THE PRESIDENT OF THE SENATE

RE: SENATOR SCULLION

ADVICE

SENATOR SCULLION

1. On 10 November 2001 Senator Scullion was elected to the Senate as a senator for the Northern Territory. He was nominated on 16 October 2001.

2. Section 44(v) of the Constitution provides that any person who has a 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 25 persons shall be incapable of being chosen or sitting as a senator.

ADVICE SOUGHT

3. I have been asked by the President of the Senate to answer the following questions:

> "1. **The facts and the circumstances leading up to and following the election of Senator Scullion to the Senate in 2001 in relation to his involvement, both as an individual and a shareholder in Kerrawang Pty Ltd trading as Barefoot, Marine in business dealings with various entities including the Australian Fisheries Management Authority, Coastwatch, Department of Defence, Defence Maritime Services and the ABC and whether there is evidence that Senator Scullion had any direct, or indirect, pecuniary interest in any agreement with the Public Service of the**

**Commonwealth in accordance with the provisions of section 44(v).**

2. **Having regard to the decision of the High Court in *In Re Webster* (1975) 132 CLR 270 and the 1981 report of the Senate Legal and Constitutional Affairs Committee on qualifications for parliamentary office and the evolution of parliamentary practices and community standards since the provisions of section 44(v) were enacted, whether the circumstances are such as to demand or require the Senate to refer the matter to the High Court sitting as the Court of Disputed Returns.**

3. **Do the facts as disclosed indicate any lack of integrity on the part of Senator Scullion, or any intention on his part to allow the Crown to influence him in the performance of his obligations as a member of the Senate?**

4. **Do the facts as disclosed indicate that Senator Scullion, or any entity with which he was associated, obtained any benefit or intended to obtain any benefit from the fact that Senator Scullion was either a candidate for the Senate or as a member of that House?**

5. **Do the facts as disclosed indicate any awareness or realisation on the part of Senator Scullion that any arrangements or transactions involving himself or any entities with which he was associated fell or might fall within section 44(v) of the Constitution?"**

*RE WEBSTER*

4. *In Re Webster* (1975) 132 CLR 270 Barwick CJ said of section 44(v):

> **"Because of the evident purpose of the disqualification provision, it applies only to executory contracts, that is to say, to contracts under which at the relevant time something remains to be done by the contractor in performance of the contract: see *Royse v. Birley* (25). An illustration of the principle may be seen in the case of *George Eric Leyland Laforest (Clerk of the House of Representatives) v. Morris Cargill* (26). For the same reason, it has been said that "What are meant to be covered" (i.e., by 22 Geo. 111 c.45) "are contracts of a more permanent or continuing and lasting character, the holding and enjoying of which might**

improperly influence the action both of legislators and the Government": per Low J. in *Tranton v. Astor* (27). In somewhat the same vein, Montague Smith J. in *Royse v. Birley* (28) thought that what was contemplated was "a contract which would endure for some period of time" during which something remained to be done by the contractor. True it is that both these judges were influenced to some extent by the presence in the statutes with which they were concerned of a disqualification which was "during the time" that the contractor held the contract. But, in my opinion, this requirement of something more than a "casual or transient" contract in order to found a disqualification, springs out of the purpose of the statute, in this case the Constitution, creating the disqualification.

It seems to me that, upon the proper construction of the paragraph, bearing in mind the purpose of its presence in the Constitution, the agreement to fall within the scope of s.44(v.) 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, or by something done or refrained from being done in relation to the contract or to its subject matter, whether or not that act or omission is within the terms of the contract. In the climate of the eighteenth century, the likelihood of such influence upon a government contractor could well be thought to be high. Accordingly, the mere existence of a supply contract justified the disqualification. But in modern business and departmental conditions the possibility of influence by the Crown is not so apparent: whilst it need not be certain, at least it must be conceivable, and in any case the possibility will arise from the continuing nature of the agreement. Further, it seems to me that the interest in the agreement of the person said to be disqualified must be pecuniary in the sense that through the possibility of financial gain by the existence or the performance of the agreement, that person could conceivably be influenced by the Crown in relation to Parliamentary affairs." (at 279-80)

...

"But, however that may be, it is in my opinion more than difficult to conclude that the shareholder does have a pecuniary interest in each and every of the day to day transactions of the company, whether they be strictly "over the counter" transactions or arise out of orders given for the immediate supply of goods pursuant to a standing offer of supply. Under the general law, plainly he does not: in my opinion, there is good reason to conclude that the same is true in relation to s.44(v.). It may possibly be that other

> **circumstances may combine with his shareholding to create such an interest: but no such circumstances exist in this case.**
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> **Further, bearing in mind the purpose of the disqualification, it is difficult to see that the shareholder in this instance has any such pecuniary interest in the particular agreement arising from the giving of a specific order as would conceivably place him in any respect under the influence of the Crown in relation to Parliamentary activities, or in any wise enable the Crown through him to "sap" the freedom and independence of Parliament. However, I have no reason to decide that further point.**" (at 287-8)

KERRAWANG PTY LTD

5. In October and November 2001 Senator Scullion held 3 shares in Kerrawang Pty Ltd. There were 8 shares issued in the company. Senator Scullion's wife, J.G. Scullion, held 3 shares. 2 shares were held by DJJ Rolfe. Senator Scullion was a director and the secretary of Kerrawang. He gave notice of his resignation as a director and secretary on 4 February 2002. He was paid a director's salary until 25 February 2002. Senator Scullion sold his shares in Kerrawang to his wife on 14 May 2002. In the year ended 30 June 2002 Senator Scullion received $47,600 in salary from Kerrawang; and he also appears to have received some dividends, the amount of which is not clear to me.

6. I was originally told that in the year ended 30 June 2002 Kerrawang received over $1.3 million (GST exclusive) from the Australian Fisheries Management Authority (***AFMA***). This amount represented approximately 75% of its income for the year. Kerrawang had had a written contract with AFMA to provide caretaker and other services. That contract had expired on 30 June 2001. No further written contract was entered into until 7 February 2003.

However in the meantime Kerrawang continued to provide services to AFMA on an as required basis on substantially the same terms as before but with some increases in reimbursements, and Kerrawang was paid by AFMA for its services. The payments received included reimbursement for long-term costs. It was under this pro term arrangement that Kerrawang received the $1.3 million to which I have referred.

7. However it has since appeared that the position was that Kerrawang had had a written contract with the Commonwealth which expired in 1996. That contract was extended in writing to June 1998, then to June 1999, and then to June 2000. Thereafter there was no written agreement in force, until February 2003. Between June 2000 and February 2003 Kerrawang continued to provide substantially the same services as it had been providing to the Commonwealth before June 2000, but it is not clear to me whether Kerrawang was providing those services to the Commonwealth or to AFMA or which of the two was paying for them. It does seem however that during this period, there was no written or oral or implied contract in place with Kerrawang for it to provide the services for any particular period of time. The $1.3 million paid to Kerrawang may therefore have been paid by the Commonwealth or by AFMA.

8. (a) Having regard to the terms of the Fisheries Administration Act I do not think that the AFMA is part of the Public Service of the Commonwealth within section 44(v) of the Constitution. The AFMA is a body corporate with 8 directors. All, except the Managing Director, are appointed by the Minister. But the 5 nominated directors are to be appointed from persons nominated by a Selection Committee.

A Selection Committee consists of the Presiding Member who is appointed by the Minister, two members determined by the Minister, two member nominated by the peak industry body, and one member nominated by the Ministerial Council. A Selection Committee must select only one person in respect of each appointment to be made by the Minister. The AFMA has its own employees and its finances are provided for in Division 8. Accordingly if the arrangements Kerrawang had in the period October 2001 – May 2002 were arrangements with AFMA I do not think that they were arrangements with the Public Service of the Commonwealth within section 44(v).

(b) On the other hand if Kerrawang's arrangements were arrangements with the Commonwealth, I think that they are arrangements which might potentially be arrangements with the Public Service of the Commonwealth, although they were with the Commonwealth itself. However, in order that an agreement with the Public Service of the Commonwealth should fall within section 44(v) of the Constitution, it is necessary, according to *Re Webster*, that the agreement "have currency for a substantial period of time". The period of time (July 2000 – February 2003) during which Kerrawang provided its services on an informal basis and without the benefit of any contract to do so for any particular period of time, is, it seems to me, "a substantial period of time". But the informal arrangements pursuant to which those services were provided, do not appear to have been arrangements that the services would be provided for any particular period of time. They were simply provided as required. If it was the Commonwealth

to which those services were provided, it follows, in my opinion, that they were not provided pursuant to an agreement that had currency for a substantial period of time, as required by *Re Webster*, and accordingly that the provisions of section 44(v) were not infringed by reason of the arrangements with Kerrawang pursuant to which the services were provided. What seems to have occurred is that on each occasion on which services were required, the service required was requested, and, upon Kerrawang agreeing to provide the service, a contract for that service (only) came into existence.

9. The payment ($13,420) invoiced by Kerrawang to Coastwatch on 2 November 2001 relates to a charter arranged for 24 October 2001 i.e. before Senator Scullion's election but after his nomination. The charter, when arranged by Kerrawang, was understood by it to be being arranged for AFMA. AFMA was invoiced. But AFMA then informed Kerrawang that Coastwatch had agreed to take responsibility for the invoice. Coastwatch was then invoiced by Kerrawang. In the circumstances this contract does not seem to be a contract with the Public Service of the Commonwealth.

10. (a) In period from 16 October 2001 to 14 May 2002 Kerrawang was also engaged by the Department of Defence to repair a gangplank or gangplanks, as one off job(s), and was paid over $11,000. In my opinion this contract was not one with "a currency for a substantial period of time, and ... one under which the Crown could conceivably influence" Kerrawang or Senator Scullion "in relation to parliamentary affairs" – see *Re Webster* at 280.

(b) In November and December 2001 Kerrawang carried out repair work for the Darwin Naval Base Stores and was paid by the Department of Defence approximately $10,600. In my opinion this contract was not of the kind just described.

(c) Nor, in my opinion, can the two contracts or sets of contracts referred to in this paragraph be together regarded as of that kind.

11. In the period from 16 October 2001 to 14 May 2002 Kerrawang carried out three short charters for the ABC, and was paid $1,000 in total. In my opinion these charters were not of the kind described above.

12. During the relevant period, on three occasions Kerrawang entered into subcontract arrangements with and carried out work for Defence Maritime Services, which had contracts with the Navy, and Kerrawang received payments for this work totalling about $1,500. Defence Maritime Services is a private company. I do not think that these arrangements are arrangements by Kerrawang with the Public Service of the Commonwealth, even indirectly.

13. During the relevant period Kerrawang chartered a vessel to the NT Quarantine Department. Responsibility for paying for the charter apparently rests with the Australian Quarantine Inspection Service. But as the charter was to the NT Department, it does not seem to be a contract with the Public Service of the Commonwealth.

OTHER

14. The NG and JG Scullion Partnership does not appear to have entered into any arrangements with Kerrawang or any Commonwealth department or body during the relevant period.

15. The NG & JG Scullion Superannuation Fund has received contributions from Kerrawang. The only contributions made for Senator Scullion during the relevant period were the compulsory 8 percent of wages. I do not think that Senator Scullion's interest in this fund is a contract of the kind referred to above.

GENERAL

16. Criticism has been levelled in the decision *In Re Webster.* A discussion of some of the criticisms appears in the Report of the Senate Standing Committee Constitutional and Legal Affairs on "The Constitutional Qualifications of Members of Parliament" Parliamentary Paper No 131/1981 Chapter 7. At paragraphs 7.3 and 7.18 the Report says:

> "7.3 **At first sight, s.44(iv) seems extremely far-reaching, and capable – on a strictly literal interpretation – of disqualifying members for engaging in quite trivial or every-day transactions with government departments. Examples of the manifest absurdities that could arise include renting a telephone, subscribing to a Commonwealth loan, buying stamps and so on. Some commentators have argued that so many possible applications of the section are patently absurd that the courts would end up denying it any practical application at all. Others hold the view that s.44(v) is capable of relatively precise, narrow and acceptable**

> **application.[1] This latter view is more in accord with the reasonably well-defined body of case law developed around the Act of 1782 and the similar legislative provisions in Commonwealth jurisdictions, including the Australian States, and was the reasoning followed by Barwick CJ sitting as a Court of Disputed Returns when s.44(v) eventually came under judicial interpretation in the case of *In re Webster*.[2]"**
>
> **"7.18 While the Chief Justice's judgment in the *Webster* case offers little clarification on these issues, parliamentarians can perhaps gain some solace from the decision, as it indicates that the High Court is prepared to view the provision restrictively. Despite the difference in the statutory language between s.44(v) and its progenitors, His Honour felt able to apply English cases which tended to construe these earlier provisions in a restrictive manner, ensuring a relatively narrow and acceptable application. This raises the possibility that the High Court may consider many of these decisions as persuasive which would in turn, we suggest, give some efficacy to s.44(v). Whichever way the court approaches this question in the future, it seems apparent that they will continue to seek out ways of confining the operation of s.44(v) to the cases to which it was really intended to apply, namely, those where the character of the agreement is such as to raise prima facie questions in the public mind about the exercise of improper influence on the part of either the Government or the contractor."**

17. I think that it is obvious that section 44(v) of the Constitution cannot be given a strictly literal effect. The consequences would be absurd, as the Report says. This being so, the construction adopted by Barwick CJ in *Re Webster* which is set out pp 279-80 of the Report and above is not only founded on authority but is based on an attempt to construe the section in a manner which gives it effect according to its perceived purpose. As far as I am aware no case has been decided since that case was decided which diminishes its authority and the

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[1] See Gareth Evans, 'Pecuniary Interests of Members of Parliament under the Australian Constitution', (1975) 49 ALJ 464: a detailed analysis of ss.44(v) and 45(iii).
[2] (1975) 49 ALJR 205.

Report indicates a guarded acceptance of it. In my opinion I should accept the ration decidendi of *Re Webster.* The latter part of the decision is not only more controversial but is expressly obiter dicta. That part of the decision is presently irrelevant to the reasoning in this Advice.

ADVICE

18. Accordingly I answer the questions on which I have been asked to advise as follows:

Question 1: The facts and circumstances as disclosed to me by and on behalf of Senator Scullion are set out above. I have accepted what I have been told, as I have no reason to doubt it and no real ability to test it or amplify it. In my opinion, the facts and circumstances as disclosed to me do not show that Senator Scullion had any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth within section 44(v) of the Constitution. My opinion is based on my acceptance of the ratio decidendi of *Re Webster.* In my opinion, the ratio decidendi of *Re Webster* should be accepted.

Question 2: In my opinion, no.

Question 3: In my opinion, no.

Question 4: In my opinion, no.

Question 5: In my opinion, no, not at the time of the arrangements or transactions. Subsequently Senator Scullion became aware of the possibility that he had breached section 44(v).

**Owen Dixon Chambers West**
**18 December 2003**

**B.J. SHAW**