

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

No. C27 of 2017



**RE MS JACQUI LAMBIE**

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

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**PROPOSITIONS OF STEVE MARTIN**

**(for hearing on 6 February 2018)**

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### Construction: “Office of profit under the Crown”

1. (**Text**): It is not in controversy that the term “Crown” speaks to the Executive, as distinct from the legislative branch of Government.
2. The phrase “office of profit under the Crown” speaks to a connection; a relationship. The relationship is between the office of profit, on the one part, and the Executive branch of Government, on the other.
3. (**History**): The prohibition under consideration derives from an Act of the Imperial Parliament, the *Succession to the Crown Act 1707*.

See: *Report from the Select Committee on Offices or Places of Profit under the Crown* (1941), pages (xi) – (xv); paragraphs [14] – [22].

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4. The meaning of the phrase “office of profit under the Crown” is obscure. That being so, real assistance on the question of construction is to be derived from material speaking to the earlier English provisions.
5. (**Purpose**): It is not in controversy that one object or purpose of the provision is to protect the proper functioning of the Parliament - by reducing Crown or Executive influence over the House.
6. Martin contends for a second object or purpose. He contends that s.44(iv) is one provision, among a series, providing for a system of responsible ministerial government.

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See: *Egan v Willis* (1998) 195 CLR 424, 451 – 452 [42].

7. In Australia, it is settled that, by virtue of incompatibility, permanent officers of government departments hold offices subject to the prohibition.

See: *Sykes v Cleary* (1992) 176 CLR 77 at 95-97.

### The State statutory scheme

8. The relationship to be evaluated is to be undertaken by reference to provisions of the *Local Government Act 1993* (Tas) (**LG Act**).
9. Martin contends that the relevant evaluation might (at least) identify who appoints, who controls, who dismisses and the nature of the duties attached to each relevant office.

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See: *Report from the Select Committee on Offices or Places of Profit under the Crown* (1941), pages 127 - 130.

10. The following features of the statutory scheme may, thus, particularly be noticed:

- (a) (Council): The Devonport City Council is an independent statutory corporation, established under the LG Act. Its functions are those of local government, including to represent and promote the interests of the community.

See: s.18 of the LG Act; s.20 of the LG Act.

- (b) (Election of Councillors): Councillors are elected by eligible electors within the community of the municipal area. Councillors are elected to office for a term of four years.

10 See: ss.44(1) of the LG Act; ss.45(2) of the LG Act.

- (c) (Election of Mayor): The Mayor is directly elected by eligible electors at a separate but concurrent election. A person may not accept the office of Mayor unless the person is a Councillor.

See: s.40 of the LG Act; ss.41(4) of the LG Act; ss.43(2) of the LG Act.

- (d) (Functions and duties of Councillor): Each individual Councillor is to represent the community and to act in the best interests of the community. The Minister may by order clarify the functions of the Councillors.

See: s.28(1) of the LG Act; ss.28AA(1) of the LG Act.

- 20 (e) (Remuneration): A Councillor is entitled to a prescribed allowance; and a Mayor is entitled, in addition, to a further allowance. Those allowances are prescribed under Regulations. Further, the Regulations provide for a Councillor to be reimbursed for reasonable expenses.

See: s.340A of the LG Act; *Local Government (General) Regulations* 2015, Reg. 42(2) and Reg. 43.

### **Response to Contradictor**

11. Martin seeks in terms to respond to three matters in issue, as raised by the Contradictor.

30 12. (Control in performance): In truth, only in limited and circumscribed respects may it be said that the LG Act confers on the Executive Government of Tasmania the ability to control the performance of the functions of Councillors (and the Mayor).

13. (Remuneration): The reliance by the Contradictor on the question of remuneration is unpersuasive for three reasons. First, there is not an at large power in the Minister to vary prescribed allowances; *a fortiori* for the purposes of seeking to exercise control. Second, under s.47 of the Tasmanian *Acts Interpretation Act 1931*, any such regulation is required to be placed before each House of Parliament, in any event. Third, and finally, a permissible exercise of power to alter remuneration attached to an office would not thereby elevate that office to an office under the Crown for the purposes of s.44(iv).
- 10 14. (Crown in right of the State): The Council is not the Crown, for the purposes of s.44(iv). Even if it were, the offices under consideration are not “under” the Crown in the right of the State.

### Conclusion

15. The relationship between each office and the Crown is slight. With due regard to history and purpose, the Court may comfortably conclude that neither office is under the Crown.

Dated: 6 February 2018



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