IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY **No. C14 of 2016**

10 **IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE COMMONWEALTH ELECTORAL ACT 1918 (CTH) CONCERNING MR ROBERT JOHN DAY**

20

ANNOTATED SUBMISSIONS OF MR ROBERT DAY

Filed on behalf of Mr Day
Griffins Lawyers
49 Flinders Street
ADELAIDE SA 5000

Telephone: (08) 8410 2020
Fax: (08) 8410 1920
Email: jwhitington@griffins.com.au
Ref: Greg Griffin / John Whitington

PART I: CERTIFICATION

1. It is certified that this submission is in a form suitable for publication on the internet.

PART II: ISSUES

2. The issues to be resolved in the proceedings are fixed by the questions referred to this Court by the Senate under s 376 of the *Commonwealth Electoral Act 1918* (Cth) (**Electoral Act**). See CB[1] 7.

3. Those questions are:

   (a) whether, by reason of s 44(v) of the Constitution, or for any other reason,[2] there is a vacancy in the representation of South Australia in the Senate for the place for which Robert John Day was returned;

   (b) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;

   (c) whether, by reason of s 44(v) of the Constitution, or for any other reasons, Mr Day was at any time incapable of sitting as a Senator prior to the dissolution of the 44th Parliament and, if so, on what date he became so incapable;

   (d) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and

   (e) what, if any, orders should be made as to the costs of these proceedings.

4. In answering questions (a) and (c), the precise primary question that arises is whether or not Mr Day, at any material time, had a direct or indirect pecuniary interest in a lease executed on or about 1 December 2015 (**the Lease**) between Fullarton Investments Pty Ltd (**Fullarton Investments**) and the Commonwealth of Australia in relation to premises being part of the Ground and First Floors of 77 Fullarton Road, Kent Town, South Australia (**the Fullarton Road Property**).

5. Mr Day submits that the answer to this question is "No" with the consequence that the Court should answer questions (a) and (c) "No" and question (b) as "Does not arise". In relation to question (e), the Attorney-General has agreed to submit to an order that the Commonwealth pay Mr Day's costs of the reference on a party-party basis irrespective of the outcome of the proceedings. Mr Day submits that this is appropriate given the nature of the litigation, and the fact that he has participated on the basis of the Commonwealth's undertaking.

---

[1] Court Book.

[2] Note that on 21 November 2016, French CJ ordered that "In the absence of any contrary contention, questions (a) and (c) of the questions referred by the Senate to the Court of Disputed Returns on 7 November 2016 shall be read as referring to section 44(v) of the Constitution only and not any other reason for the vacancy referred to in those paragraphs": CB 271 (order 2). There has been no contrary contention.

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

6. It is certified that notice has been given in compliance with s 78B of the *Judiciary Act 1903* (Cth): CB 274-290.

PART IV: MATERIAL FACTS

7. The critical factual issue in the proceedings is the nature and degree of the connection, if any, between Mr Day and rent payable under the Lease. So understood, the central facts are these.

8. Mr Day is not a party to the Lease. The parties to the Lease are Fullarton Investments and the Commonwealth. It is not alleged that the Lease was a sham.

9. Mr Day is not and has never been either a director or shareholder of Fullarton Investments: CB 264-265.

10. Fullarton Investments was trustee of the Fullarton Road Trust: CB 53. That is a discretionary trust of which there were many beneficiaries, including (i) Debra Smith and her spouse, (ii) each child of Debra Smith and his or her spouse, (iii) the parents, brothers, sisters, cousins, nephews and nieces of Debra Smith (and her spouse), (iv) any trust in which any of those persons is or are a beneficiary or any corporation in which any of the shares are held by any of those persons, and (v) any charitable, educational, benevolent, sporting or religious institution, person, corporation or association: CB 53-54 (cl 2(c), 56 (cl 3(a)), 68-71 (cll 10-13)). B&B Day Pty Ltd (**B&B Day**) was one of the many beneficiaries of the Fullarton Road Trust, but Mr Day was not. Mr Day did not settle the Fullarton Road Trust: CB 53. Nor did he have power to remove the trustee, that power being vested in Debra Smith: CB 53, 72 (cll 2(b), 18). The beneficiaries of the trust had no personal liability for debts of the trust: CB 72-73 (cl 20).

11. B&B Day was trustee of a further trust, the Day Family Trust: AF [4]. That, too, was a discretionary trust with many beneficiaries, of which Mr Day was one: CB 29-30, 32, 46-47 (cll 2(a), 3(a), 10-13). The trust's beneficiaries included, in addition to Mr Day, (i) Mr Day's spouse, (ii) Mr Day's children and grandchildren and their spouses; (iii) Mr and Mrs Day's parents, brothers, sisters, cousins, nephews and nieces, (iv) John Eric Smith and Lesley Ann Smith, (v) any trust in which any of those persons is or are a beneficiary or any corporation in which any of the shares are held by any of those persons, and (vi) any charitable, educational, benevolent, sporting or religious institution, person, corporation or association. Mr Day did not settle the trust and the trust's beneficiaries had no personal liability for trust debts: CB 29, CB 49 (cl 20).

12. Since 30 June 2014, the sole director and shareholder of B&B Day has been Bronwyn Day, Mr Day's spouse: AF [5] (CB 426).

13. The land the subject of the Lease (**the Fullarton Road Property**) was acquired by Fullarton Investments from B&B Day by means of a memorandum of transfer dated 4 September 2014, which was registered on 11 November 2014: AF[3] [19], CB 103-105. Fullarton Investments became the registered proprietor of the land: AF [18]. Mr Day was

[3] Areas of Factual Agreement between the Parties filed on 23 December 2016.

not a director or shareholder of B&B Day at the time of the sale: AF [5]; CB 259-260. B&B Day was liable to make payments to the National Australian Bank (**NAB**) in respect of a mortgage over the Fullarton Road Property: AF [31].

14. At the time the Lease was executed, the sole shareholder and director of Fullarton Investments was Mr Colin Steinert: AF [38], [40], CB 187. There is no evidence of any agreement between Mr Steinert and Mr Day as to how Mr Steinert would exercise his powers or discharge his duties as director of Fullarton Investments nor as to how he, as the controller of the Fullarton Road Trust, would exercise his powers. Mr Steinert conducted his own inquiries – effectively due diligence – regarding Fullarton Investments before he became a Director: see MTB[4] 143-145.

15. Neither the Commonwealth nor Ms McEwen has led any evidence from Mr Steinert despite the fact that he has co-operated with them in the production of documents and information: see, eg, MTB 362-363.

16. The upshot of this is that Mr Day's legal connection to the Lease was, at most, tenuous and remote. It did not constitute an interest *in* the Lease. Put at its highest, Mr Day's connection was mediated through two trusts, both of which were discretionary. Mr Day was no more than one of many beneficiaries under the second of those trusts. The trustee of each trust was a corporate trustee, and Mr Day was neither a director nor shareholder of either of the corporate trustees.

17. In relation to the Lease, the following salient features should be noted, apart from the obvious fact that Mr Day was not a party to it.

    (a) The lessor was Fullarton Investments: CB 123, 131, 187.

    (b) Rent was payable *at the direction of* Fullarton Investments CB 142 (cl 9.4, CB 173 (Sch 1, item 1), CB 174 (Sch 1, cl 10). As events transpired, the relevant direction to pay rent was signed by Colin Steinert who, by the time of execution of the Lease, was the director of Fullarton Investments: see CB 924. Rent was not payable to B & B Day or Mr Day under or pursuant to the Lease.

    (c) The rent was to be set independently by an independent valuer appointed by the Australian Property Institute: CB 166 (cl 36.2), CB 174 (item 10); AF [42].

    (d) Rent was not payable until the earlier of 14 August 2016 (which was the date of existing lease in respect of 19 Gilles Street, Adelaide) or, if the Gilles Street lease was subleased to a third party before its expiry, the date of commencement of rent under that sub-lease: CB 141 (cl 9.2.1), CB 166 (cl 36.1.1), CB 174 (item 11); AF [41].

    (e) There is no evidence that the rent set for the Lease was anything other than market rent. Moreover, it was cheaper than the rent the Commonwealth was paying in respect of 19 Gilles Street, Adelaide: AF [43] – [44] (CB430).

[4] McEwen's Tender Bundle of Documents.

18. In the events that transpired, although invoices for rent were issued by Fullarton Investments (CB 247-248), the Commonwealth never made any payment of rent under the Lease: AF [58].

PART V: RELEVANT PROVISIONS

19. In addition to the provisions set out in the submissions of the Attorney-General of the Commonwealth (**CS**) and Ms McEwen (**MS**), ss 16, 34, 45, 46 and 51(xxxvi) of the *Constitution* are relevant. These are set out in the Annexure.

PART VI: ARGUMENT

Summary

20. The terms of ss 16, 44, 45 and 46 of the Constitution have profound consequences: they disentitle a citizen from eligibility for elected office and, in a case such as the present, have the capacity to override the election of a chosen representative for either House of Parliament. That is not a conclusion that this Court, sitting as the Court of Disputed Returns, should lightly reach or encourage through a broad construction of the provisions. And it is not one that should be reached in this case.

21. The starting point is the construction of s 44(v). Text, context, purpose, structure and precedent all dictate that s 44(v) does not bear an expansive meaning. It was calculated to address a discrete mischief – the exercise of undue influence *by the Executive* over parliamentarians which thereby undermined the independence of Parliament. This mischief informs the scope of the section: it can be engaged only if there is an agreement under which the Crown could influence a legislator in relation to the legislator's parliamentary affairs.

22. The expansive construction of s 44(v) advanced by the Commonwealth and Ms McEwen, which discerns in the text of the provision a constitutionalised prohibition on apprehended bias, should be rejected. That reading finds no support in text, history or precedent. It is overbroad, it constrains Parliament's express power to determine the qualifications for members of Parliament and will yield great uncertainty.

23. Whichever construction of s 44(v) is adopted, the provision was not engaged in this case. The case is most closely analogous to the decision of the Full Court of the Supreme Court of Queensland in *Hobler v Jones* [1959] Qd R 609 (***Hobler v Jones***). The issue in that case was whether a member was disqualified from sitting in the Queensland Parliament because he was a party to two leases with the Crown. The relevant provision of the Queensland Constitution was in terms similar to the *House of Commons (Disqualification) Act 1782* (UK) (**the 1782 Act**), which, as will be seen, was the progenitor to s 44(v) and was recognized as such in *In Re Webster* (1975) 132 CLR 270 (***Webster's Case***); see also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [200]. At 420, the Full Court in *Hobler v Jones* referred to, and accepted, the argument of Gibbs QC and Mr Brennan (as they then were) which was to the following effect:

> [T]hese leases are not within the words of the Act or the mischief aimed at by it – they were ordinary leases in terms of the condition and form required by the Land Acts. They have no special conditions. The Land Court controls the rent, forfeiture

for breach depends on hearing and determination by the Commissioner's Court. *The respondent did not come and was not liable to come under Crown influence by virtue of the lease in his capacity as a member of Parliament, or at all.* (emphasis added)

24. *Hobler v Jones* is consistent with the subsequent decision of Barwick CJ in *Webster's Case*. In *Hobler v Jones*, the parliamentarian was a *party* to the leases. The position is so much the clearer in a case such as the present.

The general approach to the construction of s 44(v)

25. Section 44(v) takes its place in a suite of provisions—ss 44, 45 and 46—which prescribe the qualifications of Commonwealth parliamentarians and the consequences of sitting when disqualified.

26. These provisions should not be afforded the expansive construction now contended for by the Commonwealth and Ms McEwen. As in other areas concerning the selection and structure of Parliament—including the qualifications of electors (ss 8, 30) and the method of election (ss 7, 24, 29)—the framers entrusted the Parliament with a broad power to determine the qualifications of members of the Houses of Parliament.[5] That power is express: see ss 16, 34 and 51(xxxvi). It should not be unduly constrained by an expansive judicial interpretation of s 44 (and s 44(v) in the context of the present case).

27. As Gleeson CJ said in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 [6]: "*A notable feature of our system of representative and responsible government is how little of the detail of that system is to be found in the Constitution, and how much is left to be filled in by Parliament*".

28. To similar effect, in *McGinty v Western Australia* (1996) 186 CLR 140 at 279-280 (***McGinty***),[6] Gummow J observed: "*the architects of the Constitution 'placed great faith in the capacity of elected senators and members to design statute law for a system of representative self-government, notwithstanding that they would be legislating in their own interest*".

29. The result was that "*[c]onstitutional rigidity was, to a significant degree, avoided*": *McGinty* at 269. See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 273 [4] (Gleeson CJ) (***Roach***), *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 106 [325] (Crennan J), 121 [386] (Kiefel J) (***Rowe***); *McGinty* at 284 (Gummow J).

30. Many of the submissions advanced by the Commonwealth and Ms McEwen assume that the systems of representative and responsible government for which the Constitution provides bear a degree of rigidity which the framers consciously avoided: see particularly CS [22]-[32]. Their acceptance would introduce a rigidity. Such rigidity is inconsistent with the notion of representative and responsible government itself, which is dynamic and varies with time and place: *Bennett v The Commonwealth* (2007) 231 CLR 91 at [32] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *McGinty* at 280-281 (Gummow J); *Roach* at 186-7 [45] (Gummow, Kirby and Crennan J).

---

[5] See also Convention Debates, Sydney, 21 September 1897, 1027 (Higgins).

[6] Quoting Reid and Forrest, *Australia's Commonwealth Parliament 1901-1988* (1989) 87.

31. The more expansive the interpretation given to s 44(v), the less scope there is for the Commonwealth Parliament to exercise its express constitutional powers concerning the qualifications of parliamentarians. That is the kind of "*broad restraint upon legislative development*" has been cautioned against: *Rowe* at 130 [420] (Kiefel J) and which should not be introduced now. This caution is particularly apt in the context of s 44 because of the provision's profound consequences referred to in paragraph 20 above.

The purpose of s 44(v)

32. As Barwick CJ observed in *Webster's Case*, "*in [the] construction and application*" of s 44(v), "*the purpose it seeks to attain must always be kept in mind*". Similarly, in *Vardon v O'Loghlin* (1907) 5 CLR 201, where the High Court was sitting as the Court of Disputed Returns, Isaacs J (at 215) applied the "*safe rule*" of construction from *Prigg v Pennsylvania*, 16 Pet. 539 at 610: "*[p]erhaps, the safest rule of interpretation after all will be found to look at the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed*".

33. There is a special need to construe s 44(v) by reference to its purpose because its text is capable of bearing broader or narrower meanings. The broadest meanings—which may extend to over the counter transactions with, for example, the Commonwealth bank[7] or a Commonwealth health insurer—would yield a standard which the framers could not possibly have contemplated. This difficulty cannot be resolved by discerning some "de minimis" condition, which has no support in the text of s 44(v) and would, in any event, raise more problems than it solves: cf CS [40]; MS [29]. It is unlikely that the framers intended that the composition of federal Parliament would turn on the quantum of a parliamentarian's savings with a Commonwealth bank or the size of a parliamentarian's insurance payout from a Commonwealth health insurer.

34. So too, the difficulty cannot be resolved by discerning some exclusion for "routine ... transactions": cf CS [40]. Again, such a carve-out finds no support in the text of s 44(v) and raises more questions than it answers. Is a lease "routine" because the Commonwealth regularly leases property? Is an employment contract "routine" because many Australians are parties to employment contracts and the Commonwealth is a large employer?

35. Examples of the situations which would be caught on an overly expansive reading of s 44(v) can be multiplied. For example, on overly expansive readings, it would cover a parliamentarian or potential parliamentarian:

    (a) who, without his or her knowledge (and perhaps as a strategy by a political opponent), is named as a beneficiary of a discretionary trust, an asset of which is an agreement with the Commonwealth;

    (b) who subscribes for a government bond such as a government war or infrastructure bond;

---

[7] The Commonwealth Bank was established by the *Commonwealth Bank Act 1911* (Cth) and had power to "carry on the general business of banking" and "to receive money on deposit": s 7.

(c) who takes the benefit of a government contract that devolves to the member by will or under an intestacy or as executor or administrator;

(d) who is a creditor of a person who is owed money under an agreement with the Commonwealth or otherwise has an agreement with the Commonwealth;

(e) whose spouse is a senior public servant who is remunerated pursuant to a contract with the Commonwealth in circumstances where the spouse's income directly or indirectly benefits the parliamentarian or potential parliamentarian e.g. through the reduction of a mortgage for which both are jointly and severally liable;

(f) whose rates are reduced because the Commonwealth arranges with the local government to partially fund a road;whose membership fees of a small shooting club are reduced because the Commonwealth gives the club a cheap or concessional lease;

(g) who is saved the expense of leasing a parliamentary office from their own funds because the Commonwealth funds and negotiates a lease and permits the person to use the land for their parliamentary office;

(h) whose taxes are reduced because the Commonwealth is able to exercise a power under a debt agreement with a financial institution to lower the interest rate payable.

36. This Court's jurisprudence on pure economic loss in the area of negligence shows the dangers of indeterminacy and overbreadth which arise when one extends an inquiry into indirect pecuniary consequences too far: see, eg, *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 551 (Gibbs J).

37. The need to impose a limit on s 44(v) points—as was the case with the broad language of s 92[8]—to a purposive reading. That purpose was correctly identified by this Court in *Webster's Case*, namely, the "*protection of the independence of the Parliament*": at 278-279. The object of s 44(v) is not to prevent actual or perceived conflicts of interest, nor is it to protect the public against fraudulent conduct of parliamentarians: *Webster's Case* at 278-9.

38. On this approach, the mischief at which s 44(v) is directed is sufficiently identified as preventing contracts which place a person "*under the influence of the Crown in relation to Parliamentary activities*" or enable the Crown to "*'sap' the freedom and independence of Parliament*": *Webster's Case* at 288.1. The Lease in question was not such an agreement. This interpretation is supported by the context within which s 44(v) was made, to which these submissions now turn.

Context and history

39. The object of s 44(v) identified in *Webster's Case* reflected the pre-federation position in the United Kingdom established by the *House of Commons (Disqualification) Act 1782* (UK) (**the 1782 Act**) and confirmed in *Royse v Birley* (1869) LR 4 CP 296 at 312-313 (Willes J), 317-8 (Montague Smith J), 320 (Brett J) (***Royse v Birley***).

[8] See, eg, *Cole v Whitfield* (1988) 165 CLR 360 at 395-6.

40. The 1782 Act was a progenitor of s 44(v) of the *Constitution*: *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [200] (Gummow, Crennan and Bell JJ).

41. The 1782 Act forms part of the "*combined fabric of the common law, and the statute law which preceded*" the *Constitution* and in light of which the *Constitution* is to be construed: *Engineers' Case* (1920) 28 CLR 129 at 152. See also *Engineers' Case* at 148 ("*We therefore look to the judicial authorities which are part of our own development, which have grown up beside our political system, have guided it, have been influenced by it and are consistent with it, and which, so far as they existed in 1900, we must regard as in the contemplation of those who, whether in the Convention or the Imperial Parliament, brought our Constitution into being*").

42. The 1782 Act provided in s I:

> any person who shall, directly or indirectly, himself or by any Person whatsoever in Trust for him, or for his Use or Benefit, or on his Account, undertake, execute, hold, or enjoy, in the Whole or in Part, any Contract, Agreement, or Commission, made or entered into with, under, or from the Commissioners of his Majesty's Treasury, or of the Navy or Victualling Office, or with the Master General or Board of Ordnance, or with any one or more of such Commissioners, or with any other Person or Persons whatsoever, for or on account of the Publick Service ... shall be incapable of being elected, or of sitting and voting as a Member of the House of Commons, during the Time that he shall execute, hold, or enjoy any such Contract, Agreement, or Commission, or any Part or Share thereof, or any Benefit or Emolument arising from the same.

43. The preamble to the 1782 Act identified its purpose: "*For further securing the Freedom and Independence of Parliament*". Holdsworth, in *Holdsworth's History of the English Parliament* (10th ed) at 87, which is referred to in *Hobler v Jones* at 620, explains that the 1782 Act was passed to diminish the power of the Crown to exert corrupt influence over Parliament. So too, the 10th edition (1893) of *Erskine May's Law and Usage of Parliament*, which was current at federation, stated: "*Government contractors, being supposed to be liable to the influence of their employers, are disqualified from serving in Parliament*": at 30.8.

44. The 1782 Act was also a progenitor of the current proviso to s 44(v). Section III of the 1782 Act stated:

> Provided always, and be it enacted, That nothing herein contained shall extend, or be construed to extend, to any Contract, Agreement, or Commission, made, entered into, or accepted, by any incorporated trading Company in its corporate Capacity, nor to any Company now existing or established and consisting of more than ten Persons, where such Contract, Agreement, or Commission, shall be made, entered into, or accepted, for the general Benefit of such Incorporation or Company.

45. Quick and Garran, in *The Annotated Constitution of the Australian Commonwealth: Part I* (1901) 493 described s 44(v) by reference to the purpose of the 1782 Act recognised in the UK cases. Of s 44(v) they said:

> This is a disability arising from any contract or agreement for valuable consideration, which any person may have entered into to supply any goods or perform any services

> to the Government of the Commonwealth. In England, Government contractors are disqualified under 22 Geo. III. Cl. 45, sec. 1. *The reason for the disqualification of Government contractors is that they are supposed to be liable to the influence of their employers.* (emphasis added)

46. There is no mention in Quick and Garran of any broader "conflict of interest" purpose of the kind advanced by the Commonwealth and Ms McEwen in these proceedings.

47. The disqualification in the 1782 Act was, in substance, adopted in the constitutions of a number of the colonies:[9] see *New South Wales Constitution Act 1855* (NSW) s 27;[10] *Victorian Constitution Act 1855* (Vic) s 25;[11] *Tasmanian Constitution Act 1855* (Tas)

---

[9] It appears that the South Australian Constitution did not adopt a disqualification for government contractors until the *Constitution Act 1934* (SA) s 49. That disqualification was repealed by the *Statutes Amendment (Constitution and Members Registration of Interests) Act 1994* (SA).

[10] "Any Person who shall directly or indirectly, himself, or by any Person whatsoever in trust for him, or for his Use or Benefit, or on his Account, undertake, execute, hold or enjoy, in the whole or in part, any Contract or Agreement for or on account of the Public Service, shall be incapable of being summoned or elected, or of sitting or voting, as a Member of the Legislative Council or Legislative Assembly during the Time he shall execute, hold, or enjoy any such Contract, or any Part or Share thereof, or any Benefit or Emolument arising from the same; and if any Person, being a Member of such Council or Assembly, shall enter into any such Contract or Agreement, or having entered into it shall continue to hold it, his Seat shall be declared by the said Legislative Council or Legislative Assembly, as the Case may require, to be void, and thereupon the same shall become and be void accordingly: Provided always, that nothing herein contained shall extend to any Contract or Agreement made, entered into, or accepted by any Incorporated Company, or any Trading Company, consisting of more than Twenty Persons, where such Contract or Agreement shall be made, entered into, or accepted for the general Benefit of such Incorporated or Trading Company".

[11] "Any person who shall directly or indirectly himself or by any person whosoever in trust for him or for his use or benefit or on his account undertake execute hold or enjoy in the whole or in part any contract or agreement for or on account of the public service shall be incapable of being elected or of sitting or voting as a Member of the Council or Assembly during the time he shall execute hold or enjoy any such contract or any part or share thereof or any benefit or emolument arising from the same Provided that nothing herein contained shall extend to any contract or agreement made entered into or accepted by any company or association consisting of more than twelve persons where such contract or agreement shall be made entered into or accepted for the general benefit of such company or association Provided also that if any Member of the Council or Assembly shall enter into any such contract or agreement his seat shall be declared by the said Council or Assembly respectively to be and shall thereupon become void".

s 19;[12] *Queensland Constitution Act 1867* (NSW) s 6;[13] *Constitution Act 1889* (WA) s 24 (which had some differences, but adopted broadly similar language).[14]

Drafting history

48. The link between the 1782 Act and s 44(v) is direct. The text of s 1 of the 1782 Act was strikingly similar to the text which first appeared in cl 37 in the draft of the Constitution prepared by Sir Samuel Griffith, Andrew Inglis Clark and Charles Kingston and presented to the members of the Constitutional Committee on the Lucinda on 26 March 1891. That clause stated:[15]

> Any person who directly or indirectly, himself, or any person whomsoever in trust for him, or for his use or benefit, or on his account, undertakes, executes, holds, or enjoys, in the whole or part, any contract or agreement for or on account of the Public Service of the Commonwealth, shall be incapable of being elected, or of sitting or voting, as a Member of the Senate or House of Representatives during the time he executes, holds, or enjoys any such contract, or any part or share thereof, or any benefit or emolument arising from it; and if any person, being a Member of the Senate or the House of Representatives, shall enter into any such contract or agreement, or

---

[12] "Any person who shall directly or indirectly himself or by any person whatsoever in trust for him or for his use or benefit or on his account undertake execute hold or enjoy in the whole or in part any contract or agreement for or on account of the public service shall be incapable of being elected or of sitting or voting as a Member of such Assembly during the time he shall execute hold or enjoy any such contract or any part or share thereof or any benefit or emolument arising from the same – Provided always that nothing herein contained shall extend to any contract or agreement made entered into or accepted by any incorporated company or any trading company consisting of more than six persons where such contract or agreement shall be made entered into or accepted for the general benefit of such incorporated or trading company – Provided also that if any person being a Member of such Assembly shall enter into any such contract or agreement or having entered into it shall continue to hold it his seat shall be void".

[13] "Any person who shall directly or indirectly himself or by any person whatsoever in trust for him or for his use or benefit or on his account undertake execute hold or enjoy in the whole or in part any contract or agreement for or on account of the public service shall be incapable of being summoned or elected or of sitting or voting as a member of the Legislative Council or Legislative Assembly during the time he shall execute hold or enjoy any such contract or any part or share thereof of any benefit or emolument arising from the same and if any person being a member of such Council or Assembly shall enter into any such contract or agreement or having entered into it shall continue to hold it his seat shall be declared by the said Legislative Council or Legislative Assembly as the case may require to be void and thereupon the same shall become and be void accordingly Provided always that nothing herein contained shall extend to any contract or agreement made entered into or accepted by any incorporated company or any trading company consisting of more than twenty persons where such contract or agreement shall be made entered into or accepted for the general benefit of such incorporated or trading company".

[14] "ANY person who shall directly or indirectly, himself, or by any person whomsoever in trust for him, or for his use or benefit. or on his account, undertake, execute, hold, or enjoy in the whole or in part any contract, agreement, or commission made or entered into with, under, or from any person whomsoever, for or on account of the Government of the Colony ; Or shall knowingly furnish or provide in pursuance of any such contract. agreement, or commission any money to be remitted abroad, or any goods whatsoever to be used or employed in the service of the public ; And any member of any company, and any person holding any office or position in any company formed for the construction of any railway or other public work, the payment for which, or the interest on the cost of which has been promised or guaranteed by the Government of the Colony ; shall be incapable of being a member of the Legislative Council or Legislative Assembly during the time he shall execute, hold, or enjoy any such contract, agreement, or commission, or office or position, or any part or share thereof, or any benefit or emolument arising from the same."

[15] See John M. Williams, *The Australian Constitution: A Documentary History* (2005) 173.

having entered into it continues to hold it, his seat shall be declared by the Senate or the House of Representatives, as the case may require, to be void, and thereupon the same shall become and be void accordingly.

49. With some drafting changes, the clause remained in a substantially similar form until amendments made in private committee between the 1897 Sydney Convention and the March 1898 Melbourne Convention. After those amendments, the provision, which had by then become cl 45(v), stated:[16]

> Any person who –
>
> ...
>
> 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:
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

Convention Debates

50. Here, as in other cases and to use the language of this Court in the *Engineers' Case*,[17] the "*combined fabric*" of the common law and statute law which preceded the *Constitution* is, in many respects, a surer guide to the meaning of s 44(v) than the *Convention Debates*.

51. Both the Commonwealth and Ms McEwen make highly selective reference to a much longer debate during the Convention Debates. That is akin to picking brief, helpful, comments made in the course of a long debate on a Bill and then elevating those comments to authoritative status.

52. In truth, the Convention Debates do not expose "*a single collective view*" about the purpose of s 44(v) and there is a significant danger in fastening upon individual comments made in the course of debates as "*fixing 'the framers' intention*'": *Work Choices Case* at [119]-[120]. Thus, while Sir Isaac Isaacs referred to an object of "*prevent[ing] individuals making a personal profit out of their public positions*",[18] in the context of a debate on an amendment to the clause, it appears that Sir Joseph Abbott and Sir William Zeal saw the purpose of the section as being "*to keep members from being in the pay of the Government*".[19]

53. Ms McEwen does not gain anything by referring to Sir John Downer's comments: cf MS [27(b)]. Sir John was, in fact, critical of s 44(v), seeing it is an unnecessary "*limitation upon the operations of the government*": Convention Debates, Sydney, 21 September

---

[16] John M. Williams, *The Australian Constitution: A Documentary History* (2005) 869.

[17] See paragraph 40.

[18] Convention Debates (21 September 1897) 1023.

[19] Convention Debates (21 April 1897) 1035.

1897 at 1025. Nor is McEwen assisted by the comments of Sir Simon Fraser, which, read in context, are arguably addressed to the discrete issue of one-person companies: cf MS [27(c)]. In any event, those comments do not establish any collective view of the object or objects of the provision.

Context: s 44 is a penal provision and should be construed narrowly and so that its reach is readily ascertainable

54. Section 44, when engaged, has penal consequences. It disqualifies the affected person from the privilege of election and sitting in Parliament (s 44) and exposes them to a financial "penalty" for sitting while disqualified. (s 46). The United Kingdom forebears of ss 44, 45 and 46 were, before federation, described as "*highly penal*": *Royse v Birley* (1869) LR 4 CP 296 at 314 (Willes J), 319 (Brett J).

55. Barwick CJ made the same point, in respect of s 44, in *Webster's Case* at 279 (accepting the argument of Deane QC referred to at 273.8). And, in *Sykes v Cleary* (1992) 176 CLR 77 at 116, Deane J said: "*Barwick CJ, speaking of par (v) of s 44, said that the effect of those penal consequences was that 'the paragraph should receive a strict construction'. I respectfully agree with that comment.*"

56. The provisions were also understood to be penal in the Convention Debates: see, eg, Convention Debates, Sydney, 21 September 1897 at 990 (Glynn), 1026 (Fraser).

57. The provision, being a penal one, should be construed strictly, in accordance with the rule governing penal provisions which was well established before federation: see, eg, *Fletcher v Lord Sondes* (1826) 3 Bing. 501, 580-581 (Best CJ); cf CS [32]; MS [28].

58. As was said by Hayne, Heydon, Crennan and Kiefel JJ in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 49 [57], the fact that a provision is penal "*is part of the context and therefore is relevant to the task of construing the Act in accordance with those settled principles*". One of those settled principles is that a penal provision must be "*certain and its reach ascertainable to those subject to it*": *Construction, Forestry, Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 634-5 [48] (Crennan, Kiefel, Bell, Gageler and Keane JJ) (***Mammoet***).

59. That Parliament has subsequently exercised its power to reduce the severity of the penalty presumptively imposed by the Constitution cannot change the meaning of the provision: cf MS [28].

Context: the *Constitution* has alternative protections against conflicts of interest and apprehended bias

60. It should not be thought that it is necessary to construe s 44(v) so as to ensure that legislators are not subject to conflicts of interest or apprehended bias. The Constitution admits of ample alternative measures to ensure the integrity of Parliament.

61. Parliament has an ancient power to discipline members for contempt, which includes misconduct.[20] That power is facilitated, in current times, by the Senate Standing Committee of Senators' Interests, which oversees compliance with Senate resolutions regarding reporting of interests.[21] Senate Standing Order 27(4) prohibits a Senator from sitting on a committee "if the Senator has a conflict of interest in relation to the inquiry of the committee".[22] House of Representatives Standing Order 134(a) prohibits a Member from voting "in a division on a question about a matter, other than public policy, in which he or she has a direct pecuniary interest".[23] There is no similar prohibition in the Senate.

10 62. Parliament also has the express power, referred to above, to prescribe further qualifications for parliamentarians. The examples referred to in paragraph 35 above show the difficulties which arise if s 44(v) is read as entrenching an expansive norm. That supports the proposition that the framers intended to give the primary norm-setting power to Parliament, which could tailor measures to ensure consistency with community standards while bringing appropriate certainty.

63. Further, the ultimate power to supervise and correct aberrations from proper practice lies with the people, through the regular, direct elections mandated by the Constitution. That is particularly so because, as the Commonwealth accepts, departure from norms related to conflicts of interest and apprehended bias invite "an evaluative judgment": CS [41].

20 **The authority of *Webster's Case***

64. A number of the submissions advanced by the Commonwealth and Ms McEwen invite this Court not to follow *Webster's Case* in various respects: see CS [20], [34], [46]; MS [25], [28], [29]. Even so, no application is made to re-open that decision, nor is any real argument advanced as to why it should be overturned.

65. In Mr Day's submission, *Webster's Case* is binding unless overruled. The case was a decision of the High Court sitting as the Court of Disputed Returns. The decision is, subject only to principles governing overruling, binding – and that is so even though it was a decision of a single judge.

66. In *Webster's Case*, this Court sat in exercise of the jurisdiction given by ss 184(1)
30 and 203 of the *Commonwealth Electoral Act 1918* (Cth), which were the predecessors to the current ss 354 and 386. That jurisdiction could be exercised by a single Justice: s 184(3). Section 195, the predecessor to s 368, stated that *"[a]ll decisions of the Court*

---

[20] This was one reason for the repeal of the disqualification for government contractors referred to by the Law Reform Commission of Western Australia in "Disqualification for Membership of Parliament: Offices of Profit under the Crown and Government Contracts" (1971) at [40].

[21] See Committee of Senators' Interests, *Registration of Senators' Interests: A handbook for senators* (August 2016) Pt 2 (available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Senators_Interests/Guidelines_and_Resolutions).

[22] See Senate Standing Orders, available at http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders/b00/b05#standing-order_c05-027.

[23] See House of Representatives Standing Orders, available at http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/House_of_Representatives_Standing_Orders.

shall be final and conclusive and without any appeal, and shall not be questioned in any way". The result of these provisions is that there was no appeal from the decision of Barwick CJ in *Webster's Case* to this Court differently constituted: cf *Judiciary Act 1903* (Cth).

67. The Court in *Webster's Case* was therefore exercising a coordinate jurisdiction to that now being exercised by the Court. The binding nature of the decision is not affected by the number of judges which constituted the Court. That would be akin to saying that a five-judge decision of this Court is not binding on a Court constituted by seven: see *Chubb Insurance Company of Australia v Moore* (2013) 302 ALR 101 at [102].

10 68. The upshot of this is that this Court should decline to follow *Webster's Case* "*only with great caution and for strong reasons*": *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 554 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). Generally, that should occur only if the Court is satisfied that *Webster's Case* is "*manifestly wrong*": *The Tramways Case (No 1)* (1914) 18 CLR 54 at 58, 69, 70, 83, 86. See also *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at [66]-[67] per French CJ, referring to the strongly conservative cautionary principle adopted in the interests of continuity and consistency in the law.

69. Here, there is no strong reason to depart from *Webster's Case* and good reason to apply it. The decision has stood for more than 40 years. There is no suggestion that it has caused
20 inconvenience. The Court exercised interpretive choices in making the decision, but did so fully cognisant of the counter-arguments and by applying orthodox principles of constitutional interpretation. Although the case was decided before *Cole v Whitfield* (1988) 165 CLR 360, the Court had regard to the Convention Debates: see at 279.4 (cf CS [39]). The case was argued by Tom Hughes QC and Sir William Deane QC. It is open to infer that parliamentarians, including Mr Day,[24] have relied on the correctness of *Webster's Case* in arranging their affairs. If the Court were to overrule *Webster's Case* and adopt the construction advanced by the Commonwealth and Ms McEwen, it would thereby extend the understood operation of a penal provision.

70. It is also significant that the purpose of s 44(v) identified in *Webster's Case* has arguably
30 been approved by the government in the House of Representatives: see *House of Representatives Hansard* (10 June 1999) 6725 ("*The original rationale was to prevent the executive having influence in parliamentary affairs*"). This is significant in part because the jurisdiction exercised by this Court as the Court of Disputed Returns is coordinate with that of the Houses of Parliament which arise from Parliament's longstanding power to determine its own membership, which is now mediated through s 5 of the *Parliamentary Privileges Act 1987* (Cth): see *Odgers' Australian Senate Practice Thirteenth Edition* Ch 2 ("Powers of the Houses").

71. The Court would be particularly reluctant to depart from *Webster's Case* in circumstances where Parliament could have, but has not, exercised its power under ss
40 16, 34 and 51(xxxvi) of the *Constitution* to effectively overrule it. Parliament has exercised that power by means of s 163 of the *Commonwealth Electoral Act 1918*

---

[24] See CB 250.

(Cth),[25] but has made no attempt to adopt any disqualification akin to that advanced by the Commonwealth and Ms McEwen. Parliament's choices are particularly significant given its prior and coordinate jurisdiction with the High Court in respect of the matter.

72. To adopt a more expansive interpretation of s 44(v) would also be out of step with community standards as evidenced by legislative developments since federation. In New South Wales, the disqualification for government contractors was substantially cut down by the *Constitution (Amendment) Act 1962* (NSW).[26] The *Constitution Act 1975* (Vic) carves out a number of contracts from the disqualification provision in ss 54 and 55 including, relevantly, agreements for the lease of land: s 57. In Western Australia, disqualifications for government contractors were repealed in 1984: *Acts Amendment and Repeal (Disqualification for Parliament) 1984* (WA). And in South Australia, disqualifications for government contractors were repealed in 1994: *Statutes Amendment (Constitution and Members Registration of Interests) Act 1994* (SA). In Queensland, there is no general disqualification for government contractors: see *Parliament of Queensland Act 2001* (Qld) ss 64-76 and particularly ss 71(1) and 72(1)(h). The *Constitution Act 1934* (Tas) introduced a number of carve-outs to the general disqualification of government contractors, including in respect of leases of Crown land: see s 33(3)(i).[27] In the United Kingdom, the disqualification for government contractors was abolished by the *House of Commons Disqualification Act 1957* (UK) s 9.

73. The variety of positions adopted in the jurisdictions is evidence of the dynamism and flexibility which the framers expected to inhere in the constitutional systems of government. The degree of detail into which some of the statutes go in identifying which contracts are in and which are out—particularly s 13(4) of the *Constitution Act 1902* (NSW) and s 71 of the *Parliament of Queensland Act 2001* (Qld)—is also powerful evidence of the advantage which legislative power has over judicial power in crafting norms which reflect constitutional and community standards.

Text

74. It is with this understanding of the object, history and context of s 44(v) that one turns to the text of the provision. As a simple textual matter, there must be:

(a) a "pecuniary interest";

(b) in an "agreement" with the Public Service of the Commonwealth;

(c) the person to whom the section is directed must have the pecuniary interest "in the agreement"; and

(d) the interest may be "direct or indirect".

75. As to these elements, the following submissions are made.

---

[25] "A person who: (a) has reached the age of 18 years; (b) is an Australian citizen; and (c) is either: (i) an elector entitled to vote at a House of Representatives election; or (ii) a person qualified to become such an elector; is qualified to be elected as a Senator or a member of the House of Representatives".

[26] Which, amongst other things, confirmed that "a lease ... of land to or for Her Majesty" was not covered.

[27] See also *Constitution (Disqualification Removal) Act 1961* (Tas).

"Pecuniary interest"

76. First, the word "interest" represents something concrete, and certainly greater than a mere hope or expectancy: see *Ford v Andrews* (1916) 21 CLR 317 at 320.8-321.2 (Griffith CJ), 325.3-7 (Barton J), 335.5-7 (Gavan Duffy J). A "pecuniary interest" is an interest "sounding in money or money's worth": see *Webb v R* (1994) 181 CLR 41 at 75 (fn 33) and CS [54].

"Agreement"

77. "Agreement" means a contract: *Webster's Case* at 279.7. It is inappropriate to read modern "trade practices" conceptions of "arrangements or understandings" into s 44(v): cf CS [45]. Those words do not appear in s 44(v). They have no foundation in the constitutional history preceding s 44(v). The framers were well aware of language which would have extended the operation of s 44(v): for example, ss 44 and 45 refer to "*office[s] of profit*" (s 44(iv)) and the taking of "*fee[s] or honorari[a]*" (s 45(iii). The scope of s 44(v) would be unacceptably uncertain if it extended to vague "arrangements or understandings".

"Interest ... in the agreement"

78. Further, the interest must be "*in the agreement*".[28] This language is quite specific. It is narrower, for example, than having a pecuniary interest "*as a result of the agreement*" or "*flowing from the agreement.*" Nor does the Constitution refer to benefits "*arising out of*" or "*arising from*" an agreement or "*arising from the existence, performance, or breach*" of an agreement: cf CS [19], [40]. The Constitution does not refer to an "*expectation of a monetary gain or loss*": cf CS [57]. Nor, again, does the Constitution refer to a person "*stand[ing] to gain (or lose) financially from the existence or performance of the agreement*": cf MS [35]. Notably, the Constitution also refers to having an "*interest in a[n] agreement*", not being "*interested in an agreement*". The former is a narrower concept: *Ford v Andrews* (1916) 21 CLR 317 at 321.6 (Griffith CJ) (***Ford v Andrews***).

79. These issues were considered prior to federation in *Le Feuvre v Lankester* (1854) 23 LJQB 254 (***Le Feuvre***) and *Ex parte Anderson* (1880) NSWR 338, both of which were followed by the High Court in *Norton v Taylor* (1905) 2 CLR 291 (***Norton v Taylor***). These cases concerned local government statutes in a somewhat similar form to s 44(v). For reasons set out in paragraph 94, there is no direct analogy with those local government statutes. Even so, *Norton v Taylor* is instructive.

80. The relevant statute imposed a penalty on a person who "*while holding any civic office under this Act, continues to be or becomes directly or indirectly, by means of partnership with any other person, or otherwise howsoever knowingly engaged or interested in any contract, agreement, or employment, with or on behalf of the Council, but not being a director in any joint stock company*": see 291.9. Taylor was initially a member of the Council and then became its mayor and chairman of its works committee: 292.6. The Council contracted with a company, Henley's Co Ltd, for Henley's to provide electrical apparatus and plan. A company of which Taylor was a shareholder then arranged with

---

[28] See also *Webster's Case* at 286.9.

Henley's to supply timber to Henley's for the "purpose" of Henley's using that timber to perform the contract with the Council: at 292.7.

81. The argument which the High Court rejected bore a striking similarity to that advanced by the Commonwealth and McEwen:[29]

> The more timber Henley's Co Ltd required for the purposes of the contract, the more they would be likely to order from the defendant's firm. The defendant would therefore profit by the contract. Moreover, the position of the defendant as chairman of the works committee placed him in a position in which his interest might conflict with his duty. That is the mischief which such provisions as this are designed to prevent.

82. The High Court accepted that the defendant's firm "sold timber to contractors for the purpose of carrying out a contract with" the Council: at 295.10. But that did not engage the statutory prohibition.

83. *Ford v Andrews* is also significant. The relevant statute applied where an alderman was "*directly or indirectly, engaged or interested ... in any contract, agreement, or employment with, by, or on behalf of the council*": 317.8. Ford was an alderman of Enfield Council. He was also the Managing Director and a Director of the Enfield Park Brick Co Ltd. The company contracted with the Council. Article 92(p) of the company's articles of association gave the directors power "to give any director ... a commission on the profits of any particular business transaction or share in the general profits of the company". The High Court held, with Isaacs J dissenting, that Ford's position as alderman was not vacated. The possibility that the power in 92(p) might be exercised to give Ford a commission on the contract did not mean that he was "interested in" the contract: see at 320.8-321.2 (Griffith CJ), 325.3-7 (Barton J), 335.5-7 (Gavan Duffy J). To use Gavan Duffy J's language, there was no more than a "mediate chain of possibilities": at 335.6.

84. These cases are all contrary to a contention that there may be a "pecuniary interest in an agreement" if a person "stands to gain" from the agreement, may obtain a benefit "arising out of" the agreement or has some reasonable expectation of gain from the performance of the agreement.

85. Further, consistently with the object of s 44(v), an interest will not be a pecuniary interest "in the agreement" in the relevant sense unless "*through the possibility of financial gain by the existence or performance of the agreement, the person could conceivably be influenced by the Crown in relation to Parliamentary affairs*": *Webster's Case* at 280.7. That is, the agreement "*must be one under which the Crown could conceivably influence the contractor in relation to parliamentary affairs*": *Webster's Case* at 280.3. This is consistent with the text of s 44(v) which expressly limits the provision's operation to agreements with "the Public Service of the Commonwealth", thereby indicating that the provision is concerned with agreements to which the Commonwealth is a party (and can influence the contractor).

---

[29] 293.1.

86. It would be an error to discern some broader operation in s 44(v) than the 1782 Act because the former refers to "interest in" an agreement while the latter referred to "*undertak[ing], execut[ing], hold[ing] or enjoy[ing]*" an agreement: cf CS [34]. As indicated in paragraphs 40-43, the language of s 44(v) was initially in substantially the same form as the 1782 Act and it was not until the Melbourne 1898 Convention that s 44(v) took its current form. Indeed, if anything, the language of the 1782 Act would seem to be broader – since it extends to the *enjoyment* of *part* of an agreement.

"Direct or indirect"

87. A "direct" pecuniary interest will be one that a person will have if he or she is party to the agreement with the Public Service.

88. The extension to "indirect" interests indicates that a person need not be a party to an agreement to have an interest in it. However, the term "indirect" should not be given an overbroad or indeterminate meaning. To do so would divorce s 44(v) from its purpose. And it would lead to significant uncertainty in the operation of the provision.

89. These points were made in *Thompson v Pearce* (1819) 1 Brod & Bing 25; 129 ER 632 in respect of the 1782 Act. The Court there held that the 1782 Act did not apply to persons who did not contract with the government themselves. That was in part because of the difficulty in drawing lines if an alternative construction were adopted and in part because the Crown's influence is weakened the more distant the chain between the Crown and the Parliamentarian: see 636-637.

90. Similarly, in *Miles v McIlwraith* (1883) 4 LR App Cas 120, the Privy Council found that the equivalent provision in the *Queensland Constitution Act of 1867* was not engaged where it was not shown that the relevant contract was enforceable against the parliamentarian and, accordingly, it was not established "*that the circumstances were such that the Government could have held the defendant bound to them*": at 134 (emphasis added). This also furnishes a further reason why s 44(v) should not be read as encompassing arrangements or understandings.

91. A person *may* have an indirect interest where the party to the subject agreement is a company of less than 25 members and the "person" whose eligibility for sitting as a senator or MHR is a member of that company. This construction is supported both by the text of s. 44(v), the Convention Debates, (Adelaide (15 April 1897) 736-738; Sydney (21 September 1897) at 1022-1028) which took place within 12 months of the decision in *Salomon v Salomon* [1897] 2 AC 22 and the then relatively recent advent of proprietary companies.[30]

92. Thus, several references were made in the Debates to "*one man companies*": Barton (Adelaide at 737); Isaacs (Sydney at 1023); Higgins (Sydney at 1027 – "*it should be remembered that the one man companies are often the source of great abuse*"). The immediate context was reflected in the following passage (Sydney 1023):

---

[30] P. Lipton "A History of company law in colonial Australia: economic development and legal evolution" (2007) 31 Melbourne University Law Review 805.

The Hon. I.A. ISAACS (Victoria)[9.29]: Before my hon. and learned friend moves his amendment, I want to substitute the word "twenty-five" for the word "twenty," in line 4 of the paragraph. The object of the clause is to prevent individuals making a personal profit out of their public positions; and, following the general exemption, the clause goes on to say that the prohibition is not to extend to an agreement made by an incorporated company consisting of more than twenty persons, if the agreement is made for the general benefit of the company. In Victoria, by recent legislation, there is what is called a proprietary company-that is to say, a private individual having a business may incorporate his company. It is really a private concern or firm, and as long as it does not exceed twenty-five shareholders, he can have many of the benefits and escape a good many of the liabilities of incorporated companies.

Mr. GLYNN: How does it prevent dummying?

The Hon. I.A. ISAACS: It does not prevent it; I want to guard against it. They are called companies, but they are really, in the majority of cases at all events, private concerns.

Mr. WALKER: One-man companies!

The Hon. I.A. ISAACS: They are really one-man companies. I can understand the case of a person in Victoria who is a member of the federal parliament, who would escape if the word "twenty" remains, by floating his business into a proprietary company not exceeding twenty-five persons. He would be able to contract with the Government, and have no disability. If we extend it to twenty-five persons it covers every other colony and Victoria as well.

The Hon. S. FRASER (Victoria)[9.32]: There is no virtue in numbers. I do not object to twenty-five; I only say there is no more virtue in twenty-five than in twenty. A man may have thousands and tens of thousands of pounds in a company of twenty-five, twenty-six, or thirty, or more persons, and he may have a very small interest indeed in a company of twenty. That, however, would not in the slightest degree influence me one way or the other. It is impossible to draw the line. A man may be the proprietor of a paper company. He may not be able to sell one shilling's worth of paper to the Government, and yet his interest may be infinitesimally small. If we fix the number at twenty-five instead of twenty, it may be on a par with our colonial acts. If we go the full length, we ought to exclude bank shareholders who deal with the Crown through the departments. We cannot draw a hard and fast line in cases like this. If we did, the result would be all kinds of complications.

93. What became the qualification in s 44(v) was for this reason amended from a company of 20 members to one of 25 members, thus bringing the constitutional provision into line with the existing colonial Companies Acts. Some participants suggested there also be a monetary interest ascribed to a shareholder but this was rejected. The real point, however, is that the manner in which the indirect interest in an agreement was conceived as being capable of arising was through membership of a proprietary company.[31] This

[31] Lipton (above at 818) noted 'prejudice and distrust prevailing amongst "respectable" business people towards the corporate form' and stated that "[i]t was not until the 1880s, some 20 years after the introduction of

construction is also supported by *Webster's Case* at 286: *"But could [the Crown] exert such influence on the senator through the company. It is only through the senator's shareholding that this could possibly take place."* In the present case, of course, Mr Day was never a shareholder of Fullarton Investments. The only shareholder of Fullarton Investments at the time of entry into the Lease was Mr Steinert who held his shares beneficially: see CB 264.

94. There is no analogy with the statutes referred to at CS [51] (fn 54). The *Act for the Government of New South Wales and Van Diemen's Land 1842* (5 & 6 Vic c 76) provided for the qualifications of both legislative councilors and of district councils: the latter, but not the former, were subject to restrictions relating to government agreements. The other statutes referred to at CS [51], which concern local councilors, say nothing as to the position for parliamentarians. It was said prior to federation that the principle adopted in the case of local government was that "the councilors of a municipality are in the position of trustees of the general body of ratepayers".[32] See also *Ford v Andrews* (1916) 21 CLR 317 at 321, referring to *Bowes v City of Toronto* (1858) 11 Moo PCC 463. Indeed, in the case of the *Ross Water Act 1895* (Tas) and *The Midland Water Act 1898* (Tas), the officials were expressly designated as "trustees". There is no analogy with parliamentarians: cf CS [51]; MS [27]. Still less is there an analogy with laws regulating wardens exercising administrative and judicial functions under mining statutes: cf [51] (fn 54, referring to the *Mining Act 1874* (NSW) s 127).

The Commonwealth and McEwen's construction of s 44(v) should be rejected

95. The Commonwealth 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*": CS [40]. McEwen similarly submits that s 44(v) is calculated to prevent perceptions of corruption and undue influence: MS [28], [29]. There are many difficulties with these propositions.

96. At the outset, it can be observed that these submissions yield a test involving many concepts which appear nowhere in the text of s 44(v) (or, for that matter, the Constitution).

97. No possible reason is advanced as to how the standard in s 44(v) could extend to perceived influence, as if it were some form of constitutionalised apprehended bias principle. (See also MS at [28] ("perceptions of corruption and undue influence")). Even if the object of the provision is that asserted by the Commonwealth—ensuring that parliamentarians perform their public duties—that purpose is not in any way advanced by proscribing parliamentarians who could be *perceived* to be influenced by pecuniary interests, as opposed to those who are actually so influenced.

98. The basis of the Commonwealth's construction of s 44(v) is, in truth, an atextual, ahistorical and individual conception of the systems of representative and responsible

---

companies legislation, that the number of company registrations [in the Australian colonies] significantly increased, and even then from a low base."

[32] Alfred MacHugh, *The Manual of Local Government Law and Municipal Guide* (1892) 327.

government. The Commonwealth then applies that conception to construe the text of s 44(v). This kind of top-down reasoning has been repeatedly rejected by this Court: see *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 195-6 (McHugh J); *McGinty* at 169-171 (Brennan CJ), 188 (Dawson J), 231-234 (McHugh J), 269 (Gummow J); *Rowe* at 67 [192], 69 [197] (Hayne J).

99. Even if the mischief to which s 44(v) is directed is assumed to be the avoidance of actual or perceived conflicts of interest, that does not justify reading words into the provision which are not there. That was the point made in respect of the local government statutes on which the Commonwealth relies in *Le Feuvre* at 258, and which was applied by the High Court in *Norton v Taylor* (1905) 2 CLR 291 at 294-5.

100. In any event, it is difficult to discern any proper source for a contention that s 44(v) pursues the purpose of preventing parliamentarians from the risk or perception of conflicts of interest. If that were the purpose of the provision, there is no reason it would be confined to contracts with the Public Service. The Commonwealth is not assisted in this respect by the duty of fidelity referred to in *R v Boston* (1923) 33 CLR 386 at 400: cf CS [26]. Their Honours observed that the discharge of a parliamentarian's duties was "*necessarily left to the member's conscience and the judgment of the electors*": at 401-402.

101. The Commonwealth and Ms McEwen's constructions also give rise to substantial uncertainty in the application of s 44(v). That is wholly undesirable given the consequences of lack of qualification. Even the Commonwealth accepts that its criterion invites an evaluative judgment: CS [41]. That is contrary to the principle already referred to, namely that a penal provision must be "*certain and its reach ascertainable to those subject to it*": *Mammoet* at 634-5 [48] (Crennan, Kiefel, Bell, Gageler and Keane JJ).

102. A constitutional principle which exacts penal consequences on a person because of a "*real risk* that a person *could be perceived to be*" influenced is not lightly to be adopted. Experience from the jurisprudence of apprehended bias well demonstrates that this is an area upon which minds might readily differ: see, for example, *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 in which this Court spilt 3:2 as to whether there was a reasonable apprehension of bias (French CJ and Gummow J dissenting); and *Isbester v Knox City Council* (2015) 255 CLR 135 and *Michael Wilson & Partners v Nicholls* (2011) 244 CLR 427 where this Court differed in its assessment from the Victorian and New South Wales Courts of Appeal respectively as to the existence of apprehended bias.

Analysis

103. Before turning to the specific contentions advanced by the Commonwealth and Ms McEwen, it is convenient to set out Mr Day's general position.

104. The agreement in which Mr Day must be shown to have a direct or indirect pecuniary interest is the Lease between Fullarton Investments and the Commonwealth of Australia. It can be accepted that the Lease, being an executory contract,[33] is an

[33] See *Willmott Growers Group Inc v Willmott Forests Limited (Receivers and Managers Appointed) (In liquidation)* (2013) 251 CLR 592 at [39] (French CJ, Hayne and Kiefel JJ), [62] (Gageler J).

"agreement" for the purposes of s 44(v). Mr Day does not dispute that that agreement was with the Public Service of the Commonwealth.

105. A number of features of the Lease are important. First, and most obviously, Mr Day was not a party to the Lease and Mr Day is not and has never been a shareholder in the entity which is a party to the Lease, Fullarton Investments.[34]

106. Secondly, under the Lease, the rent was not set by the Commonwealth or the subject of any negotiation which may have been capable of influencing Mr Day and compromising his independence; rather, rent was fixed by an independent valuer appointed by the Australian Property Institute: cl 9.1 (CB 141), cl 36.2 (CB 167), Sch 1, item 10 (CB 174).

107. Thirdly, no rent was to be payable to Fullarton Investments for a lengthy initial period of the Lease (see cll 9.2.1, 36.1.1, Sch 1, item 11) – a position scarcely likely to result in impermissible influence on Mr Day or apt to compromise his independence as a Senator.

108. Even if Mr Day were a party to the Lease, or was a shareholder of a party to the Lease, the Lease cannot be understood as an agreement by which the Crown was seeking to compromise the independence of Senator Day as a member of the Parliament. There is no suggestion that, at any material time, the Commonwealth knew or could have known that Mr Day had any direct or indirect interests in Fullarton Investments. Nor is there any suggestion in the evidence that the Commonwealth was aware, prior to entry into the Lease, of the terms of the sale between B & B Day and Fullarton Investments or of the fact that B&B Day had a bank facility with the NAB in respect to which Mr Day was a guarantor.

109. Furthermore, the evidence supports the view that the Commonwealth was strongly opposed to entering into the Lease in the first place as it wished Mr Day to use office space that was already the subject of a lease in another part of Adelaide and had been used as office accommodation by the previous Senator Farrell: see, for example, CB 919; see also CB79 (second paragraph). In short, the Lease was scarcely a contract foisted upon Senator Day by the Executive with a view to compromising his independence as a Senator. The independent setting of the rent and the deferral of any payment are also features of the agreement wholly inconsistent with any such purpose and show that the agreement lacked the requisite *character* which s 44(v) of the Constitution is concerned to foreclose.

110. The mere possibilities that Fullarton Investments might receive moneys under the Lease and then exercise its discretion as trustee to pay amounts to B&B Day which might, in turn, exercise its discretion as trustee to pay amounts to Mr Day do not establish that Mr Day had an indirect interest in the Lease. The connection is even more indirect than that considered in *Ford v Andrews*: here, there were two layers of discretionary powers between the agreement and Mr Day. And as already noted, it was also *a fortiori* the situation dealt with by the Full Court of the Supreme Court of Queensland in *Hobler v Jones* [1959] Qd R 609.

---

[34] Nor, to the extent that it is relevant, has he ever been a director of Fullarton Investments.

111. Section 44(v) could not be interpreted as disqualifying a parliamentarian merely because they are the beneficiary of a discretionary trust which might be paid an amount pursuant to an agreement with the Commonwealth: cf MS [49]. The absurdity of that outcome is demonstrated on the facts of this case: it would deprive the relatives of Mr and Mrs Day, together with any "sporting or religious ... person" of the right to stand for Parliament merely because they are named as beneficiaries of the Day Family trust.

112. Ms McEwen's reliance on *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (***Ebner***) in this respect is misplaced: cf MS [37]. The judge in *Ebner* was not only a beneficiary of the trust, but was also a director of the trust company: see *Ebner* at 346-7 [15]. Ms McEwen misquotes paragraph [15] of *Ebner* when she says that this Court described the judge as a "contingent beneficiary" of the trust beneficiary.[35] Nor did this Court hold, as Ms McEwen suggests, that the judge would have had a relevant pecuniary interest "if the outcome of the case could affect the value of the shares": cf MS [37]. The holding of the Court is at 358 [58] and is not to that effect.

113. *Hall v Hall* (2016) 332 ALR 1 also does not assist: cf MS [38]. It was concerned with courts' powers, in the family law context and under s 75 of the *Family Law Act 1975* (Cth), to bring all the financial resources of parties to a marriage to bear to ensure proper spousal maintenance. A broad interpretation of "financial resources" was apt in that very different context.

114. For the foregoing reasons, it is submitted that Mr Day does not have a direct or indirect pecuniary interest in the Lease.

The Commonwealth and Ms McEwen's contentions

115. The Commonwealth and Ms McEwen theorise various connections between Mr Day and the Lease, which can be summarised as follows.

(a) Mr Day was a beneficiary of the Day Family Trust: MS [43].

(b) Mr Day controlled B&B Day: MS [43].

(c) Mr Day was a substantial creditor of B&B Day: MS [43].

(d) Mr Day had a reasonable expectation that he would receive future distributions of income from the Day Family Trust: MS [43], [49].

(e) Mr Day controlled rental payments under the Lease: CS [63]; MS [49].

(f) Mr Day expected that rent under the Lease would or might be applied for his benefit: CS [64]-[65].

(g) The Commonwealth had an option to renew the Lease and Mr Day's interests would or might be affected if the Commonwealth decided not to exercise the option: CS [66]-[70].

[35] That was the language used by the trial judge in disclosing the nature of his interest.

(h) Mr Day controlled the Fullarton Road Trust and there was an arrangement between Fullarton Investments and B&B Day that rent paid under the Lease would be applied only for the benefit of the Day Family Trust: MS [45].

(i) Mr Steinert's shares in Fullarton Investments were held on trust for Mr Day and Mr Day therefore has a pecuniary interest in all of the assets of Fullarton Investments: MS [48].

116. Each of these is addressed in turn below. However, it can immediately be noted that the difficulty which the Commonwealth and Ms McEwen have had in articulating the "interest in the Lease" itself shows the difficulties which arise if s 44(v) is given an expansive and vague construction. It is also noteworthy that the Commonwealth has rather departed from the argument originally put in paragraph 52 of its Statement of Contentions of Fact and Law (CB289), a matter that is scarcely surprising given that it was predicated on the notion that the Commonwealth would not honour its own contractual obligations: see paragraph 52.3(e).

117. **(a) Mr Day was a beneficiary of the Day Family Trust: MS [43], [49].** Ms McEwen puts this contention as high as the proposition that a beneficiary of a discretionary trust ipso facto has an interest in all agreements to which the trustee is a party in the trustee's capacity as trustee. This proposition cannot be correct for the reasons advanced in paragraph 107-108 above. The position is even clearer here since B&B Day was not a party to the Lease but was no more than one of many beneficiaries of a discretionary trust, the trustee of which was a party to the Lease.

118. **(b) Mr Day controlled B&B Day: MS [43].** There is no factual basis for the contention that Mr Day controlled B&B Day, whether in general or in its capacity as trustee for the Day Family Trust: cf MS [43]. The sole director and shareholder of B&B Day has, at all material times, been Bronwyn Day: AF [5]. There is no contention that Mr Day has ever been a shadow director of the company, or was a shadow director at the time of entry into the Lease. There is no evidence of any arrangement between Bronwyn Day and Mr Day concerning the company's operations. And even if Mr Day did control or was a shadow director of B & B Day, it would not follow that that company, still less he personally, has a pecuniary interest in the Lease.

119. **(c) Mr Day was a substantial creditor of B&B Day: MS [8], [41], [43].** There is no factual basis for this contention. Mr Day was in fact a debtor of B&B Day: see CB 807, 810. In any event, the assumption of this submission is that a creditor has an "interest" in contracts to which the debtor is a party. That proposition is plainly overbroad. It would, for example, disqualify any parliamentarian who has deposited money in a bank which, in turn, has some contract with the Commonwealth. Nor does it sit well with *Royse v Birley* in which it was held that a creditor of the government did not fall within the 1782 Act. There is good reason for that: one would not expect the *Constitution* to disqualify, say, parliamentarians who are owed a tax refund by the Commonwealth or who have the benefit of a costs order against the Commonwealth. The connection is even more remote here than in *Royse v Birley* since B&B Day was not a party to the Lease.

120. **(d) Mr Day had a reasonable expectation that he would receive income from the Day Family Trust: MS [43], [49].** The factual basis for this contention may be questioned in circumstances where: (i) Mr Day was one of many beneficiaries of the

Day Family Trust, (ii) Mr Day was not the trustee, (iii) the trust was discretionary, (iv) the management accounts for B&B Day in its capacity as trustee for the Day Family Trust show a fairly substantial excess of liabilities over assets: CB 807, and (v) Mr Day was, in fact, a significant debtor of the trust. In any event, this contention really rises no higher than that addressed in paragraph 108 – that a beneficiary of a discretionary trust must ipso facto have an interest in agreements to which the trust is a party.

121. **(e) Mr Day controlled rental payments under the Lease: CS [63].** The contention is that Mr Day had a pecuniary interest in the Lease because he had "sufficient control over Fullarton Investments to direct the rental payments to himself": CS [63]. See also MS [45].

122. There is no factual basis for this contention. At all material times, the sole director and shareholder of Fullarton Investments was Colin Steinert (Mrs Smith had ceased to be a director prior to entry into the Lease). Neither the Commonwealth nor Ms McEwen has called evidence from Mr Steinert and there is no evidence suggesting that Mr Steinert was subject to Mr Day's will or control or would not act independently.

123. The rent payable under the Lease was payable at the direction of Fullarton Investments: see paragraph 17(b). In fact, invoices were sent "on behalf of Fullarton Investments" and were on Fullarton Investments letterhead: see CB 246-248. The direction to pay rent was ultimately issued by Colin Steinert as director of Fullarton Investments: CB 924.

124. If Fullarton Investments chose to direct payment of the rent to a third party, that was its decision and, if it was made pursuant to any agreement, that agreement was not the Lease.

125. That rental payments under the Lease were ultimately directed to be made to an account in a business name which was registered to Mr Day does not come close to establishing that Mr Day controlled the direction of the payments. It is not the case that any lessor which directs rent to be paid to a third party must be controlled by the third party.

126. There is no evidence that "the Commonwealth was directed to pay rent ... to a bank account in the name of Mr Day": cf MS [49].

127. It is also significant that rent under the Lease was fixed by an independent third party. This further undercuts any contention that the Crown could, by means of the Lease, have interfered with the independence of Mr Day.

128. **(f) Mr Day expected that rent under the Lease would or might be applied for his benefit: CS [64]-[65].** It is contended in the alternative that Mr Day "expected" rent under the Lease to be applied for his benefit: see CS [64]-[65]; see also MS [43]. The relevant benefit is said to be the servicing of the loan between B&B Day and NAB and/or an alleged subsisting guarantee from Mr Day and Bronwyn Day to NAB in respect of that loan.

129. It is by no means clear why any belief or expectation of Mr Day is relevant to the constitutional issue, particularly since the Commonwealth asserts that the test is objective: see CS [42].

130. It can also be noted that the contention that Mr Day and Bronwyn Day remain liable under the guarantee is speculative.

131. More fundamentally, the contention involves a tortured and somewhat contrived process of reasoning, the premise of which is that the Commonwealth would not honour its obligations to Fullarton Investments under the Lease. The contention is that, because Fullarton Investments was dependent for its income on payments by the Commonwealth under the Lease, if those moneys were not paid, its ability to repay B&B Day the purchase moneys for the acquisition of the Fullarton Road Property would be affected, B&B Day's ability to meet obligations under a bill facility with the NAB may in turn be affected and Mr Day may then be liable under a guarantee to NAB.

132. This Court would not proceed on the premise of the Commonwealth's contention. In *Webster's Case*, Barwick CJ rejected an argument based upon *"bare theoretical possibilities unrelated to the practical affairs of business and departmental life"* (at 286.6) and was correct to do so. This Court has repeatedly rejected arguments that the operation of the *Constitution* should depend on the possibility that power might be abused: see, eg, *Kerr v Pelly* (1957) 97 CLR 310 at 317-318; *Tasmania v Victoria* (1934) 52 CLR 157 at 177; *Buck v Bavone* (1976) 135 CLR 110 at 118-119, 125-130; *Egan v Willis* (1998) 195 CLR 424 at 505 [160]. That is particularly so where the hypothesised abuse of power is a *"hypothetical fac[t] or mere possibilit[y]"*: *J Bernard & Co Pty Ltd v Langley* (1980) 153 CLR 650 at 658.

133. It would be extraordinary that a Senator could be disqualified on the strength of an argument advanced by the Attorney General than an indirect pecuniary interest existed because of the possibility that the Commonwealth would default on its contractual obligations, thereby increasing the possibility of a downstream call on a guarantee: cf Attorney General's Statement of Contentions of Fact and Law paragraph 52.3(e).

134. There are further difficulties with the Commonwealth's contention, apart from the flawed premise upon which it is based. Even if the Commonwealth did default on its obligations under the Lease, the Commonwealth would obviously be liable for damages for breach of contract which would be recoverable at the suit of Fullarton Investments so that the hypothesis of the Commonwealth's argument, *viz.* Fullarton Investments not being able to make payments to B&B Day and B&B Day therefore not being able to pay the NAB and therefore Mr Day being liable on the guarantee, would not be sustained.

135. Even if these difficulties could be overcome, any pecuniary interest Mr Day might have would not be "in the agreement" but would exist at most as *a result of* the agreement and in *remote* circumstances.

136. **(g) The Commonwealth had an option to renew the Lease and Mr Day's interests would or might be affected if the Commonwealth decided not to exercise the option: CS [66]-[70].** The Commonwealth also contends that that Mr Day had an interest in the Lease because the Commonwealth might or might not exercise the option to renew.

137. This contention in fact rises no higher than the argument addressed in paragraphs 131 to 134 immediately above, as it depends on the increasingly remote possibilities

pursuant to which non-payment of rent by the Commonwealth (under the future lease agreement) might conceivably affect Mr Day in a pecuniary way.

138. The contention is in fact far weaker than that address above as it is, in truth, an argument that Mr Day has a pecuniary interest in a future agreement which is not yet in existence. On no view can s 44(v) be construed as applying to potential future agreements. Indeed, those kind of future hypotheticals were the very kinds of possibilities which were ruled out in *Ford v Andrews*.

139. This argument also depends on the assumption, which has not been substantiated, that if the Fullarton Road Property were not leased to the Commonwealth, it could not be leased to another party on the open market.

140. **(h) Mr Day controlled the Fullarton Road Trust and there was an arrangement between Fullarton Investments and B&B Day that rent paid under the Lease would be applied only for the benefit of the Day Family Trust: MS [45].** There is no factual basis for this contention. The trustee of the Fullarton Road Trust was Fullarton Investments, the director and shareholder of which was Colin Steinert. The trust was a discretionary trust. There is no contention of a sham. There is no explanation as to why, if the asserted arrangement was between Fullarton Investments and B&B Day, it was Mr Day that controlled the Fullarton Road Trust (as distinct from B&B Day or its director and shareholder, Bronwyn Day). Further, even if there were an arrangement that rent was to be paid for the benefit of the Day Family Trust, that would rise no higher than a contention that a beneficiary of a discretionary trust has an interest in any arrangement a result of which may be that money is paid to the trust. That is plainly overbroad.

141. This argument also depends, to an extent, on a further contention of mixed fact and law advanced by Ms McEwen.

142. The **first** is that the Fullarton Road Property was held by Fullarton Investments on trust for B&B Day. This contention should be rejected for the following reasons.

143. *First*, the property was sold by B&B Day to Fullarton Investments on 4 September 2014 with stamp duty paid on the sale.[36] That would be a strange commercial step to take if the latter was intended to hold the property on trust for the former.

144. *Secondly*, B&B Day's mortgage of the property in favour of the NAB was discharged,[37] another curious commercial step if the property was to remain in the beneficial ownership of B & B Day.

145. *Thirdly*, there is no evidence of any declaration of trust to the effect of the contention made by Ms McEwen, namely that Fullarton Investments held the property on trust for B&B Day.

---

[36] AF [19], CB 103-105

[37] AF [30].

146. *Fourthly*, the evidence is inconsistent with the existence of any such trust in a number of respects:

(a) the Management Accounts for Fullarton Investments disclose the property as beneficially owned by Fullarton Investments in its capacity as trustee of the Fullarton Road Trust;[38]

(b) so too does an extract of a minute signed by Ms Smith and provided to the NAB;[39]

(c) the Fullarton Road Trust is a discretionary trust;

(d) even though the Day Family Trust is one of many beneficiaries of the Fullarton Road Trust, it is trite that beneficiaries of a discretionary trust hold no beneficial interest in the assets of a discretionary trust: *Re Coleman; Henry v Strong* (1888) 39 Ch D 443; *Re Weir's Settlement Trusts; Macpherson v Inland Revenue Commissioners* [1971] Ch 145; *Lygon Nominees Pty Ltd v Commissioner of State Revenue* (2007) 23 VR 474 at [77], [78];

(e) the Management Accounts of B & B Day for 2015 do not record the Fullarton Road Property as an asset of B & B Day.[40]

147. Even if the Day Family Trust were the beneficial owner of the Fullarton Road Property, that would not establish that Mr Day had a pecuniary interest in the Lease. Any interest he had would still be dependent on the possibility of a favourable exercise of the trustee's discretion. He was one of many beneficiaries of the Day Family Trust. He is, in that respect, no different to Mr Ford in *Ford v Andrews*. The submission that Mr Day "was in control of the trustee of the Day Family Trust" is unsupported: cf MS [43].

148. **(i) Mr Steinert's shares in Fullarton Investments were held on trust for Mr Day and Mr Day therefore has a pecuniary interest in all of the assets of Fullarton Investments: MS [48].**

149. This contention proceeds on an unsound factual basis and is otherwise flawed.

150. The initial shareholder of Fullarton Investments was Mrs Debra Smith. The ASIC Search records her shares as being beneficially owned by her.[41]

151. There is no evidence of a written declaration of trust or any oral declaration of trust by Ms Smith in respect of her shareholding in Fullarton Investments in favour of either Mr Day or B & B Day. Nothing was said or written by Ms Smith to manifest an intention to create a trust in favour of Mr Day.

152. This Court has twice approved the observation of Du Parq LJ that "[u]nless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the Court ought not be astute to discover indications of such an

---

[38] CB 121.

[39] CB 611.

[40] CB 802-810.

[41] CB 265.

intention": see *Bahr v Nicolay [No.2]* (1988) 164 CLR 604 at 618; *Byrnes v Kendle* (2011) 243 CLR 253 at [49].

153. Nor is there any evidence that Mr Steinert, who relevantly held the shares in Fullarton Investments at the time of entry into the Lease held those shares on trust for anyone, let alone Mr Day. The relevant ASIC Search also records his shares as being beneficially owned by him at the time of execution of the Lease.[42]

154. Ms McEwen's case also overlooks and is inconsistent with the fact that Fullarton Investments is in fact itself a trustee company, and the Fullarton Road Property is held on trust by it in its capacity as trustee of the Fullarton Road Trust. Further, a beneficial interest in shares in a trustee company which holds its property as trustee of a trust would be an unpromising basis to found an argument that Mr Day had an indirect pecuniary interest in the Lease. Mr Day, of course, does not contend that Mrs Smith held her shares on trust for him.

155. Fullarton Investments acquired the Fullarton Road Property by way of transfer dated 4 September 2014 from B&B Day which transfer was subsequently registered, following the payment of stamp duty. It has not been shown that Mr Day paid the stamp duty but, even if he did, this would not advance the argument nor give him any interest in Mrs Smith's shares or in Fullarton Investments or in the Fullarton Road Property. Nor is there any legal significance whatsoever to be attached to the fact that B & B Day paid for improvements to Mr Day's office as a Senator. The Lease was entered into by the Commonwealth pursuant to his entitlements as a senator to have office accommodation. That he (or B & B Day) elected to spend money doing those premises up was entirely a matter for him and subject no doubt to the landlord's approval. It says absolutely nothing as to the existence or otherwise of a trust arrangement.

156. Even if (which is denied) Mrs Smith held her shares in Fullarton Investments on trust for Mr Day, she had no direct or indirect pecuniary interest in the Lease. She was not a party to the Lease and although Fullarton Investments was a party, its assets were held on trust under the terms of the Fullarton Road Trust.

Question (b)

157. If Mr Day was not capable of being chosen for the Senate, the appropriate course is that there should be a special recount, with votes indicated for Mr Day allocated to the candidate next in the order of the voter's preference and, as necessary, to those indicated lower done in the order of preference. For above the line votes, the next in the order of preference will be the second candidate listed on the Family First ticket, Ms Gichuhi: see s 272(2) of the *Commonwealth Electoral Act 1918* (Cth). Mr Day adopts CS [73]-[76] and [79]-[80] in this respect.

158. As regards the eligibility of Ms Gichuhi. At the time of filing these submissions, it is not known whether the parties will be able to reach agreement on the facts pertaining to this issue. At present, and consistent with the presumption of validity, it is doubtful that any "reason of ... substance" has been raised to cast doubt on Ms Gichuhi's qualifications: cf *Judd v McKeon* (1926) 38 CLR 380 at 387. The mere fact that a person

---

[42] CB 265.

was born in another country is not a sufficient reason to raise a question in and of itself. So far as the question does arise, Mr Day will ultimately submit that Ms Gichuhi was not a citizen of Kenya at material times and, accordingly, was eligible to be chosen.

Answers to the questions referred

159. The following answers should be given to the five questions referred and noted in paragraph 1 of these submissions:

(a) No.

(b) Does not arise [but if it does, there should be a special recount, with votes indicated for Mr Day allocated to the candidate next in the order of the voter's preference].

(c) No.

(d) Not necessary to answer [but if it is, the question should be remitted to a single judge for determination].

(e) The Commonwealth pay Mr Day's costs of the reference on a party/party basis.[43]

PART VIII: ESTIMATE OF TIME REQUIRED FOR SUBMISSIONS

160. Mr Day estimates that he will require 2.25 hours for the making of submissions. This is half of the allocated time for the hearing.

Dated 19 January 2017

.....
Andrew Bell SC
Eleven Wentworth Chambers
T: (02) 9233 1370
F: (02) 9232 7626
asbell@eleventworth.com

.....
David Hume
Six Selborne Wentworth Chambers
T: (02) 8915 2694
F: (02) 9232 1069
dhume@sixthfloor.com

[43] The Attorney-General of the Commonwealth has submitted, on behalf of the Commonwealth, to an order that the Commonwealth pay Mr Day's costs of the reference on a party-party basis: CS [82].

Annexure - relevant provisions

Section 16 provides:

> The qualifications of a senator shall be the same as those of a member of the House of Representatives.

Section 34 provides:

> Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:
>
> (i) he must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen;
>
> (ii) he must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

Section 45 provides:

> If a senator or member of the House of Representatives:
>
> (i) becomes subject to any of the disabilities mentioned in the last preceding section; or
>
> (ii) takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors; or
>
> (iii) 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;
>
> his place shall thereupon become vacant.

Section 46, headed "Penalty for sitting when disqualified" provides:

> Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.

Section 51(xxxvi) provides:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xxxvi) matters in respect of which this Constitution makes provision until the Parliament otherwise provides.