



HIGH COURT OF AUSTRALIA

5 April 2017

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS
PURSUANT TO SECTION 376 OF THE COMMONWEALTH ELECTORAL ACT 1918 (CTH)
CONCERNING MR ROBERT JOHN DAY AO
[2017] HCA 14

Today the High Court, sitting as the Court of Disputed Returns, unanimously held that Mr Robert John Day AO was a person who had an "indirect pecuniary interest" in an agreement with the Public Service of the Commonwealth prior to and at the time of the 2016 federal election, and was therefore incapable of being chosen or of sitting as a senator by reason of s 44(v) of the Constitution.

On 9 May 2016, the 44th Parliament of the Commonwealth was dissolved and a general election was subsequently held. Mr Day's nomination for the 2016 federal election was declared on 10 June 2016. On 4 August 2016, he was declared re-elected as a senator for South Australia.

On 1 December 2015, the Commonwealth entered into a lease agreement with Fullarton Investments Pty Ltd ("Fullarton Investments"), the registered proprietor of premises at 77 Fullarton Road, Kent Town in South Australia ("the Fullarton Road property"), for use by Mr Day as his electorate office. The commencement date of the lease was 1 July 2015. Under the lease, Fullarton Investments was entitled to direct the Commonwealth to pay rent to any person. On 26 February 2016, it directed that rental payments be made to a bank account owned by Mr Day.

The Fullarton Road property was previously owned by B & B Day Pty Ltd ("B & B Day") as trustee for the Day Family Trust, a discretionary trust of which Mr Day and his wife were beneficiaries. On 24 April 2014, Fullarton Investments purchased the Fullarton Road property from B & B Day on a vendor finance basis. Fullarton Investments was the trustee of the Fullarton Road Trust, a discretionary trust of which the Day Family Trust was a beneficiary. There was also a loan facility provided by a bank to B & B Day, and loan facilities provided to companies associated with Mr Day. Each loan facility was secured by, among other things, a guarantee given by Mr Day and a mortgage over the Fullarton Road property. Payment of rent by the Commonwealth would facilitate repayment of the purchase price of the Fullarton Road property by Fullarton Investments to B & B Day, which would in turn facilitate repayment by B & B Day of the loan facility, thereby reducing the extent of Mr Day's contingent liability to the bank as guarantor. If the Commonwealth did not pay rent, Fullarton Investments had no other significant source of revenue.

On 8 November 2016, the President of the Senate referred five questions to the Court of Disputed Returns. The principal question was whether Mr Day was incapable of being chosen or of sitting as a senator by reason of s 44(v) of the Constitution. The Senate's reference also asked how the resulting vacancy should be filled if Mr Day were found to have been incapable of being chosen or of sitting as a senator.

The Court held by majority that there was no requirement that a "pecuniary interest" be a legally enforceable interest, and it was unanimously held that the financial benefit which Mr Day stood to obtain from the Commonwealth performing its obligations to pay rent pursuant to the lease constituted an "indirect pecuniary interest" within the meaning of s 44(v) of the Constitution. By virtue of the direction that the rent be paid into a bank account owned by him, Mr Day was to receive rent directly from the Commonwealth. Therefore he had an expectation of a pecuniary benefit from the lease. A majority of the Court held he was incapable of being chosen or of sitting as a senator from no later than 26 February 2016, when the direction was made. The Court unanimously held that the resulting vacancy should be filled by a special count of the ballot papers.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*