

**PROTECTING DEMOCRATIC INTEGRITY:
RE DAY [NO 2] (2017) 343 ALR 181**

I INTRODUCTION

Section 44(v) of the *Australian Constitution* is one of several express provisions imposing candidacy restrictions for the Australian Federal Parliament, and has an important role to play in the protection of representative and responsible government. This particular section operates to disqualify any person with a pecuniary interest in an agreement with the Commonwealth Public Service, from being elected or sitting as a Commonwealth parliamentarian. The provision had previously only been considered by the High Court of Australia once, in the case of *Re Webster*,¹ in which an interpretation so narrow as to rob the provision of all practical impact was adopted. Following decades of criticism, the High Court adopted a broader construction of s 44(v) in the case of *Re Day [No 2]*,² a constitutional challenge to the eligibility of an Australian Senator.

This case note, after reviewing the background of *Re Day [No 2]*, turns to analysis of the Court's decision and the resulting ramifications. For so long, the narrow interpretation of s 44(v) has rendered the provision functionally inert and without purpose. While *Re Day [No 2]* leaves significant ambiguity regarding s 44(v)'s outer limits, it nevertheless marks a long overdue development in the interpretation of the *Australian Constitution*, by extending the provision to the prohibition of certain conflicts of interest for Commonwealth parliamentarians. This broader construction of s 44(v) reinforces the duty of Australian elected representatives to serve the interests of the people above their own — yielding a positive outcome for the protection of representative and responsible government.

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¹ (1975) 132 CLR 270.

² (2017) 343 ALR 181. The preceding instance of this case was heard before Gordon J sitting alone, and was heard to determine whether any of the additional findings of facts sought by Anne McEwen should be made: *Re Questions Referred to the Court of Disputed Returns Pursuant to Section 376 of the Commonwealth Electoral Act 1918 (Cth) Concerning Robert John Day AO* (2017) 340 ALR 368.

II BACKGROUND

A The Rise and Fall of Mr Day

In the Australian federal election on 7 September 2013, Robert Day was elected as a Senator of the 44th Parliament of Australia, representing South Australia as a Family First Party candidate.³ The 44th Parliament was dissolved on 9 May 2016 by a double dissolution of both the House of Representatives and the Senate.⁴ In the federal election on 2 July 2016, Mr Day was narrowly re-elected, and returned to the Senate in the 45th Parliament.⁵

On 1 November 2016, amidst concerns regarding the liquidation of Home Australia Pty Ltd (a building company which Mr Day founded and managed)⁶ Mr Day resigned from the Senate.⁷ Shortly thereafter, the Senate passed a resolution referring the following questions to the High Court,⁸ sitting as the Court of Disputed Returns:

- (a) Whether, by reason of s 44(v) of the Constitution, or for any other reason, there is a vacancy in the representation of South Australia in the Senate for the place for which Robert John Day was returned?
- (b) If the answer to Question (a) is ‘yes’, by what means and in what manner that vacancy should be filled?
- (c) Whether, by reason of s 44(v) of the Constitution, or for any other reason, Mr Day was at any time incapable of sitting as a Senator prior to the dissolution of the 44th Parliament and, if so, on what date he became so incapable?
- (d) What directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference?
- (e) What, if any, orders should be made as to the costs of these proceedings?⁹

³ Australian Electoral Commission, *2013 Federal Election* (25 November 2014) <http://www.aec.gov.au/Elections/federal_elections/2013/>.

⁴ Parliament of Australia, *Double Dissolution* <http://www.aph.gov.au/Parliamentary_Business/Double_dissolution>.

⁵ Australian Electoral Commission, *2016 Federal Election* (20 April 2017) <http://www.aec.gov.au/Elections/Federal_Elections/2016/>.

⁶ Mr Day resigned due to the concerns surrounding the liquidation of Home Australia Pty Ltd. However, this was not the basis of the constitutional challenge to his eligibility as a Senator in *Re Day [No 2]*.

⁷ Stephanie Anderson and Mathew Doran, ‘Bob Day Tenders Resignation as Family First Senator’, *ABC News* (online), 1 November 2016 <<http://www.abc.net.au/news/2016-11-01/bob-day-resigns/7983088>>.

⁸ See generally *Commonwealth Electoral Act 1918* (Cth) s 376.

⁹ *Re Day [No 2]* (2017) 343 ALR 181, 183 [1] (Kiefel CJ, Bell and Edelman JJ).

B *Central Issue — Pecuniary Interest in an Agreement with the Public Service*

The referred questions centred around whether Mr Day had an indirect pecuniary interest in an agreement with the Public Service of the Commonwealth, specifically the lease agreement for his electorate office. If Mr Day had such an interest, he would be disqualified from sitting as a senator under s 44(v) of the *Australian Constitution*, which 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.¹⁰

C *The Pecuniary Interest*

When Mr Day was elected in 2013 he became entitled to office accommodation at the Commonwealth's expense.¹¹ Mr Day wished to use 77 Fullarton Road, Kent Town as his office,¹² a property owned at that time by B & B Day Pty Ltd (controlled and owned by Mr Day) as trustee of the Day Family Trust (of which Mr Day was a beneficiary).¹³ In 2014, ownership of 77 Fullarton Road passed from B & B Day Pty Ltd to Fullarton Investments Pty Ltd (trustee of the Fullarton Road Trust, of which the Day Family Trust was a beneficiary).¹⁴

On 1 December 2015, the Commonwealth entered into an agreement with Fullarton Investments Pty Ltd to lease 77 Fullarton Road for use as Mr Day's electorate office.¹⁵ It was undisputed that this was an agreement with the Commonwealth Public Service.¹⁶

On 26 February 2016, Mr Day's executive assistant, acting on behalf of Fullarton Investments Pty Ltd, directed the Commonwealth to pay rent under the lease to a

¹⁰ *Australian Constitution* s 44(v).

¹¹ *Parliamentary Entitlements Act 1990* (Cth) s 4(1), sch 1 pt 1 item 7.

¹² *Re Day [No 2]* (2017) 343 ALR 181, 208 [134] (Keane J).

¹³ *Ibid* 184 [6] (Kiefel CJ, Bell and Edelman JJ).

¹⁴ *Ibid* 184 [7] (Kiefel CJ, Bell and Edelman JJ).

¹⁵ *Ibid* 185 [8] (Kiefel CJ, Bell and Edelman JJ).

¹⁶ *Ibid* 217 [185] (Keane J).

bank account named Fullarton Nominees.¹⁷ Mr Day owned both this bank account and the Fullarton Nominees business name.¹⁸

III DECISION OF THE HIGH COURT

A Mr Day Disqualified as a Senator

The Full Court of the High Court unanimously held that Mr Day was disqualified from being elected or sitting as a Senator by reason of s 44(v) of the *Australian Constitution*, on the basis that he had an indirect pecuniary interest in the lease agreement.¹⁹

1 *Departing from Re Webster*

In reaching this decision, the Full Court adopted a significantly broader interpretation of s 44(v), departing from the only previous High Court decision that considered this constitutional provision — *Re Webster*.²⁰

In *Re Webster*, Barwick CJ, sitting alone as the Court of Disputed Returns, adopted an extremely narrow interpretation of s 44(v),²¹ which ‘significantly limited its operation.’²² His Honour took a purposive approach, regarding s 44(v) as having the same purpose as a similar United Kingdom provision,²³ which his Honour considered to be the ‘precise progenitor’ of s 44(v).²⁴ Specifically, his Honour interpreted s 44(v)’s purpose as being solely to secure the independence of Parliament from the Crown’s influence, as opposed to preventing conflict between Members of Parliament’s duties and their personal financial interests.²⁵

Notably, *Re Webster* was a decision of a Chief Justice sitting alone, an unusual feature for matters involving the *Australian Constitution*.²⁶ Moreover, the decision did not rest on a principle reinforced in successive cases. Accordingly, the Court in *Re Day [No 2]* deemed it appropriate to reconsider the decision in *Re Webster*.²⁷

¹⁷ Ibid 210 [144] (Keane J).

¹⁸ Ibid 185 [9] (Kiefel CJ, Bell and Edelman JJ).

¹⁹ Ibid 197 [76] (Kiefel CJ, Bell and Edelman JJ), 200 [92] (Gageler J), 219 [195] (Keane J), 234 [277] (Nettle and Gordon JJ).

²⁰ (1975) 132 CLR 270.

²¹ Ibid 278–80.

²² *Re Day [No 2]* (2017) 343 ALR 181, 190 [38] (Kiefel CJ, Bell and Edelman JJ).

²³ *House of Commons (Disqualification) Act 1782* (UK) 22 Geo 3, c 45, s 1.

²⁴ *Re Webster* (1975) 132 CLR 270, 278.

²⁵ Ibid 278–9.

²⁶ *Re Day [No 2]* (2017) 343 ALR 181, 191–192 [44] (Kiefel CJ, Bell and Edelman JJ); Transcript of Proceedings, *Re Day* [2017] HCATrans 15 (7 February 2017) (Kiefel CJ).

²⁷ *Re Day [No 2]* (2017) 343 ALR 181, 191–193 [43]–[52] (Kiefel CJ, Bell and Edelman JJ).

In *Re Day [No 2]*, the Court was critical of Barwick CJ's approach, regarding his Honour's interpretation of s 44(v) as too narrow.²⁸ Having regard to the Convention Debates,²⁹ the Court indicated that while the similar United Kingdom provision was indeed a 'progenitor' of s 44(v), it was not its 'precise progenitor'.³⁰ Section 44(v) had undergone a 'substantial change in its terminology'³¹ from its United Kingdom progenitor, such that its purpose also extends to preventing Parliament members' conflict between their duties to the people and their personal interests.³² Accordingly, the Full Court elected to depart from the narrow construction of the section in *Re Webster*, in favour of a broader interpretation.³³

2 A Broader Interpretation of s 44(v)

Although the exact expression varies across the four judgments of *Re Day [No 2]*, in substance, each of the Full Court's judgments adopted largely the same broad construction of s 44(v).

Turning to the interpretation of an '*indirect pecuniary interest* in any agreement with the Public Service of the Commonwealth',³⁴ Kiefel CJ, Bell and Edelman JJ held that beneficiaries of a discretionary trust which benefit from such an agreement may be considered to have an indirect pecuniary interest.³⁵ Accordingly, their Honours rejected Mr Day's proposition that individuals must be party to such an agreement to have an interest in it.³⁶ Additionally, in light of their view of s 44(v)'s purpose, their Honours rejected Mr Day's argument that due to the penal consequences for breach,³⁷ the provision should be narrowly construed.³⁸

In defining 'indirect pecuniary interest', Gageler J adopted the formulation of Gavan Duffy J in *Ford v Andrews*:

²⁸ *Re Day [No 2]* (2017) 343 ALR 181, 193 [51]–[52] (Kiefel CJ, Bell and Edelman JJ), 201–202 [98] (Gageler J), 212 [161] (Keane J), 233–234 [272]–[276] (Nettle and Gordon JJ).

²⁹ *Official Report of the Australasian National Convention Debates*, Adelaide, 15–21 April 1897; *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 21 September 1897; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 March 1898.

³⁰ *Re Day [No 2]* (2017) 343 ALR 181, 189 [30] (Kiefel CJ, Bell and Edelman JJ), 233 [273] (Nettle and Gordon JJ).

³¹ *Ibid* 189 [30] (Kiefel CJ, Bell and Edelman JJ).

³² *Ibid* 192 [48] (Kiefel CJ, Bell and Edelman JJ).

³³ *Ibid* 193 [51]–[52] (Kiefel CJ, Bell and Edelman JJ), 201–202 [98] (Gageler J), 212 [161] (Keane J), 233–234 [272]–[276] (Nettle and Gordon JJ).

³⁴ *Australian Constitution* s 44(v) (emphasis added).

³⁵ *Re Day [No 2]* (2017) 343 ALR 181, 194–195 [62].

³⁶ *Ibid* 197 [75].

³⁷ *Australian Constitution* s 46.

³⁸ *Re Day [No 2]* (2017) 343 ALR 181, 196 [72].

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.³⁹

Without seeking to improve on Gavan Duffy J's formulation, Gageler J made two observations regarding its application to s 44(v).⁴⁰ Firstly, that the interest must be pecuniary, meaning capable of sounding in 'money or money's worth', and more than trivial.⁴¹ Secondly, that the existence of an expectation of receiving a benefit must be determined objectively with reference to the practical consequences of the agreement's performance or non-performance.⁴²

Justice Keane likewise noted the need to have regard 'to practical as well as legal effect'⁴³ in considering whether an indirect pecuniary interest exists. Emphasising that an individual need not be party to an agreement,⁴⁴ his Honour held that an expectation of gain or loss generated by a promise, even without a legally enforceable entitlement, is sufficient for an indirect pecuniary interest:⁴⁵ 'it is enough that the person's pockets were or might be affected.'⁴⁶

Justices Nettle and Gordon adopted a similar interpretation,⁴⁷ emphasising the aforementioned requirement that the connection between the pecuniary interest (direct or indirect) and the agreement be immediate, and not merely connected by a chain of possibilities.⁴⁸ Their Honours stated that s 44(v)'s central test is:

whether, because of that interest in that agreement, that person could conceivably be influenced in the exercise of their functions, powers and privileges, or in the performance of their duties, as a member of Parliament.⁴⁹

Each Justice, in their own way, broadly interpreted that s 44(v) applies beyond immediate legally enforceable interests, to the practical benefits and detriments of an agreement's performance.⁵⁰

³⁹ Ibid 204 [108], quoting *Ford v Andrews* (1916) 21 CLR 317, 335.

⁴⁰ *Re Day [No 2]* (2017) 343 ALR 181, 204 [110].

⁴¹ Ibid 204 [111].

⁴² Ibid 205 [113].

⁴³ Ibid 218 [192], quoting *Crump v New South Wales* (2012) 247 CLR 1, 26 [60].

⁴⁴ *Re Day [No 2]* (2017) 343 ALR 181, 213–214 [167].

⁴⁵ Ibid 218 [191]–[192].

⁴⁶ Ibid 218 [191].

⁴⁷ Ibid 228–231 [251]–[267].

⁴⁸ Ibid 229 [255]–[256].

⁴⁹ Ibid 230 [258].

⁵⁰ Ibid 197 [75] (Kiefel CJ, Bell and Edelman JJ), 204 [108]–[110] (Gageler J), 218 [192] (Keane J), 229 [255] (Nettle and Gordon JJ).

3 *Application of a Broader Interpretation to Mr Day*

The Full Court was unanimous in holding that Mr Day had an indirect pecuniary interest prior to his July 2016 re-election, triggering s 44(v) to disqualify Mr Day from being elected or sitting as a senator.⁵¹ Yet curiously, despite being largely unified in its interpretation of s 44(v), the Court was divided regarding exactly how and when the indirect interest came into existence. A majority of four Justices held that the pecuniary interest arose on 26 February 2016, when the Commonwealth was directed to make payment directly to Mr Day's own bank account.⁵² The remaining three Justices held that it arose on 1 December 2015, when the lease was entered into, on the basis that arrangements were such that Mr Day would financially benefit from rent payments under the lease.⁵³

Notably, the disparity in the Court's view of when the interest arose seemingly does not denote any distinction in the scope of s 44(v)'s application. Given that 26 February 2016 was itself prior to Mr Day's re-election, the majority simply deemed it unnecessary to determine whether a pecuniary interest arose any earlier.⁵⁴

B Filling the Senate Vacancy

The High Court was unanimous in following *Re Wood*,⁵⁵ and holding that the Senate vacancy should be filled by analogous application of s 273(27) of the *Commonwealth Electoral Act 1918* (Cth),⁵⁶ meaning that it should be dealt with in the same way as if a deceased candidate's name appeared on the ballot paper. Specifically, the Court decided that a special count of the ballot papers should be held, such that above the line votes for Mr Day would instead be counted to Ms Lucy Gichuhi, the only other Family First Party candidate for the Senate.

⁵¹ Ibid 197 [76] (Kiefel CJ, Bell and Edelman JJ), 200 [92] (Gageler J), 219 [195] (Keane J), 234 [277] (Nettle and Gordon JJ).

⁵² Ibid 197 [76] (Kiefel CJ, Bell and Edelman JJ), 219 [195] (Keane J).

⁵³ Ibid 200–201 [92]–[93] (Gageler J), 234 [277] (Nettle and Gordon JJ).

⁵⁴ Kiefel CJ, Bell and Edelman JJ concluded that Mr Day had a pecuniary interest in the lease from 26 February 2016, and never expressly assessed whether such an interest existed any earlier than this. Keane J concluded the same, and expressly indicated that it is unnecessary to consider whether such an interest existed any earlier: *ibid* 197 [76] (Kiefel CJ, Bell and Edelman JJ), 219 [195] (Keane J).

⁵⁵ (1988) 167 CLR 145.

⁵⁶ *Re Day [No 2]* (2017) 343 ALR 181, 197–198 [77]–[80] (Kiefel CJ, Bell and Edelman JJ), 201 [93] (Gageler J), 221–222 [206]–[211] (Keane J), 236–239 [291]–[306] (Nettle and Gordon JJ).

IV RAMIFICATIONS

A Immediate Political Ramifications

Ordinarily, a challenge to an individual's capability to sit as a Senator is brought to remove them from office.⁵⁷ *Re Day [No 2]* is distinct in this regard, in that Mr Day's Parliamentary eligibility was challenged *after* he had formally resigned from his seat.

Consequently, the immediate political impact of the decision instead turns on who would be selected to replace Mr Day in the Senate. If Mr Day had been validly elected, the South Australian Parliament would have chosen a nominee of the Family First Party to fill the vacancy caused by his resignation.⁵⁸ Instead, with Mr Day invalidly elected, a special count of the ballot papers was conducted,⁵⁹ confirming Ms Gichuhi, the other Family First Party candidate for the Senate, as elected.⁶⁰ Shortly thereafter, the High Court rejected a citizenship-based challenge to Ms Gichuhi's eligibility as a Senator,⁶¹ leaving her free to fill the Senate vacancy.

Prior to the judgment, much uncertainty surrounded how the vacancy would be filled if Mr Day had been invalidly elected. This included speculation that a different party's candidate may fill the vacancy, such as Labor's Anne McEwen or One Nation's Steven Burgess.⁶² Such a change could have had consequences for the Coalition Government's legislative agenda given that Mr Day had consistently voted with the Coalition, which did not have firm control of the Senate.⁶³ *Prima facie*, the short-term

⁵⁷ For example, the challenges brought against various Senators over the past several decades, referred to the High Court whilst they were still in office, such as James Webster, Robert Wood and Rod Culleton: see, eg, *Re Webster* (1975) 132 CLR 270; *Re Wood* (1988) 167 CLR 145; *Re Culleton [No 2]* 341 (2017) ALR 1.

⁵⁸ See *Australian Constitution* s 15.

⁵⁹ See generally Transcript of Proceedings, *Re Day [No 2]* [2017] HCATrans 85 (11 April 2017).

⁶⁰ Parliament of Australia, *Senator Lucy Gichuhi* <http://www.aph.gov.au/Senators_and_Members/Parliamentarian?MPID=270552>; Chris Uhlmann and Matthew Doran, 'Family First's Lucy Gichuhi Set to Replace Bob Day in South Australian Senate Seat', *ABC News* (online), 13 April 2017 <<http://www.abc.net.au/news/2017-04-13/family-first-lucy-gichuhi-replaces-bob-day-in-senate/8442564>>.

⁶¹ Transcript of Proceedings, *Re Day* [2017] HCATrans 86 (19 April 2017); Matthew Doran, Henry Belot and Joanna Crothers, 'Family First Senator Lucy Gichuhi Survives ALP Challenge over Citizenship Concerns', *ABC News* (online), 20 April 2017 <<http://www.abc.net.au/news/2017-04-19/labor-party-to-challenge-eligibility-of-senator-elect/8452514>>.

⁶² See, eg, Tom McIlroy and Michael Koziol, 'The Bob Day Controversy Explained', *The Sydney Morning Herald* (online), 2 November 2016 <<http://www.smh.com.au/federal-politics/political-news/the-bob-day-controversy-explained-20161102-gsg061.html>>.

⁶³ *Ibid.*

political ramifications of *Re Day [No 2]* were less impactful than some observers predicted, as Ms Gichuhi, a Family First Party member, filled the vacancy regardless.

However, shortly after filling the vacancy, Ms Gichuhi declined to join Cory Bernardi's Australian Conservatives Party when it absorbed the Family First Party in April 2017.⁶⁴ Instead, Ms Gichuhi decided to sit as an independent Senator, leaving her political allegiances somewhat uncertain. It remains to be seen what impact Ms Gichuhi's influence may have over the 45th Parliament's life.

B *Long-Term Ramifications of a Broader s 44(v)*

1 *Positive Change for Representative and Responsible Government*

Chief Justice Barwick's narrow interpretation in *Re Webster* has long been criticised for interpreting s 44(v) such that it had almost no effect at all.⁶⁵ The High Court's embracing of a broader interpretation marks a welcome remedy to these criticisms.

As acknowledged in *Re Day [No 2]*, s 44(v)'s purpose extends to preventing conflict between parliamentarians' duties to the people, and their own personal interests.⁶⁶ Indeed, as Kiefel CJ, Bell and Edelman JJ remarked:

there is much to be said for the view that the provision has a special status, because it is protective of matters which are fundamental to the Constitution, namely representative and responsible government in a democracy.⁶⁷

The operation of s 44(v) is central to the protection of representative and responsible government in Australia. It is a key democratic principle that elected officials discharge their duties in the pursuit of the people's interests, and not merely their own. With the judgment in *Re Day [No 2]*, this constitutional provision will at last extend to such fundamental protection, insofar as regards agreements with the Public Service of the Commonwealth (over which parliamentarians possess degrees of influence). This protection is not total, but remains as:

an irreducible minimum of protection against the possibility that the personal pecuniary interests of parliamentarians might be allowed to compete with the

⁶⁴ Louise Yaxley, 'Cory Bernardi's Australian Conservatives to Amalgamate with Family First', *ABC News* (online), 26 April 2017 <<http://www.abc.net.au/news/2017-04-25/cory-bernardi-australian-conservatives-family-first-to-merge/8471244?sf73113548>>.

⁶⁵ See, eg, Bob Bennett, 'Candidates, Members and the Constitution' (Research Paper No 18, Parliamentary Library, Parliament of Australia, 2002); Commonwealth, *Parliamentary Debates*, House of Representatives, 10 June 1999, 6720-35 (Mr Neil Andrew); J D Hammond, 'Pecuniary Interest of Parliamentarians: A Comment on the *Re Webster* Case' (1976) 3 *Monash University Law Review* 91.

⁶⁶ (2017) 343 ALR 181, 192 [48] (Kiefel CJ, Bell and Edelman JJ).

⁶⁷ *Ibid* 196 [72].

interests of the people they represent, and so ‘cynically turn public debate into a cloak for bartering away the public interest’.⁶⁸

Consequently, Commonwealth parliamentarians must exercise greater caution in avoiding financial interests (direct or indirect) in agreements with the Public Service, lest they be disqualified. Complex trust or corporate structures, creating degrees of separation between an elected representative and their interest, will no longer suffice to prevent disqualification.⁶⁹

2 Difficulties of a Broader s 44(v)

While a broader s 44(v) is logically a positive shift for democratic integrity, concerns exist that this interpretation may extend to disqualification for perfectly innocent arrangements with the Commonwealth Public Service.⁷⁰ Alleviating this issue, the Court in *Re Day [No 2]* limited s 44(v) from extending to agreements which are ‘ordinarily made between government and a citizen.’⁷¹ However, exactly how this distinction should be drawn remains uncertain.⁷²

Moreover, the Court in *Re Day [No 2]* declined to define the outer limits of s 44(v),⁷³ leaving much uncertainty regarding exactly what arrangements the broader application captures. At present, a current or potential Commonwealth parliamentarian, even with noble intentions, may run afoul of this provision, with ‘automatic and draconian consequences.’⁷⁴ Compounding this issue, Australian electoral law experts observe that smaller party candidates are more likely to inadvertently breach s 44 disqualification provisions as they lack the comprehensive constitutional advice afforded by major parties.⁷⁵

Nevertheless, this ambiguity accords with the ‘judicial self-restraint’ doctrine, wherein constitutional questions are only decided where doing so is judicially

⁶⁸ Ibid 216 [183] (Keane J) quoting *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 159.

⁶⁹ *Re Day [No 2]* (2017) 343 ALR 181, 194 [61] (Kiefel CJ, Bell and Edelman JJ).

⁷⁰ For example, Mr Day proposed that a broad s 44(v) would disqualify an individual who subscribes for a government bond: *ibid* 219 [197] (Keane J).

⁷¹ *Ibid* 196 [69] (Kiefel CJ, Bell and Edelman JJ); see also *ibid* 202 [102] (Gageler J), 220 [200]–[201] (Keane J).

⁷² Cf Gageler J noted the importance of s 44(v) having a sufficiently clear meaning such that individuals can ‘gauge the constitutional propriety of their affairs,’ given that the provision has a ‘blunt and limiting effect on democratic participation’: *ibid* 201 [97].

⁷³ *Ibid* 203 [106] (Gageler J), 220 [201] (Keane J), 230 [260] (Nettle and Gordon JJ).

⁷⁴ *Ibid* 201 [95] (Gageler J).

⁷⁵ ABC Radio National, ‘Senator Bob Day’s Disqualification’, *The Law Report*, 11 April 2017 (Graeme Orr) <<http://www.abc.net.au/radionational/programs/lawreport/hca-disputed-returns/7333944>>.

necessary.⁷⁶ Here, defining the provision's outer limits was unnecessary and inappropriate, as Mr Day's interest fell squarely within its scope.⁷⁷ Over time, future cases will further define s 44(v)'s outer limits, alleviating the present ambiguity.

V CONCLUSION

The High Court's broader interpretation of s 44(v) in *Re Day [No 2]* marks a significant positive change in the interpretation of the *Australian Constitution*, speaking to contemporary needs of preventing conflicts of interests in elected representatives. Indeed, the decision reinforces the fundamental responsibility of Australian elected representatives: 'the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community.'⁷⁸

The Court's adoption of a broader interpretation is a worthy response to decades of criticism of the narrow view in *Re Webster*. While *Re Day [No 2]* presents concerns regarding s 44(v)'s uncertain outer limits, it yields a positive impact on the preservation of democratic integrity that will echo throughout future years.

⁷⁶ George Williams, Sean Brennan and Andrew Lynch, *Australian Constitutional Law & Theory: Commentary and Materials* (Federation Press, 6th ed, 2014) 476–7.

⁷⁷ *Re Day [No 2]* (2017) 343 ALR 181, 203 [106] (Gageler J), 220 [201] (Keane J), 230 [260] (Nettle and Gordon JJ).

⁷⁸ *R v Boston* (1923) 33 CLR 386, 400 (Isaacs and Rich JJ) (emphasis in original).

