

ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

No. C14 of 2016

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

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ANNOTATED PRIMARY SUBMISSIONS

OF MS MCEWEN



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Filed on behalf of Ms Anne McEwen .
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PART I: PUBLICATION

1 This submission is in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2 On 7 November 2016 the Senate resolved to refer to the High Court of Australia sitting as the Court of Disputed Returns several questions concerning the eligibility of Mr Robert John Day to be chosen as a Senator to represent the State of South Australia.

3 The key issues raised by this reference are:

10 (a) Whether by reason of s 44(v) of the Constitution Mr Day was incapable of being chosen as a Senator at the 2016 election. In particular, did Mr Day have a direct or indirect pecuniary interest in the lease between Fullarton Investments Pty Ltd (**Fullarton Investments**) and the Commonwealth entered into on 1 December 2015? Ms McEwen submits that he did.

(b) If Mr Day was incapable of being chosen, by what means and in what manner should his vacancy be filled? Ms McEwen submits that the vacancy should be filled by a special recount of votes cast at the 2016 election, (i) disregarding a vote indicated on the ballot paper for Mr Day below the line; (ii) disregarding a vote indicated on the ballot paper for Mr Day and Ms Gichuhi's group above the line; and (iii) otherwise giving effect to the order of voter preference indicated on the ballot paper.

PART III: SECTION 78B NOTICE

20 4 The Attorney-General of the Commonwealth has given sufficient notice of this proceeding.¹

PART IV: CITATIONS

5 There are no reasons for judgment below.

PART V: FACTS

6 Mr Day was elected as a Senator for the State of South Australia at the 2013 federal election.² Mr Day was (and is) the registered officer of Family First under the *Commonwealth Electoral Act 1918 (Electoral Act)*.³ He also was (and is) the federal chairman of the party.⁴

7 B&B Day Pty Ltd (**B&B Day**) is the trustee of a discretionary family trust, the Day Family Trust, whose beneficiaries include Mr Day and his wife, Mrs Day.⁵ In 2013, the most recent year in which the trust earned a profit, that profit was distributed to Mr and Mrs Day.⁶ Mr

¹ Court Book (CB) 274

² Areas of Factual Agreement between the Parties dated 23 December 2016 (**Agreed Facts**), [1] [CB 426].

³ Agreed Facts, [71], [72] [CB 435].

⁴ Agreed Facts, [91] [CB 437].

⁵ Agreed Facts, [3]-[4] [CB 426]; Day Family Trust [CB 28].

⁶ Financial statement for B&B Day atf the Day Family Trust for the year ended 30 June 2013 [CB 455].

Day was the sole shareholder in and director of B&B Day until June 2014, when his wife became the sole shareholder and director of the company.⁷

- 8 Mr Day was a creditor of B&B Day in its capacity as trustee for the Day Family Trust. As at the years ended 30 June 2013, 2014 and 2015, Mr Day was owed over \$1.5 million, over \$2.2 million and over \$2.6 million respectively.⁸

The Fullarton Road property

- 9 B&B Day, in its capacity as trustee of the Day Family trust, was the registered proprietor of the property at 77 Fullarton Road, Kent Town, South Australia (the **Fullarton Road property** or **property**).⁹ Following his election to the Senate, Mr Day wanted the Commonwealth to take a lease of a portion of the Fullarton Road property for Mr Day to use as his electoral office.¹⁰ However, the Commonwealth informed Mr Day that it would not take a lease of the property unless Mr Day disposed of his interest in it.¹¹ To overcome this problem, Mr Day sought advice from his accountant, Mr Rasera.

- 10 On 2 December 2013, the accountant emailed Mr Smith, a friend and business associate of Mr Day, and his wife Mrs Debra Smith¹², with a copy to Mr Day, stating:¹³

20 Bob has sought advice on establishing an entity in which the Senate Office on Fullarton Road can be housed so as to avail himself of the rental allowance provided by the government. I propose incorporating a new company with Deb as sole director and shareholder, to act as trustee for a discretionary trust. This removes the property from Day family members and any entity in which Bob has an interest, and by having Deb as sole director, puts further distance between the Trust and Bobs business interests and partner of nearly 40 years.

The trust will simply hold the property and collect rent on a regular basis. That rent will then pass back to the Day Family Trust so there will be no profit nor loss in the new trust.

- 11 Mrs Smith agreed to this course by reply email.
- 12 Following the receipt of the accountant's advice: Mr Day arranged for the incorporation of Fullarton Investments;¹⁴ Mrs Smith agreed to and became the sole shareholder and director

⁷ Agreed facts, [5] [CB 426].

⁸ Financial statement for B&B Day atf the Day Family Trust for the year ended 30 June 2013 [CB 455]; Financial statement for B&B Day atf the Day Family Trust for the year ended 30 June 2014 [668]; Financial statement for B&B Day atf the Day Family Trust for the year ended 30 June 2015 [CB 810].

⁹ Agreed facts, [6] [CB 426].

¹⁰ Agreed facts [10] [CB 427].

¹¹ See eg Letter from Senator Ronaldson to Mr Day dated 20 March 2014 stating "I confirm your advice to me that you have disposed of your interest in the Kent Town property" [CB 75] (Agreed facts, [13] [CB 427]); Email from Mr Day to C Steinert dated 25 March 2014 stating that "The Government has given approval for me to locate my Senate office at Fullarton Road – subject to me disposing of my interest in the property" [CB 579].

¹² Agreed facts, [7], [83] [CB 426, 436].

¹³ Email dated 2 December 2013 from Vic Rasera [CB 503].

¹⁴ Agreed facts, [6] [CB 426]. See also Mr Day's Statement of Contentions of Fact and Law at [10], responding to Ms McEwen's Statement of Contentions at [10].

of Fullarton Investments;¹⁵ a discretionary trust was established known as the Fullarton Road Trust, with Fullarton Investments as trustee and the Day Family Trust as one of the beneficiaries;¹⁶ and on 11 November 2014, the property was transferred by B&B Day to Fullarton Investments.¹⁷ The contract of sale document and the transfer recorded a purchase price of \$2.1 million,¹⁸ however no money changed hands. B&B Day or Mr Day paid the stamp duty on the transfer and the other costs of the conveyance, which totaled \$125,549.19.¹⁹ There was no adjustment for rates or taxes.²⁰

13 Following the transfer, B&B Day expended over \$200,000 on building works improving the property, despite having purportedly sold it.²¹

10 **The lease**

14 Both before and after the transfer, Mr Day informed the Commonwealth that he had disposed of his or his company's interest in the property.²²

15 In anticipation of the Commonwealth taking a lease of the property, Fullarton Investments provided the Commonwealth with a lessor "vendor information form" which was signed by Mr Day as "representative". The form directed that any rent be paid to the bank account "Fullarton Nominees", an account that stood in Mr Day's name.²³

16 On 1 December 2015, Fullarton Investments granted a lease of a portion of the Fullarton Road property to the Commonwealth (the **lease**). The lease included a rent-free period which was to end by 14 August 2016, at the latest.²⁴ Under the lease Fullarton Investments was
20 entitled to direct the Commonwealth to pay the rent to any person.²⁵

17 Following the grant of the lease, Ms Joy Montgomery, the executive assistant of then-Senator Day, wrote to the Commonwealth on behalf of Fullarton Investments requesting that the Commonwealth pay rent under the lease to the Fullarton Nominees account.²⁶

¹⁵ Agreed facts [6] [CB 426].

¹⁶ Agreed facts, [85] [CB 436].

¹⁷ Agreed facts, [25], [29] [CB 428, 429].

¹⁸ Agreed facts, [14]; see also at [25] [CB 427, 428].

¹⁹ Agreed facts, [87] [CB 436].

²⁰ Agreed facts, [15] [CB 427].

²¹ Agreed facts, [28] [CB 429].

²² See eg Letter from Senator Ronaldson to Mr Day dated 20 March 2014 stating "I confirm your advice to me that you have disposed of your interest in the Kent Town property" [CB 75] (Agreed facts, [13] [CB 427]); Email from Mr Day to Ben Hooper dated 5 May 2014 stating Fullarton Investments is the "new owner" of the property [CB 76]; Email from Mr Day to the Senator Cormann dated stating that Fullarton Investments is an "independent entity" and there are "no business arrangements" between Fullarton Nominees – being a business name registered by Mr Day – and Fullarton Investments, other than Fullarton Nominees being the owner of the designated bank account for the lease payments [CB 253] (Agreed facts, [65] [CB 433]).

²³ Agreed facts, [37] [CB 430].

²⁴ Agreed facts, [40], [41] [CB 430]. See also Memorandum of Lease [CB 123].

²⁵ By cl 9.4.1 [CB 142]

²⁶ Agreed facts, [56], [60], [61] [CB 432]

Mr Day is aware of his potential constitutional disqualification and still nominates

- 18 By at least 16 February 2016, Mr Day was aware that the lease arrangements may cause him to be disqualified because of s 44(v) of the Constitution. On that date Mr Day sent an email to the Department of Finance indicating that he had researched and considered this issue.²⁷ He asserted in the email that he was not so disqualified based, he said, on information he had obtained from the Parliamentary Library as well as “my own assessment that any interest business arrangement I may have with Fullarton Investments does not create a pecuniary interest between me as a Senator and the Commonwealth”.²⁸
- 10 19 On 2 June 2016, Mr Day, in his capacity as registered officer of Family First, submitted to the Australian Electoral Officer a Nomination of Senators in the form of Form CC of Schedule 1 of the Electoral Act.²⁹ By that form and accompanying requests: Mr Day was nominated as a candidate for the Senate in South Australia; Ms Gichuhi was nominated as a candidate for the Senate in South Australia; Mr Day requested jointly with Ms Gichuhi that their names be grouped together on the ballot; and Mr Day, as registered officer of Family First, endorsed himself and Mr Gichuhi as candidates and requested that Family First’s name and logo be printed next to their names and next to their group square on the ballot.³⁰
- 20 20 As a candidate for election, Mr Day was required to declare (and did declare) that he was qualified under the laws of the Commonwealth to be elected as a Senator (the **declaration**). Mr Day was also required to state (and did state) that he “was not, by virtue of s 44 of the Constitution, incapable of being chosen or of sitting as a Senator” (the **statement**).³¹
- 20

Additional factual findings

- 21 These submissions are due to be filed prior to Gordon J resolving the disputed facts. In that context, it is necessary for the purposes of these submissions to make certain assumptions as to facts that may be found by her Honour. It is assumed that some or all of the following facts will be found:
- (a) Mr Day controlled Fullarton Investments at all material times.
 - (b) Mr Day controlled B&B Day at all material times.
 - (c) The B&B Day Family trust was likely to continue to distribute its profits to Mr and Mrs Day irrespective of who controlled B&B Day.
 - 30 (d) Upon the transfer of the Fullarton Road property by B&B Day, it was held by Fullarton Investments on trust for B&B Day in its capacity as trustee for the Day Family Trust; or alternatively, on trust for the Fullarton Road Trust in circumstances where the property would be dealt with for the sole benefit of only one beneficiary, the Day Family Trust.

²⁷ See Agreed facts, [62] [CB 432].

²⁸ Agreed facts, [62] [CB 432].

²⁹ Agreed facts, [71] [CB 435].

³⁰ Agreed facts, [73] [CB 435]; see forms at CB 319-324.

³¹ Electoral Act, s 170; Form CC of Schedule 1; Agreed facts [73(b)] [CB 435].

- (e) Further and alternatively, the shares in Fullarton Investments were held on trust for either Mr Day personally or for B&B Day as trustee of the Day Family Trust.
- (f) In any event, Mr Day had such control over the affairs of Fullarton Investments that he could require it to transfer the property to B&B Day (or some other nominee) when he wished.

22 For one aspect of the submission, it is further assumed that Gordon J will find that when Mr Day submitted the Form CC nomination form and stated that he was not, by reason of s 44 of the Constitution, incapable of being chosen as a Senator, he was at the least recklessly indifferent to whether that statement was true such that he had no real belief in that statement.

10 **PART VI: ARGUMENT**

QUESTION (A): WAS MR DAY INCAPABLE OF BEING CHOSEN AS A SENATOR?

23 For s 44(v) to apply there must be: an “agreement”; with “the public service of the Commonwealth”; in which a Senator has a “indirect or direct pecuniary interest”, “otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons”. Each of these requirements was satisfied with respect to the lease at issue here. Before addressing why that is so, it is necessary to say something more about s 44(v).

Section 44(v) – Background and purpose

24 In *In re Webster*, Barwick CJ read in a purposive limitation, namely that the provision applies only to an “executory” agreement, where the agreement:³²

20 must have currency for a substantial period of time, and must be one under which the Crown could conceivably influence the contractor in relation to parliamentary affairs by the very existence of the agreement, or by something done or refrained from being done in relation to the contract or to its subject matter, whether or not that act or omission is within the terms of the contract.

25 It is submitted that his Honour took too narrow a view of the purpose of the provision. As Barwick CJ discussed, the origins of s 44(v) can be traced back to 7 & 8 Wm III c. 25 passed in the year 1696, and it has its “precise progenitor” in s 1 of 22 Geo. II c.45, the *House of Commons (Disqualification) Act 1782*.³³ The original rationale for the legislation was to secure the freedom and independence of the Parliament from the Crown and its influence.³⁴

30 During the debate on the 1782 Bill, Sir Edmund Burke remarked that “individuals had an option either to retain their political rights and sit in Parliament, or their professional and commercial rights by pursuing their trade and supplying government as usual”, adding that

³² *In re Webster* (1975) 132 CLR 270, 280.

³³ *Webster* (1975) 132 CLR 270, 278; note further *Pape v Commissioner of Taxation* (2009) 238 CLR 1, [200]. See also, Gareth Evans, ‘Pecuniary Interests of Members of Parliament under the Australian Constitution’ (1975) 49 *Australian Law Journal* 464, 467.

³⁴ *Webster* (1975) 132 CLR 270, 278; Evans, 49 ALJ 464, 467.

it “was strict justice to the public for Parliament to separate two sorts of rights when they were found to be incompatible; a good member of Parliament could not be a contractor”.³⁵

26 Later the Privy Council explained that “the mischief guarded against is the sapping of that freedom and independence by members being admitted to profitable contracts [by the Crown]”.³⁶

27 By the time of the Convention debates the purpose of such provisions was no longer confined to avoiding any undue influence of office-holders. Another principal concern was to avoid actual or perceived conflicts relating to elected office-holders using their position for their own personal profit or advantage.³⁷ This rationale was invoked in the Convention Debates relating to s 44(v);³⁸ for example:

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(a) Mr Isaacs said: “The object of the clause is to prevent individuals making a personal profit out of their public positions”.³⁹ He also said:⁴⁰

We should be careful to do all that is possible to separate the personal interests of a public man from the exercise of his public duty. We should bear in mind that it is not only important to secure that so far as we can in actual fact, but, in every way possible, we should prevent any appearance of the contrary being exercised. ... The public are interested in seeing and ensuring, so far as it is possible to ensure it, that no member of Parliament shall for his own personal profit allow his judgment to be warped in the slightest when he is called upon to decide on questions of public moment.

20

(b) Mr Downer stated that “it [was] inexpedient to allow members of parliament to have any contractual relations which might suggest that their position might be impure”.⁴¹

(c) Mr Fraser said: “In the case of private persons who are supplying the departments of government, they, through the various means at their disposal, could influence heads of department and others ... and it would be very wrong to open a door of that kind to them”.⁴²

³⁵ Cited in ‘Members of Parliament and Government Contractors’ (1948) 17 *Journal of the Society of Clerks-at-Table in Empire Parliaments* 289, 292.

³⁶ *In re Sir Stuart Samuel* [1913] AC 514, 524 per Lord Haldane.

³⁷ Evans, 49 ALJ 464, 467; *Ford v Andrews* (1916) 21 CLR 317, 330 per Isaacs J (in dissent on the result), referring to the purpose of a provision disqualifying a councillor if he or she is interested in a contract with the council and observing that: “No matter how indirect the interest in the contract is, it is sufficient to disqualify if it is such as might affect the judgment and action of the alderman or councillor in conducting the affairs of the [council]. ... It may be hard on him ... but public safety is the highest consideration, and so the Legislature has, in my opinion, said”.

³⁸ *Webster* was decided at a time where it was not generally considered permissible to rely on the Convention Debates in aid of constitutional interpretation (though Barwick CJ did refer to the Debates at 279): see eg *Sydney MC v Commonwealth* (1904) 1 CLR 208, 213-214; *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 47. That is no longer the position: *Cole v Whitfield* (1988) 165 CLR 360, 385.

³⁹ Convention Debates, Sydney, 21 September 1897, at 1023.

⁴⁰ Convention Debates, Adelaide, 21 April 1897, 1037-1038.

⁴¹ Convention Debates, Sydney, 21 September 1897, at 1025.

⁴² Convention Debates, Sydney, 21 September 1897, at 1026.

- 28 Barwick CJ reasoned that “[t]here being penal consequences of its breach, the paragraph should receive a strict construction”.⁴³ Yet that is a principle of statutory construction of last resort.⁴⁴ It is inapposite in this constitutional context, not only because the penal provision was subject to parliamentary change (and as it happens is now minor),⁴⁵ but because it fails to take account of the place of this provision within the broader constitutional context. The broader understanding of the purpose of s 44(v) is consistent with the system of representative and responsible government established by the Constitution, for perceptions of corruption and undue influence (let alone the actuality of such) may undermine public confidence in government and in the electoral system itself.⁴⁶ The broader rationale encompasses the earlier understanding.
- 10
- 29 There is no warrant for reading in a distinct purposive limitation, whether of the narrow historical version favoured by Barwick CJ, or the broader rationale that lay behind s 44(v). The provision was meant to introduce a clear requirement of separation of politics and business dealings. No doubt if it was established that the pecuniary interest was de minimis then the provision may not apply.⁴⁷ Otherwise, its terms are clear.
- 30 Nor, similarly, is there a sound foundation for accepting Barwick CJ’s view that s 44(v) only applies to executory contracts which “have a currency for a substantial period of time”.⁴⁸ This requirement derived from his Honour’s perception of the purpose of the provision, and the perceived need to read the provision strictly. The issue is sufficiently dealt with by asking, consistently with the text of the provision, whether the person “has” a relevant pecuniary interest at the time the Senator/member is chosen or sitting.
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An agreement

- 31 This case relates to a lease. A lease is a contract, and thus an agreement, albeit of a special kind.⁴⁹ A lease was found to be a contract for the purpose of s 76 of the *Local Government Act 1933* (UK), which prohibited members of a local authority from voting where the member “has any pecuniary interest, direct or indirect, in any contract ... or other matter”.⁵⁰
- 32 Here, if relevant, the lease was executory at the time of Mr Day’s election – and Mr Day had at that time a relevant pecuniary interest – and the lease had a substantial period to run: the term of the lease was not to expire until 30 June 2020 (with an option to renew).⁵¹

⁴³ *Webster* (1975) 132 CLR 270, 279.

⁴⁴ *Waugh v Kippen* (1986) 160 CLR 156, 164 per Gibbs CJ, Mason, Wilson and Dawson JJ.

⁴⁵ See *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth), s 3: \$200 maximum penalty prior to service of the originating process, and \$200 per sitting day thereafter.

⁴⁶ Note *McCloy v New South Wales* (2015) 325 ALR 15, 25-9 [32]-[47] per French CJ, Kiefel, Bell and Keane JJ, 54-60 [165]-[184] per Gageler J, 68-9 [224]-[229] per Nettle J, 88-9 [322]-[326] per Gordon J.

⁴⁷ But note *Ford v Andrews* (1916) 21 CLR 317, 330 per Isaacs J (“If the private advantage which he does or may obtain would weigh in any degree, however small, in the mind of the officer, if it would diminish to any extent the impartial and disinterested consideration that the law expects him to bring to the determination of the corporation business, then he is sufficiently ‘interested’ in the subject matter to disqualify him”).

⁴⁸ *Webster* (1975) 132 CLR 270, 279-280.

⁴⁹ *Progressive Mailing House Pty Ltd v Tabali* (1985) 157 CLR 17.

⁵⁰ *Brown v DPP* [1956] 2 QB 369.

⁵¹ Memorandum of lease [CB 123].

An agreement “with the public service of the Commonwealth”

33 The terms of the lease were negotiated by the Department of Finance on behalf of the Commonwealth.⁵² That suffices for the lease to be an agreement “with the public service of the Commonwealth”.

34 Mr Day’s position that it is not such an agreement because it was entered by the Commonwealth itself should be rejected.⁵³ There is no warrant for taking a narrow view of the reference to “public service” here. As Gummow, Crennan and Bell JJ stated in *Pape*, referring to the English history from the late 18th century on:⁵⁴

10 The phrase “Public Service” was not used in this period and thereafter as a limitation upon the activities of the executive branch of government. Rather, it encompassed the range of those activities conducted from time to time, and whether pursuant to statute or to what in the United Kingdom might be identified as “the prerogative”.

A “direct or indirect pecuniary interest”

35 In general, a person will have a pecuniary interest in an agreement if that person stands to gain (or lose) financially from the existence or performance of the agreement.⁵⁵

36 A discretionary trust is generally understood to be a trust where the beneficiaries are dependent upon the exercise or non-exercise of the power given to the trustee (or other power-holder) to appropriate income or capital to the beneficiaries.⁵⁶ A discretionary family trust in this context refers to a trust that has been established for the benefit of members of a particular family (including spouses, children etc). Usually, a member of the family is the trustee or is in control of the trustee if it is a corporation.

37 Beneficiaries of a discretionary trust do not have a proprietary interest in the trust assets until an appropriation has occurred. However, that does not answer the question whether the beneficiary may have a “pecuniary interest” in the assets pending an appropriation for the purposes of s 44(v). A beneficiary of a discretionary family trust has at least an indirect pecuniary interest in the trust assets. In *Ebner*, the Court considered whether the trial judge, who was a beneficiary of a discretionary trust, had a pecuniary interest in the outcome of a proceeding over which he was presiding by reason of the fact that the trust held shares in the bank that had funded the proceeding. The Court held that if the outcome of the case could affect the value of the shares the judge had a relevant pecuniary interest in the proceeding, referring to the judge as a “contingent beneficiary” of the trust property.⁵⁷

⁵² See CB [125]; Agreed facts, [40] [CB 430].

⁵³ See Mr Day’s Statement of Contentions of Fact and Law, at page 11 [19].

⁵⁴ *Pape v Commissioner of Taxation* (2009) 238 CLR 1, [199] (citation omitted).

⁵⁵ Note *Webster* (1975) 132 CLR 270, 280. Note also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 357 [55] – a judge may have a disqualifying pecuniary interest in a case if the outcome of a case would have a bearing on the value of an interest (eg shares) held by the judge.

⁵⁶ *Federal Commissioner of Taxation v Vegners* (1989) 90 ALR 547, 551-2 per Gummow J, stating that the expression “discretionary trust” is used to identify a species of express trusts in which, unlike a fixed trust, the entitlement of the beneficiaries to income, or to corpus, or both, is not immediately ascertainable; *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226, 234 [8].

⁵⁷ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 346-7 [15], 357-8 [55]-[58].

38 Similarly, in *Hall v Hall* the question was whether trust assets were a “financial resource” of a discretionary beneficiary. The majority held that “it has long correctly been recognised that a nominated beneficiary of a discretionary trust, who has no control over the trustee but who has a reasonable expectation that the trustee’s discretion will be exercised in his or her favour, has a financial resource to the extent of that expectation”.⁵⁸

39 Further, there can be little doubt that a beneficiary who is in control of the trust has a pecuniary interest in the trust assets. Where a beneficiary controls the trust he or she “has something approaching a general power and the ownership of the trust property”.⁵⁹

10 40 The conclusion that a discretionary beneficiary has a “pecuniary interest” in the trust fund is consistent with the exclusion from the operation of s 44(v) of a Senator who is a member of a company that has more than 25 members, which at the time of Federation was the maximum number of members of a proprietary company.⁶⁰ What is not excluded is membership of a proprietary company. The assumption is that a member of company has (or, at the least, may have) a “pecuniary interest” in the assets of that company. That is so even though a member has no proprietary interest in a company’s assets.⁶¹ Membership of a proprietary company was included within the ambit of s 44(v) in order to prevent Senators/members from evading the prohibition by entering into contracts with government through the medium of a company, and thereby doing indirectly what they could not do directly.⁶²

20 41 It is not only a beneficiary of a discretionary trust who has a pecuniary interest in trust assets. A creditor of the trustee will also have a pecuniary interest. Indeed, the creditor’s pecuniary interest may be greater than the interest of a beneficiary as the creditor’s interest over the trust assets stands in priority to those of the beneficiary.

42 Here, Mr Day had a direct or indirect pecuniary interest in the lease for the following reasons.

If the property is held on trust for B&B Day

30 43 If it is found that Fullarton Investments held the Fullarton Road property on trust for B&B Day in its capacity as trustee for the Day Family Trust, the beneficial interest of B&B Day (as trustee) included the right to receive income from the use of the property, ie the rent under the lease. In that context, by reason of any one of the following circumstances, Mr Day had a pecuniary interest in the lease: he was a beneficiary of the Day Family Trust; he was in control of the trustee of the Day Family Trust; he had a reasonable expectation that he would

⁵⁸ *Hall v Hall* (2016) 332 ALR 1, 11 [54].

⁵⁹ *ASIC v Carey (No 6)* (2006) 153 FCR 509, 520-1 [37], and generally 518-9 [29], 520-1 [36]-[39], per French J. See also *Kennon v Spry* (2008) 238 CLR 366, 388-9 [55]-[57], 394 [77] per French CJ; *Craig v Federal Commission of Taxation* (1945) 70 CLR 441, 446, considering the meaning of “interest” in an estate duty Act.

⁶⁰ That is why the cut off figure of 25 was chosen for the exclusion: Convention Debates, Adelaide, 21 April 1897, 1039 (Sir George Turner); Convention Debates, Sydney, 21 September 1897, 1023 (Mr Isaacs).

⁶¹ *Commissioner of Stamp Duties v Millar* (1932) 48 CLR 618, 632; *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* (2005) 220 CLR 592, 612-614 [51]-[58].

⁶² Convention Debates, Sydney, 21 September 1897, 1022 (Mr Glynn) (a person floating his business into a company is “an evasion of this provision which I do not think ought to be allowed to continue”); 1024 (Mr Kingston) (“We ought not allow a thing to be done indirectly to a great extent which we prohibit when done directly...”); see also Convention Debates, Adelaide, 15 April 1897, 736-737, 21 April 1897, 1039ff.

receive future distributions of income from the trust estate; and he is a substantial creditor of the trustee.

If the property is held on trust for the Fullarton Road Trust

- 10 44 A similar analysis applies if the property is held by Fullarton Investments as trustee of the Fullarton Road Trust (as is now, belatedly, asserted by Mr Day). The Day Family Trust is a beneficiary of that trust. If it be correct that in any of the circumstances mentioned in the preceding paragraph a beneficiary of a discretionary trust (trust A) has a pecuniary interest in the assets of trust A, it would equally be correct that if trust A is a discretionary beneficiary of trust B, a beneficiary of trust A in the same circumstances also has a pecuniary interest in the assets of trust B.
- 45 In any event, the conclusion would follow, if any of the following facts is established:
- (a) Mr Day controls “trust B” (the Fullarton Road Trust);
 - (b) There is an arrangement between Fullarton Investments and B&B Day (irrespective of who controls Fullarton Investments) that the property or any rent payable under the lease will only be applied to or for the benefit of the Day Family Trust.

If the shares in Fullarton Investments are held on trust for B&B Day as trustee or for Mr Day

- 46 This variant is only relevant if it is found that Fullarton Investments is itself the beneficial owner of the Fullarton Road property (as previously claimed by Mr Day,⁶³ but which claim he has now abandoned in favour of saying it is held on trust for the Fullarton Road Trust).
- 20 47 If the shares in Fullarton Investments are held on trust for B&B Day as trustee – that is, if the equitable interest in the shares formed part of the trust estate – a beneficiary of the Day Family Trust has a direct pecuniary interest in the Fullarton Investment shares, and, through those shares, an indirect pecuniary interest in the assets of Fullarton Investments.
- 48 If the shares in Fullarton Investments were held on trust for Mr Day, then he has a pecuniary interest in the assets of the company, all of the shares in which he owns beneficially (being a company that has less than 25 members).

Payment of the rent / liability to make payments

- 30 49 The agreed facts establish that the Commonwealth was directed to pay the rent under the lease to a bank account in the name of Mr Day. As the intended recipient of the rent, Mr Day had a pecuniary interest in the lease. Likewise, if there was simply an arrangement between Fullarton Investments and B&B Day pursuant to which B&B Day (as trustee) would be paid the rent under the lease, then Mr Day, as beneficiary of the trust, also had a pecuniary interest in the lease for that reason.
- 50 Further, Mr Day had a pecuniary interest by virtue of the debt to the National Australia Bank, for which B&B Day was liable.⁶⁴

⁶³ See Mr Day’s Statement of Contentions of Fact and Law at [10.4].

⁶⁴ See Agreed Facts, [31] CB 429.

Not a de minimis interest

51 In each instance, the pecuniary interest was material, and far from being a kind that might be established to be de minimis.

52 If, contrary to the submissions made above, it is necessary to consider the purposes of s 44(v) as part of determining whether it applies, then any such requirement is satisfied here. Mr Day's interest in the lease meant that the government could conceivably influence him in relation to parliamentary affairs (either by entering into the arrangement or in its performance), and the arrangement could reasonably give rise to a perception that he was seeking pecuniary advantage by virtue of holding elected office. The rental sums involved (at least some \$66,000 per annum)⁶⁵ are significant. The overall debt to the NAB was substantial. On each variant above Mr Day was in control of what was occurring, and he or the B&B Day Trust (of which he was a beneficiary, a creditor, and the practical controller) bore the ultimate economic benefits and burdens of the Fullarton Road property.

QUESTION (B): FILLING THE VACANCY

53 If Mr Day is found to have been incapable of being chosen as a Senator, the vacancy is not a casual one in the s 15 sense.⁶⁶ Nor is there any warrant for holding a new election in South Australia either for all 12 spots or for the vacant 12th spot.⁶⁷ The issue is how a recount should be conducted – specifically, what is to be disregarded given the ineligibility of Mr Day. Ms McEwen submits the vacancy should be filled by a special count of the ballots cast at the 2016 election by (a) disregarding votes cast below the line for Mr Day; (b) disregarding votes cast above the line for the Family First group; and (c) otherwise giving effect to the order of voter preference indicated on the ballot paper. The suggestion at (b) is different to the approach adopted in *Wood*. That step should be taken here for two broad reasons:

- (a) As Mr Day was ineligible and his group consisted of only two members (himself and Ms Gichuhi), there was no valid group or group request permitting the electoral officer to print Family First's square above the line. Mason CJ's conclusion to the contrary in *Wood* is distinguishable and in any event should not be followed.
- (b) If it is established that Mr Day was at the least recklessly indifferent as to whether his statement or declaration were true, such that he had no real belief in them, it would follow that the decision to print the Family First's square above the line was procured by fraud and, accordingly, the square should be disregarded.

54 Before addressing those arguments, it is appropriate first to refer to relevant provisions of the Electoral Act, then to identify ways in which the presence of Mr Day on the ballot paper distorted the vote for the Family First Group.

⁶⁵ See Agreed Facts, [45] CB 430, cf [46] suggesting it was \$6,099.50pm (being over \$73,000pa).

⁶⁶ *Wood* (1988) 167 CLR 145, 167-8.

⁶⁷ *Wood* (1988) 167 CLR 145, 166-7.

The Electoral Act provisions⁶⁸

- 55 The nomination provisions are contained in Part XIV of the Electoral Act. The nomination of a candidate for the Senate is to be made on one of several specified forms: s 166. In the case of the nomination of two or more candidates for the Senate that are endorsed by a political party, the nomination may be on Form CC. That form is to be submitted by the registered officer of the political party. The form must contain the candidate's declaration required by s 170 that, among other things, the person is qualified under the Constitution to be elected as a Senator. The form must also contain a statement by each candidate that he or she is not "by virtue of s 44 of the Constitution incapable of being chosen or of sitting as a Senator".
- 10
- 56 The ballot paper for the Senate contains squares above and below the line: s 209(1); Form E of Sch 1. The squares above the line are allocated to a group of candidates, usually endorsed by a political party. The squares below the line contain the names of the individual candidates in each group.
- 57 A group of candidates obtains a square above the line in the following way. Under s 168 "two or more candidates" may make a "joint request" that their names be group on the ballot. In turn, s 210(1)(f)(ii) provides that a square must be printed above the line on the ballot where candidates have made a request under s 168.
- 58 The registered officer of a political party may endorse a candidate or candidates or a group of candidates: ss 169(1) and (4)(b). He or she may request that the party's name (or abbreviated name) and logo be printed next to the candidates' name and next to the group square above the line.
- 20
- 59 Voting is dealt with in Part XVIII. Under the new system (in force for the first time for the 2016 election), a vote cast above the line is "deemed" to be a vote for each member of the group who appears below the line, in sequence: s 272. Voters who vote above the line must mark at least six boxes above the line: s 239(2). However, the vote is not informal if the voter has marked at least one box above the line: s 269(2).
- 60 The main difference between the present system and the system that existed before the recent amendments (and at the time of *Wood*) is that a voter voting above the line was only permitted to mark one square. That vote was then deemed to be a vote in accordance with the "group voting ticket" lodged by the relevant group.⁶⁹ Now, there are no such tickets; voters themselves are required to express preferences if they vote above the line.
- 30

Distortion of the vote by the inclusion of Mr Day on the ballot

- 61 The presence of Mr Day on the ballot paper as the first of two candidates listed for Family First distorted the vote for that party and those votes cannot reasonably be attributed to the second candidate. There were only two candidates in Mr Day's group (the minimum

⁶⁸ See also *Day v Australian Electoral Officer (SA)* (2016) 331 ALR 386, [21]ff, describing the voting process before and after the introduction of the *Commonwealth Electoral Amendment Act 2016* (Cth).

⁶⁹ For a more detailed explanation see *McKenzie v Commonwealth* (1984) 57 ALR 747, 748-749 per Gibbs CJ; *Day v Australian Electoral Officer (SA)* (2016) 331 ALR 386, [21]ff.

number).⁷⁰ Here it cannot be said that it is “highly probable, if not virtually certain”⁷¹ that had Mr Day not been on the ballot, Family First and/or Ms Gichuhi would have received the same number of votes. It is probable that far less votes would have been received.

62 Mr Day was an incumbent Senator with a significant public profile who featured prominently in Family First’s election campaign.⁷² A minor party ticket comprising two candidates, the first of whom is an incumbent Senator who is the focus of the party’s election campaign, would inevitably attract a significant number of votes that would not otherwise have been obtained.

10 63 The total number of votes received by Mr Day on the final, 457th count was 72,392 votes.⁷³ Of that number, 7.59% was his first preference personal vote below the line (5,495 votes),⁷⁴ 34.28% was the party’s first preference above the line vote (24,817 votes), and the remaining 58.13% was from second or later preferences, whether above or below the line. In contrast, Ms Gichuhi received only 152 first preference below the line votes, showing a marked disparity between her popular appeal and that of Mr Day.

64 No doubt some voters would have wished to vote the Family First group regardless of Mr Day’s presence. But it cannot simply be assumed that this accounts for most votes for the group (whether as first or later preferences) given that Family First is a minor party and its election campaign was dominated by Mr Day.

20 65 Moreover, in the case of an ineligible first candidate who is a member of a two person group, the presence of the above the line square on the ballot itself can distort the vote. At the 2016 election 91.5% of voters in South Australia voted above the line.⁷⁵ If only Ms Gichuhi had stood for Family First, there would have been no group and no above the line box. No doubt another candidate might have been selected so as to form a group, but that person would not have been an incumbent Senator, and this moves well into the realm of speculation.

66 In sum, in a case such as this the second candidate obtains an unfair advantage (and voter intentions would be distorted) if the above the line votes are counted to them – both because they obtain the advantage of an above the line square which should not have been there, and because they effectively ride on the coat-tails of the reputation of the first candidate, an incumbent Senator who led the campaign, who should not have been on the ballot paper.

30 **The first argument – no valid group**

67 It is submitted that one effect of Mr Day’s ineligibility is that his group application (now constituted by only one candidate) under s 168 was invalid. For that reason, Family First’s

⁷⁰ See ballot paper at CB 326.

⁷¹ Cf *Sykes v Cleary* (1992) 176 CLR 77, 102.

⁷² Agreed facts, [92] CB 437. See also evidence gathered by Mr Paul Erickson.

⁷³ Affidavit of Timothy Courtney, [33], CB 309. This was less than the quota of 81,629 votes (ibid at [30]). A person can (relevantly) be elected in last spot with less than a quota because they defeat the final competitor after elimination of other candidates. They may have less than a quota notably (but not only) because under the new voting system votes may be exhausted because voters are only required to preference 6 groups above the line, or 12 persons below the line, and a vote will also still be counted even if it records a vote for fewer groups or persons.

⁷⁴ First preference votes are found relevantly at CB 415.

⁷⁵ Affidavit of Timothy Courtney, [40], CB 310.

above the line box should not have been on the ballot in accordance with s 210(1)(f). Accordingly, any votes cast above the line for that group should be disregarded on a recount.

- 68 A similar argument was considered and rejected by Mason CJ in *Wood*, sitting alone after the Full Court had answered questions referred to it.⁷⁶ His Honour considered the argument made was inconsistent with the Full Court’s reasons – in particular, the Full Court’s equation of an ineligible candidate with a deceased candidate, and the conclusion that although the relevant candidate was ineligible, his nomination was in order and his name was properly on the ballot paper. Mason CJ stated that “only the election of Robert Wood miscarried”, in other respects the election was valid, and “in counting the votes it is necessary to have regard to the group voting ticket process ... because that process was a central feature of the ballot-paper”, which electors were entitled to use and which “must be taken into account in order to give effect to the intentions of the voters as expressed in the ballot-papers”.⁷⁷ For the following (overlapping) reasons his Honour’s decision is distinguishable, and in any event should not be applied in the context now before the Court.
- 10
- 69 First, *Wood* was decided before significant amendments were made to the Electoral Act. Under the earlier legislation, a vote above the line adopted the group voting ticket. Thus, if the group square (and group voting ticket) were to be ignored, the voter’s voting intention would have failed entirely, including the voter’s preferences for candidates from other parties.⁷⁸ In contrast, under the current regime, if the votes for the above the line square were ignored, only the “deemed” vote for the number two candidate in that group would be disregarded. Votes for candidates in other groups for which the voter expressed a preference would not be affected. The consequence of the argument is thus quite different. The single preference “group voting ticket process” is no longer a feature of the voting system.
- 20
- 70 Secondly, a key proposition relied on by Mason CJ was that Mr Wood “was properly on the ballot paper” and the ballot itself was not invalid.⁷⁹ Yet the critical question is not whether the ballot is invalid, but what parts of the ballot paper should be disregarded in light of a candidate’s ineligibility. There is no dispute that votes recorded on the ballot against the candidate’s name below the line should be disregarded. The issue is whether that is sufficient to avoid the effects of the ineligibility, or whether votes recorded in the square above the line should also be disregarded.
- 30
- 71 In any event, the name of a candidate who is constitutionally ineligible to sit in the Senate is not “properly included on the ballot paper”. The effect of s 44 of the Constitution is that an ineligible candidate is “incapable of being chosen”. That being so, their name cannot be said to be properly included on the ballot paper. In so far as this depends on the Electoral Act, its provisions assume that an ineligible candidate will not be nominated for the Senate. If, contrary to that assumption, an ineligible person’s name is entered on the ballot paper, that could not be described as “proper”. In the case of certain irregularities, the electoral officer can refuse to accept a nomination: s 172. It may be that, though not covered by s 172, if it is clear beyond doubt that a candidate is ineligible, the electoral officer may also be able

⁷⁶ *Wood* (1988) 167 CLR 145, 173-5.

⁷⁷ *Wood* (1988) 167 CLR 145, 174-5.

⁷⁸ An issue which may have also concerned the Full Court: *Wood* (1988) 167 CLR 145, 165-6.

⁷⁹ *Wood* (1988) 167 CLR 145, 174, referring to 165.

to reject the nomination.⁸⁰ Further, if the ineligibility of a nominated candidate is discovered before the election takes place, a court could order the name of the candidate to be removed.⁸¹ It follows that it is not “proper” to include the name of an ineligible candidate on the ballot paper. That the nomination formalities have been satisfied, or that the electoral officer may have accepted the nomination without fault, is not to the point.

72 This view does not lead to the voiding of an entire election where an unqualified candidate stands for election (as may have been assumed by the Full Court in *Wood*). It merely goes to what steps must be taken to address the invalid inclusion of a candidate on the ballot.

10 73 Thirdly, the Court’s approach has evolved since *Wood*. The Full Court in *Wood* sought to ascertain “the true result of the polling – that is to say, the true legal intent of the voters so far as it is consistent with the Constitution and the Act”.⁸² Since then, the Court has accepted that the presence of an unqualified candidate on the ballot may distort the vote, with consequences for how the “true intention” of the voters should be ascertained upon a finding that a “winning” candidate was ineligible.

20 74 In *Sykes v Cleary*, in the context of an election of a disqualified candidate to the House of Representatives, the High Court refused to order a special count by distributing the preferences of the unqualified candidate, instead holding that the election as a whole was void. The joint judgment of Mason CJ, Toohey and McHugh JJ held that a special count was not appropriate because “it could result in a distortion of the voters’ real intentions because the voters’ preferences were expressed within the framework of a larger field of candidates presented to the voters by reason of the inclusion of the first respondent”.⁸³ The joint judgment distinguished *Wood*, observing that:

[i]n light of the group system of voting which applies in Senate elections, it was highly probable, if not virtually certain, that a person who voted for Mr Wood would have voted for another member of his group, had the voter known that Mr Wood was ineligible. The same cannot be said in the present case.

75 Later, in *Free v Kelly* – also a case concerning the ineligibility of a candidate for the House of Representatives – Brennan CJ sought to reconcile *Sykes* and *Wood*, explaining:⁸⁴

30 The principle to be derived from both cases is that an election in which a person who incapable of being chosen is purportedly returned as a member of the Senate or as a member of the House of Representatives will not warrant an order for a

⁸⁰ See *Wood* (1988) 167 CLR 145, 164, observing that an electoral officer may have authority to determine whether a nominated candidate is qualified to be elected in the case of “a mere abuse of the right of nomination or an obvious unreality”, citing *Harford v Linskey* [1899] 1 QB 852, 862; cf *Sue v Hill* (1999) 199 CLR 462, 544-5 [217].

⁸¹ See eg s 383, giving the Federal Court broad injunctive powers in the case of a contravention of the Act or other Commonwealth law in so far as it affects an election.

⁸² cf *Wood* (1988) 167 CLR 145, 166.

⁸³ *Sykes v Cleary* (1992) 176 CLR 77, 102 (with the agreement of Brennan J at 108, Dawson J at 130-1, Gaudron J at 132; Deane J did not address the issue). Brennan CJ later observed that “the logic of that proposition seems to me to be inexorable”; “if the names of the disqualified Mr Cleary had not appeared on the ballot paper, the voters’ preferences might have been differently expressed”: *Free v Kelly (No 1)* (1996) 138 ALR 646, 647.

⁸⁴ (1996) 185 CLR 296, 303.

special count unless a special count would reflect the voters' true legal intent, or conversely, would not result in the distortion of the voter's real interest.

76 In *Sue v Hill* it was held by the Full Court, based on *Wood*, that the election was not entirely void, but Mason CJ's approach did not arise.⁸⁵

77 The suggestion that "it was highly probable, if not virtually certain, that a person who voted for Mr Wood would have voted for another member of his group, had the voter known that Mr Wood was ineligible" may well have been true for Mr Wood (being a new candidate). It was not accepted to be correct in the subsequent two House of Representative cases just referred to. For the reasons outlined above, it is not the case here. To attribute the above the
10 line votes of the Family First group to the second candidate here could and would result in the distortion of the voters' real intent. Where the group was not properly included on the ballot paper, and where the consequence of disregarding the above the line square is not wholly to disenfranchise those voters who cast a "vote" in that square, such votes should not be attributed to the second candidate.

78 In *Wood*, the Court stated that an indication of preference for an unqualified candidate was "a nullity".⁸⁶ But, as explained in *Sykes*, "the primary vote for an unqualified candidate does not destroy the voter's indication of his or her subsequent preference".⁸⁷ Under the new Senate voting system, this approach can equally be applied to votes above the line. So, if a large proportion of the two member group party vote is the likely result of the presence of
20 the disqualified candidate, the party vote should be disregarded. This would both preserve the voter's other above the line preferences and address the distorting effect of the ineligible candidate's presence on the ballot.

79 On the facts of this case, disregarding the votes cast above the line for Family First gives best effect to the true intention of the voters consistently with the Constitution and the regime prescribed by the Electoral Act.

The second argument – fraud in relation to the square

80 Upon nominating for election Mr Day was required to state (and did state) that he was not incapable of being chosen as a Senator by reason of s 44 of the Constitution. Gordon J will be asked to find that when Mr Day made this statement he, at the least, was sufficiently
30 reckless as to whether or not it was true that it cannot be said he made the statement truthfully.⁸⁸ The contention then is that the recount of votes should ignore the above the line square for Family First for the reason that its inclusion on the ballot papers was procured by fraud. In summary, this argument is based on the following propositions:

⁸⁵ *Sue v Hill* (1999) 199 CLR 462, 530 [178]-[179] per Gaudron J, Gleeson CJ, Gummow and Hayne JJ agreeing at 472 [1].

⁸⁶ *Wood* (1988) 167 CLR 145, 166.

⁸⁷ *Sykes v Cleary* (1992) 176 CLR 77, 101.

⁸⁸ Note *Banditt v The Queen* (2005) 224 CLR 262, 265 [2]: "fraud is proved when it is shown 'that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false'. But (3) is but an instance of (2) because, as Lord Herschell put it in *Derry v Peek*: '[O]ne who makes a statement under such circumstances can have no real belief in the truth of what he states.'"

- (a) Mr Day made a fraudulent statement in completing and providing to the Australian Electoral Commission the Form CC, in which he stated that he was not incapable of being chosen as a Senator under s 44 of the Constitution.⁸⁹ This statement was in effect reiterated when, in his capacity as registered officer of Family First in South Australia, Mr Day endorsed the joint request of Ms Gichuhi and himself to be listed as candidates of Family First with a square above the line by using the name of Family First.⁹⁰
- (b) An administrative decision may be set aside if there is a fraud perpetrated on the decision-maker.⁹¹
- 10 (c) Decisions to accept a request to be grouped on the ballot under s 168 of the Act and to print a box above the line for that group under s 210(f)(ii) are administrative decisions. Here, these decisions were induced by Mr Day's actions. Mr Day's fraudulent statement resulted in the Family First square appearing above the line on the ballot. In other words, the decision-maker was affected by the fraud.
- (d) Mr Day's fraudulent statement also effected a fraud on voters. The voters were induced to vote for the Family First ticket on the basis that Mr Day was an eligible candidate at the top of that ticket.
- 20 (e) In determining how the recount should take place, the Court should treat as invalid the decision to accept the group request and the decision to print the square above the line because each was affected by fraud. On the recount votes cast above the line for Family First should be disregarded. This will overcome the distorting effect on the voters caused by the presence of the Family First square (and Mr Day) on the ballot paper.

Fraud in public law

81 Lord Denning's proposition that "fraud unravels everything" is "oft repeated".⁹² In *SZFDE v Minister for Immigration*, the Court examined how this principle applies in the public law context. Generally speaking, where an administrative act or decision is affected by fraud, that is grounds for impugning (or setting aside) the act or decision.⁹³ The principle applies more strongly, or with fewer exceptions, in the public law context. Although there are some areas of general law where fraud may not have a vitiating effect (eg the equitable doctrine protecting a bona fide purchaser without notice), "a different trend" has emerged in public law.⁹⁴ Courts guard fiercely against fraud in this context. One reason is the concern to protect the "the due administration of justice", having regard to the "important constitutional underpinnings" of the courts' role in ensuring the due administrative of the laws of the Commonwealth.⁹⁵ Another is the "practical aspect" that "victims" in the public law context "may have no useful remedy except to have the fraudulently affected result set aside".⁹⁶

30

⁸⁹ CB 321-322.

⁹⁰ CB 319-320.

⁹¹ *Craig v South Australia* (1995) 184 CLR 163, 175-176.

⁹² *SZFDE v Minister for Immigration* (2007) 232 CLR 189, 195-6 [14]-[15], citing Lord Denning in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712-713.

⁹³ *SZFDE* (2007) 232 CLR 189, 193-4 [6]-[7], 194-5 [11]ff.

⁹⁴ *SZFDE* (2007) 232 CLR 189, 196-7 [16]-[17].

⁹⁵ *SZFDE* (2007) 232 CLR 189, 194-5 [11], 196-9 [17]-[21].

⁹⁶ *SZFDE* (2007) 232 CLR 189, 199 [22].

Fraud in the public law context may encompass impropriety that does not rise to the level of “red blooded” common law fraud and may include bad faith and the like.⁹⁷

82 What constitutes fraud and what the effect of fraud may be must be consider in the light of the statute (if any) that governs the impugned act or decision. It is necessary to pay “close attention” to the “nature, scope and purpose” of the particular statutory scheme to determine “what amounts to ‘fraud’ in the particular context” and “that which is to be unravelled”. It is then necessary to “identify the available curial remedy to effect the ‘unravelling’”.⁹⁸

The Family First square should be ignored

10 83 In an ordinary case, as *SZFDE* demonstrates, fraud that affects an administrative act would nullify that act. The two administrative acts brought about by Mr Day’s fraud (if established) were that Mr Day’s nomination as a candidate was accepted, and that Mr Day and Ms Gichuhi’s group application was given effect such that the Family First square was printed above the line. Applying the ordinary rule, these consequences should be unravelled by directing that, on the recount, the above the line Family First square should be ignored.

84 If Mr Day’s ineligibility had become known before the election, a court of competent jurisdiction had power in effect to set aside the electoral officer’s decision to print the ballot with the Family First square above the line.⁹⁹ Appropriate consequential relief could have been ordered. Because the issue comes before a different court and in different circumstances does not mean that the result should be different.

20 85 In the context of the Electoral Act, this Court must be guided by the substantial merits and good conscience of each case: s 364, as picked up by s 381. Treating the above the line square as “invalid” is the appropriate means of “unravelling” the fraud. That would in effect restore the form of the ballot paper to what it should have been at the time of the election. At the same time it would avoid the distorting effect of the fraud on the voters. In the end, this is the only available remedy to put right what went wrong.

30 86 There is an added dimension to this case. The fraud is attributable not only to Mr Day. Mr Day was the registered officer of Family First and its Federal Chairman.¹⁰⁰ In his capacity as the registered officer – in effect, the authorised representative of the party¹⁰¹ – Mr Day endorsed the group of two on behalf of Family First, authorising the use of both the name of the party and its logo on the ballot paper.¹⁰² That conduct was undertaken on behalf of the party and is attributable to the party.¹⁰³ A party should not be permitted to benefit from the fraudulent action of its authorized representative. The importance of unravelling fraud is heightened where it may undermine the democratic process and affect the result of an election.

⁹⁷ *SZFDE* (2007) 232 CLR 189, 195 [13], see also 196-7 [17].

⁹⁸ *SZFDE* (2007) 232 CLR 189, 200-201 [28]-[29].

⁹⁹ See eg s 383. Further, the Federal Court retains its general supervisory jurisdiction over decisions made under the Electoral Act: see s 383(10); cf *Courtice v AEC* (1990) 21 FCR 554.

¹⁰⁰ Agreed Facts, [72], [91]; CB 435, 437.

¹⁰¹ See Electoral Act, ss 4C, 126(2), 133(1), 134A, 136, 137, 138A, 140, 166, 167, 169, 169B, 172, 177, 180, 210A, 287B, 299(5H).

¹⁰² See form at CB 319.

¹⁰³ *Brooke v Bool* [1928] 2 KB 578, 586; *Ex parte Colonial Petroleum Oil Pty Ltd* (1944) 44 SR (NSW) 307, 308; *JF & BE Palmer Pty Ltd v Blowers and Lowe Pty Ltd* (1987) 75 ALR 509, 511.

- 87 The Electoral Act has established a carefully structured scheme for elections to the Senate and House of Representatives. That scheme consists of, first, the nominations (Pt XIV); secondly, the polling (Pt XVI), which includes the manner in which the ballot paper is put together as well as how votes are to be cast; and thirdly, the scrutiny (Pt XVIII), which governs how the votes are to be counted. Where there has been a serious failure in the nomination and polling parts of the scheme, the scheme as a whole is subverted. For that reason, it cannot be said that the vote as recorded on the “ballot” reflects the voters’ true legal intention as they would have been expressed had there been compliance with the Act.
- 10 88 There is a further reason why disregarding the Family First square is consistent with the statutory scheme. If, as a result of Mr Day’s ineligibility, Ms Gichuhi was declared duly elected, then the Court of Disputed Returns under s 362(3) would have jurisdiction on a petition to declare a person not to have been duly elected. Potential grounds for doing so would include “any illegal practice committed by any person other than the candidate and without the knowledge or authority of the candidate”, provided the Court is satisfied that the result of the election was “likely to be affected” and that it is just to make the declaration.
- 20 89 If Ms Gichuhi were declared elected, a petition seeking a declaration that Ms Gichuhi should not be declared duly elected would likely succeed. “Illegal practice” is defined in s 352(1) to mean “a contravention of this Act or the regulations”.¹⁰⁴ Both the declaration made by Mr Day on the Form CC that he was “qualified under the Constitution ... to be elected as a Senator”, and the statement on that form that he was not “by virtue of s 44 of the Constitution incapable of being chosen or of sitting as a Senator”, were false. It is irrelevant for the purpose of this argument whether the declaration and statement were fraudulently false. The false declaration and statement are “illegal practices” because it is implicit in the requirement in s 170 that the declarations to be made must be accurate. Likewise, it is an implicit requirement that the statements required to be made on the Form CC (required by s 166(1AAA)) are also to be accurate.
- 30 90 The nomination provisions in part XIV are an integral part of the statutory scheme. The Constitution and the Electoral Act specify who is and is not eligible to stand for election. The purpose of s 170 (and the requirements for the Form CC) is to ensure, so far as possible, that only the names of eligible candidates will appear on the ballot paper. That purpose will only be achieved if the candidate provides accurate information. It follows that it would be a contravention of the relevant provisions if inaccurate information is provided. Any other construction would subvert the purpose for requiring the declarations to be made.

¹⁰⁴ An illegal practice does not mean the commission of an offence: see *Sue v Hill* (1999) 199 CLR 462, 512 [124]. The meaning of contravention includes a failure to comply with the Act: *Acts Interpretation Act* 1901 (Cth), s 2B (“*contravene* includes fail to comply with”). “Contravention” is to be given a wide meaning: cf also *Weinstock v Beck* (2013) 251 CLR 396, 415 [42]. Previously, making a false statement in the nomination paper was in fact an offence under the Electoral Act (former s 339(3)) and therefore clearly an illegal practice: note *Sue v Hill*, 512-3 [125]-[126] per Gaudron J; 544-6 [217]-[218] per McHugh J. The provision was repealed by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth), Sch 2, cl 139. The purpose expressed was to avoid duplication of criminal offences in federal statutes, false statements already being covered by the Criminal Code (see ss.137.1 and 137.2): see Commonwealth Hansard, House of Representatives, 24 November 1999, p 12463 (Mr Daryl William, Attorney-General, Second Reading Speech). It would be an odd result if the repeal of a provision simply to avoid duplication had the consequence that the act was no longer an “illegal practice”.

91 For reasons explained above relating to distortion, it is likely (on either view of that word)¹⁰⁵ that the illegal practices affected the result of the election and it would be just that Ms Gichuhi be declared not to be duly elected.

PART VII: PROVISIONS

92 The applicable constitutional and legislative provisions are attached as Annexure A.

PART VIII: ORDERS SOUGHT

93 Ms McEwen contends that the questions referred by the Present of the Senate should be answered as follows:

10

Question (a): By reason of s 44(v) of the Constitution there is a vacancy in the representation of South Australia in the Senate for which Mr Day was returned.

Question (b): The vacancy should be filled by a special recount of the ballot papers by (i) disregarding a vote indicated on the ballot paper for Mr Day below the line; (ii) disregarding a vote indicated on the ballot paper for Mr Day and Ms Gichuhi's group above the line; and (iii) otherwise giving effect to the order of voter preference indicated on the ballot paper.

Question (c): Unnecessary to answer [or alternatively, by reason of s 44(v) of the Constitution, Mr Day was from 1 December 2015, or alternatively from 22 March 2016, incapable of sitting as a Senator prior to the dissolution of the 44th Parliament].

Questions (d) & (e): Should most appropriately be answered after questions (a), (b) and (c) are answered.

20 **PART IX: ESTIMATE OF ORAL ARGUMENT**

94 Ms McEwen estimates that she requires approximately 2.5 hours to present oral argument.

6 January 2017



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¹⁰⁵ cf *AEC v Johnston* (2014) 251 CLR 463, 495 [103], 496 [106] per Hayne J, noting but not resolving whether “likely” in s 362(3) means “more probable than not” or “substantial possibility less than probability”.

Annexure A

Relevant provisions of the *Commonwealth Constitution*

44 Disqualification

Any person who:

- (i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or
- (ii) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; or
- (iii) is an undischarged bankrupt or insolvent; or
- (iv) holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; or
- (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.

But subsection (iv) does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

Relevant provisions of the *Commonwealth Electoral Act 1918* (Cth)

The provisions are still in force in this form as at the date of making the submissions



Commonwealth Electoral Act 1918

No. 27, 1918

Compilation No. 63

Compilation date:	21 October 2016
Includes amendments up to:	Act No. 61, 2016
Registered:	31 October 2016

Prepared by the Office of Parliamentary Counsel, Canberra

Part I Preliminary

Section 4A

- (f) an issue submitted to, or otherwise before, the electors in connection with the election.
- (10) In this Act, a reference to the principal office of the Electoral Commission in a place is a reference to the office for the time being declared by the Electoral Commissioner, by notice published in the *Gazette*, to be the principal office of the Commission in that place.
- (11) In determining whether a person is next of kin of another person, the following persons are also to be taken into account:
 - (a) a de facto partner of the person;
 - (b) a child of the person, or someone of whom the person is a child, because of the definition of *child* in this section;
 - (c) anyone else who would be a relative of the person because someone mentioned in paragraph (a) or (b) is taken into account.

4A Extraterritorial operation of Act

This Act extends to officers outside Australia.

4B Act to bind Crown

This Act binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory and of the Northern Territory, but nothing in this Act renders the Crown liable to be prosecuted for an offence.

4C Registered officer of political party

- (1) Subject to subsection (2), a reference in this Act to the registered officer of a registered political party is a reference to the person shown in the Register of Political Parties as the registered officer of the party.

Note: A person must not be the registered officer or a deputy registered officer of more than one registered political party at a particular time (see subsection 126(2B)).

- (2) A reference in Part XIV or XVI to the registered officer of a registered political party includes a reference to a person for the time being nominated by the registered officer of a party as a deputy registered officer of the party for the purposes of this Act.
- (3) A nomination under subsection (2):
 - (a) must be in writing, signed by the registered officer and lodged with the Commission; and
 - (b) must specify the name and address of the person nominated and bear the signature of that person; and
 - (ba) must include a signed declaration by the person nominated that subsection 126(2B) is not contravened by lodging the nomination of the person as the deputy registered officer; and
 - (c) may be revoked at any time by the registered officer by written notice lodged with the Commission.
- (4) A nomination of a person as a deputy registered officer under subsection (2) is invalid if subsection 126(2B) is contravened by lodging the nomination of the person as the deputy registered officer.

4D Application of the *Criminal Code*

Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Part XIV—The nominations

162 Candidates must be nominated

No person shall be capable of being elected as a Senator or a Member of the House of Representatives unless duly nominated.

163 Qualifications for nomination

- (1) 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.
- (2) A person is not entitled to be nominated for election as a Senator or a member of the House of Representatives unless the person is qualified under subsection (1).

164 State and Territory members not entitled to be nominated

A person who is, at the hour of nomination, a member of:

- (a) the Parliament of a State;
- (b) the Legislative Assembly of the Northern Territory of Australia; or
- (c) the Legislative Assembly for the Australian Capital Territory;

is not capable of being nominated as a Senator or as a Member of the House of Representatives.

Section 165

165 Multiple nominations prohibited

- (1) Where:
- (a) a day is fixed as the polling day for 2 or more elections under this Act; and
 - (b) at the hour of nomination there exist nominations of a person for 2 or more of those elections;
- each of those nominations is invalid.
- (2) For the purposes of subsection (1), where a person has consented to act if elected in relation to a nomination in relation to an election and the person withdraws that consent under section 177 before the hour of nomination, the nomination of the person for the election shall be taken to have ceased to have effect at the time when the person withdrew that consent.

166 Mode of nomination

Nominations of single candidates as Senators or members

- (1) Subject to subsections (1A), (1AA), (1B) and (1C), a nomination may be in Form C, CA, D or DA in Schedule 1, as the case requires, and must:
- (a) set out the name, place of residence and occupation of the candidate; and
 - (b) be signed by:
 - (i) not less than 100 electors entitled to vote at the election for which the candidate is nominated; or
 - (ii) the registered officer of the registered political party by which the candidate has been endorsed for that election.

(1AAAA) If:

- (a) 2 or more candidates in a Senate election make a joint request under section 168; and
- (b) a person signs, under subparagraph (1)(b)(i), a nomination for more than one of the candidates;

the person's signature must not be counted for any of the candidates for the purposes of that subparagraph.

Nominations of 2 or more candidates as Senators

- (IAAA) Subject to subsections (1A), (IAA) and (1B), a nomination may be in Form CC in Schedule 1, and must:
- (a) set out the name, place of residence and occupation of each candidate; and
 - (b) be signed by the registered officer of the registered political party by which the candidates have been endorsed for that election.

Other matters relating to nominations

- (1A) Where:
- (a) a candidate in a Senate election is:
 - (i) a Senator; or
 - (ii) in the case of an election following a dissolution of the Senate, a person who was, immediately before the dissolution, a Senator; and
 - (b) the candidate's name is, under subsection 99(4), enrolled on the Roll for any Subdivision of a Division of the State or Territory that he or she represents or represented;
- the candidate may set out in his or her nomination the address recorded in that enrolment rather than his or her place of residence.
- (IAA) For a House of Representatives election for a particular Division, the registered officer of a particular registered political party must not sign nominations under subparagraph 166(1)(b)(ii) for that election for more than one candidate.

Note: This does not prevent an amendment of a nomination under section 177 (withdrawal of consent to a nomination) or 180 (death of candidate after nomination).

- (1B) Where:
- (a) a candidate in an election for the House of Representatives was, immediately before the dissolution or expiration of the

Section 166

House of Representatives that preceded the election, a member of the House of Representatives; and

- (b) the candidate's name is, under subsection 99(4), enrolled on the Roll for any Subdivision of the Division that he or she represented;

the candidate may set out in his or her nomination the address recorded in that enrolment rather than his or her place of residence.

- (1C) A nomination form need only be signed by at least one other person entitled to vote at the election (the *new election*) for which the candidate is nominated if the candidate:
 - (a) is a sitting independent in relation to the new election; and
 - (b) is not endorsed by a registered political party in the new election at the close of nominations.
- (1D) For the purposes of subsection (1C), a candidate for election to the Senate for a State or Territory is a *sitting independent* for the new election if:
 - (a) the candidate was elected as a Senator for that State or Territory in an election (the *previous election*); and
 - (b) the candidate was not endorsed by a registered political party in the previous election; and
 - (c) the candidate continues to be a Senator for that State or Territory as a result of the previous election until:
 - (i) the writ for the new election is issued; or
 - (ii) if the writ for the new election is issued in relation to a dissolution of the Senate—that dissolution of the Senate.
- (1E) For the purposes of subsection (1C), a candidate for election to the House of Representatives for a Division (the *seat being contested*) is a *sitting independent* for the new election if:
 - (a) the candidate was elected as a member of the House of Representatives in an election (the *previous election*) for a particular Division (the *existing seat*); and
 - (b) the candidate was not endorsed by a registered political party in the previous election; and

- (c) the candidate continues to be a member of the House of Representatives for the existing seat as a result of the previous election until:
 - (i) the writ for the new election is issued; or
 - (ii) if the writ for the new election is issued in relation to a dissolution of the House of Representatives—that dissolution of the House of Representatives; and
 - (d) the existing seat is either the same as, or has territory in common with, the seat being contested.
- (2) A nomination may name a candidate only by specifying:
- (a) the surname and the Christian or given name, or one or more of the Christian or given names, under which the candidate is enrolled; or
 - (b) in a case where the candidate is not enrolled—a surname and the Christian or given name, or one or more of the Christian or given names, under which the candidate is entitled to be enrolled.
- (3) For the purposes of subsection (2), a Christian or given name may be specified by specifying:
- (a) an initial standing for that name; or
 - (b) a commonly accepted variation of that name (including an abbreviation or truncation of that name or an alternative form of that name).
- (4) A nomination shall include a statement of the form in which the candidate's name or candidates' names, as the case may be, is or are to be printed on the ballot papers for the election.
- (5) Where:
- (a) persons to be nominated as candidates in a Senate election wish to have their names grouped in the ballot papers; and
 - (b) those persons have been endorsed for that election by different registered political parties;
- the nominations of the candidates may be combined in such manner as the Electoral Commission approves.

Section 167

- (6) Nothing in this Act is to be taken as requiring a person:
 - (a) who is a candidate or the nominator of a candidate; and
 - (b) whose address is not shown on the Roll because of section 104;to set out his or her address on a nomination paper.
- (7) A candidate who does not set out his or her address on a nomination form must provide the Divisional Returning Officer or Australian Electoral Officer, as the case may be, with an address for correspondence.

167 To whom nominations made

- (1) Nominations of candidates for election to the Senate must be made to the Australian Electoral Officer.
- (2) Subject to subsection (3), nominations of candidates for election to the House of Representatives must be made to the DRO.
- (3) A nomination of all of the candidates endorsed by a registered political party for election to the House of Representatives in respect of the Divisions situated in a particular State or Territory may be made by the registered officer of the party to the Australian Electoral Officer for that State or Territory.
- (4) If a nomination for a House of Representatives election is made to the Australian Electoral Officer, the Australian Electoral Officer:
 - (a) must deliver to the DRO for each Division for which a candidate has been so nominated, as soon as practicable before the hour of nomination, a facsimile of the nomination paper; and
 - (b) must advise the DRO for each Division for which a candidate has been so nominated, forthwith after a sum is deposited with the Australian Electoral Officer under section 170, being a sum that is, or includes an amount, in respect of that candidate, that it was so deposited.

168 Grouping of candidates

- (1) Two or more candidates for election to the Senate may make a joint request:
 - (a) that their names be grouped in the ballot papers; or
 - (b) that their names be grouped in the ballot papers in a specified order.
- (2) A request under subsection (1) shall be in writing, signed by the candidates, and shall be given to the Australian Electoral Officer with the nomination or nominations of the candidates.
- (3) A candidate's name may not be included in more than one group.

169 Notification of party endorsement

- (1) The registered officer of a registered political party may request that the name, or the registered abbreviation of the name, of that party be printed on the ballot papers for an election adjacent to the name of a candidate who has been endorsed by that party.
- (3) A request under subsection (1) shall be in writing, signed by the person making the request, and shall:
 - (a) in the case of a Senate election, be given to the Australian Electoral Officer before the close of nominations; and
 - (b) in the case of an election for a Member of the House of Representatives for a Division, be given to the Divisional Returning Officer with the nomination of the candidate or to the Australian Electoral Officer for the State or Territory in which the Division is situated before the close of nominations.
- (4) Where:
 - (a) a request has been made under subsection (1) in respect of candidates in a Senate election; and
 - (b) the candidates have made a request under section 168 that their names be grouped in the ballot papers for the election;

Section 169A

the request under subsection (1) may include a further request that the name of the registered political party that endorsed the candidates, or a composite name formed from the registered names of the registered political parties that endorsed the candidates, be printed on the ballot papers adjacent to the square printed above the line in relation to the group.

- (5) In this section, *registered abbreviation*, in relation to the name of a registered political party, has the same meaning as in section 210A.

169A Notification of independent candidacy

- (1) A candidate in an election may request that the word “Independent” be printed adjacent to the candidate’s name on the ballot papers for use in that election.
- (2) A request under subsection (1) shall be in writing, signed by the candidate, and shall be given to the Australian Electoral Officer or the Divisional Returning Officer, as the case requires, with the nomination of the candidate.
- (3) A candidate may not make requests under both this section and section 168.

169B Verification of party endorsement

- (1) For the purposes of this Act, subject to subsection (2), a person shall be taken to have been endorsed as a candidate in an election by a registered political party if:
- (a) the candidate is nominated by the registered officer of the party;
 - (b) the name of the candidate is included in a statement, signed by the registered officer of the party, setting out the names of the candidates endorsed by the party in the election and lodged:
 - (i) in the case of a Senate election, with the Australian Electoral Officer; and

- (ii) in the case of an election of a member of the House of Representatives for a Division, with the Australian Electoral Officer for the State or Territory in which that Division is situated;
before the close of nominations for the election; or
 - (c) the Electoral Commission is satisfied, after making such inquiries as it thinks appropriate of the registered officer of the party or otherwise, that the candidate is so endorsed.
- (2) For the purposes of sections 214 and 214A, if a person would, apart from this subsection, be taken to have been endorsed as a candidate in an election by more than one registered political party, the person is taken to have been endorsed:
- (a) if the person is nominated by the registered officer of one, and only one, of the parties—by that party; or
 - (b) if paragraph (a) does not apply and a request is made under section 169 by the registered officer of one, and only one, of the parties—by that party; or
 - (c) if neither paragraph (a) nor (b) applies and the person specifies one, and only one, of the parties, in a written notice given to the Australian Electoral Officer or Divisional Returning Officer, as the case requires—by that party; or
 - (d) if none of paragraph (a), (b) or (c) applies—by the party that the Electoral Commission decides, after making such enquiries as it thinks appropriate of the registered officers of the parties or otherwise, is the appropriate party.

169C Combination of requests and nominations

A request required by a provision of this Part or Part XVI to be given to the Australian Electoral Officer or a Divisional Returning Officer may:

- (a) be written on the same paper as the nomination of the candidate to whom the request relates; and
- (b) if 2 or more such requests are to be made by the same person, may be combined with the other requests.

Section 170

170 Requisites for nomination

- (1) A nomination is not valid unless, in the nomination paper, the person nominated:
 - (a) consents to act if elected; and
 - (b) declares that:
 - (i) the person is qualified under the Constitution and the laws of the Commonwealth to be elected as a Senator or a member of the House of Representatives, as the case may be; and
 - (ii) the person is not, and does not intend to be, a candidate in any other election to be held on the same day as the election to which the nomination relates; and
 - (c) states whether the person is an Australian citizen by reason of birth in Australia or other means and provides:
 - (i) in the case of citizenship by birth in Australia—the date and place of birth; or
 - (iii) in the case of citizenship by any other means—particulars of those means.
- (2) A nomination is not valid unless:
 - (a) the nomination paper or a facsimile of it:
 - (i) if it is a nomination for a Senate election—is received by the Australian Electoral Officer after the issue of the writ and before the hour of nomination; or
 - (ii) if it is a nomination for a House of Representatives election made to the Australian Electoral Officer—is received by the Australian Electoral Officer after the issue of the writ and not less than 48 hours before the hour of nomination; or
 - (iii) if it is a nomination for a House of Representatives election made to the DRO—is received by the DRO after the issue of the writ and before the hour of nomination; and
 - (b) if, for the purpose of the nomination, a nomination paper is delivered to the Australian Electoral Officer or the DRO—the person nominated, or some person on his or her behalf,

deposits with that officer, at the time of delivery of the nomination paper, a sum determined under subsection (3); and

- (c) if, for the purpose of the nomination, a facsimile of a nomination paper is received by the Australian Electoral Officer or the DRO—the person nominated, or some person on his or her behalf deposits with that officer, before the latest time at which such a facsimile could have been received so that the nomination is valid, a sum determined under subsection (3).

- (3) For the purposes of paragraphs (2)(b) and (c), the sum to be deposited by or on behalf of a person nominated is:
- (a) if a person is nominated as a Senator—\$2,000; or
 - (b) if a person is nominated as a member of the House of Representatives—\$1,000;
- in legal tender or in a cheque drawn by a bank or other financial institution on itself.

171 Form of consent to act

The consent of the person nominated to act if elected and the declaration referred to in paragraph 170(1)(b) shall be sufficient if the person signs the form of consent and declaration at the foot of the nomination paper, but the Australian Electoral Officer or Divisional Returning Officer receiving the nomination may accept any other form of consent and declaration whether accompanying the nomination paper or not that the officer deems satisfactory, and such acceptance shall be final.

172 Rejection of nominations and requests

- (1) Subject to subsections (1A) and (2), a nomination shall be rejected by the officer to whom it is made if, and only if, the provisions of section 166, 167, 170 or 171 have not been complied with in relation to the nomination.

(1A) If:

Part XIV The nominations

Section 173

- (a) contrary to subsection 166(1AA), the registered officer of a party signs nominations for 2 or more candidates (the *same Division candidates*) for a single Division; and
 - (b) the same Division candidates are nominated by the registered officer under subsection 167(3) together with a number of other candidates for other Divisions;
- then:
- (c) the nomination of the same Division candidates must be rejected; but
 - (d) the nomination of the other candidates must not be rejected merely because subsection 166(1AA) was not complied with in relation to the same Division candidates.
- (2) No nomination shall be rejected by reason of any formal defect or error in the nomination if the officer to whom the nomination is made is satisfied that the provisions of sections 166, 167, 170 and 171 have been substantially complied with.
 - (3) A request under this Part is not ineffective because of any formal defect or error in the request if the requirements of this Act have been substantially complied with.

173 Deposit to be forfeited in certain cases

- (1) The deposit made by or on behalf of a candidate at a Senate election or at a House of Representatives election shall be retained pending the election, and after the election shall be returned in accordance with subsection (2), if the candidate is elected, or:
 - (a) in the case of a Senate election:
 - (i) if the total number of votes polled in the candidate's favour as first preferences is at least 4% of the total number of votes polled in favour of the candidates in the election as first preferences; or
 - (ii) in a case where the name of the candidate is included, in ballot papers used in the election, in a group in pursuance of section 168—if the sum of the votes polled in favour of each of the candidates included in the group as first preferences is at least 4% of the total number of

Part XVI The polling

Section 209

arrange for the list to be made available to the officer in time for that use.

209 Ballot papers

- (1) Ballot papers to be used in a Senate election shall be in Form E in Schedule 1.
- (2) Ballot papers to be used in a House of Representatives election shall be in Form F in Schedule 1.
- (3) Ballot papers must have a green background colour for House of Representatives elections and a white background colour for Senate elections and are to be printed using black type face of a kind ordinarily used in Commonwealth Government publications.

Note: One effect of this subsection is that party logos are printed only in black on ballot papers.

- (5) The ballot papers to be used for postal voting shall have the words "Postal Ballot paper" as a heading and shall contain the following directions:
"Fold the ballot paper, place it in the envelope on which the postal vote certificate is printed and fasten the envelope."
- (6) Before issuing a ballot paper for a Senate election, an officer shall, if the particulars are not already printed on the ballot paper, write on the ballot paper:
 - (a) the name of the State or Territory in which the election is to be held;
 - (b) the number of candidates to be elected;
 - (c) the numbers required to complete the *Directions* on the ballot paper;
 - (d) the full names of all candidates arranged in the same way as would be required if the names were being printed on the ballot paper; and
 - (e) the information that would be required by section 214 to be printed on the ballot paper if the ballot paper were being printed.

- (7) Before issuing a ballot paper for a House of Representatives election, an officer shall, if the particulars are not already printed on the ballot paper, write on the ballot paper:
 - (a) the name of the State or Territory, and the name of the Division, in which the election is to be held;
 - (b) the numbers required to complete the *Directions* on the ballot paper;
 - (c) the full names of all candidates for the Division in the same order as would be required if the ballot paper were being printed; and
 - (d) the information that would be required by section 214 to be printed on the ballot paper if the ballot paper were being printed.
- (8) Before issuing a ballot paper that is to be used for postal voting, an officer must ensure that the words and directions required by subsection (5) are printed or written on the ballot paper.

209A Official mark

The official mark for the authentication of ballot papers is either:

- (a) a water mark consisting of a representation of a shield having within it the letters “CA” intertwined; or
- (b) a feature of the ballot paper approved by the Electoral Commissioner.

210 Printing of Senate ballot papers

- (1) In printing the ballot papers to be used in a Senate election:
 - (a) the names of candidates by whom requests have been made under section 168 shall be printed in groups on the ballot papers in accordance with the requests and before the names of candidates who have not made such requests;
 - (b) the order of the names of the candidates, who have only made a request under paragraph 168(1)(a), must be determined by the Australian Electoral Officer in accordance with section 213;

Part XVI The polling

Section 210A

- (c) the order of the several groups in the ballot papers shall be determined by the Australian Electoral Officer in accordance with section 213;
 - (d) the order of the names of the candidates whose names are not included in any group shall be determined by the Australian Electoral Officer in accordance with section 213;
 - (e) where similarity in the names of 2 or more candidates is likely to cause confusion the names of those candidates may be arranged with such description or addition as will distinguish them from one another; and
 - (f) except as otherwise provided by the regulations:
 - (i) a square must be printed opposite the name of each candidate; and
 - (ii) for candidates who made a request under section 168 that their names be grouped in the ballot papers for the election—a square must be printed above the dividing line and above the squares printed opposite those names.
- (3) The names of candidates not included in a group shall be printed on the ballot papers according to the following rules:
- (a) unless paragraph (b) applies, the names of the candidates must be printed in a single column;
 - (b) if a single column would be longer than the longest column containing the names of candidates included in groups, the names of the candidates may be printed in 2 or more columns;
 - (c) if the names of the candidates are printed in 2 or more columns, none of the columns may be longer than the longest column containing the names of candidates included in groups.

210A Form of party name on ballot papers

- (1) In this section, *registered abbreviation*, in relation to the name of a registered political party, means the abbreviation (if any) of the name of the party entered in the Register of Political Parties.

- they had been fraudulently altered or otherwise interfered with so as not to reflect the voter's intention;
- (d) the number of envelopes the AEO examined;
- (e) the number of envelopes that were excluded from the preliminary scrutiny conducted in accordance with Schedule 3 because the AEO was satisfied that they had been fraudulently altered.

Preservation of material

- (14) The AEO is responsible for the safe custody, in accordance with the directions of the Electoral Commissioner, of the parcels referred to in paragraphs (11)(b) and (d), the ballot-box and the report and any other thing given to the AEO under subsection (5) until they are destroyed.
- (15) Subject to Part XXII, the Electoral Commissioner may direct that the things referred to in subsection (14) be destroyed if:
 - (a) not less than 6 months have elapsed since the declaration of the poll in the election in which the things were used; and
 - (b) the things are no longer required by the Electoral Commission for the performance of its functions.

239 Marking of votes in Senate election

Voting below the line

- (1) Subject to subsection (2), a person must mark his or her vote on the ballot paper in a Senate election by:
 - (a) writing at least the numbers 1 to 12 in the squares printed on the ballot paper below the line (with the number 1 being given to the candidate for whom the person votes as his or her first preference, and the numbers 2, 3, 4 and so on to at least the number 12 being given to other candidates so as to indicate the order of the person's preference for them); or
 - (b) if there are 12 or fewer squares printed on the ballot paper below the line—numbering the squares consecutively from

Part XVI The polling

Section 240

the number 1 (in order of preference as described in paragraph (a)).

Note: See also section 268A for when the vote is formal.

Voting above the line

- (2) A vote may be marked on a ballot paper by:
- (a) writing at least the numbers 1 to 6 in the squares (if any) printed on the ballot paper above the line (with the number 1 being given to the party or group for whom the person votes as his or her first preference, and the numbers 2, 3, 4, 5 and 6 being given to other parties or groups so as to indicate the order of the person's preference for them); or
 - (b) if there are 6 or fewer squares printed on the ballot paper above the line—numbering the squares consecutively from the number 1 (in order of preference as described in paragraph (a)).

Note: See also section 269 for when the vote is formal.

Candidates who die before polling day

- (4) Where a candidate dies between the date of nomination and polling day, and the number of candidates remaining is greater than the number of candidates to be elected, a ballot paper shall not be informal by reason only:
- (a) of the inclusion on the ballot paper of the name of the deceased candidate;
 - (b) of the marking of any consecutive number opposite that name; or
 - (c) of the omission to place any number opposite that name, or of any resultant failure to indicate in consecutive order the voter's preferences.

240 Marking of votes in House of Representatives election

- (1) In a House of Representatives election a person shall mark his or her vote on the ballot paper by:
-

- (a) the voter has marked the ballot paper in accordance with paragraph 239(1)(b); or
 - (b) if there are more than 6 squares printed on the ballot paper below the line—the voter has consecutively numbered any of those squares from 1 to 6 (whether or not the voter has also included one or more higher numbers in those squares).
- (2) For the purposes of this Act:
- (a) a voter who, in a square printed on the ballot paper below the line, marks only a single tick or cross is taken as having written the number 1 in the square; and
 - (b) the following numbers written in a square printed on the ballot paper below the line are to be disregarded:
 - (i) numbers that are repeated and any higher numbers;
 - (ii) if a number is missed—any numbers that are higher than the missing number.

Note: Paragraph (2)(b) applies both for the purposes of determining whether a ballot paper is formal, and for the purposes of determining which numbers marked on a ballot paper are counted in the election.

Example: A ballot paper has squares below the line that are numbered 1, 2, 3, 3, 4, 5 and 6. The vote is informal because, by disregarding the numbers 3 and upwards under subparagraph (2)(b)(i), only 2 squares have been numbered.

A second ballot paper has squares below the line that are numbered consecutively from 1 to 9 and then 11, 12, 13 and 14. The vote is formal under paragraph (1)(b). However, only the squares numbered from 1 to 9 are counted for the purposes of sections 273 and 273A because the numbers 11 and upwards are disregarded under subparagraph (b)(ii) of this subsection.

269 Formal votes above the line

- (1) A ballot paper in a Senate election is not informal under paragraph 268(1)(b) if:
 - (a) the voter has marked the ballot paper in accordance with subsection 239(2); or

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(b) the voter has marked the number 1, or the number 1 and one or more higher numbers, in squares printed on the ballot paper above the line.

(1A) For the purposes of this Act:

(a) a voter who, in a square printed on the ballot paper above the line, marks only a single tick or cross is taken as having written the number 1 in the square; and

(b) the following numbers written in a square printed on the ballot paper above the line are to be disregarded:

- (i) numbers that are repeated and any higher numbers;
- (ii) if a number is missed—any numbers that are higher than the missing number.

Note: Paragraph (1A)(b) applies both for the purposes of determining whether a ballot paper is formal, and for the purposes of determining which numbers marked on a ballot paper are counted in the election.

Example: A ballot paper has squares above the line that are numbered 1, 1, 2 and 3. The vote is informal because, by disregarding the numbers 1 and upwards under subparagraph (2)(b)(i), no squares have been numbered.

A second ballot paper has squares above the line that are numbered consecutively from 1 to 9 and then 11, 12, 13 and 14. The vote is formal under paragraph (1)(b). However, only the squares numbered from 1 to 9 are counted for the purposes of sections 273 and 273A because the numbers 11 and upwards are disregarded under subparagraph (b)(ii) of this subsection.

Votes that are formal both above and below the line

(2) If a ballot paper in a Senate election:

(a) has squares marked above the line in accordance with subsection 239(2) or paragraph (1)(b) of this section; and

(b) has squares marked below the line in accordance with subsection 239(1) or section 268A;

then, for the purposes of sections 272 and 273, the only squares that are taken to have been marked on the ballot paper are the squares that are marked below the line.

271 Officers not to mark ballot papers so that voter can be identified

Except as authorized by this Act or the regulations, an officer shall not place upon any ballot paper any mark or writing which would enable any person to identify the voter by whom it is used.

Penalty: 10 penalty units.

272 Treatment of Senate ballot papers of voters who have voted above the line

- (1) This section applies if:
 - (a) a ballot paper for a Senate election is marked in accordance with subsection 239(2) or paragraph 269(1)(b); and
 - (b) one or more numbers, that are not disregarded under paragraph 269(1A)(b), are written in squares printed on the ballot paper above the line in relation to groups of candidates (each group being a *preferred group*).
- (2) The ballot paper is taken to have been marked as if, instead of the numbers referred to in paragraph (1)(b):
 - (a) each candidate in a preferred group was given a different number starting from 1; and
 - (b) candidates in a preferred group were numbered consecutively starting with the candidate whose name on the ballot paper is at the top of the group to the candidate whose name is at the bottom; and
 - (c) the order in which candidates in different preferred groups are numbered is worked out by reference to the order in which the groups were numbered on the ballot paper, starting with the group marked 1; and
 - (d) when all the candidates in a preferred group have been numbered, the candidate whose name is at the top of the next preferred group is given the next consecutive number.

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273 Scrutiny of votes in Senate elections

- (1) Subject to section 273B, in a Senate election for a particular State or Territory, the scrutiny must be conducted, and the vacancies filled under this section or under section 273A.
- (2) An Assistant Returning Officer must take the following steps in the presence of a polling official, and of any authorised scrutineers who attend:
 - (a) exhibit each securely fastened ballot-box for the inspection of the scrutineers;
 - (b) record the condition of the ballot-box;
 - (c) open the ballot-box and:
 - (i) remove the ballot papers from the box; and
 - (ii) count the ballot papers without inspecting them; and
 - (iii) record the number of ballot papers removed from the box;
 - (ca) count the number of first preference votes marked in each of the squares above the line;
 - (d) make, sign and keep a copy of a statement (which may be countersigned by a polling official, and by any scrutineers who are present if they so desire) setting out the number of first preference votes marked in each of the squares above the line and the number of ballot papers;
 - (da) transmit the number of first preference votes marked in each of the squares above the line to the Divisional Returning Officer as soon as practicable;
 - (e) seal up the ballot papers in a securely fastened container and endorse on each container a description of the contents of the container, and permit any scrutineers present, if they so desire, to countersign the endorsement;
 - (f) transmit the container to the Divisional Returning Officer for the relevant Division as soon as practicable, together with the statement under paragraph (d).
- (3) The Divisional Returning Officer for a Division must:

- (a) in relation to containers of ballot papers for the Division received under paragraph (2)(f), do the following:
 - (i) open the containers of ballot papers;
 - (ii) check the accuracy of the statement made under paragraph (2)(d) by carrying out the steps in paragraphs (2)(c) and (ca);
 - (iii) repeat the steps in paragraphs (2)(d) to (e) (as if the reference in paragraph (2)(da) to the Divisional Returning Officer were a reference to the Australian Electoral Officer for the State that includes the Division); and
 - (b) in relation to ballot-boxes for the Division received under this Act by the Divisional Returning Officer—repeat the steps in paragraphs (2)(c) to (e) (as if the reference in paragraph (2)(da) to the Divisional Returning Officer were a reference to the Australian Electoral Officer for the State that includes the Division); and
 - (c) keep a copy of:
 - (i) the statement made under paragraph (2)(d) by the Assistant Returning Officer; and
 - (ii) the statements made by the Divisional Returning Officer under that paragraph (as a result of subparagraph (a)(iii) and paragraph (b) of this subsection); and
 - (d) transmit the containers sealed under paragraph (2)(e) (as a result of subparagraph (a)(iii) and paragraph (b) of this subsection) to the Australian Electoral Officer for the State that includes the Division as soon as practicable, together with the statements made by the Divisional Returning Officer.
- (4) An Australian Electoral Officer must:
- (a) scrutinise all ballot papers received by him or her under paragraph (3)(d); and
 - (b) reject any informal ballot papers; and
 - (c) make, sign and keep a record of the preferences on the ballot papers that have been received by him or her (including

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informal ballot papers, and formal ballot papers that are not sequentially numbered).

- (7) Where, for the purposes of the succeeding provisions of this section:
- (a) the number of ballot papers or votes in any category is required to be ascertained;
 - (b) a quota, a transfer value or the order of standing of continuing candidates in a poll is required to be determined;
 - or
 - (c) a candidate is required to be identified;
- the Australian Electoral Officer for the State shall ascertain the number, determine the quota, transfer value or order, or identify the candidate, as the case may be.
- (8) The number of first preference votes given for each candidate and the total number of all such votes shall be ascertained and a quota shall be determined by dividing the total number of first preference votes by 1 more than the number of candidates required to be elected and by increasing the quotient so obtained (disregarding any remainder) by 1, and any candidate who has received a number of first preference votes equal to or greater than the quota shall be elected.
- (9) Unless all the vacancies have been filled, the number (if any) of votes in excess of the quota (in this section referred to as *surplus votes*) of each elected candidate shall be transferred to the continuing candidates as follows:
- (a) the number of surplus votes of the elected candidate shall be divided by the number of first preference votes received by the candidate and the resulting fraction shall be the transfer value;
 - (b) the total number of ballot papers of the elected candidate that express the first preference vote for that candidate and the next available preference for a particular continuing candidate shall be multiplied by the transfer value, the number so obtained (disregarding any fraction) shall be added to the number of first preference votes of the

continuing candidate and all those ballot papers shall be transferred to the continuing candidate;

and any continuing candidate who has received a number of votes equal to or greater than the quota on the completion of any such transfer shall be elected.

- (10) Unless all the vacancies have been filled, the surplus votes (if any) of any candidate elected under subsection (9), or elected subsequently under this subsection, shall be transferred to the continuing candidates in accordance with paragraphs (9)(a) and (b), and any continuing candidate who has received a number of votes equal to or greater than the quota on the completion of any such transfer shall be elected.
- (11) Where a continuing candidate has received a number of votes equal to or greater than the quota on the completion of a transfer under subsection (9) or (10) of the surplus votes of a particular elected candidate, no votes of any other candidate shall be transferred to the continuing candidate.
- (12) For the purposes of the application of paragraphs (9)(a) and (b) in relation to a transfer under subsection (10) or (14) of the surplus votes of an elected candidate, each ballot paper of the elected candidate that was obtained by the candidate on a transfer under this section shall be dealt with as if any vote it expressed for the elected candidate were a first preference vote, as if the name of any other candidate previously elected or excluded had not been on the ballot paper and as if the numbers indicating subsequent preferences had been altered accordingly.
- (13) Where, after the counting of first preference votes or the transfer of surplus votes (if any) of elected candidates, no candidate has, or fewer than the number of candidates required to be elected have, received a number of votes equal to the quota:
- (a) the candidate who stands lowest in the poll must be excluded; or
 - (b) if a bulk exclusion of candidates may be effected under subsection (13A), those candidates must be excluded;

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and the ballot papers of the excluded candidate or candidates must be distributed in accordance with subsection (13AA).

- (13AA) Where a candidate is, or candidates are, excluded in accordance with this section, the ballot papers of the excluded candidate or candidates must be transferred as follows:
- (a) the total number of ballot papers:
 - (i) expressing a first preference for an excluded candidate; or
 - (ii) received by an excluded candidate on distribution from another excluded candidate at a transfer value of 1 vote; being ballot papers expressing the next available preference for a particular continuing candidate must be transferred at a transfer value of 1 vote to the continuing candidate and added to the number of votes of the continuing candidate;
 - (b) the total number (if any) of other ballot papers obtained by an excluded candidate or the excluded candidates, as the case may be, must be transferred beginning with the ballot papers received by that candidate or those candidates at the highest transfer value and ending with the ballot papers received at the lowest transfer value, as follows:
 - (i) the total number of ballot papers received by the excluded candidate or candidates, as the case may be, at a particular transfer value and expressing the next available preference for a particular continuing candidate must be multiplied by that transfer value;
 - (ii) the number so obtained (disregarding any fraction) must be added to the number of votes of the continuing candidate;
 - (iii) all those ballot papers must be transferred to the continuing candidate.
- (13A) The procedure for a bulk exclusion, and the circumstances in which such an exclusion may be made, are as follows:
- (a) a continuing candidate (in this subsection called *Candidate A*) shall be identified, if possible, who, of the continuing candidates who each have a number of notional votes equal

to or greater than the vacancy shortfall, stands lower or lowest in the poll;

- (b) a continuing candidate (in this subsection called **Candidate B**) shall be identified, if possible, who:
- (i) stands lower in the poll than Candidate A, or if Candidate A cannot be identified, has a number of notional votes that is fewer than the vacancy shortfall;
 - (ii) has a number of notional votes that is fewer than the number of votes of the candidate standing immediately higher than him or her in the poll; and
 - (iii) if 2 or more candidates satisfy subparagraphs (i) and (ii)—is the candidate who of those candidates stands higher or highest in the poll;
- (c) in a case where Candidate B has been identified and has a number of notional votes fewer than the leading shortfall—Candidate B and any other continuing candidates who stand lower in the poll than that candidate may be excluded in a bulk exclusion; and
- (d) in a case where Candidate B has been identified and has a number of notional votes equal to or greater than the leading shortfall:
- (i) a continuing candidate (in this subsection called **Candidate C**) shall be identified who:
 - (A) has a number of notional votes that is fewer than the leading shortfall; and
 - (B) if 2 or more candidates satisfy sub-subparagraph (A)—is the candidate who of those candidates stands higher or highest in the poll; and
 - (ii) Candidate C and all other continuing candidates who stand lower in the poll than that candidate may be excluded in a bulk exclusion.
- (13B) Where, apart from this subsection, the number of continuing candidates after a bulk exclusion under subsection (13A) would be fewer than the number of remaining unfilled vacancies, subsection (13A) shall operate to exclude only the number of

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candidates, beginning with the candidate who stands lowest in the poll, that would leave sufficient continuing candidates to fill the remaining unfilled vacancies.

- (13C) Notwithstanding any other provision of this section (other than subsection (18)), where a candidate or candidates has or have been elected and there are surplus votes as a result of that election, paragraphs (13A)(a), (b), (c) and (d) may be applied as if references in those paragraphs to notional votes were references to adjusted notional votes.
- (14) Any continuing candidate who has received a number of votes equal to or greater than the quota on the completion of a transfer under subsection (13) or (15) of ballot papers of an excluded candidate or candidates, as the case may be, shall be elected, and, unless all the vacancies have been filled, the surplus votes (if any) of the candidate so elected shall be transferred in accordance with paragraphs (9)(a) and (b), except that, where the candidate so elected is elected before all the ballot papers of the excluded candidate or candidates, as the case may be, have been transferred, the surplus votes (if any) of the candidate so elected shall not be transferred until the remaining ballot papers of the excluded candidate or candidates, as the case may be, have been transferred in accordance with paragraphs (13AA)(a) and (b) to continuing candidates.
- (15) Subject to subsection (17) where, after the transfer of all of the ballot papers of an excluded candidate or the excluded candidates, as the case may be, no continuing candidate has received a number of votes greater than the quota:
- (a) the continuing candidate who stands lowest in the poll must be excluded; or
 - (b) if a bulk exclusion of candidates may be effected under subsection (13A), those candidates must be excluded; and the ballot papers of the excluded candidate or candidates must be transferred in accordance with subsection (13AA).
- (16) Where a candidate is elected during a transfer of ballot papers under subsection (13) or (15), no other ballot papers of an excluded
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candidate or candidates, as the case may be, shall be transferred to the candidate so elected.

- (17) In respect of the last vacancy for which two continuing candidates remain, the continuing candidate who has the larger number of votes shall be elected notwithstanding that that number is below the quota, and if those candidates have an equal number of votes the Australian Electoral Officer for the State shall have a casting vote but shall not otherwise vote at the election.
- (18) Notwithstanding any other provision of this section, where the number of continuing candidates is equal to the number of remaining unfilled vacancies, those candidates shall be elected.
- (19) At the conclusion of the scrutiny, the Australian Electoral Officer must place in containers all ballot papers transmitted to the officer under paragraph (3)(d), seal the containers and endorse a description of the contents on each container.
- (20) For the purposes of this Act and the *Representation Act 1983*:
- (a) the order of election of candidates in a Senate election shall be taken to be in accordance with the order of the count as a result of which they were elected, the candidates (if any) elected on the count of first preference votes being taken to be the earliest elected; and
 - (b) where 2 or more candidates are elected as a result of the same count, the order in which they shall be taken to have been elected shall be in accordance with the relative numbers of their votes, the candidate with the largest number of votes being taken to be the earliest elected, but if any 2 or more of those candidates each have the same number of votes, the order in which they shall be taken to have been elected shall be taken to be in accordance with the relative numbers of their votes at the last count before their election at which each of them had a different number of votes, the candidate with the largest number of votes at that count being taken to be the earliest elected, and if there has been no such count the Australian Electoral Officer for the State shall determine the order in which they shall be taken to have been elected.
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- (21) Subject to subsections (22) and (23), where, after any count under this section, 2 or more candidates have surplus votes, the order of any transfers of the surplus votes of those candidates shall be in accordance with the relative sizes of the surpluses, the largest surplus being transferred first.
- (22) Subject to subsection (23), where, after any count under this section, 2 or more candidates have equal surpluses, the order of any transfers of the surplus votes of those candidates shall be in accordance with the relative numbers of votes of those candidates at the last count at which each of those candidates had a different number of votes, the surplus of the candidate with the largest number of votes at that count being transferred first, but if there has been no such count the Australian Electoral Officer for the State shall determine the order in which the surpluses shall be dealt with.
- (23) Where, after any count under this section, a candidate obtains surplus votes, those surplus votes shall not be transferred before the transfer of any surplus votes obtained by any other candidate on an earlier count.
- (25) Where a candidate is elected by reason that the number of first preference votes received by the candidate, or the aggregate of first preference votes received by the candidate and all other votes obtained by the candidate on transfers under this section, is equal to the quota, all the ballot papers expressing those votes shall be set aside as finally dealt with.
- (26) A ballot paper shall be set aside as exhausted where on a transfer it is found that the paper expresses no preference for any continuing candidate.
- (27) In any case to which subsection 239(4) applies, a vote indicated on a ballot paper opposite the name of a deceased candidate shall be counted to the candidate next in the order of the voter's preference, and the numbers indicating subsequent preferences shall be deemed to be altered accordingly.
- (28) For the purposes of this section:

- (a) a transfer under subsection (9), (10) or (14) of all the surplus votes of an elected candidate;
- (b) a transfer under paragraph (13AA)(a) of all ballot papers of an excluded candidate or excluded candidates, received by that candidate, or one of those candidates:
 - (i) as the first preference vote; or
 - (ii) on distribution from another excluded candidate at a transfer value of 1 vote; or
- (c) a transfer under paragraph (13AA)(b) of all ballot papers received by the excluded candidate or candidates, as the case may be, at a particular transfer value;

each constitutes a separate transfer.

(29) In this section:

adjusted notional vote, in relation to a continuing candidate, means, in a case where a candidate or candidates has or have been elected, the sum of:

- (a) the number of notional votes of the continuing candidate; and
- (b) the number, before the transfer of any of the surplus votes, of those surplus votes.

continuing candidate means a candidate not already elected or excluded from the count.

leading shortfall, in relation to a particular stage during the scrutiny in a Senate election, means the shortfall of the continuing candidate standing highest in the poll at that stage.

notional vote, in relation to a continuing candidate, means the aggregate of the votes obtained by that candidate and the votes obtained by each other candidate who stands lower in the poll than him or her.

shortfall, in relation to a continuing candidate at a particular stage during the scrutiny in a Senate election, means the number of votes that the candidate requires at that stage in order to reach the quota referred to in subsection (8).

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State includes Territory.

vacancy shortfall, in relation to a particular stage during the scrutiny in a Senate election, means the aggregate of the shortfalls of that number of leading candidates equal to the number of remaining unfilled vacancies, the leading candidates being ascertained by taking the continuing candidate who stands highest in the poll, the continuing candidate who stands next highest in the poll, and so on in the order in which the continuing candidates stand in the poll.

- (30) In this section, a reference to votes, or ballot papers, as the case may be, of or obtained or received by a candidate includes votes, or ballot papers, as the case may be, obtained or received by the candidate on any transfer under this section.
- (31) For the purposes of this section, at any time after the counting of first preference votes the order of standing of the continuing candidates in the poll shall be determined as follows:
- (a) subject to paragraph (b), the continuing candidates shall stand in the poll in the order of the relative number of votes of each continuing candidate, with the continuing candidate with the greatest number of votes standing highest in the poll and the continuing candidate with the fewest number of votes standing lowest in the poll;
 - (b) if 2 or more continuing candidates have the same number of votes, those candidates shall stand in the poll in the order of the relative number of votes of each of those candidates at the last count at which each of them had a different number of votes, with the continuing candidate with the greater or greatest number of votes at that count standing higher in the poll and the continuing candidate with the fewer or fewest number of votes at that count standing lower in the poll, but if there has been no such count the Australian Electoral Officer for the State shall determine the order of standing of those candidates in the poll.
- (32) When the last vacancy is filled, the scrutiny shall immediately cease and any exclusion in progress shall not be completed.
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Part XXII—Court of Disputed Returns

Division 1—Disputed Elections and Returns

352 Interpretation

- (1) In this Part:

bribery or corruption means a contravention of section 326.

illegal practice means a contravention of this Act or the regulations.

undue influence means a contravention of section 327 of this Act or section 28 of the *Crimes Act 1914*.

- (2) For the purposes of this Part, a person who aids, abets, counsels or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the contravention of a provision of this Act, the *Crimes Act 1914* or the regulations under this Act shall be deemed to have contravened that provision.

353 Method of disputing elections

- (1) The validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise.
- (2) The choice of a person to hold the place of a Senator by the Houses of Parliament of a State or the appointment of a person to hold the place of a Senator by the Governor of a State under section 15 of the Constitution shall be deemed to be an election within the meaning of this section, and the provisions of this Division shall, so far as applicable, have effect as if that choice or appointment were an election within the meaning of this Division.
- (3) The choice of a person to hold the place of a Senator for the Australian Capital Territory by the Legislative Assembly for the Australian Capital Territory or the appointment of a person to hold

Part XXII Court of Disputed Returns

Division 1 Disputed Elections and Returns

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the place of such a Senator by the Chief Minister for the Australian Capital Territory under subsection 44(1) shall be deemed to be an election within the meaning of this section, and the provisions of this Division shall, so far as applicable, have effect as if that choice or appointment were an election within the meaning of this Division.

- (4) The choice of a person to hold the place of a Senator for the Northern Territory by the Legislative Assembly of the Northern Territory or the appointment of a person to hold the place of a Senator by the Administrator of the Northern Territory under subsection 44(2) shall be deemed to be an election within the meaning of this section, and the provisions of this Division shall, so far as applicable, have effect as if that choice or appointment were an election within the meaning of this Division.

354 The Court of Disputed Returns

- (1) The High Court shall be the Court of Disputed Returns, and shall have jurisdiction either to try the petition or to refer it for trial to the Federal Court of Australia (the *Federal Court*).
- (2) When a petition has been so referred for trial, the Federal Court shall have jurisdiction to try the petition, and shall in respect of the petition be and have all the powers and functions of the Court of Disputed Returns.
- (3) The High Court may refer to the Federal Court part of a petition in respect of an election or return, being a part that consists of a question or questions of fact.
- (4) Subject to any directions by the High Court, if the High Court refers part of a petition to the Federal Court under subsection (3):
 - (a) the Federal Court has jurisdiction to deal with the part of the petition that has been referred; and
 - (b) the Federal Court has, in respect of the petition, the powers and functions of the Court of Disputed Returns, other than the powers referred to in paragraphs 360(1)(v), (vi), (vii) and (viii) and in section 379; and

- (c) subject to any directions by the High Court, further proceedings in relation to the part of the petition are as directed by the Federal Court.
- (5) The High Court may have regard to the findings of the Federal Court in dealing with the petition and may in its discretion receive further evidence on questions of fact.
- (6) The jurisdiction conferred by this section may be exercised by a single Justice or Judge.

355 Requisites of petition

Subject to section 357, every petition disputing an election or return in this Part called the petition shall:

- (a) set out the facts relied on to invalidate the election or return;
- (aa) subject to subsection 358(2), set out those facts with sufficient particularity to identify the specific matter or matters on which the petitioner relies as justifying the grant of relief;
- (b) contain a prayer asking for the relief the petitioner claims to be entitled to;
- (c) be signed by a candidate at the election in dispute or by a person who was qualified to vote thereat, or, in the case of the choice or the appointment of a person to hold the place of a Senator under section 15 of the Constitution or section 44 of this Act, by a person qualified to vote at Senate elections in the relevant State or Territory at the date of the choice or appointment;
- (d) be attested by 2 witnesses whose occupations and addresses are stated;
- (e) be filed in the Registry of the High Court within 40 days after:
 - (i) if the polling day for the election in dispute is not the polling day for any other election—the return of the writ for the election; or

- (3) The Court shall not grant relief under subsection (2) unless it is satisfied that:
- (a) in spite of the failure of the petition to comply with paragraph 355(aa), the petition sufficiently identifies the specific matters on which the petitioner relies; and
 - (b) the grant of relief would not unreasonably prejudice the interests of another party to the petition.

359 Right of Electoral Commissioner to be represented

The Electoral Commission shall be entitled by leave of the Court of Disputed Returns to enter an appearance in any proceedings in which the validity of any election or return is disputed, and to be represented and heard thereon, and in such case shall be deemed to be a party respondent to the petition.

360 Powers of Court

- (1) The Court of Disputed Returns shall sit as an open Court and its powers shall include the following:
- (i) To adjourn;
 - (ii) To compel the attendance of witnesses and the production of documents;
 - (iii) To grant to any party to a petition leave to inspect in the presence of a prescribed officer the rolls and other documents (except ballot papers) used at or in connexion with any election and to take, in the presence of the prescribed officer, extracts from those rolls and documents;
 - (iv) To examine witnesses on oath;
 - (v) To declare that any person who was returned as elected was not duly elected;
 - (vi) To declare any candidate duly elected who was not returned as elected;
 - (vii) To declare any election absolutely void;
 - (viii) To dismiss or uphold the petition in whole or in part;
 - (ix) To award costs;

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- (x) To punish any contempt of its authority by fine or imprisonment.
- (2) The Court may exercise all or any of its powers under this section on such grounds as the Court in its discretion thinks just and sufficient.
- (3) Without limiting the powers conferred by this section, it is hereby declared that the power of the Court to declare that any person who was returned as elected was not duly elected, or to declare an election absolutely void, may be exercised on the ground that illegal practices were committed in connexion with the election.
- (4) The power of the Court of Disputed Returns under paragraph (1)(ix) to award costs includes the power to order costs to be paid by the Commonwealth where the Court considers it appropriate to do so.

361 Inquiries by Court

- (1) The Court shall inquire whether or not the petition is duly signed, and so far as Rolls and voting are concerned may inquire into the identity of persons, and whether their votes were improperly admitted or rejected, assuming the Roll to be correct, but the Court shall not inquire into the correctness of any Roll.
- (2) Where the Court makes inquiries in relation to ballot papers marked in Antarctica pursuant to the provisions of Part XVII, a statement of the particulars of the marking of the ballot papers prepared by an Australian Electoral Officer under subsection 260(3) is, unless the Court otherwise orders, conclusive evidence of the particulars stated.

362 Voiding election for illegal practices etc.

- (1) If the Court of Disputed Returns finds that a successful candidate has committed or has attempted to commit bribery or undue influence, the election of the candidate shall be declared void.

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- (2) No finding by the Court of Disputed Returns shall bar or prejudice any prosecution for any illegal practice.
- (3) The Court of Disputed Returns shall not declare that any person returned as elected was not duly elected, or declare any election void:
- (a) on the ground of any illegal practice committed by any person other than the candidate and without the knowledge or authority of the candidate; or
 - (b) on the ground of any illegal practice other than bribery or corruption or attempted bribery or corruption;
- unless the Court is satisfied that the result of the election was likely to be affected, and that it is just that the candidate should be declared not to be duly elected or that the election should be declared void.
- (4) The Court of Disputed Returns must not declare that any person returned as elected was not duly elected, or declare any election void, on the ground that someone has contravened the *Broadcasting Services Act 1992* or the *Radiocommunications Act 1992*.

363 Court to report cases of illegal practices

When the Court of Disputed Returns finds that any person has committed an illegal practice, the Chief Executive and Principal Registrar of the High Court shall forthwith report the finding to the Minister.

363A Court must make its decision quickly

The Court of Disputed Returns must make its decision on a petition as quickly as is reasonable in the circumstances.

364 Real justice to be observed

The Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or

Division 2—Qualifications and vacancies

376 Reference of question as to qualification or vacancy

Any question respecting the qualifications of a Senator or of a Member of the House of Representatives or respecting a vacancy in either House of the Parliament may be referred by resolution to the Court of Disputed Returns by the House in which the question arises and the Court of Disputed Returns shall thereupon have jurisdiction to hear and determine the question.

377 President or Speaker to state case

When any question is referred to the Court of Disputed Returns under this Part, the President if the question arises in the Senate, or the Speaker if the question arises in the House of Representatives, shall transmit to the Court of Disputed Returns a statement of the question upon which the determination of the Court is desired, together with any proceedings, papers, reports, or documents relating to the question in the possession of the House in which the question arises.

378 Parties to the reference

The Court of Disputed Returns may allow any person who in the opinion of the Court is interested in the determination of any question referred to it under this Part to be heard on the hearing of the reference, or may direct notice of the reference to be served on any person, and any person so allowed to be heard or so directed to be served shall be deemed to be a party to the reference.

379 Powers of Court

On the hearing of any reference under this Part the Court of Disputed Returns shall sit as an open Court and shall have the powers conferred by section 360 so far as they are applicable, and in addition thereto shall have power:

Part XXII Court of Disputed Returns
Division 2 Qualifications and vacancies

Section 380

- (a) to declare that any person was not qualified to be a Senator or a Member of the House of Representatives;
- (b) to declare that any person was not capable of being chosen or of sitting as a Senator or a Member of the House of Representatives; and
- (c) to declare that there is a vacancy in the Senate or in the House of Representatives.

380 Order to be sent to House affected

After the hearing and determination of any reference under this Part the Chief Executive and Principal Registrar of the High Court shall forthwith forward to the Clerk of the House by which the question has been referred a copy of the order or declaration of the Court of Disputed Returns.

381 Application of certain sections

The provisions of sections 364, 368, 370, 371, 373, 374 and 375 shall apply so far as applicable to proceedings on a reference to the Court of Disputed Returns under this Part.

Section 209

FORM E

		SENATE BALLOT PAPER (5) ELECTION OF (6) SENATORS							
<p>You may vote in one of two ways</p>									
<p><i>either</i> </p> <p>By numbering at least 6 of these boxes in the order of your choice (with number 1 as your first choice)*</p>	(8) A <input type="checkbox"/> (2)	(8) B <input type="checkbox"/> (2)	(8) C <input type="checkbox"/> (2)	(8) D <input type="checkbox"/> (4)	(8) E <input type="checkbox"/> (4)	(8) F <input type="checkbox"/> (2)	(8) G <input type="checkbox"/> (4)	(8) H <input type="checkbox"/> (4)	

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Schedule 1 Forms



<p>or</p> <p>By numbering at least 12 of these boxes in the order of your choice (with number 1 as your first choice)**</p>	A (2)	B (2)	C (2)	D (2)	E (2)	F (2)	G (2)	H (2)	Ungrouped
	<input type="checkbox"/> (1) <input type="checkbox"/> (3)	<input type="checkbox"/> (1) <input type="checkbox"/> (4)	<input type="checkbox"/> (1) <input type="checkbox"/> (4)	<input type="checkbox"/> (1) <input type="checkbox"/> (3)	<input type="checkbox"/> (1) <input type="checkbox"/> (4)	<input type="checkbox"/> (1) <input type="checkbox"/> (4)			

- (1) Here insert name of a candidate.
- (2) Here insert name of a registered political party or composite name of registered political parties if to be printed.
- (3) Here insert the name of a registered political party if to be printed.
- (4) Here insert name of a registered political party or word 'Independent' if to be printed.
- (5) Here insert name of State or Territory and year of election.
- (6) Here insert number of vacancies.

(8) Here insert the logo of a registered political party if to be printed.

* If the ballot paper has 6 or fewer squares above the line, replace the instruction with "By numbering these boxes in the order of your choice (with number 1 as your first choice)".

** If the ballot paper has 12 or fewer squares below the line, replace the instruction with "By numbering these boxes in the order of your choice (with number 1 as your first choice)".

Section 166

FORM CC

Nomination of Senators

To the Australian Electoral Officer for the [State/Territory] of [name of State or Territory].

I, [name], the registered officer [or deputy registered officer] of the [name of registered political party] hereby nominate the persons named below as Senators for the above [State/Territory] to serve in the Senate of the Parliament of the Commonwealth.

I wish/do not wish the logo of the [name of registered political party] entered in the Register to appear on the ballot paper.

Dated 20 .

[Signature]

Each of the candidates named below, states that:

- | | |
|---|---------------------|
| | Please tick [√] |
| • I am an Australian citizen | Yes [] No [] |
| • I am at least 18 years of age | Yes [] No [] |
| • I am an elector or qualified to be an elector | Yes [] No [] |
| • I am not, by virtue of section 44 of the Constitution, incapable of being chosen or of sitting as a Senator | Yes [] No [] |

and declares as follows:

- I am qualified under the Constitution and the laws of the Commonwealth to be elected as a Senator;
- I am not, and do not intend to be, a candidate in any other election to be held on the same day as the election to which the above nomination relates;
- I consent to act as a Senator for the above [State/Territory] if elected.

Each of the candidates named below requests that the Christian or given names of the candidate appear on the ballot paper in the form shown below.

Schedule 1 Forms

Name of candidate as enrolled		Form of Christian or given names to appear on ballot paper	Residential address	Occupation	Signature
Surname or family name	Christian or given names				

Section 272 of the *Commonwealth Electoral Act 1918* at the time of *In re Wood* (1988) 167 CLR 145.

In 2010 “ballot-paper” was changed to “ballot paper”: *Statute Law Revision Act 2010* (Cth). Otherwise, this was the form of s 272 until the *Commonwealth Electoral Amendment Act 2016* (Cth).

272. (1) For the purposes of section 273, where:

(a) a ballot-paper in a Senate election has been marked in accordance with subsection 239 (2) by a mark having been placed in a square printed above the names of candidates in a group; and

(b) the candidates in that group have only one group voting ticket registered for the purposes of that election;
that ballot-paper shall be deemed to have been marked in accordance with that ticket.

(2) For the purposes of section 273, where:

(a) in a Senate election, a ballot-paper has, or ballot-papers have, been marked in accordance with subsection 239 (2) by a mark having been placed in a square printed above the names of candidates in a group; and

(b) the candidates in that group have 2 group voting tickets registered for the purposes of that election;

then:

(c) if the number of ballot-papers is an even number - half of the ballot-papers shall be taken to have been marked in accordance with one of the tickets and the other half in accordance with the other ticket; or

(d) if the number of ballot-papers is not an even number:

(i) one of the ballot-papers shall be deemed to have been marked in accordance with whichever of the 2 tickets is determined by lot by the Australian Electoral Officer for the relevant State or Territory; and

(ii) half the remainder (if any) of the ballot-papers shall be deemed to have been marked in accordance with one of the tickets and the other half in accordance with the other ticket.

(3) For the purposes of section 273 where:

(a) in a Senate election a ballot-paper has, or ballot-papers have, been marked in accordance with subsection 239 (2) by a mark having been placed in a square printed above the names of candidates in a group; and

(b) the candidates in that group have 3 group voting tickets registered for the purposes of that election;

then:

(c) if the number of ballot-papers is a number divisible by 3 without any remainder - one-third of the ballot-papers shall be taken to have been marked in accordance with one of the tickets, one-third of the ballot-papers shall be taken to have been marked in accordance with another one of the tickets and the other one-third in accordance with the other ticket;

(d) if there is only one ballot-paper or the number of ballot-papers is a number divisible by 3 with a remainder of 1:

(i) the ballot-paper or one of the ballot-papers shall be deemed to have been marked in accordance with whichever of the 3 tickets is determined by lot by the Australian Electoral Officer for the relevant State or Territory; and

(ii) one-third of the remainder of the ballot-papers (if any) shall be deemed to have been marked in accordance with one of the tickets, one-third of that remainder shall be deemed to have been marked in accordance with another one of the tickets and the other one-third of that remainder shall be deemed to have been marked in accordance with the other ticket; or

(e) if there are 2 ballot-papers or the number of ballot-papers is a number divisible

by 3 with a remainder of 2:

(i) one of the ballot-papers shall be taken to have been marked in accordance with whichever of the 3 tickets is determined by lot by the Australian Electoral Officer for the relevant State or Territory;

(ii) one of the ballot-papers shall be taken to have been marked in accordance with whichever of the other 2 tickets is determined by lot by the Australian Electoral Officer for the relevant State or Territory; and

(iii) one-third of the remainder of the ballot-papers (if any) shall be deemed to have been marked in accordance with one of the tickets, one-third of that remainder shall be deemed to have been marked in accordance with another one of the tickets and the other one-third of that remainder shall be deemed to have been marked in accordance with the other ticket.

(4) Subsection (5) applies if, and only if, effect cannot be given to subsection (2) or (3), as the case requires, for any reason.

(5) For the purposes of section 273, where:

(a) a ballot-paper in a Senate election has been marked in accordance with subsection 239 (2) by a mark having been placed in a square printed above the names of candidates in a group; and

(b) the candidates in that group have 2 or 3 group voting tickets registered for the purposes of that election;

then, to the extent that the preferences shown in each ticket commencing with the first preference are the same, the voter shall be taken to have marked the ballot-paper so as to express those preferences and the voter shall be taken not to have expressed any further preferences.

(6) Where, in a Senate election, a ballot-paper has, or ballot-papers have, been marked in accordance with subsection 239 (2) by a mark having been placed in a square printed above the name of a candidate who has lodged a statement under section 211A, this section applies to that ballot-paper or those ballot-papers as if:

(a) a reference to the candidates in a group were a reference to the candidate;

(b) a reference to the names of the candidates in a group were a reference to the name of the candidate; and

(c) a reference to a group voting ticket or group voting tickets registered for the purposes of the election were a reference to the order of preferences, or the orders of preferences, given in that statement, as the case may be.