

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



ANNOTATED REPLY SUBMISSIONS

OF Ms McEWEN

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PART I: PUBLICATION

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

PART II: ARGUMENT IN REPLY

2 These submissions are filed in response to the Annotated Submissions of Robert Day of 19 January 2017 (DS), and to the Submissions of the Attorney-General of the Commonwealth of 6 January 2017 (CS).

Mr Day's construction arguments

- 3 Mr Day's approach to the construction of s 44(v) appears to involve the argument that the sole purpose of the provision is to prevent the executive having undue influence over Parliamentarians and that, seemingly, only an agreement that is of this character, that is, only
10 an agreement that, by reason of its terms, could influence Parliamentarians in relation to the member's parliamentary affairs is caught (see eg at DS [21]). The argument should be rejected, for the following additional reasons beyond those already put by Ms McEwen (including as to the broader purpose of the provision: MS [24]-[30]). The language of the provision directs attention to the nature of the member's interest in the agreement and with whom that agreement is made. As to the latter, it is sufficient that it is with the "public service of the Commonwealth". Mr Day no longer disputes that the lease is such an agreement: DS [104]. The provision is not concerned with the character of the agreement. The words in s 44(v), namely "any agreement", are clear.
- 20 4 *Hobler v Jones* [1959] Qd R 609 does not assist Mr Day: cf DS [23]-[24]. The issue there was whether the lease in question was an agreement "for or on account of the public service". This phrase was construed as referring to the subject matter of the contract – ie that "it must be established that such subject matter [of the contract] deals with some service to the public" (trial judge at 614-615, with the Full Court agreeing at 619-620). That construction has no role to play with respect to s 44(v).
- 5 Ms McEwen does not, as Mr Day implies (DS [95]ff), adopt the Attorney's submission that there must be "a real risk that person could be influenced, or perceived to be influenced, in relation to Parliamentary affairs" before s 44(v) is engaged: CS [40]; cf MS [23]. Ms McEwen's approach is to apply the language of the text, without a separate assessment
30 of whether the purpose of the provision is satisfied. The purpose informs construction; it is not part of the test on Ms McEwen's approach. Properly construed, the provision is then to be applied to any "agreement" with the Commonwealth to ascertain whether the person has a relevant pecuniary interest. The provision *assumes* that when its terms are satisfied there will be a risk of influence by the executive or a risk of potential conflict; that is why the provision has been drafted in the way that it has. There is no additional requirement that there *in fact* be a real (objective) risk of influence or conflict.
- 6 Mr Day submits (in reliance on *Webster* at 280) that there will only be a pecuniary interest in the agreement where "through the possibility of financial gain by the existence or the performance of the agreement, the person could conceivably be influenced by the Crown in
40 relation to Parliamentary affairs": DS [85]. This is the type of reasoning that led Barwick CJ to hold that an agreement for the purpose of s 44(v) must be executory. This interpretation is not founded in the text of the provision and it should not be accepted: MS [24]-[30]. Either

the elements, as properly construed, are satisfied, or they are not. In so far as *Webster* suggests otherwise, it should not be followed. In any event, as submitted below, even if this approach is accepted, s 44(v) is still engaged here.

- 7 As to the status of *Webster*, the fact that it was not capable of appeal does not alter the fact that it was a decision of one justice of this Court (cf DS [66]). This is the first occasion for consideration of the provision by the Full Court, and a judgment of a single Justice does not bind a Full Court. In any event, to the extent that the *John* factors are relevant,¹ *Webster* did not rest upon a principle carefully worked out in a significant succession of cases; it is a single decision of one Justice, thus no potential for disagreement by other Justices has arisen; it has achieved no useful result in the sense that it is contrary to the better view of the provision; and Mr Day's submission that *Webster* has "arguably been approved by the government in the House of Representatives" (DS [70]) is inconsistent with the definitive role of this Court in construing the Constitution, and ignores the fact that the Full Court has never yet undertaken that task. That the Parliament may have coordinate jurisdiction to determine contraventions of the provision does not undermine that point (cf DS [71]).
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- 8 Mr Day submits that s 44(v) should be narrowly construed because of the "profound consequences" of disentitling a citizen from being eligible to be elected: DS [20]. Yet that is the very purpose of the provision. That it has that effect is no reason for reading it down. A similar argument was made by Mr Sykes in *Sykes v Cleary* (at 88) but, it must be inferred, did not persuade the majority.² Likewise, Mr Sykes sought to rely (at 88) on the fact that the provision had penal consequences in advocating a narrow construction, to no avail: cf DS [54]ff.
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- 9 Mr Day's submissions as to "rigidity" rely on quotations relating to the breadth of the doctrines of representative and responsible government: DS [27]-[30]. Those doctrines are given effect by the Constitution to the extent they arise from its text and structure.³ It is incorrect reasoning to then invoke those doctrines to read down terms of the Constitution.
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- 10 Mr Day relies on what he asserts to be "ample alternative measures" in the Constitution to ensure the integrity of Parliament to contend that s 44(v) need not be concerned with conflicts of interest: DS [60]. The alternative measures relate to circumstances in which a member of Parliament has a conflict of interest in relation to the matter being considered by the Parliament. Those measures do not address the "mischief" to which s 44(v) is primarily directed. Section 44 establishes core requirements for eligibility. That the Parliament is authorized to go further in setting qualifications says little, if anything, as to how the constitutional requirements should be construed.
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- 11 Mr Day criticizes the approaches put by Ms McEwen and the Attorney as too uncertain: DS [101]. Yet the approach adopted in *Webster* was seen by Barwick CJ to "turn largely on technical concepts of the law of contracts" (at 277) – a formalistic approach not consonant with the way this Court now deals with issues of constitutional construction. In any event, the purposive approach adopted by his Honour at 280 itself raises issues of fact and degree, which is not unusual in the constitutional context. Barwick CJ's approach does not give rise
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¹ *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438-439. Cf DS [68].

² (1992) 176 CLR 77, note 96-98; 108, 130-131,132; cf 121 per Deane J (in dissent).

³ *Lange v ABC* (1997) 189 CLR 520, 566-657.

to a bright line. Mr Day seems to assume otherwise in giving the examples of the purportedly too-broad approach at DS [35]. But it is not clear how Mr Day's proposed construction would avoid many of his examples from being caught.

- 12 Further, even if a literal reading of s 44(v) leads to "hard" consequences for candidates in some cases, so be it: cf *Ford v Andrews* (1916) 21 CLR 317, 330 per Isaacs J. As Isaacs J explained (in dissent) in *Ford v Andrews*, "public safety is the highest consideration, and so the Legislature has, in my opinion, said": at 330. Likewise, Sir Edmund Burke put it as follows: an "individual has an option"; they can either "retain their political rights and sit in Parliament" or retain their "professional and commercial rights" and contract with the government: see MS [25].
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- 13 Mr Day asserts that the indirect or direct pecuniary interest must be "in the agreement" not "flowing from" or "arising from" the agreement, by which he means it does not include a person who stands to gain or lose from the performance or existence of the agreement: DS [78]. Yet the fact that s 44(v) includes the word "indirect" makes clear that the pecuniary interest may arise other than, for example, by being a party to the agreement. It must thus encompass broader notions of financial consequences and practical effects.
- 14 Mr Day appears to submit (although it is not completely clear) that an indirect interest in an agreement can only arise through membership of a proprietary company: DS [93]. That construction is not supported by the text. The qualification relating to closely-held companies assumes that a pecuniary interest can arise outside the qualification, but does not suggest that that is the only way in which such an interest might arise. There is no reason why an indirect interest arising through a trust structure, for example, should be treated differently from an interest arising via membership of a proprietary company.
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Application to Mr Day

- 15 **Mr Day was a beneficiary of the Day Family Trust:** Ms McEwen has submitted that individual beneficiaries of a discretionary family trust of the kind at issue here have an indirect pecuniary interest in the assets of the trust. That follows from the plain meaning of "indirect or direct pecuniary interest", the purpose of s 44(v) and a comparison of the position of members of a proprietary company (who have no proprietary interest in the company's assets and no more than an expectation that the directors might distribute profits (or capital) to members) and the position of beneficiaries of a discretionary family trust: MS [36]-[40]. Mr Day's answer does not address this reasoning: cf DS [107]-[108], [117].
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- 16 Ms McEwen also submitted that a beneficiary who also controls the trust would self-evidently have a pecuniary interest in the trust's assets: MS [39]. Mr Day's answer is to assert that, as a matter of fact, Mr Day did not have control over the trust (DS [118]). Gordon J declined to find that Mr Day "remained in effective control" of B&B Day after ceasing to be a director on 30 June 2014, but her Honour did find that after that date, in relation to some of the activities of B&B Day, Mr Day was a person who "made, or participated in making, decisions that affected a substantial part of the business of B&B Day", and "although Mr Day was not validly appointed as a director, he is shown to have done acts in the position of a director".⁴ Further, it remains the fact that Mr Day is the appointor of the
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⁴ *Re Day* [2017] HCA 2, [62]-[65].

trust (CB 29, 49 (cls 2(a)(i), 18 of the Day Family Trust)). As French J stated in *ASIC v Carey (No 6)* (2006) 153 FCR 509 at [37], “the beneficiary who effectively controls the trustee’s power of selection because he or she is the trustee or one of them and/or *has the power to appoint a new trustee* has something approaching a general power and the ownership of the trust property” (emphasis added).

- 17 **The property is held on trust for the Fullarton Road Trust / Agreement re payment of rent:** Mr Day disputes the factual assertions underlying Ms McEwen’s contention (DS [140]-[147]), but does not explain why, if some or all of these facts are made out, Mr Day does not have a pecuniary interest in the lease for the reasons put forward by Ms McEwen: MS [44]-10 [45]; cf DS [140]. As Gordon J found, the arrangement (which subsisted) was that “the Fullarton Road Trust was to hold the Fullarton Road Property, it would collect the rental allowance provided by the government and it would then pass the rent back to the Day Family Trust with the result that there would be no profit or loss in the Fullarton Road Trust”.⁵
- 18 Mr Day does not directly address Ms McEwen’s contention that Mr Day had a pecuniary interest in the lease for the reason that the Commonwealth had been directed to pay rent to a bank account that stood in Mr Day’s name (ie the Fullarton Nominees account): MS [49].⁶ Nor does Mr Day deal with Ms McEwen’s contention that Mr Day had a pecuniary interest in the lease because Fullarton Investments and B&B Day had an agreement that the any rent would be paid to B&B Day as trustee for the Day Family Trust: MS [49]⁷. Mr Day’s argument is confined to the Attorney-General’s assertion that Mr Day “controlled the rental payments” or “expected that rent would be applied for his benefit”: DS [121]ff, [128]ff. Those arguments do not address Ms McEwen’s contentions.
- 20 **Mr Day was a debtor of the Day Family Trust:** Accepting that Mr Day was a debtor and not a creditor of the Day Family Trust (DS at [119], cf MS [41])⁸, and having regard to the facts (as found by Gordon J) that the property is held on trust for the Fullarton Road Trust and rent is to be paid to the Day Family Trust, this still provides a basis why Mr Day has a pecuniary interest in the assets of the trust, including the rental payments under the lease. As at the years ended 30 June 2013, 30 June 2014 and 30 June 2015, the Day Family Trust had lent Mr Day over \$1.5 million, over \$2.2 million and over \$2.6 million respectively: CB 455, 30 CB 668, CB 810; *Re Day*, [173]. The Day Family Trust thus serves as significant source of funds for Mr Day resulting in him having a real pecuniary interest in its assets.
- 20 **Purpose:** Even if Mr Day’s statement of the limited purpose of s 44(v) is correct, that purpose is engaged here. Mr Day, as a member of Parliament, could conceivably have been influenced by the government by the grant of the lease or in its performance (through, for example, the Commonwealth’s performance of its obligation to pay rent; as this case shows, there are a number of circumstances in which the Commonwealth might not perform its obligations, or at least not perform those obligations to the satisfaction of its counter-party). Whether or not the Commonwealth actually knew of his continuing connection at the time

⁵ Ibid, [100], also [97(5)], [103], [111].

⁶ *Re Day* [2017] HCA 2, [124].

⁷ *Re Day* [2017] HCA 2, [97(5)]: “the Fullarton Road Trust was to hold the Fullarton Road property, it would collect the rental allowance provided by the government and it would then pass the rent back to the Day Family Trust ...”. See also at [100], [111], [114], [123].

⁸ Ibid, [173]-[174].

of entry into the lease is not to the point (cf DS [106], [108]-[109]); the potential for influence was always there.

Response to the Attorney-General in relation to question (b)

- 21 The Attorney-General submits that a special count would give effect to the true legal intent of the voters, and that the “statutory analogue” of s 273(27) should be applied as it was in *Wood* (CS [73]-[81]). Mr Day relevantly adopts those submissions: DS [157]. That approach should not be adopted.
- 22 Something has gone awry with the election. An ineligible candidate was included on the ballot. The Act does not specify how a recount is to occur; s 273(27) is not directed to this situation. The Court is required to determine that issue for itself. A choice must be made. When making its choice, the Court must, of course, as far as possible give best effect to the intention of the voters having regard to that scheme and the Constitution.
- 23 The electoral scheme is carefully structured. It comprises the nominations, the polling (which includes the way the ballot should be printed and how votes should be cast) and the scrutiny: MS [87]. Having regard to that scheme, it cannot simply be said that giving effect to a vote cast in a square that is not validly included on the ballot reflects the true legal intention of the voter in accordance with the Act. Their true legal intention is only reflected by a valid vote for an eligible candidate or a vote for a valid above the line square.
- 24 In making its determination, the Court must also be guided by the “substantial merits and good conscience of each case”: *Electoral Act*, s 364. In that context, it must consider whether the presence of the ineligible candidate distorted the vote and if so, how best to address that distorting effect. That the real possibility of distortion is a relevant factor in the Court’s analysis has been confirmed by *Sykes v Cleary* (1992) 176 CLR 77, 102, and *Free v Kelly* (1996) 185 CLR 296, 303. Indeed, even in *Wood*, the Full Court confirmed its approach by observing that it would, “be unreal to suggest in the *present case* that the presence of Senator Wood’s name on the ballot paper has falsified the declared choice of the people of the State for any of the first eleven candidates”: (1988) 167 CLR 145, 167 (emphasis added). An approach which fails to take into account the possibility of distortion, is one that, contrary to s 364, favours form and technicality over substance and practicality.

30 30 January 2017



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