SG No. 21 of 2018

IN THE MATTER OF THE ELIGIBILITY OF MR DUTTON PURSUANT TO SECTION 44(v) OF THE CONSTITUTION

OPINION

Introduction

1. I have been asked for my urgent advice about whether Mr Peter Dutton MP has a "direct or indirect pecuniary interest" in an "agreement with the Public Service of the Commonwealth" for the purpose of s 44(v) of the Constitution.

2. Section 44(v) relevantly provides that a person who has such an interest[1] is "incapable of being chosen or of sitting" as a member of the House of Representatives. If s 44(v) is engaged at a time after a member has been validly elected, s 45(i) of the Constitution operates to render the member's place vacant.

3. The specific question I have been asked is as follows:

> On the assumptions that:
>
> (a) Mr Dutton is a beneficiary of the **RHT Family Trust**, the trustee of which is RHT Investments (Qld) Pty Ltd (**RHT Investments**);
>
> (b) In 2014, RHT Investments completed a standard form "Application for approval under the Family Assistance Law", which was subsequently approved by the Secretary of the Department of Education and Training (**Secretary**);
>
> (c) During the first half of 2018, RHT Investments completed a standard form "Child Care Subsidy (**CCS**) Online Transition Form", which was subsequently approved by the Commonwealth;
>
> (d) After 2 July 2018, CCS has been paid by the Commonwealth to RHT Investments pursuant to the *New Tax System (Family Assistance) (Administration) Act 1999* (Cth) (**Administration Act**), including ss 67EB and/or 67EE;
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> is Mr Dutton incapable of sitting as a member of the House of Representatives by reasons of s 44(v) of the Constitution, with the consequence that his seat has become vacant by reason of s 45(i) of the Constitution?

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[1] "[O]therwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons".

Summary of conclusions

4. On the facts set out below, in my opinion the better view is that Mr Dutton is not incapable of sitting as a member of the House of Representatives by reasons of s 44(v) of the Constitution.

5. Section 44(v) of the Constitution applies only where there is an "agreement with the Public Service of the Commonwealth". In my opinion there is no such agreement between RHT Investments and the Public Service of the Commonwealth, and therefore no agreement in which Mr Dutton could have an indirect pecuniary interest by virtue of his status as a beneficiary of the RHT Family Trust.

6. There appear to be two possible bases upon which such an agreement might be argued to exist.

7. The first is that the process by which RHT Investments applied to become, and was approved as, a provider of child care services under Pt 8 of the Administration Act constituted an "agreement" within s 44(v) of the Constitution. Under Pt 8 of the Administration Act, RHT Investments was *entitled* to approval if it satisfied certain statutory criteria. In my opinion, the word "agreement" in s 44(v) does not extend to an application for a statutory entitlement. On its ordinary meaning, an "agreement" requires the consent of at least two parties. While RHT Investments voluntarily chose to subject itself to the regulatory regime under the Administration Act, and in that sense "agreed" to bring itself within that regime, the recipient of the application, being the Secretary, was *required* to grant the approval if the statutory criteria were met. That obligation points strongly against the process of application and approval being characterised as an "agreement" under s 44(v).

8. The second argument is that the process by which CCS is paid by the Commonwealth into a bank account that is nominated and managed by RHT Investments should be characterised as involving an agreement between RHT

Investments and the Public Service of the Commonwealth. However, payments of CCS are made in accordance with a detailed statutory scheme under Pt 3A of the Administration Act. That scheme provides that CCS must be claimed by an *individual*, the Secretary *must* determine that the *individual* is eligible for CCS, and the amount payable *must* be determined on a weekly basis by the Secretary. The role of the approved provider (i.e. RHT Investments) within this regime is limited, and does not involve any agreement with the Public Service of the Commonwealth. While the approved provider must be *notified* of a determination by the Secretary as to the amount of CCS that is payable,[2] and payment of CCS is ordinarily made to the credit of a bank account maintained by the approved provider,[3] the provider is merely a conduit, being obliged within 14 days either to pass the amount of CCS to the individual who applied for it, or if that is not practicable to remit it to the Secretary. Failure to take either of those steps is an offence of strict liability.[4] No aspect of that regime involves the approved provider making an agreement with the Public Service of the Commonwealth.

9. While I consider the position summarised above to represent the better view, it is impossible to state the position with certainty. That is so for three reasons. *First*, the facts concerning Mr Dutton are unlike those that have previously been assessed against s 44(v). *Second*, as I note below, there may be further facts of which I am presently unaware. *Third*, there is a significant division of opinion on the High Court as to key questions concerning the legal operation of s 44(v), which creates some difficulty in predicting the manner in which the Court would analyse the facts. There is a possibility, consistently with the approach that the High Court recently took in the context of s 44(i) of the Constitution, that the Court might endeavour to create a clearer line in the interests of certainty, which might involve a broader reading of s 44(v) than was reflected in some of the judgments in *Re Day (No 2)*.

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2 Administration Act, s 67CE(4).
3 Administration Act, s 67EB(1).
4 Administration Act, s 201A(3).

10. For those reasons I consider there to be some risk, particularly in light of the substantial size of the payments that appear to have been made by the Commonwealth to RHT Investments, that the High Court might conclude that there is a conflict between Mr Dutton's duty as a parliamentarian and his personal interests. The Court might consider those payments to have created the expectation of benefit to Mr Dutton, on the basis that they would contribute to the amount of surplus income available to be distributed to beneficiaries of the RHT Family Trust, and that Mr Dutton had an indirect pecuniary interest on that basis. However, while that risk cannot be entirely discounted, it would remain necessary for the Court to identify an agreement in which Mr Dutton held that interest. I am unable to identify such an agreement. For that reason, I consider that the High Court is more likely to conclude that the size of the payments made to RHT Investments is not relevant to the s 44(v) analysis, because those payments were made pursuant to statutory entitlements of particular individuals who use child care services operated by RHT Investments.

11. Finally, I consider it unlikely that Mr Dutton is disqualified by reason of payments made to RHT Investments under the Inclusion Support Programme (**ISP**).

Facts

12. The operation of s 44(v) is highly fact dependent.[5] However, for a variety of reasons, I have been briefed with very little factual information. I have not, for example, had access to the trust deed of the RHT Family Trust, and I have no information concerning the financial position of RHT Investments or the child care centres that it operates (and therefore no information concerning the extent to which RHT Investments generates income that is available to be

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[5] See, eg, *Re Day* (2017) 91 ALJR 26; *Re Day (No 2)* (2017) 91 ALJR 518 at [260] (Nettle and Gordon JJ).

distributed to beneficiaries of the RHT Family Trust). Of particular note, other than the documents referred to in paragraphs 16 and 17 below, I have not seen any document that is capable of being characterised as an agreement between RHT Investments and the Public Service of the Commonwealth pertaining to the payment of CCS (or its predecessors).

13. In those circumstances, I provide my opinion on the basis of my present understanding of the facts, as set out immediately below. If the facts turn out to be materially different to those stated, my opinion will need to be revisited.

14. Mr Dutton was declared elected to the House of Representatives of the 45th Parliament as the member for Dickson on 29 July 2016.[6]

15. Mr Dutton's statement of registrable interests, last updated on 27 June 2018, includes an entry listing Mr Dutton as a beneficiary of the RHT Family Trust.[7] The listing indicates that the trustee for the RHT Family Trust is "RHT Investments P/L", which I have assumed to refer to RHT Investments (Qld) Pty Ltd (i.e. the company defined as RHT Investments at [3(a)] of this Opinion). The statement also includes an entry listing Mr Dutton's spouse as a shareholder of RHT Investments and a director of RHT Investments and Bald Hills Child Care Pty Ltd.[8]

16. In 2014, an application was made to the Department of Education for Camelia Avenue Childcare Centre to be approved as a long day care centre to operate 91 places. The application for approval was made by way of a standard form titled "Child Care Service: Application for approval under the family

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6 Australian Electoral Commission, 'Declaration of polls – 2016', https://www.aec.gov.au/Elections/federal_elections/2016/declaration-results.htm (accessed 23 August 2018).

7 See Item 2 of Mr Dutton's Statement of Registrable Interests (45th Parliament), Register of Members' Interests (45th Parliament), available at https://www.aph.gov.au/Senators_and_Members/Members/Register#cf (accessed 23 August 2018).

8 See Items 1 and 4 of the Statement.

assistance law". The application listed the operator of the Camelia Avenue Childcare Centre as "RHT Investments (QLD) P/L ATF RHT Family Trust".

17. On 7 January 2015, a delegate of the Secretary for the Department of Social Services certified that Camelia Avenue Childcare Centre was approved for the purposes of the family assistance law as a centre-based long day care service, with effect from 1 December 2014. The certificate of approval listed the operator of the centre as RHT Investments as trustee for the RHT Family Trust.

18. Fairfax Media has reported that the Camelia Avenue Childcare Centre "received $2.03 million in Commonwealth funding between 2014 and 2018".[9] I have not been instructed as to the accuracy of that figure. Further, if the total figure is accurate, I have no instructions as to the amount of that total that was paid directly into the account of RHT Investments, nor as to the proportion that was paid prior to 2 July 2018 (and therefore pursuant to the previous legislative scheme). The views that I express in this Opinion do not depend on the accuracy of the total figure, or its breakdown.

19. In addition to the Camelia Avenue Child Care Centre, RHT Investments is also the operator of Bald Hills Child Care Centre.[10] However, it appears that RHT Investments does *not* operate that centre as trustee for the RHT Family Trust. Moreover, it seems from Mr Dutton's statement of registrable interests that he is neither a director nor a shareholder of RHT Investments. In those circumstances, it is more difficult to identify a basis upon which Mr Dutton might be said to have any interest in any agreement concerning the Bald Hills Child Care Centre. I therefore confine my analysis to the operation of Camelia

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9 *Sydney Morning Herald*, "Government refers Dutton's eligibility to Solicitor-General", 22 August 2018, https://www.smh.com.au/politics/federal/government-refers-dutton-s-eligibility-to-solicitor-general-20180822-p4zyy6.html (accessed 23 August 2018).

10 RHT Investments is also identified as the provider of "Centre-Based Care" on the website of the Australia Children's Education and Care Quality Authority: https://www.acecqa.gov.au/resources/national-registers/services/bald-hills-child-care-centre (accessed 23 August 2018).

Avenue Child Care Centre by RHT Investments in its capacity as trustee for the RHT Family Trust, of which Mr Dutton is a beneficiary (for his position can be no worse with respect to the Bald Hills Child Care Centre than it is with respect to the Camelia Avenue Child Care Centre).

Legislative scheme

20. A critical issue in the possible application of s 44(v) of the Constitution to Mr Dutton is to identify an "agreement with the Public Service of the Commonwealth" in which he had a direct or indirect pecuniary interest. One possible such "agreement" is the application and approval process pursuant to which RHT Investments became an approved provider of child care services under the Administration Act, such that it was then eligible to have child care subsidies paid to it. Accordingly, it is necessary to examine the legislative scheme pursuant to which that approval was sought and granted in order to assess whether it constituted an "agreement with the Public Service of the Commonwealth".

21. An alternative argument is that Mr Dutton has an interest in an agreement pursuant to which CCS is paid directly to the operators of child care centres. It is therefore also necessary to examine the legislative scheme pursuant to which such payments are made to identify whether such an agreement exists.

Approved providers

22. Part 8 of the Administration Act in its current form was inserted by the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* (**Amendment Act**) with effect from 2 July 2018.[11]

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[11] Amendment Act, s 2 and Sch 1, item 205.

23. Part 8 deals with the "[a]pproval of provider of child care services". An "approved provider" is a provider for which an approval is in effect under Div 1 of Pt 8.[12] A child care service is an "approved child care service" if an approved provider is approved in respect of the service under Div 1 of Pt 8 and that approval is in effect.[13]

24. Under s 194A, a provider may apply to be approved for the purposes of the family assistance law[14] in respect of one or more child care services that the provider operates or proposes to operate. Under s 194B(1), the Secretary may approve a provider if the Secretary is satisfied that the provider satisfies the eligibility rules in s 194C and that the provider operates, or will operate, at least one child care service that satisfies the eligibility rules in s 194D.

25. Those provisions were not in force at the time that RHT Investments "as Trustee for RHT Family Trust" obtained approval as the provider in relation to the Camelia Avenue Childcare Centre.[15] As noted above, that approval was granted on 7 January 2015, with effect from 1 December 2014. At that time, s 194(1) of the Administration Act enabled a person who operated, or proposed to operate, a child care service to apply to the Secretary to have that service approved. The application was required to be made in the form and manner required by the Secretary, and to be accompanied by any fee prescribed in the regulations.[16] The Secretary was *required* to approve the service if satisfied of various matters, including that the application was made in accordance with s 194.[17] The Secretary was required to provide the

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12 Administration Act, s 3(1).
13 Administration Act, s 194G.
14 Defined to include the Assistance Act and the Administration Act: see definition in s 3 of the Administration Act.
15 https://www.acecqa.gov.au/resources/national-registers/services/camelia-avenue-childcare-centre (accessed 23 August 2018).
16 Administration Act, s 194(3).
17 Administration Act, s 195(1). See also s 195(5).

applicant with a certificate of approval setting out the kind of approved child care service and the date from which the approval took effect.[18]

26. Part 4 of Sch 4 to the Amendment Act sets out the transitional arrangements regarding approvals made under the previous version of the Administration Act. Item 9(1) deals with the situation if, immediately before 2 July 2018,[19] a person is the "operator of an approved child care service" within the meaning of the Administration Act as then in force. In those circumstances, on and after 2 July 2018, the person is taken to be "an approved provider within the meaning of the Administration Act" and "approved in respect of the service".[20]

27. Accordingly, RHT Investments "as Trustee for RHT Family Trust" is taken to be an approved provider under Div 1 of Pt 8 of the Administration Act by reason of its past approval under former s 194.

Payment of subsidies

28. Part 4A of the *A New Tax System (Family Assistance) Act 1999* (Cth) (**Assistance Act**) is headed "Child Care Subsidy". This Part was inserted by the Amendment Act and commenced on 2 July 2018.[21] Part 3A of the Administration Act was also inserted by the Amendment Act and also commenced on 2 July 2018.[22] The two Parts work together to provide for the payment of child care subsidies.

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18 Administration Act, s 195(3).
19 See definition of "commencement day" in item 1 of Sch 4.
20 Further, the service is taken to be a service of a type determined by the Secretary under Item 9(2): see *Child Care Subsidy (Transition of approved child care services) Determination 2018* (Cth).
21 Amendment Act, s 2 and Sch 1, item 40.
22 Amendment Act, s 2 and Sch 1, item 92.

29. A "child care subsidy" or "CCS" is a child care subsidy "for which an individual may become eligible" under s 85BA of the Assistance Act.[23] Under s 85BA(1) of the Assistance Act, an "individual is eligible for CCS for a session of care provided by an approved child care service to a child" if a series of conditions are met, including that "the individual, or the individual's partner, has incurred a liability to pay for the session of care under a complying written arrangement" (sub-s (1)(b)).[24]

30. The payment of CCS is governed by Pt 3A of the Administration Act, headed "Payment of child care subsidy and additional child care subsidy". Under that Part, an individual may become entitled to be paid "CCS by fee reduction".[25]

31. The only way that an individual can become entitled to be paid CCS is to make a claim in respect of a child for CCS in accordance with Div 2 of Pt 3A ("Making Claims").[26] The only persons who can make a claim for CCS in accordance with Div 2 are *individuals*.[27] Such a claim must be made in the form and manner approved by the Secretary, and must generally be for CCS by "fee reduction".[28] Amongst other things, the individual making a claim for CCS must provide details of a bank account maintained by the person[29] and tax file number[30] details. The quantum of CCS payable to individuals is determined in accordance with Schedule 2 to the Assistance Act.[31]

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23 In particular circumstances, an individual who is eligible for CCS subsidy may also be eligible for an "additional child care subsidy" (ACCS). These circumstances are set out in Div 3 of Part 4A of the Assistance Act. Exceptionally, approved providers (as opposed to individuals) may be eligible for one particular form of ACCS – "ACCS (child wellbeing)". The circumstances in which eligibility arises for a provider are narrowly prescribed and confined to cases where a child is assessed to be at risk of serious abuse or neglect: see s 85CA(2) of the Assistance Act.

24 "A written arrangement between a provider and an individual is a ***complying written arrangement*** if the arrangement complies with the requirements prescribed by the Secretary's rules": Administration Act, s 200B(3).

25 Administration Act, s 67AB, see also s 67BD(a).

26 Administration Act, s 67BB.

27 Administration Act, s 67BC.

28 Administration Act, s 67BD. The only other possibility is CCS in substitution for an individual who has died.

29 Administration Act, s 67BG, read with s 67BE(c).

30 Administration Act, s 67BH, read with s 67BE(d).

31 Assistance Act, Part 4A, Div 6.

32. Entitlement to be paid CCS involves a two stage process. *First*, an individual is only entitled to be paid CCS if the Secretary has made a determination to that effect under Div 3 of Pt 3A of the Administration Act ("Determinations").[32] If an individual makes an effective claim in respect of a child for CCS by fee reduction, the Secretary must determine that the individual is *eligible* for CCS by fee reduction for the child if, when making the determination, the Secretary is satisfied that the requirements in s 85BA(1) of the Assistance Act are met in relation to the claim.[33]

33. *Second*, if (amongst other things) a determination that an individual is eligible for CCS by fee reduction for the child is in effect, and the provider of the service has given the Secretary a report under s 204B in relation to the child for a week then, under s 67CD(2), if the Secretary is satisfied (amongst other things) that an individual is eligible for CCS under s 85BA of the Assistance Act for sessions of care provided to the child in the week the Secretary *must* determine that the *individual is entitled* to be paid CCS for those sessions *and the amount of CCS that the individual is entitled to be paid*.

34. The Secretary must also give written notice of a determination made under s 67CD to the provider of the child care service that provided the sessions of care as soon as practicable after making the determination.[34]

35. A determination made under s 67CD(2) of an amount of CCS the individual is entitled to be paid for sessions of care provided by a service to a child in a week, if made while the child is still enrolled for care by the service, is a "fee reduction decision".[35] Section 67EB(1), which is contained within Div 5 ("Payments") of Pt 3A of the Administration Act, provides:

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32 Administration Act, s 67CB(1).
33 Administration Act, s 67CC(1)(a).
34 Administration Act, s 67CE(4).
35 Administration Act, s 67EB(2), Table item 1.

> If a fee reduction decision is made for an individual in relation to sessions of care provided by a child care service to a child, the Secretary must pay the fee reduction amount for the decision *to the credit of a bank account nominated and maintained by the provider of the service*. (emphasis added)

36. It is by reason of that provision that payments of CCS with respect children who receive child care at the Camelia Avenue Childcare Centre are paid to RHT Investments (less a "withholding amount" under s 67EB(4)). However, the fact that this arrangement does not mean that an approved provider is entitled to receive CCS is illustrated by s 67EC(2), which empowers the Secretary to pay the fee reduction amount directly to an individual instead of to the provider if the Secretary considers that is appropriate in the circumstances.

37. Further, a provider to whom a payment is made under s 67EB must, no later than 14 days after the notice of the fee reduction decision is given, either pass on the fee reduction amount for the decision to the individual to whom the decision relates or, if it is not reasonably practicable to pass it on, remit the fee reduction amount to the Secretary.[36] The provider may pass on the fee reduction amount "by reducing fees or in any other way".[37] Failure to pass it on constitutes an offence,[38] and has the result that an amount equal to the fee reduction amount becomes a debt due to the Commonwealth by the provider.[39]

38. The Administration Act contemplates that there may be a written arrangement entered into between the provider and an individual.[40] It also contemplates that there may be other types of arrangements entered into between a provider and an individual.[41] It does not, however, contemplate that there would be any agreement between the provider and the Commonwealth.

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36 Administration Act, s 201A(1).
37 Administration Act, s 201A(5).
38 Administration Act, s 201A(3). It also renders the provider liable to a civil penalty: s 201A(4).
39 Administration Act, s 71D.
40 Administration Act, s 200B.
41 Administration Act, s 200A(3).

39. In summary, the critical elements of the legislative scheme for the payment of CCS are that:

(a) the focus is on the *individual* who is eligible for CCS. It is that individual who becomes *entitled* to be paid CCS if the relevant preconditions are satisfied, and the amount of CCS that is payable to that individual depends on factors personal to the individual;

(b) the mechanism for the payment of CCS is by way of fee reduction. The provider directly receives the amount, but is *required* to pass on that amount to the individual, making the provider merely a conduit for the CCS that is payable to the individual.

(c) For a provider to receive that amount, the provider must be approved by the Secretary. At the relevant time, the Secretary was *required* to approve an application by a provider if the Secretary was satisfied of certain conditions.

40. Although I have only been asked about the position since 2 July 2018, I do not consider that the differences between the scheme summarised above and those that existed prior to 2 July 2018 are material to the conclusions that I express below.[42]

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[42] Prior to the commencement of the 2 July 2018 amendments, Divs 4 and 4AA of Pt 3 of the Administration Act provided for two forms of financial assistance in respect of childcare costs: the childcare rebate (**CCR**) and the childcare benefit (**CCB**). An individual could elect under s 65EAAAA of the Administration Act to have the CCR paid in one of a number of ways, one of which was by means of weekly payment to one or more approved child care services. The CCB was (with certain exceptions) payable to the credit of a bank account nominated and maintained by a childcare service: s 219Q. Providers were required to pass on amounts paid to them to the claimant or remit amounts that could not be passed on: see ss 219EA, 219B, 219QB.

Section 44(v)

41. Section 44(v) of the Constitution renders a member of Parliament incapable of being chosen, or of sitting, if each of the following elements are satisfied. There must be :

(a) an "agreement";

(b) "with the Public Service of the Commonwealth";

(c) in which a person has "direct or indirect pecuniary interest".

42. The leading authority concerning s 44(v) is *Re Day (No 2)*.[43] In that case the High Court unanimously held that Mr Day had a pecuniary interest in an agreement with the Public Service of the Commonwealth. However, four separate judgments were delivered and the reasoning varies considerably between those judgments. For that reason, uncertainty remains in relation to key aspects of the operation of s 44(v).

43. In *Re Day (No 2)*, all Justices agreed that the construction of s 44(v) adopted by Barwick CJ in *Re Webster*[44] – the only prior authority on the scope of s 44(v) – should be overruled. Chief Justice Barwick had held that s 44(v) was engaged only by an agreement "under which the Crown could conceivably influence the contractor in relation to parliamentary affairs."[45] That construction was strongly informed by his Honour's view that the purpose of s 44(v) was to protect parliamentarians from influence by the Crown.[46] All Justices agreed that that purpose was too narrow,[47] and that the purpose of s 44(v) also extends to preventing the influence of a member's private

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43 (2017) 91 ALJR 518.
44 (1975) 132 CLR 270.
45 *Re Webster* (1975) 132 CLR 270 at 280.
46 See also *Re Day (No 2)* (2017) 91 ALJR 518 at [14].
47 *Re Day (No 2)* (2017) 91 ALJR 518 at [48], [72], [98] (Gageler J), [161] (Keane J), [275] (Nettle and Gordon JJ).

financial interests upon the discharge of his or her parliamentary functions.[48] But, while accepting that wider purpose, five Justices rejected a submission that s 44(v) should be construed so as to operate in a manner that was directly referrable to that purpose.[49]

44. Unfortunately, however, no consensus emerged as to the limits of the section. Justices Gageler and Keane focussed on element (b) above, while Nettle and Gordon JJ focussed on element (c). The reasoning of Kiefel CJ, Bell and Edelman JJ is more difficult to characterise. The result was quite differently framed tests, leaving the operation of the provision uncertain.

"Agreement"

45. In *Re Day (No 2)*, the parties all accepted that a lease between Mr Day and the Department of Finance was an "agreement with the Public Service of the Commonwealth".[50] Accordingly, the judgments provide only limited assistance on the meaning of the word "agreement" as it appears in s 44(v).

46. In my opinion, the word "agreement" in s 44(v) has a broader meaning than contract. An agreement need not be legally enforceable.[51] Indeed, in *Re Webster*, Barwick CJ said that it would be "a matter for great regret" that s 44(v) should "turn on technical concepts of the law of contracts".[52] In *Re Day (No 2)*, Keane J thought it "inconceivable that s 44(v) would not be engaged by an agreement by an officer of the executive government to provide payments to a parliamentarian, in return for support in the Parliament, simply

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48 *Re Day (No 2)* (2017) 91 ALJR 518 at [48] (Kiefel CJ, Bell and Edelman JJ), [168] (Keane J), [275] (Nettle and Gordon JJ). Justice Gageler agreed with this aspect of the other judgments: at [98].

49 *Re Day (No 2)* (2017) 91 ALJR 518 at [53] (Kiefel CJ, Bell and Edelman JJ), [100] (Gageler J), [154]-[156] (Keane J).

50 *Re Day (No 2)* (2017) 91 ALJR 518 at [12] (Kiefel, Bell and Edelman JJ), [185] (Keane J), [249] (Nettle and Gordon JJ).

51 See *Re Day (No 2)* (2017) 91 ALJR 518 at [190] (Keane J), [253], [258] (Nettle and Gordon JJ).

52 *Re Webster* (1975) 132 CLR 270, 277.

because both parties to the agreement were content that their arrangement should not be a contract enforceable in the courts".[53]

47. In *Re Day (No 2)*, the Commonwealth Attorney-General submitted that the word "agreement" encompassed any agreement, arrangement or understanding. While the Court did not need to rule on that submission,[54] in my opinion it reflects the preferable approach.

48. It appears that there are two arguments by which it might be said that RHT Investments has an agreement with the Public Service of the Commonwealth.

49. The first argument is that the process by which RHT Investments became an approved provided of child care services is an "agreement" within s 44(v) of the Constitution. The argument would involve treating an application for approval as a kind of "offer" that is "accepted" if the application is approved by the Secretary.

50. In my opinion that argument should be rejected, because the application process, which is governed by Pt 8 of the Administration Act, is one by which RHT Investments was *entitled* to approval if it satisfied certain fixed and non-discretionary statutory criteria. The word "agreement", in its ordinary meaning, involves consent or a meeting of minds. The Macquarie Dictionary definitions of "agreement" include "an expression of assent by two or more parties to the same object" and "unanimity of opinion; harmony in feeling". To similar effect, the Oxford Dictionary definitions include an arrangement "agreed by mutual consent" and the "action of consenting; consent". The notion of consent directs attention to the existence of choice. If one or more persons to an arrangement cannot choose whether or not to agree, it is not meaningful to refer to their "agreement".

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53 *Re Day (No 2)* (2017) 91 ALJR 518 at [190].
54 See *Re Day (No 2)* (2017) 91 ALJR 518 at [260] (Nettle and Gordon JJ).

51. That approach to the meaning of "agreement" in s 44(v) aligns with the purpose of that section as identified in *Re Day (No 2)*, because the capacity of an agreement to influence a member of parliament in the discharge of his or her parliamentary functions if the member has a right to a particular benefit or entitlement may be limited. That follows because the relevant benefit or entitlement can be obtained irrespective of the manner in which the member performs his or her parliamentary functions.

52. Applied to the present circumstances, an application and approval pursuant to Pt 8 of the Administration Act is not an "agreement" because, while the applicant for such approval has a choice as to whether to apply, the recipient of the application has no such choice. The Secretary was obliged to grant the approval sought by RHT Investments under s 194 of the Administration Act (as it existed in 2014) provided the relevant preconditions were satisfied. As the Secretary could not refuse the application, he or she cannot properly be described as having agreed to it. That points strongly against the conclusion that the grant of an approval is an "agreement" to which s 44(v) applies. Further, the process created no capacity to influence Mr Dutton in the discharge of his parliamentary duties, because RHT was entitled to be registered irrespective of the manner in which he discharged those duties.

53. The second argument is that the process by which CCS is paid into a bank account nominated and managed by RHT Investments should be characterised as involving an agreement between RHT Investments and the Public Service of the Commonwealth. However, once again, such payments are made in accordance with a detailed statutory scheme under Pt 3A of the Administration Act. Of particular note, that scheme provides that CCS must be claimed by an *individual*, the Secretary must determine that the *individual* is eligible for CCS, and the amount payable must be determined on a weekly basis by the Secretary pursuant to provisions that allow for means testing. While the approved provider (here, RHT Investments) must be *notified* of such a

determination,[55] there is no agreement between the provider and the Secretary notwithstanding that, since 2 July 2018, payment of CCS is ordinarily made to the credit of a bank account maintained by the provider.[56] No such agreement is necessary because the provider is merely a conduit, being obliged within 14 days either to pass the amount of CCS to the individual who applied for it, or if that is not practicable to remit it to the Secretary. Failure to take either of those steps is an offence of strict liability.[57]

Agreement "with the Public Service of the Commonwealth"

54. Even if the High Court were to conclude by one of the above avenues that there is an "agreement", there is a reasonable argument that that agreement would not be "with the Public Service of the Commonwealth".

55. In *Re Day (No 2)*, some members of the High Court limited the notion of an "agreement with the Public Service of the Commonwealth" by drawing a distinction between an agreement with the Public Service and an agreement with the Crown. In particular, Keane J, having drawn that distinction, indicated that an agreement with "the Commonwealth" or with the "Crown in right of the Commonwealth" made "under a law of the Commonwealth of general application" will not engage s 44(v).[58] His Honour explained:

> Pecuniary benefits available generally to members of the Australian community are not within the mischief at which s 44(v) is directed merely because the Commonwealth is the ultimate source of the benefit. Given the purpose that informs s 44(v), there is no reason to expand its disqualifying effect to any person who might obtain a pecuniary benefit conferred by the Commonwealth which is available generally to the community.

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55 Administration Act, s 67CE(4).
56 Administration Act, s 67EB(1).
57 Administration Act, s 201A(3).
58 *Re Day (No 2)* (2017) 91 ALJR 518 at [200].

56. Justice Gageler agreed with Keane J that "an agreement entered into by the Executive Government of the Commonwealth in the execution of a law of general application enacted by the Parliament" would not engage s 44(v).[59] His Honour apparently intended that exception to capture a pecuniary interest that a parliamentarian might "reasonably be expected to be able to have in routine or otherwise patently benign agreements with the Executive Government of the Commonwealth". Examples included a bond issued by the Treasury, or "an agreement as to the amount of compensation constituting just terms following the compulsory acquisition of land under the *Lands Acquisition Act 1989* (Cth)". That last example highlights that the agreement in execution of a law of general application does not need to be one of a kind that all members of the public may enter into. It suggests that the concept of an agreement in execution of a law of general application is one where the agreement is made pursuant to the same law and in the same manner as it would have been made with any member of the public. So understood, while the payments of CCS have their source in Commonwealth consolidated revenue, the fact that those payments are made in accordance with Pt 3A of the Administration Act might have the consequence that they were not made pursuant to an agreement with "the Public Service of the Commonwealth".

57. That said, Nettle and Gordon JJ specifically rejected the utility of the distinction between an agreement with the Commonwealth and an agreement with the Public Service of the Commonwealth, so the Court is sharply divided on this point.[60]

58. The position of Kiefel CJ, Bell and Edelman JJ is more difficult to assess. Their Honours did not embrace the distinction in terms. However, at one point their Honours reasoned that particular agreements (the leases in issue in one of the earlier authorities[61]) were not agreements that would attract

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59 *Re Day (No 2)* (2017) 91 ALJR 518 at [102]-[107].
60 *Re Day (No 2)* (2017) 91 ALJR 518 at [266]-[267].
61 *Hobler v Jones* [1959] Qd R 609.

disqualification because "they were merely ordinary leases in the terms and conditions and in the form required by legislation. This is how the government ordinarily deals with persons".[62] Their Honours went on to state that "[t]here can be no relevant interest if the agreement in question is one ordinarily made between government and a citizen. Were this otherwise, every day-to-day dealing which a citizen has with government could result in the disqualification of a citizen who happens to be a parliamentarian."[63]

59. On that approach, the fact that RHT Investments both applied for registration pursuant to the same statutory provisions as apply to any other child care provider, and received payments of CCS to be passed on to individuals who were entitled to them again pursuant to the same provisions that apply to all other child care providers, has the consequence that, even if the arrangements pursuant to which that occurred were characterised as an "agreement", they may not be agreements that would attract the operation of s 44(v).

Direct or indirect pecuniary interest in the agreement

60. A pecuniary interest is an interest "sounding in money or money's worth".[64] In order to determine whether such an interest exists, it is necessary to look to the "practical effect" of an agreement on a person's interests.[65] "Given the constitutional context, it is enough that the person's pockets were or might be affected."[66] Several Justices in *Re Day (No 2)* indicated that the benefit must "be more than trivial" or "not insubstantial".[67]

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62 *Re Day (No 2)* (2017) 91 ALJR 518 at [68].
63 *Re Day (No 2)* (2017) 91 ALJR 518 at [69].
64 *Re Day (No 2)* (2017) 91 ALJR 518 at [54] (Kiefel CJ, Bell and Edelman JJ), [111], [116] (Gageler J), [191]-[192] (Keane J), [252]-[253] (Nettle and Gordon JJ).
65 *Re Day (No 2)* (2017) 91 ALJR 518 at [54] (Kiefel CJ, Bell and Edelman JJ), [89], [113], [118] (Gageler J), [192], [196] (Keane J).
66 *Re Day (No 2)* (2017) 91 ALJR 518 at [191] (Keane J), [253] (Nettle and Gordon JJ).
67 See *Re Day (No 2)* (2017) 91 ALJR 518 at [111] (Gageler J), [252], [278], [287], [288] (Nettle and Gordon JJ).

61. While I do not have any factual instructions concerning the financial position of RHT Investments, in my opinion it is probable that if the High Court reached this issue (which would occur only if, contrary to my conclusion above, the Court found that there is an agreement between the Public Service of the Commonwealth and RHT Investments) it would be likely to find that Mr Dutton had an indirect pecuniary interest in that agreement. I say that because, as a matter of practical commercial reality, the payment of a substantial amount of money pursuant to that agreement (reported by Fairfax Media as in the order of $2 million) would create the expectation of a benefit dependent on the performance if the contract. This is, however, a matter that would require further examination once further facts are available.

62. In my opinion, it is not to the point that the potential for Mr Dutton to benefit financially from such an agreement arises only by reason of him being a beneficiary of a discretionary trust. That follows because, in my view, *Re Day (No 2)* establishes that a parliamentarian may have an "indirect pecuniary interest" in an agreement between the Public Service and the trustee of a discretionary trust simply by reason of the parliamentarian being one of the potential beneficiaries of that trust. Chief Justice Kiefel, Bell and Edelman JJ expressly said "[b]eneficiaries of a discretionary trust, which benefits from, or via its trustee is party to, an agreement to which s 44(v) refers, may be considered to have an indirect pecuniary interest in an agreement".[68] Similarly, one basis upon which Gageler J held that Mr Day had an indirect pecuniary interest was because he was the beneficiary of the Day Family Trust (a discretionary trust).[69] The reasoning of those Justices is sufficient to constitute a majority on the point.

63. However, while the point was not decided by the remaining Justices,[70] their reasoning is consistent with the possibility that a beneficiary of a discretionary

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68 *Re Day (No 2)* (2017) 91 ALJR 518 at [62].
69 *Re Day (No 2)* (2017) 91 ALJR 518 at [89]-[92], [116].
70 See *Re Day (No 2)* (2017) 91 ALJR 518 at [191], [195] (Keane J), [287] (Nettle and Gordon JJ).

trust might have an indirect pecuniary interest. In particular, Nettle and Gordon JJ (in addition to Gageler J) endorsed[71] the entirety of following passage from the reasons of Gavan Duffy J in *Ford v Andrews*[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.

Justice Keane quoted the first half of the same passage with approval.[73] That passage can plainly be read as potentially capturing the circumstances of a beneficiary under a discretionary trust.

Inclusion Support Programme

64. Quite independently of the CCS arrangements analysed above, I am instructed that payments have been made by the Commonwealth to RHT Investments pursuant to the Inclusion Support Programme. That program, which does not have a statutory basis,[74] is designed to "provide support to early childhood and child care … services to build their capacity and capability to include children with additional needs in mainstream services".[75] One element of the ISP is the "Inclusion Development Fund" (**IDF**), which provides funding for, amongst other things, "IDF Subsidy for an Additional Educator". That subsidy provides "per hour funding to centre based services to subsidise the employment of an Additional Educator to increase the educator to child ratio

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71 *Re Day (No 2)* (2017) 91 ALJR 518 at [108], [110] (Gageler J), [254] (Nettle and Gordon JJ).
72 (1916) 21 CLR 317 at 335.
73 *Re Day (No 2)* (2017) 91 ALJR 518 at [194].
74 Funding is authorised under item 109 of Pt 2 of Sch 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth).
75 Department of Education and Training, "Inclusion Support Programme Guidelines 2016-2017 to 2018-2019" (June 2017, v 1.3) (**ISP Guidelines**) at [2].

in the care environment to support the inclusion of a child (or children) with disability, with ongoing high support needs with typically developing peers".[76]

65. Since the ISP commenced on 1 July 2016, the Camelia Avenue Childcare Centre, being the Centre operated by RHT Investments as trustee for the RHT Family Trust, has received IDF Subsidy for an Additional Educator totalling $15,640. To receive that funding, the Camelia Avenue Childcare Centre submitted applications in accordance with the ISP Guidelines, which were assessed and approved by the IDF Manager.[77] On the occasion of each approval, the IDF Manager sent a letter to Camelia Avenue Childcare Centre, which stated:

> This Approval Letter, together with the Conditions of Funding, make up the agreement between the Commonwealth and You in relation to how the Subsidy, for which you have been approved, will be used. You will be able to claim funding in accordance with this Approval Letter and the Conditions of Funding, as agreed at the time of submitting the application.
>
> …
>
> You agreed to the Conditions of Funding of the IDF Subsidy under the ISP upon submission of your Subsidy application. When You submit your first claim for the IDF Subsidy for an Additional Educator, this is considered Your acceptance of the approval as outlined in this approval letter.

66. Each letter also stated that the IDF Subsidy was to be paid "directly" to Camelia Avenue Childcare Centre "from the department, to the same bank account" that was nominated in the relevant application.[78]

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76 ISP Guidelines, "Section C".

77 See ISP Guidelines at [G], being an organisation called "KU Children's Services". The first approval was given on 10 February 2018 for the period 13 February 2017 to 11 February 2018; the second was given on 2 March 2018 for the period 5 March 2018 and 3 March 2019.

78 See ISP Guidelines at [C6].

67. In light of the above, in my opinion it is very likely that RHT Investments had "agreement[s] with the Public Service of the Commonwealth" pursuant to which $15,640 has been paid to RHT Investments.[79]

68. However, at present the better view appears to me to be that Mr Dutton is unlikely to have an indirect pecuniary interest in the agreements. That follows because, to receive the funding under the ISP, the Camelia Avenue Childcare Centre had to submit a claim that identified the Additional Educator, the details of when the Additional Educator attended the centre, and the details of when the relevant child attended the centre.[80] As indicated in each of the approval letters and the ISP Guidelines,[81] to receive payment for the IDF Subsidy for an Additional Educator, services providers had to submit claims retrospectively following the Additional Educator and the child's attendance. Under each agreement, the funding was provided in relation to a particular child for up to 10 hours per week. Importantly, it was a condition of each agreement that the funding be used for the purposes as stated in the approval letter.[82]

69. Assuming the Camelia Avenue Childcare Centre complied with that condition, it therefore appears unlikely that the IDF funding would have generated a surplus for RHT Investments that could have been distributed to Mr Dutton, for that funding should have been entirely consumed in providing the Additional Educator for the particular child. For that reason, I consider it unlikely that Mr Dutton would be disqualified on this basis.[83] However, it is

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79 Comprised of $4,140.00 in the 2016-2017FY, $9,890.00 in the 2017-2018FY, and $1,610.00 in the 2018-2019FY.

80 See ISP Guidelines at [C5].

81 ISP Guidelines at [C4.2].

82 See ISP Guidelines at [C2.6], Appendix 2.

83 In addition, I am instructed that in the 2015-2016 FY, the Camelia Avenue Childcare Centre received $886.55 under the "Jobs, Education and Training Child Care Fee Assistance" scheme. I understand that, under this scheme, certain social security recipients were eligible for an additional payment, which was paid directly to child care providers on the understanding that the amounts were to be used to offset the costs of child care incurred by the social security recipient. Even assuming there was an "agreement" between the Centre and the "Public Service of the Commonwealth" under this scheme (which is by no means clear), and even assuming that

not possible to reach a definitive conclusion on that matter without more detailed factual information.

70. I am grateful to my counsel assisting, Christine Ernst and Thomas Wood, for their assistance in the preparation of this Opinion.

71. I so advise.

Dated: 24 August 2018

STEPHEN DONAGHUE QC

Solicitor-General

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amount was not entirely consumed in the provision of services (as it may well have been), the amount that RHT Investments could have received that could have been distributed to Mr Dutton as a beneficiary of the RHT Family Trust in the short period between the date of his nomination for the 2016 election and the end of the 2015-2016 FY would plainly be negligible. Section 44(v) is not concerned with trifles: see *Re Day (No 2)* (2017) 91 ALJR 518 at [111] (Gageler J), [252] (Nettle and Gordon JJ).

IN THE MATTER OF THE

ELIGIBILITY OF MR DUTTON

PURSUANT TO SECTION 44(v) OF

THE CONSTITUTION

OPINION

Attention:
Will Frost
Senior Adviser
Office of the Attorney-General

SG No. 21 of 2018