Re Culleton, Re Day:
Challenging Senators' Eligibility

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Last year I seemed to spend a lot of time writing about Rodney Norman Culleton[1] and Robert John Day.[2] But the Culleton case has now been decided,[3] and presumably the Day case soon will be. So I'll try to summarise Culleton quickly, in order to spend more time on Day.

Rodney Norman Culleton

I've actually dealt with Culleton more fully in a posting for *AUS PUB LAW* on 6 February;[4] so this is just a summary.

On 11 April 2014, at his property in Guyra, New South Wales, Culleton confronted a tow truck driver who came to repossess a truck. He removed the tow truck's ignition key. In the ensuing scuffle the key was lost: the tow truck driver said Culleton had stolen it, and Culleton was charged with larceny. The charge was listed for hearing at Armidale on 2 March last year. But Culleton was facing another charge in Western Australia the previous day, and he claimed that this made it impossible for him to get to Armidale. Instead he telephoned the Armidale courthouse and offered to give evidence by telephone. The offer was rejected. He was convicted in his absence and a warrant was issued for his arrest.

Culleton appealed against the conviction, and throughout the ensuing election period that appeal was pending. But he made no attempt to respond to the warrant until after he was elected. The declaration of the poll took place on Tuesday 2 August. On the following Monday, 8 August, Culleton presented himself at the Armidale courthouse and the warrant was executed. Later that day the conviction was annulled (to clear the decks so that the original charge could finally proceed to trial). At a final hearing on 25 October, Culleton pleaded guilty. He was ordered to pay compensation of $322.85 for the theft of the key, but otherwise the charge was dismissed without proceeding to a conviction.

Culleton evidently thought that the annulment on 8 August would dispose of any constitutional problem. But that would only have been the case if the annulment was fully retrospective, wiping out the legal effect of the conviction as if it had never happened. In my supplementary posting to *Inside Story* on 9 August, I argued that the answer must depend not on any general assumptions about the effects of annulment, but on the precise interpretation of the particular statutory provision under which the annulment was granted. That provision is s 10 of the *Crimes (Appeal and Review) Act 2001* (NSW), which says simply that: 'On being annulled, a conviction or sentence ceases to have effect.' To say that something 'ceases to

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1 "In the Matter of Rodney Culleton", *Inside Story*, 3 August 2016 (with postscript added 9 August 2016) (http://insidestory.org.au/in-the-matter-of-rodney-culleton); "Void or Vacant? The Vibes of Vardon", *AUS PUB LAW*, 26 August 2016 (with postscript added 29 August 2016) (https://auspublaw.org/2016/08/void-or-vacant-the-vibes-of-vardon/).

2 "A Day in Court", *Inside Story*, 20 May 2016 (http://insidestory.org.au/a-day-in-court); "Another Day in Court", *Inside Story*, 3 November 2016 (http://insidestory.org.au/another-day-in-court).

3 *Re Culleton (No 2)* [2017] HCA 4.

4 "Incapable of Being Chosen", *AUS PUB LAW*, 6 February 2017 (https://auspublaw.org/2017/02/incapable-of-being-chosen/).

have effect on Monday' (I wrote) 'means that it did have effect before Monday. It means that there can be no new effects, but it doesn't wipe out the previous effects.'

The joint judgment in the High Court took a similar view: "To say … that the annulment 'ceases to have effect' is to acknowledge that it has been in effect to that point."

Section 10 adds that 'any enforcement action previously taken is to be reversed'. But the joint judgment pointed out that this language, too, is prospective: its effect:

> is to leave the legal state of affairs previously established by the conviction unaffected, save for the actual reversal of any action taken by way of enforcement against the defendant.

In short, the provisions 'indicate that a conviction is annulled only for the future'; they 'do not purport to operate retroactively to deny legal effect to a conviction from the time that it was recorded'.

Justice Nettle took a similar view, but he added a qualification. In his view the annulment was not retrospective in the sense that it might wipe out the legal effects which the conviction had already had; but its prospective operation included the result that, for purposes of events occurring *after* the annulment, the person is to be regarded as never having been convicted. Thus, if the conviction had been annulled *before* the election period, Culleton would have been entitled to stand. Similarly, when the case was argued on 7 December, Justice Nettle had suggested that a person whose conviction had been annulled, when interviewed on some future occasion, might truthfully deny that he had ever been convicted.

In my supplementary posting to *AUS PUB LAW* on 29 August, I added a further argument. This was that, even if s 10 of the New South Wales legislation were interpreted as allowing the annulment to operate retrospectively, it could not operate retrospectively for constitutional purposes – since, prior to the annulment on 8 August, the Constitution had already operated throughout the election period to render Culleton 'incapable of being chosen'. Any subsequent annulment arising under State legislation (I said) could not undo a consequence which the self-executing provisions of the Constitution had already produced. I ascribed this to the idea that a stream cannot rise higher than its source, as articulated by Justice Fullagar in the *Communist Party Case*.[5] Others have supported a similar conclusion by reference to *University of Wollongong v Metwally*,[6] with its insistence that once 'the immediate and self-executing provisions' of the Constitution 'have already operated' to produce a result, nothing can change that result.

Justin Gleeson SC, in his last opinion as Commonwealth Solicitor-General,[7] was inclined, as a matter of statutory interpretation for purposes of New South Wales criminal law, to think that an annulment should be treated as having full retrospective effect. But he argued that, even if that were the case, no such retrospective operation could affect the fact that s 44(ii) had already operated to make Culleton 'incapable of being chosen'; and that result was irreversible. Yet he based that conclusion not on appeal to fundamental constitutional principle, but on more pragmatic grounds: on the need for 'certainty in the identification of whether a person is eligible for election at the point of nomination', and for 'certainty of make-up of the Parliament'.

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5 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, esp at 258, 263.
6 (1984) 158 CLR 447, esp at 478-79.
7 SG No 23 of 2016, 28 October 2016.

The joint judgment in the High Court accepted the lesser argument that Gleeson had been inclined to reject: that, simply as a matter of statutory interpretation, the annulment was not retrospective even for purposes of State criminal law. It followed that there was no need to consider the constitutional argument. Justice Nettle accepted it; but he too based it primarily on 'the need for certainty in the electoral process' – for 'certainty that, at the date of nomination, a nominee is capable of being chosen' – and on the need to avoid long periods of uncertainty about whether a conviction would be annulled or not, and hence about the composition of the Parliament.

He supported these arguments by two considerations sitting rather oddly together. One was the need to protect and promote 'the system of representative and responsible government established by the text and structure of the Constitution.[8] The other was 'originalism'. On the one hand, the framers of the Constitution were likely to assume that a conviction 'would remain' a conviction, since at that time 'there were only very limited mechanisms' for annulment and appeal. On the other hand, if they had foreseen the possibility that an annulment might affect disqualification, they were 'inherently unlikely' to have been satisfied with such an outcome.

Section 44(ii) refers to offences 'punishable … by imprisonment for one year or longer'. Under s 117 of the *Crimes Act* 1900 (NSW), the maximum sentence for larceny is imprisonment for five years; but under s 268 of the *Criminal Procedure Act* 1986 (NSW) the maximum term of imprisonment that a Local Court may impose for larceny or stealing is two years. Thus, on either basis, Culleton was convicted of an offence 'punishable … by imprisonment for one year or longer'. In fact, of course, the offence of which he was convicted was a trivial one: the alleged theft of an ignition key said to have a value of $7.50. If any sentence had ever been imposed, it clearly would have fallen far short of 'imprisonment for one year'. It might have been possible to argue that, if the focus was on the particular offence involved in the individual case, this particular offence was *not* 'punishable … by imprisonment for one year or longer'. But no such argument was ever made. It was assumed throughout, as has always been assumed, that s 44(ii) applies to any offence falling into a *category* for which the *maximum* punishment is 'imprisonment for one year or longer'.

There were, however, two other arguments.

Under s 25(1) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW), a Local Court 'must not make … an order imposing a sentence of imprisonment' on 'an absent offender'. Culleton had been convicted *in absentia*, and did not show himself in Armidale again until after the declaration of the poll. Was he not therefore 'an absent offender', and hence not 'subject to be sentenced'?

The answer was: No. Immediately after Culleton's conviction, a warrant had been issued for his arrest, and according to s 25(2) it was issued 'for the purpose of having the offender brought before the Local Court … for sentencing'. The warrant, which remained unexecuted throughout the election period, was for the purpose of sentencing, and was itself an indicator that he was 'subject to be sentenced'.

The other argument had even less chance of success. Section 44(ii) applies to a person who 'has been convicted *and* is under sentence, or subject to be sentenced' (emphasis added). In *Nile v Wood*,[9] Justices Brennan, Deane and Toohey had emphasised the word 'and' to

[8] He quoted *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, at 557-59.
[9] (1988) 167 CLR 133, at 139.

make it clear that 'conviction of an offence per se' is not enough to attract s 44(ii); the references to conviction and sentence are 'conjunctive'.

That would have been clear enough if their Honours had not added a citation to a passage in Quick and Garran,[10] which they summarised as saying that disqualification operates only while the person is 'under sentence'. The words 'or subject to be sentenced' were elided. When the *Culleton* reference was argued on 7 December, counsel repeatedly tried to argue that the judgment in *Nile v Wood* had elided those words not merely from its formulation of the temporal limits of disqualification under s 44(ii), but from the metes and bounds of the operation of s 44(ii) itself. On that reading, s 44(ii) applied only to a person who 'has been convicted *and* is under sentence'. The mere fact of conviction would be insufficient unless the person convicted was also 'under sentence'.

The argument was clearly untenable, and the joint judgment explained that s 44(ii) 'cannot sensibly be read in that way'. Yet the explanation was followed by a curious addendum, suggesting that the reason for the disqualification was simply that, for a period of one year or longer, the person affected 'might not be able to sit'. The idea that imprisonment for one year was selected, not as a measure of the maximum length of a tolerable absence from the Senate, but as a criterion of the degree of criminal turpitude that might disqualify a person from representing a democratic electorate, seemed itself to be elided from the reasoning. As with the idea that s 44 operates irreversibly, the emphasis was on the practicalities of parliamentary and electoral processes, rather than on some fundamental constitutional value.

Whether that might have implications for the Day case remains to be seen.

Robert John Day: the Facts

The facts in the Day case are much more complex, and the legal issues much more uncertain. Fortunately it's all been very helpfully analysed by Oscar Roos from Deakin University, initially in a post for *AUS PUB LAW* last November,[11] and just last week together with Ben Saunders in a longer piece for the *Sydney Law Review*.[12] We also have the benefit of the facts agreed to in the course of the High Court hearing, as well as those found – or more often not found – by Justice Gordon in her judgment on 27 January.[13]

It is also helpful to look at the Senate proceedings on 7 November last year, when the matter was referred to the High Court as a Court of Disputed Returns. On that occasion both Senator Mathias Cormann and Senator Scott Ryan gave full explanations[14] of their dealings with Day in the course of their respective periods of office as Special Minister(s) of State; and a bundle of relevant documents, including a timetable of events, were tabled and are now available on the parliamentary website.[15]

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[10] J. Quick & R.R. Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 492.

[11] "Another Day in Court: The purpose and interpretation of section 44(v)", *AUS PUB LAW*, 21 November 2016 (https://auspublaw.org/2016/11/another-day-in-court/).

[12] Oscar Roos and Benjamin Saunders, "Re Robert John Day AO: Section 44(v) of the Australian Constitution Revisited" (2017) 39 *Sydney Law Review*.

[13] *Re Day* [2017] HCA 2.

[14] Senate, *Hansard*, 7 November 2016, at 1909-1915.

[15] At http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Tabled_Papers/7Nov2016. In particular, the relevant correspondence in 2014 (primarily between Day and Senator Ronaldson) is included there as Attachment C.

Finally, insofar as the issue depends on the judgment given by Chief Justice Barwick in 1975 in *Re Webster*,[16] there is of course an enormous academic literature on that case, most of it highly critical; but I should draw special attention to the discussion by Gerard Carney, in Chapter 4 of his book entitled *Members of Parliament: Law and Ethics*.[17]

The problem is whether Day had "any direct or indirect pecuniary interest" in an agreement with the Commonwealth of the kind referred to in s 44(v) of the Constitution. If he did have such an interest, it would seem to date back at the very least to December 2015.

Robert John Day was first elected to the Senate on 7 September 2013. In order, the six South Australian senators elected on that day were Cory Bernardi, Nick Xenophon, Penny Wong, Sarah Hanson-Young, Robert Day and Simon Birmingham. Day was the only new senator among them. The only outgoing senator who failed to gain re-election was the Labor Party's Don Farrell.[18]

Day took his seat on 1 July 2014, after Farrell's six-year term had expired. Initially it was assumed that he would move into the electoral office that Farrell had occupied in central Adelaide (at 19 Gilles Street), but Day had other ideas. Insisting that the location in Gilles Street had problems with traffic, parking and signage, he proposed to establish his electoral office in the building which he already used as his headquarters for Family First. That building, located to the east of the city at 77 Fullarton Road, Kent Town, was owned by Day's family company, B&B Day Pty Ltd. Day had renamed the building as "The Bert Kelly Research Centre" (after Charles Robert ("Bert") Kelly (1912-1997, the "Modest Member of Parliament" who for years wrote a conservative column under that title for the *Australian Financial Review*); and had sought to establish it as what he called "a conservative hub". At the time of the 2013 election the Samuel Griffith Society was also housed in the building, along with Senator Cory Bernardi and his Conservative Leadership Foundation.[19]

Significantly for purposes of s 44(v) of the Constitution, B&B Day Pty Ltd was an incorporated company consisting of fewer than twenty-five persons. Moreover, it was already the central link in a complicated financial arrangement. Robert Day himself was the company's sole director and company secretary, and the company owned the building as a trustee for the Day Family Trust. Day and his wife Bronwyn were beneficiaries of the family trust; so were John Eric Smith and his first wife Lesley. [20] Smith had known Day since high school, and originally they had traded as plumbers together before establishing the building company Homestead Homes Pty Ltd. His second wife Debra had been a friend of Day's since she was four years old.

In January 2014 the National Australia Bank ("NAB") extended a loan facility to B&B Day, as trustee of the Day Family Trust, with a limit of 1.6 million dollars. The loan was secured by a registered mortgage over the building in Fullarton Road, and by a written guarantee and indemnity from Bob and Bronwyn Day.

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[16] (1975) 132 CLR 270.

[17] (Prospect Media Pty Ltd, 2000), esp at 113.

[18] Farrell was re-elected in 2016, but in 2013 he was excluded on count 223. Hanson-Young was elected on count 227 and Day on count 228, leaving Birmingham to fight it out for the final position with another candidate from the Xenophon team.

[19] See Liam Mannix, "Inside Australia's conservative HQ", *Inside Daily* (Adelaide), 4 September 2013 (http://indaily.com.au/news/2013/09/04/inside-adelaides-conservative-hq/).

[20] The trust deed (dated 19 August 1986) is accessible (as Attachment 1) at the location given in note 4 above.

Initially Day proposed that the Commonwealth should take out a lease of office space in the Fullarton Road building, to be used as his electoral office. When it was explained to him that it was not possible for the Commonwealth to lease property from a sitting senator, he came up with an alternative plan. In the restructured corporate arrangements that followed Day himself tried to play a more limited role, while other significant roles were assigned to his wife Bronwyn and to John and Debra Smith.

Under the new arrangements Day stepped down as sole director and secretary of B&B Day, and was replaced by his wife Bronwyn. (The replacement took place on 30 June 2014, the day before he took his seat in the Senate.) The building in Fullarton Road was sold to a new company, Fullarton Investments Ltd, formed for that purpose. Until 23 September 2015 the company was controlled by John Smith, and its sole director and secretary was Debra Smith.

In September 2015 John Smith severed his connection with Robert Day, and Debra Smith resigned as a director of Fullarton Investments. She was replaced as director by Colin Steinert, to whom she also transferred her shares. Steinert, who retired in 2003 from a successful conveyancing business, now has his own group of building, real estate and conveyancing companies; but as recently as 2011 he was working with Robert Day and John Smith as a "project manager" for their building company, Homestead Homes Pty Ltd, and "had advised Mr Day on the transfer … from B&B Day to Fullarton Investments".[21]

The contract for the sale to Fullarton Investments was executed on 24 April 2014, and the actual transfer took place on 4 September 2014.[22] It was signed on behalf of B&B Day by Robert Day himself, although he was no longer a director.

The sale was for a notional price of 2.1 million dollars, but under what was called a vendor finance arrangement[23], the vendor company (B&B Day) loaned that amount to the purchaser company. The liability for repayments to the NAB continued to rest with B&B Day, but the mortgage to the NAB was replaced (on 11 November 2014) by a new mortgage with Fullarton Investments as the mortgagee. At that stage the plan was that the rent for the electoral office would be paid by the Commonwealth to Fullarton Investments; Fullarton Investments would use those funds to make payments to B&B Day; and B&B Day would then use those payments to make loan repayments to the bank.

These arrangements were disclosed to the Department of Finance in a letter written by Robert Day on 25 January 2016. The arrangements had been established, at the latest, by the time the building in Fullarton Road was transferred on 4 September 2014.

In October 2016 there were several reports[24] that as long ago as 25 February 2014 the Department of Finance had strongly advised *against* the Fullarton Road proposal, stressing that it is "expected that an incoming senator or member will occupy the office vacated by his

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[21] *Re Day* [2017] HCA 2, para [250] (Agreed Fact 89).

[22] Both the contract and the transfer are accessible (as Attachments 4 and 5) at the location in note 4 above.

[23] In a one-page document signed by Bronwyn Day (for B&B Day) and Debra Smith (for Fullarton Investments), and accessible (as Attachment 6) at the location given in note 4 above. The document is dated 1 December 2014, but was apparently not signed until about 21 September 2016. Mrs Smith, who signed on behalf of Fullarton Investments, had ceased to be a director of that company twelve months earlier, but was asked to sign because she had been a director at the relevant time. Justice Gordon found nothing suspicious in the belated completion of the document: *Re Day* [2017] HCA 2, paras [118] and [119].

[24] See, e.g., http://www.abc.net.au/news/2016-11-02/bob-day-was-advised-against-relocating-offices-documents-reveal/7988430; http://www.skynews.com.au/news/politics/federal/2016/11/03/ronaldson-took-keen-interest-in-day-s-office.html; *Sydney Morning Herald*, 2 November 2016.

or her predecessor". Three weeks later, on 12 March, the Special Minister for State, Senator Michael Ronaldson, was said to have flown to Adelaide for a meeting with Day, who then informed him (apparently for the first time) that the building in Fullarton Road would be sold. But there may have been some misunderstandings. On the one hand, in a letter to Day eight days later, on 20 March,[25] Senator Ronaldson was at pains to "confirm your advice to me that you have disposed of your interest in the Kent Town property" (whereas Day had only indicated that he was willing to do so). On the other hand, Ronaldson went on to say that (subject to certain conditions) he was "prepared to give further consideration to your proposal", and had "asked the Department of Finance …[for] a detailed briefing on the feasibility of the …arrangement" (whereas Day apparently understood that his proposal had already been approved).

In her judgment on 27 January, Justice Gordon found that on 25 March 2014, Day had emailed Colin Steinert: "The Government has given approval for me to locate my Senate office at Fullarton Road – subject to me disposing of my interest …"[26]

In a further letter written on 23 June 2014 (apparently after a further meeting with Day on 28 May), Ronaldson spelled out certain "conditions that will need to be met" in order for the Fullerton Road proposal to be approved. But he added (with evident emphasis):

> As I have indicated from the start of our discussions, I have no option but to ensure that your tenancy at Kent Town is at no cost to the Commonwealth. As I also indicated very early on, other incoming Senators in recent times have had no choice but to move into the office of a retiring Senator. It is my understanding that the office of soon to retire Senator Farrell is viewed by Finance as absolutely fit for purposes and there is no justification whatsoever for the office being closed as a Senator's office. The location of the office is your primary concern, however, I am unable to take that into account when determining these matters.[27]

Nevertheless, in a final letter on 9 October 2014, Senator Ronaldson wrote that (subject to the specified conditions), "I am prepared to agree to the establishment of your electorate office … at 77 Fullarton Road". The conditions included renewed insistence that the necessary modifications must be "undertaken at your expense"; that "the costs … will be payable by you"; and that the arrangement would "satisf[y] your requirements while remaining cost-neutral to the Commonwealth". As to the payment of rent the letter said:

> As I have indicated from the commencement of our discussions on this subject, there can be no rent payable by the Commonwealth in respect of the Fullarton Road premises until such time as the lease on the office of former Senator the Hon Don Farrell at Level 5, 19 Gilles Street, Adelaide ceases, or until Finance is able to sub-lease that office. In the event that Finance is able to sub-let only on terms that are unfavourable, rent payable on the Fullarton Road property shall not exceed that of the rental return on Gilles Street.

The letter also stipulated for "[a] rent-free period until 14 August 2016, or until such time as Finance is able to sub-lease the existing Gilles Street office".[28]

Pursuant to this letter, Day moved into the refurbished office at 77 Fullarton Road in April 2015. Initially no formal lease was signed; but on 14 September 2015 Malcolm Turnbull

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[25] The letter is included in Attachment 3, note 4 above.

[26] *Re Day* [2017] HCA 2, paras [185] and [250] (Agreed Fact 86). In an email to Day from the Department of Finance on 26 March 2014 (reproduced in Attachment 3, note 4 above), the true position was again stated clearly: "You have hopefully by now received a letter from the Special Minister of State … indicating a willingness to give further consideration [to the Fullarton Road proposal]".

[27] The letter is included in Attachment 3, note 4 above.

[28] Again this letter is included in Attachment 3, note 4 above.

became Prime Minister. On 21 September he appointed Mal Brough as Special Minister of State, and at Brough's direction a memorandum of lease was finally signed on 1 December 2015. When it was signed, it stipulated for a term commencing on 1 July 2015. Clause 36 provided for a rent-free period to be terminated on –

> a. 14 August 2016, being the date of expiry of the Gilles Street Lease ("Gilles Street Expiry"); or
> b. Where the Gilles Street Lease is subleased by the Lessee before the Gilles Street Expiry to a third party, the date of commencement of rent under that sublease –

whichever proved to be the earlier.[29]

On 29 December Mal Brough stood down as Special Minister of State and was replaced by Mathias Cormann, initially in an acting capacity. Within a matter of hours, he received (by internal Parliament House email) a letter from Robert Day demanding that – despite the explicit wording in Clause 36 of the lease – Fullarton Investments should be paid arrears of rent backdated to 1 July 2015, on the basis that the Gilles Street office should have been sublet by that time. As Day's letter said in part:

> It is now one and half years since 1.7.14 and no tenant has been secured. Coming from a property background, I can only conclude that the Department is not at all interested in sub-letting Senator Farrell's old office and is happy to keep paying the rent there until June 2016 knowing it is not paying any rent for Kent Town. I spent nearly $200,000 getting Kent Town up to standard … and have been paying rent out of my salary since moving into the Kent Town office early this year.[30]

As Justice Gageler pointed out at the hearing on 7 February, any back payment would have required an amendment to the lease. Nevertheless, Cormann's initial response (in a letter dated 7 January 2016) was to express his agreement that payment of rent to Fullarton Investments, backdated to 1 July 2015, should indeed begin – "once satisfactory evidence of rental payments by you [has] been provided to Finance". But, as Cormann told the Senate in his statement on 7 November 2016:[31]

> [D]espite … repeated requests by the Department of Finance, then Senator Day did not provide any evidence of rental payments which he asserted in his letter to me he had made. Instead, information he subsequently provided to the department for the first time … caused concern about whether then Senator Day in fact remained connected to the Fullarton Road property.

In spite of this concern, the Department of Finance advised Senator Cormann on 18 February 2016 that the payment of rent to Fullarton Investments (albeit not retrospective) should begin as from 1 March. But when the Department tried to set up an automatic electronic transfer, it was found that the ABN number nominated to receive the payments was in the name of "Robert John Day", trading as "Fullarton Nominees".[32] At that stage, Senator Cormann told the Senate, "a conscious decision was made" that no rent would be paid to Fullarton Investments, either retrospectively or for the future:

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[29] The lease is accessible (as Attachment 9) at the location in note 4 above.

[30] Day's letter (and Senator Cormann's reply dated 7 January 2016) are accessible (as "Documents tabled by Senator Cormann") at the location in note 4 above

[31] Senate, *Hansard*, 7 November 2016, at 1913.

[32] The statement to that effect, obtained by the Department of Finance on 7 March 2016, is accessible (as Attachment 11) at the location in note 4 above.

> I understood at the time that the non-payment of rent meant that any potential breach of section 44 of the Constitution had been avoided … [A]t no point did I receive any advice … that the lease signed on 1 December 2015 in itself and in the absence of rental payments could cause a potential breach of section 44 of the Constitution.[33]

After the election on 2 July 2016, a new ministry was formed, and Cormann was replaced as Special Minister of State by Senator Scott Ryan. On 2 August it was confirmed that Day had been re-elected; and on 4 August he wrote to Scott Ryan again requesting payment (including back payment) of rent. Ryan responded by instituting more formal inquiries, including a series of written questions to Day on 26 August 2016. [34] Ultimately it was as a result of those inquiries that Ryan presented to the Senate the detailed information on which the referral to the High Court was based.

Although it has sometimes been suggested that the leasing arrangements were subject throughout to an "understanding" or "arrangement" that no rent would ever be paid, it would seem that in fact the only "understanding" was that set out in clause 36 of the lease: that an initial rent-free period would come to an end on 14 August 2016, or as soon as the Gilles Street office was sublet – whichever would be the earlier. Indeed, an agreement to that effect had been proposed in Senator Ronaldson's letter of 9 October 2014, and again in a letter to Debra Smith on 21 November 2014 from a private leasing manager in Adelaide acting on behalf of the Commonwealth.[35] Neither those letters in 2014, nor clause 36 of the lease, could be said to offer any foundation for Day's apparent assumption that when the "rent-free period" did come to an end, rent would be paid retrospectively.

In any event, Senator Cormann's decision in March 2016 meant that no rent was ever paid. In Justice Gordon's judgment on 27 January, she wrote:

> The parties have agreed, and I find, that no rental payments have ever been made by the Commonwealth for the premises at … Fullarton Road.[36]

Constitutional Consequences

If the Commonwealth had ever paid any rent for the office space at Fullarton Road, and if directly or indirectly the proceeds had made their way to Day, one might well see that as evidence that the arrangements involved a "direct or indirect pecuniary interest" of the kind envisaged by s 44(v). In fact no rent was ever paid; but the formal documents envisaged circumstances in which it *might have been* paid, and in fact it appears that rent would *have been paid* in March 2016 if Day's ABN number had not drawn attention to the possibility that the payment might ultimately be received by him. Would the possibility that such a payment might directly or indirectly make its way to Day amount to a "direct or indirect pecuniary interest" within the meaning of s 44(v)?

On the face of it, the answer would seem to be Yes. But counsel for Robert Day insisted that any assumption to that effect was lacking in "precision of analysis", and at the hearing ten days ago it was clear that, one way or the other, the seven members of the Court were concerned to achieve that precision.

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[33] Senate, *Hansard*, 7 November 2016, at 1914.

[34] The correspondence of 4-29 August is accessible (as Attachment 13) at the location in note 4 above.

[35] A copy of the letter (apparently made in February 2015, and described as "Copy Heads of Agreement") is accessible (as Attachment 7) at the location in note 4 above.

[36] *Re Day* [2017] HCA 2, para [135].

In an email to the Department of Finance on 16 February 2016, Day asserted that he had "researched the question as to whether I have a pecuniary interest in the [lease] agreement … with Fullarton Investments … and am satisfied that I do not". He argued that this followed from "[a]pplying the logic" of *Re Webster*,[37] which is in fact the only judicial precedent on the meaning of s 44(v).

Senator James Webster was a shareholder in JJ Webster Pty Ltd, a small family company established by his grandfather to run the family timber business. At the time of the 1974 election, Webster was its managing director and company secretary. At various times in 1973 and 1974 the company had submitted quotations and tenders, accepted offers, and entered into contracts for the supply of timber to Commonwealth departments. The question was whether the recurring contracts gave rise to a "direct or indirect pecuniary interest" within the meaning of s 44(v).

Chief Justice Barwick initially proposed to refer the issue to a Full Court, but then resolved to decide it himself by sitting as a single judge. That in itself has always been a controversial aspect of *Re Webster*. As Chief Justice Kiefel put it at the hearing on 7 February:

> It was a fairly unusual step, even historically, for a Chief Justice to sit alone on a matter involving the Constitution … [T]he decision … was not informed by previous decisions of this Court and there was nothing really directly in point, which normally would have indicated that the Court should sit with a larger number.

In any event, Barwick went on to hold that Webster was *not* disqualified under s 44(v). Applying the rules of contract law relating to offer and acceptance, he held that each quotation submitted by the company was an offer, that acceptance occurred each time the government placed an order, that each such acceptance gave rise to a separate contract relating to that particular order, and that none of these separate contracts attracted the provisions of s44(v).

Barwick drew a contrast between these separate contracts and the kind of arrangement which he saw as attracting the "purpose" of s 44(v). In order to fall within that "purpose", he said, "the agreement … must have a currency for a substantial period of time, and must be one under which the Crown could conceivably influence the contractor in relation to parliamentary affairs by the very existence of the agreement".[38] Arguably, even that formulation might extend to the Fullarton Road lease. A lease intended to last (at a minimum) for more than a year is very different from a contract for goods sold and delivered, which is normally exhausted by the delivery; and one concern prompted by knowledge of the Fullarton Road arrangement was the idea that Day might already have been given special treatment in order to secure his cross-bench support "in relation to parliamentary affairs". In the course of argument before the Full Court, Justice Keane suggested (as a hypothetical example) that s 44(v) would "necessarily" apply

> if the Minister responsible for the grant of the lease had said to your client, "Yes, we will backdate the rental payments and we will increase them by $10,000 a month as long as you vote for the government's program in the Senate, and by the way we both agree that this arrangement is not legally enforceable".

[37] (1975) 132 CLR 270.
[38] Id at 280.

In his speech to the Senate on 7 November last year, Senator Cormann effectively rebutted any concern of this kind by stressing that Special Ministers of State habitually "work in a non-partisan and confidential manner" to assist "members and senators from all sides of politics" with "their office and staff arrangements".[39] Yet the fact that he thought it necessary to make those remarks was itself a pointer to the potential perception.

Yet, even in 1975, Barwick's formulation of the relevant test was widely perceived as artificially narrow; and his reason for adopting that formulation was narrower still. Assuming that the purpose of s 44(v) was similar to that of older English statutes using similar language – in particular, the *House of Commons (Disqualification) Act* 1782 (22 Geo III c 45) – he turned to decisions on the effect of that Act: in particular, the 1869 decision in *Royse v Birley*[40] and the more recent decisions in *In re Sir Stuart Samuel*[41] and *Tranton v Astor*.[42] Those decisions had treated the 1782 statute as concerned merely to protect the independence of Parliament against influence by the Crown, and in any event had insisted on the need for such a statute to be narrowly construed. In particular, in *Royse v Birley*, the 1782 statute was criticised as "totally inapplicable to the present state of commerce", as creating "a pit-fall into which men who wish to walk uprightly and according to law may unwittingly tumble".[43]

Oscar Roos and Ben Saunders have shown, by recourse to the Convention Debates of the 1890s, that the purpose of s 44(v) was in fact much wider.[44] In 1897, for example, Isaac Isaacs spoke of a need "to do all that is possible to separate the personal interests of a public man from the exercise of his [public] duty" – not only as a matter of "actual fact", but "in every way possible … [to] prevent any appearance of the contrary"[45]. They argue that, in 1975, Barwick's approach to the interpretation of s 44(v) was still limited by the rule forbidding any recourse to the Convention Debates, but that since *Cole v Whitfield* [46] such a constraint has been relaxed.

It may not be true that Sir Garfield Barwick was quite so constrained as Roos and Saunders propose. For example, in the very next paragraph after his quotation from *Royse v Birley*, Barwick did in fact refer to the Convention Debates as showing that, in settling the final language of s 44(5), the framers "were seemingly concerned … with the possibility of members of the parliament defrauding the community".[47] And during the course of argument in the Day case before the Full Court ten days ago, an amusing snippet from the transcript of the argument in *Webster's Case* emerged. In the course of that argument Barwick said:

> One ought not to do it, but I did it; I went and looked at the original debates, and it is very amusing, they were concerned with the possibility of fraudulent contract …

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[39] Senate, *Hansard*, 7 November 2016, at 1914-1915.
[40] (1869) LR 4 CP 296. See Carney, note 17 above, at100-02.
[41] [1913] AC 514.
[42] (1917) 33 TLR 383.
[43] (1869) LR 4 CP at 319 (Montague Smith J).
[44] Oscar Roos and Benjamin Saunders, "Re Robert John Day AO: Section 44(v) of the Australian Constitution Revisited" (2017) 39 *Sydney Law Review*.
[45] *Official Report of the National Australasian Convention Debates*, Adelaide, 21 April 1897, 1037.
[46] (1988) 165 CLR 360, esp at 385.
[47] 132 CLR at 279.

In response to that comment Tom Hughes QC said: "The temptation of going to [the] debates is almost too strong to resist, really". And Barwick answered: "It is easier to resist the temptation of giving them any effect."[48]

The exchange is not just amusing, but revealing. It is not that Barwick was unaware of the wider purposes of s 44(v), but only that he was determined to "resist the temptation of giving them any effect".

Accordingly, while the Commonwealth has argued that s 44(v) is applicable to Day's situation even on the interpretation adopted in *Re Webster*, it has also argued that such an interpretation is excessively narrow. Like Isaac Isaacs in 1897, the Commonwealth's arguments have repeatedly emphasised the need to protect the political process not merely against actual influence, but from the perception of influence; and not merely (as *Re Webster* suggests) against the possibility or appearance of influence by the executive government, but equally against the possibility or appearance of a conflict of interest in which parliamentary concern with the "public interest" might appear to be in tension with the "pecuniary interest" of a parliamentarian as a private citizen. Repeatedly, in the Commonwealth's written and oral submissions, this wider emphasis has been linked with the High Court's concern – increasingly pervasive since the early cases[49] announcing an implied freedom of political communication – with "the maintenance of the constitutionally prescribed system of representative and responsible government".[50] In particular, the argument has been peppered with references to the 2015 decision in *McCloy v New South Wales*,[51] with its emphasis on the need to protect political institutions not only against actual corruption, but also against the damage arising from perceptions of corruption – and indeed against the more insidious danger that reliance on convenient financial arrangements " may, over time, become so necessary as to sap the vitality, as well as the integrity, of the political branches of government".[52]

Of course, to recognise such concerns as legitimate grounds for legislative action is not necessarily to endorse them as legitimate grounds for judicial interpretation of the Constitution. Nevertheless, it would be surprising if s 44(v) were not to be reinterpreted in a manner more responsive to the Court's contemporary solicitude for representative and responsible government.

Yet that solicitude may cut both ways. While undoubtedly supporting attempts to shield parliamentary institutions against corruption and against any aura of corruption, it may also militate against excessive restrictions on the freedom of individuals to seek to participate in the political process. As Justice Deane put it in *Sykes v Cleary*,[53] in arguing for a narrow view of s 44(iv):

> 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.

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[48] Quoted in *Re Day* [2017] HCA Transcript 15 (7 February 2017).

[49] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, as substantially reaffirmed in *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

[50] 189 CLR at 567; see also the general exposition at 557-58.

[51] (2015) 325 ALR 15. See Tony Blackshield, "Speech Defects", *The Saturday Paper*, 8 October 2016, p 7: https://www.thesaturdaypaper.com.au/opinion/topic/2016/10/08/the-constitutions-implied-freedom/14758452003827 .

[52] 325 ALR at 26 (French CJ, Kiefel , Bell and Keane JJ).

[53] (1992) 176 CLR 77, at 121.

Not surprisingly, counsel for Robert Day seized upon this in support of his argument for a limited view of s 44(v).

The argument also relied on another aspect of Barwick's approach in *Re Webster*. He argued that because s 44(v) is effectively a penal statute, it should be strictly construed. He characterised it as "penal" because, he said:

> The disqualification under s 44(v) as effected by s 45 of the Constitution, is automatic and does not depend upon a decision of the House or of the Court of Disputed Returns …[54]

Given the reasoning in the *Metwally* case,[55] that view of s 44(v) as an automatic self-executing provision may well be both accurate and relevant; but it seems an insufficient justification for the narrow approach in *Re Webster*. In the Day case, the Commonwealth has argued that to characterise the provision as "penal" is to look at it only from the viewpoint of the member of Parliament directly affected, and thereby to neglect its constitutional and systemic importance. Again, in the light of the Court's current concern with representative and responsible government, that argument seems likely to prevail.

In any event, the Commonwealth's emphasis on the *possibility* or *perception* of a conflict of interest seems likely to be accepted. There is therefore no need to suggest that Robert Day's voting behaviour as a senator might *in fact* have been influenced by a desire to derive a "direct or indirect" pecuniary benefit from the Fullarton Road arrangement; the possibility that such a consideration *might* influence a senator's voting behaviour, or might be perceived as having the potential to do so, should be sufficient.[56]

Electoral Consequences

If the Court interprets s 44(v) as applicable to Day's situation, two consequences will follow. In the current Forty-fifth Parliament he will never have been a senator at all, since when the election was held in July he was "incapable of being chosen"; and in the previous Parliament to which he was elected in September 2013, his seat will have fallen vacant at least by 1 December 2015.

The latter result, had it been perceived at the time, would have led to a casual vacancy, to be filled by the Parliament of South Australia according to the procedure prescribed by s 15 of the Constitution. As it is now, it will have no practical consequences at all, except perhaps that he might have to repay his salary from the period for which he continued to sit though unqualified. The former result, in relation to his seat in the current Parliament, will give rise to the need for a recount.

Normally this would be expected to mean that each of the votes cast for him will be simply transferred to the next preferred candidate. For those votes that were cast "above the line", whether as first preferences for Family First or by transfer from other group tickets, this would mean a transfer to the second Family First candidate, Lucy Gichuhi; and this means that in such a recount, she would probably be elected. But since first preference votes "above the line" for Family First accounted for only 2.34% of the total vote, that result cannot be predicted with certainty.

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[54] 132 CLR at 279.

[55] Note 6 above.

[56] Compare the reasoning in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (996) 189 CLR 1, especially at 20.

Were Ms Gichuchi not to be elected, the candidate most likely to succeed would be Anne McEwen, the fourth candidate on the Labor Party's ticket – who, on the final count last July (Count 457) had still been battling it out with Robert Day for the final Senate place.

Accordingly, Ms McEwen – and presumably the Labor Party on her behalf – sought energetically to establish additional facts, or additional legal arguments, which would either make it more likely that s 44(v) would in fact be found to apply, or would have the effect of eliminating Lucy Gichuhi from the recount as well as Robert Day. (If Gichuhi as well as Day were excluded, it would then seem overwhelmingly likely that McEwen would be elected.)

On most of the factual issues involved, Justice Gordon refused to make the findings which McEwen and her counsel had sought. In particular, McEwen had sought to show (first) that despite the formal corporate arrangements and the roles played by Mr and Mrs Smith, Day himself had remained in effective control throughout; and (secondly) that the whole arrangement was not a *bona fide* attempt to avoid the operation of s44(v) but a deliberate "fraud" or "sham". Justice Gordon declined to make any such finding. As to the first claim, she accepted 'that steps were taken … that were not consistent with detailed planning or careful implementation", and that the documentation "was not always consistent".[57] She accepted that Day had repeatedly taken actions, signed documents, or made payments, on behalf of Fullarton Investments or B&B Day as if he were still entitled to do so; and that in relation to B&B Day he had "made, or participated in making" decisions, and continued to act as a director, after supposedly severing any connection.[58] Nevertheless, she declined to make a finding of "effective control". As to the imputation of "fraud" or "sham", she concluded:[59]

> A readily available competing conclusion (and the one more likely on the evidence before the Court) is that Mr Day thought that, as a result of the steps taken and the transactions entered into, he was not disqualified. There is no direct evidence to the contrary of the competing conclusion and it is, in my view, the more probable view of the facts.

As to whether Ms Gichuhi should be excluded from a recount, the most interesting argument turned on the precise consequences to follow from a finding that Day was "incapable of being chosen". Under s 210 of the *Commonwealth Electoral Act* 1918(Cth), as now amended, the inclusion on the ballot paper of a square "above the line" is available only to "candidates who made a request under section 168 that their names be grouped in the ballot papers"; and under s 168 such a request may be made by "[t]wo or more candidates for election to the Senate". But if Day was "incapable of being chosen", he could hardly be described as a "candidate", and if he was not a candidate, then the legal requirements for including a square "above the line" for Family First could not have been satisfied.

One argument, therefore, is that if Day was "incapable of being chosen", the square "above the line" for Family First must itself be rendered invalid. The votes allotted to Day cannot simply be transferred to Gichuhi, because she shouldn't have been there, either.

The trouble is that a similar argument was advanced in *Re Wood* [60] and rejected. The Full Court in that case had made the point that the inclusion of an unqualified candidate did not invalidate the whole process: "If it were otherwise, the nomination of unqualified candidates

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[57] *Re Day* [2017] HCA 2, para [35].
[58] Paras [61] and [65].
[59] Paras [196] and [201].
[60] (1988) 167 CLR 145.

would play havoc with the electoral process".[61] On that basis, when Sir Anthony Mason came to settle the details of the recount in that case, he ordered that the votes cast "above the line" for the Nuclear Disarmament Party, and initially treated as securing the election of Robert Wood (whose name appeared first on that ticket), should now be treated as votes for Irina Dunn (whose name appeared second on that ticket). This was so "notwithstanding [the fact] that candidate Dunn acting alone would not have been able to make a joint request under s 128".[62]

Presumably the Court is likely to hold that the view thus taken of the Wood case should apply to the Day case as well. Yet there are at least two distinctions.

In the first place, though Robert Wood might potentially have been treated as "incapable of being chosen" under s 44(i) of the Constitution, the Court did not reach that question; in fact the decision that he was not "capable of being elected" was based simply on ss 162 and 163 of the *Commonwealth Electoral Act* 1918 (Cth).

When a statutory provision in general terms is applied to produce a specific result in an individual case, that is usually thought to depend on the interposition of a judicial decision. An administrative decision may sometimes be said to provide the "factum" which triggers a consequence thought to flow directly from the statute; but that conception would not normally be applied to a judicial decision. Indeed, the "factum" notion is typically invoked to indicate that the decision in question is *not* a judicial decision.[63] A decision based on the *Commonwealth Electoral Act*, therefore, might be contrasted with a decision based on s 44(v) of the Constitution – which, like the constitutional provisions considered in the *Metwally* case,[64] might be thought to operate immediately and irreversibly by its own automatic self-executing force. On that basis, while there might be room for judicial determination or modification of the consequences following from a decision based on s 163 of the Act, there might be no such leeway in the operation of s 44(v). Its operation might be seen as self-executing and absolute. Thus, a determination in the present context that Day was "incapable of being chosen" by reason of s 44(v), might be more uncompromising in its effects than a similar judgment based merely on statute.

On the other hand, the suggested contrast here might be illusory. To the extent that limitations on the possibility of being elected (or being nominated for election) are imposed by ss 162 and 163 of the *Commonwealth Electoral Act*, they are seen to have statutory force; but by virtue of s 16 of the Constitution, they may also have constitutional force. That section provides, as a constitutional mandate: "The qualifications of a senator shall be the same as those of a member of the House of Representatives".

A more significant distinction might be that, under the Senate electoral system in force in 1987,[65] to vote "above the line" was to enter a "1" for a single box on the ballot paper, thus automatically triggering all the consequences proposed by the party symbolised by that box. To remove or obliterate that box would effectively disenfranchise any voter entering a "1" for that box. By contrast, under the provisions introduced in 2016 for preferential voting "above the line", any person entering a "1" against a particular box will also have entered additional

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[61] Id at 167.
[62] Id at 173-75.
[63] See, e.g., *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, at 371, 378; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, at 111.
[64] See note 6 above.
[65] Introduced in 1983 by amendments to what were then ss 105B and 106 of the *Commonwealth Electoral Act*.

numbers – extending at least up to "6", and potentially to as many numbers as there are boxes – against other boxes which are thereby ranked in that voter's order of preference. Under the current system, therefore, to completely obliterate or extinguish one box would not otherwise disenfranchise its voters: beyond that box, the recount could simply move from box to box in the same way that a recount "below the line" progresses from candidate to candidate.

What Sir Anthony Mason said in *Re Wood* [66]was that because the electors "were entitled to vote in accordance with a group voting ticket process", the group box affected by Robert Wood's ineligibility must nevertheless remain on the ballot paper and be given its full effect (subject only to the elimination of Wood). But under the system introduced in 2016, electors are still "entitled to vote in accordance with [the] group voting ticket process" even if one group is removed from their preferential ordering, and even if it is the first. The conclusion which Sir Anthony drew from the system in force in 1987 is simply inapplicable to the system in force in 2016.

Sir Anthony saw his conclusion as following from what had earlier been said in the judgment of the Full Court in *Re Wood*:[67] that even though Wood was ineligible his name was "properly on the ballot paper", and hence that a vote for his group must be valid except as it applied to him. In the Day case counsel for McEwen sought to argue that a departure from the conclusion reached by Chief Justice Mason need not undermine the more general conclusions spelled out by the whole Court in *Re Wood*. It might be better to say that the views expressed in both judgments are conditioned on the group voting system used in 1987, in a way that does not necessarily follow for the system used in 2016.

What remains compelling in the judgment of the Full Court in *Re Wood* is that whatever conclusion is chosen should be guided by the need to ensure that "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 Act – can be ascertained".[68] In *Re Wood* the cost of insisting that the relevant box was not validly presented to the voters would have been that any voters who chose that box were totally disenfranchised. In *Re Day* the decision is only between the removal of only one name from a preferential list of at least twelve candidates, and the removal of two.

Another argument arising from *Re Wood*[69] is more easily disposed of. In 1992 the joint judgment in *Sykes v Cleary*,[70] explaining why the by-election in that case for the seat of Wills must be treated as absolutely void, had contrasted the situation with that in *Re Wood*, where the Court had been happy to order a Senate recount with Robert Wood's name excluded. The contrast was explained by saying:[71]

> In the light of the group system of voting which applies in Senate elections, it was highly probable, if not virtually certain, that a person who voted for Mr. Wood would have voted for another member of his group, had the voter known that Mr. Wood was ineligible. The same comment cannot be made in the present case. Here a special count could result in a distortion of the voters' real intentions because the voters' preferences were expressed within the framework of a larger field of candidates presented to the voters by reason of the inclusion of the first respondent.

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[66] 167 CLR at 175.
[67] Id at 165-66.
[68] Id at 166.
[69] (1988) 167 CLR 145.
[70] (1992) 176 CLR 77. The judgment is that of Mason CJ, Toohey and McHugh JJ.
[71] 176 CLR at 102.

Seizing on the reference to "distortion of the voters' real intentions", McEwen's counsel argued that those words were applicable here – essentially because Day was a sitting senator and a celebrity. By contrast, in the course of the earlier hearings to clarify the factual issues, McEwen had successfully[72] asserted that:

> At the time of the 2016 election: (a) Ms Gichuhi did not hold political office in South Australia, and had not previously stood for or held political office in South Australia; (b) in contrast to Mr Day, Ms Gichuhi did not feature prominently in Family First's election campaign, or in media coverage relating to Family First in South Australia.

The argument was that, because Day's candidature had attracted a far bigger vote for Family First than would otherwise have been the case, it would not be fair simply to transfer his votes to the second (and relatively unknown) person whose name appeared on the ticket.

The argument is misconceived. The intended contrast in *Sykes v Cleary* was between a by-election for a single member to represent a single electorate in the House of Representatives, and the situation arising from "the group system of voting that applies in Senate elections". The point was that, under the latter system, voters expressing a preference for a particular group are likely to be equally satisfied whichever candidate for that group gets elected, so that the inclusion or exclusion of an individual candidate is unlikely to affect the representative nature of the result. By contrast, in a contest for the election of a single member, the inclusion or exclusion of a single candidate may well distort the determination of preferences. The notoriety of one candidate rather than another has nothing to do with it.

One final complication might arise from the fact that Ms Gichuhi was born in Kenya. She arrived in Australia in 1999, enrolled as a law student at the University of South Australia in September 2012, and was admitted to practice as a lawyer in November 2015. In the lead-up to last year's election, rumours circulated on social media within the Family First community to the effect that she was not an Australian citizen. One Family First member tweeted: "my concern is she may be a muslim". (Another defended her by tweeting back that "Kenya is a Christian Country", and that "she is a God fearing Woman" [capitals in original].)

There was, of course, never any reason to take such rumours more seriously than the similar rumours that used to circulate in the United States in relation to Barak Obama.[73] In any event, the Commonwealth has now confirmed that Ms Gichuhi is in fact a naturalised Australian citizen – and that, at the time of her naturalization, s 97(3)(a) of the Constitution of Kenya provided:

> A citizen of Kenya shall … cease to be such a citizen if … having attained the age of twenty-one years, he acquires the citizenship of some country other than Kenya by voluntary act (other than marriage).

That seems to be enough to dispose of any issue under s 44(i). But the Commonwealth submission noted that in Kenya s 97(3)(a) has since been repealed, and in any event that judicial dicta in Kenya might cast doubt upon its effect. The submission recommended that, if it turned out that a suitable recount procedure "might depend upon the eligibility of Ms Gichuhi", there might still be a question to be explored.[74]

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[72] That is, Day had agreed with this formulation and Gordon J had therefore found it as a fact: *Re Day* [2016] HCA 2, para [237].

[73] See *Jamhuri News* ("Connecting Kenyan Diaspora"), 10 November 2016 (https://jamhuri-news.com/citizenship-concerns-arise-about-kenyan-senate-candidate-in-australia/).

[74] Submissions of the Attorney-General, 6 January 2017, para [77].