

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)

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**SUBMISSIONS OF MR STEVEN MARTIN**



3477-5902-2088v1

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**I: CERTIFICATION**

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

**II: CONCISE STATEMENT OF ISSUES**

2. By reason of Mr Martin holding the offices of mayor and councillor of Devonport City Council at all times during and since the 2 July 2016 Federal Election, is he incapable of being chosen or of sitting as a Senator pursuant to section 44(iv) of the Constitution?

**III: CERTIFICATION AS TO SECTION 78B OF THE *JUDICIARY ACT***

3. The Attorney-General has filed and served a notice of constitutional matter.

**10 IV: NARRATIVE STATEMENT OF FACTS**

4. The facts are stated in a Statement of Agreed Facts dated 21 December 2017 (CB97). The critical facts may be summarised as follows.

5. Mr Martin was elected to the office of councillor of the Devonport City Council at the local government election held in October 2009 (CB99[13]), and was re-elected to that office at the local government elections held in October 2011 (**2011 election**) and in October 2014 (**2014 election**)(CB100[14]). Mr Martin has held the office of councillor continuously since the 2011 election; he remains a councillor.

6. Mr Martin was elected to the office of mayor of Devonport at the 2011 election, and was re-elected to that office at the 2014 election. He has held the office of mayor continuously since his first election to that office; he remains mayor  
20 (CB100[19]).

7. Mr Martin nominated as a candidate to be elected to represent the State of Tasmania in the Senate at the July 2016 federal election (**2016 federal election**) (CB98[3]), and was listed as the second of three nominated candidates for the endorsed candidate group nominated by the Jacqui Lambie Network (CB99[5.1]).

8. Ms Lambie was elected as one of the 12 Senators for the State of Tasmania at the 2016 federal election; Mr Martin was not so elected (CB99[10]).

9. On 8 December 2017, Ms Lambie’s position as Senator for the State of Tasmania was declared vacant by operation of s 44(i) of the Constitution, and a special count ordered to be undertaken of the ballot papers cast for candidates for the election of Senators for the State of Tasmania at the 2016 federal election (CB101[29]).
10. On the results of that special count, Mr Martin would be elected as a Senator representing the State of Tasmania unless disqualified by reason that section 44(iv) of the Constitution prohibits a councillor or the mayor of Devonport City Council from being chosen or sitting in the Senate (CB102[32]).

**V: CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS**

- 10 11. The contradictor’s statement of applicable statutes and regulations is incomplete in relation to Mr Martin’s offices as mayor and councillor of Devonport City Council. For convenience, the applicable statutes and regulations are set out in full.
12. The offices of mayor and councillor of the Devonport City Council are established by the *Local Government Act 1993* (Tas) (**Act**). By section 349 of the Act, the governor may make regulations for the purposes of the Act, and has made the *Local Government (General) Regulations 2005* (Tas) (**2005 Regulations**) and the *Local Government (General) Regulations 2015* (Tas) (**Regulations**).
13. The statutory provisions herein referred to were in force at the time of the 2014 election and at all times since, unless stated otherwise. The 2005 Regulations were  
20 in force at the time of the 2014 election and were repealed on 29 June 2015. The Regulations took effect on 29 June 2015 and have been in force at all times since. All regulations referred to herein were remade with no substantive changes, only minor drafting changes. References are to the Act, unless stated otherwise.
14. [**Councils**] Subsections 16(1) and (2) provide that the State is divided into the municipal areas specified in column 1 of schedule 3. “Devonport” is one such municipal area. Subsection 18(1) provides that there is established in each municipal area a council. Subsection 18(2) provides that the name of each council in a municipal area is specified in schedule 3. The name of the council in the municipal area “Devonport” is the “Devonport City Council”. Subsection 19(1)  
30 provides that a council is a body corporate with perpetual succession.

15. **[Functions and powers of councils]** Subsection 20(1) confers upon a council functions including (a) to provide for the health, safety and welfare of the community; (b) to represent and promote the interests of the community; and (c) to provide for the peace, order and good government of the municipal area. Further:
- (a) Subsection 21(1) provides that, in carrying out its powers, a council may engage in various types of enterprises. Subsection 21(2) provides that a Council must obtain the approval of the Minister before exercising any of these powers if the exercise of that power is above a set threshold. The Minister has not made an order under this subsection.
- 10 (b) Subsection 61(1) provides that council is to appoint a general manager of the council. Section 61A provides that the Minister, by order, may specify principles and procedures in relation to the appointment. Since s 61A was introduced by s 14 of the *Local Government Amendment (Targeted Review) Act 2017*, the Minister has not made an order under s 27A(1).
- (c) Sections 66 to 70E and 84 provide that council is to prepare certain plans, reports, strategies, policies and financial statements. Section 70F and subsection 84(2A) provide that the Minister, by order, may specify the matters that are to be included in certain of these documents. The Minister has made one order under s 70F, specifying the content of certain plans and
- 20 strategies – *Local Government (Content of Plans and Strategies) Order 2014*.
16. **[Council accountability]** Subsection 20(2) provides that in performing its functions, a council is to consult, involve and be accountable to the community.
17. **[Council’s funding and expenditure]** Section 73 provides that a council may raise funds in eight enumerated ways. Section 74 provides that a council may expend its funds for the purpose of exercising its powers or carrying out its functions. Section 78 provides that a council may borrow, and section 80 provides a limit on borrowing without the Minister’s approval.
18. **[Councillors]** Subsections 25(1) and (2) provides that a council consists of persons elected in accordance with Part 4, and a person elected to a council is a councillor.

19. **[Election of councillors]** Subsection 45(2), which sits in Part 4, provides that the election of councillors is to be held in accordance with Part 15. That part addresses electors (sections 254 to 262), issuing places and electoral officials (sections 263 to 268), notices of elections and nominations (sections 268A to 276), advertising in respect of elections (sections 278 to 282), postal voting (sections 283 to 296), determination of result of elections (sections 299 to 306), casual vacancies (sections 307 to 310), offences relating to elections (sections 311 to 315) and miscellaneous matters (sections 316 to 323).
- 10 20. **[Councillor's declaration]** Section 321 provides that any person elected as councillor must make a prescribed declaration in a prescribed manner, and that failure to do so stops a person elected as councillor from acting in the office of councillor or mayor and from taking part in meetings of the council. Section 321A provides that the office of councillor becomes vacant if the councillor fails to make the prescribed declaration within 60 days of being elected. Reg 40(1) of the Regulations provides that a person elected as a councillor must complete the declaration set out in schedule 2 of the Regulations, which is a declaration that the councillor will (a) faithfully carry out the functions and exercise the powers vested in him or her by virtue of that office to the best of his or her ability and in accordance with the law; and (b) comply with the Council's code of conduct.<sup>1</sup>
- 20 21. **[Councillors' term of office]** Subsection 46(1) provides that a councillor is to be elected for a period of 4 years and holds office from the date of issue of the certificate of election in respect of an ordinary election for that office.
22. **[Vacation of office]** Item 3(1) of sched 5 provides that the office of councillor becomes vacant in various circumstances, including if the councillor is a member of the Legislative Council or House of Assembly for set periods.<sup>2</sup>
23. **[Functions of councillors]** Subsection 28(1) lists the functions of councillors as individual councillors, including to represent the community and to act in the best interests of the community. Subsection 28(2) lists the functions of councillors of a

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<sup>1</sup> The requirement for a councillor to declare that he or she will comply with the Council's code of conduct was included in the Declaration of Office at Schedule 2 of the Local Government (General) Regulations 2015 (Tas) following amendments by s 7 of the *Local Government Amendment (Code of Conduct) Act 2015* (Tas).

<sup>2</sup> Subsection 25(5) provides that sched 5 has effect with respect to the office of councillor.

council collectively. Section 28AA provides that the Minister, by order, may clarify the functions of councillor; it was inserted by section 8 of the *Local Government Amendment (Targeted Review) Act 2017* (Tas). No such order has been made.

24. **[Mayors]** Subsection 26(1) provides that the chairperson of a council is to be known as a mayor (except for Hobart).
25. **[Election of the mayor]** Section 40 provides that the mayor of a council is elected by the electors of the municipal area. Subsection 41(4) provides that a person may not accept the office of mayor unless the person is a councillor. Subsection 43(2) provides that the election of mayor is separate from the election of councillors but must be held concurrently with the election of councillors.
26. **[Mayor's term of office]** Subsection 44(1) provides that the mayor is to be elected for a period of 4 years and holds office from the date of issue of the certificate of election in respect of an ordinary election for that office.
27. **[Functions of mayors]** Subsection 27(1) lists the functions of a mayor, which include to act as a leader of the community of the municipal areas, and to lead and monitor the performance of the general manager. Section 27 was amended by s 6 of the *Local Government Amendment (Targeted Review) Act 2017* (Tas), to add to the stated functions of mayor. Subsection 27A(1) provides that the Minister, by order, may (a) clarify the functions of mayor; and (b) impose on mayors such functions as the Minister considers appropriate; it was inserted by s 7 of the *Local Government Amendment (Targeted Review) Act 2017* (Tas). No such order has been made.
28. **[Allowances for councillors and the mayor]** Section 340A provides that a councillor is entitled to a prescribed allowance, and a mayor is entitled to a prescribed allowance in addition to an allowance as a councillor. The allowances for councillors and the mayor are prescribed under reg 42(2) of the Regulations.
29. **[Expenses for councillors]** Reg 43 of the Regulations provides that a councillor is entitled to be reimbursed for reasonable expenses in accordance with the policy adopted under sched 5.
30. **[Minister's further powers]** Section 85B provides that the Minister, by order, may specify matters in relation to audit panels. Section 109J provides for a council to

apply to the Minister in relation to re-making of rates. Section 154 provides that a by-law may be repealed or amended on the recommendation of the Minister, by an order of the Governor. Section 338 provides that a council is to furnish to the Minister, the Treasurer, the Director of Local Government (appointed under s 334) or the Local Government Board any information requested in relation to its activities; and (b) any documents or records as requested.

- 10 31. **[Code of conduct]** Section 28R in Div 3A provides that the Minister, by order, may make a model code of conduct relating to the conduct of councillors. Section 28T provides that the council must adopt the model code of conduct, subject to a limited ability to vary or amend it. Section 28U provides that in performing the functions and exercising the powers of his or her office with a council, a councillor is to comply with the provisions of the council's code of conduct.<sup>3</sup> These provisions were introduced to Subdivision 2 of Div 3A by s 7 of the *Local Government Amendment (Code of Conduct) Act 2015*.
- 20 32. **[Code of Conduct Panel]** Subsection 28K(1) provides that the Code of Conduct Panel is established. The Panel investigates and determines code of conduct complaints against councillors. Subsection 28K(2) provides that the Minister is to appoint as members lawyers and persons who have experience in local government.<sup>4</sup> These provisions were introduced to Subdivision 1 of Div 3A by s 7 of the *Local Government Amendment (Code of Conduct) Act 2015*.
33. **[Local Government Board]** Section 210 establishes the Local Government Board. Section 211 provides that it has the functions (a) to carry out reviews; and (b) to advise the Minister on any other matters the Minister may determine. Section 214 provides that the Minister may require the Board to carry out a general or a specific review of a council, and section 214A provides that any review may take into account a wide range of factors including any matter referred to it by the Minister.<sup>5</sup> Section 214D provides that the Board is to submit to the Minister a written report of any review it carries out together with its recommendations and, after

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<sup>3</sup> This power has been exercised once: on 4 April 2016, the Minister by order set out the Model Code of Conduct in Local Government (Model Code of Conduct) Order 2016 (Tas).

<sup>4</sup> Div 3A, relating to the Code of Conduct Panel and its proceedings were inserted by the *Local Government Amendment (Code of Conduct) Act 2015* (Tas), with effect from 13 April 2016.

<sup>5</sup> Section 214A(a) was amended by s 19 of the *Local Government Amendment (Targeted Review) Act 2017* (Tas) to expand the scope of review in respect of the governance and operations of a council.

considering any submissions, the Minister may accept or reject those recommendations. Section 214E provides that, as a result of any review, the Governor, by order and on the recommendation of the Minister, may do one or more of twenty acts, including (k) dismiss all the councillors of a council; and (t) declare that an election is to be held.

34. **[Performance Improvement Directions]** Section 214L provides that the Director of Local Government (appointed under section 334) may recommend to the Minister that he or she issue a performance improvement direction to a council or councillor. Subsection 214M(1)(a) provides that, on receipt of a recommendation of the Director, the Minister may issue to the council or a councillor a direction requiring the council or councillor to take, refrain from taking or cease taking an action for the purpose of complying with the statutory obligations of the council or councillor under the Act or any other Act. Section 214O provides that, if a council or councillor fails to comply with such a direction, the Minister may: (a) suspend all of the councillors or the councillor from office for a period not exceeding 6 months; (b) under section 214, require the Local Government Board to carry out a review of the council; (c) under section 215, establish a Board of Inquiry to investigate the council. Sections 214L to 214O were inserted by section 20 of the *Local Government Amendment (Targeted Review) Act 2017* (Tas).
35. **[Board of Inquiry]** Section 215 provides that the Minister may establish a Board of Inquiry to investigate a council if the Minister is satisfied that a matter justifies its establishment. Section 216 provides that the functions of a Board of Inquiry are (a) to conduct an inquiry into any matter referred to it by the Minister; and (b) to make recommendations to the Minister as a result of its inquiry. Subsection 224(1) provides that a Board of Inquiry is to submit a report of its finding and recommendations to the Minister. Subsection 225(2) provides that the Minister may direct a council or councillor to take responsive action, and by subsection 226(2) if a council or councillor fails to comply with the direction, the Minister may recommend that the Governor by order dismiss the councillor or all councillors. Subsection 226(1) provides that, instead of making the direction, the Minister may recommend that the Governor by order dismiss any councillor or all councillors if, in the opinion of the Minister (a) the failure of the councillor or council to perform



any function has seriously affected the operation of the council; or (b) the irregularity of the conduct of the councillor or council has seriously affected the operation of the council.<sup>6</sup>

## VI: ARGUMENT

36. Section 44(iv), and in particular the collocation “under the Crown”, must be interpreted not only according to the ordinary meaning of its text but also in light of its place in the structure of the Constitution and its history.<sup>7</sup> Taking that approach, this part addresses the following:

- (a) Origins of section 44(iv) of the Constitution;
- 10 (b) Colonial predecessors to section 44(iv) of the Constitution;
- (c) Convention debates on section 44(iv) of the Constitution;
- (d) Section 44(iv) within the Constitution;
- (e) Legal test for whether an office of profit is “under the Crown”;
- (f) Application of the test to the offices of mayor and councillor of the Devonport City Council; and
- (g) Position in other States.

37. Ultimately, the question of whether an office created by statute is “under the Crown” is answered by consideration of the statutory framework governing that office to determine the extent of statutory power over or control of that office by the executive government. In this case, the offices of mayor and councillor of Devonport City Council are not “under the Crown” because of the high degree of independence of those offices from the executive government.

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<sup>6</sup> Sections 215, 225 and 226 were amended by ss 21, 27 and 28 of the *Local Government (Targeted Review) Act 2017* respectively. Those amendments brought the provisions into their current form by empowering the Minister variously to suspend councillors while a Board of Inquiry investigates (s 225(5)), to direct councillors to take specified actions (s 225(2)) and to dismiss councillors based on their conduct (s 226).

<sup>7</sup> In respect of s 44(v) see *Re Day (No 2)* (2017) 91 ALJR 518, 554 [247]; 343 ALR 181, 228 (Nettle and Gordon JJ).

### Origins of section 44(iv) of the Constitution

38. Section 44(iv) finds its origins in post-Restoration England, and the concerns of members of the House of Commons with the effect of members holding office under the Crown and the House's relationship with the King.<sup>8</sup>

39. By the *Act of Settlement 1701*,<sup>9</sup> the complete exclusion of persons holding offices of profit under the Crown was to take effect after the accession of the House of Hanover.<sup>10</sup> The operative provision relevantly stated:<sup>11</sup>

10                   That no Person who has an Office or Place of Profit under the King or receives a Pension from the Crown shall be capable of serving as a Member of the House of Commons.

40. That provision was wound back by the *Regency Act 1705*,<sup>12</sup> which in turn was replaced by the *Succession to the Crown Act 1707*.<sup>13</sup> The principal provisions dealing with the holding of office by members of the House of Commons are contained in sections 24 and 25 of the *Succession to the Crown Act 1707*, which relevantly provide as follows:

20                   [Section 24] No person, who shall have in his own name ... or for his own benefit any new Office or Place of Profit whatsoever under the Crown which at any time since the 25th October, 1705, have been created or erected, or hereafter shall be created or erected ... shall be incapable of being elected, or of sitting or voting as a Member of the House of Commons ...

[Section 25] If any person, being chosen a member of the House of Commons, shall accept of any Office of Profit from the Crown, during such time as he shall continue a member, his election ... is hereby declared to be void, and a new writ shall be issued for a new election ... provided nevertheless that such person shall be capable of being again elected ...

41. The generally accepted reading of these provisions is that section 25 related only to old offices, being those created before 25 October 1705.<sup>14</sup>

<sup>8</sup> *Report from the Select Committee on Offices or Places of Profit under the Crown* (1941) [14].

<sup>9</sup> 12 & 13 WM III c 2.

<sup>10</sup> *Report from the Select Committee on Offices or Places of Profit under the Crown* (1941) [15].

<sup>11</sup> 12 & 13 WM III c 2.

<sup>12</sup> 4 Ann c 8.

<sup>13</sup> 6 Ann c 41.

<sup>14</sup> *Report from the Select Committee on Offices or Places of Profit under the Crown* (1941) [17]; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 493.

42. A series of statutes, over generations, had the effect of: (a) disqualifying almost all old offices (otherwise eligible under section 25 of *Succession to the Crown Act 1707*), except the holders of ministerial offices; (b) providing for the eligibility of new ministerial heads of departments on the same conditions as section 25; and (c) limiting the total number of ministerial office holders in the House of Commons.<sup>15</sup>
43. The historical circumstance of these statutory amendments was constitutionally significant because, by the disqualification of non-political office holders a politically neutral permanent civil service was fostered, and by the (eventually necessary) presence of a proportion of ministers in the House of Commons the essential condition of responsible government was created.<sup>16</sup>
44. It may be observed that, in the early twentieth century, elected councillors were not thought to infringe upon the prohibition on persons holding an office of profit under the Crown sitting in the House of Commons.<sup>17</sup>

#### **Colonial predecessors to section 44(iv) of the Constitution**

45. In the Australian colonies, general prohibitions on persons holding offices of profit under the Crown from sitting in colonial legislatures appeared in constitutions prepared as part of the movement to bring responsible government to the colonies.
46. Section 32 of the *Australian Constitutions Act 1850* (13 & 14 Vict c 59) conferred power upon the governors and Legislative Councils of New South Wales, South Australia, Van Diemen's Land (renamed Tasmania in 1856), Victoria and Western Australia to replace their single chambers with bicameral legislatures and to establish some self-government over local affairs.<sup>18</sup> Responsible government, by which the executive was required to command a majority in the elected legislature, was viewed as the means to achieve that offered self-government in local affairs.<sup>19</sup>
47. In this context, by the time the colonial leaders came together in the 1890s to draft the Constitution, disqualifying persons from sitting in colonial legislatures who

<sup>15</sup> *Report from the Select Committee on Offices or Places of Profit under the Crown* (1941), [18].

<sup>16</sup> *Report from the Select Committee on Offices or Places of Profit under the Crown* (1941), [18].

<sup>17</sup> *Report from the Select Committee on Offices or Places of Profit under the Crown* (1941), [1194].

<sup>18</sup> Waugh, "Framing the First Victorian Constitution, 1853-5" (1997) 23 *Monash University Law Review* 331, 331.

<sup>19</sup> Waugh, "Framing the First Victorian Constitution, 1853-5" (1997) 23 *Monash University Law Review* 331, 351.

held offices of profit under the Crown, except for a set number of ministers, was a familiar feature of the system of Australian colonial parliamentary government.

- (a) In New South Wales, by sections 18 and 19 of the *Constitution Act 1855* (NSW), persons holding an office of profit under the Crown were incapable of being elected or of sitting or voting in the Legislative Assembly, unless holding one of five identified offices or one of five other office proclaimed by the governor.
- (b) In South Australia, by sections 17 and 32 of the *Constitution Act 1856* (SA), the seat of any member who accepted an office of profit from the Crown was declared vacant, unless that was an office to be held by a member of Parliament.
- (c) In Van Diemen's Land, by section 27 of the *Constitution Act 1854* (Tas), the seat of any member who accepted an office of profit from the Government became vacant.
- (d) In Victoria, by sections 17 and 25 of the *Constitution Act 1855* (Vic), holders of offices of profit under the Crown only had to be re-elected after appointment. But by sections 1 to 3 of the *Independence of the Legislature Act 1859* (Vic), a specified number of office holders were the only offices of profit under the Crown exempted from disqualification.
- (e) In Western Australia, section 6 of the *Constitution Act 1889* (WA) provided that no member to be appointed by the Governor to the Legislative Council was to hold an office of profit under the Crown, while subsection 29(5) provided that the seat of any member of Parliament who accepted an office of profit from the Crown, other than as a military officer, became vacant<sup>20</sup>.
48. Following Queensland's separation from New South Wales, by Order in Council made 6 June 1859, a bicameral legislature was created for Queensland and all the provisions in the *Constitution Act 1855* (NSW), with amendments, including as to the qualification and disqualification of members of the Assembly, were applied.

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<sup>20</sup> Section 29 was repealed in 1899 by the *Constitution Acts Amendment Act 1899* (63 Vic No 19). However, s 38 of the 1899 Act re-enacted the provision in substantially identical terms.

49. It may be recognised that the precise form of disqualification of such office-holders from parliament as a characteristic of the systems of responsible government then in operation in the Australian colonies was neither uniform nor fixed. Indeed, the nature of the systems of responsible government then in operation in the Australian colonies was still in the process of development.<sup>21</sup>

#### **Convention Debates on section 44(iv) of the Constitution**

50. A review of the Convention Debates establishes the following three propositions:
- 10 (a) Several delegates stated that the object of disqualifying persons holding offices of profit under the Crown from the Commonwealth Parliament was to remove the possibility of government influence over members and Senators.
- (b) Delegates assumed, and amendments were put and voted upon on the basis, that disqualifying persons holding offices of profit under the Crown from the Commonwealth Parliament did not disqualify members of State Parliaments.
- (c) Several delegates opined that questions of conflicting duties to the House of Representative and Senate on the one hand, and State Parliaments on the other, was best left to electors and to the Commonwealth Parliament.

#### National Australasian Convention (Sydney) in 1891

- 20 51. The prohibition upon a person holding an “office of profit under the Crown”, save for a minister of the Commonwealth, was proposed (as cl 49), and agreed to, at the National Australasian Convention (Sydney) in 1891.<sup>22</sup> During the debate of this clause, in relation to an amendment concerning “pensions during pleasure”, Sir Samuel Griffith stated: “The object is to prevent persons who are dependent for their livelihood upon the government, and who are amenable to its influence, from being members of the legislature”.<sup>23</sup> Later, Sir John Bray asked whether it was

<sup>21</sup> See *Egan v Willis* (1997) 195 CLR 424, 451-453 [41]-[45] (Gaudron, Gummow and Hayne JJ); Parkinson, “George Higinbotham and Responsible Government in Colonial Victoria” (2001) 25 *Melbourne University Law Review* 181.

<sup>22</sup> *Report of the National Australasian Convention, Sydney, 1891*, 660-662, 898.

<sup>23</sup> *Report of the National Australasian Convention, Sydney, 1891*, 660.

necessary to except in the clause the speaker and president, to which Sir Samuel Griffith responded “They are not under the Crown!”<sup>24</sup>

52. Two further important clauses were also proposed:

*Clause 10* – A member of the Senate or House of Representative shall not be capable of being chosen or of sitting as a member of any House of the Parliament of a State.

*Clause 11* – If a member of a House of a Parliament of a State is, with his own consent, chosen as a member of either House of the Parliament of the Commonwealth, his place in the first mentioned House of Parliament shall become vacant.

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53. In relation to clause 10, Sir Samuel Griffith explained that the committee “were of opinion that members of the Senate and the House of Representatives ought not to become candidates for seats in their own local legislatures”.<sup>25</sup> The clause was passed.<sup>26</sup> In relation to clause 11, although Mr Kingston opposed the clause for taking able men from State Parliaments, it was agreed to.<sup>27</sup> These clauses were debated on the basis that members of State Parliaments and members of the federal parliament would otherwise be eligible to stand for and sit in both legislatures.

Australasian Federal Convention, First Sitting – Adelaide 1897

54. The prohibition upon a person holding an “office of profit under the Crown”, save for a minister of the Commonwealth, was proposed (as cl 47), and agreed to.<sup>28</sup> In the course of discussion about whether the prohibition on accepting offices of profit under the Crown should be extended 6 months after a person ceased to be a member or Senator, Sir George Turner stated “The object is to prevent the Ministry of the day from bestowing its patronage upon members of Parliament”.<sup>29</sup>
55. Dr Cockburn moved that two clauses, in the same terms as clauses 10 and 11 at the National Australasian Convention (Sydney) in 1891, be inserted to follow clause

<sup>24</sup> *Report of the National Australasian Convention, Sydney, 1891*, 660.

<sup>25</sup> *Report of the National Australasian Convention, Sydney, 1891*, 878.

<sup>26</sup> *Report of the National Australasian Convention, Sydney, 1891*, 881.

<sup>27</sup> *Report of the National Australasian Convention, Sydney, 1891*, 882-883.

<sup>28</sup> *Report of the Australasian Federal Convention, Adelaide, 1897*, 739-756, 1198.

<sup>29</sup> *Report of the Australasian Federal Convention, Adelaide, 1897*, 740.

103.<sup>30</sup> Mr Higgins spoke against the motion, on the basis that “perfect liberty of choice” should be left to the voters. The motion was negated.<sup>31</sup>

Australasian Federal Convention, Second Sitting – Sydney 1897

56. The prohibition upon a person holding an “office of profit under the Crown”, save for a minister of the Commonwealth, was read (as cl 48), and agreed to.<sup>32</sup>

57. A motion was proposed to include, as clause 44A, the following: “A member of a House of the Parliament of a State shall be incapable of sitting in either House of the Parliament of the Commonwealth”.<sup>33</sup> During the debate several delegates, including Mr Barton and Mr Symon, recognised that it may be impossible for any politician to do his duty to the electors both in a State Parliament and in the Commonwealth Parliament.<sup>34</sup> Messrs Higgins, Isaacs and Barton, amongst others, expressed the view that the best plan was to provide no absolute prohibitions in the constitution, and to allow the electors to decide in the first instance, and to allow the Federal Parliament to enact laws imposing disqualifications for eligibility to sit in the Commonwealth Parliament.<sup>35</sup> The clause was negated.<sup>36</sup>

Australasian Federal Convention, Third Sitting – Melbourne 1898

58. The prohibition upon a person holding an “office of profit under the Crown”, save for a minister of the Commonwealth, was read (as cl 45). Sir John Forrest moved an amendment to except from the prohibition ministers in a State as they would otherwise be excluded. The motion was agreed to.<sup>37</sup>

59. A motion was proposed to include, as clause 104, the following: “A member of the Senate or House of Representatives shall not be capable of being chosen or of sitting as a member of any House of the Parliament of a State”. Mr Kingston spoke

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<sup>30</sup> *Report of the Australasian Federal Convention, Adelaide, 1897*, 1181.

<sup>31</sup> *Report of the Australasian Federal Convention, Adelaide, 1897*, 1182.

<sup>32</sup> *Report of the Australasian Federal Convention, Sydney, 1897*, 1028-1034.

<sup>33</sup> *Report of the Australasian Federal Convention, Sydney, 1897*, 996.

<sup>34</sup> *Report of the Australasian Federal Convention, Sydney, 1897*, 997, 1005.

<sup>35</sup> *Report of the Australasian Federal Convention, Sydney, 1897*, 1001, 1002, 1007.

<sup>36</sup> *Report of the Australasian Federal Convention, Sydney, 1897*, 1011.

<sup>37</sup> *Report of the Australasian Federal Convention, Melbourne, 1898, 1941-1942.*

against the motion as an “unwarrantable interference in local matters”, and the motion was negated.<sup>38</sup>

### Section 44(iv) within the Constitution

60. Section 44(iv) relevantly has a dual object, or purpose, within the Constitution.<sup>39</sup>

61. The first object, or purpose, is to protect the proper functioning of the Parliament by stopping the Crown from interfering with its members’ performance of their fundamental obligation, being “*the duty to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community”.<sup>40</sup> As the plurality in *Sykes v Cleary* has determined, “the principal mischief which section 44(iv) and its predecessors were directed at eliminating or reducing [was] Crown or executive influence over the House”.<sup>41</sup>

62. In this regard, section 44(iv) should be read within section 44 as but one such protection, which collectively constitute the essential bases for disqualification by reason that they were thought appropriate for inclusion in the Constitution. The founding fathers, however, left other matters for the electors and their will as expressed through the Commonwealth Parliament’s exclusive power to determine eligibility for its members and Senators.<sup>42</sup> By leaving these other matters for the electors and parliament, the founding fathers rejected the kind of broad proscription of conflicts of duty for which Ms McCulloch contends (MS [11], [12], [57]-[65]). Specifically, they assumed that members of State parliaments – who would be said to owe loyalty to their state constituents – would be free to sit in federal parliament. The result is that section 44(iv) expresses no concern that members might advance

<sup>38</sup> *Report of the Australasian Federal Convention, Melbourne, 1898*, 646.

<sup>39</sup> In construing any constitutional provision, “the purpose it seeks to attain must always be kept in mind”: *In re Webster* (1975) 132 CLR 270, 278 (Barwick CJ); *Sykes v Cleary* (1992) 176 CLR 77, 121 (Deane J).

<sup>40</sup> *R v Boston* (1923) 33 CLR 386, 400, approved *Re Day (No 2)* (2017) 91 ALJR 518, 529 [49]; 343 ALR 181, 192-193 (Kiefel CJ, Bell and Edelman JJ), ALJR 557 [269]; ALR 232 (Nettle and Gordon JJ). See also *Horne v Barber* (1920) 27 CLR 494, 500.

<sup>41</sup> *Sykes v Cleary* (1992) 176 CLR 77, 97 (Mason CJ, Toohey and McHugh JJ, with whom Brennan and Gaudron JJ agreed on this issue).

<sup>42</sup> *Smith v Oldham* (1912) 15 CLR 355, 358, 359-60, 365; *In re Richard Foreman and Sons Pty Ltd; Uther v. Federal Commissioner of Taxation* (1947) 74 CLR 508, 530; *Nelungaloo Pty Ltd v The Commonwealth* (1952) 85 CLR 545, 564. The Commonwealth Parliament has since so legislated, including to provide that a person who is, at the hour of nomination, a member of the Parliament of State, or the Legislative Assembly of the Northern Territory, or the Legislative Assembly for the Australian Capital Territory, is not capable of being nominated as a Senator or as a member of the House of Representatives. *Commonwealth Electoral Act 1918* (Cth), s 164.



the interests of a constituency different to the federal constituency for which they are elected; the only conflict section 44(iv) proscribes is a conflict between loyalty to the Crown and loyalty to federal Parliament. Quite simply, section 44(iv) does not speak to potential conflicts arising between duties to the federal parliament and duties to local councils.

63. The second object, or purpose, is, together with other provisions, to establish “a formal relationship between the Executive Government and the Parliament and provide for a system of responsible ministerial government”.<sup>43</sup> Section 44(iv), read together with sections including 64 and 65, enshrines one part of the cabinet or Westminster parliamentary democracy (that is otherwise structured upon the doctrine of a separation of executive, legislative and judicial powers).<sup>44</sup>

#### **Legal test for whether an office of profit is “under the Crown”**

64. Sir Donald Somervell, then Attorney-General and later a Lord of Appeal in Ordinary, advised the Select Committee on Offices or Places of Profit under the Crown, which reported in 1941, on the principles to determine whether an office was “under the Crown” for the purposes of eligibility to sit in the House of Commons. Somervell stated those principles as follows:<sup>45</sup>

20 In considering whether an office is under the Crown one has to consider who appoints, who controls, who dismisses and the nature of the duties. If the Crown itself has the power of appointment and dismissal, this would raise a presumption that the Crown controls, and that the office is one under the Crown. ... If the duties are duties under and controlled by the Government then the office is, *prima facie*, at any rate, an office under the Crown ...

65. Mr Martin submits that this test is a useful organising principle for considering whether any office of profit is “under the Crown”, including an office created by statute.<sup>46</sup> The use of the word “under” strongly supports an analysis on the extent to which an office is subject to control by the Crown.

<sup>43</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 558. See, too, *Egan v Willis* (1998) 195 CLR 424, 451-452 [42] (Gaudron, Gummow and Hayne JJ).

<sup>44</sup> See *Sykes v Cleary* (1992) 176 CLR 77, 121 (Deane J).

<sup>45</sup> *Report from the Select Committee on Offices or Places of Profit under the Crown* (1941) 136.

<sup>46</sup> An approach of referring to the statutory framework to decide whether an office was “under the Crown” was applied in *Hodel v Cuckshank* (1889) 3 QJLJ 141, 142 (Lilley CJ) and whether an office

66. Mr Martin agrees with Ms McCulloch that the meaning of the term “Crown”, as presently relevant, is the third meaning of that term identified by the plurality in *Sue v Hill* as the “Government, being the executive as distinct from the legislative branch of government, represented by the ministry and the administrative bureaucracy which attends to its business”.<sup>47</sup>

### **Application of the test to the offices of councillor and mayor of Devonport City Council**

67. Mr Martin’s offices, being a councillor and the mayor of Devonport City Council, do not exhibit the indicia of an office of profit “under the Crown”. These offices  
10 have a high degree of independence, and the Crown’s ability to interfere is slight.

#### The council is an independent statutory corporation

68. The Devonport City Council, established under section 18(1) of the Act, is an independent statutory corporation. Its functions are those of local government, including to represent and promote the interests of the community (subsection 20(1) of the Act). It consists of councillors elected on democratic principles (subsections 25(1) and (2) of the Act), who must involve, and are accountable to, the community (subsection 20(2) of the Act).
69. The council has power to raise funds, and to expend those funds in the exercise of its powers or in carrying out its functions (sections 73 and 74 of the Act). The  
20 statutory scheme does not make a council financially dependent upon the Crown; to the contrary, it establishes the conditions for financial independence of a council.

#### Councillors and the mayor are elected by the community

70. Councillors and the mayor are elected by eligible electors within the community of the municipal area. The Crown neither appoints these offices, nor controls the eligibility of candidature, nor determines the pool of eligible voters.
- (a) Councillors are directly elected by eligible electors (section 254 of the Act).  
No part of that election process, and no part of taking or holding office as a

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was “in the service of the Crown” in *Sydney City Council v Reid* (1994) 34 NSWLR 506, 520 (Kirby P, Meagher and Powell JA agreeing), 521 (Meagher JA).

<sup>47</sup> (1999) 199 CLR 462, [87] (Gleeson CJ, Gummow and Hayne JJ).

councillor, involves any affirmation by, or of, the Crown. To the contrary, a councillor's declaration is to "faithfully carry out the functions and exercise the powers vested in him or her by virtue of that office to the best of his or her ability and in accordance with the law" (section 321 of the Act and reg 40(1) of the Regulations).

- (b) The mayor, who must be a councillor (section 41(4) of the Act), is directly elected by eligible electors at a separate but concurrent election to that of councillors (section 40 and subsection 43(2) of the Act).

- 10 71. Councillors and the mayor are elected to office for a term of four years (subsections 44(1) and 46(1) of the Act). The circumstances in which the Crown may cause the office of councillor or the mayor to be vacated by the office-holder are limited by statute to improper conduct and to failures in the performance of statutory functions. Moreover, those limited powers may only be exercised following independent reviews (see paragraphs 33 to 35 above).

Councillors and the mayor are separate from, and not subject to control by, the Crown

- 20 72. The functions, or duties, of individual councillors include to represent the community and to act in the best interests of the community (section 28(1) of the Act). The functions, or duties, of the mayor include to act as a leader of the community of the municipal area and to lead and monitor the performance of the general manager of the council (section 27(1) of the Act). These duties, to represent and provide leadership to the community, and to monitor the general manager of the council, are distinct and separate from the Crown.

73. While the Minister may clarify these functions and, in the case of the mayor, add to them, the Minister has a limited ability to control or direct the manner in which a councillor or the mayor performs these functions (for example, to issue a direction that a councillor or the mayor must comply with statutory obligations: subsection 214M(a) of the Act).

Remuneration of councillors and the mayor

- 30 74. Ms McCulloch's submissions place primary importance upon the "Crown's power to control, directly or indirectly, the remuneration attached to the office, or the

Mayor’s receipt of it” (MS [13]; see also [17], [54] – [56], [62], [71]). That power – to vary Mr Martin’s remuneration – rises to control over his offices because it is said to be “at large” (MS [17]; see also [26]), [56]). But it is not. Section 349(1) provides that the governor may make regulations for the purposes of the Act; section 340A provides a councillor and a mayor are entitled to prescribed allowances. Those provisions, read within the context of the Act, do not confer upon the minister an “at large” power to change a councillor’s or a mayor’s allowances to control his or her performance of those offices, or any other office.

75. Further, the prospect that a minister might exercise his or her statutory powers to benefit or harm the conditions (including allowances) attached to an office could not, of itself, elevate that office to an office “under the Crown” for the purposes of section 44(iv).<sup>48</sup>

### Position in other States

76. Recognising that the conclusion as to whether a mayor or councillor of a local council holds an office of profit under the Crown rests upon a consideration of the statutory regime governing those offices, two intermediate appellate court decisions speak to the position in New South Wales and Queensland.
77. In *Sydney City Council v Reid*,<sup>49</sup> the New South Wales Court of Appeal found that local government employees are not “in the service of the Crown” by reason of the high measure of independence of councils from ministerial intervention.<sup>50</sup>
78. Meagher JA added the following:<sup>51</sup>

... Even the learned solicitor who argued the case for the respondent, Mr D M Bennett QC, did not advance so farouche a submission that a municipal council was the Crown, or an arm of the Crown, or an emanation of the Crown, or an agent of the Crown. The aldermen of a council are elected by popular suffrage, not appointed by the Crown. They neither ask for, nor, in general, receive, any assistance from the Crown in the discharge of their daily tasks. The extent to which the

<sup>48</sup> Indeed, it may be observed that, at times, allowances for members of the Commonwealth Parliament were calculated according to regulations. *Cunningham v The Commonwealth* (2016) 90 ALJR 1138, [81]-[83], [102] (Gageler J), [137] (Keane J), and [277], [299] (Gordon J).

<sup>49</sup> (1994) 34 NSWLR 506.

<sup>50</sup> (1994) 34 NSWLR 506, 520 (Kirby P, Meagher and Powell JJA agreeing).

<sup>51</sup> (1994) 34 NSWLR 506, 521.

Crown can interfere with their activities is slight, and the extent to which it does is minimal.

79. In *Local Government Association of Queensland (Inc) v State of Queensland*,<sup>52</sup> the Queensland Court of Appeal considered the validity of a statutory provision by which local government councillors ceased to be a councillor on becoming a candidate for the Senate or House of Representatives. In that case, neither the State of Queensland nor the Attorney General for the Commonwealth contended that section 44(iv) applies to local government councillors.<sup>53</sup> McMurdo P found that “it remains exclusively for the Commonwealth Parliament to decide whether it wishes to add to s. 164 of the *Commonwealth Electoral Act 1918* a fourth category of persons not entitled to be nominated as a Senator or Member of the House of Representatives, namely local government councillors”.<sup>54</sup>

## VII. ORDERS SOUGHT

80. If this Court answers the question reserved “No”, a process should be put in place to make orders declaring Mr Martin returned as a senator for the State of Tasmania.

## VIII. TIME ESTIMATE

81. Mr Martin estimates that he requires 1½ hours to present his oral argument.

20 Dated: 22 January 2018

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<sup>52</sup> [2003] 2 Qd R 354.

<sup>53</sup> [2003] 2 Qd R 354, [14].

<sup>54</sup> [2003] 2 Qd R 354, [14].

RE MS JACQUI LAMBIE

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

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CHRONOLOGY

Part I:

Mr Martin certifies that this chronology is in a form suitable for publication on the internet.

Part II:

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| Date                  | Event   | Source                                      |
|-----------------------|---|---|
| 13 to 27 October 2009 | 2009 Tasmanian local government election held<br>• Mr Steve Martin first elected as Councillor                        | SOAF [13]<br>(CB 99)                        |
| 12 to 25 October 2011 | 2011 Tasmanian local government election held<br>• Martin re-elected as Councillor<br>• Martin first elected as Mayor | SOAF [14](a)<br>and [20]<br>(CB 99 and 100) |
| 14 to 28 October 2014 | 2014 Tasmanian local government election held<br>• Martin re-elected as Councillor<br>• Martin re-elected as Mayor    | SOAF [14](b)<br>and [20]<br>(CB 99 and 100) |
| 6 November 2014       | Martin swears declaration of office witnessed by General Manager of Devonport City Council                            | SOAF [20]<br>(CB 100)                       |
| 9 May 2016            | Governor-General dissolves both the House of Representatives and the Senate   | SOAF [1]<br>(CB 98)                         |
| 23 May 2016           | Rolls close for the 2016 double dissolution election  | SOAF [2.1]<br>(CB 98)                       |

Filed on behalf of: Mr Steven Martin

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| Date             | Event  | Source   |
|------------------|--|--|
| 2 June 2016      | Martin signs Nomination of Senator form (CB 7)<br>Acting Electoral Officer (AEO) receives Jacqui Lambie Network nomination form (CB 5-6)   | SOAF [3]<br>(CB 98)  |
| 9 June 2016      | Nominations close for candidates at the 2016 double dissolution election close   | SOAF [7]<br>(CB 99)  |
| 2 July 2016      | Polling day in 2016 double dissolution election  | SOAF [9]<br>(CB 99)  |
| 28 July 2016     | AEO certifies result of Senate election for Tasmania. Ms Jacqui Lambie elected.  | SOAF [10]<br>(CB 99)   |
| 14 November 2017 | Ms Lambie resigns from Senate  | Senate reference letter (CB 2 [2])                               |
| 15 November 2017 | Senate refers questions of Ms Lambie's eligibility   | Senate reference letter (CB 2-3)                                 |
| 6 December 2017  | Laurie Fransman QC delivers Report on British Nationality Law in relation to Ms Lambie   | CB 41-44   |
| 8 December 2017  | Nettle J orders addition of Attorney-General of the Commonwealth, Martin and McCulloch as parties to the reference in relation to Ms Lambie.<br><br>Nettle J makes orders in relation to disqualification and special count <ul style="list-style-type: none"> <li>• Ms Lambie declared not eligible (order 2(a))</li> <li>• Special count ordered (order 2(b))</li> <li>• Commonwealth to pay Martin and McCulloch's costs (order 7)</li> </ul> | CB 68 – parties orders<br><br>CB 70-71 – disqualification orders |
| 12 December 2017 | AEO conducts special count and Martin identified as person who would be elected  | SOAF [32]<br>(CB 102)  |
| 13 December 2017 | Nettle J makes orders: <ul style="list-style-type: none"> <li>• for timetabling of hearing (orders 1-11)</li> <li>• referring a question of Mr Martin's eligibility to the Full Court (order 12)</li> <li>• listing question for hearing before Full Court (order 13)</li> </ul>   | CB 90  |

Dated: 22 January 2018

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