ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
SITTING AS THE COURT OF DISPUTED RETURNS
CANBERRA REGISTRY

NO C27 OF 2017

**RE MS JACQUI LAMBIE**

Reference under s 376 of the *Commonwealth Electoral Act 1918* (Cth)

# SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

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## PART I INTERNET PUBLICATION

1. These submissions are in a form suitable for publication on the Internet.

## PART II BASIS OF APPEARANCE

2. The Attorney-General gave notices under s 78B of the *Judiciary Act 1903* (Cth) on 1 December 2017 (**CB 38**) and 15 December 2017 (**CB 94**).

3. The Attorney-General of the Commonwealth intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth). He is also a party pursuant to s 378 of the *Commonwealth Electoral Act 1918* (Cth) (**CB 68**).

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## PART III APPLICABLE PROVISIONS

4. Section 44(iv) of the Constitution relevantly provides that '[a]ny person who … holds any office of profit under the Crown … shall be incapable of being chosen or of sitting as a senator ...'.

5. The applicable provisions of the *Local Government Act 1993* (Tas) (**LGA**) are extensive and the Court is likely to be assisted by having access to the whole of that Act. There are two relevant versions, sufficiently identified as the versions in force immediately before and immediately after 22 November 2017. The relevant differences between those two versions appear from the *Local Government Amendment (Targeted Review) Act 2017* (Tas) (as made) (**Targeted Review Act**).

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## PART IV ARGUMENT

### SUMMARY

6. The issue presented by the reserved question of law is whether either of the offices of Councillor of the Devonport City Council or Mayor of Devonport is an office of profit under the Crown within the meaning of s 44(iv) of the Constitution (**CB 92**).

7. The Attorney-General submits that neither office is an office of profit 'under the Crown' in the requisite sense.

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8. 'The Crown' means the executive government. 'Under' means 'under the control of'. The language of s 44(iv) focuses upon control of the office itself: an office is under the control of the executive government if it is in the gift of the executive government. Such an office is identified by whether the executive government has the power to appoint the occupant of the office or, if it does not have that power, whether it nonetheless has such extensive power to dismiss the occupant, or to alter the remuneration attached to the office, that, in substance and practical effect, the occupancy of the office (i.e. the ongoing 'holding' of the office) is in the gift of the executive government.

9. The offices of mayor and councillor under the LGA are elected offices, with specified terms. Appointment to those offices obviously is not in the gift of the executive. The confined powers of the executive government to dismiss the occupants of those offices, or to affect the remuneration that attaches to them, fall far short of establishing that, in substance or practical effect, ongoing occupancy of either office is in the gift of the executive government. For those reasons, while both offices are 'offices of profit', neither is an office of profit 'under the Crown'.[1]

10. These submissions will address first the construction of s 44(iv), then apply the preferred construction of s 44(iv) to the facts to show that Mr Martin is not incapable of being chosen or of sitting as a senator by reason of s 44(iv). Finally, the submission will respond to the contentions advanced on behalf of Ms McCulloch.

## CONSTRUCTION OF SECTION 44(iv)

### Approach to construction generally

11. Section 44(iv) should be construed according to 'the ordinary and natural meaning of the language' read in light of its context, including its purposes, the surrounding constitutional structure, and any relevant drafting history.[2] Section 44(iv) should also be construed sensitively to the function that the disqualifying provisions of s 44 serve

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[1] That accords with the conclusion expressed with respect to the position of a mayor in Twomey, *The Constitution of New South Wales* (2004) 437-438.

[2] See *Re Canavan* (2017) 91 ALJR 1209, 1215 [19], 1215-1218 [20]-[36] (The Court); *Re Day (No 2)* (2017) 91 ALJR 518, 554 [247] (Nettle and Gordon JJ).

within the constitutional scheme for representative government. In particular, it is important that there be certainty and stability in those electoral processes by which the constitutionally mandated direct choice of the people is carried into effect. Those considerations favour a construction of s 44(iv) that does not involve a test that is 'unduly evaluative', 'vague', or 'impressionistic'.[3] Section 44(iv) should take a meaning that gives it 'the greatest certainty of operation that is consistent with its language and purpose',[4] although that is not to say that it is necessarily to be read in any narrow way, its true breadth being discerned from the language and purpose itself.[5]

**'Office of profit'**

10 12. An 'office' is '"a right to exercise a public or private employment" and to take the "fees and emoluments thereunto belonging"'.[6] It may be relevant (but not determinative) that a given position is described in law as an 'office'.[7] An office 'of profit' is one to which there is attached an entitlement to allowances in the nature of remuneration for performing the duties of the office. Allowances in the nature of mere reimbursement of expenses will not suffice, but no issue about this arises in this proceeding.

**'Under the Crown'**

13. 'The Crown', in s 44(iv), is synonymous with the executive government (whether of the Commonwealth or a State or Territory).[8] While the term was understood at the time of
20 Federation to be 'used in several metaphorical senses',[9] s 44(iv) had its origins in older statutory antecedents in England. The identified purposes of those English provisions, in particular the 'incompatibility' of certain non-ministerial offices under the Crown

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3 See *Re Day (No 2)* (2017) 91 ALJR 518, 535 [98], [100] (Gageler J), 542 [156] (Keane J), 556 [263] (Nettle and Gordon JJ); see also 529 [53] (Kiefel CJ, Bell and Edelman JJ); *Re Canavan* (2017) 91 ALJR 1209, 1219 [48], 1220-1221 [55], 1221 [57] (The Court).

4 *Re Day (No 2)* (2017) 91 ALJR 518, 535 [97] (Gageler J).

5 *Re Day (No 2)* (2017) 91 ALJR 518, 531-532 [72] (Kiefel CJ, Bell and Edelman JJ).

6 *Sykes v Cleary* (1992) 176 CLR 77, 95 (Mason CJ, Toohey and McHugh JJ, with whom Brennan, Dawson and Gaudron JJ relevantly agreed) quoting Blackstone, *Commentaries on the Laws of England* (1766), bk 2, 36.

7 *Sykes v Cleary* (1992) 176 CLR 77, 97 (Mason CJ, Toohey and McHugh JJ), 117 (Deane J).

30 8 Quick and Garran, writing in 1901, said that it extended to offices under the Crown 'in any part of the British dominions': *Annotated Constitution of the Australian Commonwealth* (1901), 492.

9 *Sue v Hill* (1999) 199 CLR 462, 498 [83] (Gleeson CJ, Gummow and Hayne JJ).

with membership in the House of Commons and 'the need to limit the control or influence of the executive government over the House'[10] point to a usage of the term 'the Crown' in the sense of 'the government', being the executive as distinct from the legislative branch of government.[11] That is consonant with the holding in *Sykes v Cleary* that s 44(iv) encompasses at least permanent employees of the government.[12]

14. The preposition 'under' has a variety of ordinary meanings and so its precise connotation in s 44(iv) must be derived from its context. As will be explained, that context indicates that 'under' is used to connote an office that is subject to the control of the executive government. The focus is upon control of *the office itself* ('office ... under the Crown'). That is different from control of *the officeholder*. Control of the officeholder in the performance of his or her duties (or some subset thereof) might be incidentally relevant, but the question is whether the executive government controls the 'office of profit'. That directs attention to whether occupation of the office (whether initially, or on an ongoing basis) is 'in the gift of' the executive government.

15. Whether an office has this character will usually be discerned from the source of the power to appoint the occupant of the office. An executive power of appointment is a sufficient condition for an office to be an office of profit under the Crown: if the executive government appoints the office-holder, then the office is 'under the Crown'.

16. If the executive government does <u>not</u> appoint the office-holder, then the office is not 'under the Crown' unless (in what is likely to be a rare case) the executive government has such extensive power to dismiss the office-holder, or to alter the remuneration attached to the office that, in substance and practical effect, ongoing occupation of the office (the 'holding' of the office), or access to the benefits attached thereto, is in the gift of the executive government.

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[10] *Sykes v Cleary* (1992) 176 CLR 77, 95 (Mason CJ, Toohey and McHugh JJ).

[11] *Sue v Hill* (1999) 199 CLR 462, 499 [87]-[88] (Gleeson CJ, Gummow and Hayne JJ). Ms McCulloch's submissions at [21] are to the same effect.

[12] *Sykes v Cleary* (1992) 176 CLR 77, 96 (Mason CJ, Toohey and McHugh JJ).

17. The purposes of s 44(iv), and particularly the elimination of the 'principal mischief' of control or influence of Parliament by the executive government,[13] point to the central significance of the executive's power to gift offices of profit and thereby to exert control or influence. It is the gifting of the office of profit itself, the threat of removal from the remunerated office, or the prospect of altering fundamentally the terms on which the office is filled by changing the remuneration attached to it, that is apt to give rise to control or influence over the office-holder in their parliamentary role, that being the concern of s 44(iv).

18. By contrast, s 44(iv) is not concerned to prevent executive control over a person in the performance of non-parliamentary duties. Accordingly, the fact that the executive government can direct an officer in the discharge of one or more duties of an office says little about whether the office itself is 'under the Crown'. For example, a statutory power of direction to a person that is enforceable under administrative law or via an injunction, but breach of which has no implications for the office-holder's continued occupation of the office, does not itself indicate that the office is 'under the Crown'. If, however, failure to follow the direction exposed the officer-holder to dismissal (or, perhaps, reduced remuneration), that would be a factor pointing to the conclusion that the office is 'under the Crown'.

19. The above submission finds textual support in the focus in s 44(iv) on offices 'of profit'. Loyalties to the Crown that might arise as an incident merely of the duties of an office do not themselves engage the disqualification;[14] some *profit* attaching to the office is required, which indicates that it is the loyalties incidental to the gift (or retention) of the office itself against which s 44(iv) guards. There is also textual support in the balance of s 44(iv), which is concerned with pensions 'payable during the pleasure of the Crown'. Of that disqualification, Sir Samuel Griffith said in the Convention Debates that the object was 'to prevent persons who are dependent for their livelihood upon the government, and who are amenable to its influence, from being

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[13] *Sykes v Cleary* (1992) 176 CLR 77, 97 (Mason CJ, Toohey and McHugh JJ).

[14] Cf *Sykes v Cleary* (1992) 176 CLR 77, 122 (Deane J).

members of the legislature'.[15] That rationale, consistent with the recognised purposes of the English antecedents, can be seen also to support the first limb of s 44(iv).

20. There is further historical support for the construction advanced above. State constitutions in force at the time of Federation contained similar provisions, and there was some appreciation during the Convention Debates that s 44(iv) amounted 'merely to the carrying out of the present system under [those] various constitutions'.[16] Under the *New South Wales Constitution Act 1855* (Imp) (18 & 19 Vict c 54) Sch 1, there were two relevant provisions: by s 18, 'any person holding any office of profit under the Crown' (with specified exceptions) was incapable of being elected or of sitting or voting as a member of the Legislative Assembly; by s 19, if a member of the Legislative Assembly 'shall accept of any office of profit or pension from the Crown' then his election was declared void. There is no reason to think that either provision was intended to operate more or less broadly than the other. Each was directed to the same mischief, albeit at different points in time. Sections 28 and 29(5) of the *Western Australia Constitution Act 1890* (Imp) (53 & 54 Vict, c 26) contained a similar usage of the different language without relevant difference in meaning. No other State Constitution contained any provision casting doubt upon that conclusion. The New South Wales and Western Australian provisions tend to show the contemporary equivalence of meaning of 'under the Crown' and 'from the Crown'. The better view is therefore that both offices of profit under the Crown and offices of profit from the Crown refer to the same sub-class of offices of profit generally.

21. Ms McCulloch at [46] relies upon an asserted historical distinction in the English antecedents between the language of offices 'under' and 'from' the Crown. Rogers, who tentatively suggested some distinction in meaning, considered that offices 'from' the Crown were a *narrower* class than offices 'under' the Crown.[17] On the other hand, Dwyer J, considering an argument directed to 'an historical difference between the

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[15] *Convention Debates*, Sydney, 3 April 1891, 660 (Sir Samuel Griffith).

[16] *Convention Debates*, Sydney, 18 March 1891, 471 (Mr Thynne).

[17] Carter, *Rogers on Elections, Registration, and Election Agency* (13th ed, 1880), 219; Williams; *Rogers on Elections: Parliamentary Elections and Petitions* (20th ed, 1928) vol 2, 9; Select Committee on Offices or Places of Profit under the Crown, *Report*, House of Commons Paper No 121, Session 1940–1 (1941) xiii [17].

former phrase "an office under the Crown" and "an office from the Crown"', did not decide whether there was any difference between the two phrases, but said that 'if there is any substantial difference [he was] disposed to think that "an office from the Crown" has a rather *wider* meaning than "an office under the Crown"'.[18] The other judges in that case, Draper J and Northmore CJ (at first instance), said nothing bearing on the precise point.[19] Thus, there does not appear ever to have been a clear enough distinction between the two phrases to think that, by the time of their Australian reception in NSW and WA, any such distinction had survived. Certainly, s 44(iv) adopted no such distinction and the Court has referred in that context to both antecedent formulations.[20]

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22. Offices in the gift of the executive government will in most cases be sufficiently identifiable from the source of the power to appoint the office-holder. This is a clear and workable standard capable of certain and stable operation.

23. The standard must, of course, operate not formalistically but with regard to matters of substance and practical effect. The circumstances in which control might be exercised over an office of profit are 'not limited by experience but by imagination'.[21] There may therefore be circumstances where the power of appointment is reposed elsewhere than the executive government, but the executive government nonetheless retains such extensive powers to remove the office-holder or to affect the remuneration of the office that ongoing holding of the office is, in substance and practical effect, in the gift of the executive. For example, an unconfined power to dismiss a disfavoured appointee may, in substance and practical effect, amount to a veto over the holding of the office by anyone other than a person chosen by the executive. This standard will necessarily involve some evaluation of the circumstances, but within limited bounds. The question is not whether the level of control is too great in some impressionistic sense; it is whether the level of control is such as to mean that the holding of the office (and the right to the associated remuneration) is in the gift of the executive, notwithstanding that the power of appointment is reposed elsewhere.

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18 *Clydesdale v Hughes* (1934) 36 WALR 73, 85.

19 See also *Clydesdale v Hughes* (1934) 51 CLR 518, 525 (Rich, Dixon, McTiernan JJ).

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20 *Sykes v Cleary* (1992) 176 CLR 77, 95.

21 *Re Day (No 2)* (2017) 91 ALJR 518, 555 [260] (Nettle and Gordon JJ) (in the context of an 'agreement' within the meaning of s 44(v)).

24. The construction of s 44(iv) advanced above is consistent with authority. In particular, both *Sykes v Cleary* and *Re Nash (No 2)* concerned offices in which the executive government had the power of appointment. That was sufficient to characterise the relevant offices as 'under the Crown' notwithstanding that, in the case of the office of part-time AAT member considered in *Re Nash (No 2)*, the executive government had at most extremely confined powers to supervise, control or remove the office-holder following appointment.[22]

25. The construction advanced above is also consistent with the apparent recognition during the Convention Debates that judges (appointed by the executive, but otherwise not subject to supervision, control or removal) hold offices of profit under the Crown,[23] but that the President of the Senate and the Speaker of the House of Representatives (who are not appointed by the executive, instead being chosen respectively by the Senate (s 17) and the House (s 35)) are not offices of profit 'under the Crown'.[24]

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26. This construction is also consistent with this Court's consideration of the word 'under' in the context of s 116 of the Constitution. In *Williams v Commonwealth*, Gummow and Bell JJ (with whom French CJ, Hayne, Crennan and Kiefel JJ agreed) held that chaplains engaged by SUQ did not hold any 'office under the Commonwealth'. In so holding, their Honours emphasised that the chaplains were 'engaged by SUQ' and did not 'enter into any contractual or other arrangement with the Commonwealth'.[25]

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## FACTS

27. The facts are agreed between the parties in a Statement of Agreed Facts (**AF**) (**CB 98-102**). At all relevant times, Mr Martin has held the offices of Councillor of the Devonport City Council and Mayor of Devonport {AF [14], [19] (**CB 100**)}.

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22 *Re Nash (No 2)* (2017) 92 ALJR 23, 31-32 [44]-[45]. See also *Bowman v Hood* (1899) QLJ 272, 276 (Real J sitting as the Elections Tribunal).

23 *Convention Debates*, Adelaide, 17 April 1897, 739-745; Sydney, 21 September 1897, 1028-1029.

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24 *Convention Debates*, Sydney, 3 April 1891, 660 (Sir Samuel Griffith); Melbourne, 16 March 1898, 2448 (Mr Barton).

25 *Williams v Commonwealth* (2012) 248 CLR 156, 223 [109] (Gummow and Bell JJ); see also 179-180 [9] (French CJ), 240 [168] (Hayne J), 341 [476] (Crennan J), 374 [597] (Kiefel J).

## Applicable Tasmanian legislation

28. The offices of councillor and mayor are established under the LGA. The Court is to consider Mr Martin's eligibility to be chosen at all times since his nomination, since the process of choice under s 7 of the Constitution has not yet been completed in respect of the representation of Tasmania in the Senate.[26] It will therefore be necessary to consider the LGA in its form both before and after the amendments made by the Targeted Review Act, which took effect from 22 November 2017. The submissions which follow deal chiefly with the version of the legislation in force between 9 June 2016 and 22 November 2017, and then address the amendments made by the Targeted Review Act.

10 **Councils**

29. Tasmania is divided into municipal areas (s 16(1)), of which Devonport is one (s 16(2) and Sch 3, Column 1). There is established in each municipal area a council (s 18(1)), in the case of Devonport, the Devonport City Council (s 18(2) and Sch 3, Column 2).

30. A council is a body corporate with perpetual succession and a common seal (s 19(1)). Its functions include 'to provide for the health, safety and welfare of the community', 'to represent and promote the interests of the community', and 'to provide for the peace, order and good government of the municipal area' (s 20(1)). In performing its functions, a council is to 'consult, involve and be accountable to the community'

20 (s 20(2)).

31. A council consists of persons elected in accordance with Pt 4 (s 25(1)). Div 2 of Pt 4 deals with election of councillors and provides that elections are to be held in accordance with Pt 15 (s 45(2)). A councillor is to be elected for a period of 4 years and holds office from the date of the issue of the certificate of election (s 46(1)).

32. A person elected to a city council 'is a councillor' (s 25(2)) and Sch 5 has effect with respect to 'the office of councillor' (s 25(5)). Schedule 5 deals with reimbursement of councillors' expenses, provision of support services, facilities and equipment on loan to councillors, and vacation of the office of councillor.

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[26] *Re Nash (No 2)* (2017) 92 ALJR 23, 31 [43].

33. The chairperson of a council is to be known as 'the mayor' (s 26(1)(b)). The mayor is to be elected by the electors of the municipal area (s 40).[27] The election of mayor is a separate election from the election of councillors but must be held concurrently with the election of councillors (s 43(2)). The election of mayor is governed by Pt 15 (s 43(3). The mayor is elected for a period of 4 years (s 44(1)).

**Council elections**

34. Pt 15, which governs elections of both councillors and mayor, contains provisions dealing with the procedures for an election. Pt 15 provides for a broad franchise, with the entitlement to vote broadly mirroring the enrolment for the House of Assembly in Tasmania (s 254(1)) but also including owners or occupiers of land in an electoral area (s 254(2)). The integrity of the electoral process is protected by the creation of various offences (ss 312(1), 312(3)(f), 314 and 315).

**Functions of councillors and mayor**

35. An individual councillor has the functions set out in s 28(1), which include participating in the activities of the council and undertaking duties and responsibilities as authorised by the council. The councillors collectively have the functions set out in s 28(2), which relate to such matters as: developing and monitoring the implementation of strategic plans and budgets; planning and development of the municipal area; appointment and monitoring of the general manager; and determining and reviewing the resource allocation and expenditure of the council.

36. The functions of a mayor are: to act as a leader of the community of the municipal area; to act as chairperson of the council; to act as the spokesperson of the council; to liaise with the general manager on the activities of the council and the performance of its functions and exercise of its powers; and to oversee the councillors in the performance of their functions and exercise of their powers (s 27(1)). Like councillors, a mayor is to 'represent accurately the policies and decisions of the council' in performing his or her functions (ss 27(1A); 28(4)).

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[27] Contrary to McCS [71], the Local Government (Election of Mayors) Order (No 2) 1998 is inconsistent with s 40 as amended in 1998 and again in 2000 and can have no continuing operation: see *Local Government Amendment Act 2000* (Tas); *Local Government Amendment Act 1998* (Tas).

**Remuneration of councillors and mayor**

37. A councillor is entitled to prescribed allowances (s 340A(1)). A mayor is entitled to prescribed allowances in addition to those for a councillor (s 340A(2)). The relevant allowances are specified in reg 42 and Sch 4 of the *Local Government (General) Regulations 2005* (Tas). While those regulations are made by the Governor under s 349 of the Act, they are disallowable by either House of the Tasmanian Parliament (s 47 of the *Acts Interpretation Act 1931* (Tas)). It follows that any change in the remuneration attached to the office is subject to the control of the legislature.

38. A council pays the prescribed allowances by expenditure of its funds in accordance with s 74. Those funds may be raised in any one or more of the ways set out in s 73 and include, in the case of the Devonport City Council, rates, fees, charges, fines and government grants (Commonwealth and State, tied and untied) {AF [28] (**CB 101**)}.

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**Control and supervision of councillors and removal from office**

39. Consistently with the stipulation in s 20(2) that a council is to be accountable 'to the community', a council is not generally subject to control or supervision by the executive government. A councillor may resign at any time (s 47(1)), but can be removed from office in only the limited circumstances summarised below.

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Incapacity

40. A councillor may be removed for physical or mental incapacity by order of a magistrate on application by the Director of Local Government (s 28J; *Local Government (General) Regulations 2015* (Tas), reg 30).

Certain offences

41. A councillor is liable to be dismissed by order of a court for commission of certain offences, namely: breach of conflict of interest provisions (s 48(6)(b)); disclosure of confidential information (s 338A(2)(b)); improper use of information (s 339(4)(b)); and misuse of office (s 339A(2)(b)).

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Code of conduct and other complaints

42. A councillor is required to comply with the council's code of conduct (s 28U). A code of conduct is a model code made by the Minister under the LGA (ss 28R and 28S), with such variations as the council may make under s 28T. A complaint that a councillor has contravened the code of conduct may be made (s 28V), and will be referred to the Code of Conduct Panel or to the Director of Local Government (depending on whether the complaint is against less than half of the councillors or not) (s 28Z).

43. The Code of Conduct Panel consists of members appointed by the Minister (s 28K). Members are appointed for a fixed term of not more than 4 years and can be removed from the panel by the Minister only in the limited circumstances prescribed by cl 5(3) of Sch 2A (which applies by force of s 28K(4)). After investigating and determining a complaint, the panel may impose a sanction no greater than suspension for a period not exceeding 3 months (s 28ZI(2)(e)). If the panel imposes three suspensions within the councillor's current term (or within the period of two consecutive terms), then the Minister may remove the councillor from office (s 28ZL(3)).

44. When a complaint was referred to the Director of Local Government and investigated (s 339E), the Director appears to have had no specific power to impose sanctions on a councillor found to have failed to comply with the LGA or to have committed an offence under the LGA (see further below at [53] for the position since 22 November 2017).

Structural changes to municipal areas and electoral districts

45. The Local Government Board is established by s 210. Its members are appointed by the Minister (s 210(3)), but include nominees of the Local Government Association of Tasmania and the Local Government Managers Australia (Tasmania) (s 210(2)). The Board may, at the direction of the Minister, conduct a review of a council (s 214). As a result of any review, the Governor, by order and on the recommendation of the Minister, may do any of the things set out in s 214E(1), which includes 'dismiss all the councillors of a council' (para (k)). However, an order under s 214E(1)(k) 'may be made only in conjunction with an order made under' certain other paragraphs, all of which relate to structural changes to municipal areas and electoral districts (s 214E(4)).

Failure to perform function or irregularity of conduct

46. The Minister may establish a Board of Inquiry to investigate a council if satisfied that a matter justifies its establishment (s 215(1)). A Board of Inquiry consists of one or more persons appointed by the Minister (s 215(3)). A Board of Inquiry is to submit a report of its findings and recommendations to the Minister (s 224(1)).

47. After considering a report from a Board of Inquiry, and any submissions made as of right by an affected council or councillor, the Minister may direct a council to take certain actions (s 225). Instead of making such a direction, the Minister may recommend that the Governor dismiss the councillors of the council if, in the opinion of the Minister, the council's failure to perform a function or the irregularity of its conduct 'has seriously affected the operation of the council' (s 226(1)). The Minister may also recommend such dismissal if a council fails to comply with a direction under s 225(2) (s 226(2)).

**Amendments made by the Targeted Review Act with effect from 22 November 2017**

48. The Targeted Review Act made numerous amendments to the LGA, some of which bear upon the characterisation of the offices of councillor or mayor.

49. Section 27 was amended to add and remove certain functions of mayors including the addition of 'any function imposed by an order under section 27A' (para (i)) and 'any other function imposed by [the LGA] or any other Act' (para (j)). Section 27A provides that the Minister, by order, and only after consultation with the council, may clarify the functions of mayor and may impose on mayors such functions as the Minister considers appropriate (s 27A(1), (3)). Such an order is subordinate legislation (s 27A(6)) and is disallowable by either house of the Tasmanian Parliament (by reason of s 27A(5) applying relevant provisions of the *Acts Interpretation Act 1931* (Tas)).

50. Section 28AA similarly provides that the Minister may clarify the functions of councillors (s 28AA(1), (3)) (but does not provide for the imposition of functions). Such an order is also disallowable and subordinate legislation (s 28AA(5), (6)).

51. Part 12B empowers the Minister, on the recommendation of the Director of Local Government (s 214L), to issue to a council or councillor a direction relating to

compliance with statutory obligations (s 214M(1)(a)). The consequences of failing to comply with a direction include suspension for a period not exceeding 6 months, or further inquiry by the Board of Local Government (s 214) or a Board of Inquiry (s 215).

52. Certain amendments were made to the scheme for inquiries by a Board of Inquiry. Sections 225 and 226 were amended to permit the Minister to give a direction not just to a council, but also to an individual councillor (s 225(2), (3)), and to dismiss an individual councillor (in addition to the power to dismiss all councillors) on specified grounds (s 226(1)). Relatedly, the power to suspend all of the councillors for up to 6 months in old s 215(5) was omitted and substituted by a new s 215(5), which empowers the Minister to suspend all 'or any' of the councillors, and to do so for a period ending on the giving of a direction under s 225(2) or on the dismissal of all or any of the councillors.

53. Section 339EA was inserted to provide that the Director may provide any information obtained from the conduct of an investigation to appropriate authorities including law enforcement agencies, the Integrity Commission or the Auditor-General.

## APPLICATION TO THE FACTS

### Offices of profit

54. Each of the offices of mayor and councillor under the LGA is an office of profit. They answer the description of a right to exercise public employment and to take fees and emoluments thereunto belonging. They are described in the LGA as 'offices' (ss 25(5), 43A, Sch 5). They carry entitlements to prescribed allowances in the nature of remuneration for carrying out the duties of the office.

55. Mr Martin has been entitled to be paid, and has been paid, the prescribed allowances in accordance with s 340A and reg 42 and Sch 4 of the *Local Government (General) Regulations 2005* (Tas) {AF [21]-[25] (**CB 100-101**)}.

### Not 'under the Crown'

56. While the offices of mayor and councillor under the LGA are both offices of profit, neither office is 'under the Crown'. Both offices are elected positions. Elections are carried out in accordance with a detailed statutory scheme providing for a wide

franchise and electoral integrity. The executive government has no role in appointing those office-holders. Nor does the executive government have such power to remove a mayor or councillor, or to alter their remuneration, as to warrant the conclusion that the ongoing holding of those offices is, in substance and practical effect, in the gift of the executive.

57. The circumstances in which the executive government can remove a councillor or mayor are confined. They are limited to:

    57.1. seeking an order from a court (which obviously is not the executive government) on specified grounds of incapacity or in connection with conviction for specified offences (s 28J; ss 48(6)(b), 338A(2)(b), 339(4)(b), 339A(2)(b));

    57.2. removal following three suspensions, within a limited period of time, by the Code of Conduct Panel (s 28ZL(3)), which itself enjoys a measure of independence from the executive government (cl 5(3) of Sch 2A);

    57.3. removal as an incident of structural changes to municipal areas, itself dependent upon a review by the Local Government Board (s 214E);

    57.4. removal following investigation by a Board of Inquiry, and then only for conduct that has 'seriously affected the operation of the council' (s 226).

58. The 'profit' attaching to the relevant offices is in the form of allowances prescribed by regulation (s 340A). As noted above, while the regulations prescribing those allowance are made by the Governor, they are disallowable by either House of the Tasmanian Parliament and therefore within the ultimate control of the legislature.

59. The above matters provide a sufficient basis to conclude that the offices held by Mr Martin are not 'under the Crown'. However, if it is relevant to evaluate further aspects of the relationship between the offices and the executive government, there is still nothing to suggest that the relevant offices are under the Crown. In addition to the matters relating to appointment, removal and remuneration, the following features highlight the separation of the offices from the executive government:

59.1. although the Minister (since 22 November 2017) has been able to impose functions upon mayors (s 27A), the Minister cannot generally direct a mayor (or councillor) in the actual performance of those functions. In any event, the power to impose functions is subject to parliamentary disallowance and is thus ultimately within the control of the Tasmanian Parliament (s 27A(5); see also s 28AA(5));

59.2. the Minister can (since 22 November 2017) regulate in specified ways the exercise of the power to appoint a general manager (s 61A), but the Minister's power is, again, subject to parliamentary disallowance (and is, in any event, not a significant form of control over the relevant offices, as opposed to the Council);

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59.3. the Minister's power (since 22 November 2017) to issue performance improvement directions is limited to ensuring compliance with statutory obligations.

60. The careful circumscription of the Minister's powers in relation to local councils, and the frequent provision for parliamentary disallowance, highlights the distinct separation of local government from the executive government.

61. In summary, the offices of mayor and councillor: are filled by popular election, rather than appointment by the State executive; are for a term fixed by legislation and extending from one election to the next, rather than being in the discretion of the executive; receive remuneration that is fixed by disallowable regulations and involve duties and responsibilities relating to the functions of the municipal council, being a separately incorporated entity that is not part of the State executive. For those reasons, they are not offices of profit 'under the Crown'.

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**Authorities**

62. This conclusion is consistent with authority. In *Sydney City Council v Reid*,[28] the NSW Court of Appeal held that an employee of a local government authority was not employed 'in the service of the Crown' (in the context of a NSW employment statute).

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[28] (1994) 34 NSWLR 506; see especially 519-520 (Kirby P).

Kirby P, with whom Meagher and Powell JJA agreed, emphasised the high measure of independence guaranteed to NSW councils. The features of that independence are mirrored in the Tasmanian legislation, namely: establishment as bodies corporate (s 18); accountability to the electors rather than the Crown (ss 20(2), 25(1)); and only highly particularised and exceptional powers of ministerial interference with local government functions. In *Local Government Association of Queensland (Inc) v Queensland*,[29] Davies JA cited *Reid* to observe that the parties' common position in that case that the office of councillor was not an office of profit under the Crown within the meaning of s 44(iv) seemed to be correct. *Reid* has also been cited in other contexts in support of the conclusion that a local council is not to be regarded as 'the Crown'.[30]

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63. The conclusion is also consistent with past parliamentary practice, which appears to identify several examples (on one count 'at least 20') of members of previous Commonwealth parliaments holding concurrent local government positions (including Messrs Chifley and Calwell).[31]

## SUBMISSIONS OF MS McCULLOCH

64. Ms McCulloch, in written submissions filed on 15 January 2017 (**McCS**), contends that a person will hold an office of profit 'under the Crown' for the purpose of s 44(iv) if, between the office and the Executive, there 'is a connection or relationship … that, when properly characterised, is of a nature that answers to the purpose of the constitutional provision, as revealed by its history and context and the mischief sought to be avoided' (McCS [10]). In addition to the factors already addressed above that inform the identification of the requisite relationship between the office and the Executive, Ms McCulloch places great weight on the asserted incompatability between the offices of mayor and councillor with the duties of a senator (McCS [11]-[12], [50], [57]-[65]).

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29 [2003] 2 Qd R 354, 373 fn 49. See also 364-365 (McMurdo P).

30 *Townsend v Waverley Council* (2001) 120 LGERA 224, 232 [24] (Barrett J); *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178, 189-192 [23]-[27] (Lehane J).

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31 Gerard Carney, *Members of Parliament: Law and Ethics* (2000), 71, citing J Rydon, *A Federal Legislature: The Australian Commonwealth Parliament 1901-1980* (1986), 100.

65. The approach is unduly evaluative, and erroneously treats the asserted purpose of s 44(iv) as determinative of the operation of the provision, rather than as a consideration that informs the construction of the text of that provision.[32] The point is illustrated by Ms McCulloch's attempt to transpose the reference in *Sykes v Cleary* to one of the 'considerations or policies' of s 44(iv) – being recognition of 'the incompatibility of certain non-ministerial offices under the Crown'[33] with membership of Parliament – into a general prohibition on the holding of any office that conflicts with 'the public duty of loyalty to the Parliament', despite the absence of any textual foundation for that asserted operation of s 44(iv) (McCS [50]).

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66. Nor is any attempt made to demonstrate how a test that turns on the 'incompatability' of an office of profit with membership of the Federal Parliament can be accommodated with the text of s 44(iv). *Sykes* does not support such a test, for the use made in that judgment of the concept of 'incompatibility' was much more limited. In *Sykes*, the plurality referred to the accepted position in England and Australia that permanent public servants were excluded from membership of Parliament as recognising the incompatability of a person simultaneously being a permanent public servant and a member of the House. The plurality identified three factors that give rise to that incompatability, all in the specific context of office as a public servant.[34] Accordingly, *Sykes* does not establish or support the proposition that the test for whether an office answers the description of an 'office of profit under the Crown' is whether that office is 'incompatible' with membership of Parliament. Rather, the discussion of incompatability in *Sykes* was directed to answering Mr Cleary's contention that 'office' in s 44(iv) should be read narrowly to disqualify only office-holders of 'important or senior positions in government'.[35]

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67. Ms McCulloch is therefore wrong to submit that it follows from the conclusion in *Sykes* that Mr Cleary was disqualified that Mr Martin must also be disqualified (McCS [60]).

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32 *Re Day (No 2)* (2017) 91 ALJR 518, 529 [53] (Kiefel CJ, Bell and Edelman JJ), 535 [98]-[100] (Gageler J), 142 [156] (Keane J).

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33 *Sykes v Cleary* (1992) 176 CLR 77, 96 (Mason CJ, Toohey and McHugh JJ).

34 *Sykes v Cleary* (1992) 176 CLR 77, 96 (Mason CJ, Toohey and McHugh JJ).

35 *Sykes v Cleary* (1992) 176 CLR 77, 96-97 (Mason CJ, Toohey and McHugh JJ).

Mr Cleary was disqualified because he was a permanent public servant. As a holder of elected office, Mr Martin is in an entirely different position.

68. The text of the Constitution points against adopting 'incompatibility' or 'conflict of interest' tests as the touchstone for the operation of s 44(iv) (Cf McCS [57], [59]). In particular, s 44 provides that s 44(iv) 'does not apply to the office of ... any of the Queen's Ministers for a State'. That language expressly permits a person to serve in the Commonwealth Parliament whilst simultaneously serving as a Minister of the executive of a State government. Service as a Minister in a State government (which, in light of responsible government, also entails service in a State Parliament) would carry the same (or greater) risks of the possible conflicts of duty or loyalty between different levels of government to which Ms McCulloch points (McCS [41], [57], [64]). There is no basis to treat s 44(iv) as concerned with such possible conflicts in relation to local, but not State, government.

69. Similar points may be made in answer to Ms McCulloch's query as to how a person could attend properly to the duties of a member of Parliament and a Mayor (McCS [65]). This submission erroneously treats s 44(iv) as directed to ensuring that members of Parliament do not accept appointment to offices that will impair their capacity to give their undivided attention to service as Commonwealth Parliamentarians. But that is not the issue to which s 44(iv) is directed. Indeed, the Constitution requires Commonwealth Ministers to be members of Parliament (s 64), notwithstanding that service in that position will substantially detract from the time available to perform parliamentary duties. Quite apart from Ministerial positions, there are many roles that Parliamentarians can accept that do not engage s 44(iv), notwithstanding that acceptance of those roles will limit the time available to engage in parliamentary duties. The Constitution deals with that issue not through s 44(iv), but through the minimum attendance requirements (ss 20, 38). Further, the Houses themselves regulate attendance and performance of parliamentary duties. Provided members of Parliament and senators comply with those requirements, the Constitution does not prevent them from performing extra-Parliamentary roles that exert considerable demands on their time on some impressionistic basis of 'incompatibility' with parliamentary service.

70. Contrary to McCS [38]-[39], the authorities do not support the proposition that local government bodies are "the State" in the sense of the executive government. In some contexts, as the quotation at McCS [38] itself shows, a local government body might be identified with the State in the sense of the body politic because it is a creature of State statute, but that is a very different conception of the State.[36] Further, the legislation impugned in the *State Banking Case* expressly applied to State authorities "including a local governing authority". The Court emphasised that no question of severance arose, so that the application of the legislation to the local government body plaintiff stood or fell with its application to States.[37]

## PART V ORDERS SOUGHT

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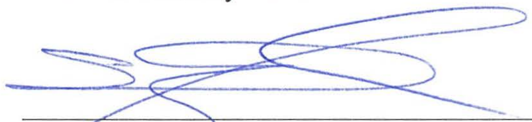
71. The reserved question of law should be answered 'No' and there is no reason why the declarations sought in the summons filed by the Attorney-General should not be made.

## PART VI ORAL ARGUMENT

72. The Attorney-General estimates that he will require 1 hour for oral argument.

Date: 22 January 2018



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[36] See also the different meanings of the Crown identified in *Sue v Hill* (1999) 199 CLR 462 at 498 [84], 499 [87] (Gleeson CJ, Gummow and Hayne JJ).

[37] (1947) 74 CLR 31 at 44 (Latham CJ), 70 (Starke J), 76–77 (Dixon J).