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

RE ROBERT JOHN DAY

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

REPLY SUBMISSIONS OF

THE ATTORNEY-GENERAL OF THE COMMONWEALTH

Filed on behalf of the Attorney-General of the Commonwealth by:

The Australian Government Solicitor
Level 42, MLC Centre
19 Martin Place
Sydney NSW 2000

Date of this document: 30 January 2017
Contact: Simon Daley / Simon Thornton

File ref: 16008239
Telephone: 02 9581 7490 / 02 6253 7287
Facsimile: 02 9581 7652
E-mail: simon.daley@ags.gov.au / simon.thornton@ags.gov.au

PART I PUBLICATION AND SCOPE OF REPLY

1. This reply, both to Mr Day (**DS**) and Ms McEwen (**MS**), is in a form suitable for publication on the internet. With the parties' consent, reference is made to facts found by Gordon J in the "Facts Judgment" (**FJ**): [2017] HCA 2.

PART II SUBMISSIONS IN REPLY TO MR DAY (QUESTIONS (A) AND (C))

2. Mr Day's submissions proceed upon: (1) an unduly narrow approach to the construction generally of s 44; (2) an erroneous interpretation of the phrase "pecuniary interest in any agreement"; and (3) legal characterisations of the facts that ought not to be accepted.

Unduly narrow approach to construction generally

3. ***General approach***: The legislative power of the Parliament to prescribe the qualifications of parliamentarians (ss 16, 34 and 51(xxxvi)) is expressly "subject to [the] Constitution" — and therefore "subject to" s 44. Section 44 confines the scope of s 51(xxxvi), not the other way around. Contrary to DS [25]-[31], the existence of power to prescribe *qualifications* provides no reason to prefer a narrow construction of the s 44 *disqualifications*.

4. *Mulholland*, *McGinty*, *Roach*, and *Rowe*, on which Mr Day relies, all concerned asserted *implications* from the text and structure of the Constitution. Such implications are to be drawn only if and to the extent "necessary". [1] Conversely, express constitutional rules cannot be approached with any *a priori* assumption in favour of a narrow reading.

5. Mr Day's submission is even weaker in light of s 44 being directed to protecting the *integrity* of the exercise of Parliament's legislative power. Precisely because Commonwealth legislative power is, as Mr Day submits, broad in many respects, it is important that the body in which it is vested retain its institutional integrity. Section 44 is directed to that systemic object: see the Attorney-General's submissions in chief (**CS**) at [27], [31].

6. ***Authority of Webster***: To the extent necessary, the Attorney-General applies to re-open the decision of Barwick CJ in *Re Webster* (1975) 132 CLR 270. It is accepted that the Court would not lightly depart from *Webster*. But whether it will is not "answered by the application of a well-defined rule" or, contrary to DS [68], "such visceral criteria as 'manifestly' ... wrong"; it requires, instead, "evaluation of factors which may weigh for and against overruling".[2] Contrary to DS [65]-[67], it is relevant that *Webster* is a decision of a single judge (even if technically exercising a coordinate jurisdiction). It is also relevant that *Webster*: did not rest on any principle carefully worked out in a significant succession of cases; rested on a pre-*Cole v Whitfield* understanding of the Convention Debates; applied now-disfavoured principles of construction of penal provisions; and thereby

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1 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, [39], [83]-[96], [171].

2 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 352 [70] (French CJ).

reached a narrow construction that does not cohere with the purpose or history of s 44(v).

7. ***Attorney-General's test***: Contrary to Mr Day's mischaracteristion (DS [22], [97]), the Attorney-General does not seek to constitutionalise an apprehended bias test. The question is not what a fair-minded lay observer might apprehend. The question is whether there is, adjudged by the Court, a real risk that a person could be influenced, or perceived to be influenced, in relation to parliamentary affairs by an expectation of a monetary gain or loss arising from the existence, performance, or breach of an agreement with the executive government of the Commonwealth: see CS [40].

8. The risk of *perceived* as distinct from *actual* influence, contrary to DS [97], is no less corrosive of the fidelity and trust between the people and their representatives that underpins the prescribed system of representative and responsible government. That the test calls for evaluative judgment does not, contrary to DS [58], [101], introduce intolerable uncertainty. Many penal provisions prescribe norms breach of which depends upon evaluative judgment.[3] So too is the accepted test for the application of s 44(i) of the Constitution evaluative.[4] Indeed, Mr Day's own proposed test (DS [21]) calls for evaluative judgment. The necessity for evaluation does not provide a basis for discriminating between the Attorney-General's and Mr Day's respective constructions. Further, the particular concern in *CFMEU v Mammoet*, on which Mr Day relies (DS [58], [101]), was avoiding a construction by which persons "could become liable to a penalty, not only by taking some positive action, but also by doing no more than maintaining the status quo".[5] That is a very particular mischief that constructional principles are calculated to avoid,[6] but not one that is relevant in this case.

9. The necessity for evaluative judgment also answers Mr Day's "multiplied" examples at DS [35]. In each of those examples, the parliamentarian may or may not have a prohibited interest depending on an assessment of all the facts (and not merely of the generalised descriptions there given). For example, the risk of executive influence over a "creditor of a person who is owed money under an agreement with the Commonwealth" (DS [35(b)]) will be lower, and perhaps trivial, if there is nothing more to it than that. But it may be sufficiently cognisable to engage s 44(v) if, say, the debt is factually connected with the agreement with the Commonwealth or if the creditor can effectively direct Commonwealth payments in satisfaction of the debt. In all cases, the question is whether the risk of influence or perceived influence is real as assessed in light of the constitutional objects of s 44(v): CS [40]-[41].

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3 See, eg, false and misleading or unconscionable conduct (*ACL*, *Corporations Act 2001* (Cth), and *ASIC Act 2001* (Cth)). See also insider trading prohibitions engaged in respect of information which, if generally available, a "reasonable person would expect it to have a material effect on the price or value of" financial products: s 1042A of the *Corporations Act 2001* (Cth).

4 See CS [41] fn 39, referring to *Sykes v Cleary* (1992) 176 CLR 77 at 107-108, 114.

5 *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, 635 [49].

6 See also *DPP (Cth) v Poniatowska* (2011) 244 CLR 408 at [29].

Misconstruction of pecuniary interest "in any agreement"

10. Mr Day attempts to distinguish between interests "in" an agreement and interests "arising from" an agreement: DS [78]. That is a distinction without a difference, in the context of s 44(v). Mr Day's submission does not accommodate the express contemplation that a person may have an "indirect" pecuniary interest "in an agreement". Mr Day concedes that a person may come within s 44(v) although not being a party to the relevant agreement: DS [88]. He does not explain how such a person could *ever* have a prohibited interest if, as he submits, an interest "arising from" is too remote to be an interest "in" the agreement.

11. Indeed, Mr Day's reliance on the 1782 Act, its colonial replicates, and cases thereon is misplaced for this very reason. As he correctly observes at DS [89], the 1782 Act "did not apply to persons who did not contract with the government themselves". Section 44(v) expressly goes further than the 1782 Act. Its text was adopted after specific debate and consideration of the wider constitutional purpose identified at CS [27]-[31].

12. Mr Day also relies on *Le Feuvre* (1854) 23 LJQB 254 and *Anderson* (1880) NSWR 338, cases about local government legislation. He submits that these cases were "followed" and "applied" in *Norton v Taylor* (1905) 2 CLR 291: DS [79], [99]. That is not so. *Norton v Taylor*, being a refusal of special leave to appeal from a decision which followed those earlier cases, said only (at 291) that the decision below was "unattended with sufficient doubt to justify ... special leave" and therefore does not have precedential force.[7]

13. In any event, *Norton v Taylor* turned on its own facts and, in particular, the degree of connection between the Council's contract with Henley's, and Henley's contract with the company of which the councillor Taylor was a member. Griffith CJ observed (at 295) that there was "no further evidence as to any contract except that the defendant's firm from time to time supplied timber to Henley's... which was used in carrying out the contract with the Council". O'Connor J (at 297) indicated that "evidence might in such a case as this be given which would establish" a prohibited interest, "for instance, that he was not to be paid for the timber unless it should be accepted by the Council". Thus, these cases, contrary to DS [78]-[86], actually *demonstrate* that a person, though standing at some distance from a government contract, might nonetheless have a prohibited interest in it. It all depends on a close assessment of the facts.

Wrong characterisations of the facts

14. Mr Day's analysis of the facts is inapposite in several respects. Contrary to DS [108], it is not fatal that the Lease "cannot be understood as an agreement by which the Crown was seeking to compromise the independence of Senator Day". It is enough that the existence, performance

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7 *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, 643 (McHugh J).

or breach of the Lease would give rise to a monetary gain or loss by Mr Day by which there is a real risk that Mr Day might be influenced.

15. Contrary to DS [110], little weight should be placed upon the "two layers of discretionary powers" between Fullarton Investments as trustee of the Fullarton Road Trust and Mr Day as a beneficiary of the Day Family Trust. As to the first "layer", there was an "arrangement", implemented (FJ [103], [108]) and subsisting at the relevant time (FJ [110]-[111]) and with nothing to suggest that it would not have continued (FJ [124]), by which the Fullarton Road Trust "would collect the rental allowance provided by the government and ... pass the rent back to the Day Family Trust", without any profit or loss in the Fullarton Road Trust (FJ [97(5)-(6)], [114]) (Cf AF [81]). As to the second "layer", the class of beneficiaries of the Day Family Trust was confined and Mr Day's wife was the sole director and shareholder of B&B Day: see CS [64]. And the rental payments were, in fact, directed to be paid to a bank account owned by Mr Day (not the Trust): FJ [124(7)].

16. Contrary to DS [121]-[126], there is ample basis to infer that Mr Day controlled the direction of rental payments under the Lease: FJ [124]. Prior to the execution of the Lease, Fullarton Investments provided DTZ with Fullarton Nominees' bank details, identifying Mr Day as the contact person (**CB 800**). Mr Day in fact owned the Fullarton Nominees bank account (FJ [124(7)]). The later payment direction to JLL signed by Mr Steinart (to which Mr Day refers at DS [123]) identified Mr Day's parliamentary assistant, Ms Montgomery, as the "Accounts Contact" (**CB 924**) and it was she who pursued the rental payments and provided the signed direction (FJ [124(3)-(5)]; **CB 921-923**). Moreover, Mr Day maintained in August 2016 that "an offer was made to the department that if this was in any way a problem then the lease payments could go into a Fullarton Investments Pty Ltd-owned bank account" (AF [65.2] **CB 433**): the potential "problem" was that Mr Day was the owner of the account, and the payment direction combined with his offer to have it changed shows his control over the direction of rental payments.

17. Contrary to DS [128]-[129], Mr Day's expectation that rental payments would be applied for his benefit highlights the pecuniary character of his interest in the Lease and demonstrates the financial "stake" that he personally had in the agreement.

18. There is no "contrivance" in postulating a breach of Lease by the Commonwealth (DS [131]-[133]). The monetary loss that would flow from breach is but the flip-side of the monetary gain that flows from performance and illustrates Mr Day's pecuniary interest. Nor is the Commonwealth's liability for damages for breach any answer to that pecuniary interest (DS [134]). The submission appears to be that Mr Day is financially indifferent as between performance or breach of the Lease because of the Commonwealth's liability to compensate for any breach. But even if that be right, the very notion of compensation is predicated on the loss of some benefit, indicating that Mr Day did have a pecuniary interest in the Lease.

19. Contrary to DS [138], Mr Day's interest arising by virtue of the Commonwealth's option to renew the Lease is not merely an "interest in a future agreement". The benefit to be gained certainly extends to the benefit of any future agreement, but arises in *this* Lease through the option, exercisable by the Commonwealth in its executive discretion.

PART III SUBMISSIONS IN REPLY TO MS MCEWEN (QUESTION (B))

20. Ms McEwen's submissions propose a manner of special count that should not be adopted. Ignoring preferences for Family First would entail, as submitted at MS [69], that "the 'deemed' vote for the number two candidate in that group would be disregarded". No sufficient reason is shown for disregarding the preferences of a significant number of electors (24,817: **CB 415**) not to mention the lawful operation of s 272 of the Electoral Act. In particular, there is no sufficient factual foundation to support the submission that Mr Day "distorted" the vote (MS [61]-[66]) or that a recount *ignoring* only Mr Day would distort the true legal intent of the voters (which is the correct question according to *Wood*): FJ [241]-[246].

21. "Distortion" aside, Ms McEwen's "first argument" is that there was no valid group: MS [67]-[79]. That argument is contrary to authority.[8] The reasoning in *Wood* applies equally under the new voting rules: whereas previously an above-the-line preference was treated as an adoption of a group ticket, now each above-the-line preference is treated as a sequential preference of the candidates underneath the group: s 272. The statutory analogue for a recount that was adopted in *Wood* remains: s 273(27). *Sykes v Cleary* and *Free v Kelly* concerned the materially different form of elections for the House of Representatives.[9] Further, MS [78] rests on the unsound factual proposition that "a large proportion of the two member group party vote is the likely result of the presence of the disqualified candidate": cf FJ [244]. Ms McEwen's "second argument" is that the group square is affected by fraud: MS [80]-[91]. There is no factual basis for that submission: FJ [195]-[204].

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Stephen Donaghue QC
Commonwealth Solicitor-General
T: 02 6141 4139
E: stephen.donaghue@ag.gov.au

.....
Neil Williams SC
Sixth Floor Selborne/Wentworth Chambers
T: 02 9235 0156
E: njwilliams@sixthfloor.com.au

.....
Craig Lenehan
5 St James Hall

.....
Brendan Lim
Eleven Wentworth

Counsel for the Attorney-General of the Commonwealth

8 *In Re Wood* (1988) 167 CLR 145 at 166-167 (The Court).

9 *Sykes v Cleary* (1992) 176 CLR 77 at 102.