

Before the High Court

Re Robert John Day AO:

Section 44(v) of the *Australian Constitution* Revisited

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Abstract

In February 2017, the High Court of Australia will sit as the Court of Disputed Returns in *Re Day* to consider five questions referred to it by the Australian Senate about s 44(v) of the *Australian Constitution* and the position of the former South Australian Senator, Robert Day AO. The reference is a rare opportunity for the High Court to consider how s 44(v) should be interpreted and applied, as it has only been considered once before by the Court — in 1975 in *Re Webster*. This column argues that the interpretation adopted in *Re Webster* does not adequately take account of the provision's anti-corruption purpose. Based on the drafting history of s 44(v), we propose that it should be interpreted so as to disqualify a person who has a pecuniary interest in an agreement with the Public Service of the Commonwealth that creates a real risk of conflict between that person's private interests and their public duties as a parliamentarian; or where there is a real risk that the person has used his or her position as a parliamentarian to obtain an improper financial advantage. If the Court adopts our proposal, it is likely that Mr Day will be disqualified by s 44(v).

I Introduction

Robert ('Bob') Day AO was first elected at the 2013 Australian Federal Election as a senator for South Australia as a candidate of the Family First party. He commenced his term on 1 July 2014. He was re-elected at the Federal Election held on 2 July 2016 and resigned (or purported to resign) his position on 1 November 2016. That Mr Day is no longer a senator is not in doubt. How his seat should be filled depends on when he ceased to be a senator. It has been alleged that Mr Day was disqualified from sitting as a senator by s 44(v) of the *Australian Constitution* because he had a pecuniary interest in an agreement with the Federal Government concerning the lease of his electoral office.

On 8 November 2016, the Senate referred five questions to the High Court of Australia, sitting as the Court of Disputed Returns under ss 376 and 377 of the *Commonwealth Electoral Act 1918* (Cth).¹ The four critical questions are:

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¹ *Re Robert John Day AO*, Case No S226/2016 ('*Re Day*').

1. whether Mr Day was disqualified from sitting as a senator;
2. if he was disqualified, on what date he became incapable;
3. whether there is a vacancy in the representation of South Australia in the Senate for the place for which Mr Day was returned; and
4. if there is a vacancy, how it should be filled.²

The outcome of this reference may have important political implications. If Mr Day's resignation on 1 November 2016 was effective, the Senate casual vacancies provision in s 15 of the *Constitution* will be triggered and the South Australian Parliament will be required to select another Family First candidate to fill his seat. This will likely strengthen the Coalition Government's position in the Senate, as Family First generally supports the Coalition's legislative and political agenda. However, if Mr Day was disqualified prior to 1 November 2016, his resignation was not effective, the South Australian Senate vote at the 2016 Federal Election will almost certainly have to be recounted to elect Mr Day's replacement and it is possible that a Green or Labor Senator could be chosen as that replacement.

Section 44(v) of the *Constitution* provides:

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

The only case on s 44(v) is *Re Webster*,³ which was decided by the High Court in 1975. In that case, Barwick CJ (sitting alone) interpreted s 44(v) restrictively. While the parties in *Re Day* have referred extensively to *Re Webster* in their written submissions, the Court is not bound to follow it.⁴ If the Court in *Re Day* does follow *Re Webster*, it is unlikely that it will find that Mr Day was disqualified. However, this column argues that Barwick CJ's reasoning in *Re Webster* is based on two flawed premises and proposes a broader interpretation of s 44(v). If the Court adopts our proposed interpretation, it is likely that it will determine that Mr Day was incapable of sitting as a senator from 18 February 2015, and incapable of being elected to, or sitting as a senator in, the 45th Parliament. Finally, we argue that, in relation to the 2016 Federal Election, a recount of the South Australian Senate vote with the 'above the line' votes for the Family First group allocated to the second listed Family First candidate would be consistent with previous authority and voters' intentions.

Editors' note: This Before the High Court column was originally published online in February 2017, prior to the High Court hearing. The High Court has since handed down its judgment, in which it unanimously held that Robert Day AO was incapable of being chosen as a senator by reason of s 44(v) of the *Australian Constitution: Re Day (No 2)* [2017] HCA 14 (5 April 2017). The Court also unanimously held that the resulting vacancy should be filled by a special count of the ballot papers.

² High Court of Australia, 'Reference by the Senate to the Court of Disputed Returns — Mr Robert John Day AO' (Notice, 9 November 2016) <http://www.hcourt.gov.au/assets/news/Notice_Court_of_Disputed_Returns_-_Day.pdf>.

³ (1975) 132 CLR 270.

⁴ Cf Mr Robert Day, 'Annotated Submissions of Mr Robert Day', Submission in *Re Robert John Day AO*, Case No C14/2016, 19 January 2017, [64]–[73] ('Day Submissions').

II Agreed Facts

Some of the facts of *Re Day* are agreed and some are in dispute.⁵

Mr Day was elected as a senator for South Australia in 2013, and the Federal Government initially assumed that he would move into the electoral office of the outgoing Senator Doug Farrell at 19 Gilles Street in central Adelaide. However, prior to commencing his term, Mr Day proposed instead that the Commonwealth lease a portion of a property at 77 Fullarton Road, Kent Town, South Australia to use as his electoral office. At that time, the registered proprietor of this property was B&B Day Pty Ltd ('B&B Day') as trustee of the Day Family Trust. Mr Day was the sole director and company secretary of B&B Day and Mr Day and his family were beneficiaries of the Day Family Trust. On 2 January 2014, the National Australia Bank ('NAB') had approved a loan facility to B&B Day as trustee of the Day Family Trust to a limit of \$1.6 million, secured by a registered mortgage over 77 Fullarton Road. Mr Day and his wife provided a guarantee and indemnity in respect of this loan for \$2 million.

Government representatives indicated that it was not possible for the Commonwealth to lease property from a sitting senator. To circumvent this difficulty, 77 Fullarton Road was sold during 2014 to the company Fullarton Investments Pty Ltd, which was formed for the purpose of purchasing 77 Fullarton Road from B&B Day and was controlled by a long-term business partner of Mr Day. On 30 June 2014, Mr Day's wife became sole director and company secretary of B&B Day. The property was sold to Fullarton Investments under a vendor finance arrangement for \$2.1 million dollars, which B&B Day as vendor loaned to Fullarton Investments. The property was subsequently transferred to Fullarton Investments in late 2014 and a new mortgage registered over the property, although B&B Day remained liable to make payments to the NAB under the loan facility. Under this arrangement, it was intended that Fullarton Investments receive rent from the Commonwealth for the lease of the property and then make payments to B&B Day using those funds;⁶ B&B Day would then use those funds to make the loan repayments to the NAB.

On 24 November 2014, a Heads of Agreement relating to the proposed lease of office premises at 77 Fullarton Road was signed by Fullarton Investments as lessor and on 18 February 2015 it was signed by the leasing manager DTZ on behalf of the Commonwealth as lessee. The Heads of Agreement identified the date the rent would commence as '14 August 2016 or the day of rent commencement at 19 Gilles Street if/when subleased whichever is the earlier'.⁷ In April 2015, Mr Day moved into his electoral office at 77 Fullarton Road. On 1 December 2015, a memorandum of lease between Fullarton Investments and the Commonwealth

⁵ Attorney-General (Cth), 'Areas of Factual Agreement and Disagreement between the Parties', Submission in *Re Robert John Day AO*, Case No C14/2016, 11 December 2016.

⁶ *Re Day* [2017] HCA 2 (27 January 2017) [97], [122]–[124].

⁷ *Appendix 2: Copy Heads of Agreement* (21 November 2014) Parliament of Australia, 'Qualification of Senators: Documents Tabled 7 November 2016 — Senator Day <http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Tabled_Papers/7Nov2016> Attachment 7 ('Appendix 2: Copy Heads of Agreement').

was executed for rent of \$66 540 plus GST per annum, to commence retrospectively on 1 July 2015. The lease provided for a rent-free period to expire on 14 August 2016 or when the premises at 19 Gilles Street was sublet, whichever was earlier. At no stage have any rental payments been made by the Commonwealth for the Fullarton Road electoral office.⁸

After the dissolution of Parliament on 9 May 2016, Mr Day submitted a nomination of senators form on behalf of Family First, nominating two candidates for the Senate for South Australia for the 2016 Federal Election; namely, Mr Day and Ms Lucy Gichuhi. Mr Day also requested that the names of these candidates be grouped and that Family First's name be printed next to their group square 'above the line' on the Senate ballot paper. The Australian Electoral Commission accepted this request.

The principal areas of factual disagreement are between Mr Day and former Labor Senator Anne McEwen.⁹ In summary, Ms McEwen contends that Mr Day retained control of B&B Day, that Fullarton Investments acted at his direction, and that the purpose of the arrangement was to give the appearance that Mr Day did not have a pecuniary interest in the 77 Fullarton Road property.¹⁰ There are also two minor areas of factual disagreement between the Attorney-General and Mr Day.¹¹

III Why Mr Day Will Probably Not Be Disqualified if the Court Follows *Re Webster*

In *Re Webster*, Barwick CJ was of the view that s 44(v) of the *Constitution* was derived from 18th and early 19th century British legislation designed to preserve the independence of Parliament from the influence of the Crown¹² and that s 44(v) had the same 'evident purpose'.¹³ Accordingly, the Chief Justice determined that four criteria had to be satisfied in order to attract the constitutional disqualification:

1. The relevant agreement must be an executory contract; namely, a contract 'under which at the relevant time, something remains to be done by the contractor in performance of the contract',¹⁴ and not a contract that is really 'casual and transient'.¹⁵
2. The contract 'must be one under which the Crown could conceivably influence the contractor in relation to parliamentary affairs by the very existence of the agreement, or by something done, or refrained from being done, in relation to the contract or to its subject matter';¹⁶

⁸ Ibid [135].

⁹ Attorney-General (Cth), 'Areas of Factual Agreement and Disagreement', above n 5, [71]–[113].

¹⁰ Ibid [71], [74], [76].

¹¹ Ibid [69]–[70].

¹² *Re Webster* (1975) 132 CLR 270, 277–8.

¹³ Ibid 279.

¹⁴ Ibid.

¹⁵ Ibid 286.

¹⁶ Ibid 280. See also at 279.

3. '[T]he interest in the agreement of the person said to be disqualified must be pecuniary in the sense that 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'.¹⁷
4. The disqualifying pecuniary interest 'must be a pecuniary interest in the particular agreement'.¹⁸

While the first of Barwick CJ's criteria is satisfied on the facts of *Re Day* — as the memorandum of lease executed between Fullarton Investments and the Commonwealth on 1 December 2015 was clearly executory¹⁹ — the others are probably not.²⁰

In *Re Webster*, Barwick CJ assumed that the word 'interest' in s 44(v) was confined to a legal or equitable right or interest in the relevant agreement.²¹ Mr Day does not have a legal or equitable interest in the lease between Fullarton Investments and the Commonwealth. Under the sale agreement for the Fullarton Road property, Fullarton Investments agreed to make payments to B&B Day from rent received by the Commonwealth, but this was not a term of the lease between Fullarton Investments and the Commonwealth.²² Moreover, Mr Day had ceased to be shareholder and director of B&B Day prior to 1 December 2015²³ and, in any event, being a shareholder or director of a company does not confer a legal or equitable interest in the property of the company.²⁴ As the Day Family Trust is discretionary, Mr Day also does not have an equitable or legal interest in the property held by the trust.²⁵ If the Court follows *Re Webster*, the arrangement cannot, therefore, give Mr Day an interest in the lease in the sense required by *Re Webster*.

In addition, putting aside 'bare theoretical possibilities unrelated to the practical affairs of business and departmental life',²⁶ it seems very unlikely that under the agreement, Mr Day could have been influenced by the Crown in relation to parliamentary affairs through the possibility of financial gain by the existence or performance of the agreement.²⁷ The agreement was proposed by Mr Day, and only

¹⁷ Ibid 280.

¹⁸ Ibid 286.

¹⁹ Attorney-General (Cth), 'Submissions of the Attorney-General of the Commonwealth', Submission in *Re Robert John Day AO*, Case No C14/2016, 6 January 2017, [58] ('A-G (Cth) Submissions'); Day Submissions, above n 4, [104]; Ms Anne McEwen, 'Annotated Primary Submissions of Ms McEwen', Submission in *Re Robert John Day AO*, Case No C14/2016, 6 January 2017, [32] ('McEwen Submissions').

²⁰ See also Day Submissions, above n 4, [23]–[24]. *Contra* A-G (Cth) Submissions, above n 19, [21], [70]. *Re Webster* (1975) 132 CLR 270, 286–7.

²² *Re Day* [2017] HCA 2 (27 January 2017) [169]–[170].

²³ Attorney-General (Cth), 'Areas of Factual Agreement and Disagreement', above n 5, [5].

²⁴ Robert P Austin and Ian M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis, 16th ed, 2015) [4.170].

²⁵ *Re the Stamps Acts and Rule's Settlement* [1915] VLR 670, 674 (Madden CJ); *Commissioner of State Revenue v Serana Pty Ltd* (2008) 36 WAR 251, 264–5 (Martin CJ), 282–3 (Buss JA); *Lygon Nominees Pty Ltd v Cmr of State Revenue* (2007) 23 VR 474, 495 (Redlich JA; Ashley JA and Bell AJA agreeing).

²⁶ *Re Webster* (1975) 132 CLR 270, 286.

²⁷ *Contra* A-G (Cth) Submissions, above n 19, [70].

entered into reluctantly by the Commonwealth, after a long period of negotiation. The lease only provided for the payment of rent from the earliest to occur of 14 August 2016 or the day of rent commencement at 19 Gilles Street if it was subleased, and rent was to be set by an independent valuer.²⁸

IV How the High Court Could Interpret and Apply s 44(v) in *Re Day*

A *Re Webster* Adopted an Overly Restrictive Interpretation of s 44(v)

Prima facie, Barwick CJ's interpretation of s 44(v) in *Re Webster* is not consistent with the express terms of the provision, which are capable of applying to a much broader range of circumstances than His Honour identified. While it is conceded that some narrowing of the application of the provision is necessary in order to avoid disqualification in spurious circumstances,²⁹ we argue that Barwick CJ's interpretation of s 44(v) is overly restrictive because it is based on two flawed premises.³⁰

1 *The Purpose of s 44(v)*

The first flawed premise of Barwick CJ's reasoning in *Re Webster* is that s 44(v) is directed exclusively at protecting the independence of Parliament from the influence of the Crown.³¹ We argue that this interpretation is a significant narrowing of s 44(v), which is not warranted by the express terms of the provision and which fails to recognise that s 44(v) has an additional purpose of combatting the risk that parliamentarians may act corruptly.

Although Barwick CJ referred to the Convention Debates, His Honour identified the purpose of s 44(v) principally by reference to the British legislative antecedents of s 44(v), in particular the *House of Commons (Disqualification) Act 1782*.³² The *1782 Act* was enacted in the wake of significant concern about the Crown's ability to influence Parliament and it was enacted for the express purpose of 'further securing the [f]reedom and [i]ndependence of Parliament'.³³ Chief Justice Barwick considered that s 44(v) was designed to achieve the same goal and was quite different to disqualification provisions under local government legislation whose object was to 'preserve purity in local government administration'.³⁴ Hence, His Honour restricted its interpretation to circumstances where a contractor may be influenced by the Crown in relation to the affairs of Parliament.

²⁸ Day Submissions, above n 4, [105]–[110].

²⁹ See *Woolley v Kay* (1856) 1 Hurl & N 307, 309; 156 ER 1220, 1221 (Alderson B); *Nicholson v Fields* (1862) 7 Hurl & N 810, 821; 158 ER 695, 700 (Martin B); *Lewis v Carr* (1876) 1 Ex D 484, 490–1 (Bramwell B). See also Day Submissions, above n 4, [33]–[35].

³⁰ *Contra* Day Submissions, above n 4, [20]–[22], [25].

³¹ A-G (Cth) Submissions, above n 19, [20], [31]; McEwen Submissions, above n 19, [24]–[30]. *Contra* Day Submissions, above n 4, [32]–[53].

³² 22 Geo 3 c 45 ('1782 Act').

³³ *Ibid* s 1. See also Day Submissions, above n 4, [43].

³⁴ *Re Webster* (1975) 132 CLR 270, 278–9.

Re Webster was decided before *Cole v Whitfield*.³⁵ Since *Cole v Whitfield*, the High Court has shown a greater willingness to consider the Convention Debates in order to identify the subject to which the language of the *Constitution* was directed.³⁶ It is true that some framers were concerned to ensure that Members of Parliament would not be improperly influenced by the Crown in relation to the conduct of their duties³⁷ and the wording of the clause that became s 44(v) adopted by the 1891 Convention mirrored the terms of the *1782 Act*, which disqualified persons who ‘undertake, execute, holds or enjoy’ agreements with the Crown from sitting in Parliament.³⁸ This was, however, not the framers’ sole concern. A careful reading of the Convention Debates reveals that the framers contemplated s 44(v) serving multiple purposes, which were complementary, rather than conflicting.³⁹

When the clause was debated at the second Federal Convention, Edmund Barton, the Leader of the Convention, opposed an amendment that would have expanded the express qualification to apply to all incorporated companies because it would enable parliamentarians to carry out ‘a fraud upon the public’.⁴⁰ John Gordon, a South Australian delegate, stated ‘[i]f we are going to prevent fraud let us make the perpetration of it as difficult as possible’⁴¹ and Isaac Isaacs stated:

We should be careful to do all that is possible to separate the personal interests of a public man from the exercise of his duty. We should bear in mind that it is not only important to secure that so far as we can in actual fact, but, in every way possible, we should prevent any appearance of the contrary being exercised.⁴²

These comments at the second Convention almost certainly reflect the scandalous problems with political corruption that had occurred in colonial parliaments and local government in the 1880s and early 1890s.⁴³ The wording of the clause was subsequently altered by the Drafting Committee during the Melbourne Session of the second Convention into its current form, so that it disqualified any person who ‘has any direct or indirect *pecuniary interest* in any agreement with the Public Service of the Commonwealth’.⁴⁴ This alteration is significant because it closely resembles the terms of anti-corruption provisions that had been enacted throughout the 19th century, first by the United Kingdom

³⁵ (1988) 165 CLR 360.

³⁶ *Ibid* 385. See A-G (Cth) Submissions, above n 19, [39].

³⁷ See, eg, *Official Report of the National Australasian Convention Debates*, Adelaide, 21 April 1897, 1035–6 (Sir Joseph Abbott and Sir William Zeal). See also John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 493.

³⁸ *1782 Act* s 1. For the initial wording of s 44(v) (originally numbered clause 48), see John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 445. See also Day Submissions, above n 4, [48].

³⁹ See McEwen Submissions, above n 19, [27]. Cf Day Submissions, above n 4, [51]–[52].

⁴⁰ *Official Report of the National Australasian Convention Debates*, Adelaide, 15 April 1897, 737 (Edmund Barton).

⁴¹ *Ibid*.

⁴² *Official Report of the National Australasian Convention Debates*, Adelaide, 21 April 1897, 1037. See also at 1038; *Official Record of the Debates of the National Australasian Convention*, Sydney, 21 September 1897, 1023 (Isaac Isaacs).

⁴³ See generally Michael Cannon, *The Land Boomers* (Thomas Nelson, 1976).

⁴⁴ Williams, above n 47, 869 (emphasis added).

Parliament, and then by the legislatures of the colonies, to reform local government and public boards.⁴⁵ Although the alteration to the text of s 44(v) by the Drafting Committee was not subsequently debated by the Convention, the timing and substance of the Committee's alteration, and the delegates' comments at the second Convention which preceded it, indicate that the framers intended that the provision would have an anti-corruption purpose that was broader than merely ensuring that parliamentarians were not subject to improper influence from the Crown.⁴⁶

2 *The Presumption of Restrictive Interpretation*

The second flawed premise of the reasoning in *Re Webster* is that s 44(v) should be interpreted restrictively because it may have penal consequences under s 45 of the *Constitution*.⁴⁷ We argue that this proposition is inconsistent with the preponderance of contemporaneous case law and with the High Court's typical approach to the interpretation of s 44. Nineteenth century cases interpreting analogous provisions generally found that the presumption that penal provisions should be interpreted restrictively was outweighed by the remedial purposes of the legislation.⁴⁸ Likewise, cases considering other paragraphs of s 44 have not applied such a presumption.⁴⁹

B *Our Proposed Interpretation of s 44(v) and Its Application to the Facts of Re Day*

We argue that the drafting history of s 44(v) supports an interpretation of the provision that is directed to both conflicts of interest and corruption. On our proposed interpretation, s 44(v) would disqualify a person who has a pecuniary interest in an agreement with the Public Service of the Commonwealth:

⁴⁵ See, eg, *Municipal Corporations Act 1835* (UK) (5 & 6 Wm IV c 76) s 28; *Rural Municipalities Act 1865* (Tas) s 56; *Municipalities Act 1867* (NSW) s 33; *Local Government Act 1874* (Vic) s 54; *Municipal Corporations Act 1890* (SA) s 22; *Local Government Act 1890* (Vic) s 51; *Local Government Act 1891* (Vic) s 16; *Municipal Institutions Act 1895* (WA) s 54; *Municipalities Act 1897* (NSW) s 38(ii). *Contra* Day Submissions, above n 4, [79], [94].

⁴⁶ *Contra* Day Submissions, above n 4, [86].

⁴⁷ *Re Webster* (1975) 132 CLR 270, 279. See also A-G (Cth) Submissions, above n 19, [32]; McEwen Submissions, above n 19, [28]. *Contra* Day Submissions, above n 4, [54]–[59].

⁴⁸ See, eg, *Nicholson v Fields* (1862) 7 Hurl & N 810; 158 ER 695; *Re Heather*; *Ex parte Kilpatrick* (1890) 16 VLR 16. See also *R v Eddy*; *Ex parte Forbes* (1871) 2 AJR 83; *R v Lovell*; *Ex parte Gwyther* (1871) 2 AJR 55; *Ex parte Lansdown* (1886) 7 NSW 434; *R v Drevermann* (1884) 6 ALT 141; *R v Haverfield* (1868) 5 W W & A'B 228; *R v Knipe* (1866) 3 W W & A'B 46; *Fletcher v Hudson (No 2)* (1881) 7 QBD 611, 617 (Bramwell LJ), 618 (Cotton LJ); *Todd v Robinson (No 2)* (1884) 14 QBD 739; *Ex parte Bowring* (1886) 7 NSW 439, 440–1 (Windeyer J), 441 (Innes J); *Nutton v Wilson* (1889) 22 QBD 744; *City of London Electric Lighting Co Ltd v London Corporation* [1903] AC 434. Cf *Lewis v Carr* (1876) 1 Ex D 484, 491 (Cleasby B); *Ex parte Bowring* (1886) 7 NSW 439, 440 (Martin CJ); *Woolley v Kay* (1856) 1 Hurl & N 307, 308–9; 156 ER 1220, 1221 (Alderson B); *O'Dwyer v Casey* (1863) 2 W & W 85.

⁴⁹ See, eg, *Re Culleton [No 2]* [2017] HCA 4 (3 February 2017); *Re Wood* (1988) 167 CLR 145; *Sue v Hill* (1999) 199 CLR 462; *Sykes v Cleary (No 2)* (1992) 176 CLR 77; *Nile v Wood (No 2)* (1988) 167 CLR 133. Cf *Sykes v Cleary (No 2)* (1992) 176 CLR 77, 116 (Deane J).

- (i) that creates a real risk of conflict⁵⁰ between that person's private interests and their public duties as a parliamentarian,⁵¹ or
- (ii) where there is a real possibility that the person has used his or her position as a parliamentarian to obtain an improper financial advantage for himself or herself or his or her associates.⁵²

We propose that 'direct or indirect pecuniary interest in an agreement with the Public Service of the Commonwealth' in s 44(v) refers to a pecuniary interest in a broad sense — for example, the expectation of deriving a pecuniary benefit that is not remote or insubstantial — and is not confined to a legal or equitable pecuniary interest in the agreement.⁵³ Moreover, the word 'agreement' should not be confined to a formal, binding contract.⁵⁴ This proposed interpretation is consistent with: contemporaneous case law on analogous legislation;⁵⁵ the remedial purpose of the provision; and the text, specifically, the express qualification to s 44(v), which presumes that a member of a company may otherwise have a disqualifying pecuniary interest,⁵⁶ and the choice the framers made in drafting the provision to refer to both direct *and indirect* pecuniary interests, and their use of the word 'agreement'.⁵⁷ If the Court adopts this expanded interpretation of s 44(v) in *Re Day*, it is likely to conclude that Mr Day was incapable of sitting as a senator from 18 February 2015⁵⁸ until the dissolution of the 44th Parliament on 9 May 2016, and incapable of being elected to, or sitting as a senator in, the 45th Parliament.

On 18 February 2015, DTZ, on behalf of the Commonwealth,⁵⁹ signed a Heads of Agreement with Fullarton Investments concerning the 'proposed lease by the Commonwealth of Australia' of office accommodation at 77 Fullarton Road. This agreement set out the key commercial terms that were to be reflected in a more formal Lease to be entered into by the parties.⁶⁰ Mr Day had a private direct or indirect pecuniary interest in this agreement because, on his own admission, he, or

⁵⁰ See, eg, *Nicholson v Fields* (1862) 7 Hurl & N 810, 823; 158 ER 695, 701 (Channell B); *Nutton v Wilson* (1889) 22 QBD 744; *Re Heather; Ex parte Kilpatrick* (1890) 16 VLR 460.

⁵¹ See *Towsey v White* (1836) 5 B & C 125, 131; 108 ER 46, 48–9 (Bayley J); *Whiteley v Barley* (1887) 20 QBD 196; *Re Heather; Ex parte Kilpatrick* (1890) 16 VLR 16; *England v Inglis* [1920] 2 KB 636. See also A-G (Cth) Submissions, above n 19, [4], [19]–[20], [26]–[31], [39]–[42]. Cf Day Submissions, above n 4, [60], [85], [95]–[102].

⁵² See, eg, *Lewis v Carr* (1876) 1 Ex D 484, 490–1 (Bramwell B); *England v Inglis* [1920] 2 KB 636. See also *Towsey v White* (1836) 5 B & C 125, 131; 108 ER 46, 48–9 (Bayley J).

⁵³ A-G (Cth) Submissions, above n 19, [4], [51]–[57]; McEwen Submissions, above n 19, [35]–[41]. Cf Day Submissions, above n 4, [36], [76], [78]–[84], [87]–[90], [111].

⁵⁴ A-G (Cth) Submission, above n 19, [4]. *Contra* Day Submissions, above n 4, [77].

⁵⁵ See, eg, *Simpson v Ready* (1844) 12 M & W 736; 152 ER 1395; *Woolley v Kay* (1856) 1 Hurl & N 307; 156 ER 1220; *Todd v Robinson (No 2)* (1884) 14 QBD 739; *Ex parte Lansdown* (1886) 7 NSW 434; *Ex parte Bowring* (1886) 7 NSW 439; *Re Heather; Ex parte Kilpatrick* (1890) 16 VLR 16; *City of London Electric Lighting Co Ltd v London Corporation* [1903] AC 434. See also *Whiteley v Barley* (1888) 21 QBD 154; *England v Inglis* [1920] 2 KB 636. But see *Re Heather; Ex parte Kilpatrick* (1890) 16 VLR 460.

⁵⁶ A-G (Cth) Submissions, above n 19, [36]–[37]. *Contra* Day Submissions, above n 4, [91]–[93].

⁵⁷ See also A-G (Cth) Submissions, above n 19, [4], [33]–[38], [41], [45]–[47]. *Contra* Day Submissions, above n 4, [76]–[94].

⁵⁸ Cf A-G (Cth) Submissions, above n 19, [71].

⁵⁹ See also A-G (Cth) Submission, above n 19, [48]–[50], [59]–[60]; McEwen Submissions, above n 19, [33]–[34].

⁶⁰ *Appendix 2: Copy Heads of Agreement*, above n 7.

an entity in which he had an interest, stood to benefit from the rent payments under the lease.⁶¹ The trustee of a trust of which Mr Day was a beneficiary had sold property under a vendor finance arrangement, and it was intended that the purchaser of that property would pay the purchase price utilising funds obtained from the Commonwealth.⁶² In substance, under a scheme he had devised himself, Mr Day intended to pay off a loan previously entered into by B&B Day, with Mr Day and his wife acting as guarantors, utilising funds provided by the Commonwealth in the form of rental payments. Given the large sums of money involved, depending upon the High Court's findings on the facts, it would be open to the Court to find that there was a real possibility that Mr Day had used his position as a senator to obtain an improper financial advantage for himself and his wife.

V Consequential Orders

The consequences of falling foul of s 44 for sitting senators and members are specified in s 45(i) of the *Constitution*. Section 45(i) provides that if any senator or member of the House of Representatives becomes subject to any of the disabilities listed in s 44, then 'his place shall thereupon become vacant'. Section 45(i) is self-executing — such that the vacancy occurs by operation of the constitutional provision, rather than a judicial declaration.⁶³ However, the Court may, by order, declare the resulting legal consequences.⁶⁴ On our proposed interpretation, Mr Day held a pecuniary interest in an agreement with the Commonwealth from 18 February 2015, and so his seat automatically became vacant from that date. In addition, while this pecuniary interest remained, Mr Day was incapable of being elected in the 2016 election; as put by the High Court in *Re Wood*.⁶⁵ The consequence should be that 'the place has not been filled in the eye of the law for he lacked the qualifications to be elected'.⁶⁶ Accordingly, if the interpretation of s 44(v) proposed in this column is adopted by the Court, it will likely declare that Mr Day was not capable of being chosen or of sitting as a senator in the 2016 election, such that he was not duly elected, and that his seat is vacant.⁶⁷

What consequences should follow from this for the composition of the Senate? The High Court has the power to declare the 2016 election for South Australian senators to be void⁶⁸ where it considers that a recount would result in the distortion of voters' intentions,⁶⁹ which would require a new election to be held. This seems unlikely, for, as put in *Re Wood*, it would be 'unreal' to suggest that the presence of the disqualified Senator's name on the ballot paper 'has falsified the

⁶¹ Attorney-General (Cth), above n 5, 'Areas of Factual Agreement and Disagreement', [67]. See also A-G (Cth) Submissions, above n 19, [5], [61]–[69]; McEwen Submissions, above n 19, [35]–[52]. *Contra* Day Submissions, above n 4, [4]–[5], [7]–[18], [103]–[156].

⁶² A-G (Cth) Submissions, above n 19, [15]–[18].

⁶³ *Re Webster* (1975) 132 CLR 270, 279 (Barwick CJ); *Re Wood* (1988) 167 CLR 145, 163.

⁶⁴ *Sue v Hill* (1999) 199 CLR 462, 478 (Gleeson CJ, Gummow and Hayne JJ).

⁶⁵ (1988) 167 CLR 145.

⁶⁶ *Ibid* 168.

⁶⁷ *Commonwealth Electoral Act 1918* (Cth) ss 360(1)(v), 379(b)–(c).

⁶⁸ *Ibid* s 360(1)(vii). See A-G (Cth) Submissions, above n 19, [73].

⁶⁹ *Sykes v Cleary (No 2)* (1992) 176 CLR 77, 102 (Mason CJ, Toohey and McHugh JJ). See A-G (Cth) Submissions, above n 19, [75].

declared choice of the people of the State' for the other elected candidates.⁷⁰ The most likely outcome is that the Court will order that Mr Day's seat is to be filled by a recount of the ballot papers with his name excluded.⁷¹ Votes below the line for Mr Day would be disregarded as a nullity.⁷² A more difficult question is how votes cast above the line for the Family First party and second and later preferences received by Mr Day should be treated.

As noted in Part II of this column, in the 2016 election, Mr Day was grouped above the line with another Family First candidate, Ms Gichuhi. The Act provides that a request to be grouped on the ballot papers must be made by two or more candidates.⁷³ Ms McEwen argued that, as Mr Day was disqualified, the application to group the candidates was invalid and the group listing of the two Family First candidates distorted the vote.⁷⁴ If this argument were accepted, the consequence would be that the grouping of the Family First candidates would be invalid, and that first preference votes for Family First above the line should be distributed to the voter's next above the line preference, rather than the next Family First candidate after Mr Day.

Although there is High Court authority that this approach should be rejected, the current provisions of the Act are different in some potentially important respects. In *Re Wood*, in an application for further directions subsequent to delivery of the main judgment, Mason CJ held that the disqualification of a candidate in that case meant that the election of the disqualified candidate (Mr Wood) miscarried, but that the group voting process was a 'central feature of the ballot-paper', and so had to be taken into account 'in order to give effect to the intentions of the voters as expressed in the ballot-papers'.⁷⁵ Accordingly, where a voter had indicated a wish to adopt the group voting ticket of which Mr Wood was a part (in that case, the Nuclear Disarmament Party), the vote was treated as if the group voting ticket was valid, even though the remaining candidate would not have been able to make a request to group candidates.⁷⁶ Following Mason CJ's reasoning would mean that votes cast for the Family First group should be counted for Ms Gichuhi.

Although not identical, requests to group candidates under s 168 of the current law follow a similar process to that applicable when *Re Wood* was decided. Nevertheless, the 2016 Federal Election can be distinguished from earlier cases such as *Re Wood* due to the introduction of (partial) optional preferential above-the-line voting for Senate elections.⁷⁷ These reforms allow electors to vote by numbering at

⁷⁰ *Re Wood* (1988) 167 CLR 145, 167; *Re Culleton [No 2]* [2017] HCA 4 (3 February 2017) [43] (Kiefel CJ, Bell, Gageler and Keane JJ; Nettle J agreeing at [67]. Note that Kiefel CJ is listed in the report as Kiefel J). See also *Sykes v Cleary (No 2)* (1992) 176 CLR 77, 101–2 (Mason CJ, Toohey and McHugh JJ).

⁷¹ *Re Wood* (1988) 167 CLR 145, 168. See A-G (Cth) Submissions, above n 19, [73]–[76].

⁷² *Re Wood* (1988) 167 CLR 145, 166.

⁷³ *Commonwealth Electoral Act 1918* (Cth) s 168.

⁷⁴ McEwen Submissions, above n 19, [61]–[79]. See also at [80]–[91]. Ms McEwen subsequently modified this in oral argument: *Re Day* [2017] HCA 2 (27 January 2017) [243]–[246].

⁷⁵ *Re Wood* (1988) 167 CLR 145, 174–5 (Mason CJ).

⁷⁶ *Ibid* 173–4 (Mason CJ).

⁷⁷ The changes were introduced by the *Commonwealth Electoral Amendment Act 2016* (Cth). See Anne Twomey, 'Before the High Court — *Day v Australian Electoral Officer (SA)*: Senate Voting Reforms under Challenge' (2016) 38(2) *Sydney Law Review* 231.

least six boxes above the line for parties or grouped candidates and at least 12 boxes below the line for individual candidates.⁷⁸ Under the earlier system, voters were only able to indicate one preference above the line, and so if a vote above the line was considered invalid, the vote would have exhausted. By contrast, under the current system, voters may indicate more than one vote above the line, so the invalidation of the Family First group would not prevent a voter's ballot from electing a candidate from a later preferred group or party.

In our view, allocating votes received by Mr Day to the next Family First candidate, Ms Gichuhi, would best give effect to voters' intentions.⁷⁹ Most of the first preference votes received by Mr Day were for Family First, rather than Mr Day specifically.⁸⁰ Had these voters known that Mr Day was disqualified, it is likely that the majority would have cast their votes for the remaining Family First candidate, rather than a candidate from another party.⁸¹ Adapting the words of the plurality in *Re Culleton*, there is no reason to suppose that votes cast above the line in favour of the Family First group 'were not intended to flow to the next individual nominee' of the Family First party in the event that Mr Day was incapable of being elected.⁸² It is also likely that second or later preference votes received by Mr Day⁸³ would have been directed to the remaining eligible Family First candidate, had it been known that Mr Day was disqualified, rather than a candidate from another party.

Finally, it should be noted that even if votes received by Mr Day are allocated to Ms Gichuhi, her path to election may be blocked. There is a live question as to whether she remains a Kenyan citizen, and so she may be disqualified under s 44(i) of the *Constitution*.⁸⁴

⁷⁸ *Commonwealth Electoral Act 1918* (Cth) s 239.

⁷⁹ Day Submissions, above n 4, [157]. *Contra* McEwen Submissions, above n 19, [53]–[91].

⁸⁰ *Re Day* [2017] HCA 2 (27 January 2017) [239].

⁸¹ *Ibid* [244]–[246].

⁸² *Re Culleton [No 2]* [2017] HCA 4 (3 February 2017) [44] (Kiefel CJ, Bell, Gageler and Keane JJ; Nettle J agreeing at [67]).

⁸³ These amounted to 58.13% of the votes received by Mr Day: McEwen Submissions, above n 19, [63].

⁸⁴ A-G (Cth) Submissions, above n 19, [77]–[81]; Day Submissions, above n 4, [158].