

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

C27 of 2017



**RE MS JACQUI LAMBIE**

Reference under s 376 of the

*Commonwealth Electoral Act 1918 (Cth)*

**OUTLINE OF ORAL ARGUMENT FOR MS MCCULLOCH**

**PART I: Internet Certification**

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

**PART II: Outline of Oral Argument**

2. To determine if any particular “office of profit” is “under the Crown” for the purpose of s 44(iv) it is necessary to identify and examine a relationship between the Crown and the office throughout the time such relationship subsists. {AS [10], [70]-[72]}
3. In context, the ordinary meaning of the word “under” denotes subordination. With reference to persons acting in a particular capacity, it is considered in relation to one holding a superior position or office.
4. Section 116 of the Constitution draws attention to an “office under the Commonwealth”. Whilst the provision does not require the office to be one of “profit”, and identifies the “Commonwealth” and not the “Crown” as the relevant body, it is the closest constitutional analogue because of the identical requirement that the office be “under” the Commonwealth. {AS [33], [70]-[71]}
5. To that extent, the reasoning of this Court in *Williams v The Commonwealth* (2012) 248 CLR 156 [Tab 28] is relevant to establish the proposition that the inquiry into whether an office is “under” the Commonwealth is one into the whole relationship or connection between the office and the “Crown” or the “Commonwealth”: at [107]-[110] per Gummow and Bell JJ (French CJ at [84]; Hayne J at [168]; Crennan J at [476]; Kiefel J at [597] agreeing); and at [442]-[446] per Heydon J (in dissent, but not on this point). {AS [33], [70]-[71]}
6. The Crown for this purpose is the Executive Government of Tasmania (*Sue v Hill* at [87]) and the office is that of Mayor of Devonport. The quality and nature of the relationship or connection between them is revealed by the *Local Government Act 1993 (Tas)* in that it explains the functions and powers of councillors and the

Mayor and the powers and privileges of the Crown in respect of councillors and the Mayor. {AS [21]-[22]}

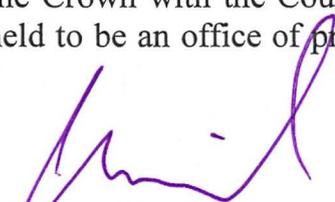
7. There is no warrant in the text or the evident purpose of section 44(iv) to:
  - a. automatically exclude elected offices from the reach of the provision; or
  - b. limit its operation to public servants employed by a Department of State.

To do so would defeat the purpose of s 44(iv). It is easy to identify a myriad of conflicts of duty and interest for a person seeking to discharge his or her duties as a Mayor and as a member of the Commonwealth Parliament at the same time, with such conflicts arising by reason of the former office being under the State Crown. {AS [45]-[72]}

*Sykes v Cleary* (1992) 176 CLR 77 at 95-97 (Tab 25)

8. The constitutional text provides for an office that is “under” the Crown – not an office that is “controlled by”, “directly controlled by”, “directly under”, “in the gift of” or “appointed by” the Crown.
9. The fact that a power or privilege of the Crown is, in certain instances, conditioned on the actions or recommendations of other bodies established by statute, is also not conclusive of any answer. In all relevant circumstances under the *Local Government Act*, the Executive retains a discretion to act or to not act. A relationship or connection is defined as much by the ability of persons to choose not to act in relation to one another as by any duty or choice to act.
10. It is an elision to put undue focus on the fact that the relevant relationship is engendered by the statute and can be altered or terminated by statute. An inquiry into whether the Mayor is “under” the Crown, is an inquiry into the condition of their connectedness or the relation between their involvement with one another whilst that connection or relation subsists, not merely how they came to be connected to, or related with, one another. {AS [69]-[72]}
11. The contention that the interposition of a body corporate constituted by statute between the Mayor and the Crown prevents the relationship from being characterised as “under the Crown” is misplaced. The Mayor is one of the natural persons who constitute and control the local council in acting as agent of the State. The *Local Government Act* provides for a direct relationship between the Crown and the Mayor in many significant respects. The office of Mayor is connected with the Crown in a sense sufficient to answer the constitutional description of being “under” the Crown.
12. The fact that some aspects of the powers that the Crown can exercise over an office are subject to a degree of Parliamentary oversight does not derogate from the proposition that the relationship between the office and the Crown is one that answers the constitutional description. Control does not equate to “ultimate control”.

13. The quality and nature of the relevant relationship is informed by the separate but overlapping relationship between the Crown and the local council. In that regard, it is relevant for constitutional purposes that a local council administers State government in a geographical area, and is an agent of the State for administering and making laws relating to a particular geographic area within the State {AS [37]-[42]}.
- a. *The Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208 at 240 per O'Connor J (Tab 18)
  - b. *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 (Tab 17) at 44 per Latham CJ; at 67 per Rich J; at 75 per Starke J; at 76, 78-79, 83-84 per Dixon J
14. The relevant provisions of the *Local Government Act* that reveal the nature of the relationship between the Mayor and the Crown are {AS [13]-[14], [17], [23]-[31], [71]}:
- Sections 16, 17, 18, 20, 25, 26, 27, 27A, 28, 28AA, 28K, 28R-28ZL, 40, 45, 73, 62A, 62B, 73, 74, 78, 80, 145, 171, 172, 210, 214-214E, 214L-214O, 215, 215A 225, 226, 230, 254, 255, 340A, 349.
15. The relevant Minister has the ability to, inter alia, cause inquiries into the conduct of councillors, suspend councillors, dismiss councillors, alter the remuneration of councillors, impose a code of conduct on councillors, alter the size of councils or the number of councillors per council, and alter the boundaries of councils and electoral districts. Some of the powers are reposed entirely in the Minister, some are reposed in her or him conditionally on the exercise by another person of anterior powers, and some are subject to Parliamentary oversight. {AS [13]-[14], [17], [23]-[31], [71]}
16. Taken together in the context of the relationship of the Crown with the Council itself, the office of Mayor of Devonport ought to be held to be an office of profit under the Crown for the purpose of s 44(iv).



Robert Newlinds

Peter Kulevski