

# Direct or indirect pecuniary interest under s 44(v) of the Constitution

Peter Strickland reports on *Re Day* [No 2] [2017] HCA 14

In *Re Day* [No 2] [2017] HCA 14 (*Re Day*), the High Court sat as the Court of Disputed Returns. The central issue was whether Robert John Day AO, who had been elected as a South Australian senator in the Commonwealth Parliament, had any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth within the meaning of s 44(v) of the Constitution. If he did, it meant that his election was invalid and there was therefore a vacancy in South Australia's representation in the Senate.

Additional questions which the court had to consider included, if there were a vacancy, by what means and in what manner that vacancy should be filled.

The court held that Mr Day had an indirect pecuniary interest within the meaning of s 44(v). It also held that the resulting vacancy should be filled by applying, by analogy, the provisions of s 273(27) of the *Commonwealth Electoral Act 1918* (Electoral Act). This meant filling the vacancy with a special count of the ballot papers by counting each vote 'above the line' for the Family First party as a vote for the other Family First candidate.

### Background

Mr Day was elected to the Senate as a senator for South Australia at the 2013 federal election. His term commenced on 1 July 2014.

The interest in question concerned a lease entered into between Fullarton Investments Pty Limited (Fullarton Investments), which was the registered proprietor of premises at 77 Fullarton Road, Kent Town (premises), and the Commonwealth on 1 December 2015. One of the benefits accruing to Mr Day as a senator was the provision of office accommodation within his electorate. The purpose of the lease was to provide Mr Day with that accommodation. Mr Day occupied an office in the premises from April 2015.

Fullarton Investments was the trustee of the Fullarton Road Trust, whose beneficiaries included the Day Family Trust. The trustee of the Day Family Trust was B&B Day Pty Limited (B&B Day), and the beneficiaries of the Day Family Trust included Mr Day. On 24 April 2014, B&B Day had sold the Premises to Fullarton Investments for \$2.1 million and provided vendor finance in relation to that purchase. B&B Day had a loan facility from a bank of \$1.6 million, secured by a mortgage over the premises. Mr Day and his wife had given a guarantee and indemnity in relation to that loan.

On 26 February 2016, Fullarton Investments directed the Commonwealth to pay the rent due under the lease to 'Fullarton Nominees', which was a business name owned by Mr Day, to be deposited into a bank account of Mr Day.

Mr Day's nomination for the 2016 federal election was declared on 10 June 2016; he was declared elected to the Senate on 4 August 2016. Subsequently, he resigned from the Senate on 1 November 2016.

### The central issue

Section 44(v) of the Constitution 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 or a member of the House of Representatives.

There was no dispute that the lease was an agreement with the Public Service of the Commonwealth and that Mr Day was not a party to the lease. The question was whether Mr Day had an indirect pecuniary interest in the lease.

### Decision on the central issue

The court had previously considered s 44(v) in *In re Webster* (1975) 132 CLR 270. In that case, Barwick CJ construed s 44(v) by reference to its perceived purpose, which his Honour took to be the same as that of a provision of the *House of Commons (Disqualification) Act 1782* (UK) (**1782 Act**). That purpose was said to 'secure the freedom and independence of Parliament from the Crown'.<sup>1</sup> Mr Day submitted that this decision should be followed with the effect that he was not disqualified from being elected as a senator, because the Commonwealth could not exert any influence over him by anything it could do under the lease.<sup>2</sup>

This submission was rejected by all members of the court, which held as follows.

First, while the 1782 Act was the progenitor of s 44(v), it was not the 'precise progenitor'. The references in s 44(v) to 'pecuniary interest' and the exception for shareholdings in companies with more than 25 members were not included in the 1782 Act. Those different words reflected a broader concern with personal interests which was discussed during the Convention Debates.<sup>3</sup> As such, the purpose of s 44(v) is wider than merely protecting the freedom and independence of parliamentarians from the Crown. It includes prevention of financial gain which may create a conflict of interest and duty.<sup>4</sup>

Secondly, the proper construction of s 44(v) proceeded from an understanding that parliamentarians have a duty to act in the public interest, uninfluenced by considerations such as personal financial gain.<sup>5</sup> The court held also that the interpretation in

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*Webster* could not be supported because it was narrower than the meaning which the text conveyed as a matter of ordinary meaning.<sup>6</sup>

Thirdly, the construction in *Webster* was unsatisfactory because it adopted a criterion for disqualification that was vague and unduly evaluative.<sup>7</sup> Section 44(v)'s 'blunt and limiting effect on democratic participation tells in favour of an interpretation which gives the disqualification ... the greatest certainty of operation that is consistent with its language and purpose'.<sup>8</sup>

Accordingly, s 44(v) was to be construed as having a broader purpose, which includes preventing direct and indirect pecuniary interests that conceivably could influence parliamentarians in the performance of their duty by reason of the effect of that interest on their private concerns.<sup>9</sup>

As to what constitutes a 'pecuniary interest', the court held this to be an interest 'sounding in money or money's worth'<sup>10</sup>, which can include avoiding a monetary loss.<sup>11</sup> An *indirect* pecuniary interest in an agreement with the Public Service requires a 'personal connection' to the agreement.<sup>12</sup> This looks to the practical effect of the agreement in question on a person's pecuniary interests.<sup>13</sup> In this regard, both Gageler J and Nettle and Gordon JJ<sup>14</sup> endorsed the view of Gavan Duffy J in *Ford v Andrews* (1916) 21 CLR 37 at 335 that:

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.

For example, if a parliamentarian's spouse is employed by the Public Service, the parliamentarian would not have an indirect pecuniary interest in the spouse's employment agreement, because the connection is not immediate.<sup>15</sup>

In the case of Mr Day, the fact that the rent was directed to be paid into a bank account of Mr Day was sufficient to give him a relevant indirect pecuniary interest in the lease.<sup>16</sup> He also had an indirect pecuniary interest because payment of the rent would have the practical prospect of reducing Mr Day's contingent liability to the bank (which arose from the guarantee).<sup>17</sup> Further, Mr Day had the prospect of receiving, through the sequential exercise of discretions, some or all of the funds that Fullarton Road Trust might receive under the lease.<sup>18</sup>

### How was the vacancy due to Mr Day's disqualification to be filled?

Section 360(1)(vi) of the Electoral Act permits the court to

declare that any candidate elected to the parliament in fact was not duly elected.<sup>19</sup> That carries with it the incidental power to order a special count by which the true result of the polling is given effect – that is, the true legal intent of the voters.<sup>20</sup>

In the case of deceased candidates, section 273(27) of the Electoral Act provides that each vote indicated for the deceased is counted as a vote for the next candidate in order of preferences. By analogy, a vacancy for a disqualified candidate could be filled by a special count of the ballot papers in the same way.<sup>21</sup> If the vacancy due to Mr Day's disqualification were to be filled in that way, the only other Family First candidate would be elected.

That result was opposed by Ms McEwan, who was the fourth South Australian candidate for the Senate on the Australian Labor Party's ticket. Ms McEwan submitted that 'above the line' votes for Family First should be disregarded, because s 168 of the Electoral Act required a group to comprise two or more members. That is, since Mr Day's candidacy was invalid, Family First was ineligible to be a group, meaning that votes above the line for Family First ought not to be counted.<sup>22</sup>

Ms McEwan's submission was rejected. This is because her approach would have distorted voter intentions.<sup>23</sup> Keane J also held that, alternatively, Ms McEwan did not demonstrate that it would distort voter intentions to allocate Mr Day's votes to the other Family First candidate.<sup>24</sup> His Honour held further that nothing in s 168 of the Electoral Act indicated that votes 'above the line' for a group are invalidated where one of two members of the group is subsequently disqualified.<sup>25</sup> The effect of an 'above the line' vote is to vote for members of the group in order of preference below the line, which means there is no substantive difference between a vote above the line, and a vote below the line. Accordingly, it was correct to count the votes in order of the next preference, which in this case, was the other Family First candidate.<sup>26</sup>

The court therefore held that the resulting vacancy should be filled by applying the provisions of s 273(27) of the Electoral Act by analogy, meaning that the above the line votes for Mr Day were to be treated as votes for the other Family First candidate.<sup>27</sup>

### Endnotes

- 1 *Re Day [No 2]* [2017] HCA 14 at [14] per Kiefel CJ, Bell and Edelman JJ.
- 2 *Re Day [No 2]* [2017] HCA 14 at [15] per Kiefel CJ, Bell and Edelman JJ.
- 3 *Re Day [No 2]* [2017] HCA 14 at [31] and [33] per Kiefel CJ, Bell and Edelman JJ. See also Nettle and Gordon JJ at [271], [273].
- 4 *Re Day [No 2]* [2017] HCA 14 at [39] per Kiefel CJ, Bell and Edelman JJ, at [98] per Gageler J, at [275] per Nettle and Gordon JJ. See also Keane J at [161] and [165].
- 5 *Re Day [No 2]* [2017] HCA 14 at [49] per Kiefel CJ, Bell and Edelman JJ.
- 6 *Re Day [No 2]* [2017] HCA 14 at [161] per Keane J. See also Nettle and Gordon JJ at [247].
- 7 *Re Day [No 2]* [2017] HCA 14 at [98] per Gageler J.

## RECENT DEVELOPMENTS

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- 8 *Re Day [No 2]* [2017] HCA 14 at [97] per Gageler J.
- 9 *Re Day [No 2]* [2017] HCA 14 at [260], [264] per Nettle and Gordon JJ. See also at [39], [48] per Kiefel CJ, Bell and Edelman JJ, at [183] – [184] per Keane J.
- 10 *Re Day [No 2]* [2017] HCA 14 at [54] per Kiefel CJ, Bell and Edelman JJ, at [111] per Gageler J, at [252] per Nettle and Gordon JJ.
- 11 *Re Day [No 2]* [2017] HCA 14 at [111] per Gageler J, at [252] per Nettle and Gordon JJ.
- 12 *Re Day [No 2]* [2017] HCA 14 at [66] per Kiefel CJ, Bell and Edelman JJ.
- 13 *Re Day [No 2]* [2017] HCA 14 at [54] per Kiefel CJ, Bell and Edelman JJ, at [192] per Keane J.
- 14 *Re Day [No 2]* [2017] HCA 14 at [108] per Gageler J, at [254] per Nettle & Gordon JJ.
- 15 *Re Day [No 2]* [2017] HCA 14 at [256] per Nettle and Gordon JJ.
- 16 *Re Day [No 2]* [2017] HCA 14 at [13], [76] per Kiefel CJ, Bell and Edelman JJ, at [88] per Gageler J, at [195] per Keane J, at [279] per Nettle and Gordon JJ.
- 17 *Re Day [No 2]* [2017] HCA 14 at [89] per Gageler J, at [280] per Nettle and Gordon JJ.
- 18 *Re Day [No 2]* [2017] HCA 14 at [90] per Gageler J.
- 19 *Re Day [No 2]* [2017] HCA 14 at [206] per Keane J, at [292] per Nettle and Gordon JJ.
- 20 *Re Day [No 2]* [2017] HCA 14 at [206]-[207] per Keane J.
- 21 *Re Day [No 2]* [2017] HCA 14 at [77] per Kiefel CJ, Bell and Edelman JJ, at [293] – [294] per Nettle and Gordon JJ.
- 22 *Re Day [No 2]* [2017] HCA 14 at [79] – [80] per Kiefel CJ, Bell and Edelman JJ.
- 23 *Re Day [No 2]* [2017] HCA 14 at [78] per Kiefel CJ, Bell and Edelman JJ, at [210] per Keane J.
- 24 *Re Day [No 2]* [2017] HCA 14 at [210]-[211] per Keane J.
- 25 *Re Day [No 2]* [2017] HCA 14 at [209] per Keane J.
- 26 *Re Day [No 2]* [2017] HCA 14 at [298], [301] and [303] per Nettle and Gordon JJ.
- 27 Gageler J at [93] agreed with the reasoning of the other members of the court as to the means and manner of filling the vacancy.