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)

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

Filed on behalf of the Attorney-General for the State of Victoria

Dated: 22 January 2018

Victorian Government Solicitor
Victorian Government Solicitor's Office
Level 25, 121 Exhibition Street
Melbourne VIC 3000
Contact: Alison O'Brien

Tel: 03 8684 0416
Fax: 03 8684 0449
Ref: 1750728

PART I: CERTIFICATION

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

PARTS II & III: INTERVENTION

2. The Attorney-General for the State of Victoria intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of Mr Steven Martin.

PART IV: APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

3. A copy of the *Local Government Act 1993* (Tas) will be provided to the Court by the Commonwealth.[1] Other relevant provisions are annexed to these submissions.

PART V: ARGUMENT

10 **Summary**

4. The Acting Australian Electoral Officer for the State of Tasmania conducted a special count of the ballot papers cast for candidates for the election of 12 Senators for Tasmania, and reported to the Court of Disputed Returns the 12 candidates who would be elected. One of those candidates was Mr Martin.[2]

5. At the time that he nominated for election, Mr Martin held the offices of Councillor and Mayor of Devonport City Council,[3] for which he was entitled to be, and was, paid certain allowances pursuant to s 340A of the *Local Government Act*.[4] Nettle J reserved for the Full Court the question whether Mr Martin is incapable of being chosen or of sitting as a Senator by reason of s 44(iv) of the Constitution.

20 6. It is established that s 44(iv) extends to an office of profit under the Crown in right of a State.[5] Given that Mr Martin was entitled to receive, and in fact received, payment in respect of his offices, the key issue is whether the offices he held were offices "under the Crown". Victoria contends that the offices of councillor and mayor under the *Local Government Act* are not offices "under the Crown".

---

1 Various relevant provisions of *Local Government Act 1993* (Tas) were inserted or amended in November 2017, by the *Local Government Amendment (Targeted Review) Act 2017* (Tas). Thus the Act in force at the time Mr Martin nominated for the Senate (June 2016) was different from the Act presently in force. However, because the process of electoral choice has not yet concluded (*Re Nash [No 2]* (2017) 92 ALJR 23 at 30 [38], 31[43] (the Court)), Victoria's submissions focus on the Act as presently in force.

2 Agreed Facts at [29]-[32] [AB 101-102].

3 Agreed Facts at [14] and [19] [AB 100].

4 Agreed Facts at [21]-[24] [AB 100-101].

5 *Sykes v Cleary* (1992) 176 CLR 77 at 98 (Mason CJ, Toohey and McHugh JJ); Brennan J, Dawson J and Gaudron J each agreed with the reasoning of the plurality in relation to s 44(iv): see, respectively, 108, 130, 132.

7. In summary, Victoria makes the following submissions:

(a) Not every office created under an Act for a public purpose will necessarily be an office "under the Crown".

(b) Whether a particular office is an office "under the Crown" will depend on the nature of the connection between the office and the Executive Government of the Commonwealth or a State. In determining whether an office falls within s 44(iv), it is necessary to analyse the Act under which the office is created, and to consider matters such as:

(i) whether a person may be appointed to, or removed from, the office by the Executive Government;

(ii) whether the holder of the office is accountable to, and subject to the supervision of, the Executive Government; and

(iii) the degree of control that the Executive Government has over the performance of the functions of the office.

(c) The offices of councillor and mayor under the *Local Government Act* lack the requisite connection with the Executive Government of Tasmania to be offices "under the Crown". The principal reason is that the holders of those offices are chosen by, and accountable to, the electors of a municipality, not the Executive.

Determining whether an office is an "office of profit under the Crown"

8. This Court has not previously considered the circumstances in which an office created under an Act for a public purpose, not forming part of a department of the government of the Commonwealth or a State, will be an "office of profit under the Crown" within the meaning of s 44(iv) of the Constitution.[6]

9. For the reasons given below, Victoria contends that not every such office will be an office "under the Crown" within the meaning of s 44(iv). Whether a particular office is an office "under the Crown" will depend on the nature of the office — in particular, the nature of the connection between the office and the Executive Government of the Commonwealth or a State.

---

[6] It was alleged in *Sykes v Australian Electoral Commission* (1993) 67 ALJR 714 that the office of councillor of the City of Coburg was an "office of profit under the Crown" under s 44(iv), but it was not necessary for Dawson J to determine that question.

10. Although the origins of the expression "office of profit under the Crown" in s 44(iv) are well known,[7] its meaning has been described as "obscure".[8] However, some aspects of that meaning are now clear.

11. As explained in *Sykes v Cleary*, s 44(iv) applies at least to those persons who are permanently employed by the Executive Government of the Commonwealth or a State.[9] It is not limited to persons who hold important or senior positions in the Executive Government. Thus, a person who held a permanent position as a teacher in the public service of a State held an "office of profit under the Crown", even while on a period of leave without pay.

10 12. Section 44(iv) is not limited to offices forming part of what is traditionally regarded as the public service of the Commonwealth or a State.[10] For example, a part-time member of the Administrative Appeals Tribunal holds an "office of profit under the Crown".[11] It is clear that the expression "office of profit under the Crown" has a broader meaning than the expression "the Public Service of the Commonwealth", used in s 44(v).[12]

13. However, it does not follow from the above that every person who holds an office created under an Act for a public purpose holds an "office of profit under the Crown" within the meaning of s 44(iv) — even where that office is remunerated. The words "under the Crown" must be understood as imposing a limitation on the
20 types of offices that will fall within the scope of s 44(iv). An office cannot be an "office of profit under the Crown" within the meaning of s 44(iv) unless it is properly characterised as an office "under the Crown" within the meaning of that provision.

14. It is therefore necessary to consider what meaning should be given to the words "under the Crown" in s 44(iv). This requires attention both to what is meant by "the Crown" and what is meant by "under the Crown".

---

7 *Sykes v Cleary* (1992) 176 CLR 77 at 95 (Mason CJ, Toohey and McHugh JJ). See also House of Commons, *Report from the Select Committee on Offices or Places of Profit under the Crown*, (1941) at vi-xiv.

8 *Sykes v Cleary* (1992) 176 CLR 77 at 95 (Mason CJ, Toohey and McHugh JJ).

9 *Sykes v Cleary* (1992) 176 CLR 77 at 95-98 (Mason CJ, Toohey and McHugh JJ).

10 That is, persons employed or appointed under the *Public Service Act 1999* (Cth) and equivalent State Acts, such as the *Public Administration Act 2004* (Vic).

11 *Re Nash [No 2]* (2017) 92 ALJR 23 at 25-26 [8]-[9] (the Court).

12 *Re Day [No 2]* (2017) 91 ALJR 518 at 536 [103] (Gageler J).

"the Crown"

15. The expression "the Crown" is used in a number of different senses in constitutional theory.[13] Without setting out each of those senses, Victoria contends that the context, purpose and history of s 44(iv) of the Constitution all indicate that, where it appears in s 44(iv), the expression "the Crown" is used in the third sense identified by Gleeson CJ, Gummow and Hayne JJ in *Sue v Hill*:[14]

> Thirdly, the term "the Crown" identifies what Lord Penzance in [*Dixon v London Small Arms Co* (1876) 1 App Cas 632 at 651] called "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.

16. Reading the expression "the Crown" in s 44(iv) as referring to the Executive Government of the Commonwealth or a State is consistent with the decisions of this Court concerning s 44(iv) referred to in paragraphs 10 to 12 above, which have treated the expression "office of profit under the Crown" as referring to offices in the Executive Government.

17. This is also consistent with the principal purpose of s 44(iv) identified in *Sykes v Cleary*. In that case, Mason CJ, Toohey and McHugh JJ identified the "principal mischief" at which s 44(iv) is directed as being the elimination or reduction of the influence of the Executive Government over the Parliament.[15] That purpose is best served by reading the expression "the Crown" in s 44(iv) as referring to the Executive Government. Offices that are not under the Executive Government do not create the same risk of influence over the Parliament.

18. Their Honours noted that s 44(iv) had other purposes, including recognising the incompatibility of being, at the same time, both a permanent officer of the Executive Government and a member of the Parliament.[16] The other purposes identified by their Honours are consistent with reading the expression "the Crown" in s 44(iv) in the manner described above.

"<u>under</u> the Crown"

19. In order to be an "office ... under the Crown", an office must have a particular connection with the Crown. That connection is described in s 44(iv) by the word

---

13 *Sue v Hill* (1999) 199 CLR 462 at 497-503 [83]-[94] (Gleeson CJ, Gummow and Hayne JJ).

14 (1999) 199 CLR 462 at 499 [87]. See also *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 392-393 (Kitto J).

15 *Sykes v Cleary* (1992) 176 CLR 77 at 96-97 (Mason CJ, Toohey and McHugh JJ), again noting that Brennan J, Dawson J and Gaudron J agreed in relation to s 44(iv): see n 5, above.

16 *Sykes v Cleary* (1992) 176 CLR 77 at 95 (Mason CJ, Toohey and McHugh JJ).

"under", which connotes a degree of control by, or accountability to, a higher power. In this context, it requires that the relevant office be under the control of, or accountable to, the Executive Government of the Commonwealth or a State.

20. Where an office is under the control of, and accountable to, a different arm of government, such as the Parliament of the Commonwealth or a State (for example, the Speaker of the House of Representatives or the President of the Senate), the office will be "under" that arm of government, and will not be "under the Crown".[17]

21. In many cases, it will be clear that an office has the requisite connection with the Executive Government of the Commonwealth or a State to be said to be an office "under the Crown". In particular, where an office forms part of what is traditionally regarded as the public service of the Commonwealth or a State, it will plainly be an office "under the Crown".

22. In other cases, particularly where an office is created under an Act for a public purpose, it may be necessary to give close consideration of the terms of the Act creating the office in order to determine whether the office can properly be characterised as being "under the Crown".

23. It is not possible to state precisely the degree to which an office created under an Act must be independent of the Executive Government, or the characteristics that such an office must bear, before it will cease to be an office "under the Crown". However, the process of characterisation of the office must be informed by the "principal mischief" to which s 44(iv) is addressed — namely, eliminating or reducing influence of the Executive Government over the Parliament.[18] With that purpose in mind, it is possible to identify some indicia of whether a particular office is "under the Crown".

24. An office is more likely to be an office "under the Crown" if the holder of the office may be appointed or removed at the discretion of the Executive Government, is accountable to or subject to the supervision of the Executive Government, and is subject to the direction or control of the Executive Government in the performance of his or her functions. To allow the holder of such an office to sit in the Parliament would plainly give rise to possibility of Executive influence over the Parliament of the kind identified in *Sykes v Cleary*.

---

17 *Official Report of the Debates of the National Australasian Convention*, Sydney, 3 April 1891, at 660-661 (Sir John Bray, Sir Samuel Griffith); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 16 March 1898, at 2448 (Sir Edmund Barton). See also Twomey, *The Constitution of New South Wales*, (2004) at 438.

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

25. However, such a possibility is remote where the holder of an office is not appointed by the Executive Government, may only be removed in certain specified circumstances, is accountable to a body or entity other than the Executive Government, and is not subject to the direction or control of the Executive Government in the performance of his or her functions. Were the holder of such an office allowed to sit in the Parliament, there would be little reason to suppose that the Executive would gain any influence over the Parliament as a result.

26. The indicia identified above are similar to those that courts have relied on in determining whether a body "represents the Crown", or is entitled to the "shield of the Crown".[19] However, Victoria does not submit that the question whether a particular office is an office "under the Crown" within the meaning of s 44(iv) is the same as the question whether that office is entitled to the privileges and immunities of the Crown. Those questions are asked for different purposes.[20] Further, a key factor in answering the latter question is whether the relevant Act expressly provides that the office is entitled to the privileges and immunities of the Crown.[21] However, a Parliament could not take an office outside the expression "office of profit under the Crown" in s 44(iv) of the Constitution merely by providing that the office was not such an office.[22]

27. Nor is the question whether a particular office is an office "under the Crown" within the meaning of s 44(iv) the same as the question whether that office is part of "the Commonwealth" or "a State". Although the expression "the Crown" is capable, in certain contexts, of referring to a body politic such as the Commonwealth or a State, it is not used in that sense in s 44(iv).[23] As discussed in paragraphs 15 to 18 above, the expression "the Crown" is used in a narrower sense in s 44(iv), to refer to the

---

19 See, eg, *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330 at 341-350 (Stephen J), 353-355 (Mason J), 364-366 (Aickin J); *Townsville Hospitals Board v Council of the City of Townsville* (1982) 149 CLR 282 at 288-292 (Gibbs CJ; Murphy, Wilson and Brennan JJ agreeing at 292).

20 *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 394 (Kitto J); *Bropho v Western Australia* (1990) 171 CLR 1 at 23-24 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646 at 661-662 [43]-[44] (McHugh, Gummow and Heydon JJ).

21 *Townsville Hospitals Board v Council of the City of Townsville* (1982) 149 CLR 282 at 291 (Gibbs CJ; Murphy, Wilson and Brennan JJ agreeing at 292). In Victoria, s 46A of the *Interpretation of Legislation Act 1984* (Vic) expressly addresses the construction of provisions relating to entities representing, or not representing, the Crown.

22 The position is different in Victoria. Section 49 of the *Constitution Act 1975* (Vic) provides that "[e]xcept where express provision is made to the contrary by any Act", a person who holds an office of profit under the Crown shall not sit in Parliament. For an example of such express provision, see *National Gallery of Victoria Act 1966* (Vic), s 10A.

23 *Sue v Hill* (1999) 199 CLR 462 at 498 [84] (Gleeson CJ, Gummow and Hayne JJ).

Executive Government of the Commonwealth or a State. It follows that, contrary to Ms McCulloch's submissions,[24] authorities concerning the question whether a particular office or body is "a State" within the meaning of s 75(iv) or s 114 of the Constitution[25] do not assist in answering the question whether a particular office is "under the Crown" within the meaning of s 44(iv).[26]

28. Ultimately, the question whether an office is an office "under the Crown" within the meaning of s 44(iv) must be answered by reference to a process of characterisation informed by the "principal mischief" to which s 44(iv) is addressed, having regard to the indicia referred to in paragraphs 24 and 25 above. The balance of these submissions applies that process of characterisation to the offices of councillor and mayor under the *Local Government Act*.

Elected offices in local government under the *Local Government Act*

29. For the reasons given below, Victoria contends that the offices of councillor and mayor under the *Local Government Act* lack the requisite connection with the Executive Government of Tasmania to be offices "under the Crown" within the meaning of s 44(iv) of the Constitution.

Features of the offices of councillor and mayor under the Local Government Act

30. Under ss 18 and 19 of the *Local Government Act*, a council is a body corporate which is responsible for a particular municipal area. A council is constituted by the persons elected as councillors in accordance with Part 4 of the *Local Government Act*.[27] Councillors are elected by the electors of the relevant municipal area,[28] by means of a postal ballot.[29] A councillor serves for a term of four years.[30]

31. The mayor of a council is generally also elected by the electors of the municipal area for which the council is responsible.[31] Only a councillor may hold the office of mayor.[32] A mayor serves for a term of four years.[33]

---

24 Submissions of Ms McCulloch, 15 January 2018 (**McCulloch submissions**), [37]-[39].

25 See, eg, *Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208; *State Bank (NSW) v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639; *Deputy Commissioner of Taxation (Cth) v State Bank (NSW)* (1992) 174 CLR 219.

26 *Deputy Commissioner of Taxation (Cth) v State Bank (NSW)* (1992) 174 CLR 219 at 230 (the Court); *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 282-283 (McHugh and Gummow JJ).

27 *Local Government Act*, s 25(1).

28 *Local Government Act*, s 45(1).

29 *Local Government Act*, ss 274, 275 and Div 6 of Pt 15.

30 *Local Government Act*, s 46.

31 *Local Government Act*, s 40. Unless there is no nomination for the office of mayor, in which case the mayor is elected by the councillors: s 43A.

32. The functions of mayors are set out in s 27 of the *Local Government Act*, and the functions of councillors are set out in s 28. The Minister has no power under the *Local Government Act* to direct or control a mayor or councillor in the performance of his or her functions, although the Minister may make an order clarifying the functions of mayors or councillors, or imposing additional functions on them.[34]

33. The ability of the Executive Government of Tasmania to control the performance of the functions of mayors and councillors, or to remove them from office, is limited.

(a) Complaints against mayors and councillors are dealt with by the Code of Conduct Panel.[35] Although the members of the Panel are appointed by the Minister,[36] the Panel is not subject to the direction and control of the Minister, and must deal with complaints against councillors in accordance with Division 3A of Part 3 of the *Local Government Act*.

(b) The Minister may require the Local Government Board to carry out a review of a council.[37] Following a review, and the making of submissions by the council concerned, the Governor may, on the recommendation of the Minister, exercise certain powers in relation to a council, including dismissing all the councillors (but not particular councillors).[38]

(c) Under Part 12B of the *Local Government Act,* the Minister, on the recommendation of the Director of Local Government, may issue a "performance improvement direction" to a councillor, but only if the councillor has failed to comply with his or her legislative obligations. A councillor who fails to comply with such a direction may be suspended from office.[39]

(d) Under Division 1 of Part 13 of the *Local Government Act*, the Minister may establish a Board of Inquiry to investigate a council on any matter relating to the administration of the Act. After considering a report from a Board of Inquiry, the Minister may recommend that the Governor dismiss a councillor only if, in the Minister's opinion:[40]

---

32 *Local Government Act*, s 41(4).

33 *Local Government Act*, s 44.

34 *Local Government Act*, s 27A (mayors) and s 28AA (councillors).

35 *Local Government Act*, Div 3A of Pt 3.

36 *Local Government Act*, s 28K(2).

37 *Local Government Act*, s 214.

38 *Local Government Act*, s 214E.

39 *Local Government Act*, s 214O.

40 *Local Government Act*, s 226.

(i) the failure of the councillor to perform any function has seriously affected the operation of the council; or

(ii) the irregularity of the conduct of the councillor has seriously affected the operation of the council.

34. Contrary to Ms McCulloch's submissions, these provisions do not rise to the level of "control" by the Executive over the tenure of councillors.[41] The Minister's powers to suspend or dismiss councillors provide a form of accountability of councillors, and those powers are subject to significant limits, enforceable by judicial review.

35. It may also be noted that councillors have a statutory immunity from liability in respect of acts done or omitted to be done in good faith in the performance or exercise of a function or power under an Act. Any liability that would lie against a councillor in respect of such an act or omission lies instead against the council.[42] In contrast, any liability that would lie against a member of the Board, the Panel or a Board of Inquiry lies against the Crown.[43]

36. It may be accepted that the Minister has somewhat greater powers in relation to the activities of a council. In particular, under the *Local Government Act*:

(a) the Minister must approve borrowing and spending by a council above particular thresholds: ss 21(2) and 80;

(b) the Minister may specify particular matters that are to be included in certain plans and strategies that councils are required to prepare: s 70F;

(c) a by-law made by a council may be repealed or amended by an order of the Governor on the advice of the Minister: s 154; and

(d) a council must furnish to the Minister any information requested in relation to its activities, and any documents or records as requested: s 338.

37. However, it does not follow from the Minister having those powers in relation to a council that individual councillors or the mayor are under the control of the Executive Government, or hold an "office of profit under the Crown". Nor does it follow that a council is a part of "the Crown". Rather, as Kirby P stated in *Sydney City Council v Reid,* albeit in a different context, councils are "largely independent corporations accountable (in the ordinary course) not to the minister (that is, the Crown), but to the people who elect them. In this sense, the high measure of

---

41 McCulloch submissions at [28]-[29].

42 *Local Government Act*, s 341(2).

43 *Local Government Act*, s 341(3).

independence of statutory corporations, by which local government is ordinarily carried out, is inconsistent with viewing their employees as servants of the Crown".[44] That final sentence applies with even greater force to the elected members of a council.

Characterisation of the offices of mayor and councillor

38. When the features of the offices of councillor and mayor summarised above are considered together, Victoria contends that those offices are not properly characterised as offices "under the Crown" within the meaning of s 44(iv) of the Constitution.

39. The offices of councillor and mayor under the Local *Government Act* bear many of the indicia identified in paragraph 25 above of an office that is not "under the Crown" within the meaning of s 44(iv). In particular, the Executive Government of Tasmania does not appoint persons to those offices, and has only limited powers to remove persons from them. Further, although the Executive Government has some control over the performance by a council of its functions, it has no power to direct or control a particular mayor or councillor in the exercise of his or her functions.

40. A key feature of the offices of councillor and mayor under the *Local Government Act* that distinguishes those offices from offices in the public service — and from other offices created under an Act for a public purpose — is that a person must be elected to them by the electors of his or her municipality. In order to continue to hold the office, a councillor or mayor must be re-elected every four years.[45] Accordingly, just as a member of Parliament is primarily accountable to his or her constituents, a mayor or councillor elected under the *Local Government Act* is primarily accountable not to the Executive Government of Tasmania, but to the electors of his or her municipality.[46] It is those electors who will, in the ordinary course, determine whether a councillor or mayor may continue to hold that office.

41. That the holder of an office is elected by popular suffrage, and is therefore primarily accountable to the members of his or her community, is a compelling factor in favour of the conclusion that the office is not an office "under the Crown". That is particularly so where, as in the case of the office of mayor or councillor under the *Local Government Act*, the Executive Government has little or no power to direct or control the holder of the office in the exercise of his or her functions.

---

44 (1994) 34 NSWLR 506 at 520.

45 *Local Government Act*, s 44 (mayors) and s 46 (councillors).

46 *Sydney City Council v Reid* (1994) 34 NSWLR 506 at 520 (Kirby P), 521 (Meagher JA).

42. This understanding of s 44(iv) is consistent with the historical understanding of the expression "office of profit under the Crown" as referring to an office to which a person was appointed, either by the Sovereign or the Executive, rather than elected.[47] It is also consistent with the historical understanding that the disqualification of holders of "office[s] of profit under the Crown" from sitting in Parliament was directed to holders of non-political, rather than political, offices.[48]

43. Ms McCulloch's submissions state that, historically, certain offices under the Crown were elected, giving the example of the office of sheriff, which was an elected office prior to the 16th century.[49] However, practices dating from before the English Civil War can have little relevance in this context, given the significant changes in the nature of relations between the Parliament and the Crown after that time, and given the time at which the Constitution was drafted.

44. Further, it is no answer to the contention that the offices of mayor and councillor under the *Local Government Act* are not offices "under the Crown" to say that, for some purposes, a local government authority is part of "the State".[50] So much may be accepted. But, as discussed in paragraph 27 above, that characterisation was made in different contexts, for different purposes.

45. Further, the *Municipal Council of Sydney* case, on which Ms McCulloch relies, refers to the State as the repository of "the whole executive and legislative powers of the community", which may be "hand[ed] over to" a local council — reflecting the fact that a council exercises legislative, as well as executive powers, as "the agent of the power that created it" — namely the Parliament.[51] That passage does not support the conclusion that a council is an emanation of the Executive, or that councillors hold an office "under the Crown".

46. Victoria contends that it is consistent with the purposes of s 44(iv) of the Constitution identified in *Sykes v Cleary* to conclude that the offices of councillor and mayor under the *Local Government Act* are not offices "under the Crown".

47. As noted in paragraph 17 above, the "principal mischief" at which s 44(iv) is directed is the elimination or reduction of the influence of the Executive

---

47 Erskine May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, (4th ed, 1859) at 550-551; House of Commons, *Report from the Select Committee on Offices or Places of Profit under the Crown*, (1941) at xii-xiii.

48 House of Commons, *Report from the Select Committee on Offices or Places of Profit under the Crown*, (1941) at xiii.

49 McCulloch submissions at [68].

50 McCulloch submissions at [37]-[39].

51 McCulloch submissions at [38], quoting *Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208 at 240 (O'Connor J) (emphasis added).

Government over the Parliament.[52] Given the degree of independence that councillors and mayors under the *Local Government Act* have from the Executive Government — particularly by virtue of the fact that those offices are elected — there is little reason to suppose that allowing a holder of those offices to sit in the Parliament would give the Executive any influence over the Parliament.

48. Ms McCulloch's submissions seek to attach great significance to the fact that the allowances for the offices of councillor and mayor are prescribed by regulations,[53] arguing that those allowances are therefore within the control of the Executive Government of Tasmania.[54] However, any regulation purporting to alter the allowances payable to councillors or mayors must be tabled in each House of the Tasmanian Parliament,[55] and is subject to disallowance by either House.[56] Any change to the allowances payable to councillors and mayors under the *Local Government Act* is therefore subject to the supervision and control of the Tasmanian Parliament, and is not solely within the control of the Executive Government. Further, any regulations would have to be general in nature (not specific to a particular councillor) and made for a proper purpose; the interpretation and application of s 44(iv) should not be predicated on the possibility of an unlawful exercise of the power to determine the allowances payable to councillors.[57] In any event, while control over the remuneration attaching to an office may be relevant in determining whether an office is "under the Crown", it cannot be determinative.

49. Ms McCulloch's submissions also point to the possibility that a councillor or mayor could seek to use his or her position in the Parliament to secure benefits for his or her municipality.[58] However, this possibility does not involve any degree of influence by the Executive Government over the Parliament.

50. Nor is there any reason to suspect that a councillor or mayor would necessarily share in the political opinions of the Executive Government of his or her State.[59] A person elected to such an office may be affiliated with a political party other than the party in control of the Executive Government, or with no political party at all.

---

52 *Sykes v Cleary* (1992) 176 CLR 77 at 97 (Mason CJ, Toohey and McHugh JJ).

53 *Local Government Act*, s 340A; *Local Government (General) Regulations 2015* (Tas), reg 42 and Sch 4.

54 McCulloch submissions at [26], [55]-[56].

55 *Acts Interpretation Act 1931* (Tas), s 47(3).

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

57 *Wainohu v New South Wales* (2011) 243 CLR 181 at 240-241 [151]-[152] and the authorities cited there (Heydon J, noting that his Honour was in dissent in the result).

58 McCulloch submissions at [63]-[64].

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

51. To the extent that a purpose of s 44(iv) is to foster the development of a politically neutral public service,[60] that purpose has no application to the office of mayor or councillor under the *Local Government Act*. Holders of elected offices in local government are not required or expected to be politically neutral.

52. As to the capacity of the holder of an office to attend to the duties of a member of Parliament, and vice versa, discussed in *Sykes v Cleary*,[61] while the offices of councillor or mayor under the *Local Government Act* may impair that capacity to some extent, the degree of impairment is likely to be less because those offices are usually part-time. In any event, there will be some degree of impairment of that capacity whenever a person attempts to hold an office (whether "under the Crown" or otherwise), or engage in private employment, while serving as a member of Parliament.[62] Yet only some offices of profit are targeted by s 44(iv). The fact that holding an office would impair a person's practical capacity to attend to the duties of a member of Parliament cannot determine whether that office is an office "under the Crown" within the meaning of s 44(iv).

53. Finally, to the extent that any of the concerns identified in Ms McCulloch's submissions were to be experienced in practice, it remains open to the Commonwealth Parliament to prescribe additional qualifications for membership in the House of Representatives or the Senate, pursuant to ss 34 and 16 of the Constitution, respectively. As Deane J observed in *Sykes v Cleary*, s 44 is not a code determining qualifications and disqualifications for election; the Parliament itself retains that power, subject to the overriding disqualification found in s 44.[63] Likewise, it is open for a State Parliament to provide that, upon election to the Commonwealth Parliament, a person is not capable of continuing to be a councillor.[64] Thus it is not necessary to extend the operation of s 44(iv) beyond those offices that are properly regarded as part of the Executive Government of the Commonwealth or a State.

---

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

61 *Sykes v Cleary* (1992) 176 CLR 77 at 96 (Mason CJ, Toohey and McHugh JJ). See also McCulloch submissions at [65].

62 This is recognised and dealt with by provisions such as cl 3(1)(ea) and (eb) of Sch 5 to the *Local Government Act*.

63 (1992) 176 CLR 77 at 121 (noting that Deane J was in dissent in the result).

64 See, eg, *Local Government Act 1989* (Vic), s 28A(1)(a).

PART VI: ESTIMATE OF TIME

54. The Attorney-General for Victoria estimates that he will require approximately 10 minutes for the presentation of his oral submissions.

Dated: 22 January 2018

.....
KRISTEN WALKER
Solicitor-General for Victoria
Telephone: 03 9225 7225
Facsimile: 03 9670 0273
k.walker@vicbar.com.au

.....
MARK HOSKING
Telephone: 03 9225 8483
Facsimile: 03 9225 8395
mark.hosking@vicbar.com.au

IN THE HIGH COURT OF AUSTRALIA **No. C27 of 2017**

SITTING AS THE COURT OF DISPUTED RETURNS

CANBERRA REGISTRY

RE MS JACQUI LAMBIE

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

10 **INDEX TABLE OF PROVISIONS REFERRED TO IN THE ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)**

Act	Provision(s)
Commonwealth Constitution	s 16, 34, 44(iv), 75(iv) and 114
Acts Interpretation Act 1931 (Tas)	s 47
Local Government (General) Regulations 2015 (Tas)	reg 42, Schedule 4

Filed on behalf of the Defendants Dated: 22 January 2018

Victorian Government Solicitor
Victorian Government Solicitor's Office
Level 25, 121 Exhibition Street
Melbourne VIC 3000
Contact: Alison O'Brien

Tel: 03 8684 0416
Fax: 03 8684 0449
Ref: 1750728

Commonwealth of Australia Constitution Act

(The Constitution)

This compilation was prepared on 4 September 2013
taking into account alterations up to Act No. 84 of 1977

[Note: This compilation contains all amendments to the Constitution made by the Constitution Alterations specified in Note 1
Additions to the text are shown in bold type
Omitted text is shown as ruled through]

Prepared by the Office of Parliamentary Counsel, Canberra

Representatives to expire or be dissolved after that law came into operation; or

(b) if the senator elected by the people of the State had a term of service expiring on the thirtieth day of June, One thousand nine hundred and eighty-one—until the expiration or dissolution of the second House of Representatives to expire or be dissolved after that law came into operation or, if there is an earlier dissolution of the Senate, until that dissolution.

16 Qualifications of senator

The qualifications of a senator shall be the same as those of a member of the House of Representatives.

17 Election of President

The Senate shall, before proceeding to the despatch of any other business, choose a senator to be the President of the Senate; and as often as the office of President becomes vacant the Senate shall again choose a senator to be the President.

The President shall cease to hold his office if he ceases to be a senator. He may be removed from office by a vote of the Senate, or he may resign his office or his seat by writing addressed to the Governor-General.

18 Absence of President

Before or during any absence of the President, the Senate may choose a senator to perform his duties in his absence.

19 Resignation of senator

A senator may, by writing addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

chosen for each division. A division shall not be formed out of parts of different States.

In the absence of other provision, each State shall be one electorate.

30 Qualification of electors

Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once.

31 Application of State laws

Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives.

32 Writs for general election

The Governor-General in Council may cause writs to be issued for general elections of members of the House of Representatives.

After the first general election, the writs shall be issued within ten days from the expiry of a House of Representatives or from the proclamation of a dissolution thereof.

33 Writs for vacancies

Whenever a vacancy happens in the House of Representatives, the Speaker shall issue his writ for the election of a new member, or if there is no Speaker or if he is absent from the Commonwealth the Governor-General in Council may issue the writ.

34 Qualifications of members

Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:

Part IV—Both Houses of the Parliament

41 Right of electors of States

No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

42 Oath or affirmation of allegiance

Every senator and every member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some person authorised by him, an oath or affirmation of allegiance in the form set forth in the schedule to this Constitution.

43 Member of one House ineligible for other

A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House.

44 Disqualification

Any person who:

(i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or

(ii) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; or

(iii) is an undischarged bankrupt or insolvent; or

(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; or

from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

74 Appeal to Queen in Council [*see* Note 12]

No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

75 Original jurisdiction of High Court

In all matters:

(i) arising under any treaty;

(ii) affecting consuls or other representatives of other countries;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(iv) between States, or between residents of different States, or between a State and a resident of another State;

State, or other chief executive officer or administrator of the government of the State.

111 States may surrender territory

The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

112 States may levy charges for inspection laws

After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.

113 Intoxicating liquids

All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

114 States may not raise forces. Taxation of property of Commonwealth or State

A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

115 States not to coin money

A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

Acts Interpretation Act 1931

Version current from 5 September 2017 to date (accessed 19 January 2018 at 12:08)

TASMANIA

Acts Interpretation Act 1931

An Act to provide certain rules for the interpretation of Acts of Parliament; to define certain terms commonly used therein; and to facilitate the shortening of their phraseology

[Royal Assent 18 January 1932]

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows

(iii) the rights or privileges of a person (other than the Crown in right of the State, or any department, instrumentality, authority, or agency of the State) existing at the date of that notification or publication would be prejudiced; or

(iv) liabilities or obligations would be imposed on any person (other than the Crown in right of the State, or any department, instrumentality, authority, or agency of the State) in respect of anything done or omitted to be done on or before that date of notification or publication.

(3A) Where –

(a) regulations are not published in the *Gazette* as required by subsection (3) (a) ;

(b) the making of regulations is not notified in the *Gazette* as required by subsection (3) (b) ; or

(c) regulations in relation to a matter referred to in subsection (3) (d) (iii) or (iv) are expressed to take effect on or from a day or date preceding the date of publication of those regulations in the *Gazette* or, as the case may be, on or from a day or date preceding the date of the notification in the *Gazette* of the making of those regulations –

those regulations are void.

(4) If either House of Parliament passes a resolution, of which notice has been given within the first 15 sitting days of such House after any regulation is laid before it, that such regulation be disallowed, such regulation thereupon shall be void and thenceforth shall cease to have effect except as regards anything done thereunder prior to the passing of such resolution.

(5) Notice of the passing of every such resolution shall be gazetted forthwith by the Clerk of the House by which the same was passed.

(6) Where in any such resolution any section, division, or part of a regulation is expressed to be disallowed, the resolution shall have the effect of annulling only such section, division, or part, and in every other case such disallowance shall extend to the whole of such regulation.

(7) Where a regulation, or any part thereof, has been disallowed as aforesaid by either House of Parliament, no regulation to the same, or substantially the same, effect made within 12 months after such disallowance shall take effect until the same has been laid upon the table of such House and 30 sitting days of such House have elapsed after the same was so laid, unless such House shall have sooner passed a resolution allowing the same.

(8) Where by any Act it is provided that regulations may be made thereunder, and the authority by whom the same are to be made is not specified, the same shall be made by the Governor.

(9) . . . . . .

(10) Every regulation made after the passing of this Act and before the commencement of the Legislation Publication Act 1996 shall be filed and recorded in the office of the Attorney-General, but no regulation shall be challenged, or the validity thereof impugned, on the ground of the non-observance of this provision, nor shall it be necessary to prove compliance therewith in any proceedings under or in relation to such regulation.

(11) Every regulation made on or after the commencement of the Legislation Publication Act 1996 is to be filed and recorded by the Chief Parliamentary Counsel in the responsible Department in relation to the Legislation Publication Act 1996 .

(12) A regulation may not be challenged, or its validity may not be impugned, on the ground of the non-observance of subsection (11) and it is not necessary to prove compliance with that subsection in any proceedings under or in relation to that regulation.

Local Government (General) Regulations 2015

I, the Governor in and over the State of Tasmania and its Dependencies in the Commonwealth of Australia, acting with the advice of the Executive Council, make the following regulations under section 349 of the Local Government Act 1993 .

22 June 2015

C. WARNER

Governor

By His Excellency's Command,

PETER GUTWEIN

Minister for Planning and Local Government

SCHEDULE 4 - Allowances for elected members

Regulation 42

Column 1 Council	Column 2 Allowance for Councillors	Column 3 Additional allowance for Deputy Mayors	Column 4 Additional allowance for Mayors
Hobart City	33 173	21 424	82 934
Launceston City	33 173	21 424	82 934
Clarence City	26 856	18 660	67 137
Glenorchy City	26 856	18 660	67 137
Kingborough	26 856	18 660	67 137
Burnie City	20 338	15 896	50 846
Central Coast	20 338	15 896	50 846
Devonport City	20 338	15 896	50 846
West Tamar	20 338	15 896	50 846
Brighton	13 823	13 130	34 555
Huon Valley	13 823	13 130	34 555
Meander Valley	13 823	13 130	34 555
Northern Midlands	13 823	13 130	34.555
Sorell	13 823	13 130	34 555
Waratah-Wynyard	13 823	13 130	34 555
Break O'Day	11 553	11 058	28 883
Circular Head	11 553	11 058	28 883
Derwent Valley	11 553	11 058	28 883
Dorset	11 553	11 058	28 883
George Town	11 553	11 058	28 883
Latrobe	11 553	11 058	28 883
Glamorgan-Spring Bay	9 729	9 676	24 322
Kentish	9 729	9 676	24 322
Southern Midlands	9 729	9 676	24 322
West Coast	9 729	9 676	24 322
Central Highlands	8 513	8 985	21 281
Flinders	8 513	8 985	21 281