HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING MS JACQUI LAMBIE

Re Lambie
[2018] HCA 6
Date of Order: 6 February 2018
Date of Publication of Reasons: 14 March 2018
C27/2017

ORDER

The question reserved for the consideration of the Full Court under s 18 of the Judiciary Act *1903 (Cth) be answered as follows:*

Question

Is Mr Martin incapable of being chosen or of sitting as a senator by reason of s 44(iv) of the Constitution?

Answer

No, Mr Martin is not incapable of being chosen or of sitting as a senator by reason of s 44(iv) of the Constitution.

Representation

C R C Newlinds SC with P Kulevski appearing on behalf of Ms McCulloch (instructed by Holman Webb Lawyers)

P H Solomon QC with C O H Parkinson appearing on behalf of Mr Martin (instructed by Corrs Chambers Westgarth)

S P Donaghue QC, Solicitor-General of the Commonwealth with Z E Maud and B K Lim appearing on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

No appearance for Ms Lambie

K L Walker QC, Solicitor-General for the State of Victoria with M Hosking appearing on behalf of the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

CATCHWORDS

Re Lambie

Constitutional law (Cth) – Parliamentary elections – Reference to Court of Disputed Returns – Where Court held there was a vacancy in representation of Tasmania in Senate – Where Court made directions for special count of ballot papers to fill vacancy – Where orders sought following special count that Mr Steven Martin be declared elected as senator to fill vacancy – Where Mr Martin held offices of mayor and of councillor of local government corporation under *Local Government Act* 1993 (Tas) – Whether Mr Martin incapable of being chosen or of sitting as senator by reason of s 44(iv) of Constitution – Proper construction of s 44(iv) of Constitution – Where no dispute that office of mayor or of councillor is "office of profit" – Whether office of mayor or of councillor constitutes office of profit "under the Crown".

Words and phrases – "civil service", "conflict between duties", "conflict of duty and interest", "control over holding or profiting from holding", "employment by the Crown", "employment in the public service", "executive government", "executive influence", "from the Crown", "incapable of being chosen or of sitting", "office of profit", "public service", "under the Crown", "will of the executive government".

Constitution, ss 44(iv), 45(i), 48.
Commonwealth Electoral Act 1918 (Cth), s 376.
Local Government Act 1993 (Tas).

1 KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ. On 14 November 2017, the Senate resolved to refer questions to the High Court sitting as the Court of Disputed Returns pursuant to s 376 of the *Commonwealth Electoral Act* 1918 (Cth) ("the Electoral Act"). The questions referred included whether, by reason of s 44(i) of the Constitution, there is a vacancy in the representation of Tasmania in the Senate for the place for which Ms Jacqui Lambie was returned at the double dissolution election held on 2 July 2016 and, if so, by what means and in what manner that vacancy should be filled. On 8 December 2017, after making orders allowing the Attorney-General of the Commonwealth, Mr Steven Martin and Ms Katrina McCulloch to be heard on the reference, as a consequence of which each was deemed to be a party to the reference by operation of s 378 of the Electoral Act, Nettle J answered those questions to the effect that there is such a vacancy in the representation of Tasmania in the Senate which should be filled by a special count of the ballot papers in accordance with orders which his Honour then made.

2 On 12 December 2017, the Australian Electoral Officer for Tasmania conducted a special count in accordance with the orders which had been made by Nettle J and reported on the candidates who would be elected as senators for Tasmania as a result of that special count. Those candidates included Mr Martin, who had not previously been returned as a senator.

3 Mr Martin holds and for current terms which commenced in 2014 has held the offices of mayor and of councillor of Devonport City Council, a local government corporation established under the *Local Government Act* 1993 (Tas) ("the Local Government Act"). In respect of each of those offices, Mr Martin has and throughout its current term has had a statutory entitlement to be paid a substantial annual allowance by the Council.

4 On 13 December 2017, pursuant to s 18 of the *Judiciary Act* 1903 (Cth), Nettle J stated for the consideration of the Full Court the question of whether Mr Martin is incapable of being chosen or of sitting as a senator by reason of s 44(iv) of the Constitution. On 6 February 2018, at the conclusion of the hearing of the question so stated, the Full Court answered that question in the negative. These are our reasons for that answer.

Section 44(iv) of the Constitution and earlier authority

5 To the extent immediately relevant, s 44 of the Constitution provides:

"Any person who:

...

(iv) holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; …

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But subsection (iv) does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth."

6 Important to the context in which s 44(iv) is to be construed is s 45(i), which provides:

"If a senator or member of the House of Representatives:

(i) becomes subject to any of the disabilities mentioned in the last preceding section; …

his place shall thereupon become vacant."

7 The temporal relationship between s 44 and s 45(i) was recently explained in *Re Nash (No 2)*[1]. The process of "being chosen" to which s 44 refers is a process of electoral choice which begins with nomination for election and which remains incomplete unless and until a candidate who is not subject to a disability mentioned in s 44 at any time during that process is validly returned as elected. The "senator or member" to whom s 45 refers is a qualified candidate who has been validly returned as elected. If a qualified candidate once having been returned as elected thereafter becomes subject to a disability mentioned in s 44,

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1 (2017) 92 ALJR 23; 350 ALR 204; [2017] HCA 52.

"not only does s 44 operate to prevent the person from sitting but s 45(i) operates to vacate his or her place"[2].

8 The ambit of the disability mentioned in s 44(iv) has been considered by the High Court sitting as the Court of Disputed Returns in two previous cases. The first was *Sykes v Cleary*[3], where s 44(iv) was held to apply to Mr Cleary by reason of him holding an appointment as "a permanent officer in the teaching service" under the *Teaching Service Act* 1981 (Vic)[4]. The second was *Re Nash (No 2)*, where the Court noted in passing that "[t]here could be, and was, no dispute" that Ms Hughes had held an "office of profit under the Crown" within the meaning of s 44(iv) during the period between the commencement of her appointment to and her resignation from the position of a part-time member of the Administrative Appeals Tribunal under the *Administrative Appeals Tribunal Act* 1975 (Cth)[5].

9 Consistently with the reasoning in *Sykes v Cleary*[6], there was no dispute in the present case that the reference in s 44(iv) to "the Crown" is to executive government and that the reference encompasses the executive government of a State as well as the executive government of the Commonwealth. There was also no dispute that the offices of mayor and of councillor of a local government corporation established under the Local Government Act each answer the description of an "office of profit" within the meaning of s 44(iv): each is a position of a public character constituted under governmental authority to which duties and emoluments are attached[7].

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2 (2017) 92 ALJR 23 at 29 [33]; 350 ALR 204 at 212.

3 (1992) 176 CLR 77; [1992] HCA 60.

4 (1992) 176 CLR 77 at 97.

5 (2017) 92 ALJR 23 at 26 [9]; 350 ALR 204 at 207.

6 (1992) 176 CLR 77 at 95-98, 108, 130, 132. Cf *Sue v Hill* (1999) 199 CLR 462 at 499 [87]; [1999] HCA 30.

7 Cf *Sykes v Cleary* (1992) 176 CLR 77 at 95; *R v Boston* (1923) 33 CLR 386 at 402; [1923] HCA 59.

Issues and parties' submissions

10 The sole issue for determination by the Full Court in answering the question reserved was whether, within the meaning of s 44(iv), the offices of mayor and of councillor of a local government corporation established under the Local Government Act answer the description of offices of profit "under" the executive government of Tasmania.

11 The parties were agreed that determination of the existence or non-existence of the relationship between a statutory office and executive government connoted by the word "under" turned solely on an examination of the statutory incidents of the office. They were not agreed on what that relationship entailed and what factors would indicate its existence.

12 For Ms McCulloch it was argued that the relationship connoted by the word "under" was one merely of subordination of the office to an executive government; the factors that might indicate the existence of such a relationship were argued to be many and varied. For the Attorney-General of the Commonwealth, it was argued that the relationship was rather one of dependence for the holding or continued holding of the office on the will or continuing will of an executive government; the factors that might indicate the existence of such a relationship were argued to be closely circumscribed. The arguments for Mr Martin, and for the Attorney-General for the State of Victoria, who intervened at the hearing under s 78A of the *Judiciary Act*, supported the making of a multi-factorial evaluative determination somewhere along a spectrum bounded by those two positions.

Construction of s 44(iv)

Pre-federation history

13 The language of s 44(iv) can be traced back through the same or similar language in colonial constitutions[8], to provisions of the *Succession to the Crown*

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8 Section 27 of the *Constitutional Act* 1854 (Tas) (18 Vict No 17); ss 18 and 19 of Sched 1 to the *New South Wales Constitution Act* 1855 (Imp) (18 & 19 Vict c 54); s 17 of Sched 1 to the *Victoria Constitution Act* 1855 (Imp) (18 & 19 Vict c 55); s 17 of the *Constitution Act* 1855-6 (SA); s 20 of the *Constitution Act* 1867 (Q) (31 Vict No 38); ss 6 and 29(5) of Sched 1 to the *Western Australia Constitution Act* 1890 (Imp) (53 & 54 Vict c 26).

Act 1707[9] and Statute 4 & 5 Anne c 20 (1705)[10], and ultimately to a provision of the *Act of Settlement* 1701[11]. Textually, the most that can for present purposes be drawn from that context is the emergence of a general understanding over the centuries that offices of profit "under" the Crown was a wider category than offices of profit "from" the Crown, the latter being generally understood to be confined to offices the appointment to which was made directly by the Crown and not through the medium of a Minister[12].

14 There is a passing observation in the edition of *Rogers on Elections* current at the time of federation to the effect that the words "under the Crown" "seem to apply to all offices connected with the public service"[13]. Nothing of present utility can legitimately be taken from it. The observation was tentative and descriptive as distinct from definitional.

15 The edition of Erskine May's well-known treatise on parliamentary practice current at the time of federation referred to a hodgepodge of peculiarly English offices then treated as a matter of parliamentary practice as disqualifying their holders from membership of the House of Commons[14]. There is no profit in cataloguing them. They do not disclose any principled basis for determining when an office would or would not be considered an office of profit under the Crown.

16 The expression "under" the Crown appearing in the context of disqualification for election to the position of member of a Divisional Board

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9 6 Anne c 41, ss 24 and 25.

10 Sections 29 and 30.

11 12 & 13 Will III c 2, s 3. See *Sykes v Cleary* (1992) 176 CLR 77 at 95.

12 See Day, *Rogers on Elections*, 17th ed (1895), vol 2 at 10, 44; United Kingdom, House of Commons, *Report from the Select Committee on Offices or Places of Profit under the Crown*, (1941) at xiii [17]. Cf *Clydesdale v Hughes* (1934) 36 WALR 73 at 85.

13 Day, *Rogers on Elections*, 17th ed (1895), vol 2 at 10, 44.

14 Erskine May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 10th ed (1893) at 28-29, 603-608.

under the *Divisional Boards Act* 1887 (Q)[15] was interpreted by the Supreme Court of Queensland in 1889 to disqualify a person who had been appointed as a poundkeeper on the basis that "his appointment and removal depend on the judgment of ... officers of the Crown"[16]. The expression "under" the Crown appearing in the context of parliamentary disqualification, however, has until now lacked judicial exposition[17].

17 Nothing in pre-federation history suggests that the expression "under" the Crown appearing in the context of parliamentary disqualification had acquired a technical meaning by the time of federation. Moreover, nothing in the drafting history of s 44(iv)[18] suggests that any significance was ascribed by the framers of the Constitution to the precise choice of language. The issue now for determination cannot be resolved by discovering the historical connotation of a preposition.

18 Pre-federation history is more enlightening as to the purpose of the disqualification. By the end of the nineteenth century, the disqualification of a member of the House of Commons who held an office of profit under the Crown was but one of a long list of disqualifications for parliamentary office which had by then come to be imposed by statute[19].

19 Writing in 1886, Sir William Anson described the numerous disqualifications as falling into two groups. The first group comprised disqualifications "created during the greater part of the [eighteenth] century [that] were designed to secure the independence of Parliament". The second group comprised "more modern disqualifications ... for the most part imposed to secure

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15 51 Vict No 7.

16 *Hodel v Cruckshank* (1889) 3 QLJ 141 at 142.

17 Carney, *Members of Parliament: Law and Ethics*, (2000) at 64.

18 See *Official Report of the National Australasian Convention Debates*, (Sydney), 18 March 1891 at 471-472, 3 April 1891 at 660-661; *Official Report of the National Australasian Convention Debates*, (Adelaide), 17 April 1897 at 739-745; *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 16 March 1898 at 2448.

19 Anson, *The Law and Custom of the Constitution*, (1886), pt 1 at 85-87.

the undivided attention of officials to the business of their departments, and the advantage of a permanent civil service unaffected by changes of ministry or by considerations of party politics"[20].

20 Disqualification by reason of holding an office of profit under the Crown fell within Sir William's first group of disqualifications. In relation to that first group, Sir William wrote[21]:

> "The amount of influence accruing to the Crown from the places which were thus abolished, or made to disqualify, may be collected from Burke's speech on Economical Reform, made with a view to the passing of the last of the Acts I have mentioned. It is not difficult to see the use to which such places were put when the reform of the king's household was thwarted because 'the turnspit in the king's kitchen was a member of Parliament'; when the Board of Trade could be described as 'a sort of temperate bed of influence: a sort of gently ripening hot-house where eight members of Parliament receive salaries of a thousand a year, for a certain given time, in order to mature, at a proper season, a claim to two thousand granted for doing less, and on the credit of having toiled so long in that inferior laborious department.'"

21 Writing also in 1886, in Melbourne, Professor Hearn explained how the continuing disqualification of a member of the House of Commons who held an office of profit under the Crown had contributed in practice to the emergence of a permanent non-political public service and went on to explain by reference to conflicting duties of office how "a seat in Parliament and a permanent official position are irreconcilable"[22]. Consistently with Sir William Anson, however, Professor Hearn stated[23]:

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20 Anson, *The Law and Custom of the Constitution*, (1886), pt 1 at 290-291. See also Maitland, *The Constitutional History of England*, (1955) at 368-369.

21 Anson, *The Law and Custom of the Constitution*, (1886), pt 1 at 291.

22 Hearn, *The Government of England: Its Structure and Its Development*, 2nd ed (1886) at 259-262, 273.

23 Hearn, *The Government of England: Its Structure and Its Development*, 2nd ed (1886) at 262-263.

> "The laws which now regulate the capacity or incapacity of officers of the Crown to serve in Parliament did not originally contemplate the results which I have attempted to describe. The great aim of our legislation on this subject has been the limitation of Royal influence in Parliament."

The purpose to which s 44(iv) is directed

22 Bearing on the resolution of the issue for determination is the combination of two overarching considerations. One is the precept, endorsed in *Re Canavan*[24] in relation to s 44(i) and applicable equally to s 44(iv), that the provision's "limiting effect on democratic participation tells in favour of an interpretation which gives the disqualification set out ... the greatest certainty of operation that is consistent with its language and purpose"[25]. The other is the identification in *Sykes v Cleary*, consistently with the writings of Sir William Anson and Professor Hearn, of the "principal mischief" to which s 44(iv) is directed in terms of "eliminating or reducing ... executive influence over the House"[26].

23 More significant still is the function attributable to s 44(iv), conformably with that identified purpose, in protecting the framework for responsible government established primarily through the operation of ss 7, 24, 61 and 64 of the Constitution. The capacity for the Houses of Parliament to act as a check on executive action is essential to responsible government.

24 The corresponding duty of a member of Parliament was spelt out by Isaacs J in *Horne v Barber*[27]:

> "When a man becomes a member of Parliament, he undertakes high public duties. Those duties are inseparable from the position: he cannot

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24 (2017) 91 ALJR 1209 at 1219 [48]; 349 ALR 534 at 546; [2017] HCA 45.

25 *Re Day (No 2)* (2017) 91 ALJR 518 at 535 [97]; 343 ALR 181 at 201; [2017] HCA 14. See also 91 ALJR 518 at 535 [98], [100], 542 [156], 556 [263]; 343 ALR 181 at 201-202, 212, 230-231.

26 (1992) 176 CLR 77 at 97.

27 (1920) 27 CLR 494 at 500; [1920] HCA 33. See also *R v Boston* (1923) 33 CLR 386 at 401-402.

> retain the honour and divest himself of the duties. One of the duties is that of watching on behalf of the general community the conduct of the Executive, of criticizing it, and, if necessary, of calling it to account in the constitutional way by censure from his place in Parliament – censure which, if sufficiently supported, means removal from office. That is the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses. The effective discharge of that duty is necessarily left to the member's conscience and the judgment of his electors, but the law will not sanction or support the creation of any position of a member of Parliament where his own personal interest may lead him to act prejudicially to the public interest by weakening (to say the least of it) his sense of obligation of due watchfulness, criticism, and censure of the Administration."

25 The word "under" in s 44(iv) obviously must connote the same connection between a senator or member and the executive government of a State as it connotes between a senator or member and the executive government of the Commonwealth. What must nevertheless be emphasised is that s 44(iv) is at its apogee, in conjunction with s 45(i), in protecting the framework for responsible government established by the Constitution in so far as it operates to limit the capacity of the Commonwealth executive to influence a sitting senator or member in the performance of his or her parliamentary duty by the grant of an office of profit. It is impossible to resist the conclusion that "[a]t the very least, s 44(iv) was intended to prevent any revival of the practice (forbidden in Great Britain by the Act of Settlement of 1701) of the executive government suborning votes in the Houses of Parliament through purchase – that is through the grant of offices of profit under the Crown"[28]. The competing interpretations of the word "under" are appropriately evaluated by considering how they would operate to achieve that purpose.

26 The plurality in *Sykes v Cleary* noted that s 44(iv)'s disqualification for holding an office of profit under the Crown had been accepted in Australia to exclude "public servants, who are officers of the departments of government,

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28 Hanks, "Parliamentarians and the Electorate", in Evans (ed), *Labor and the Constitution 1972-1975*, (1977) 166 at 192 (footnote omitted).

from membership of the legislature"[29] and stated that the disqualification had in that way "played an important part in the development of the old tradition of a politically neutral public service"[30]. Consistently with the observations of Professor Hearn concerning the pre-federation position in the United Kingdom, the plurality referred to that exclusion of "permanent officers of the executive government" as "a recognition of the incompatibility of a person at the one time holding such an office and being a member of the House" and identified as one of the factors giving rise to that incompatibility that "performance by a public servant of his or her public service duties would impair his or her capacity to attend to the duties of a member of the House"[31].

27 Plainly, however, s 44(iv) is not designed to eliminate a conflict merely between the duty which a person might have as the holder of an office and the duty which that person would assume as a senator or member of the House of Representatives. Were that its design, the confining of its relevant operation to an office of profit and the carving out from its operation of State Ministers would make no sense. To the extent s 44(iv) has the effect of eliminating such a conflict between duties, the operation of the provision has been consequential but serendipitous.

28 Rather, s 44(iv) can be seen to be quite narrowly tailored to eliminate a particular form of conflict of duty and interest. The targeted conflict is between the parliamentary duty of a senator or member and a pecuniary interest of a kind which, if permitted, would give rise to a real capacity for executive influence over the performance of that duty. The particular form of conflict to which the first clause of the provision is addressed is that which would arise from a senator or member being able to hold at the will of an executive government an office in respect of which he or she receives a financial gain.

29 Concern to eliminate a similar conflict between parliamentary duty and pecuniary interest is evident in the disqualification by the second clause of s 44(iv) of a person who holds a pension payable during the pleasure of the

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29 (1992) 176 CLR 77 at 95, citing Australia, Joint Standing Committee on Electoral Matters, *Inquiry into the Conduct of the 1987 Federal Election and 1988 Referendums*, Report No 3, (May 1989) at 28 [3.53].

30 (1992) 176 CLR 77 at 95-96.

31 (1992) 176 CLR 77 at 96.

Crown out of any of the revenues of the Commonwealth. Commenting on an early draft of that second clause in the course of debate at the National Australasian Convention in 1891, in language that can fairly be treated as applicable to what was to become s 44(iv) in its entirety, Sir Samuel Griffith summed up its object as being "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"[32].

30 Within that relatively narrow yet important compass, s 44(iv) in combination with s 45(i) has a prophylactic quality. Not only does s 44(iv) operate to prevent a person who holds at the will of executive government an office in respect of which he or she receives a financial gain from being chosen as a senator or member, but s 44(iv) and s 45(i) operate together to limit the capacity for a person who has been chosen as a senator or member to be influenced by the prospect of obtaining any present or future financial gain at the will of the executive during the period in which the person serves as a senator or member. The provisions can be seen to combine in that way to complement the operation of s 48 of the Constitution, which made provision for a specified pecuniary allowance to be paid to each senator and each member until the Parliament otherwise provided, and by reference to which the comment was made in *Brown v West* that "[t]here is much to be said for the view that the Parliament alone may make provision for benefits having a pecuniary value which accrue to its members in virtue of their office and which are not mere facilities for the functioning of the Parliament"[33].

Interpretation of office of profit "under" the Crown

31 The disqualification set out in the first clause of s 44(iv) is given the greatest certainty of operation that is consistent with its language and with its purpose of eliminating or reducing the executive influence over a senator or member which would arise from a relationship of financial dependency by adopting an interpretation of the word "under" which substantially accords with that proposed by the Attorney-General of the Commonwealth. An office of profit is "under" the Crown within the meaning of the provision if the holding or

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32 *Official Report of the National Australasian Convention Debates*, (Sydney), 3 April 1891 at 660.

33 (1990) 169 CLR 195 at 201; [1990] HCA 7.

continued holding of that office, or the receipt of profit from it, depends on the will or continuing will of the executive government of the Commonwealth or of a State.

32 The disqualification effected by the provision as so interpreted can be seen to have two distinct aspects.

33 First, the provision operates to disqualify any person who holds any office of profit to which that person has been appointed at the will of the executive government of the Commonwealth or of a State. The security of the person's tenure in such an office and the mechanism by which the person might be removed from such an office are irrelevant to that aspect of the provision's operation: a sinecure to which a person might be appointed at the will of an executive government as an inducement is no less attractive because it is secure. Mere appointment to an office of profit at the will of an executive government of itself gives rise to the capacity for the executive government to influence the performance of the parliamentary duty of a senator or member, which influence it is the constitutional design to eliminate.

34 Second, the provision operates to disqualify a person who holds an office of profit to which that person has not been appointed at the will of the executive government of the Commonwealth or of a State if the continued holding of that office or continued profiting from holding that office is dependent on the will of the executive government of the Commonwealth or of a State. To this aspect of the operation of the provision, the security of the person's tenure and remuneration in such an office, the means by which the person might be removed or suspended from it, and any means by which emoluments of the office might be withheld, are all of critical importance. Executive control over the performance of the functions of the office is relevant only in so far as it might bear on the nature and degree of any executive capacity to achieve such removal or suspension or withholding. The second aspect of the provision's operation will be engaged if, but only if, the executive government has such power over the continued holding of the office or profiting from holding the office as to amount to effective control over holding or profiting from holding the office.

35 The first aspect of the operation of the provision is sufficient to explain the disqualification of Mr Cleary in *Sykes v Cleary* and of Ms Hughes in *Re Nash (No 2)*. Each held an office of profit to which officeholders were appointed by executive government. On the issues relevantly joined in argument

in *Sykes v Cleary*[34], it was held not to matter that Mr Cleary's office had become "unattached" and that he had taken leave without pay[35]. The security of Mr Cleary's and Ms Hughes' tenure was irrelevant and, notably, was not explored in the reasoning in either case.

36 Mr Martin, in contrast, does not hold an office of profit to which officeholders are appointed by executive government. The offices of mayor and of councillor are offices to which officeholders are elected[36]. Mr Martin's position therefore turns on the second aspect of the operation of s 44(iv), namely, whether the continued holding of those offices, or the receipt of profit from them, turns on the will or continuing will of the executive government of the Commonwealth or of a State.

Application of s 44(iv) of the Constitution

37 The incidents of the offices of mayor and of councillor of Devonport City Council, including those which bear on the relationship between those offices and the executive government of Tasmania, are to be found entirely within the provisions of the Local Government Act and subordinate legislation.

38 The Local Government Act divides the State into municipal areas some of which are cities and one of which is Devonport City[37], and establishes in each municipal area a council, Devonport City Council being the council in the municipal area which corresponds to Devonport City[38]. A council is a body corporate[39] the functions of which include "to represent and promote the interests

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34 (1992) 176 CLR 77 at 88.

35 (1992) 176 CLR 77 at 97-98.

36 Part 4 of the Local Government Act.

37 Section 16 and column 1 of Sched 3, and s 16A and column 1 of Sched 3B to the Local Government Act.

38 Section 18 and column 2 of Sched 3 to the Local Government Act.

39 Section 19 of the Local Government Act.

of the community" and "to provide for the peace, order and good government of the municipal area"[40].

39 A council consists of a mayor (whose functions include "to act as a leader of the community of the municipal area" and "to represent the council on regional organisations and at intergovernmental forums at regional, state and federal levels")[41], a deputy mayor[42], and councillors (whose functions include "to represent the community", "to act in the best interests of the community" and "to participate in the activities of the council")[43]. The mayor, the deputy mayor and councillors are each to be elected by electors of the municipal area subject to the proviso that a person cannot accept the office of mayor or deputy mayor unless the person is a councillor[44]. The term of office of a mayor, a deputy mayor and a councillor is in each case a period of four years from the date of the issue of a certificate of election[45]. A councillor is entitled to a prescribed allowance and a mayor and deputy mayor are entitled to prescribed allowances in addition to their allowance as councillors[46]. The allowances are payable by the council from sources of funds which include imposition of rates, fees and charges and obtaining grants and other allocations of money[47].

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40 Section 20 of the Local Government Act.

41 Sections 25 and 27 of the Local Government Act.

42 Section 25 of the Local Government Act.

43 Sections 25 and 28 of the Local Government Act.

44 Sections 40, 41 and 45 of the Local Government Act.

45 Sections 44 and 46 of the Local Government Act.

46 Section 340A of the Local Government Act.

47 Section 73 of the Local Government Act.

40 The prescribed allowance for a councillor of Devonport City Council is currently in excess of $20,000 per annum and the additional prescribed allowance for the mayor of Devonport is currently in excess of $50,000 per annum[48].

41 While there is no doubt that the council in a municipal area is a corporation on which is conferred governmental functions sufficient to characterise it as the "State" for the purposes of s 75(iv), s 114 and similar references in the Constitution[49], there could be no suggestion that a council or a mayor or deputy mayor or councillor form part of the executive government of Tasmania[50].

42 The argument for Ms McCulloch, who alone sought to establish that Mr Martin at all times relevant to the double dissolution election held on 2 July 2016 has held offices of profit under the Crown within the meaning of s 44(iv) of the Constitution, sought to locate the requisite connection between the offices of mayor and of councillor and the executive government of Tasmania in a number of provisions of the Local Government Act which confer certain powers or functions variously on:

- the Governor of Tasmania;
- the Minister administering the Local Government Act ("the Minister");
- the Director of Local Government ("the Director", who is a State Service officer or employee appointed by the Governor to undertake the general administration of the Local Government Act subject to the direction of the Minister[51]);

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48 Regulation 42 and Sched 4 to the Local Government (General) Regulations 2015 (Tas).

49 *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 233; [1992] HCA 6, citing *The Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208; [1904] HCA 50.

50 Cf *Sydney City Council v Reid* (1994) 34 NSWLR 506 at 519-520.

51 Sections 334 and 335 of the Local Government Act.

- the Code of Conduct Panel (which is established by the Act and which, when investigating and determining a code of conduct complaint, is constituted by an Australian lawyer and two other persons with experience in local government each appointed by the Minister[52]);

- the Local Government Board (which is established by the Act and which is comprised of the Director or his or her nominee together with a chairperson and nominees of the Local Government Association of Tasmania and Local Government Managers Australia (Tasmania), each appointed by the Minister[53]); and

- Boards of Inquiry (which may be established by the Minister and which are to consist of one or more persons appointed by the Minister[54]).

43 The answer to the argument is that the provisions on which Ms McCulloch relied do not alone or in combination confer power on the executive government of Tasmania over the continued holding of the office or profiting from holding the office of mayor or of councillor sufficient to amount to effective control over holding or profiting from holding those offices. To explain that answer, it is necessary to refer to each provision or set of provisions in turn.

44 The first set of provisions comprises ss 27A and 28AA, which allow the Minister, after consultation with a council, to make orders imposing on mayors such functions as the Minister considers appropriate and clarifying the functions of mayors and of councillors. Neither section gives the Minister any power over the holding of the office or profiting from holding the office of mayor or of councillor. Ministerial control over the functions of those offices is not to the point.

45 The second, third and fourth sets of provisions may be considered together. They have the common feature that they provide for the suspension or removal or dismissal of a councillor from office by or on the recommendation of the Minister or of other officeholders who in the performance of their relevant

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52 Sections 28K and 28L of the Local Government Act.

53 Section 210 of the Local Government Act.

54 Section 215 of the Local Government Act.

functions may be accepted to form part of the executive government of Tasmania.

46 The second set of provisions is contained within Div 3A of Pt 3. That Division requires the Minister, by order, to make a model code of conduct relating to the conduct of councillors and permits the Minister, by order, to amend or revoke and substitute the model code of conduct[55]. The model code of conduct must provide for matters which include "the proper and improper use by a councillor of his or her office with the council" and "the appropriate or inappropriate behaviour of a councillor in his or her relationships with the community, other councillors and council employees" and may provide for "any other matter relating to the conduct of councillors that the Minister considers appropriate and is consistent with" the Local Government Act[56]. Each council must adopt the model code of conduct as its code of conduct with or without such variations as are allowed by the model code of conduct[57]. In performing the functions and exercising the powers of his or her office with a council, a councillor is obliged to comply with the provisions of the council's code of conduct[58]. A complaint of breach triggers a statutory procedure which can result in referral to the Code of Conduct Panel for investigation by means of a hearing[59]. If the complaint is upheld in whole or in part, the Code of Conduct Panel has power to impose one or more sanctions against a councillor ranging from a reprimand to a suspension from performing and exercising the functions and powers of his or her office as a councillor for a period not exceeding three months[60]. A councillor is not entitled to any allowances during such a period of suspension[61]. If the Code of Conduct Panel imposes a third suspension on a councillor during the councillor's current term of office or during a period of two

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55 Section 28R of the Local Government Act.

56 Section 28S of the Local Government Act.

57 Section 28T of the Local Government Act.

58 Section 28U of the Local Government Act.

59 Subdivision 3 of Div 3A of Pt 3 of the Local Government Act.

60 Section 28ZI of the Local Government Act.

61 Section 340A of the Local Government Act.

consecutive terms, the Panel is to notify the Minister of that suspension and of the details of each suspension of the councillor during the prescribed period, on receipt of which the Minister may remove the councillor from office[62].

47 The third set of provisions is contained within Pt 12B. Under that Part, the Minister is empowered, on the recommendation of the Director, to issue a direction requiring a 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 Local Government Act] or any other Act"[63]. If a council or councillor fails to comply with such a direction, the Minister is empowered to suspend all or any of the councillors from office for a period not exceeding six months[64]. Additionally or alternatively, the Minister is empowered to require the Local Government Board to carry out a review of the council[65], which is to result in a written report to the Minister containing recommendations which the Minister can accept or reject[66], and as a result of which the Governor on the recommendation of the Minister has the ability to exercise a range of powers which include abolishing a council and dismissing all the councillors of a council[67]. Additionally or alternatively again, the Minister has the option of establishing a Board of Inquiry to investigate the council[68].

48 The fourth set of provisions is contained in Pt 13. Under that Part, the Minister is empowered to establish a Board of Inquiry to investigate a council if the Minister is satisfied that a matter justifies its establishment[69]. The functions of the Board of Inquiry are to conduct an inquiry into the matter referred to it by

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62 Section 28ZL of the Local Government Act.

63 Section 214M of the Local Government Act.

64 Section 214O(1)(a) of the Local Government Act.

65 Section 214O(1)(b) of the Local Government Act.

66 Section 214D of the Local Government Act.

67 Section 214E of the Local Government Act.

68 Section 214O(1)(c) of the Local Government Act.

69 Section 215 of the Local Government Act.

the Minister and to make recommendations to the Minister as a result of its inquiry[70]. After considering a report from the Board of Inquiry, and inviting and considering submissions from the council or councillor concerned, the Minister may direct the council or councillor to take any one or more of a range of remedial actions[71]. Failure to comply with such a direction by a councillor or the council can result in the Minister recommending that the Governor by order dismiss the councillor or all councillors[72]. Instead of making such a direction to a council or councillor, the Minister may recommend that the Governor by order dismiss any councillor or all councillors if, in the opinion of the Minister, the failure of the councillor or council to perform any function has seriously affected the operation of the council or the irregularity of the conduct of the councillor or council has seriously affected the operation of the council[73]. During the period between establishing the Board of Inquiry and either the giving of a direction to a councillor or the council or the coming into effect of an order dismissing a councillor or all councillors, the Minister also has power to suspend a councillor or all councillors from office[74]. Councillors so suspended are not entitled to any allowances during the period of suspension[75].

49 With the exception of interim suspension by the Minister pending the outcome of a Board of Inquiry established under Pt 13, suspension or removal or dismissal pursuant to the second, third and fourth sets of provisions is in each case the culmination of an administrative process which involves an administrative finding of non-compliance with a statutory norm involving a measure of misconduct or dereliction of duty. The interim suspension that can occur pending the outcome of a Board of Inquiry established under Pt 13 is in the context of an administrative process having been commenced which may lead to an administrative finding of that nature. The suspension or removal or dismissal is in each case capable of being imposed only in the exercise of a statutory

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70 Section 216 of the Local Government Act.

71 Section 225 of the Local Government Act.

72 Section 226(2) of the Local Government Act.

73 Section 226(1) of the Local Government Act.

74 Section 215(5) of the Local Government Act.

75 Section 340A of the Local Government Act.

discretion the permissible exercise of which is bounded by the subject matter, scope and purposes of the Local Government Act. Ensuring the lawful exercise of that discretion within those bounds is in each case within the supervisory jurisdiction of the Supreme Court of Tasmania. When regard is had to those additional features, the power which the provisions individually and cumulatively confer on the executive government of Tasmania to suspend or remove or dismiss a councillor from office cannot be characterised as rising to the level of control.

50 The remaining provision on which Ms McCulloch relied is s 340A, which, when read with the general regulation-making power in the Local Government Act[76], is the source of authority for the Governor to make regulations which prescribe the allowances to which a mayor, a deputy mayor and councillors are entitled. Like other regulations made in the exercise of the general regulation-making power, a regulation made for the purpose of s 340A is subordinate legislation which is governed by the *Subordinate Legislation Act* 1992 (Tas) and disallowable by resolution of either House of the Tasmanian Parliament under s 47 of the *Acts Interpretation Act* 1931 (Tas).

51 The authority of the Governor to promulgate subordinate legislation setting the remuneration attaching to the holding of the relevant offices is likewise bounded by the subject matter, scope and purposes of the Local Government Act and ensuring its lawful exercise within those bounds is likewise within the supervisory jurisdiction of the Supreme Court of Tasmania. The authority would be used for an improper purpose were the allowance of a mayor, deputy mayor or councillor who happened to be a senator or member of the House of Representatives altered by way of penalty or reward for anything done or proposed to be done in that other capacity. The authority does not amount to executive control over profiting from those offices so as to engage s 44(iv) of the Constitution.

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76 Section 349 of the Local Government Act.

EDELMAN J.

Introduction

52 Section 44 of the Constitution relevantly provides:

> "Any person who:
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> ...
>
> (iv) holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; ...
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.
>
> But subsection (iv) does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth."

53 At all relevant times in 2016, from the close of the Rolls until the return of the writ for the election of Senators, Mr Martin held offices of profit as a councillor of Devonport City Council and as mayor of Devonport. The issue on this reference was whether the offices of profit held by Mr Martin were "under the Crown" within the meaning of s 44(iv) of the Constitution. If so, then Mr Martin was incapable of being chosen or of sitting as a Senator at the federal election held on 2 July 2016. He would therefore be incapable of filling the vacancy created following the ineligibility of Ms Lambie.

54 In 1992, in *Sykes v Cleary*[77], a majority of this Court, sitting as the Court of Disputed Returns, held that Mr Cleary was incapable of being chosen as a member of the House of Representatives by operation of s 44(iv) of the Constitution. The office of profit under the Crown held by Mr Cleary – although he was on leave without pay – was that of teacher in the Education Department of Victoria[78]. A party to this reference, Ms McCulloch, submitted that if the

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77 (1992) 176 CLR 77; [1992] HCA 60.

78 (1992) 176 CLR 77 at 93-94.

office of school teacher is an office of profit under the Crown, then the offices of councillor and mayor must also be offices of profit under the Crown.

55 In the parties' submissions, two different approaches were taken to the construction of "office of profit under the Crown" in s 44(iv) of the Constitution. Although there were differences in emphasis, the submissions of Ms McCulloch, Mr Martin, and the Attorney-General for the State of Victoria can be collectively treated as the first approach. That approach focused upon the ordinary meaning of "under" as requiring, in every case, an evaluation of all of the incidents of the office, and the extent to which it is controlled by the executive government of Tasmania. If that approach were adopted, there would be real force in Ms McCulloch's submission that it would be an anomaly to treat a school teacher as holding an office of profit under the Crown, but not a councillor or mayor.

56 The second approach to the construction of "office of profit under the Crown" was the submission of the Attorney-General of the Commonwealth. His submission was that an office of profit is under the Crown if (i) the office is appointed by the executive government, or (ii) the person holds the office subject to the power of the executive government to remove the person at will or to alter the remuneration of the office at will. Like the first approach, the enquiry required by this submission involved evaluation. But the enquiry was not into some unspecified degree of control by the Crown. It was into whether there was complete control by the Crown over appointment to the office, removal from the office, or the profits from the office. This submission is inconsistent with the decision of this Court in *Sykes v Cleary*, which treated holding of an office as employment in the public service. The Court considered Mr Cleary's submission that the only persons subject to sufficient power of the executive government to require disqualification were those "who hold important or senior positions in government"[79]. In his 1887-1888 lectures, Maitland had explained that governmental offices of "high order" and "executive officers" were positions that could be dismissed at the will of the Crown[80]. In rejecting Mr Cleary's submission three members of this Court said that "[h]istory provides no support for this interpretation which would, in any event, fail to give effect to all the considerations or policies said to underlie the disqualification"[81].

57 If the matter were free from (i) the unchallenged authority of the decision in *Sykes v Cleary*, and (ii) the pre-Federation purpose and context, relevant to informing the meaning of the expression "under the Crown" in the sense it was

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79 (1992) 176 CLR 77 at 96.

80 Maitland, *The Constitutional History of England*, (1955) at 428-429.

81 (1992) 176 CLR 77 at 96 per Mason CJ, Toohey and McHugh JJ, with whom Brennan, Dawson and Gaudron JJ agreed.

intended to have in its continuing operation, the choice might be between the first and second approaches. That choice would be one of degree. The question would be whether the preposition in the expression "office of profit under the Crown", in its unchanged, ordinary meaning informed by constitutional purpose, required complete control by the Crown over the appointment to the office, the removal from the office, or the profits from the office. On the Commonwealth's submission, anything short of complete control, even complete control over appointment or remuneration subject only to disallowance by Parliament[82], would not disqualify.

58 Neither of these approaches should be accepted. The meaning of the expression "office of profit under the Crown" in s 44(iv) of the Constitution had crystallised after two centuries of legal usage prior to Federation. As Sir Samuel Griffith QC said in submissions in 1889, it was "an old phrase, well understood in relation to parliamentary law"[83]. Although its application to particular facts was not always simple, the phrase encompassed (i) offices "from" the Crown, where the holder was appointed by the Crown, and (ii) as decided in *Sykes v Cleary*, offices, whether or not from the Crown, which involved employment by the Crown. Prior to Federation, this second limb of an office "under the Crown" had been described as membership of the public service[84]. In *Sykes v Cleary*, Mason CJ, Toohey and McHugh JJ, whose reasons concerning s 44(iv) were the subject of express agreement by Brennan J[85], Dawson J[86] and Gaudron J[87], applied this second limb, explaining that it had been accepted in England and Australia that an "office of profit under the Crown" encompassed public

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82 See, eg, as to the profits from the office, *Local Government Act* 1993 (Tas), s 340A; *Acts Interpretation Act* 1931 (Tas), s 47(4). See, eg, as to appointment, *Ombudsman Act* 1974 (NSW), s 31BA; *Public Finance and Audit Act* 1983 (NSW), s 57A; *Independent Commission Against Corruption Act* 1988 (NSW), s 64A.

83 *Hodel v Cruckshank* (1889) 3 QLJ 141 at 141.

84 Day, *Rogers on Elections*, 17th ed (1895), vol 2 at 10, 44; Erskine May and Palgrave, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 10th ed (1893) at 603. See also United Kingdom, House of Commons, *Report from the Select Committee on Offices or Places of Profit under the Crown*, (1941) at 29 (Minutes of Evidence); Maitland, *The Constitutional History of England*, (1955) at 369.

85 (1992) 176 CLR 77 at 108.

86 (1992) 176 CLR 77 at 130.

87 (1992) 176 CLR 77 at 132.

servants[88] and that the disqualification embraced "at least those persons who are permanently employed by government"[89].

59 This second limb was the reason why the Court held that Mr Cleary, who was employed by the Crown but plainly could not be dismissed at will, was disqualified by s 44(iv). It is also the reason why Mr Martin, who was not employed by the Crown, was not, and is not, disqualified. For these reasons, set out in more detail below, I joined in the orders made.

The historical context and purpose of the phrase "under the Crown"

The distinction between offices "from" and "under" the Crown

60 There was no dispute on this reference that Mr Martin held offices of profit as councillor and as mayor. It was also common ground that although "the Crown" was used at the time of Federation in "several metaphorical senses"[90], the sense in which it was used in s 44(iv) was to refer to the executive branch of government, represented by the ministry and administrative bureaucracy[91]. The only issue was whether the offices of profit held by Mr Martin were "under" the Crown. In the joint judgment in *Sykes v Cleary*[92], their Honours referred to the history and purpose of s 44(iv) as derived from the *Act of Settlement* 1701[93], as repealed and replaced in 1705[94] and re-enacted by ss 24 and 25 of the *Succession to the Crown Act* 1707[95]. At the time of Federation, this legislation was still in force in the United Kingdom and had formed "the foundation of all subsequent legislation"[96] that had "reimposed"[97] the disqualification in particular contexts.

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88 (1992) 176 CLR 77 at 95.

89 (1992) 176 CLR 77 at 96.

90 *Sue v Hill* (1999) 199 CLR 462 at 498 [83]; [1999] HCA 30.

91 *Sue v Hill* (1999) 199 CLR 462 at 499 [87].

92 (1992) 176 CLR 77 at 95-98.

93 12 & 13 Will 3 c 2, s 3.

94 4 & 5 Anne c 20, ss 29, 30.

95 6 Anne c 41.

96 Maitland, *The Constitutional History of England*, (1955) at 368.

97 Anson, *The Law and Custom of the Constitution*, (1886), pt 1 at 75.

61 In the centuries before Federation it became generally accepted that ss 24 and 25 drew a distinction between (i) "old offices" (existing before the Act in 1705) in s 25, to which disqualification applied if the office was "from the Crown", and (ii) new offices (existing after the Act in 1705) in s 24, to which disqualification applied if the office was "under the Crown"[98]. The difference between the expressions came to be recognised, as the authors of *Rogers on Elections* suggested in 1857[99], and repeated in every edition between 1857 and 1895[100], as being that offices "from the Crown" were only those that were "in the immediate patronage of the Crown", whilst those "under the Crown" were not so limited and included both offices from the Crown and "all offices connected with the public service". Erskine May directed his readers to that explanation in 1893[101]. The same view was later reiterated by Sir Gilbert Campion in evidence before the House of Commons Select Committee on Offices or Places of Profit under the Crown[102].

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98 United Kingdom, House of Commons, *Report from the Select Committee on Offices or Places of Profit under the Crown*, (1941) at xiii, 144 [21]. See also Anson, *The Law and Custom of the Constitution*, (1886), pt 1 at 75; Day, *Rogers on Elections*, 17th ed (1895), vol 2 at 10, 44.

99 Power, Rogers and Wolferstan, *Rogers' Law and Practice of Elections, and Registration*, 8th ed (1857) at 189.

100 Rogers and Wolferstan, *Rogers' Law and Practice of Elections, Election Committees, and Registration*, 9th ed (1859) at 194; Wolferstan, *Rogers on Elections, Election Committees, and Registration*, 10th ed (1865) at 205; Wolferstan, *Rogers on Elections and Registration*, 11th ed (1868) at 222; Wolferstan, *Rogers on Elections, Registration, and Election Agency*, 12th ed (1876) at 237; Carter, *Rogers on Elections, Registration, and Election Agency*, 13th ed (1880) at 219; Carter and Sandars, *Rogers on Elections*, 15th ed (1886), pt 2 at 578; Day, *Rogers on Elections*, 16th ed (1892), pt 2 at 10, 63; Day, *Rogers on Elections*, 17th ed (1895), vol 2 at 10, 44.

101 Erskine May and Palgrave, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 10th ed (1893) at 603.

102 United Kingdom, House of Commons, *Report from the Select Committee on Offices or Places of Profit under the Crown*, (1941) at 154 [51] (Appendix 2 to Minutes of Evidence). See also at 29 (Minutes of Evidence).

62 The two expressions were also commonly used with different meanings in colonial constitutions[103]. For instance, ss 18 and 19 of the *New South Wales Constitution Act* 1855 (Imp)[104] created separate disqualifications for offices of profit held *under* the Crown and offices of profit accepted *from* the Crown. It is unnecessary on this reference to consider the effect of any distinction between holding an office and accepting an office because it was common ground that Mr Martin held the offices of councillor and mayor, which is the relevant criterion for s 44(iv)[105]. It suffices to say that, consistently with historical usage, ss 18 and 19 treated offices of profit held under the Crown as a broader concept than those offices accepted from the Crown.

Offices under the Crown because they were "from" the Crown

63 Prior to Federation, offices appointed by, and therefore from, the Crown were all offices "under" the Crown, no matter how little control or influence the Crown might have over the office. Justices of the peace held offices under the Crown[106] because they were appointed by the Crown. During the Convention Debates, it was assumed by the delegates that judges, appointed by the Crown, held offices of profit under the Crown[107]. And in *Re Nash (No 2)*[108], this Court held that the office of member of the Administrative Appeals Tribunal is an office of profit under the Crown. This was because it is an office appointed by, and therefore from, the Crown.

64 An office from the Crown included all manner of appointments, including appointments to statutory boards and tribunals. Very shortly before Federation,

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103 *Constitutional Act* 1854 (Tas) (18 Vict No 17), ss 27, 32; *New South Wales Constitution Act* 1855 (Imp) (18 & 19 Vict c 54), Sched 1, ss 18, 19; *Victoria Constitution Act* 1855 (Imp) (18 & 19 Vict c 55), Sched 1, ss 17, 51; *Constitution Act* 1855-6 (SA) (Act No 2 of 1855-6), ss 17, 39; *Constitution Act* 1867 (Q) (31 Vict No 38), s 20; *Western Australia Constitution Act* 1890 (Imp) (53 & 54 Vict c 26), Sched 1, ss 6, 28, 29(5), 71.

104 18 & 19 Vict c 54.

105 Compare *R v Jones* [1999] WASCA 194 at [30] with Twomey, *The Constitution of New South Wales*, (2004) at 434.

106 *Hodel v Cruckshank* (1889) 3 QLJ 141 at 142.

107 *Official Report of the National Australasian Convention Debates*, (Adelaide), 17 April 1897 at 739-745; *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 21 September 1897 at 1028-1029.

108 (2017) 92 ALJR 23 at 26 [9]; 350 ALR 204 at 207; [2017] HCA 52.

the office of member of the Board of Stock Commissioners, appointed by the Governor in Council under the *Diseases in Stock Act* 1896 (Q)[109], was held[110] to be an office of profit under the Crown within the meaning of the *Officials in Parliament Act* 1896 (Q)[111]. However, if the office was not appointed by the Crown then it was not from the Crown, even if appointed by an officer of the Crown. An example was the Clerk of the Pells, which was an office appointed by the Treasurer of the Exchequer, rather than directly from the Crown. Hence, it was not an office from the Crown[112]. Nor were the offices of Masters in Chancery, prior to 1833[113], when they were not appointed by the Crown but by the Lord Chancellor[114].

65 The rationale for a strong rule of disqualification where the office was "from the Crown" was that the process of appointment to an office by the Crown was regarded as "the conferring of a benefit upon some person whom the appointer wished to favour or reward"[115]. Prior to the *Act of Settlement* and its successors, in a practice that originated in the Tudor and Stuart periods and continued until the Revolution, an appointment could be made by the Crown in exchange for payment or as a reward for political service[116]. The disqualification from parliamentary office of persons appointed to profitable offices reduced the conflict between pecuniary interest and parliamentary duty.

66 There were well-known exceptions to the general rule that all appointments from the Crown led to the holder's disqualification from election to Parliament. One exception was the office of Minister of State. The holders of the high offices of State were required to be able to serve in Parliament because

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109 60 Vict No 1, s 5(1).

110 *Bowman v Hood* (1899) 9 QLJ 272 at 278. See, later, *Clydesdale v Hughes* (1934) 36 WALR 73.

111 60 Vict No 3, s 5.

112 Hatsell, *Precedents of Proceedings in the House of Commons*, 2nd ed (reprint) (1785), vol 1 at 44.

113 Falconer and Fitzherbert, *Cases of Controverted Elections, Determined in Committees of the House of Commons, in the Second Parliament of the Reign of Queen Victoria*, (1839) at 583-584, 587.

114 Harrison, *The Practice of the High Court of Chancery*, (1808), vol 1 at 15.

115 Holdsworth, *A History of English Law*, (1938), vol 10 at 509.

116 Holdsworth, *A History of English Law*, (1938), vol 10 at 509.

"their business must be conducted subject to the criticism of the representatives of the people"[117]. This reasoning must have informed the express exemption of Ministers from disqualification by s 44 of the Constitution.

67 In the 1941 House of Commons Select Committee Report[118], it was suggested that there had been doubt about whether the disqualification of holders of offices under the Crown in the United Kingdom included several particular appointments made by the Crown: the Regius Professors of the Universities of Oxford and Cambridge; the Master of Trinity College, Cambridge; and the Provost of Eton. The doubt was said to exist because the offices had no political significance and the stipends attached to them were not paid by the Crown or out of public funds. But even if analogous offices existed in Australia, it would be difficult to see a reason why such exceptions, not included in the express exemptions in s 44(iv), should be implied. Even in these instances, there were notorious examples of circumstances in which the Crown exercised power to make controversial selections of a Regius Professor or to veto a candidate[119].

Offices under the Crown that were not "from" the Crown

68 There were other offices "under the Crown" apart from those offices "from" (or appointed by) the Crown. As I have mentioned, the circumstances in which other offices would fall "under the Crown" were considered by the authors of *Rogers on Elections*, Erskine May, and Sir Gilbert Campion to be where those offices were "connected with the public service". Professor Maitland's subsequently published lectures of 1887-1888 took the same approach[120]. This approach was reflected in the joint judgment in *Sykes v Cleary*[121], where it was held that s 44(iv) disqualifies "public servants, who are officers of the departments of government, from membership of the legislature". That expression of the disqualification embraced "at least those persons who are permanently employed by government"[122].

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117 Anson, *The Law and Custom of the Constitution*, (1892), pt 2 at 195.

118 United Kingdom, House of Commons, *Report from the Select Committee on Offices or Places of Profit under the Crown*, (1941) at xxv.

119 See, eg, Hibbert, *Edward VII: The Last Victorian King*, (2007) at 209.

120 Maitland, *The Constitutional History of England*, (1955) at 369: "the holders of subordinate offices in the civil service of the crown are in general absolutely disqualified".

121 (1992) 176 CLR 77 at 95.

122 (1992) 176 CLR 77 at 96.

69 The concept, at Federation, of a public, or civil, servant as holding an office under the Crown ordinarily involved a conception of recruitment by interview or examination[123], age limits and compulsory retirement[124], and potential dismissal of some such servants at the pleasure of the Crown[125]. But none of these incidents was part of any "special prerogative"[126] of the Crown and, during a period in which employment in the public service was in a state of flux[127], none was part of the concept of a public servant, relevant to the meaning of an office of profit under the Crown in s 44(iv). The essential meaning involved a relationship, subject to control by the Crown, which could be characterised as employment. The content of that essential meaning (employment) may have changed but the meaning remains the same[128].

70 The characterisation of "employment" by the Crown as the meaning of the second limb of offices of profit "under the Crown" reflects the manifested intention to maintain the consequence, known and desired at Federation, that the disqualification of public servants from Parliament had played "an important part in the development of the old tradition of a politically neutral public service"[129]. As Maitland explained, the disqualification of those holding subordinate offices had the consequence of creating a permanent civil service "unidentified with any particular policy", whereas "were [civil servants] in parliament they might easily fall out with their superiors, and we should have the whole civil service changing with the ministry"[130]. The objective desire to maintain that consequence therefore informed the purpose and meaning of "under the Crown" in s 44(iv), just as it had informed the purpose of the 19th century reimposition of disqualifications "under the Crown" since the emergence of an independent public service.

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123 Halsbury, *The Laws of England*, (1909), vol 7 at 80-81, §139.

124 Cohen, *The Growth of the British Civil Service 1780–1939*, (1941) at 19.

125 *Dunn v The Queen* [1896] 1 QB 116 at 119, 120; *Carey v The Commonwealth* (1921) 30 CLR 132 at 135; [1921] HCA 54; Holdsworth, *A History of English Law*, (1964), vol 14 at 131.

126 *Shenton v Smith* [1895] AC 229 at 234-235.

127 Zafarullah, *Colonial Bureaucracies: Politics of Administrative Reform in Nineteenth Century Australia*, (2014) at 216-217.

128 *Birmingham City Council v Oakley* [2001] 1 AC 617 at 631.

129 *Sykes v Cleary* (1992) 176 CLR 77 at 96.

130 Maitland, *The Constitutional History of England*, (1955) at 369.

71 Sir William Anson explained how maintaining this desirable consequence had been a rationale for many "more modern"[131] (ie 19th century, when he was writing) disqualifications of offices of profit under the Crown. He said[132] that the legislature had not been content to "leave new offices to the operation of the [*Succession to the Crown Act*]" but had "reimposed the disqualification in a great number of Acts of Parliament" for new offices under the Crown such as the offices of Charity Commissioner and member of the Council of India. He went on to say that these 19th century disqualifications were[133]:

> "for the most part imposed to secure the undivided attention of officials to the business of their departments, and the advantage of a permanent civil service unaffected by changes of ministry or by considerations of party politics."

72 Anson's view – that an independent civil service was a rationale for the 19th century reimpositions of the disqualification provisions from the *Succession to the Crown Act* – reflected an Order in Council, derived from an 1884 Treasury Minute. That Minute was set out, as below, and described by the Royal Commissioners on the Civil Service in their 1914 Report as "representing the considered opinion of the Government of the day, a view which has been accepted by subsequent Governments without modification"[134]:

> "The First Lord expresses to the Board his own strong sense of the public injury which must be the consequence of any departure from the conditions which, under Parliamentary Government, render a permanent Civil Service possible, and he points out that, among those conditions, the essential one is that the members of such a service should remain free to serve the Government of the day, without necessarily exposing themselves to public charges of inconsistency or insincerity."

73 The Commissioners continued, saying that "[t]he rule as to candidature for Parliament by a Civil Servant on the active list has been consistently maintained; but the rule with regard to candidature for County Councils has been altered"[135].

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131 Anson, *The Law and Custom of the Constitution*, (1886), pt 1 at 290.

132 Anson, *The Law and Custom of the Constitution*, (1886), pt 1 at 75.

133 Anson, *The Law and Custom of the Constitution*, (1886), pt 1 at 290.

134 United Kingdom, Royal Commission on the Civil Service, *Fourth Report of the Commissioners*, (1914) [Cd 7338] at 95.

135 United Kingdom, Royal Commission on the Civil Service, *Fourth Report of the Commissioners*, (1914) [Cd 7338] at 95.

74 There remained also the original purpose for the reimposed 19th century disqualifications that fell under the second limb of "under the Crown". That purpose was the same as the purpose of the expression "under" the Crown in the first limb in its use from the *Act of Settlement* through to s 44(iv) of the Constitution. It was to avoid conflict between parliamentary duty and pecuniary interest within a Minister's "valuable privilege of patronage over employment in the public service"[136]. Supplementing and restating these two purposes were the three reasons given in the joint judgment in *Sykes v Cleary*[137] for the incompatibility of positions of employment by the Crown with membership of the Commonwealth Parliament:

> "First, performance by a public servant of his or her public service duties would impair his or her capacity to attend to the duties of a member of the House. Secondly, there is a very considerable risk that a public servant would share the political opinions of the Minister of his or her department and would not bring to bear as a member of the House a free and independent judgment. Thirdly, membership of the House would detract from the performance of the relevant public service duty."

75 A pre-Federation example of an office "under the Crown" arising from a relationship that could be characterised as one of employment was the office of poundkeeper under the *Impounding Act* 1863 (Q)[138]. That office was held in 1889[139] to be an office of profit under the Crown, disqualifying the holder from election to a Divisional Board under the *Divisional Boards Act* 1887 (Q)[140]. The poundkeeper was appointed and removable by justices of the peace. Like the Clerk of the Pells, who was appointed by an officer of the Crown but not directly by the Crown, it was not suggested that the office of poundkeeper was an office under the Crown because it was appointed by, and therefore "from", the Crown[141]. Instead, in argument, Mr Real focused upon the Crown's powers over the poundkeeper, including deputing the appointment to the justices, the retention by the Crown of the right to receive money and to revise the poundkeeper's accounts, and the poundkeeper's duty to give a bond and to account for his fees to

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136 "The Civil Service", (1876) 105 *The Westminster Review* 222 at 224.

137 (1992) 176 CLR 77 at 96 (footnote omitted).

138 27 Vict No 22.

139 *Hodel v Cruckshank* (1889) 3 QLJ 141.

140 51 Vict No 7, s 16(1).

141 See also Maitland, *The Constitutional History of England*, (1955) at 430.

the Crown[142]. Similarly, Sir Samuel Griffith QC focused upon all the circumstances of the office, submitting that the "direct authority given to the justices by statute to appoint him" made the poundkeeper a public officer but not one under the Crown[143]. The question was whether, in all the circumstances, the poundkeeper was "a Crown officer"[144]. In other words, was he employed by the Crown?

76 The Chief Justice delivered the judgment of the Court. He explained that the justices had the power to appoint the poundkeeper and the power to remove him for neglect or misconduct, "but there, all authority over the poundkeeper by the justices seems to cease"[145]. The Chief Justice described the question as "whether he was holder of that [office] under the Crown, or was he *merely* appointed by the Justices of the Peace"[146] (emphasis added). The circumstances beyond mere appointment that were found to be sufficient to characterise the office as one under the Crown were the same factors as would be considered in an assessment of whether the poundkeeper was employed by the Crown[147]:

> "[T]he justices are limited merely to the appointment, and removal under particular circumstances. Now, a pound is a public pound; it is established, and may be abolished by the act of the Executive Council. The poundkeeper is accountable to the Crown for fees received; he must give a bond to the Crown for the proper discharge of the duties of his office. He is placed under the inspection of an officer of the Crown, called the Inspector of Brands, and his appointment and removal depend on the judgment of other officers of the Crown, who are the Justices of the Peace. It seems to us, that, *looking at all these circumstances, and at the Act*, that he must be a minor officer of the Crown, whose appointment was made by the Justices of the Peace ... and whose appointment *under these circumstances brings him within the law, as a minor officer*. That being so, firstly, he is holding an office of profit, and secondly, he is holding that office of profit under the Crown." (emphasis added)

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142 *Hodel v Cruckshank* (1889) 3 QLJ 141 at 141.

143 *Hodel v Cruckshank* (1889) 3 QLJ 141 at 142.

144 *Hodel v Cruckshank* (1889) 3 QLJ 141 at 142.

145 *Hodel v Cruckshank* (1889) 3 QLJ 141 at 142.

146 *Hodel v Cruckshank* (1889) 3 QLJ 141 at 142.

147 *Hodel v Cruckshank* (1889) 3 QLJ 141 at 142-143.

77 In contrast with those offices appointed by, or employed by, the executive government, other offices were not "under the Crown". For instance, a member of State Parliament was not "under the Crown" and therefore not disqualified by s 44(iv)[148]. There was, and is, also a "principle that Parliament has always asserted in England and elsewhere"[149], that "appl[ies] equally"[150] in Australia, that the offices of President of the Senate and Speaker of the House of Representatives are not offices under the Crown[151]. Those offices are appointed by their respective Houses and their holders are not employed by the executive government. Similarly, in England, during the debates on the *Representation of the People Act* 1867 (UK)[152], the Attorney-General, Sir Roundell Palmer[153], said that the "uniform practice of the House" was not to treat the office of Under Secretary of State as an office under the Crown because the office "is appointed, both in form and in substance, by the Secretary of State"[154].

Sykes v Cleary and Mr Martin

78 Mr Cleary was appointed as a teacher under the *Teaching Service Act* 1958 (Vic)[155]. That legislation created a statutory tribunal (the Teachers Tribunal), which appointed teachers and determined their pay[156]. At the time of

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148 Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 129.

149 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 16 March 1898 at 2448.

150 Harris (ed), *House of Representatives Practice*, 5th ed (2005) at 162. See Constitution, ss 17, 35; *Official Report of the National Australasian Convention Debates*, (Sydney), 3 April 1891 at 660.

151 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 493; Jack and Hutton (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 24th ed (2011) at 59. Cf *Official Report of the National Australasian Convention Debates*, (Sydney), 3 April 1891 at 661.

152 30 & 31 Vict c 102.

153 Later, the Earl of Selborne, Lord Chancellor.

154 United Kingdom, House of Commons, *Parliamentary Debates*, vol 174 at 1237 (18 April 1864). See also Anson, *The Law and Custom of the Constitution*, (1886), pt 1 at 76.

155 *Sykes v Cleary* (1992) 176 CLR 77 at 94.

156 *Teaching Service Act* 1958 (Vic), ss 44, 46.

Mr Cleary's appointment as a teacher, the Teachers Tribunal consisted of six members, who served fixed terms[157]. Three of the members were appointed by the Governor in Council, and two of those appointees represented the Government of Victoria. The other three were elected by teachers[158]. The members of the Teachers Tribunal were not, in respect of their office, subject to the provisions of the *Public Service Act* 1958 (Vic)[159]. At the time of Mr Cleary's appointment it would have been difficult to characterise his office as being held "under the Crown" on the basis of an appointment from the Crown. Perhaps for this reason, the case was not argued with any focus on Mr Cleary's appointment to the office.

79 The Teachers Tribunal was abolished by the *Education Service Act* 1981 (Vic). By the time Mr Cleary nominated for the House of Representatives, the legislation had become the *Teaching Service Act* 1981 (Vic). It contained provisions defining teachers as "permanent officers" (s 2) who were "employed by Her Majesty in the teaching service" (s 3)[160]. The case was argued by the Attorney-General of the Commonwealth[161], and by Mr Sykes[162], on the basis that Mr Cleary was disqualified because Victorian teachers were employed by the Crown and therefore held offices "under the Crown". One basis upon which that submission was resisted by Mr Cleary was that employment by the Crown was not sufficient to make a teacher a member of the Victorian public service[163]. The reasoning of the Court, about which "constitutionalism and the rule of law are as

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157 *Teaching Service Act* 1958 (Vic), ss 5, 6.

158 *Teaching Service Act* 1958 (Vic), s 5.

159 *Teaching Service Act* 1958 (Vic), s 7(1).

160 *Sykes v Cleary* (1992) 176 CLR 77 at 117.

161 Outline of Submissions for the Attorney-General of the Commonwealth, 25 August 1992 at 5 [5.3]-[5.4]. See also *Sykes v Cleary* (1992) 176 CLR 77 at 90.

162 Transcript of Proceedings, 26 August 1992 at 7-8. See also *Sykes v Cleary* (1992) 176 CLR 77 at 87.

163 Outline of Submissions for Mr Cleary, 26 August 1992 at 2 [2]-[5]; Transcript of Proceedings, 27 August 1992 at 40.

concerned" as they are with the outcome[164], was that Mr Cleary was disqualified because he was employed by the Crown[165].

80 The joint reasons set out in detail the powers of the executive government of Tasmania over the offices of councillor and mayor held by Mr Martin[166]. It suffices to describe the most significant of those powers briefly. The executive has a limited power to suspend, remove or dismiss holders of those offices[167], and a power, subject to disallowance by Parliament[168], to set the remuneration of the offices[169]. Ms McCulloch rightly did not submit that these powers were sufficient to characterise Mr Martin as being employed by the executive government. The offices held by Mr Martin were not under the Crown because he was neither appointed, nor employed, by the executive government of the State of Tasmania.

Conclusion

81 For these reasons, I joined in the order of the Court answering the question reserved as follows: Mr Martin is not incapable of being chosen or of sitting as a Senator by reason of s 44(iv) of the Constitution.

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164 Winterton, "Popular Sovereignty and Constitutional Continuity", (1998) 26 *Federal Law Review* 1 at 2.

165 *Sykes v Cleary* (1992) 176 CLR 77 at 97, 117.

166 See *Local Government Act* 1993 (Tas), ss 27A, 28AA, Pt 3 Div 3A, Pt 12B, Pt 13.

167 *Local Government Act* 1993 (Tas), ss 28ZL(3), 214E, 214O(1)(a), 215(5), 226.

168 *Acts Interpretation Act* 1931 (Tas), s 47(4).

169 *Local Government Act* 1993 (Tas), s 340A.