HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

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 AO

Re Day [No 2]
[2017] HCA 14
5 April 2017
C14/2016

ORDER

The questions referred to the Court of Disputed Returns by the President of the Senate in his letter dated 8 November 2016, as amended by orders made by French CJ on 21 November 2016, be answered as follows:

Question (a)

Whether, by reason of s 44(v) of the Constitution, there is a vacancy in the representation of South Australia in the Senate for the place for which Robert John Day AO was returned?

Answer

Yes, there is a vacancy in the representation of South Australia in the Senate for the place for which Robert John Day AO was returned, by reason of s 44(v) of the Constitution.

Question (b)

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

Answer

The vacancy should be filled by applying the provisions of s 273(27) of the Commonwealth Electoral Act *1918 (Cth) by analogy by filling the vacancy by a special count of the ballot papers.*

Question (c)

Whether, by reason of s 44(v) of the Constitution, Mr Day was at any time incapable of sitting as a senator prior to the dissolution of the 44th Parliament and, if so, on what date he became so incapable?

Answer

Mr Day was incapable of sitting as a senator, by reason of s 44(v) of the Constitution, on and after 26 February 2016, being a date prior to the dissolution of the 44th Parliament.

Question (d)

What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference?

Answer

A single Justice should make any further directions and orders necessary to finally dispose of this reference.

Question (e)

What, if any, orders should be made as to the costs of these proceedings?

Answer

The Commonwealth should pay Mr Day's and Ms McEwen's costs of the proceedings, save for costs excluded by an order of a Justice of the Court.

Representation

A S Bell SC with D P Hume appearing on behalf of Mr Robert Day AO (instructed by Griffins Lawyers)

S P Donaghue QC, Solicitor-General of the Commonwealth and N J Williams SC with C L Lenehan and B K Lim appearing on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

J K Kirk SC with S Gory appearing on behalf of Ms Anne McEwen (instructed by SBA Law)

CATCHWORDS

Re Day [No 2]

Constitutional law – Parliamentary elections (Cth) – Senate – Reference to Court of Disputed Returns – Where person elected and re-elected as senator – Where person stood to gain financially from Commonwealth paying rent under lease of person's electorate office – Where person's bank account nominated by lessor as bank account for payment of rent by Commonwealth – Where payment of rent reduced person's contingent liability as guarantor under loan facilities – Where person had prospect of receiving distribution of rent proceeds as beneficiary of discretionary trust – Whether person had indirect pecuniary interest in lease agreement with Commonwealth – Whether person incapable of being chosen or of sitting as senator under s 44(v) of Constitution – Whether vacancy should be filled by special count of ballot papers – Whether special count would distort voters' real intentions.

Words and phrases – "distortion of the voters' real intentions", "expectation of pecuniary benefit", "incapable of being chosen", "indirect pecuniary interest", "special count", "true legal intent of the voters".

Constitution, s 44(v).
Commonwealth Electoral Act 1918 (Cth), ss 168(1), 272(2), 273(27), 360, 376.
Parliamentary Entitlements Act 1990 (Cth), s 4(1), Item 7 of Pt 1 of Sched 1.

1 KIEFEL CJ, BELL AND EDELMAN JJ. On 9 May 2016, the 44th Parliament was dissolved. A federal election was held, and Mr Robert John Day AO was declared elected on 4 August 2016 as a senator for South Australia. On 8 November 2016, the President of the Senate wrote to the Principal Registrar of this Court advising that the Senate had resolved that certain questions respecting a vacancy in the representation of South Australia in the Senate for the place for which Mr Day was returned should be referred to the Court of Disputed Returns. The questions are as follows:

> "(a) whether, by reason of s 44(v) of the Constitution, or for any other reason, there is a vacancy in the representation of South Australia in the Senate for the place for which Robert John Day was returned;
>
> (b) if the answer to Question (a) is 'yes', by what means and in what manner that vacancy should be filled;
>
> (c) whether, by reason of s 44(v) of the Constitution, or for any other reason, Mr Day was at any time incapable of sitting as a Senator prior to the dissolution of the 44th Parliament and, if so, on what date he became so incapable;
>
> (d) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and
>
> (e) what, if any, orders should be made as to the costs of these proceedings."

Section 44(v) of the Constitution

2 The Constitution, by s 44(v), provides that any person who:

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

3 Section 46 provides for the payment of a penalty by a person declared to be incapable of sitting as a senator or as a member of the House of Representatives for every day on which he so sits.

Background to the questions referred

4 The salient features of the facts which give rise to the questions referred may be stated shortly.

5 The events in question concern a lease entered into between Fullarton Investments Pty Ltd ("Fullarton Investments"), the registered proprietor of premises at 77 Fullarton Road, Kent Town in South Australia ("the Fullarton Road property"), and the Commonwealth. Part of those premises was used by Mr Day as his electorate office after he was elected to the Senate for the first time, following the 2013 federal election. His term as a senator for South Australia commenced on 1 July 2014. He occupied an office in those premises from April 2015.

6 At the time Mr Day was first elected, the Fullarton Road property was owned by B & B Day Pty Ltd ("B & B Day") as trustee of the Day Family Trust. Certain members of the Day family, including Mr Day and his wife, were beneficiaries of that trust. Until the day before commencing his term as a senator, Mr Day was the sole director and shareholder of B & B Day. At all relevant times there was a loan facility provided by a bank to B & B Day to a limit of $1,600,000, which was secured by a mortgage over the Fullarton Road property and by a guarantee and indemnity given by Mr Day and his wife with respect to the performance by B & B Day of its obligations under the loan facility.

7 On 24 April 2014, Fullarton Investments purchased the Fullarton Road property for $2,100,000 from B & B Day. B & B Day was said to have provided vendor finance to Fullarton Investments, although no consideration appears to have passed between those parties. The sole director of Fullarton Investments at this time was Mrs Debra Smith, the wife of Mr Day's business associate. Fullarton Investments was the trustee of the Fullarton Road Trust, of which the Day Family Trust was a beneficiary.

8 One of the benefits provided to members of Parliament[1] is office accommodation in the electorate, together with necessary equipment and facilities. A lease of the Fullarton Road office was entered into between Fullarton Investments, as lessor, and the Commonwealth, represented by the Ministerial and Parliamentary Services Division, Corporate and Parliamentary Services Group of the Department of Finance, as lessee. The lease was entered into on 1 December 2015; it had a commencement date of 1 July 2015, was for a

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1 *Parliamentary Entitlements Act* 1990 (Cth), s 4(1), Sched 1 Pt 1 item 7.

term of five years and contained an option to renew. The rent payable was $66,540 per annum, together with GST.

9 Fullarton Investments was entitled, pursuant to the lease, to direct the Commonwealth to pay rent to any person. On 26 February 2016, it nominated "Fullarton Nominees" and directed payment to a bank account. Fullarton Nominees was a business name owned by Mr Day and the bank account was his.

10 In fact, the Commonwealth did not pay the monies under the lease. Mr Day's executive assistant sent two tax invoices on behalf of Fullarton Investments on 22 March 2016 claiming rent. The bank account to which those arrears were to be paid was once again nominated as that of Fullarton Nominees.

11 Mr Day's nomination for the 2016 federal election was declared on 10 June 2016 and on 4 August 2016 he was declared elected to the Senate. Parliament was opened on 30 August 2016. On 13 October 2016, the Commonwealth gave notice of rescission of the lease. This followed earlier correspondence from the Department of Finance in which concerns were expressed that Mr Day continued to have a financial interest in the property. Mr Day resigned from the Senate on 1 November 2016.

The issue

12 In order to answer the questions referred, it is necessary to resolve the issue which arises by reason of s 44(v), that is, whether Mr Day at any relevant time had a "direct or indirect pecuniary interest" in an agreement, namely, the lease. There is no dispute that the lease was an agreement with the Public Service of the Commonwealth. Mr Day was not a party to the lease and therefore did not have a direct interest in it as such, but he was the owner of the bank account nominated as the recipient of the rental monies.

13 It is quite difficult to comprehend that this does not amount to an interest in the lease agreement of a monetary kind. It is not difficult to infer from other facts[2] that Mr Day brought the nomination about and that it was his purpose to apply the monies to the loan facility with respect to the Fullarton Road property. These matters may be put to one side. It is sufficient for the resolution of the questions referred to the Court to focus upon the fact that he was to receive the rental monies payable under the lease.

14 The question whether Mr Day had an interest of the kind referred to in s 44(v) requires that provision to be construed in the context of the Constitution

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2 *Re Day* (2017) 91 ALJR 262 at 287-288 [124]; [2017] HCA 2.

as a whole. In *In re Webster*[3], the only decision of this Court concerning s 44(v), Barwick CJ approached the construction of s 44(v) by reference to its perceived purpose. Its object or purpose was taken to be the same as that of a provision of the *House of Commons (Disqualification) Act* 1782 (UK)[4] ("the 1782 Act") which, his Honour said[5], was the "precise progenitor" of s 44(v). The purpose of the 1782 Act was well accepted. It was to secure the freedom and independence of Parliament from the Crown.

15 It is submitted for Mr Day that the decision in *Webster* should be followed. The consequence of that would be that there could be no disqualification, for there is no reason to consider that the Commonwealth could exert any influence on Mr Day's parliamentary affairs by anything it could do in relation to the lease.

16 The Attorney-General of the Commonwealth and Ms McEwen, who the Court ordered could be heard on the reference, argue that the purpose of s 44(v) differs from that of the 1782 Act. It is to prevent persons in the position of a member of Parliament from taking advantage of his or her position in order to obtain a financial advantage and to prevent a conflict between that person's duty as a member and his or her own interests arising. The Commonwealth submits that the reasoning in *Webster* is wrong and should not be followed.

17 These submissions direct attention to the historical background to the drafting of s 44(v) before consideration is given to the reasoning in that case.

The 1782 Act and the colonial Constitutions

18 Section 1 of the 1782 Act provided that:

> "any person who shall, directly or indirectly, himself, or by any person whatsoever in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in the whole or in part, any contract, agreement, or commission, made or entered into with ... [the Crown] ... for or on account of the publick service ... shall be incapable of being elected, or of sitting or voting as a member of the house of commons, during the time that he shall execute, hold, or enjoy, any such contract, agreement, or

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3 (1975) 132 CLR 270; [1975] HCA 22.

4 22 Geo III c 45.

5 *In re Webster* (1975) 132 CLR 270 at 278.

commission, or any part or share thereof, or any benefit or emolument arising from the same."

19 The purpose of the provision reflected the times, when Parliament sought to be free of the influence of the Crown. The preamble to the Act stated its purpose to be "[f]or further securing the freedom and independence of parliament".

20 The 1782 Act remained in force until 1957. Its purpose has never been in doubt. In *In re Samuel*[6] it was said that the mischief it guarded against was the sapping of the freedom and independence of Parliament. In *Thompson v Pearce*[7], the question arising from the 1782 Act was identified as being "[w]hat influence then does this contract give the government over him in the House of Commons?" Likewise, in *Royse v Birley*[8], it was held that the 1782 Act was intended to prevent the exercise of control over a man who has a contract under which he is to derive some future benefit from dealing with the government.

21 The Constitutions of the colonies of New South Wales, Victoria and Queensland[9] contained provisions to similar effect to that of the 1782 Act. The decision of the Privy Council in *Miles v McIlwraith*[10] was concerned with s 6 of the *Constitution Act* 1867 (Q)[11]. Mr McIlwraith was a member of the Legislative Assembly and the owner of a ship. An agent for the ship concluded a charter party for the use of the ship by the government, contrary to Mr McIlwraith's instructions. It was held[12] that Mr McIlwraith was not disqualified, since the government could not have held him bound to the agreement. Inferentially, no control could have been exercised over him.

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6 [1913] AC 514 at 524.

7 (1819) 1 Brod & B 25 at 35 [129 ER 632 at 636].

8 (1869) LR 4 CP 296 at 311-312.

9 *Constitution Act* 1855 (NSW), s 28; *Constitution Act* 1855 (Vic), s 25; *Constitution Act* 1867 (Q), s 6; see also *Contractors in Parliament Act* 1869-70 (SA) (33 Vict No 19), s 1.

10 (1883) 8 App Cas 120.

11 31 Vict No 38.

12 *Miles v McIlwraith* (1883) 8 App Cas 120 at 134.

Standing Rules and Orders

22 Because the purpose of the 1782 Act was to secure the freedom and independence of members of Parliament from the Crown, it was not read as directed to the possibility that a member of Parliament could take advantage of his or her position or that a conflict between that person's duty as a member and that person's personal financial interests might arise.

23 This is not to say that the possibility of a conflict between a parliamentarian's private interests and his or her public duty was not foreseen. An unwritten rule of the House of Commons, which is said to have predated the 1782 Act by at least 170 years, was[13] to the effect that:

> "no Member who has a direct pecuniary interest in a question shall be allowed to vote on it".

24 The possibility of such a conflict was a concern to some colonial Parliaments. This is evidenced by certain Standing Rules and Orders which were adopted before Federation[14]. The disqualification of a member of Parliament from voting was expressed in the same terms as the unwritten rule in the House of Commons. A member was not entitled to vote in a division upon a question in which "he has a direct pecuniary interest".

25 In his commentary on the *Webster* case J D Hammond observed[15] that the unwritten rule was the progenitor of such Standing Orders and continued:

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13 Hammond, "Pecuniary Interest of Parliamentarians: A Comment on the *Webster Case*", (1976) 3 *Monash University Law Review* 91 at 98.

14 New South Wales, Legislative Assembly, *Standing Rules and Orders of the Legislative Assembly of New South Wales* (1894), No 187; Victoria, Legislative Assembly, *Standing Rules and Orders of the Legislative Assembly of Victoria relating to Public Business* (1888), No 121; South Australia, House of Assembly, *Practice, Procedure and Usage of the House of Assembly of the Province of South Australia* (1885), No 200; New South Wales, Legislative Council, *Standing Rules and Orders and Sessional Orders of the Legislative Council* (1895), No 126; Victoria, Legislative Council, *Standing Orders of the Legislative Council of Victoria* (1895), No 154; Western Australia, Legislative Council, *Standing Rules and Orders of the Legislative Council relating to Public Business* (1891), No 174.

15 Hammond, "Pecuniary Interest of Parliamentarians: A Comment on the *Webster Case*", (1976) 3 *Monash University Law Review* 91 at 98.

> "[i]t is most unlikely that the Order was brought in to protect the Parliament from the Crown. Clearly it had another purpose, and this purpose was extensively discussed in the '*UK Report of the Select Committee on Members of Parliament (Personal Interest)* 1896'."

26 Similar provision was made following Federation. In 1901 the House of Representatives temporarily adopted "Standing Orders relative to Public Business"[16]. One such Standing Order contained a disentitlement in similar terms, save that the "direct pecuniary interest" there referred to was expressed to be one "not held in common with the rest of the subjects of the Crown"[17]. A further exception was that the Standing Order did not apply to motions or bills involving questions of public policy[18].

Local government statutes

27 Prior to Federation the colonies enacted legislation which prohibited councillors of local authorities or municipal corporations from voting on, or participating in discussions of, a matter in which the councillor had, directly or indirectly, any "pecuniary interest"[19]. These words appeared in the final draft of the clause that became s 44(v).

28 In *Ford v Andrews*[20], Isaacs J observed that legislation of this kind had been common in England. The object of such legislation had been identified by

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16 Australia, House of Representatives, *Standing Orders relative to Public Business* (1901), No 296.

17 Australia, House of Representatives, *Standing Orders relative to Public Business* (1901), No 296. The Standing Order was adopted on a permanent basis in 1950: see House of Representatives Standing Committee on Procedure, *A History of the Procedure Committee on its 20th Anniversary*, (2005) at 13-14 [3.16]-[3.18].

18 See, eg, Australia, Senate, *Standing Orders of the Senate* (1903), No 280, which prohibited a senator from sitting on a Select Committee when the senator was "personally interested in the inquiry" before the Committee. The present Standing Orders prohibit sitting where there is a conflict of interest in relation to the inquiry of the Committee: Australia, Senate, *Standing Orders*, standing order 27(5).

19 See *Boroughs Statute* 1869 (Vic) (Act No 359), s 122; *Local Government Act* 1874 (Vic) (Act No 506), s 152; *Local Government Act* 1890 (Vic) (Act No 1112), s 173; *Local Government Act* 1878 (Q) (42 Vict No 8), s 135.

20 (1916) 21 CLR 317 at 329; [1916] HCA 29.

the English Court of Appeal in *Nutton v Wilson*[21] as being to prevent members of local authorities from being exposed to temptation and to prevent a conflict between their interests and duties arising. The purpose of the legislation in the Australian colonies was understood in this way[22].

The Convention Debates

29 It would not seem an unwarranted assumption that provisions of the kind mentioned above, directed to a potential conflict of interest of parliamentarians and councillors, were known to participants in the Convention Debates on the clause that became s 44(v), particularly lawyers such as Mr Isaacs and Mr Barton. The clause was debated in Adelaide[23] and Sydney[24] in April and September 1897, respectively. It was passed in Melbourne in March 1898[25].

30 It is correct to observe, as Barwick CJ did[26] in *Webster*, that the progenitor of s 44(v) is the 1782 Act, but it is not correct, with respect, to say that it is the "precise progenitor" of s 44(v). The first draft of the clause which became s 44(v) was clearly drawn from the 1782 Act, which, it will be recalled, had been adopted by the Constitution Acts of the colonies, but by the time s 44(v) was passed it had undergone a substantial change in its terminology, as will be evident from a comparison of the two. In fact, little of the clause from the 1782 Act remained.

31 The most obvious change from the 1782 Act, it may be observed, is the introduction of the notion of a "pecuniary interest" in an agreement, which may be an "indirect" pecuniary interest. The focus of s 44(v) is on the personal interest of the member of Parliament. The 1782 Act was more concerned with the fact of the agreement with the Crown, rather than the interest that the member

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21 (1889) 22 QBD 744 at 747 per Lord Esher MR, 748 per Lindley LJ.

22 *Attorney-General v Emerald Hill* (1873) 4 AJR 135 at 136.

23 *Official Report of the Australasian National Convention Debates*, (Adelaide), 15-21 April 1897.

24 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 21 September 1897.

25 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 7 March 1898.

26 (1975) 132 CLR 270 at 278.

had in it. It referred to the member "holding" or "enjoying" a contract or agreement.

32 Consistently with this observation, no mention is made in the 1782 Act of the position of a member as a shareholder in a company. Section 44(v), however, created an exception to disqualification where the member's interest is a shareholding in a company which has more than 25 members, thereby implying that a shareholding in a smaller company will be an interest which has the consequence of disqualification.

33 These changes reflect discussions in the Convention Debates in Adelaide and Sydney. The discussions were not just about the influence which the Crown, or the Executive Government, could exert over contractors who were members of Parliament. On the topic of whether the disqualification should extend to professional men, including barristers, as well as contractors, there was certainly discussion about the possibility of corruption by the Executive Government giving contracts or briefs to such persons[27]. But, in the course of the debate, reference was made more generally to the need to separate the personal interests of a parliamentarian from the exercise of his public duties[28]. The freedom spoken of was not just from the executive, but from a person's own business interests, so that that person could more effectively represent others[29].

34 The other topic of note concerned the potential use, by members of Parliament, of companies to cloak a transaction[30]. That discussion was directed to what became the exception to s 44(v). These discussions confirm that the focus was upon a person's private dealings as the subject of the disqualification, rather than those of the Executive Government.

35 The reference to a "pecuniary interest" was inserted in the clause which became s 44(v) after these debates. The words first appeared at the following

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27 *Official Report of the Australasian National Convention Debates*, (Adelaide), 15 April 1897 at 737; 21 April 1897 at 1034, 1036.

28 *Official Report of the Australasian National Convention Debates*, (Adelaide), 21 April 1897 at 1037-1038 (Mr Isaacs).

29 *Official Report of the Australasian National Convention Debates*, (Adelaide), 21 April 1897 at 1038 (Mr Reid).

30 *Official Report of the Australasian National Convention Debates*, (Adelaide), 15 April 1897 at 737; 21 April 1897 at 1039; *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 21 September 1897 at 1023-1025.

Convention Debates in Melbourne, when the provision was passed without further discussion[31].

Webster

36 Senator Webster was a shareholder in a company in which there were eight other shareholders. He was managing director, secretary and manager of the company and received a salary in the latter capacity. The company supplied timber under agreements with two Commonwealth departments. There was no question that the agreements were with the Public Service of the Commonwealth.

37 Barwick CJ, sitting alone as the Court of Disputed Returns, held[32] that the senator was not disqualified from sitting by reason of s 44(v). His Honour considered[33] that it was difficult to see that a shareholder could be said to have a pecuniary interest in the agreements for supply. An agreement for the sale of goods merely on request from time to time was not an "agreement" within s 44(v).

38 We do not think that we are overstating his Honour's approach to the construction of s 44(v) in saying that the purpose he identified for the provision dominated the construction which he gave to it and significantly limited its operation. He identified[34] the purpose as being the same as that of the 1782 Act. His Honour did not compare the terms of the two provisions.

39 When regard is had to the terms of s 44(v), it is obvious that it is also concerned with the interest that a parliamentarian might have in agreements with the Commonwealth. A conclusion that s 44(v) has some purpose wider than the protection of the freedom and independence of parliamentarians from the influence of the Crown is inescapable. That wider purpose can only be the prevention of financial gain which may give rise to a conflict of duty and interest.

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31 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 7 March 1898 at 1942.

32 *In re Webster* (1975) 132 CLR 270 at 288.

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

34 *In re Webster* (1975) 132 CLR 270 at 278.

The Convention Debates identify that as the subject to which the clause which became s 44(v) was addressed. This is a proper use of those records[35].

40 At the time *Webster* was decided, the use to which the Convention Debates could be put was limited by decisions of this Court[36] which preceded *Cole v Whitfield*[37]. Barwick CJ nevertheless referred to them, or at least to that part of the debates which took place in Adelaide concerning the possibility of fraud being exercised by the use, by parliamentarians, of a private company. His Honour did refer to the exception created in s 44(v), but did not draw the inference that shareholders of companies where there were fewer than 25 shareholders[38] could be said to have an indirect pecuniary interest in agreements between the company and the Commonwealth. His Honour appears to have approached the position of shareholders from the perspective of the common law, which is to say that they could not be said to have any legal or equitable interest in the assets of the company.

41 Barwick CJ did not refer to the debate concerning whether the disqualification should extend to the interests of professional men, nor to the choice of the adjective "pecuniary" to identify the interests in question. His Honour did not refer to the subject to which these discussions were addressed more broadly, namely, the possibility of a conflict between personal interests and public duty arising. These factors tell against the purpose of s 44(v) being limited to that of the 1782 Act.

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35 *Cole v Whitfield* (1988) 165 CLR 360 at 385; [1988] HCA 18; *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 376-377; [1989] HCA 49; *New South Wales v The Commonwealth* (1990) 169 CLR 482 at 501; [1990] HCA 2; *Singh v The Commonwealth* (2004) 222 CLR 322 at 337-338 [21]-[22]; [2004] HCA 43; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 106 [298]; [2009] HCA 23.

36 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 17, 47; [1975] HCA 53; *Attorney-General (Cth) v T & G Mutual Life Society Ltd* (1978) 144 CLR 161 at 187; [1978] HCA 24; *Attorney-General (Vict); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 577, 603; [1981] HCA 2.

37 (1988) 165 CLR 360.

38 At the time of the Convention Debates this was the maximum number of shareholders for a proprietary company in Victoria: see *Companies Act* 1896 (Vic) (Act No 1482), s 2; see also *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 21 September 1897 at 1023.

42 His Honour was evidently aware of local government and other legislation which, it will be recalled, used some of the very language employed in s 44(v). However, his Honour considered[39] that there was no real analogy between s 44(v) and those provisions. His Honour's reasoning also had regard to what he saw as the purpose of s 44(v). His Honour said[40] that the purpose of s 44(v) was the independence of Parliament, whereas the object of disqualifying local councillors was the prevention of conflict of duty and interest.

Should *Webster* be followed?

43 Barwick CJ sat in *Webster* as the Court of Disputed Returns. His Honour was not sitting in a separate court of that name, but as the High Court exercising the additional jurisdiction given to it by the *Commonwealth Electoral Act* 1918-1973 (Cth)[41]. That jurisdiction could be exercised by a single Justice[42], whose decision was not subject to appeal[43].

44 It is a feature of the proceedings in *Webster* that no Justice of the Court other than Barwick CJ sat to hear the matter. Whilst some matters in the Court of Disputed Returns are from time to time heard by a single Justice, they usually do not involve important questions relating to provisions of the Constitution. Nevertheless it is submitted for Mr Day that the fact that the decision in *Webster* was made by a single Justice is irrelevant to the principles to be applied as to whether it should not be followed.

45 Accepting, for present purposes, that the usual principles governing when this Court should depart from its previous decisions[44] do apply, there is none which stands in the way of a reconsideration of what was decided in *Webster*.

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39 *In re Webster* (1975) 132 CLR 270 at 278.

40 *In re Webster* (1975) 132 CLR 270 at 278-279.

41 *Sue v Hill* (1999) 199 CLR 462 at 480-481 [28]-[30], 519 [142]-[143]; [1999] HCA 30.

42 *Commonwealth Electoral Act* 1918-1973 (Cth), s 184(3), the predecessor provision to s 354(6) of the *Commonwealth Electoral Act* 1918 (Cth).

43 *Commonwealth Electoral Act* 1918-1973 (Cth), s 195; now s 368 of the *Commonwealth Electoral Act* 1918 (Cth).

44 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438; [1989] HCA 5.

True it is that the decision has stood for some time, but it is not to be inferred that it has been acted upon in such a way as to prevent reconsideration. The narrow operation given to s 44(v) in *Webster* no doubt explains why no proceedings have been brought with respect to potential disqualifying interests since the decision in that case. There is the consideration that persons may have ordered their affairs on the basis of that decision, and may have to act promptly to regularise them. In any event the decision is of a special kind, involving as it does constitutional provisions respecting Parliament and its members. If the construction adopted in *Webster* is affected by error, it should not be allowed to stand.

46 It is not obvious to us why the fact that the decision was a judgment of only one member of the Court is not relevant to the question of whether it should be reviewed. It is accepted that a difference in the reasons of the majority in an earlier decision is a factor relevant to whether a decision should be reviewed[45]. That principle implies that less force is to be attributed to a decision where no single line of reasoning commands the assent of a sufficient number of the Justices of the Court. It would not seem unreasonable then to take account of the fact that in *Webster* there may well have been differing opinions held, had the Court been constituted by more than one Justice.

47 To these observations it may be added that *Webster* does not rest on a principle carefully worked out in a significant succession of cases[46]. It is not likely to have had attributed to it the status of the "last word" on s 44(v). For these reasons the reasoning in *Webster* should be reconsidered.

48 It follows from what has already been said in these reasons that s 44(v) has a wider purpose than that given to it by Barwick CJ in *Webster*. Its object is to ensure not only that the Public Service of the Commonwealth is not in a position to exercise undue influence over members of Parliament through the medium of agreements; but also that members of Parliament will not seek to benefit by such agreements or to put themselves in a position where their duty to the people they represent and their own personal interests may conflict. Recalling that s 44(v) should be construed in the context of the Constitution as a whole, it may also be observed that this wider purpose is consistent with s 44(iv) of the Constitution. That provision provides that a person who "holds any office of profit under the Crown" or "any pension payable during the pleasure of the Crown" is incapable of being chosen as a member of Parliament.

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45 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438.

46 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438.

49 A construction of s 44(v) which proceeds from an understanding that parliamentarians have a duty as a representative of others to act in the public interest is consistent with the place of that provision in its wider constitutional context. The representative parliamentary democracy, for which the Constitution provides, informs an understanding of specific provisions[47] such as s 44(v) and assists in determining the content of that duty, which includes an obligation to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations[48]. In *R v Boston*[49], Isaacs and Rich JJ spoke of a parliamentarian having a "single-mindedness for the welfare of the community".

50 More recently, it has been said[50] that Parliament has important functions to question and criticise government on behalf of the people and to secure accountability of government activity. This is not a new idea[51]. There can be no doubt that if personal financial interests were to intrude, the exercise of those obligations would be rendered difficult or even ineffective.

51 In our view, *Webster* proceeded upon a wrong view of the place of s 44(v) in the Constitution and of the purpose of that provision, and did not give effect to its terms. It should not be followed.

52 Mr Day's submission, following *Webster*[52], that s 44(v) applies only where "through the possibility of financial gain by the existence or the performance of the agreement, that person could conceivably be influenced by the Crown in relation to Parliamentary affairs" cannot be accepted. It is necessary then to consider the terms of s 44(v) and the extent of its operation, consistently with its wider purpose.

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47 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 211; [1992] HCA 45.

48 *Wilkinson v Osborne* (1915) 21 CLR 89 at 98-99; [1915] HCA 92.

49 (1923) 33 CLR 386 at 400; [1923] HCA 59.

50 *Egan v Willis* (1998) 195 CLR 424 at 451 [42], 453 [45]-[46]; [1998] HCA 71.

51 *Horne v Barber* (1920) 27 CLR 494 at 500; [1920] HCA 33.

52 (1975) 132 CLR 270 at 280.

Section 44(v), its construction and width of application

53 The Attorney-General of the Commonwealth submits that s 44(v) should apply when "objectively, there is a real risk that a person could be influenced, or be perceived to be influenced, in relation to parliamentary affairs by a direct or indirect financial interest". Mr Day submits that the Commonwealth overextends the application of s 44(v) by a test based upon perceptions. Even if the mischief to which it is directed is the avoidance of actual or perceived conflicts of interest, it is submitted, this does not justify reading words into the provision. That submission should be accepted. Section 44(v) applies according to its terms.

54 It is submitted for Mr Day that the word "interest" represents something concrete, something more than a mere expectancy. It is not disputed that a "pecuniary interest" is an interest "sounding in money or money's worth"[53]. This concession detracts from the suggestion, implicit in the submission, that the interest referred to in s 44(v) is a legal interest. Clearly it is not. An indirect pecuniary interest looks to the "practical effect"[54] of the agreement in question on a person's pecuniary interests.

55 Mr Day's other argument with respect to the terms of s 44(v) focuses upon the words "in any agreement". It is put that these words narrow what is encompassed by the pecuniary interest referred to in the provision. He submits that there cannot be a pecuniary interest in an agreement just because a person stands to gain from it or may obtain a benefit out of it. The Constitution, by s 44(v), does not refer to an expectation of money gained or lost. It refers to a person who has an interest in an agreement, not a person being "interested in an agreement".

56 Mr Day relies on two cases in support of this argument – *Norton v Taylor*[55] and *Ford v Andrews*[56] – despite the fact that the legislation with which they were concerned referred to a councillor being "interested in any agreement". They are nevertheless said to be instructive, presumably of what is not caught by s 44(v).

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53 *Webb v The Queen* (1994) 181 CLR 41 at 75; [1994] HCA 30.

54 *Crump v New South Wales* (2012) 247 CLR 1 at 26 [60]; [2012] HCA 20.

55 (1905) 2 CLR 291; [1905] HCA 8.

56 (1916) 21 CLR 317.

57 *Norton v Taylor* concerned s 24 of the *Sydney Corporation Act* 1902 (NSW), which rendered a person holding a civic office liable to a penalty where that person becomes "knowingly engaged or interested in any contract, agreement, or employment" with the local authority. *Ford v Andrews* concerned s 70 of the *Local Government Act* 1906 (NSW), which disqualified an alderman if he is "interested ... in any contract, agreement, or employment" with the local authority. Both provisions excepted a person's interest as a shareholder from their operation.

58 The defendant in *Norton v Taylor* was a councillor and a member of a firm of timber merchants which supplied timber to a manufacturer, whose tender had been accepted by the council. The Supreme Court of New South Wales held that he was not, by reason of the supply, "interested" in the manufacturer's contract and this Court refused special leave to appeal from that decision.

59 This would seem unsurprising. Apart from the fact of supply, there is no connection between the councillor's interests and the manufacturer's contract. The result would be the same if s 44(v) was applied to the facts of that case. The mere supply of goods, without more, to a person having an agreement with the Public Service could not be said to give rise to an indirect pecuniary interest of the supplier in that agreement, not the least because no financial benefit accrues to the supplier from that agreement, but rather from the contract of supply.

60 It may be otherwise where an interest in the agreement with the Commonwealth could be traced to the supplier, for example because of a relationship between the supplier and the party to the agreement with the Commonwealth, or because the supplier receives, indirectly, some financial benefit from that agreement. None of these factors were present in *Norton v Taylor*.

61 Clearly enough, the mischief addressed by s 44(v) is not to be avoided by devices such as the interposition of a company or other entity between a person who is a parliamentarian who stands to gain, or lose, from the agreement and the Commonwealth. The words "indirect pecuniary interest in [an] agreement" were no doubt chosen with that potential for avoidance in mind, as the Convention Debates confirm.

62 Beneficiaries of a discretionary trust, which benefits from, or via its trustee is party to, an agreement to which s 44(v) refers, may be considered to have an indirect pecuniary interest in an agreement. In argument for Ms McEwen it was put that the fact that beneficiaries of such a trust do not have a proprietary interest in trust assets does not answer the question whether they

have a pecuniary interest in them and therefore in contracts entered into on behalf of the trust. In *Ebner v Official Trustee in Bankruptcy*[57], in the context of the bias rule, it was suggested that a trial judge who is a beneficiary of a discretionary trust that holds shares in a bank that funds the proceedings before him is capable of having a relevant pecuniary interest[58]. This view of a discretionary trust is consistent with the inference to be drawn from the exception to s 44(v), that shareholders in a company may be regarded as having a pecuniary interest in its contracts.

63 In *Ford v Andrews*, the appellant was the alderman and mayor of a council and a director of a company which supplied bricks to it. It does not appear that the mayor was a shareholder, which, in any event, was an exception to the disqualification under the statute. The alleged interest was said to arise from an article in the company's Articles of Association, which authorised the directors to give a direction that a commission be payable to any director or that a share in profits be paid.

64 Griffith CJ rejected[59] the argument on the basis that the mayor had only a "mere possibility of a future interest", analogous to the interest of a person in the property of his next of kin. However, his Honour appears to have thought that the interest might arise if a director had a duty concerning the supply of the bricks, but held[60] the mayor did not. Barton J agreed[61]. It would appear that the duty which Griffith CJ had in mind was a duty which could give rise to a conflict of interest. Isaacs J, in dissent, took a much broader view of the application of the provision in question, but it is to be recalled that it referred to a person being "interested in" any agreement.

65 Mr Day sought to support his proposition, that it cannot be every benefit which gives rise to an indirect pecuniary interest in an agreement, by reference to hypothetical situations. One example he gave was where a husband and wife are jointly liable for mortgage repayments on their home and the wife works for the Commonwealth Public Service. The husband will benefit in a financial sense from her salary being applied to repayment of the mortgage. Does this give him

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57 (2000) 205 CLR 337; [2000] HCA 63.

58 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 357 [55].

59 *Ford v Andrews* (1916) 21 CLR 317 at 320.

60 *Ford v Andrews* (1916) 21 CLR 317 at 321-323.

61 *Ford v Andrews* (1916) 21 CLR 317 at 324-325.

an indirect pecuniary interest in her employment agreement within the meaning of s 44(v) if he is a parliamentarian?

66 It does not seem to us that a benefit of this kind could be said to give rise to an indirect interest of the husband in the wife's employment agreement with the Public Service. Whilst a person does not need to be a party to an agreement to have an interest in it, the requirement that the interest be "in" an agreement implies some personal connection to it, albeit indirect. The mischief to which the provision is addressed has this connotation. It looks to the personal financial circumstances of a parliamentarian and the possibility of a conflict of duty and interest.

67 It is also submitted for Mr Day that the facts of his case are closely analogous to those in *Hobler v Jones*[62]. It is difficult to see that this is so, as will shortly be explained. The legislative provision there in question certainly was not comparable with s 44(v). Section 6 of the *Constitution Act* 1867 (Q) was in the terms of the 1782 Act. It provided that a person who shall, directly or indirectly, undertake, execute, hold or enjoy any contract or agreement for or on account of the Public Service shall be incapable of being elected or of sitting or voting as a member of the Legislative Assembly. The defendant, a member of that Assembly, was said to be disqualified because he held two leases of land selections from the Crown.

68 An issue concerning whether the member could be regarded as disqualified, having regard to the purposes of s 6, was raised but not reached. The view which was taken by the judge at first instance, and by the Full Court, was that the leases were not contracts of the kind which were the concern of s 6. As Stanley J, in the Full Court, appeared to accept[63], they were merely ordinary leases in the terms and conditions and in the form required by legislation. This is how the government ordinarily deals with persons.

69 A similar understanding may be said to inform the Standing Orders referred to earlier in these reasons[64], which excepted pecuniary interests "held in common with the rest of the subjects of the Crown" from interests which could prevent a parliamentarian from voting. There can be no relevant interest if the agreement in question is one ordinarily made between government and a citizen.

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62 [1959] Qd R 609.

63 *Hobler v Jones* [1959] Qd R 609 at 619-620.

64 Australia, House of Representatives, *Standing Orders relative to Public Business* (1901), No 296.

Were this otherwise, every day-to-day dealing which a citizen has with government could result in the disqualification of a citizen who happens to be a parliamentarian.

70 The facts of *Hobler v Jones*[65] are in any event far removed from Mr Day's circumstances. It may be unremarkable that the Commonwealth leases premises from their owner for the purpose of providing office accommodation to a senator, but the payment of rent, by direction, to that senator is not.

71 Mr Day submits that s 44(v) should be narrowly construed because, where it applies, s 46 of the Constitution provides for penal consequences. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[66], it was said that the fact that a provision is penal in nature is part of its context and is therefore relevant to the task of construing it in accordance with established principles. In *Webster*, Barwick CJ said[67] that a strict construction should be given to s 44(v) for this reason. In *Sykes v Cleary*[68], Deane J agreed with that approach.

72 However, the construction of s 44(v) does not involve a choice between a narrow or a broad approach which are both available when regard is had to its purpose. Barwick CJ's approach was informed by his view of the purpose of s 44(v), which, as explained, was unduly narrow. To give s 44(v) a limited operation, when it is accepted that it is intended to operate more widely, would be to deny its true purpose. Moreover there is much to be said for the view that the provision has a special status, because it is protective of matters which are fundamental to the Constitution, namely representative and responsible government in a democracy. So understood there can be no warrant for limiting its operation because of the consequences which might follow for a person who is disqualified.

73 Mr Day also argues that s 44(v) takes its place in a suite of provisions (ss 44, 45 and 46) which prescribe the qualifications of a Commonwealth parliamentarian and the consequences of sitting when disqualified. The Constitution gives the Parliament a broad power to determine those qualifications and that power should not be unduly constrained by an expansive judicial

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65 [1959] Qd R 609.

66 (2009) 239 CLR 27 at 49 [57]; [2009] HCA 41.

67 (1975) 132 CLR 270 at 279.

68 (1992) 176 CLR 77 at 116; [1992] HCA 60.

interpretation of s 44. The more expansive the interpretation, the less scope there is for the Parliament to exercise its express constitutional powers.

74 The Attorney-General correctly points out that the legislative power of the Parliament to prescribe the qualifications of parliamentarians (ss 16, 34 and 51(xxxvi)) is expressly "subject to this Constitution". It is therefore subject to s 44, which itself confines the scope of s 51(xxxvi). The existence of a power to prescribe qualifications provides no reason to prefer a narrow construction of the disqualification provisions of s 44.

75 No narrow view of the operation of s 44(v) can be said to be warranted by its terms, read consistently with its purpose. The submissions for Mr Day read s 44(v) so as to require him to be akin to a party to the lease before he could be said to have an interest in it. This gives no effect to the word "indirect" or to the inferences to be drawn from the exception to s 44(v) about the types of interest which are within its purview.

76 It follows that on and from 26 February 2016, when the direction for the payment of rent to Mr Day was given, s 44(v) operated to disqualify Mr Day from sitting as a senator because he had an interest of a pecuniary nature in the lease. As a result, a vacancy arises in the representation of South Australia in the Senate.

How the vacancy should be filled

77 In *In re Wood*[69], it was held that the provisions of s 273(27) of the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act") may be applied by analogy in circumstances such as this in order to ascertain the true intention of the voters, consistently with the Constitution and the Electoral Act. That is to say, the vacancy resulting from a person being disqualified may be dealt with in the same way as applies where a deceased candidate's name appears on the ballot paper in a Senate election. Section 273(27) provides that a vote indicated on the 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 taken to be altered accordingly.

78 Ms McEwen was listed fourth of the candidates in the Australian Labor Party group on the ballot paper. The three listed above her were elected. At the last count she was the only other candidate, apart from Mr Day, who had not been excluded from the count. However, this does not mean that Ms McEwen's submission should be accepted to the effect that the other candidate for Family

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69 (1988) 167 CLR 145 at 166; [1988] HCA 22.

First would obtain an unfair advantage, and voter intentions would be distorted, if Family First above the line votes were counted for that other candidate. Contrary to that submission, a special count which deprived the above the line Family First voters of their vote would distort voter intentions.

79 The Family First group on the ballot paper consisted of Mr Day and one other candidate. It is argued for Ms McEwen that because Mr Day could not be chosen as a senator, there was no valid group of Family First candidates. Section 168(1) of the Electoral Act requires a group to comprise two or more members. The votes cast above the line for Family First must therefore be disregarded.

80 A similar argument was put in *Wood* and rejected[70]. The result of such an argument would be that no effect would be given to the votes given to the other candidate. However, as was pointed out[71] in *Wood*, a vote is valid "except to the extent that the want of qualification makes the particular indication of preference a nullity". The true intention of voters should be given effect so long as it is consistent with the Constitution and the Electoral Act[72]. Here there is no impediment to giving effect to those intentions.

Costs

81 The Attorney-General agreed to an order that the Commonwealth pay Mr Day's costs, but opposed an order in favour of Ms McEwen.

82 Ms McEwen was deemed to be a party to these proceedings and was the moving party on an application heard by Gordon J at which evidence of facts relating to Mr Day's dealings, in addition to those which had been agreed between the parties, was considered. The findings made[73] by her Honour were referred to by the parties in their submissions. Ms McEwen made submissions to Questions (a) and (c) which were not in all respects identical with those of the Commonwealth. She was the only contradictor with respect to Question (b). In these circumstances the Commonwealth should also pay her costs of the proceedings.

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70 (1988) 167 CLR 145 at 174-175.

71 (1988) 167 CLR 145 at 166.

72 *Re Culleton (No 2)* (2017) 91 ALJR 311 at 319 [43]; [2017] HCA 4.

73 *Re Day* (2017) 91 ALJR 262.

Answers to the questions referred

83 The questions referred by the Senate to this Court should be answered as follows:

(a) There is a vacancy in the representation of South Australia in the Senate for the place for which Robert John Day AO was returned, by reason of s 44(v) of the Constitution.

(b) The vacancy should be filled by applying the provisions of s 273(27) of the *Commonwealth Electoral Act* 1918 (Cth) by analogy by filling the vacancy by a special count of the ballot papers.

(c) Mr Day was incapable of sitting as a senator, by reason of s 44(v) of the Constitution, on and after 26 February 2016, being a date prior to the dissolution of the 44th Parliament.

(d) A single Justice should make any further directions and orders necessary to finally dispose of this reference.

(e) The Commonwealth should pay Mr Day's and Ms McEwen's costs of the proceedings, save for costs excluded by an order of a Justice of the Court.

84 GAGELER J. The High Court expressed the opinion in *Brown v West*[74] that "[t]here is much to be said for the view that the Parliament alone may make provision for benefits having a pecuniary value which accrue to its members in virtue of their office and which are not mere facilities for the functioning of the Parliament". The Court then set out s 48 of the Constitution, which states that "[u]ntil the Parliament otherwise provides" each senator and each member of the House of Representatives shall receive an "allowance" of a specified annual monetary amount, and continued[75]:

> "The effect of this section ... depends on the meaning attributed to 'allowance' and the width of the power conferred on the Parliament alone 'otherwise' to provide. ... Apart from the possible operation of s 48, it may be that our Constitution provides such a separation of powers as would preclude any exercise of the executive power which takes the form of the discretionary conferring of benefits having a pecuniary value on individual members of the Parliament, not being mere facilities for the functioning of Parliament."

85 Soon after *Brown v West*, the Parliament – in the exercise of its power under s 51(xxxvi) of the Constitution (to make laws with respect to a matter within the scope of s 48) or in the exercise of its power under s 51(xxxix) of the Constitution (to make laws with respect to a matter incidental to the power vested by the Constitution in the Parliament), it now matters not which – enacted the *Parliamentary Entitlements Act* 1990 (Cth). Under the *Parliamentary Entitlements Act*, senators and members of the House of Representatives are "entitled to" specified "benefits"[76], the costs of which are to be paid out of the Consolidated Revenue Fund[77]. One of those benefits is "[o]ffice accommodation in the electorate, together with equipment and facilities necessary to operate the office, as approved by the Minister"[78].

86 During his term as an elected senator for South Australia, Mr Day accordingly had a statutory entitlement to be provided at public expense with office accommodation in South Australia, together with equipment and facilities necessary to operate that office, as approved by the Minister for Finance as the Minister administering the *Parliamentary Entitlements Act*. Procuring office

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74 (1990) 169 CLR 195 at 201; [1990] HCA 7.

75 (1990) 169 CLR 195 at 201-202.

76 Section 4.

77 Section 11.

78 Sched 1, Pt 1, Item 7.

premises to provide him with that statutory entitlement was the reason why the Commonwealth of Australia (represented by the Ministerial and Parliamentary Services Division, Corporate and Parliamentary Services Group of the Department of Finance), in the exercise of non-statutory executive capacity, entered into the lease from Fullarton Investments of the Fullarton Road property for a term of five years for a permitted use identified in the lease as "Office Accommodation and Communication Facility". The lease obliged the Commonwealth to pay rent in monthly instalments into such account as was from time to time to be notified to it by Fullarton Investments.

87 On the facts sufficiently recounted in the reasons for judgment of other members of the Court, at the time of the Commonwealth entering into the lease with Fullarton Investments, Mr Day stood to gain financially from the Commonwealth performing its obligation to pay rent under the lease. He stood to gain in one or more of three distinct ways, none of which was apparent on the face of the lease and none of which was known to the Minister for Finance or officers within the Department of Finance.

88 First, Mr Day was in truth the holder of the bank account labelled "Fullarton Nominees", which Fullarton Investments had already notified the Commonwealth was the account into which the Commonwealth was to pay the rent under the lease. The rent to be paid by the Commonwealth was in that way to go directly to Mr Day.

89 Second, Mr Day was a guarantor of a loan facility provided by NAB to B & B Day and other companies with which Mr Day was associated. Fullarton Investments was indebted to B & B Day for the price of its purchase of the Fullarton Road property from B & B Day, and Fullarton Investments had no source of revenue to pay that debt other than the rent to be paid by the Commonwealth. Payment of rent by the Commonwealth would facilitate repayment by Fullarton Investments of its debt to B & B Day, which would in turn facilitate repayment by B & B Day of its indebtedness to NAB. Payment of rent would in that way have the prospect in practical effect of reducing the extent of Mr Day's contingent liability to NAB.

90 Third, Mr Day was a beneficiary of the Day Family Trust, a discretionary trust of which B & B Day was trustee. The Day Family Trust was in turn a beneficiary of the Fullarton Road Trust, a discretionary trust of which Fullarton Investments was trustee. Fullarton Investments held the Fullarton Road property, and the proceeds of the lease, on trust for the Fullarton Road Trust, of which the Day Family Trust was a beneficiary. Mr Day in that way had the prospect of receiving, through the sequential exercise of discretions on the parts of Fullarton Investments and B & B Day, a distribution of the whole or some part of such funds as Fullarton Investments as trustee of the Fullarton Road Trust might receive from rent paid to it under the lease.

91 There was nothing remote or unlikely about the funds generated from the rent to be paid by the Commonwealth in the performance of its obligation under the lease flowing through Fullarton Investments to B & B Day, either as loan repayments or as trust distributions, to the ultimate financial benefit of Mr Day. The genesis of the entire elaborate structure, according to the uncontested findings made by Gordon J, was Mr Day having sought from his accountants "advice on establishing an entity in which the Fullarton Road property could be housed so that he could avail himself of the rental allowance provided by the government" and his accountants advising him in response that the Fullarton Road Trust under the arrangements put in place "would simply hold the Fullarton Road property and collect rent on a regular basis, and the rent would then pass back to the Day Family Trust so there would be no profit or loss in the new trust"[79].

92 My view is that the financial benefit which Mr Day stood to obtain in each of those three ways from the Commonwealth performing its obligations to pay rent under the lease constituted an "indirect pecuniary interest" which Mr Day had in the lease within the meaning of s 44(v) of the Constitution, with the consequences that his seat in the Senate became vacant at the time the Commonwealth entered into the lease with Fullarton Investments and that he was in law incapable of being chosen at the subsequent general election for the place for which he was in fact returned as elected.

93 As to what flows from that, I have no disagreement with the reasoning and conclusions of other members of the Court concerning the means and manner in which the resulting vacancy in the representation of South Australia in the Senate should be filled. As to the precise manner in which the questions referred by the Senate to this Court sitting as the Court of Disputed Returns should be answered, I am content with the answers formulated by the plurality, save that my answer to question (c) would state 1 December 2015 as the date on which Mr Day became incapable of sitting as a senator.

94 What follows is my reasoning on the central issue of the meaning and application of s 44(v) of the Constitution.

95 Like the other grounds of disqualification set out in s 44 of the Constitution, that set out in s 44(v) has automatic and draconian consequences. A person who is subject to disqualification is, by force of s 44, incapable of being chosen or of sitting as a senator or member of the House of Representatives. By force of s 45(i), if the person is a senator or member when the disqualification takes effect, "his place shall thereupon become vacant". By force of legislation enacted by the Parliament under s 51(xxxvi) with respect to the matter for which

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79 *Re Day* (2017) 91 ALJR 262 at 280 [93]; [2017] HCA 2.

provision is made in s 46, the person is liable to pay to any person who sues for it pecuniary penalty for each day on which he sits while disqualified[80].

96 Disqualification under s 44 impacts irreversibly on the persons disqualified and on the electors whom they have been elected to represent or whom they seek to be elected to represent. In *Sykes v Cleary*[81], Deane J pointed out that "[w]hat s 44 does is to impose an overriding disqualification of any person who comes within its terms regardless of whether the Parliament thinks (or seeks to enact), in the context of contemporary circumstances and standards, that that disqualification is unjustified". His Honour said:

> "Such an overriding disqualification provision should, in my view, be construed as depriving a citizen of the democratic right to seek to participate directly in the deliberations and decisions of the national Parliament only to the extent that its words clearly and unambiguously require."

I agree with that view, which I do not think to be contradicted by the holding of the majority in *Sykes v Cleary*.

97 Its blunt and limiting effect on democratic participation tells in favour of an interpretation which gives the disqualification set out in s 44(v) the greatest certainty of operation that is consistent with its language and purpose. Senators and members of the House of Representatives should know where they stand. They, and their electors, are entitled to expect tolerably clear and workable standards by which to gauge the constitutional propriety of their affairs.

98 The interpretation of s 44(v) adopted in *In re Webster*[82], confining its operation to an agreement "for a substantial period of time ... 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", is unsatisfactory. That is not only because the *Webster* interpretation is founded on too narrow a view of the purpose of the disqualification, as to which I agree with and have nothing to add to the various expositions by other members of the Court. The *Webster* interpretation is also unsatisfactory because the interpretation adopts a criterion for the operation of the disqualification that is vague and unduly evaluative and that involves a gloss on the constitutional language.

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80 *Common Informers (Parliamentary Disqualifications) Act* 1975 (Cth), s 3.

81 (1992) 176 CLR 77 at 121; [1992] HCA 60.

82 (1975) 132 CLR 270 at 280; [1975] HCA 22.

99 The interpretation now advanced by the Attorney-General of the Commonwealth is that s 44(v) "is engaged at least when: objectively, there is a real risk that a person could be influenced, or be perceived to be influenced, in relation to parliamentary affairs by a direct or indirect financial interest, in the sense of an expectation of a monetary gain or loss, arising from the existence, performance, or breach of an agreement with the executive government of the Commonwealth". That interpretation has the virtue of attempting to align the disqualification to the wider constitutional purpose of removing the possibility of conflict or the appearance of conflict between advancement of a person's interests and that person's duty as a senator or member of the House of Representatives.

100 But the Attorney-General's interpretation has its own shortcomings. Even more than the *Webster* interpretation, it adopts a criterion for the operation of the disqualification that is vague and evaluative. And not unlike the *Webster* interpretation, it involves a significant gloss on the constitutional language. The extent of the disqualification and the purpose of the disqualification are run too much together. The latter properly informs the former, but should not take its place.

101 Much of the anxiety that has attended attempted exposition of s 44(v) in the past has stemmed from reading its reference to "any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth" as equivalent to "any direct or indirect pecuniary interest in any agreement with the Executive Government of the Commonwealth". The interpretation advanced by the Attorney-General of the Commonwealth is not unique in implicitly adopting that reading. The concern has been to achieve an interpretation that excludes from the disqualifying effect of s 44(v) a pecuniary interest that a senator or member might reasonably be expected to be able to have in routine or otherwise patently benign agreements with the Executive Government of the Commonwealth. Those agreements might include a postal note issued by the Postmaster-General's Department under the *Post and Telegraph Act* 1901 (Cth), a bond issued by the Treasury under the *Commonwealth Inscribed Stock Act* 1911 (Cth), or an agreement as to the amount of compensation constituting just terms following the compulsory acquisition of land under the *Lands Acquisition Act* 1989 (Cth)[83].

102 That anxiety is substantially alleviated and each of those potentially troubling examples is accommodated when "any agreement with the Public

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83 Eg Australia, Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, (1981) at 79 [7.15]-[7.16]; Australia, *Final Report of the Constitutional Commission*, (1988), vol 1 at 303 [4.878]; see also Evans, "Pecuniary Interests of Members of Parliament under the Australian Constitution", (1975) 49 *Australian Law Journal* 464 at 474-475.

Service of the Commonwealth" is read, as Keane J suggests and as I agree with him that it should be, as having no application to an agreement entered into by the Executive Government of the Commonwealth in the execution of a law of general application enacted by the Parliament.

103 The reference in s 44(v) of the Constitution to the "Public Service of the Commonwealth" is to be contrasted in that respect with the obviously broader references in s 44(iv) to "the Crown" and in s 45(iii) to "the Commonwealth". The "Public Service of the Commonwealth" is most naturally read as referring to those whom s 67 of the Constitution describes as "other officers of the Executive Government of the Commonwealth" within what s 64 of the Constitution describes as "such departments of State of the Commonwealth as the Governor-General in Council may establish".

104 The expression "Public Service of the Commonwealth" can be seen to be used in s 44(v) in the same sense in which it is used in s 84 of the Constitution in conjunction with the cognate expression "the public service of a State". Complementing ss 52(ii) and 69 of the Constitution, s 84 provides that "[w]hen any department of the public service of a State becomes transferred to the Commonwealth, all officers of the department shall become subject to the control of the Executive Government of the Commonwealth" and goes on to provide, amongst other things, that "[a]ny officer who is, at the establishment of the Commonwealth, in the public service of a State, and who is ... transferred to the public service of the Commonwealth, shall have the same rights as if he had been an officer of a department transferred to the Commonwealth and were retained in the service of the Commonwealth".

105 The Public Service of the Commonwealth is, of course, not a legal entity. An agreement with the Public Service of the Commonwealth can only be an agreement to which the relevant party is the Commonwealth. But not every agreement with the Commonwealth can properly be characterised as an agreement with the Public Service of the Commonwealth.

106 This case does not call for an examination of the outer limits of the class of agreements with the Commonwealth properly characterised as agreements with the Public Service of the Commonwealth. Outside its limits, as I have said, in my view lie agreements entered into in the execution of Commonwealth laws of general application. At its core lie agreements for the procurement of services or property negotiated and entered into for or on behalf of the Commonwealth in the exercise of non-statutory executive authority by officers of the Executive Government of the Commonwealth within a Commonwealth department. The lease lay squarely within that core.

107 To address a particular argument made, *in terrorem*, by senior counsel for Mr Day, I would regard employment under the *Public Service Act* 1999 (Cth), the effect of which is to bring persons so employed within the Public Service of

the Commonwealth, as outside the class of agreements with the Public Service of the Commonwealth to which s 44(v) refers. Were a senator or member of the House of Representatives to become so employed, his seat would become vacant. But that would be either through the operation of s 45(i) by reference to the disqualification in s 44(iv) of a person who "holds any office of profit under the Crown"[84] or through the operation of s 45(iii), which effects a vacancy where a senator or member "directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth". Section 44(v) would not be engaged. Were the spouse of a senator or member of the House of Representatives with whom he or she is jointly liable for mortgage payments on the family home to engage in such employment, none of those provisions would be engaged.

108 Once that narrow but textual and contextual reading of "any agreement with the Public Service of the Commonwealth" is adopted, there is no reason why s 44(v)'s reference to "any direct or indirect pecuniary interest" in such an agreement should be given a more restrictive interpretation than that given to materially identical language directed to a materially identical purpose by Gavan Duffy J when he said in *Ford v Andrews*[85]:

> "A man is directly interested in a contract if he is a party to it, he is indirectly interested if he has the expectation of a benefit dependent on the performance of the contract; but in either case the interest must be in the contract, that is to say, the relation between the interest and the contract must be immediate and not merely connected by a mediate chain of possibilities."

109 The notion of an indirect interest in a contract being an expectation of a benefit dependent on performance of the contract is consistent with the view of s 44(v) implicit in advice given by Robert Garran as Secretary of the Attorney-General's Department to the Secretary of the Postmaster-General's Department in 1902[86]. To the question "whether members of the Commonwealth Parliament are legally qualified to act as sureties for mail contractors", Garran had answered:

> "The position of surety for the performance of a Government contract probably would involve at least an indirect pecuniary interest in the

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84 *Sykes v Cleary* (1992) 176 CLR 77 at 95-96.

85 (1916) 21 CLR 317 at 335; [1916] HCA 29.

86 Garran, "Whether May Be Surety for Contractor to Commonwealth: Whether Seat Would Be Vacated: Whether Would Amount to Pecuniary Interest in Agreement with Commonwealth", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) 149.

> contract within the meaning of the section – seeing that the surety may in certain events be required either to take over the contract or pay the damages."

110 In my opinion, the formulation by Gavan Duffy J in *Ford v Andrews* captures the essence of s 44(v)'s reference to "any direct or indirect pecuniary interest" in an agreement with the Public Service of the Commonwealth. I would not presume to improve on it. I do no more than add two observations concerning its application to s 44(v).

111 The first observation is that for a benefit dependent on the performance of the agreement to amount to a pecuniary interest the benefit must, by definition, be pecuniary: it must be, or be capable of sounding in, money or money's worth. And it must obviously be more than trivial. The expectation that a senator or member of the House of Representatives has of receiving such a benefit dependent on the performance of an agreement with the Public Service of the Commonwealth might be an expectation of making a monetary gain as a result of the performance or non-performance of the agreement. Alternatively, it might be an expectation of avoiding a monetary loss as a result of the performance or non-performance of the agreement.

112 The express exception in s 44(v) for a pecuniary interest which a person has "as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons" indicates that there is no reason why a pecuniary interest within the scope of the provision might not be constituted by an expectation of an increase or decrease in the value of an asset (such as a shareholding) or by an expectation of receipt or non-receipt of a payment the making of which depends on the exercise of an independent discretion (such as a dividend). The exception cannot simply be explained away as reflecting a failure to assimilate the holding in *Salomon v Salomon & Co*[87] that an incorporated company is distinct from its members. The statement in *Webster* that "a person who is no more than a shareholder in a company does not, by reason of that circumstance alone, have a pecuniary interest in any agreement the company may have"[88] is correct insofar as it refers to a direct pecuniary interest. The statement would be incorrect were it taken to exclude the possibility of a person who is no more than a shareholder in a company having an indirect pecuniary interest in an agreement into which the company has entered resulting either from the effect of the agreement on the value of the person's shareholding or from its effect on the person's expectation of the receipt of dividends. In that respect, I do not think it possible to draw any meaningful distinction between an

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87 [1897] AC 22.

88 (1975) 132 CLR 270 at 287.

expected receipt of dividends by a shareholder of an incorporated company and an expected receipt of a distribution by the beneficiary of a trust. The Convention Debates make quite clear that an indirect pecuniary interest was specifically contemplated to include a beneficial interest[89].

113 The second observation is that whether a senator or member of the House of Representatives has an expectation of such a benefit that is immediate or real as distinct from mediate or remote must be determined objectively by reference to the practical consequences of performance or non-performance of the agreement. To use language drawn from *Webster*, the concern cannot be with "bare theoretical possibilities unrelated to the practical affairs of business and departmental life"[90]. The intention of the senator or member cannot be determinative but must be relevant.

114 The fact that the rent had been directed to be paid into Mr Day's bank account meant without more that he had an objective expectation of receiving a monetary benefit from the payment of rent. That was an indirect pecuniary interest. Finding it is sufficient to resolve Mr Day's status in order to answer the questions referred by the Senate.

115 Ordinarily, I think it better to refrain from venturing further into uncharted constitutional territory than is necessary to produce a result in the case at hand. Here, I think that there are countervailing considerations. The other two ways in which Mr Day had the potential to benefit from the Commonwealth performing its obligation to pay rent under the lease were raised by the facts and were the subject of full argument. The importance I place on achieving certainty in the operation of s 44(v) of the Constitution leads me to think that there is utility in expressing conclusions with respect to them.

116 Mr Day's intention in setting up the contractual and trust relationships between Fullarton Investments and B & B Day is highly probative of the way in which those relationships could objectively be expected to have worked to benefit him in practice. Quite apart from the direction as to the payment of rent, the structure he put in place resulted in Mr Day having an expectation of benefiting in money or money's worth from the Commonwealth performing its obligation to pay rent under the lease through him obtaining either, or both, a reduction in the extent of his contingent liability to NAB or a distribution from B & B Day as trustee of the Day Family Trust.

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89 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 21 September 1897 at 1022-1027.

90 (1975) 132 CLR 270 at 286.

117 Senior counsel for Mr Day placed emphasis on the potential beneficiaries set out in the trust deed of the Day Family Trust extending to include, in the discretion of the trustee, "any charitable, educational, benevolent, sporting or religious institution person or persons". True it is that none of the potential beneficiaries could be said to have a beneficial interest in any trust property and that each of the potential beneficiaries could be said to have a "mere expectancy or hope" of receiving a distribution[91]. But few could be said to have an objective expectation. Inclusion of such a broad range of entities within the class of potential beneficiaries is not uncommon in a trust deed for a discretionary family trust, just as inclusion of a very broad range of objects was once not uncommon in memoranda of association of incorporated companies: "the little man starting a grocery business usually combined groceries with power to bridge the mighty Zambesi"[92].

118 The theoretical legal possibility that others might benefit has no bearing on the practical commercial likelihood that Mr Day would benefit. The operation of s 44(v) of the Constitution is concerned with the latter, not the former.

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91 Cf *Kennon v Spry* (2008) 238 CLR 366 at 417 [160]; [2008] HCA 56.

92 *Re Introductions Ltd* [1969] 1 All ER 887 at 888.

119 KEANE J. Section 44(v) of the Constitution relevantly provides:

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

120 By letter dated 8 November 2016 to the Chief Executive and Principal Registrar of the High Court of Australia, the President of the Senate informed this Court of a resolution of the Senate referring to the Court, sitting as the Court of Disputed Returns[93], the following questions:

> "(a) whether, by reason of s 44(v) of the Constitution, or for any other reason[94], there is a vacancy in the representation of South Australia in the Senate for the place for which Robert John Day was returned;
>
> (b) if the answer to Question (a) is 'yes', by what means and in what manner that vacancy should be filled;
>
> (c) whether, by reason of s 44(v) of the Constitution, or for any other reason, Mr Day was at any time incapable of sitting as a Senator prior to the dissolution of the 44th Parliament and, if so, on what date he became so incapable;
>
> (d) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and
>
> (e) what, if any, orders should be made as to the costs of these proceedings."

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93 Constitution, s 47; *Commonwealth Electoral Act* 1918 (Cth), ss 376, 377.

94 On 21 November 2016, French CJ ordered that: "In the absence of any contrary contention, questions (a) and (c) of the questions referred by the Senate ... shall be read as referring to s 44(v) of the Constitution only and not any other reason for the vacancy referred to in those paragraphs". There has been no contrary contention.

121 Questions (a) and (c) are concerned, in particular, with whether Mr Day was incapable of being chosen, or of sitting, as a Senator by reason of his having a direct or indirect pecuniary interest in a lease of part of 77 Fullarton Road, Kent Town, in South Australia ("77 Fullarton Road") to the Commonwealth. The Attorney-General of the Commonwealth contended that Mr Day was incapable of being chosen or sitting as a Senator from no later than 1 December 2015, by which time he had an indirect pecuniary interest in the lease of part of 77 Fullarton Road, contrary to s 44(v) of the Constitution.

122 Upon the referral of the questions to this Court, French CJ directed that each of Mr Day, Ms Anne McEwen and the Attorney-General of the Commonwealth be heard on the hearing of the reference, and be deemed to be a party to the reference pursuant to s 378 of the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act"). Ms McEwen was an unsuccessful candidate at the 2016 federal election for the Australian Labor Party. Ms McEwen was defeated by Mr Day in the counting of votes for the 12th Senate seat to be filled for South Australia at that election.

123 Consideration of the questions posed for determination must begin with an account of the facts which bear upon that determination.

Mr Day and the 44th and 45th Parliaments

124 At the 2013 federal election, Mr Day was elected to serve in the Senate of the 44th Parliament of the Commonwealth representing the State of South Australia. Mr Day's term as a Senator began on 1 July 2014.

125 On 9 May 2016, the 44th Parliament was dissolved by a simultaneous dissolution of both the Senate and the House of Representatives. On 16 May 2016, the Governor of South Australia issued writs for the election of 12 Senators for the State of South Australia at the double dissolution general election to be held on 2 July 2016.

126 On 2 June 2016, Mr Day, in his capacity as the registered officer of the Family First party, submitted to the Australian Electoral Commission ("the AEC") a nomination for Senators in the form of Form CC in Sched 1 to the Electoral Act. By the form submitted by Mr Day: Mr Day was nominated as a candidate for the Senate in South Australia; Ms Lucy Gichuhi was nominated as a candidate for the Senate in South Australia; Mr Day and Ms Gichuhi jointly requested that their names be grouped together on the ballot paper, with Mr Day's name appearing above Ms Gichuhi's; Mr Day, in his capacity as registered officer of Family First, endorsed Mr Day and Ms Gichuhi and requested that Family First's registered name appear next to their names on the ballot and next to their group square above the line.

127 The nominations of Mr Day and Ms Gichuhi, their joint request to be grouped on the ballot, and Family First's request that its name be printed next to their names and group, were accepted by the AEC. The AEC printed a square for the Family First group above the line on the ballot paper for the election.

128 On 4 August 2016, following the election held on 2 July, the Acting Australian Electoral Officer for the State of South Australia certified and returned Mr Day as elected, in the 12th place, to the Senate of the 45th Parliament.

129 The 45th Parliament opened on 30 August 2016.

130 Mr Day resigned as Senator by letter to the President of the Senate, pursuant to s 19 of the Constitution, on 1 November 2016.

77 Fullarton Road

131 The primary facts relating to Mr Day's association with the lease of a portion of 77 Fullarton Road to the Commonwealth were established by the materials accompanying the reference to this Court; by agreement between the parties; and by further findings made by Gordon J after a hearing for that purpose conducted in January 2017[95]. These primary facts are not in dispute. At issue is whether, in light of these facts, Mr Day had from 1 December 2015, as the Attorney-General contended, an indirect pecuniary interest in the lease of a portion of 77 Fullarton Road to the Commonwealth.

132 B & B Day Pty Ltd ("B & B Day") was the registered proprietor of 77 Fullarton Road from September 2011 until 11 November 2014. B & B Day held 77 Fullarton Road as trustee of the Day Family Trust, a discretionary trust. B & B Day was, and remains, the trustee of the Day Family Trust. Until 30 June 2014, Mr Day was the sole director and shareholder of B & B Day; after 30 June 2014, Mr Day's wife, Bronwyn Esther Day, was the sole appointed director and shareholder. Mr and Mrs Day, and members of their family, were, and remain, beneficiaries of the Day Family Trust. Mr Day was, and remains, the appointor of the Day Family Trust.

133 On 2 January 2014, the National Australia Bank ("NAB") approved a loan facility in favour of B & B Day to a limit of $1.6 million, with interest, for a term of five years. The security for the loan included a registered mortgage by B & B Day in favour of NAB over 77 Fullarton Road. In addition, Mr and Mrs Day gave a guarantee and indemnity for $2 million for the performance by B & B Day of its obligations under the facility.

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95 *Re Day* (2017) 91 ALJR 262; [2017] HCA 2.

134 Upon Mr Day's election to the Senate in 2013, he was entitled under the *Parliamentary Entitlements Act* 1990 (Cth)[96] to be provided by the Commonwealth with an electorate office. Generally speaking, an incoming Senator is expected to occupy the premises vacated by his or her predecessor in the Senate. Mr Day made representations to the Department of Finance to the effect that he did not wish to occupy the electorate office of his predecessor, Senator Donald Farrell, at 19 Gilles Street in the Adelaide CBD, and asked whether the Commonwealth would take a lease of a portion of 77 Fullarton Road for use by Mr Day as his electorate office.

135 From late 2013, Mr Day believed that the Commonwealth would be unwilling to take a lease of part of 77 Fullarton Road while he, or an entity he owned, was the owner of the freehold. Mr Day arranged for the incorporation of Fullarton Investments Pty Ltd ("Fullarton Investments") upon advice from his accountant, Mr Vic Rasera, for the purpose of acquiring 77 Fullarton Road from B & B Day. From no later than 16 December 2013, there was an arrangement between B & B Day, as trustee of the Day Family Trust, and Fullarton Investments, as trustee of the Fullarton Road Trust, that Fullarton Investments would collect rent paid by the Commonwealth and pass it back to the Day Family Trust.

136 Fullarton Investments was incorporated on 16 December 2013. Mr Day is not, and has never been, a shareholder or a director of Fullarton Investments. Mrs Debra Smith, the wife of a long-time business associate of Mr Day, agreed to become the sole shareholder and director of Fullarton Investments. Subsequently, Mr Colin Steinert became the sole shareholder; he held his shares beneficially. On the same day that Fullarton Investments was incorporated, a discretionary trust was established, known as the Fullarton Road Trust, with Fullarton Investments as the trustee and the Day Family Trust as one of the beneficiaries.

137 On 24 April 2014, Fullarton Investments, as trustee of the Fullarton Road Trust, agreed to purchase 77 Fullarton Road from B & B Day for $2.1 million; but no money changed hands. The sale by B & B Day to Fullarton Investments was facilitated by a vendor finance agreement whereby B & B Day lent to Fullarton Investments the purchase price of $2.1 million.

138 By email dated 5 May 2014, Mr Day advised the Department of Finance that the new owner of 77 Fullarton Road was Fullarton Investments. A memorandum of transfer of the property at 77 Fullarton Road, executed by B & B Day in favour of Fullarton Investments on 4 September 2014, was registered on 11 November 2014. On that date, NAB discharged the mortgage

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96 See s 4(1) and Item 7 of Pt 1 of Sched 1.

granted by B & B Day over the property and a new mortgage was registered over the property, showing Fullarton Investments as the mortgagor. Under the terms of the loan facility in favour of B & B Day, B & B Day remained liable to make repayments to NAB.

139 On 9 October 2014, Senator Michael Ronaldson, on behalf of the Department of Finance, wrote to Mr Day acknowledging that Mr Day had agreed to undertake works for the re-configuration of the proposed electorate office at his own expense. Mr Day was advised that, subject to certain terms, the Department was prepared to agree to the establishment of Mr Day's electorate office within the premises at 77 Fullarton Road. Those terms included that there be a rent free period until such time as the lease on the 19 Gilles Street premises expired, or those premises were able to be sub-let. On 15 October 2014, Mr Day wrote back accepting the terms of the proposed lease.

140 From April 2015, Mr Day used parts of the premises at 77 Fullarton Road as his electorate office. A sum in the order of $200,000 was spent on works carried out on the property. A substantial portion of that expenditure occurred following the transfer of the property to Fullarton Investments and was met by B & B Day. All outgoings in relation to the property were paid by Mr Day, B & B Day, or other entities who were tenants of the property prior to the sale to Fullarton Investments.

141 On 29 December 2015, Mr Day wrote to the Minister for Finance requesting that the Department pay rent for 77 Fullarton Road as from 1 July 2015. The letter stated that Mr Day had "spent nearly $200,000 getting [77 Fullarton Road] up to standard" and had "been paying rent out of [his] salary since moving into [77 Fullarton Road] early this year".

142 The Commonwealth entered into an agreement with Fullarton Investments to lease 77 Fullarton Road for use as Mr Day's electorate office by a memorandum of lease executed on 1 December 2015, with a commencement date of 1 July 2015 ("the Lease"). The Lease gave the Commonwealth an option to renew for a term of six years. The Lease provided for annual rent of $66,540 plus GST, to be paid monthly by the Commonwealth to "the account nominated by" Fullarton Investments.

143 On 12 June 2015, before the Lease took effect, Mr Day, as "representative" of Fullarton Investments, had sent to the Department of Finance a completed "Vendor Information" form which recorded Mr Day as the relevant contact and nominated a bank account in the name of "Fullarton Nominees" for the receipt of rent. Fullarton Nominees is a business name owned by Mr Day. Mr Day was the owner of that bank account.

144 After the Lease was executed, on 26 February 2016, Ms Joy Montgomery, on behalf of Fullarton Investments, sent to the Department of Finance a rental

form directing the Department to pay the rent under the Lease to Fullarton Nominees. Ms Montgomery was Mr Day's executive assistant. It was this direction which was effective for the purposes of the nomination contemplated by the Lease.

145 One may observe that the control which Mr Day was in a position to exercise over rent paid by the Commonwealth into the bank account of Fullarton Nominees from 26 February 2016 was consistent with the arrangement between B & B Day and Fullarton Investments that the rent paid by the Commonwealth to Fullarton Investments would be passed back to B & B Day. With that observation, one may now turn to consider whether Mr Day's ability to deal with the rent paid by the Commonwealth in order to give effect to that arrangement was sufficient to give him an indirect pecuniary interest in the Lease, so as to engage the disqualifying effect of s 44(v) of the Constitution.

The scope of s 44(v)

The parties' contentions

146 Mr Day argued that because s 44(v) disqualifies the affected person from serving in Parliament and exposes him or her to a financial "penalty" for sitting when disqualified[97], it should be given a narrow construction[98].

147 Mr Day argued that the mischief at which s 44(v) is directed is the making of contracts that place a person "under the influence of the Crown in relation to Parliamentary activities" or that enable the Crown to "'sap' the freedom and independence of Parliament"[99]. In adopting that approach, Mr Day relied on the purpose of s 44(v) identified by Barwick CJ in *In re Webster*, namely the "protection of the independence of the parliament"[100].

148 In reliance on *Webster*, Mr Day argued that s 44(v) is engaged only where there is an agreement under which a legislator "could conceivably be influenced by the Crown in relation to Parliamentary affairs"[101]. Mr Day essayed the

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97 See Constitution, s 46. The operation of this provision has been modified by subsequent legislation in s 3 of the *Common Informers (Parliamentary Disqualifications) Act* 1975 (Cth). The penalty is $200 per day.

98 See *Fletcher v Lord Sondes* (1826) 3 Bing 501 at 580-581 [130 ER 606 at 637].

99 *In re Webster* (1975) 132 CLR 270 at 288; [1975] HCA 22.

100 *Webster* (1975) 132 CLR 270 at 279.

101 *Webster* (1975) 132 CLR 270 at 280.

argument that, because the officers of the executive government with whom he dealt were unaware of his connection with the Lease, there was no possibility that the executive government might seek to use it to influence his decisions as a Senator.

149 Finally, Mr Day argued that an interpretation of s 44(v) unconfined by the purpose identified by Barwick CJ in *Webster* would catch transactions by parliamentarians that the framers of the Constitution could not possibly have contemplated, such as a Senator taking a loan from the Commonwealth Bank.

150 Mr Day contended that the decision in *Webster* was determinative of Questions (a) and (c) in his favour. It was submitted that the decision of Barwick CJ has the same authority as a decision of the full court of this Court given that Barwick CJ was sitting as the Court of Disputed Returns. It was said that this Court should be slow to accept an invitation to depart from the approach adopted by Barwick CJ except "with great caution and for strong reasons"[102].

151 The Attorney-General acknowledged that this Court should not depart lightly from *Webster*, but submitted that the decision to depart from that authority requires an "evaluation of factors which may weigh for and against overruling"[103]. In this regard, it was said to be relevant that *Webster* is a decision of a single judge; does not rest on a principle carefully worked out in a significant succession of cases[104]; and rests on a narrow construction that does not cohere with the purpose or history of s 44(v).

152 On behalf of the Attorney-General, it was said that s 44(v) is addressed, in part at least, to ensuring faithful service by members of the legislature; not only by eliminating the influence of the executive government upon parliamentarians, but also by ensuring that the representatives are not tempted to attend to their own interests rather than to the interests of those whom they represent.

153 The Attorney-General argued that the test for the operation of s 44(v) is whether there is a real risk that an interest in an agreement could give rise to prohibited forms of influence, or the perception thereof. The Attorney-General argued that there need be no inquiry into whether the interest would *in fact* influence the discharge of the person's duties as a parliamentarian[105]. While an

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102 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554; [1997] HCA 25.

103 *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352 [70]; [2009] HCA 2.

104 See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439; [1989] HCA 5.

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

evaluation is required in each case, the test is an objective one as to the potential to influence a parliamentarian[106].

154 It was said on behalf of the Attorney-General that a risk of being influenced in the exercise of public duties will not arise where the person's expected monetary gain or loss is too remote or insubstantial. Similarly, so it was said, s 44(v) will not be engaged by routine transactions where there is no real risk of a parliamentarian being, or being perceived to be, influenced. It was said that s 44(v) sets a threshold that is low enough not to impose a rigid standard that would defeat the constitutional object, yet high enough to exclude the absurdities that may arise on a literal construction.

155 Ms McEwen argued that a person has a pecuniary interest in an agreement for the purposes of s 44(v) if that person stands to gain (or lose) financially from the existence or performance of the agreement[107]. Ms McEwen did not accept that there must be a real risk that the person could be influenced, or perceived to be influenced, in relation to parliamentary affairs before s 44(v) is engaged. Ms McEwen argued that the correct approach is to apply the language of the provision, without a separate assessment of whether the purpose of the provision is satisfied. It was said that s 44(v) *assumes* that when its terms are contravened there will be a risk of influence by the executive, or a risk of potential conflict – there is no additional requirement that there *in fact* be a real (objective) risk of influence or conflict.

156 There is considerable force in Ms McEwen's submission on this point. The Attorney-General's proposal of a test based on an evaluative judgment of whether, in the circumstances of any particular case, a risk of influence arises is an invitation to apply an impressionistic approach rather than the constitutional text. Further, the Attorney-General's exclusion of "routine transactions" from the disqualifying effect of s 44(v) offers no guidance derived from the constitutional text itself.

157 In considering the rival arguments advanced by the parties, it is necessary to address first the reliance placed by Mr Day on *Webster*.

Webster

158 In *Webster*[108], Senator James Webster was a shareholder in J J Webster Pty Ltd ("the Webster Company"), a company founded by his grandfather which

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106 See *Ford v Andrews* (1916) 21 CLR 317 at 322, 324; [1916] HCA 29.

107 See *Webster* (1975) 132 CLR 270 at 280.

108 (1975) 132 CLR 270.

carried on business in Victoria as a timber, hardware and plumbing merchant. From time to time, the Webster Company tendered, sometimes successfully, for the supply of material for the use of the Postmaster-General's Department and the Department of Housing and Construction. Senator Webster was the Webster Company's managing director, secretary and manager. The Webster Company had nine shareholders.

159 The Senate referred to this Court, sitting as the Court of Disputed Returns, questions as to whether Senator Webster was or had become incapable of being chosen, or of sitting, as a Senator. Notwithstanding that the case raised questions as to the operation of a provision of the Constitution on which no previous decision of the Court shed any light, Barwick CJ decided to hear the case alone. His Honour answered the questions posed for determination favourably to Senator Webster.

160 Barwick CJ took a narrow view of the scope of s 44(v), interpreting it as applying only to an agreement:

> "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"[109].

161 In my respectful opinion, this central element of the reasoning in *Webster*, upon which Mr Day relied, cannot be supported. It reflects a view of the scope of the disqualification which is narrower than the text conveys as a matter of its ordinary meaning, and is based on an understanding of the purpose of the provision which is narrower than that indicated by an examination of the Debates of the Australasian Federal Convention of 1897-1898 ("the Convention Debates")[110].

162 Barwick CJ proceeded upon the view that s 44(v) served the same purpose as the *House of Commons (Disqualification) Act* 1782 (UK) ("the 1782 Act"), which disqualified from Parliament any person who:

> "shall, directly or indirectly … for his use or benefit … undertake, execute, hold, or enjoy … any contract, agreement, or commission, made or entered into with [the Crown] … for or on account of the publick

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109 *Webster* (1975) 132 CLR 270 at 280.

110 The Convention Debates took place in three sessions: first session, Adelaide, 22 March to 5 May 1897; second session, Sydney, 2 to 24 September 1897; third session, Melbourne, 20 January to 17 March 1898.

> service … during the time that he shall execute, hold, or enjoy, any such contract, agreement, or commission".

163 There is something to be said for the view that the purpose of the 1782 Act was not limited exclusively to "[t]he protection of the independence of the parliament"[111]. In this regard, it should be noted that, during the debate on the Bill for the 1782 Act, Edmund Burke observed 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 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"[112]. Burke's observations support the notion that a parliamentarian should be beyond the reach of considerations of financial self-interest in the exercise of his or her office.

164 In addition, the distinction which Barwick CJ perceived between the protection of the independence of parliamentarians from the influence of the executive government, and the prevention of conflict between the interests and duties of parliamentarians, is hardly a bright line. So much was acknowledged by Barwick CJ in *Webster*[113] itself. A parliamentarian who is induced to yield to the influence of the executive by an expectation of pecuniary gain held out by the executive affords but one example, albeit an important example, of the preference for personal financial interest over parliamentary duty.

165 But even if it be accepted that the 1782 Act was directed exclusively at the mischief identified by Barwick CJ, the language in which s 44(v) is cast is sufficiently different from the 1782 Act as to suggest that it was not addressing only that mischief, but a broader concern as to the conflict between interest and duty, of which the possibility of yielding to blandishments provided by the executive government (for example, to support it on a motion of no confidence) is but one manifestation.

Textual considerations

166 Barwick CJ identified s 1 of the 1782 Act as the "precise progenitor" of s 44(v)[114]; but the 1782 Act disqualified only those persons who "undertake,

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111 *Webster* (1975) 132 CLR 270 at 279.

112 House of Commons, 12 April 1782: see *The Parliamentary History of England*, (1814), vol 22 at 1334-1335.

113 (1975) 132 CLR 270 at 279.

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

execute, hold, or enjoy" an agreement with the Crown. Section 44(v) expressly extends the disqualification to those with a "pecuniary" interest, "direct or indirect", in an "agreement" with the Public Service of the Commonwealth.

167 The express extension of s 44(v) to pecuniary interests indirectly held in an agreement necessarily means that a disqualifying agreement need not be one to which a parliamentarian is a party. In such a case, the executive government may be entirely unaware, as was the case here, of the possibility of exercising influence over the parliamentarian. This would suggest that the purpose of the disqualification is not limited to preventing executive influence upon a parliamentarian, but extends to preventing the influence of a member's private financial interests upon the discharge of his or her parliamentary functions.

168 The reference to having a pecuniary interest in an agreement appeared for the first time at the 1898 Melbourne Convention in the fourth and final draft of the provision. In *Webster*[115], Barwick CJ held that the purpose served by s 44(v) "has no real analogy in the purpose sought to be achieved by disqualification provisions under local government and comparable legislation … [which is] to prevent a possible conflict of interest and duty". But disqualification from elective office because of a "pecuniary interest in any agreement" with local government had long been used in local government legislation to remove "[t]he manifest possibility of a conflict between duty and interest"[116].

169 The language in the final draft of what became s 44(v) departed from the language of the 1782 Act in several other respects[117]. The disqualification of a person who holds "any agreement for or on account of the public service of the Commonwealth"[118] was altered to become a disqualification which depended upon the agreement being made, not for the public service of the Commonwealth – as an abstract purpose – but "with the Public Service of the Commonwealth", that is, with officers of the administrative organ of the government.

170 The contrast with s 44(iv) of the Constitution is instructive. Section 44(iv) disqualifies from Parliament the holder of "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". Significantly, s 44(v) is focused upon

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115 (1975) 132 CLR 270 at 278.

116 *Attorney-General v Emerald Hill* (1873) 4 AJR 135 at 136.

117 Hammond, "Pecuniary Interest of Parliamentarians: A Comment on the *Webster Case*", (1976) 3 *Monash University Law Review* 91 at 94-98.

118 *Official Report of the National Australasian Convention Debates*, (Adelaide), 15 April 1897 at 736.

agreements "with the Public Service of the Commonwealth", that is, with officers of the administration who might or might not be within the scope of "the Crown". Insofar as s 44(v) is apt to be engaged by an agreement with an officer of the administration other than a Minister of the Crown, it might be thought that the concern animating s 44(v) is not that the Crown might exert influence on the parliamentarian, but rather that the parliamentarian might seek to exert a corrupting influence on officers of the administration with whom he or she comes into contact. A provision such as s 44(v) might be thought to be especially necessary in a constitutional structure in which the executive government is, unlike the executive government under the Constitution of the United States of America, dependent for its survival upon the support of the legislature.

171 In addition, a broader understanding of the scope of s 44(v) than that applied in *Webster* is supported by the express exclusion from the reach of the disqualification of those pecuniary interests derived from membership of companies consisting of more than 25 persons. The express exclusion from disqualification is a further textual indication that the purpose of the disqualification is not confined to limiting the influence of the executive government over those contracted to it.

172 Apart from these textual considerations, reference to the Convention Debates shows that s 44(v) was not directed solely at a concern to keep members of Parliament from "being in the pay of the Government"[119] or "to prevent the Government of the day from buying the services and support of members of Parliament"[120].

The Convention Debates

173 Barwick CJ adopted his narrow view of the scope of s 44(v) with only limited recourse to the Convention Debates[121]. More comprehensive reference to the Convention Debates than was undertaken by his Honour suggests that s 44(v) was directed at an apprehended conflict between the disinterested performance of a parliamentarian's public duty and the possibility of enhancement of his or her financial interests by arrangements with officers of the executive government. Some of the leading lights among the framers made this concern clear during the course of the Convention Debates.

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119 *Official Report of the National Australasian Convention Debates*, (Adelaide), 21 April 1897 at 1035.

120 *Official Report of the National Australasian Convention Debates*, (Adelaide), 21 April 1897 at 1036.

121 *Webster* (1975) 132 CLR 270 at 279.

174 In Adelaide in April 1897, Mr Isaac Isaacs said[122]:

> "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 … 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."

175 This concern was echoed by Mr George Reid, who said[123]:

> "[A]s a matter of principle, the more free a man who represents the people is from transactions with the Government the better it is for himself and for his public usefulness."

176 Mr Edmund Barton considered the mischief at which the measure that became s 44(v) was directed to be the possibility of "carrying out a fraud upon the public"[124].

177 In Sydney in September 1897, Sir John Downer said[125]:

> "I think it inexpedient to allow members of parliament to have any contractual relations which might suggest to any one that their position might be impure."

178 On this occasion, Mr Isaacs was even more explicit: "The object of the clause is to prevent individuals making a personal profit out of their public positions"[126].

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122 *Official Report of the National Australasian Convention Debates*, (Adelaide), 21 April 1897 at 1037-1038.

123 *Official Report of the National Australasian Convention Debates*, (Adelaide), 21 April 1897 at 1038.

124 *Official Report of the National Australasian Convention Debates*, (Adelaide), 15 April 1897 at 737.

125 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 21 September 1897 at 1025.

126 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 21 September 1897 at 1023.

179 Subsequently, in *The King v Boston*[127], Isaacs J (as Mr Isaacs had become) joined with Rich J in the following statement, echoing the views of Edmund Burke cited earlier:

> "The fundamental obligation of a member in relation to the Parliament of which he is a constituent unit still subsists as essentially as at any period of our history. That fundamental obligation … is *the duty to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community." (emphasis in original)

A strict construction

180 In *Webster*, Barwick CJ described s 44(v) as a "vestigial" part of the Constitution which should receive a strict construction[128].

181 The concern that parliamentary office should not be, or be seen to be, a source of personal gain for members of Parliament was familiar to the framers of our Constitution from the great public debate that preceded the adoption of the Constitution of the United States. At that time, there was strong opposition to the proposal, ultimately adopted, that members of Congress should receive a salary. The opposition to salaries for congressmen reflected the view that public service as a member of the federal legislature should be entirely disinterested. The view which ultimately prevailed balanced that purist view against the egalitarian consideration that if Congress were not to be the exclusive preserve of the wealthy, it would be necessary for those serving in the legislature to receive remuneration for that service[129].

182 Our Constitution, by s 48, makes express provision for the payment of a salary to members of Parliament. That salary may be altered by the Parliament. In this way, s 48 acknowledges that, in order to achieve a broad representation of all sections of the people, including those whose only means of support is their own personal exertion, the strict standards of personal disinterest championed by Edmund Burke and Isaac Isaacs might legitimately be compromised to the extent that a member has an interest in his or her parliamentary salary. But there are limits to the compromise.

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127 (1923) 33 CLR 386 at 400; [1923] HCA 59. See also *Cunningham v The Commonwealth* (2016) 90 ALJR 1138 at 1166-1167 [173]; 335 ALR 363 at 399-400; [2016] HCA 39.

128 *Webster* (1975) 132 CLR 270 at 278-279.

129 Amar, *America's Constitution: A Biography*, (2005) at 16, 58, 72-74, 151, 453-457.

183 In this regard, s 44(v) affords an irreducible minimum of protection against the possibility that the personal pecuniary interests of parliamentarians might be allowed to compete with the interests of the people they represent, and so "cynically turn public debate into a cloak for bartering away the public interest"[130]. Section 44(v) serves to ensure that the conscientious discharge of a parliamentarian's duties is not affected by considerations of pecuniary benefit which might be made available to members of the legislative branch of government by reason of their position by officers of the executive government. In this regard, in *Brown v West*[131], Mason CJ, Brennan, Deane, Dawson and Toohey JJ observed:

> "There is much to be said for the view that the Parliament alone may make provision for benefits having a pecuniary value which accrue to its members in virtue of their office and which are not mere facilities for the functioning of the Parliament."

184 It is to do a disservice to the abiding importance of the constitutional balance between the constitutional values of social equality and parliamentary integrity to describe the protection afforded by s 44(v) to the latter as a "vestigial" provision to be strictly confined in its operation.

A "direct or indirect pecuniary interest in any agreement"

The parties' contentions

185 Mr Day accepted that the Lease, being an executory contract, was an "agreement" for the purposes of s 44(v). Mr Day did not dispute that the Lease was with the Public Service of the Commonwealth.

186 Mr Day submitted that he did not have a direct or indirect pecuniary interest in the Lease. He argued that only a legally enforceable interest is within the contemplation of s 44(v). Mr Day also argued that, consistently with the purpose of s 44(v) for which he contended, an interest will not be a "pecuniary interest" in an agreement unless "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 relation to Parliamentary affairs"[132].

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130 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 159; [1992] HCA 45.

131 (1990) 169 CLR 195 at 201; [1990] HCA 7.

132 *Webster* (1975) 132 CLR 270 at 280.

187 Mr Day argued that, even if he were a party to the Lease, or a shareholder of a party to the Lease, his interest could not be understood as apt to compromise his independence vis-à-vis the executive government because there is no suggestion that, at any material time, any officer of the executive government knew that Mr Day had any direct or indirect interest in the Lease. It may be said immediately that, by this argument, Mr Day seeks to make a virtue of necessity. Mr Day knew the executive government wished him to use premises that had been used as an electorate office by Senator Farrell and, more importantly, he understood that it would not be willing to provide financial support for his use of the premises at 77 Fullarton Road while he held an interest in them. If the officers of the executive government with whom Mr Day dealt had known of his expectation of the receipt of rent from the Lease, then his discussions with those officers could have appeared as a case of a cross-bench Senator seeking private accommodation from an executive government which was in need of cross-bench support for its legislative program. That would have appeared as a glaring example of the kind of dealing between a parliamentarian and an officer of the executive government that s 44(v) was designed to prevent. Mr Day's case that he had no pecuniary interest is not made more attractive because his self-interested dealing was masked by the trust structure he caused to be set up.

188 Mr Day also argued that the interest must be "in the agreement"; and that having such an interest is narrower than having a pecuniary interest "as a result of an agreement", or "flowing from an agreement", or "arising out of" an agreement. Mr Day argued that the mere possibility that Fullarton Investments might receive moneys under the Lease and then exercise its discretion as trustee to pay amounts to B & B Day, which might, in turn, exercise its discretion as trustee to pay amounts to Mr Day, could not establish that Mr Day had even an indirect interest *in* the Lease.

189 Ms McEwen argued that a pecuniary interest, in a context like s 44(v), is one that "sound[s] in money or money's worth"[133]. It was submitted on her behalf that, in this context, the meaning of "pecuniary interest" is the same as "financial interest". In *Amadio Pty Ltd v Henderson*[134], the Full Court of the Federal Court of Australia held that a "financial interest" is such "that it can give rise to an expectation, which is not too remote, of a 'gain or loss of money'"[135]. Ms McEwen also argued that, while the beneficiaries of a discretionary trust are generally dependent on the exercise of the power given to the trustee to distribute

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133 *Webb v The Queen* (1994) 181 CLR 41 at 75 fn 33; [1994] HCA 30.

134 (1998) 81 FCR 149.

135 *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149 at 276.

income or capital to the beneficiaries[136], a beneficiary of a discretionary family trust has, at least, an indirect pecuniary interest in a contract over the trust assets.

Mr Day's pecuniary interest

190 Mr Day's submission that only a legally enforceable interest is contemplated by s 44(v) must be rejected. Section 44(v) is concerned with "pecuniary interests", not with rights enforceable in the courts. In this regard, it is inconceivable that s 44(v) would not be engaged by an agreement by an officer of the executive government to provide payments to a parliamentarian, in return for support in the Parliament, simply because both parties to the agreement were content that their arrangement should not be a contract enforceable in the courts. Such an agreement would be a most serious (and obvious) example of what is targeted by s 44(v).

191 Accordingly, it is not necessary in this case to resolve any question as to whether the corporate and trust structures established by Mr Day were apt to avoid the disqualifying effect of s 44(v). An expectation of a gain or loss of money generated by a promise may exist without a legally enforceable entitlement to payment of money. Given the constitutional context, it is enough that the person's pockets were or might be affected[137].

192 The term "indirect" indicates that, here, regard may be had "to practical as well as legal effect"[138], so that a person has at least an "indirect" interest of a pecuniary nature in an agreement if the agreement is such that it can give rise to an expectation of a monetary gain or loss if it is performed. A person who has an expectation of a benefit dependent on the performance of an agreement is naturally said to be indirectly interested in the agreement[139]. As was said in *Ford v Andrews*[140], such a person is "'interested' if he [or she] is not 'disinterested' in a pecuniary or proprietary sense".

193 In *Ford v Andrews*, this Court was concerned with s 70(j) of the *Local Government Act* 1906 (NSW), which relevantly provided that a person is disqualified from the office of alderman if:

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136 *Federal Commissioner of Taxation v Vegners* (1989) 90 ALR 547 at 551-552.

137 *Brown v Director of Public Prosecutions* [1956] 2 QB 369 at 378; *Rands v Oldroyd* [1959] 1 QB 204 at 214.

138 *Crump v New South Wales* (2012) 247 CLR 1 at 26 [60]; [2012] HCA 20.

139 *Ford v Andrews* (1916) 21 CLR 317 at 335.

140 (1916) 21 CLR 317 at 330.

> "he is directly or indirectly … engaged or interested (other than as a shareholder in an incorporated company … consisting of more than twenty members) in any contract, agreement, or employment with, by, or on behalf of the council".

194 Gavan Duffy J said[141]:

> "A man is directly interested in a contract if he is a party to it, he is indirectly interested if he has the expectation of a benefit dependent on the performance of the contract".

195 Mr Day had a pecuniary interest in the Lease from no later than 26 February 2016. It is unnecessary to determine whether Mr Day's position as a beneficiary of the Day Family Trust, either on its own or in combination with his position as guarantor of B & B Day's financial obligations, was a sufficient indirect interest for the purposes of s 44(v). That Mr Day hoped for a pecuniary benefit from the Lease is undeniable, given the directions that the rent be paid into the bank account of Fullarton Nominees, which was owned by him. The direction of 26 February 2016 meant that the Lease would, in fact, put money into Mr Day's pocket. From that date he had an expectation of a benefit dependent on the performance of the Lease by the Commonwealth.

196 That was so even though the discretions available to Fullarton Investments and B & B Day might not have been exercised to bring these receipts to account as distributions to Mr Day. Mr Day's control over the rental payments when received would mean that he could use them, as was intended, to repay the loan to NAB. It is not to the point that Mr Day's legal entitlement might not have been established by resolutions of the trustees. Mr Day, as a practical matter, had the spending of the rental money, and so he had a pecuniary interest in the Lease. And that would be so as a matter of fact whether or not the records of the trusts acknowledged that practical reality.

197 At this point, one may return to note that Mr Day put forward a number of examples of cases that would be caught by what was said to be the "overly expansive reading of s 44(v)" urged by Ms McEwen and the Attorney-General of the Commonwealth. Mr Day offered as examples the case of a parliamentarian or potential parliamentarian:

(i) who subscribes for a government bond;

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

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141 (1916) 21 CLR 317 at 335.

(iii) whose spouse is a senior public servant who is remunerated pursuant to a contract with the Commonwealth in circumstances where the spouse's income benefits the parliamentarian, eg, through the reduction of a mortgage for which both are jointly and severally liable.

198 Mr Day mustered other examples, but it is sufficient to say that in each case the example depended upon the provision of a benefit by the Commonwealth which might enure to the benefit of the parliamentarian. The first point to be made here is that the possibility that there may be difficulty in discerning the outer limits of the operation of the constitutional disqualification is not a reason to decline to apply it to a case which is plainly within its scope; and this is such a case. Secondly, Mr Day's examples invite the response that s 44(v) is not concerned with the myriad of benefits generally provided by the Commonwealth to its citizens. Mr Day's examples exaggerate the reach of s 44(v) because they fail to pay due attention to the limitations inherent in its text.

199 The examples offered by Mr Day all assume that an agreement under which the Commonwealth is the source of an expected benefit is sufficient to engage the disqualifying effect of s 44(v). But, in the context in which s 44(v) appears, the circumstance that the Commonwealth is the source of the benefit is not sufficient to engage the incapacitating effect of s 44(v). That effect will be engaged only if the agreement is made with "the Public Service of the Commonwealth". An agreement with the Commonwealth (for the creation of which the Constitution provides) or with the Crown in right of the Commonwealth (to which s 44(iv) expressly refers) made under a law of the Commonwealth of general application is not within the letter of s 44(v).

200 The disqualifying interest contemplated by s 44(v) is a pecuniary interest generated by an agreement made with the Public Service of the Commonwealth. Of course, while the Commonwealth will inevitably be the ultimate source of the benefit under such an agreement, it is the circumstance that the source of the benefit is in an agreement made with the Public Service of the Commonwealth which engages the disqualifying effect of the provision. It is only a pecuniary interest in such an agreement that is within the purview of s 44(v). Pecuniary benefits available generally to members of the Australian community are not within the mischief at which s 44(v) is directed merely because the Commonwealth is the ultimate source of the benefit. Given the purpose that informs s 44(v), there is no reason to expand its disqualifying effect to any person who might obtain a pecuniary benefit conferred by the Commonwealth which is available generally to the community. Such a benefit does not fall within the spirit of s 44(v)[142].

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142 Cf *Hobler v Jones* [1959] Qd R 609 at 620.

201 Acceptance of this limitation might be thought to obviate the concern as to an unduly expansive operation of s 44(v), but it is not possible to come to a concluded view on this point. The Attorney-General of the Commonwealth was not disposed to support such an approach, and so it was not the subject of argument by the parties. In any event, as noted already, it is unnecessary to reach a concluded view upon the outer limits of the disqualifying operation of s 44(v) because in the present case Mr Day's interest falls squarely within its scope.

Question (b) – filling the vacancy

The parties' contentions

202 Mr Day submitted that if he were not capable of being chosen for the Senate, a special count would be the appropriate manner in which to fill the vacancy, with votes above the line in favour of Family First, and those below the line in favour of Mr Day, being allocated to Ms Gichuhi. The Attorney-General agreed with Mr Day's proposal, submitting that a special count of this kind would not result in a distortion of the voters' real intentions, and so should be preferred to a fresh election, which would occasion significant cost and inconvenience.

203 Ms McEwen submitted that if Mr Day were found to have been incapable of being chosen as a Senator, the vacancy should be filled by a special count of the ballots cast at the election, disregarding the votes cast above the line for the Family First group and those below the line in favour of Mr Day. Ms McEwen argued that the presence of Mr Day on the ballot paper as the first of two candidates for the Family First group distorted the vote for that party and those votes cannot be reasonably attributed to the second candidate.

204 Ms McEwen argued that, as there were only two candidates in Mr Day's group (the minimum number under s 168 of the Electoral Act), in the event he were found to be incapable of being chosen, there was no valid group entitled to be placed above the line on the ballot paper. In addition, Ms McEwen argued that it could not be said that it is "highly probable, if not virtually certain"[143] that, had Mr Day not been on the ballot, Family First or Ms Gichuhi would have received the same number of votes.

205 The Attorney-General argued in response that there is no sufficient factual foundation to support the submission that Mr Day's presence on the ballot "distorted" the vote; and that no sufficient reason is shown by Ms McEwen for disregarding the preferences of a significant number of voters[144].

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143 Cf *Sykes v Cleary* (1992) 176 CLR 77 at 102; [1992] HCA 60.

144 24,817 voters.

A special count

206 The Court has the power to "declare any candidate duly elected who was not returned as elected" pursuant to s 360(1)(vi) of the Electoral Act. That power carries with it an incidental power to order a special count[145].

207 In accordance with the principles stated in *In re Wood*[146] and followed in *Sue v Hill*[147], a special count may be ordered to fill a vacancy occasioned by the return of a candidate who was subject to disqualification under s 44, to be filled by giving effect to "the true result of the polling – that is to say, the true legal intent of the voters so far as it is consistent with the Constitution and the [Electoral] Act"[148].

208 There is, of course, no suggestion here that the presence of Mr Day's name on the ballot paper falsified the declared choice of the people of South Australia for any of the other 11 candidates who were declared to be elected. The circumstance that Mr Day was not eligible to be chosen as a Senator means that a vote for him was without effect[149]. That having been said, the circumstance that Mr Day was not eligible to be chosen as a Senator did not invalidate the ballot in which his name appeared. As was said by this Court in *Wood*[150], "an election is not avoided if an unqualified candidate stands" because "[i]f it were otherwise, the nomination of unqualified candidates would play havoc with the electoral process".

209 It is true that s 168(1) of the Electoral Act requires that there be two or more eligible members of a group to allow a request to be made to the Electoral Officer to print the group's square above the line on the ballot papers; but the circumstance that one member is not eligible to be chosen does not have the invalidating effect for which Ms McEwen contends. Nothing in s 168 or the associated provisions of the Electoral Act purports to suggest that the presence on the ballot of a candidate, later found to be disqualified, as part of a

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145 *In re Wood* (1988) 167 CLR 145 at 172; [1988] HCA 22. See also s 379 of the Electoral Act.

146 (1988) 167 CLR 145.

147 (1999) 199 CLR 462; [1999] HCA 30.

148 *Wood* (1988) 167 CLR 145 at 166. See also *Sykes v Cleary* (1992) 176 CLR 77 at 102; *Free v Kelly* (1996) 185 CLR 296 at 302-304; [1996] HCA 42.

149 *Wood* (1988) 167 CLR 145 at 166.

150 (1988) 167 CLR 145 at 167.

multi-person group invalidates the ballot[151]. Indeed, by virtue of s 272(2) of the Electoral Act, votes above the line are expressly deemed to have been marked below the line[152].

210 Ms McEwen has not demonstrated that the special count proposed by the Attorney-General and Mr Day would result in a distortion of the voters' real intentions rather than provide a reflection of the true legal intent of the voters so far as it is consistent with the Constitution and the Electoral Act. Indeed, Ms McEwen's contention that the votes cast for Family First should be disregarded would, if accepted, constitute a most serious distortion of the real intentions of many thousands of voters, by depriving those votes of all effect. In this regard, Mr Day received a total of 72,392 votes. Mr Day received 5,495 first preference personal votes below the line, and there were 24,817 first preference above the line votes for the Family First group. The remaining votes received by Mr Day were from second or later preferences, whether below or above the line.

211 Ms McEwen's suggestion, that voters who cast above the line votes for Family First may not have intended that their votes should flow to the next individual nominee of the Family First group in the event that Mr Day was incapable of being elected, rests upon the assumption that those voters did not understand the effect of casting their vote above the line for Family First. That assumption proceeds upon a view of the intelligence of one's fellow citizens which is inconsistent with the assumption as to the intelligence of the electorate that underpins the provisions of the Electoral Act, and, indeed, the very idea of democracy.

Costs

212 On behalf of the Attorney-General, the Court was informed that the Commonwealth agreed to submit to an order that it pay Mr Day's costs of these proceedings. It was submitted that no other order for costs should be made.

213 On behalf of Ms McEwen, it was argued that an order for costs should be made in her favour. In this regard, Ms McEwen invoked the power conferred on the Court of Disputed Returns by s 360(4) of the Electoral Act "to order costs to be paid by the Commonwealth where the Court considers it appropriate to do so".

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151 *Wood* (1988) 167 CLR 145 at 167, 174-175.

152 *Day v Australian Electoral Officer (SA)* (2016) 90 ALJR 639 at 647-648 [31]; 331 ALR 386 at 396-397; [2016] HCA 20.

214 In *Nile v Wood*[153], Deane and Toohey JJ explained that the power conferred by s 360(4):

> "is not constricted by reference to the principles controlling the making of an order for costs inter partes … [but] should be exercised when considerations of what is fair and just support, on balance, an order indemnifying a party against costs".

215 In the present case, there can be no suggestion that Ms McEwen's participation in these proceedings was unreasonable: Ms McEwen had a real interest in the outcome of the proceedings, as was recognised by the order deeming her to be a party. Ms McEwen's participation in the hearing in this Court was of real assistance to the Court in its consideration of the relatively novel question of the construction of s 44(v) of the Constitution. In addition, Ms McEwen's participation provided a contradictor in relation to Question (b). Finally, it could not be said that her participation in the hearing before this Court prolonged the hearing in any substantial way.

216 In these circumstances, it is appropriate that an order be made that, subject to any other order made by a judge of this Court, the Commonwealth pay Ms McEwen's costs of the proceedings.

Orders

217 The questions referred to this Court should be answered as follows:

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

Answer: Yes.

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

Answer: The vacancy should be filled by a special count of the ballot papers. Any directions necessary to give effect to the conduct of the special count should be made by a single Justice.

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

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153 (1988) 167 CLR 133 at 143; [1988] HCA 30.

Answer: Yes. Mr Day was incapable of sitting as a Senator from 26 February 2016.

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

Answer: Unnecessary to answer.

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

Answer: The Commonwealth should pay Mr Day's and Ms McEwen's costs of the proceedings, save for any costs excluded by an order of a Justice of the Court.

218 NETTLE AND GORDON JJ. Mr Robert John Day AO commenced his term as a senator for the State of South Australia on 1 July 2014 in the 44th Parliament of the Commonwealth.

219 On 9 May 2016, the 44th Parliament was dissolved by a simultaneous dissolution of both the Senate and the House of Representatives. After the ensuing general election, Mr Day was declared on 4 August 2016 as elected to the Senate as a senator for South Australia. He resigned as a senator for South Australia on 1 November 2016.

220 Section 44 of the Constitution, headed "Disqualification" and found in Pt IV of Ch I of the Constitution, includes s 44(v), which relevantly provides that any person who:

> "(v) has *any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth* otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons;
>
> *shall be incapable of being chosen or of sitting as a senator …*" (emphasis added)

221 On 7 November 2016, the Senate resolved that certain questions about a vacancy in the representation of South Australia in the Senate, for the place for which Mr Day was returned, should be referred to the Court of Disputed Returns ("the Court") pursuant to s 376 of the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act").

222 Substantial materials were attached to the letter ("the Reference") referring the following questions to the Court:

> "(a) whether, by reason of s 44(v) of the Constitution, … there is a vacancy in the representation of South Australia in the Senate for the place for which [Mr Day] was returned;
>
> (b) if the answer to Question (a) is 'yes', by what means and in what manner that vacancy should be filled;
>
> (c) whether, by reason of s 44(v) of the Constitution, … Mr Day was at any time incapable of sitting as a Senator prior to the dissolution of the 44th Parliament and, if so, on what date he became so incapable;
>
> (d) what directions and other orders, if any, should the Court make in order to hear and finally dispose of [the Reference]; and

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

223 Questions (a) and (c) concern an allegation that Mr Day had, at least, an indirect pecuniary interest in a lease agreement between Fullarton Investments Pty Ltd ("Fullarton Investments"), the owner of his electorate office premises at 77 Fullarton Road, Kent Town, South Australia ("the Fullarton Road Property"), as lessor, and the Commonwealth, represented by a Division within the Department of Finance, as lessee, and that that interest was of a kind prohibited by s 44(v) of the Constitution. If the answer to Question (a) is that there is a vacancy, then two further questions arise. Question (c) asks whether Mr Day became incapable of sitting as a senator prior to the dissolution of the 44th Parliament and, if so, on what date. Question (b) asks "by what means and in what manner that vacancy should be filled".

224 Those questions should be answered as follows:

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

(b) The vacancy should be filled by a special count of the ballot papers. Any directions necessary to give effect to the conduct of the special count should be made by a single Justice.

(c) By reason of s 44(v) of the Constitution, Mr Day was incapable of sitting as a senator on and after 1 December 2015, being a date prior to the dissolution of the 44th Parliament.

225 After identifying the parties and summarising the relevant facts, these reasons address the proper construction of s 44(v) of the Constitution and its application to Mr Day, before turning to the manner in which the vacancy is to be filled. Questions (d) (other orders) and (e) (costs) are then addressed.

Parties

226 Each of Mr Day and the Attorney-General of the Commonwealth sought to be heard on the hearing of the Reference and was deemed to be a party to the Reference pursuant to s 378 of the Electoral Act. Each was represented at the hearing of the Reference.

227 Ms Anne McEwen also sought to be heard on the hearing of the Reference and was deemed to be a party to the Reference. She asserted that she had "a real and distinct interest in whether or not Mr Day was validly elected to the Senate and, if he was not, what method should be adopted to identify the person elected to the twelfth spot for South Australia".

228 The foundation for Ms McEwen's assertion was that she was the fourth of six listed candidates in the Australian Labor Party group on the ballot paper for the election of senators for South Australia. The three Australian Labor Party candidates listed above Ms McEwen were elected. On the 457th count for the representation of South Australia in the Senate, being the final count, Mr Day was the 12th and final candidate elected. At that last count, Ms McEwen was the only candidate, other than Mr Day, who had not been excluded from the count.

Facts

229 There were three sources of facts: the materials contained in the Reference, additional facts and documents the parties agreed should be evidence on the hearing of the Reference and additional factual findings made after a two day trial[154]. The following summary of the facts relevant to the determination of the Reference is drawn from those sources.

230 The Fullarton Road Property was owned by B & B Day Pty Ltd ("B & B Day"). B & B Day is the trustee of the Day Family Trust, a discretionary trust. Mr Day and his wife, Mrs Bronwyn Day, are among the beneficiaries of the Day Family Trust. Mr Day was the sole director and sole shareholder of B & B Day until 30 June 2014, when he was replaced by Mrs Day. Mr Day was and remained the appointor of the Day Family Trust.

231 Fullarton Investments was incorporated on 16 December 2013 for the express purpose of purchasing the Fullarton Road Property from B & B Day. Fullarton Investments is the trustee of the Fullarton Road Trust, a discretionary trust established by deed on the same day that Fullarton Investments was incorporated. The Day Family Trust is a beneficiary of the Fullarton Road Trust.

232 On 24 April 2014, Fullarton Investments purchased the Fullarton Road Property from B & B Day, for a recorded purchase price of $2.1 million. A memorandum of transfer of the Fullarton Road Property was executed on 4 September 2014 by Mr Day, purportedly as sole director and sole secretary of B & B Day, and a Mrs Debra Smith, as sole director and sole secretary of Fullarton Investments. When Mr Day executed the memorandum of transfer, he was neither a director nor a secretary of B & B Day. Mrs Smith was the wife of Mr John Smith, a friend and a business partner of Mr Day until at least late 2013.

233 The memorandum of transfer of the Fullarton Road Property from B & B Day to Fullarton Investments was registered on 11 November 2014. The cash consideration of $2.1 million was not then and has not since been paid by Fullarton Investments to B & B Day. B & B Day or Mr Day paid the stamp

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154 *Re Day* (2017) 91 ALJR 262; [2017] HCA 2 ("the Factual Judgment").

duty on the transfer of the Fullarton Road Property from B & B Day to Fullarton Investments (in the amount of $109,330), the fee on the registration of the transfer (in the amount of $15,319.50) and the conveyancers' professional fees, for a total of $125,549.19. Fullarton Investments was and remains indebted to B & B Day for the purchase price. Fullarton Investments holds the Fullarton Road Property as trustee of the Fullarton Road Trust.

234 From April 2015, Mr Day used portions of the Fullarton Road Property as his electorate office. The Commonwealth, represented by the Ministerial and Parliamentary Services Division, Corporate and Parliamentary Services Group of the Department of Finance, entered into a lease with Fullarton Investments for the purpose of Mr Day using those parts of the Fullarton Road Property as his electorate office. The lease was executed on 1 December 2015, with a commencement date of 1 July 2015. Mr Day approved the terms of the lease.

235 Under the lease, Fullarton Investments was entitled to direct the Commonwealth to pay rent to any person. On 12 June 2015, Fullarton Investments had submitted a completed "Vendor Information" form to the Commonwealth's leasing manager. Under the heading "Bank Account Details", Fullarton Investments nominated "Fullarton Nominees", a business name owned by Mr Day, as the name of the relevant bank account. Mr Day owned that bank account. Under the heading "Contact Information", the form recorded "[Mr] Day" as the contact name together with a phone number and an email address, being "bobday@77fullarton.com.au". The form was signed by Mr Day as "Representative" of Fullarton Investments. Mr Day also signed the covering letter, which was on "Fullarton" letterhead.

236 On 26 February 2016, Ms Joy Montgomery (Mr Day's executive assistant whilst he was a senator) provided the Department of Finance with a rental form directing the Commonwealth to pay the rent to "Fullarton Nominees" and giving the banking details for the account held in that name, which, as noted earlier, Mr Day owned. No rent under the lease was, or ever has been, paid by the Commonwealth.

237 On the day on which the memorandum of transfer of the Fullarton Road Property was registered, 11 November 2014, a mortgage previously granted by B & B Day to the National Australia Bank ("NAB") over the Fullarton Road Property, as security for a loan facility approved on 2 January 2014, was discharged, and a new mortgage was registered in favour of NAB showing Fullarton Investments as the mortgagor. B & B Day remained liable to make payments to NAB under the 2 January 2014 facility. Mr and Mrs Day had given a personal guarantee and indemnity for up to $2 million for the performance by B & B Day of its obligations under the 2 January 2014 facility.

238 Following the transfer of the Fullarton Road Property to Fullarton Investments, the Fullarton Road Property continued to be used as security for loans made by NAB to companies associated with Mr Day and in respect of which Mr Day had provided a personal guarantee and indemnity. The terms of one of the guarantees and indemnities given by Mr Day were before the Court. Under cl 6.2 of that guarantee and indemnity, Mr Day agreed that, if the debtor (a company that Mr Day admitted was associated with him) did not pay an amount when due (up to an amount of $21.5 million), he would pay that amount when NAB demanded it. From the time of a demand, NAB could enforce that right against Mr Day[155].

239 It was not submitted, and there was no evidence to suggest, that the guarantee and indemnity was discharged by any of the transactions described. Mr Day admitted that, since the transfer of the Fullarton Road Property to Fullarton Investments, all outgoings in relation to the property have been paid by him, the Home Australia Group, the Family First Party, B & B Day and the Bert Kelly Research Centre.

240 In the event that the Commonwealth did not pay rent to Fullarton Investments, that company had no other significant source of revenue from which to pay the purchase price of the Fullarton Road Property to B & B Day or to make payments to NAB. Funds would have had to come from other sources, including, if need be, from Mr Day as a guarantor of loans made by NAB.

241 The various steps and transactions that have just been outlined were taken for the purpose of removing the Fullarton Road Property from Day family members and any entity in which Mr Day had an interest, and for the related purpose of "housing" the Fullarton Road Property in an entity so that Mr Day could "avail himself" of the Commonwealth rental allowance. In fact, the benefit provided by the Commonwealth is office accommodation[156], not an allowance for rent.

242 Those various steps and transactions had as their genesis an email sent by one of Mr Day's advisors to Mrs Smith (copied to Mr Day) on 2 December 2013, which was in the following terms[157]:

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155 See *Re Taylor; Ex parte Century 21 Real Estate Corporation* (1995) 130 ALR 723 at 725-726; O'Donovan and Phillips, *Modern Contract of Guarantee*, 4th ed (looseleaf) at [10.1710]; Andrews and Millett, *Law of Guarantees*, 7th ed (2015) at 313-315 [7-005].

156 See Item 7 of Pt 1 of Sched 1 to the *Parliamentary Entitlements Act* 1990 (Cth).

157 *Re Day* (2017) 91 ALJR 262 at 280 [92].

> "[Mr Day] has sought advice on establishing an entity in which the Senate Office on Fullarton Road can be housed so as to be able to avail himself of the rental allowance provided by the government. I propose incorporating a new company with [Mrs Smith] 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 [Mr Day] has an interest, and by having [Mrs Smith] as sole director, puts further distance between the Trust and [Mr Day's] business interests and [business] partner of nearly 40 years.
>
> The trust will simply hold the [Fullarton Road 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."

243 However, as the Factual Judgment records[158], although the steps in fact taken and transactions in fact entered into were directed at those two related purposes, many of the steps taken in connection with carrying those purposes into effect were not consistent with detailed planning or careful implementation. The documents were not always consistent one with the other.

244 Moreover, Mr Day made a statement to the Department of Finance in which he said, in effect, that *he* had sold the property to Fullarton Investments and that *he* had retained the funding to secure the purchase of the Fullarton Road Property. Mr Day's statement of what *he* had done was legally inaccurate. Of course, he would not be the first person who held an inaccurate belief of that kind. But that inaccurate belief caused further inconsistencies in the documentation. For example, the original idea described by the advisor was for the rent from the Commonwealth to "pass back" to the Day Family Trust. How that was to occur was not specified. In the end, as has been seen, Fullarton Investments requested that the rent be paid directly into a bank account owned by Mr Day and not to B & B Day or the Day Family Trust.

245 The questions in the Reference must be answered having regard to the steps that were taken and the transactions that were made.

Section 44(v)

246 Section 44(v) of the Constitution is set out above. It relevantly provides that a person will be incapable of being chosen or of sitting as a senator if: (1) there is an agreement with the Public Service of the Commonwealth; and (2) the person has a direct or indirect pecuniary interest in that agreement that

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158 *Re Day* (2017) 91 ALJR 262 at 272 [35], 284 [112].

arises otherwise than as a member and in common with the other members of an incorporated company consisting of more than 25 persons.

247 Section 44(v) must be interpreted not only according to the ordinary meaning of its text but also in light of its place in the structure of the Constitution and its history[159], recognising that the Constitution is "intended to apply to the varying conditions which the development of our community must involve"[160].

248 It is necessary to look at each element of s 44(v).

Agreement with the Public Service of the Commonwealth

249 The common position of all the parties is that the lease between Fullarton Investments and the Commonwealth[161] was an "agreement" with the Public Service of the Commonwealth for the purposes of s 44(v).

250 The parties, however, adopted different approaches as to what constitutes an "agreement" within the meaning of s 44(v) generally. As will become evident, it is unnecessary to resolve that issue in this Reference.

Direct or indirect pecuniary interest

251 The text of s 44(v) refers to, and requires, a direct or indirect pecuniary interest. Although the concept of an "interest" can be vague and uncertain[162], it will take its meaning from its context.

252 A "pecuniary interest" within the meaning of s 44(v) should be understood as an "interest sounding in money or money's worth"[163]. The direct or indirect interest must be pecuniary in the sense that, through the possibility of a not

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159 *McGinty v Western Australia* (1996) 186 CLR 140 at 230-231; [1996] HCA 48.

160 *McGinty* (1996) 186 CLR 140 at 231 quoting *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 368; [1908] HCA 95.

161 Represented by a Division within a Group of the Department of Finance, which is a department of State of the Commonwealth established under s 64 of the Constitution.

162 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 357 [54]; [2000] HCA 63.

163 *Webb v The Queen* (1994) 181 CLR 41 at 75 fn 33; [1994] HCA 30.

insubstantial[164] *financial gain or loss* by the existence, performance or breach of the agreement with the Public Service of the Commonwealth, that person could conceivably be influenced in the exercise of their functions, powers and privileges, or in the performance of their duties, as a member of Parliament; because the person could conceivably be influenced by the potential conduct of the executive in performing or not performing the agreement or because that person could conceivably prefer their private interests over their public duty.

253 A "financial gain or loss" is not to be equated with the receipt of money. It is sufficient if the person's "pockets … might be affected"[165]. As the Attorney-General submitted, it is sufficient if the interest affects what the person has to pay out, or if it affects the financial reward that the person is likely to receive, whether in the form of money, other consideration, or relief from making a financial outlay. Nor is there any requirement that the interest be legal or equitable or legally enforceable.

254 The requirement that the direct or indirect pecuniary interest be *in the agreement* is an important and necessary check on s 44(v). For the purposes of s 44(v), the person need not be a party to the relevant agreement, but the direct or indirect interest must be a pecuniary interest in the agreement. And "the disqualifying interest [in the agreement] must be one in existence at the critical time, and not merely a possibility of acquiring an interest"[166]. As Gavan Duffy J said in *Ford v Andrews*[167]:

> "A man is directly interested in a contract if he is a party to it, he is indirectly interested if he has the expectation of a benefit dependent on the performance of the contract; but in either case the interest must be in the contract, that is to say, the relation between the interest and the contract must be immediate and not merely connected by a mediate chain of possibilities."

255 Adopting and adapting the words of Gavan Duffy J, whether a person has a pecuniary interest (direct or indirect) "in [an] agreement" may be answered by

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164 The law cares not about trifling matters: see, eg, *Shipton, Anderson & Co v Weil Brothers & Co* [1912] 1 KB 574.

165 See, eg, *Brown v Director of Public Prosecutions* [1956] 2 QB 369 at 378 cited in *Rands v Oldroyd* [1959] 1 QB 204 at 213-214.

166 *Ford v Andrews* (1916) 21 CLR 317 at 325; see also at 320-321, 335; [1916] HCA 29.

167 (1916) 21 CLR 317 at 335.

asking: does the person's identified right or benefit (which does not have to be legal or equitable or legally enforceable) make that person necessarily interested in the agreement within the meaning of s 44(v)? Put another way, is the relation between the pecuniary interest (direct or indirect) and the agreement immediate or merely connected by a chain of possibilities?

256 An example is illustrative of the point. The partner of a parliamentarian is engaged as an employee of the Commonwealth[168]. The benefit that the parliamentarian obtains as a result of the partner's income might be thought to give rise to an indirect pecuniary interest in the partner's contract. Does that indirect interest make the parliamentarian necessarily interested in the partner's contract within the meaning of s 44(v)? The answer is "no". The relation between the indirect interest and the contract is not immediate but connected by "a mediate chain of possibilities".

257 By contrast, consider the case of a parliamentarian who enters into a non-binding consultancy arrangement with an information technology company whereby, in return for the parliamentarian advising the company on its dealings with government, the company will pay the parliamentarian an amount equal to five per cent of the profits it derives from each information technology contract with the public service into which it enters over the next three years. Plainly, the benefit in the form of the profit share that the parliamentarian derives from each such contract would be an indirect pecuniary interest and it would be an immediate pecuniary interest in each such contract, despite not being legally enforceable.

258 The nature and extent of the indirect pecuniary interest to which s 44(v) attaches, as well as the fact that the person's identified right or benefit does not have to be legal or equitable or legally enforceable, are reinforced by the proviso in s 44(v). That proviso expressly excludes from the reach of s 44(v) the interest of a shareholder in a company with more than 25[169] shareholders where that person's interest is in common with the other shareholders. The proviso reinforces that the interest of a shareholder in a corporation that enters into an agreement with the Public Service of the Commonwealth may, at least potentially, constitute an "indirect pecuniary interest" in that agreement. But, as has been seen, that is not the question for the purposes of s 44(v). The question

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168 s 22 of the *Public Service Act* 1999 (Cth).

169 In 1896, 25 was the maximum number of shareholders for a proprietary company in Victoria: s 2 of the *Companies Act* 1896 (Vic). See also *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 21 September 1897 at 1023.

is whether, because of that interest in that agreement, that person could conceivably be influenced in the exercise of their functions, powers and privileges, or in the performance of their duties, as a member of Parliament.

259 Five other matters should be noted about the test just propounded.

260 First, it is both unnecessary and inappropriate to determine the outer boundaries of what is a "pecuniary interest in any agreement" for the purposes of s 44(v). History tells us that the nature and the form of a person's dealings are not limited by experience but by imagination. In particular, whether, as the Attorney-General submitted, "agreement" is not limited to "contract" but means "any agreement, arrangement or understanding", or whether "agreement" includes both executory and certain executed contracts, cannot and should not be determined in this Reference. Each case will depend on its own facts. What can be stated is that s 44(v) does not extend to an "agreement with the Public Service of the Commonwealth" in which a person has an "interest" unless, by reason of the existence, performance or breach of that agreement, that person could conceivably be influenced by the potential conduct of the executive in performing or not performing the agreement or that person could conceivably prefer their private interests over their public duty.

261 Second, in *In re Webster*[170], Barwick CJ described the relevant sphere of influence as being "in relation to Parliamentary affairs"[171]. In the context of s 44(v), that sphere of influence is now better understood as being in the exercise of a person's functions, powers and privileges, and in the performance of their duties, as a member of Parliament.

262 Third, it might be thought that the first identified influence (by the executive) is encompassed in the second (preferring private interests over public duty). The separation of the two recognises that s 44(v) is concerned with more than one species of influence – influence by the executive over the parliamentarian and, independently of the executive, the parliamentarian preferring their own private interests over their public duty.

263 Fourth, the test described above differs from that proposed by the Attorney-General in argument; namely whether "there is a real risk that a person could be influenced, *or be perceived to be influenced*, in relation to parliamentary affairs by a direct or indirect financial interest" (emphasis added). The test propounded in these reasons is put on the basis of "conceivable influence". That test is not evaluative or impressionistic. It is a test that looks at possibilities.

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170 (1975) 132 CLR 270; [1975] HCA 22.

171 (1975) 132 CLR 270 at 280, 286.

It does not depend upon some assessment of external perceptions. It does not deal with perceptions because, unlike the apprehended bias cases[172], s 44(v) does not permit an analysis of influence limited to a specific date or a specific subject matter. Section 44(v) was included in the Constitution to prevent both influence by the executive over the parliamentarian and, independently of the executive, the parliamentarian preferring their own private interests over their public duty. Although "the disqualifying interest [in the agreement] must be one in existence at the critical time, and not merely a possibility of acquiring an interest"[173], the manner and the circumstances in which the influence could conceivably occur are not known.

264 The question is whether the direct or indirect pecuniary interest in the agreement *could* conceivably influence the person. As will later be seen, it builds on the test propounded in *Webster* but recognises, contrary to *Webster*, that the purpose of s 44(v) is not confined to protecting parliamentarians from being influenced by the executive.

265 Fifth, the test described confines the disqualifying effect of s 44(v) by reference to its purposes. But that confinement does not depend upon giving some narrow or limited operation to the notion of "the Public Service of the Commonwealth" that would exclude agreements specifically authorised by statute. As will later be explained, the lease in this case was made to provide a benefit that s 4(1) of the *Parliamentary Entitlements Act* 1990 (Cth) required the Commonwealth to provide to Mr Day.

266 No useful distinction can now be drawn between agreements made with "the Public Service of the Commonwealth" and agreements made with either the Commonwealth or the Crown in right of the Commonwealth. As s 56(1) of the *Judiciary Act* 1903 (Cth) recognises, legally enforceable agreements are enforced against the Commonwealth. As was pointed out in *Williams v The Commonwealth*[174], the executive government of the Commonwealth is not a legal person. The right and duty bearing entity relevantly called into existence by the Constitution was and is the Commonwealth[175].

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172 See, eg, *Ebner* (2000) 205 CLR 337; *Isbester v Knox City Council* (2015) 255 CLR 135; [2015] HCA 20.

173 *Ford* (1916) 21 CLR 317 at 325; see also at 320-321, 335.

174 (2012) 248 CLR 156 at 184 [21], 237 [154]; [2012] HCA 23.

175 See also *Public Service Act* 1999 (Cth).

267 And, as demonstrated in *Sue v Hill*[176], references to the Crown or the Crown in right of the Commonwealth may impede accurate analysis in this field of discourse. Any agreement, arrangement or understanding made in the course of Commonwealth government business will ordinarily be negotiated by one or more members of the Public Service of the Commonwealth. In that sense, the agreement will be made with the Public Service of the Commonwealth. It is in these circumstances now not possible to treat the phrase "any agreement with the Public Service of the Commonwealth" as limited in operation by seeking to draw the distinction earlier mentioned – between an agreement made with the Public Service on the one hand and an agreement made with the Commonwealth or the Crown in right of the Commonwealth on the other. The supposed distinction is without practical or legal content.

Construction consistent with constitutional structure and history

268 The construction of s 44(v) adopted in these reasons is consistent with the place of s 44(v) in the structure of the Constitution and with its history[177].

269 Section 44(v) is located in Ch I of the Constitution, which provides for a system of representative government[178]: a system that vests the legislative power of the Commonwealth in a Parliament[179] and gives the people of the Commonwealth control over the composition of the Parliament[180]. In that system of representative government, the elected representatives exercise sovereign power on behalf of the Australian people[181]. Parliamentarians "are not only chosen by the people but exercise their legislative and executive powers as representatives of the people"[182]. The fundamental obligation of a member of Parliament is "*the duty to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community"[183] (emphasis in original).

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176 (1999) 199 CLR 462 at 497-503 [83]-[94]; [1999] HCA 30.

177 *McGinty* (1996) 186 CLR 140 at 230.

178 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 229; [1992] HCA 45.

179 s 1 of the Constitution.

180 See, eg, ss 7, 13, 24, 28, 32 and 41 of the Constitution.

181 *ACTV* (1992) 177 CLR 106 at 138.

182 *ACTV* (1992) 177 CLR 106 at 138.

183 *R v Boston* (1923) 33 CLR 386 at 400; [1923] HCA 59.

And, in the exercise of their powers, parliamentarians are necessarily accountable to the people for what they do[184]. Moreover, the construction adopted is consistent with s 45(iii) of the Constitution, which operates to vacate the place in Parliament of a senator or member of the House of Representatives who "directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State".

270 What would become s 44(v) was the subject of debate in the sessions of the Constitutional Conventions. At the Adelaide session of the Constitutional Convention in 1897, in the course of a debate about cl 46, which would later form the basis of s 44(v), Isaac Isaacs said that "[w]e 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"[185], and that 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"[186]. The drafters of the Constitution thus recognised that s 44(v) was directed at ensuring the separation of the personal interests of a parliamentarian from the performance of their public duties.

271 As the debates at the Constitutional Convention in Sydney in 1897 record, the drafters were concerned with ensuring that what was to become s 44(v) guarded against individuals making a personal profit out of their public positions, and that that profit should also not be achieved indirectly[187].

Webster

272 Barwick CJ considered the scope and meaning of s 44(v) in *Webster*[188]. Some aspects of the decision should be noted.

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184 *ACTV* (1992) 177 CLR 106 at 138.

185 *Official Report of the National Australasian Convention Debates*, (Adelaide), 21 April 1897 at 1037.

186 *Official Report of the National Australasian Convention Debates*, (Adelaide), 21 April 1897 at 1038.

187 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 21 September 1897 at 1023-1024.

188 (1975) 132 CLR 270.

273 First, in construing s 44(v), Barwick CJ identified the "precise progenitor"[189] of s 44(v) as s 1 of the *House of Commons (Disqualification) Act* 1782 (UK)[190]. That is not accurate. Barwick CJ observed that the 1782 Act was a result of times when Parliament was establishing its independence of the Crown and it was thought that there was a real likelihood of a person with whom the government had a contract being influenced by the Crown[191]. Quoting English authorities, Barwick CJ noted that the 1782 Act was an Act that guarded against the mischief of "sapping [Parliament's] freedom and independence by members being admitted to profitable contracts"[192], and that it "refers to the case of a man having a contract under which he is to derive some future benefit from dealing with the government, in respect of which they might control him; as, for instance, by directing their officers not to look too closely to the sort of goods he sent in, or the like"[193]. Although Barwick CJ correctly analysed the 1782 Act, it was not the "precise progenitor" of s 44(v). The wording of the 1782 Act was initially adopted by the drafters. But the provision underwent a series of changes as a result of the Constitutional Conventions[194]. A comparison of s 44(v) with s 1 of the 1782 Act shows that the most obvious difference is the inclusion of the words "pecuniary interest", which had previously been used in Australia in local government or related legislation[195].

274 In the context of local government legislation, as early as 1873, it was said that the existence of a "manifest possibility of a conflict between duty and interest" was enough to give rise to a direct or indirect pecuniary interest[196]. A distinction between the existence of a disqualifying interest and the possibility

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189 (1975) 132 CLR 270 at 278.

190 22 Geo III c 45.

191 (1975) 132 CLR 270 at 278.

192 (1975) 132 CLR 270 at 278 quoting *In re Samuel* [1913] AC 514 at 524.

193 (1975) 132 CLR 270 at 278 quoting *Royse v Birley* (1869) LR 4 CP 296 at 311-312.

194 See Hammond, "Pecuniary Interest of Parliamentarians: A Comment on the *Webster Case*", (1976) 3 *Monash University Law Review* 91 at 95-100.

195 See Hammond, "Pecuniary Interest of Parliamentarians: A Comment on the *Webster Case*", (1976) 3 *Monash University Law Review* 91 at 93-94, 98. See, eg, s 173 of the *Local Government Act* 1890 (Vic).

196 *Attorney-General v Mayor of Emerald Hill* (1873) 4 AJR 135 at 136.

of a conflict existed and remains. The disqualifying interest must be one in existence at the critical time, and not merely a possibility of acquiring an interest[197].

275 Recognising that s 44(v) was part of the Constitution and had to be enforced, Barwick CJ considered that, in its construction and application, the purpose it sought to attain had always to be kept in mind[198]. But because Barwick CJ mistakenly thought that the "precise progenitor" was the 1782 Act, his Honour wrongly rejected any analogy with the disqualification provisions under local government legislation[199] and, consistent with the practice at the time[200], he did not address the Convention Debates in any detail. The purpose that Barwick CJ said s 44(v) sought to attain was too narrow[201]. Contrary to his Honour's view, it was not limited to interests that might expose a parliamentarian to "influence[] by the Crown in relation to Parliamentary affairs"[202]. It extends to interests that may affect how a parliamentarian performs his or her public duties.

276 Second, Barwick CJ considered that, because disqualification under s 44(v) of the Constitution had "penal consequences", the provision should receive a strict construction[203]. We disagree. The Constitution does provide, in s 46, for penal consequences to attach if a person disqualified under s 44(v) sits in Parliament. However, the question of whether the person is "incapable of being chosen or of sitting as a senator" will depend, at least initially, on the various paragraphs of s 44, not s 46. Not only may s 46 never be reached, it operates "[u]ntil the Parliament otherwise provides", as Parliament did in s 3 of the *Common Informers (Parliamentary Disqualifications) Act* 1975 (Cth). And, in any event, as the Attorney-General submitted, by reference to the reasons

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197 *Ford* (1916) 21 CLR 317 at 320-321, 325, 335.

198 (1975) 132 CLR 270 at 278.

199 (1975) 132 CLR 270 at 278.

200 See *Cole v Whitfield* (1988) 165 CLR 360 at 385; [1988] HCA 18.

201 (1975) 132 CLR 270 at 280.

202 (1975) 132 CLR 270 at 280; see also at 286, 288.

203 (1975) 132 CLR 270 at 279. See also *Sykes v Cleary* (1992) 176 CLR 77 at 116; [1992] HCA 60.

of Gibbs J in *Beckwith v The Queen*[204], the supposed rule of construction about penal consequences is a rule of last resort.

Questions (a) and (c) – Mr Day's indirect pecuniary interest in the lease

277 Mr Day had an indirect pecuniary interest in the lease between Fullarton Investments and the Commonwealth, which disqualified him from being chosen or from sitting as a senator, and which arose no later than 1 December 2015, when the lease was executed.

278 By the existence, performance or breach of the lease, Mr Day was exposed to the possibility of a not insubstantial financial gain or loss. That possibility arose in a number of ways.

279 First, pursuant to the terms of the lease, which Mr Day approved, the bank account into which the rent was to be paid by the Commonwealth was a bank account owned by Mr Day in the name of "Fullarton Nominees". He was to directly receive the rent from the Commonwealth.

280 Second, as Mr Day admitted, the Fullarton Road Property was used as security for loan facilities provided by NAB to companies associated with Mr Day. Mr Day had provided a guarantee and indemnity in relation to those facilities[205]. In the event that the Commonwealth did not pay rent under the lease, Fullarton Investments had no other substantial source of revenue from which to pay the purchase price of the Fullarton Road Property to B & B Day or to make payments to NAB. Funds would have had to come from other sources, including, if need be, from Mr Day as guarantor.

281 Mr Day's identified right in or benefit from the lease (the rent) made him necessarily interested in the lease within the meaning of s 44(v). The relation between the interest (the rent) and the lease was immediate; they were not merely connected by a chain of possibilities. As a result of that identified right or benefit, Mr Day could conceivably have been influenced in the exercise of his functions, powers and privileges, or in the performance of his duties, as a member of Parliament; because he could conceivably have been influenced by the potential conduct of the executive in performing or not performing the lease or because he could conceivably have preferred his private interests over his public duty.

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204 (1976) 135 CLR 569 at 576; [1976] HCA 55.

205 See [238] above.

282 As seen earlier, s 44(v) is concerned with more than one species of influence – influence by the executive over the parliamentarian and, independently of the executive, the parliamentarian preferring their own private interests over their public duty. Here, the "provision" of the lease, and the possibility of Mr Day being exposed to a not insubstantial financial gain or loss arising from its existence, performance or breach, could conceivably have influenced him in the exercise of his functions, powers and privileges, or in the performance of his duties, as a member of Parliament. In politics, those species of influence have been and remain relevant for all members of Parliament, whether they are independent, sitting on the cross-bench or a member of any political party (regardless of size), where on occasion each and every vote may be necessary for legislation to be enacted.

283 To take just one example, s 4(1) of the *Parliamentary Entitlements Act* 1990 (Cth) provides members of both Houses of Parliament with specified "benefits". One of the "benefits" is "[o]ffice accommodation in the electorate, together with equipment and facilities necessary to operate the office, as approved by the Minister"[206]. Any proposed amendment that would affect that "benefit" could have placed Mr Day in a position where he would have been required "to separate the personal interests of a public man from the exercise of his public duty"[207]. He was "on both sides of the record". That is what s 44(v) seeks to prevent. The scenario described is a clear example of what falls within the ambit of s 44(v). There may well be others.

284 Mr Day was disqualified from being chosen or of sitting as a senator no later than 1 December 2015, being the date when the lease was executed.

285 The conclusion that Mr Day was disqualified follows from the steps that were taken and the transactions that were in fact entered into in relation to the Fullarton Road Property. That conclusion is not denied – indeed it is reinforced – if regard is had to the purpose of the arrangement that was made, as recorded in the email sent by Mr Day's advisor on 2 December 2013[208].

286 As the email records, Mr Day had sought advice on establishing an entity in which the Fullarton Road Property could be housed so that *he* could "avail

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206 See Item 7 of Pt 1 of Sched 1 to the *Parliamentary Entitlements Act* 1990 (Cth).

207 *Official Report of the National Australasian Convention Debates*, (Adelaide), 21 April 1897 at 1037.

208 See [242] above.

himself" of the rental allowance provided by the Commonwealth. The arrangement put in place was one where[209]:

(1) Fullarton Investments was established (with Mrs Smith as sole director and shareholder) to act as trustee of a discretionary trust and to "house" the Fullarton Road Property so that Mr Day was "able to avail himself of the rental allowance provided by the government";

(2) by reason of "housing" the Fullarton Road Property in Fullarton Investments, the Fullarton Road Property was removed from Day family members and any entity in which Mr Day had a direct interest, and further distance was put "between the [Fullarton Road Trust] and [Mr Day's] business interests and [business] partner of nearly 40 years"; and

(3) the Fullarton Road Trust would simply hold the Fullarton Road Property, collect rent on a regular basis and then "pass back" the rent to the Day Family Trust so that there would be no profit or loss in the Fullarton Road Trust.

287 If, consistent with that arrangement, and contrary to the steps in fact taken and transactions in fact entered into, the rent was "passed back" to the Day Family Trust rather than directly to Mr Day, Mr Day would have had a disqualifying indirect pecuniary interest in the lease for the purposes of s 44(v). There was and remained the possibility of a not insubstantial financial gain or loss for Mr Day by the existence, performance or breach of the lease with the Commonwealth. That not insubstantial financial gain or loss, giving rise to the indirect pecuniary interest, would have arisen because, as Mr Day admitted, the Fullarton Road Property was used as security for facilities provided by NAB to companies associated with him. Mr Day had provided a guarantee and indemnity in relation to those facilities[210]. In the event that the Commonwealth did not pay rent to Fullarton Investments, it had no other substantial source of revenue from which to pay the purchase price of the Fullarton Road Property to B & B Day or to make payments to NAB. The funds would have had to come from other sources, including, if need be, from Mr Day as guarantor.

288 That possibility of a not insubstantial financial gain or loss for Mr Day arising from the existence, performance or breach of the lease with the Public Service of the Commonwealth would have made him necessarily interested in the

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209 *Re Day* (2017) 91 ALJR 262 at 280 [93].

210 See [238] above.

lease within the meaning of s 44(v). The relation between the indirect pecuniary interest (the rent) and the lease was immediate. They were not merely connected by a chain of possibilities. On the facts in this matter, that the rent (if it were paid by the Commonwealth) would not have been paid directly to Mr Day does not mean that Mr Day's interest would not have been a disqualifying interest for the purposes of s 44(v). Why? Because of the possibility of Mr Day's not insubstantial financial gain or loss arising from the existence, performance or breach of the lease, Mr Day could conceivably have been influenced in the exercise of his functions, powers and privileges, or in the performance of his duties, as a member of Parliament; because he could conceivably have been influenced by the potential conduct of the executive in performing or not performing the lease or because he could have preferred his private interests over his public duty.

Answers to Questions (a) and (c)

289 The answer to Question (a) is that, by reason of s 44(v) of the Constitution, there is a vacancy in the representation of South Australia in the Senate for the place for which Mr Day was returned.

290 The answer to Question (c) is that, by reason of s 44(v) of the Constitution, Mr Day was incapable of sitting as a senator on and after 1 December 2015, being a date prior to the dissolution of the 44th Parliament.

Question (b) – How the vacancy should be filled

291 The conclusion that Mr Day was incapable of sitting as a senator from at least 1 December 2015, and was therefore incapable of being chosen as a senator at the 2016 election, raises the question as to the order that should be made to fill the resulting vacancy in the Senate for South Australia.

292 Section 360(1)(vi) of the Electoral Act authorises the Court to declare any candidate duly elected who was not returned as elected[211]. Incidental to that power is the power to order a special count[212].

293 The principles applicable to deciding by what means a vacancy is to be filled were established in *In re Wood*[213]. There it was said that a want of

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211 See *In re Wood* (1988) 167 CLR 145 at 172; [1988] HCA 22. See also s 379 of the Electoral Act.

212 *Wood* (1988) 167 CLR 145 at 172.

213 (1988) 167 CLR 145.

qualification makes the particular indication of preference for the unqualified candidate a nullity; the unqualified candidate is to be treated as though they were deceased[214]. The provision to be applied by analogy in those circumstances is s 273(27) of the Electoral Act, being the provision that applies when a deceased candidate's name is on the ballot paper in a Senate election[215].

294 Section 273(27) relevantly provides that 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.

295 There is no dispute that this approach is appropriate for any votes cast for Mr Day below the line. However, Ms McEwen submitted that the votes cast above the line for the group of candidates (including Mr Day) endorsed by the Family First party should be disregarded on the basis that there is no "valid group".

296 Section 168(1) of the Electoral Act relevantly provides that "[t]wo or more candidates for election to the Senate may make a joint request" for their names to be grouped in the ballot papers. Such a request must be in writing, signed by the candidates and given to the Electoral Officer with the nomination or nominations of the candidates[216]. Where such a request has been made, the names of the candidates "shall be printed in groups on the ballot papers in accordance with the requests" and a square must be printed above the dividing line and above the squares printed opposite the names of the candidates in the group[217].

297 Ms McEwen submitted that, because Mr Day was incapable of being chosen as a senator, his group (ie, Family First) only consisted of one eligible member – being less than the minimum permitted by s 168(1) – and thus there was no valid group or group request permitting the Electoral Officer to print Family First's square above the line.

298 As Ms McEwen acknowledged, a similar argument was considered and rejected by Mason CJ in *Wood*[218]. Ms McEwen submitted that *Wood* should be

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214 *Wood* (1988) 167 CLR 145 at 166.

215 *Wood* (1988) 167 CLR 145 at 166.

216 s 168(2) of the Electoral Act.

217 See s 210(1)(a) and (f)(ii) of the Electoral Act.

218 (1988) 167 CLR 145 at 174.

distinguished for three reasons. Before addressing each of those reasons, it is important to note that none properly grapples with s 272(2) of the Electoral Act. As was explained in *Day v Australian Electoral Officer (SA)*, "[t]he effect of a number written in a square printed on the ballot paper above the line is a vote for the group of candidates appearing below the line in the order in which they appear, in accordance with the group's position in the elector's order of preferences, above the line"[219]. In that way, there is no substantive difference between a vote above the line and a vote below the line for the purposes of the Electoral Act. Votes above the line are deemed to have been marked below the line by s 272(2). There is then no reason to treat those votes any differently for the purpose of the procedure described in s 273(27).

299 It is against that background that Ms McEwen's contentions that *Wood* should be distinguished and not followed should be considered. First, Ms McEwen submitted that *Wood* should be distinguished because the "group voting ticket" is no longer a feature of the Electoral Act. It is true that, as a result of the changes to the Electoral Act, different consequences would follow if a vote in a square above the line were to be disregarded. Previously, a ballot paper marked above the line meant that the ballot paper was deemed to have been marked in accordance with the relevant group voting ticket[220], meaning that, if the mark above the line were disregarded, no preferences would be distributed at all. In contrast, under the present system, only those votes that would otherwise flow to the other candidate for Family First by the operation of s 272(2) in conjunction with the procedure described in s 273(27) would be disregarded.

300 That the proportion of preferences that might not be distributed if the above the line votes for Family First were ignored is now smaller than it would have been under the group voting system provides no reason to simply ignore the 24,817 votes cast for Family First above the line. Ms McEwen's contention also ignores the possibility that some of those people who voted above the line for Family First did not place a number in any other square above the line[221], meaning that it is possible that, like in *Wood*, their vote would be totally disregarded.

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219 (2016) 90 ALJR 639 at 648 [31]; 331 ALR 386 at 397; [2016] HCA 20.

220 See s 272 of the Electoral Act (see also ss 211 and 239) as it stood before the commencement of the *Commonwealth Electoral Amendment Act* 2016 (Cth); *Day v AEO (SA)* (2016) 90 ALJR 639 at 645 [21]-[22], 646 [25]-[26]; 331 ALR 386 at 393-394, 394-395.

221 Such a vote is not informal: s 269(1) of the Electoral Act; *Day v AEO (SA)* (2016) 90 ALJR 639 at 648 [34]; 331 ALR 386 at 397.

301 Contrary to Ms McEwen's submissions, it is not possible, and it would not be right, to take account of only so much of the electors' expressions of preference as would lead to the result that all preferences cast for the group of candidates endorsed by Family First are to be ignored. Only the election of Mr Day miscarried, so only a primary or preferential vote for him must be disregarded[222].

302 Second, in relation to *Wood*, Ms McEwen took issue with Mason CJ's reliance on the proposition that Mr Wood's name "was properly on the ballot-paper"[223]. That was the conclusion of the Full Court in *Wood*, which held[224]:

> "An unqualified candidate who has been duly nominated, that is, one whose nomination complies with the formal requirements of [the Electoral Act], is a candidate whose name is properly included on the ballot paper."

Ms McEwen, in effect, challenged that conclusion, seeking to rely on s 172 of the Electoral Act (concerning the powers of the Electoral Officer to refuse a nomination in the case of non-compliance with certain provisions of the Electoral Act). But that provision existed at the time of *Wood* and has not since been relevantly amended. Moreover, Ms McEwen's submissions are contrary to the conclusion in *Wood* that the Electoral Officer has no general power to refuse a nomination in due form[225]. No reason was given for why that aspect of *Wood* should not be followed.

303 The ballot paper was not informal[226]. Votes are valid except to the extent that the want of qualification makes the particular indication of preference a nullity[227]. There is no reason for disregarding the other indications of the voter's preference[228]. There is no suggestion that the presence of Mr Day's name on the

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222 See *Wood* (1988) 167 CLR 145 at 174.

223 (1988) 167 CLR 145 at 174.

224 (1988) 167 CLR 145 at 165.

225 (1988) 167 CLR 145 at 167.

226 *Wood* (1988) 167 CLR 145 at 165, 174.

227 *Wood* (1988) 167 CLR 145 at 166; *Sykes v Cleary* (1992) 176 CLR 77 at 101.

228 *Wood* (1988) 167 CLR 145 at 165-166; *Sykes v Cleary* (1992) 176 CLR 77 at 101.

ballot paper has "falsified the declared choice of the people" of the State of South Australia for any of the other 11 candidates who were declared to be elected[229].

304 Third, in relation to *Wood*, Ms McEwen contended that the Court's approach to determining the means by and manner in which the vacancy should be filled has evolved since *Wood*. She pointed to *Sykes v Cleary*[230] and *Free v Kelly*[231]. Those cases do not assist. They concerned the materially different form of elections for the House of Representatives. The Attorney-General nevertheless accepted that a special count would not be ordered if the special count would "result in a distortion of the voters' real intentions".

305 In this Reference, the votes cast in favour of Family First, of which Mr Day was an endorsed candidate, should be counted in favour of the next candidate in the group, in accordance with s 272(2) and the procedure described in s 273(27) of the Electoral Act. There is nothing to suggest that the votes cast above the line in favour of Family First were not intended to flow to the next individual nominee of that party in the event that Mr Day was not capable of being elected. 81.87 per cent of the first preference votes received by Mr Day were votes cast above the line for Family First.

306 Once the operation of s 272(2) is taken into account, as was the position in *Re Culleton (No 2)*, "[t]here is no reason to suppose that a special count would 'result in a distortion of the voters' real intentions', rather than a reflection of 'the true legal intent of the voters so far as it is consistent with the Constitution and [the Electoral Act]'"[232].

Question (d) – Other orders and directions to dispose of the Reference

307 Question (d) should be referred to a single Justice to answer.

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229 *Wood* (1988) 167 CLR 145 at 167; *Re Culleton (No 2)* (2017) 91 ALJR 311 at 319 [43]; [2017] HCA 4.

230 (1992) 176 CLR 77.

231 (1996) 185 CLR 296; [1996] HCA 42.

232 (2017) 91 ALJR 311 at 319 [43] (footnote omitted).

Question (e) – Costs

308 Section 360(1)(ix) of the Electoral Act gives the Court power to award costs, which includes the power to order costs to be paid by the Commonwealth where the Court considers it appropriate to do so[233].

309 The Attorney-General agreed to submit to an order that the Commonwealth pay Mr Day's costs of the Reference on a party-party basis. But the Attorney-General submitted that Ms McEwen should bear her own costs of the trial conducted on 23 and 24 January 2017 and of the hearing of the Reference before the Full Court. The Attorney-General accepted that additional facts emerged as a result of Ms McEwen's presence at the trial of facts but contended that she mounted a wide factual case that largely failed. There is some force in that contention. However, Ms McEwen was a party to the proceedings and her participation at the trial of facts did result in some additional factual findings being made. At the hearing of the Reference before the Full Court, some of those additional factual findings were relied upon by all the parties. Moreover, before the Full Court, Ms McEwen was the only contradictor in relation to Question (b).

310 Accordingly, in this case, it is appropriate that Mr Day and Ms McEwen's costs of the proceedings be paid by the Commonwealth, save for costs excluded from this order by an order of a Justice.

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233 s 360(4) of the Electoral Act. See also *Nile v Wood* (1988) 167 CLR 133 at 143; [1988] HCA 30.