 1038 (emphasis added).

20 (1920) 27 CLR 494 at 500, quoted in *McCloy* (2015) 89 ALJR 857 at 890 [170] (Gageler J) (emphasis added).

21 *Convention Debates*, Adelaide, 21 April 1897 at 1037.

31. That understanding of s 44(v) within the constitutional scheme — as a provision directed to managing the risk of executive influence and conflict of interest (actual or apparent) — points away from any suggestion that it is merely a "puny direct descendent"[22] of the *House of Commons (Disqualification) Act 1782* (**1782 Act**).[23] That was, however, the assumption on which Barwick CJ acted in *Webster*.[24] Contrary to the suggestion in that case, s 44(v) is not a "vestigial" provision. It was formulated after specific debate about the proper scope of such a provision, and has ongoing vitality, guarding against both executive and private influence on members of the Parliament in the discharge of their high constitutional duties.

32. His Honour was also incorrect to characterise s 44(v) as a "penal" provision (viewed from the perspective of the Parliamentarian).[25] That characterisation pays insufficient regard to the provision's constitutional purposes and systemic focus. The supposedly "strict construction" that was said to follow from the "penal" character of s 44(v) is therefore unduly narrow.[26]

Constitutional text and history

33. The text of s 44(v) indicates that the disqualification depends upon the "interest" of the person. It does not depend in terms upon any benefit or influence accruing to the executive government. That bespeaks a construction that extends beyond a concern only with executive influence to encompass a concern also with private interests of members.[27]

34. Equally, the "interest" with which s 44(v) is concerned is a "pecuniary" interest (which is to be understood in its usual sense as consisting of or relating to money), and it may be a direct "or indirect" pecuniary interest. These words also bespeak a wider construction of s 44(v). The provision extends beyond the 1782 Act, which Barwick CJ took to be the "precise progenitor" of s 44(v),[28] as the 1782 Act disqualified only those who "execute, hold or enjoy" any contract with the public service. The textual extension in s 44(v) to those with a "pecuniary" interest, direct or indirect, in such an "agreement" indicates that s 44(v) is concerned not just with potential executive influence on Parliamentarians, but also with the risk, or the perception, that a Parliamentarian will prefer their personal interest over

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22 JD Hammond, "Pecuniary Interest of Parliamentarians: A comment on the Webster Case" (1976) 3 *Monash University Law Review* 91 at 100.

23 22 Geo III c 45.

24 (1975) 132 CLR 270 at 278.

25 Cf *Webster* (1975) 132 CLR 270 at 279 (Barwick CJ).

26 See also *Beckwith v The Queen* (1976) 135 CLR 569 at 576 (Gibbs J), referring to the supposed "rule" as to the construction of penal statutes as a "rule ... of last resort" that "has lost much of its importance in modern times". The position is *a fortiori* when construing a constitution concerned primarily with the establishment of a system of government, rather than the protection of rights.

27 See Gerard Carney, *Members of Parliament: Law and Ethics* (2000) at 104; PJ Hanks, "Parliamentarians and the Electorate" in Gareth Evans (ed), *Labor and the Constitution 1972-1975: Essays and Commentaries on the Constitutional Controversies of the Whitlam Years in Australian Government* (1976) at 197.

28 *Webster* (1975) 132 CLR 270 at 278.

their public duty.[29] The focus is upon what is obtained by the Parliamentarian in pecuniary terms.[30]

35. The express extension of s 44(v) to "indirect" interests, and the related circumstance that the agreement of which s 44(v) speaks need not be one to which the putative member is a party, similarly indicates that the purpose of the disqualification is not limited to preventing executive influence. It rather extends to preventing the influence of a member's private interests, arising only "indirectly" out of any agreement with the executive.

36. That understanding is reinforced by the express qualification to s 44(v), which must be given work to do. The intention to exclude from the reach of the disqualification those pecuniary interests derived from membership of large companies indicates that the rule laid down by s 44(v) could, but for the qualification, have encompassed such pecuniary interests. Chief Justice Barwick opined to the contrary in obiter dicta.[31] To the extent that his Honour's reasoning depended on the circumstance that shareholders have no legal or equitable interest in a company's contracts, it took insufficient account of the possibility that a shareholder might nonetheless have an "indirect" interest in those contracts. Harmonious construction of the rule and qualification within s 44(v) requires that a shareholding in a small company be seen to be capable of giving rise to an indirect pecuniary interest.[32]

37. To the extent that the diffuse interests of a shareholder in a widely-held company which contracts with the executive could be indirect pecuniary interests proscribed by s 44(v), but for the specific exception (which recognises that such interests are unlikely vehicles for securing executive influence[33]), the need for the specific exception illustrates that textually s 44(v) is not confined to the narrow purpose of limiting executive influence.

38. The broader operation to be attributed to s 44(v) would also cohere with that disclosed by s 45(iii), which operates to vacate the place in Parliament of a senator or member who "directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State". This provision complements s 44(v) in these ways: it extends the disqualification to members "accepting fees for work done in the legislative body";[34] and it extends the disqualification to members who might otherwise provide professional services to the Commonwealth, a view having emerged in the

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29 See Gerard Carney, *Members of Parliament: Law and Ethics* (2000) at 103.

30 Cf *Webster* (1975) 132 CLR 270 at 278 (Barwick CJ).

31 *Webster* (1975) 132 CLR 270 at 287.

32 See Gerard Carney, *Members of Parliament: Law and Ethics* (2000) at 107-109; PJ Hanks, "Parliamentarians and the Electorate" in Gareth Evans (ed), *Labor and the Constitution 1972-1975* (1976) at 197-198; Gareth Evans, "Pecuniary Interests of Members of Parliament under the Australian Constitution" (1975) 49 *Australian Law Journal* 464 at 469.

33 See *Webster* (1975) 132 CLR 270 at 287-288.

34 *Convention Debates*, Melbourne, 7 March 1898 at 1945 (Mr Reid).

Convention Debates that s 44(v) might not apply to professionals who are engaged confidentially in the interests of the Commonwealth as distinct from contractors who bargain with the Commonwealth.[35] These extensions of the disqualifying principle, particularly the apparent concern about its possible circumvention by Parliamentarians who are also members of independent professions, inform the breadth of the operation that should be allowed to s 44(v).

39. The purposes for which the Court may have recourse to the Convention Debates are now understood to be wider in scope than in 1975 when *Webster* was decided. Recourse is permissible "for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged".[36] The relevant Debates pertaining to ss 44(v) and 45(iii) disclose the direction of the constitutional language to the subject not merely of executive influence over the Parliament, but also conflict between interest and duty of senators and members.[37] So too does the drafting history.[38]

The legal test for applying section 44(v)

40. The Attorney-General submits that s 44(v) is engaged at least when: objectively, there is a real risk that a person could be influenced, or be perceived to be influenced, in relation to parliamentary affairs by a direct or indirect financial interest, in the sense of an expectation of a monetary gain or loss, arising from the existence, performance, or breach of an agreement with the executive government of the Commonwealth. Such a risk of being influenced in the exercise of public duties will not arise where the person's expected monetary gain or loss is too remote or insubstantial. Similarly, s 44(v) will not be engaged by 'routine' (eg over-the-counter) transactions where there is no real risk of a Parliamentarian being, or being perceived to be, relevantly influenced. Section 44(v) is not concerned with trivialities: the risk of influence or perceived influence must be a real one.

41. The test for whether there is a real risk that an interest in an agreement could give rise to the prohibited forms of influence, or perception thereof, invites an evaluative judgment.[39] It sets a threshold that is low enough not to impose a rigid standard that would defeat the constitutional object, and yet high enough to exclude the absurdities that might arise on a literal

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35 *Convention Debates*, Adelaide, 15 April 1897 at 737-738; *Convention Debates*, Adelaide, 21 April 1897 at 1034-1040.

36 *Cole v Whitfield* (1988) 165 CLR 360 at 385 (the Court).

37 See especially *Convention Debates*, Adelaide, 21 April 1897 at 1037-1038 (Mr Isaacs).

38 JD Hammond, "Pecuniary Interest of Parliamentarians: A comment on the Webster Case" (1976) 3 *Monash University Law Review* 91 at 95-100; John Williams, *The Australian Constitution: A Documentary History* (2005) at 159, 508, 775, 1126.

39 An evaluative judgment of a similar nature arises in the context of s 44(i) in determining whether a person has taken "reasonable steps" to divest themselves of a foreign allegiance: see *Sykes v Cleary* (1992) 176 CLR 77 at 107-108 (Mason CJ, Toohey and McHugh JJ) and 114 (Brennan J).

construction (such as a contract involving the purchase of a pencil from a government stationer). And, unlike the approach in *Webster*, it does not require reading in specific requirements as to the form of the proscribed "agreement" that find no footing in the constitutional text.

42. There is no inquiry into whether the interest would *in fact* influence the discharge of the person's duties as a Parliamentarian.[40] No such inquiry is undertaken in respect of ss 44(i) and 44(iv)[41] (which, as noted above, serve broadly similar objects directed at eliminating certain forms of influence on Parliamentarians). The test is an objective one.[42]

43. This statement of the test can be explained by reference to the elements of the disqualification for which s 44(v) provides. There are four elements:

    (a) there must be an agreement;

    (b) the agreement must be with the Public Service of the Commonwealth;

    (c) the Parliamentarian must have an interest in the agreement, which interest is either direct or indirect, and also pecuniary in character; and

    (d) the interest must not be an excluded interest (an interest as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons).

44. The content of these elements is affected by the construction of s 44(v) in light of the constitutional scheme and its text, purpose and history as explained above. The fourth element, excluded interests, does not arise for consideration in this case.

First element: agreement

45. "Agreement" has a broader meaning than "contract".[43] The substantive purpose served by s 44(v) does not yield to the precise legal form taken by the arrangements which give rise to the prohibited interest. It would be "a matter for great regret" that s 44(v) should "turn largely on technical concepts of the law of contracts".[44] "Agreement" has, in its context, a broad meaning encompassing any agreement, arrangement or understanding.

46. In light of the high constitutional purpose of s 44(v), there is no occasion to confine the reach of the provision to particular forms of agreement, and it is necessary to focus instead on the substantive character of the agreement, arrangement or understanding. For example, although Barwick CJ suggested in *Webster* that for an agreement to fall within the scope of s 44(v), it must be executory and have a currency for a substantial period of time,[45] a series of short-term agreements or even the possibility of a single

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40 Cf *Webster* (1975) 132 CLR 270 at 280, 287-288.

41 See *Sykes v Cleary* (1992) 176 CLR 77; *Sue v Hill* (1999) 199 CLR 462.

42 See *Ford v Andrews* (1916) 21 CLR 317 at 322 (Griffith CJ), 324 (Barton J).

43 See s II of the 1782 Act, referring to "any contract, agreement, or commission".

44 *Webster* (1975) 132 CLR 270 at 277 (Barwick CJ).

45 (1975) 132 CLR 270 at 279, 280.

transaction could, as a matter of substance, give rise to the forms of influence or perceived influence to which s 44(v) is directed.[46] The test is one of substance, and is met by all agreements, arrangements or understandings save for those that do not give rise to a real risk of the kinds of influence against which s 44(v) guards.[47]

47. It is also not necessary that the agreement be one to which the putative Parliamentarian is a party. Such a construction would render otiose the prohibition on persons with an "indirect" interest in an agreement.[48]

Second element: with the Public service of the Commonwealth

48. To the extent that s 44(v) is concerned with the risk of executive influence, the constitutional purpose would not be served by any technical or narrow conception of the "Public Service of the Commonwealth". There may be questions about the extent to which s 44(v) would encompass agreements with statutory authorities, instrumentalities and other entities related to the Commonwealth.[49] It suffices in the present case, however, that the "Public Service of the Commonwealth" includes the executive government of the Commonwealth as organized into departments of State pursuant to s 64 of the Constitution so that s 44(v) reaches agreements entered into by the Commonwealth represented by a person or group within a department.

49. That proposition is supported by s 84 of the Constitution, which contemplated the transfer of officers, and to that extent a correspondence, between the "public service of a State" and the "public service of the Commonwealth",[50] together with other provisions which assumed that the public service of a State included its departments: ss 52(ii), 69, 85. It is also supported by the apparent correspondence between the public *service* and the civil *servants* for which provision is made by s 67 of the Constitution. The proposition is also consistent with the conception of the Public Service that was carried into effect soon after the enactment of the Constitution by the *Commonwealth Public Service Act 1902* (Cth). A wide understanding of the term "Public Service of the Commonwealth" also coheres with the now-established breadth of the original jurisdiction of the High Court over "officers of the Commonwealth": s 75(v).

50. In *Webster*, Barwick CJ said that there was no question that transactions with the Department of Housing and Construction and with the Postmaster-General's Department were transactions "with" the Public Service of the Commonwealth.[51] Of course, such transactions will necessarily involve the

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46 Indeed even on the more limited purpose identified by Barwick CJ, such influence could arise: see PJ Hanks, "Parliamentarians and the Electorate" in Gareth Evans (ed), *Labor and the Constitution 1972-1975* (1976) at 196.

47 *Webster* (1975) 132 CLR 270 at 280 (Barwick CJ).

48 See also the facts of *Webster* (1975) 132 CLR 270.

49 See Gerard Carney, *Members of Parliament: Law and Ethics* (2000) at 110.

50 See especially the reference to "public service of the Commonwealth" in the fourth paragraph of s 84.

51 *Webster* (1975) 132 CLR 270 at 281.

Commonwealth as a party, given that the departments of State have no separate juridical personality.[52]

Third element: direct or indirect pecuniary interest in the agreement

51. The notion of a "pecuniary interest" will take its precise meaning from its context.[53] Prior to and around the time of Federation, the notion of a "pecuniary interest" was in wide statutory usage in connection with disqualifying local government officials or statutory officers from voting or performing their statutory functions in circumstances where they had such an interest.[54] The notion was understood to be expansive enough to capture conflicts of interest and duty.[55] It was apt to encompass any financial interest, and not necessarily only a "proprietary" legal or equitable interest.

52. In *Ford v Andrews*,[56] in the context of one such local government statute, a majority of the High Court held that a councillor who was a director of a company, the articles of which authorised the directors to give any director a commission on profits, did not have a prohibited interest in a contract between the council and the company. In part, that was because "the disqualifying interest must be one in existence at the critical time, and not merely a possibility of acquiring an interest".[57] The discretion conferred by the articles was, however, very constrained and could not "be read as authorizing a mere gift of the Company's funds amounting to spoliation" without "service" on the part of a director.[58] The "mere possibility" of a benefit under the articles of association was therefore hedged about by contingencies that were unlikely to be met. It was considerably more remote than, say, the potential benefit of a beneficiary of a discretionary trust (particularly a beneficiary who can exercise control over the trustee).

53. Furthermore, the dissenting reasons of Isaacs J resonate with his observations during the Convention Debates and represent the preferable approach to s 44(v): "[t]he arrangement here is quite sufficient to lead the

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52 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50 at 18 [62] (French CJ, Kiefel, Bell and Keane JJ), 45 [141] (Gageler J); *Re Residential Tenancies Tribunal of New South Wales and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 436 (Dawson, Toohey and Gaudron JJ). See also *Commonwealth v O'Donohue and MMBW* [1979] VR 441 at 455 (Menhennitt J).

53 It has been suggested, in the context of the bias rule, that "the concept of interest is ... vague and uncertain": *Ebner v Official Trustee* (2000) 205 CLR 337 (***Ebner***) at 357 [54] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

54 See eg *An Act for the Government of New South Wales and Van Diemen's Land 1842* (5 & 6 Vic c 76) (UK), s XLI(3); *Municipal Corporations Act 1842* (5 & 6 Vict c 104) (UK), s 11; *Boroughs Statute 1869* (33 Vict No 359) (Vic), s 122; *Local Government Act 1874* (38 Vict No 506) (Vic), s 152; *Mining Act 1874* (37 Vict No 13) (NSW), s 127; *Municipal Corporations Act 1882* (45 & 46 Vict c 50) (UK), s 22(3); *Local Government Act 1890* (54 Vict No 1112) (Vic), s 173; *The Ross Water Act 1895* (Tas), s 11; *The Midland Water Act 1898* (Tas), s 30.

55 See eg *Attorney-General v Emerald Hill* (1873) Vic Sup Ct AJR 135 at 136.

56 (1916) 21 CLR 317.

57 (1916) 21 CLR 317 at 325 (Barton J). See also at 320-321 (Griffith CJ) ("mere possibility of a future interest" – although also there noting that he had experienced "some fluctuation of opinion" on that point), 335 (Gavan Duffy J).

58 (1916) 21 CLR 317 at 325 (Barton J).

civic officer to prefer the line of personal advantage to that of public duty, and, by operating upon his sense of self-interest, to impair the fidelity with which he is expected to maintain the welfare of the corporation".[59]

54. A pecuniary interest, in the context of s 44(v), is one that "sound[s] in money or money's worth".[60] A Full Court of the Federal Court of Australia observed that a "proprietary interest is both narrower than, and different in quality from, a financial interest ... A proprietary interest pertains to property or ownership. A financial interest pertains to money or money's worth".[61] A "pecuniary interest" is, in this sense, the same as a "financial interest". The broader meaning is akin to that attributed to the phrase "financial interest" in *Amadio* (which was derived from the discussion of the term "direct or indirect pecuniary interest" in a local government statute):

> The second and widest [view] is ... that the interest is such that it can give rise to an expectation, which is not too remote, of a 'gain or loss of money'.[62]

55. A gain or loss of money is not to be equated with the receipt of money, for that would be too narrow and constrained a conception given the constitutional context. It is enough that the person's "pockets ... might be affected".[63] That is, if it affects what she or he has to pay out, or if it affects the financial reward that she or he is likely to receive, whether in the form of money, other consideration, or even relief from making a financial outlay.

56. This broad construction is preferable in the context of s 44(v) because of the purpose of the provision and because of the express contemplation that the disqualifying interest may be an "indirect" interest.

57. The term "indirect" indicates that here, "as in other fields of constitutional discourse, regard properly may be had to matters of substance as well as of form and to practical as well as legal effect".[64] A person will have at least an "indirect" interest of a pecuniary nature if it is such that it can give rise to an expectation of a monetary gain or loss that is not remote or insubstantial. Returning to what was said by Sir Isaac during the Convention Debates, the object of s 44(v) was to cast the net as wide as possible to avoid even the appearance that members of Parliament might prefer their personal interests to their public duties: to that end they are prevented from being exposed to temptation "or even to the semblance of temptation".[65]

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59 (1916) 21 CLR 317 at 333.

60 *Webb v The Queen* (1994) 181 CLR 41 at 75 fn 33 (Deane J). See also *Ebner* (2000) 205 CLR 337 at 366 [92] (Gaudron J).

61 *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149 (***Amadio***) at 276 (the Court).

62 *Amadio* (1998) 81 FCR 149 at 276 (the Court), referring to *Downward v Babington* [1975] VR 872 at 880 (Gowans J).

63 *Brown v Director of Public Prosecutions* [1956] 2 QB 369 at 378 (Donovan J); *Rands v Oldroyd* [1959] 1 QB 204 (CA).

64 *Crump v New South Wales* (2012) 247 CLR 1 at 26 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

65 *Nutton v Wilson* (1889) 22 QBD 744 at 747 (Lord Esher MR).

Application of the test to the facts in this case

First element: agreement

58. The lease in respect of 77 Fullarton Road between Fullarton Investments and the Commonwealth was clearly an agreement. It was an agreement even in the narrower sense of an executory contract for a substantial term considered in *Webster*.

Second element: with the Public Service of the Commonwealth

59. In the lease agreement with Fullarton Investments, the Commonwealth was represented by a Division within a Group of the Department of Finance, which is a department of State established under s 64 of the Constitution. The agreement was therefore one with the Public Service of the Commonwealth.

60. Mr Day does not contend otherwise: DS [104]. ~~It appears that Mr Day contends otherwise.[66] No basis has yet been identified for that contention and it is wrong. If Mr Day's argument is that the agreement was, as a matter of law, an agreement with the Commonwealth, that could not assist him. As noted above, the same is true of any agreement with a department of State of the Commonwealth. And it would be absurd to suggest (if this is in fact what is suggested) that such agreements expressed to be entered into by "the Commonwealth" necessarily fall outside s 44(v): the result would be to circumscribe radically the reach of that provision, and to defeat the constitutional object it pursues by reference to matters of pure form.~~

Third element: direct or indirect pecuniary interest in the agreement

61. Mr Day's interest in the lease from Fullarton Investments to the Commonwealth arises from the following facts:

    a) Fullarton Investments, in accordance with the lease and acting through Mr Day, directed the Commonwealth to make rental payments into the bank account ~~said by Mr Day to have been owned by Fullarton Nominees, which was a business name owned by Mr Day~~ owned by Mr Day (FJ [124(7)]; AF [37], [65.2], [65.3]; CB 242-243).

    b) B&B Day as trustee of the Day Family Trust (of which Mr Day was a beneficiary) was at all times liable to make repayments to the NAB in respect of the loan facility formerly secured by a mortgage over 77 Fullarton Road (AF [8], [31]).

    c) Further, Mr Day personally guaranteed, and indemnified the NAB in respect of, B&B Day's obligations under the loan facility agreement (AF [8]).

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[66] ~~Mr Day's Statement of Contentions of Fact and Law filed on 6 December 2016 (not reproduced in the Court Book): see in answer to the Attorney-General's Statement of Contentions at [52] and in answer to Ms McEwen's Statement of Contentions at [19].~~

d) Fullarton Investments was indebted to B&B Day and there was an ~~agreement or understanding~~ arrangement between them that the rental payments from the Commonwealth would ~~be used to repay the debt~~ pass back to the Day Family Trust (FJ [97(5)], [111], [124]; AF [34], [50]-[53]~~, [81]~~).

e) B&B Day expected that these ~~re~~payments would in turn be used to make repayments to the NAB (AF [50]-[53]).

f) Fullarton Investments' only source of income was rent payable by the Commonwealth and any other tenants of 77 Fullarton Road. The rent from other tenants in the year ending 30 June 2015 was $10,000 (AF [54], [58], [82]). In the event that the Commonwealth did not pay rent to Fullarton Investments, then Fullarton Investments would be unable to repay its loan from B&B Day.

g) In that event, B&B Day would be deprived of the intended source of revenue by which it was to make repayments to the NAB and would have to make those repayments from other sources, or Mr Day as guarantor might personally have to make the repayments.

h) In fact, Mr Day effectively made the repayments to the NAB out of his own salary (AF [47], [55], [58]).

~~h)~~i) Fullarton Investments granted NAB a mortgage over 77 Fullarton Road which was used to secure loans made by NAB to companies associated with Mr Day (FJ [148]).

62. Having regard to all these circumstances, as one must, Mr Day's pecuniary interest in the lease can be articulated in at least three ways.

63. **Control of rental payments**: The lease permitted Fullarton Investments to nominate the bank account into which rental payments would be made. In practice, Mr Day exercised sufficient control over Fullarton Investments to direct the rental payments to himself (as in fact occurred), notwithstanding the transfer of 77 Fullarton Road from B&B Day to Fullarton Investments: [61(a)].

64. **Application of rental payments for Mr Day's benefit or potential benefit**: Fullarton Investments, having been incorporated for the purpose of purchasing 77 Fullarton Road, doing so pursuant to arrangements in which it became indebted to B&B Day in the amount of the purchase price ($2.1 million), and having few other assets or sources of income, was expected to "pass back" ~~use~~ rental payments by the Commonwealth to the Day Family Trust and did not otherwise have the means to repay its debt to B&B Day as trustee of the Day Family Trust. Mr Day was a beneficiary of the Day Family Trust: [61(d)] and [61(f)]. The class of beneficiaries under that trust was relatively confined: AF [3] and see also CB 29-30 (cl 2). And Mrs Day, as the sole director and shareholder of B&B Day (AF [5]), was in a position to cause the power conferred by clause 10 of the trust deed (CB 47) to be exercised so as to pay or apply the income of the Day Family Trust in favour of her husband. The potential benefit to Mr Day was real and not

remote (and distinguishable from the more contingent benefit considered in *Ford v Andrews*[67]).

65. Relatedly, Mr Day expected B&B Day to use the funds it received from Fullarton Investments to service the NAB loan facility: [61(e)]. Without the funds flowing to B&B Day from the Commonwealth via Fullarton Investments, Mr Day was affected in various ways. B&B Day might have serviced the NAB loan facility using other assets or income of the trust: [61(b)] and [61(g)]. In connection with its loans to other companies associated with Mr Day, NAB might have called on its security in 77 Fullarton Road, thereby depriving Fullarton Investments of its only material asset and thus its only means of repaying B&B Day the $2.1 million purchase price: [61(b)], [61(d)] and [61(f)] and [61(i)]. NAB might have called on Mr Day's personal guarantee of B&B Day's obligations: [61(c)]. In any of these events, Mr Day stood to lose money. In fact, Mr Day effectively made the repayments to the NAB out of his own salary ([61(h)]), indicating that in a real and practical sense, his financial outlays would be significantly reduced in the event that rental payments by the Commonwealth commenced.

66. **Extension of interest by exercise of executive discretion**: Such interest as Mr Day had in the lease was amplified by the Commonwealth's option to renew the lease for a further term of six years: Cl 6 and item 18 of the Schedule: CB 139-140, CB 175. And Mr Day's enjoyment of the benefit flowing from that particular interest was dependent on a future exercise of executive discretion.

67. Mr Day's interest can be seen to arise from a combination of the lease agreement itself (which was executed on 1 December 2015 with a commencement date of 1 July 2015) and the ~~agreement or understanding~~ arrangement between B&B Day and Fullarton Investments about ~~making payments out of~~ passing back rent from the Commonwealth (which was in place from no later than ~~4 September 2014~~ 16 December 2013). The interest therefore arose on, and subsisted from, 1 July 2015 or alternatively 1 December 2015, being the first date at which these concurrent arrangements were all in place.

68. Mr Day's interest was a "pecuniary" interest because he had an expectation of a monetary gain or loss that was not remote or insubstantial arising out of the existence of the lease or alternatively arising out of the things done or contemplated to be done in performance of the lease, namely payment of rent and the exercise of the option to renew. Mr Day had at least an "indirect" pecuniary interest. His position as a beneficiary of the Day Family Trust, either on its own or in combination with his position as guarantor of B&B Day's financial obligations is sufficiently proximate to bring the interest within the scope of s 44(v).

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67 (1916) 21 CLR 317.

69. The interest was such that there was a real risk that Mr Day could have been, or be perceived to have been, influenced in relation to his parliamentary affairs by the executive, and also by his private interest. For example: Mr Day's personal financial interests, in relation to both the capital of B&B Day as trustee for the Day Family Trust of which he was a beneficiary and B&B Day's obligations under the NAB loan facility, would be favourably affected by the Commonwealth's performance of the lease, and by any exercise of the Commonwealth's option to renew the lease. To the extent that his personal financial interest could, in this way, benefit from decisions of the executive government, there arose a real risk that Mr Day might conduct, or be perceived to conduct, his parliamentary affairs (such as voting on bills, or participating in scrutiny of executive action) in a way that he thought would secure the executive government's favour. That is the very impairment of the independence of Parliament against which s 44(v) guards.

70. Alternatively, that result follows even if the Court applied the narrower statement of the test in *Webster*: the Commonwealth's lease (an agreement with currency for a substantial period of time) was an agreement under which the Crown could conceivably have influenced Mr Day in relation to his Parliamentary affairs by things done or refrained from being done in relation to the lease (such as payment of rent and exercise of the option to renew); and Mr Day had a relevant pecuniary interest in that agreement in the sense that through the possibility of financial gain by the existence or performance of the agreement, Mr Day could conceivably have been influenced by the Crown in relation to his Parliamentary affairs.

Answers to Questions (a) and (c)

71. For the foregoing reasons, Mr Day was incapable of being chosen or of sitting as a Senator no later than 1 July 2015 or alternatively 1 December 2015, by which time he had an indirect pecuniary interest in the Lease of 77 Fullarton Road from Fullarton Investments to the Commonwealth represented by the Department of Finance.

72. Question (a) should be answered: "Yes". Question (c) should be answered: "Yes, on 1 July 2015" or, alternatively, "Yes, on 1 December 2015".

Question (b): by what means and manner vacancy to be filled

Principles to be applied

73. The applicable principles were established in *In re Wood*[68] and followed in *Sue v Hill*.[69] The Court, on the hearing of a reference under Pt XXII of the Electoral Act, has the powers conferred by s 360 so far as they are applicable: s 379. That includes the power to "declare any candidate duly

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68 (1988) 167 CLR 145.

69 (1999) 199 CLR 462.

elected who was not returned as elected": s 360(1)(vi). That power carries with it an incidental power to order a special count.[70]

74. A special count permits a vacancy occasioned by the return of a candidate who was subject to disqualification under s 44 of the Constitution to be filled by giving effect to "the true result of the polling – that is to say, the true legal intent of the voters so far as it is consistent with the Constitution and the [Electoral] Act".[71] By analogy with s 273(27) of the Electoral Act, which deals with votes indicated for a deceased candidate, votes indicated for the disqualified candidate should be counted to the candidate next in the order of the voter's preference and the numbers indicating subsequent preferences should be treated as altered accordingly.[72]

75. A special count would not be ordered if the special count would "result in a distortion of the voters' real intentions", as (it has been held) can happen under the different scrutiny rules for the House of Representatives.[73]

76. Provided that a special count would give effect to the true legal intent of the voters, it should be preferred to a fresh election, which would occasion significant cost and inconvenience.

Application of principles

77. A special count is appropriate in the present case. Relevantly to that submission, the Attorney-General notes the following.

    77.1. In the event that the Court considered exercising its power to declare a candidate who was not returned to have been duly elected, it would need to be satisfied that the candidate to be declared as duly elected was eligible to be chosen.

    77.2. The evidence discloses that the second of the two Family First candidates for the Senate in South Australia, Ms Lucy Gichuhi, was born in Kenya and obtained Australian citizenship by naturalisation: CB 324.[74] Ms Gichuhi's eligibility to be chosen therefore depends on a question of constitutional fact as to whether, by operation of foreign law (and, possibly, any steps she may have taken by way of renouncement), she no longer holds the citizenship that she held prior to obtaining Australian citizenship by naturalisation. At the time Ms Gichuhi acquired Australian citizenship, the Kenyan Constitution provided: "A citizen of Kenya shall … cease to be such a citizen if … having attained the age of twenty-one years, he acquires the

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70 *In re Wood* (1988) 167 CLR 145 at 172 (Mason CJ).

71 *In re Wood* (1988) 167 CLR 145 at 166 (the Court).

72 *In re Wood* (1988) 167 CLR 145 at 166 (the Court).

73 *Sykes v Cleary* (1992) 176 CLR 77 at 102 (Mason CJ, Toohey and McHugh JJ); *Free v Kelly* (1996) 185 CLR 296 at 302-304 (Brennan CJ).

74 Exhibit TJC-3 to the Affidavit of Timothy John Courtney affirmed on 20 December 2016 at 20.

citizenship of some country other than Kenya by voluntary act (other than marriage)".[75]

78. If the appropriateness of ordering that Mr Day's vacancy be filled by a special count might depend upon the eligibility of Ms Gichuhi, then it would be desirable for Question (b) to be deferred pending further directions by a single Justice.

79. However, the appropriateness of ordering a special count does not depend upon the eligibility of Ms Gichuhi. Even if all the candidates in a group are ineligible, a special count can be conducted without any distortion of the voters' real intentions under the proportional, optional preferential multi-member Senate voting system.[76]

80. The statutory analogue would remain s 273(27), albeit applied as though more than one candidate had died. Voters are permitted to express as many above-the-line preferences as they wish, so that, as a matter of principle, voter preferences expressed above the line (which are treated in law as the functionally equivalent preferences expressed below the line)[77] can be given effect. The possibility that some ballots exhaust earlier than they might otherwise have exhausted due to the ineligibility of an entire group of candidates is a consequence only of optional preferential voting[78] and does not produce any relevant distortion that would make a special count inappropriate.

81. If a special count is the appropriate manner by which to fill Mr Day's vacancy, the question of whether the manner in which the special count be conducted ought to accommodate any question about Ms Gichuhi's eligibility should be determined as an aspect of answering Question (d), by or following directions by a single Justice. Question (b) should thus be answered: The vacancy should be filled by a special count of the ballot papers and any directions necessary to give effect to the conduct of the special count should be made by a single Justice.

Questions (d) and (e)

82. Question (d) should be referred to a single Justice to answer after Questions (a), (b), and (c). As to Question (e), the Attorney-General would submit to an order that the Commonwealth pay Mr Day's costs of the

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75 Section 97(3)(a) (repealed from 27 August 2010). As to the "automatic" operation of the provision, see the decision of Judge Isaac Lenaola (now a Justice of the Supreme Court of Kenya) in *Bashir Mohamed Jama Abdi v Minister for Immigration and Registration of Persons* [2014] eKLR (High Court of Kenya at Nairobi, Petition No. 586 of 2012, 7 March 2014) at [25]. Cf *Mahamud Muhumed Sirat v Ali Hassan Abdirahman* [2010] eKLR (High Court of Kenya at Nairobi, Election Petition No. 15 of 2008, Judge L. Kimaru, 22 January 2010) at p.10. The suggestion in *Sirat* that Kenyan citizenship would be retained unless renounced was *obiter dicta* because the basis for the decision was that the evidence did not establish that the petitioner had a foreign citizenship.

76 See by analogy *In re Wood* (1988) 167 CLR 145 at 167 (the Court), 174-175 (Mason CJ). See also *Day v Australian Electoral Officer (SA)* (2016) 90 ALJR 639 (***Day No 1***) at 642-648 [6]-[14], [21]-[22], [27]-[31], [36] (the Court).

77 See s 272 of the Electoral Act and *Day No 1* (2016) 90 ALJR 639 at 650-651 [48] (the Court).

78 See *Day No 1* (2016) 90 ALJR 639 at 651 [54] (the Court).

reference on a party-party basis. There should be no order as to costs as between the Attorney-General and Ms McEwen.

PART VI ESTIMATED HOURS

83. The Attorney-General estimates that he will require 2 hours for the presentation of oral argument.

Date of filing: ~~6 January 2017~~ 1 February 2017

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