

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)*

OUTLINE OF ORAL SUBMISSIONS OF

THE ATTORNEY-GENERAL OF THE COMMONWEALTH

Filed on behalf of the Attorney-General of the
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PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Construction of section 44(iv)

2. Section 44(iv) should be given a construction that promotes certainty and stability in its operation. The other parties and intervener advance a test, turning on degrees of control or influence by the executive government, which is unduly evaluative and impressionistic: **CS [11], [65]**.

10 - *Re Day (No 2)* (2017) 91 ALJR 518 at [97], [98], [100], [156], [263] (**JBA 2 Tab 20**).

- *Re Canavan* (2017) 91 ALJR 1209 at [48] (**JBA 2 Tab 19**).

3. In s 44(iv), the phrase “under the Crown” connotes control by the executive government of the actual holding of the office, or access to the benefits pertaining thereto, and not control over the performance of the functions of the office.

Primary focus is on source of power to appoint

4. If the executive government has the power to appoint a person to an office, then the office is “under the Crown”: **CS [13]-[22], [24]-[26]**.

20 4.1. Illustrated by authority:

4.1.1. *Re Nash (No 2)* (2017) 92 ALJR 23 at [9] (**JBA 2 Tab 21**).

4.1.2. *Clydesdale v Hughes* (1934) 36 WALR 73 at 75, 85

- 4.2. Conforms to the purpose of s 44(iv), which is to prevent influence by the executive government over parliamentary functions, not to prevent influence over executive functions:

- *Sykes v Cleary* (1992) 176 CLR 77 at 97 (**JBA 4 Tab 25**).

- Convention Debates: Sydney, 3 April 1891, 660-661 (**JBA 4 Tab 31.2**); Adelaide, 17 April 1897, 740, 741, 744 (**JBA 4 Tab 31.3**); Sydney, 21 September 1897, 1030 (**JBA 4 Tab 31.4**); Melbourne, 16 March 1898, 2448 (**JBA 4 Tab 31.5**)

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4.3. “Under the Crown” is equivalent to “from the Crown”

- House of Commons (UK), *Report from the Select Committee on Offices or Places of Profit Under the Crown* (1941) pp 1478-1479 (**JBA 4 Tab 30**).
- *Sykes v Cleary* (1992) 176 CLR 77 at 95 (**JBA 4 Tab 25**)

5. The executive government has no power to appoint persons to the offices of mayor and councillor under the *Local Government Act 1993* (Tas) ss 25, 40, 45 (**JBA 1 Tab 5**): CS [56].

Powers to remove from office or alter remuneration

10 6. If the executive government does not have the power to appoint a person to an office, then the office is not “under the Crown” unless the executive has such extensive powers to remove the person from office, or to alter the remuneration of the office, that the continuing capacity of the person to “hold” the office or its benefits depends upon the will of the executive government: CS [16], [23]-[26].

6.1. This does not engage consideration of degrees of control over the performance of functions of the office.

6.2. It involves a limited form of evaluation of powers to remove and alter remuneration to ascertain whether the actual holding of the office or its benefits is, in substance if not form, under the control of the executive government.

20 6.3. The circumstance is likely to arise rarely in practice and so this is at most a limited qualification on the bright-line test provided by the primary focus on the power of appointment.

7. The holding of the offices of mayor and councillor under the *Local Government Act 1993* (Tas) (**JBA 1 Tab 5**) is not, as a matter of substance, under the control of the executive government: CS [57]-[58].

7.1. The executive powers to remove a mayor or councillor from office are confined to very limited circumstances.

30 7.2. The term of office is set by legislation: ss 44(1) and 46(1).

7.3. The remuneration is prescribed by regulation (ss 340A, 349) subject to disallowance by either House of Parliament and therefore within legislative control: *Acts Interpretation Act 1931* (Tas) s 47 (**JBA 1 Tab 6**).

Other matters

8. The conclusion that local councillors and mayors are not disqualified is consistent with academic opinion and relevant authorities: **CS [62]-[63]**.

- Twomey, *The Constitution of New South Wales* (2004) 437-438
- *Local Government Association of Qld (Inc) v Queensland* [2003] 2 Qd R 354 at 362.8, 364.9, 372 fn 49 (**JBA 2 Tab 16**).

10 9. Contrary to Ms McCulloch's submissions, the reach of s 44(iv) cannot be accurately identified by reference to notions of "incompatibility" and "conflict of interest": **CS [64]-[70]**.

- *Sykes v Cleary* (1992) 176 CLR 77 at 95-96 (**JBA 3 Tab 25**)

Date: 6 February 2018

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