

**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 (C27/2017)**

Date referred to Full Court: 13 December 2017

Section 44 of the Constitution provides that any person who has any of certain attributes shall be incapable of being chosen or of sitting as a Senator or a Member of the House of Representatives. Among those attributes are (in s 44(i)), being a subject or a citizen of a foreign power, and (in s 44(iv)), holding any office of profit under the Crown.

On 2 June 2016 Ms Jacqui Lambie was nominated as the first of three Tasmanian candidates endorsed by the Jacqui Lambie Network (JLN) for the Senate for the general election held on 2 July 2016. Steven Leigh Martin was nominated as the second of the three candidates. Ms Lambie was returned as a Senator for Tasmania after the election; Mr Martin was not.

Ms Lambie was born in Australia in 1971 of a mother born in Tasmania and a father born in Scotland in 1951 who had emigrated to Australia as a young child in the 1950's and become an Australian citizen. Ms Lambie's father never renounced his British citizenship. Unbeknown to Ms Lambie, at the time of her birth she had automatically become a citizen of the United Kingdom & Colonies by descent as a consequence of the citizenship of her father. Not having renounced that citizenship she remained a British citizen by descent at the time of her nomination and her subsequent election. On 14 November 2017, after becoming aware that she held United Kingdom citizenship, Ms Lambie submitted her resignation as a Senator in writing to the President of the Senate. (She later renounced her United Kingdom citizenship, that renunciation taking effect on 17 November 2017.)

At all times since 2009 Mr Martin has been a Councillor of the City of Devonport, Tasmania, and at all times since 2011 he has in addition been the Mayor of the City of Devonport. He held both of these positions on the day the election writs were issued for the 2016 election, on the day he nominated as a candidate, on polling day and on the day the election writ was returned. He still holds these positions today. Under s 30A of the *Local Government Act 1993* (Tas), Mr Martin is paid allowances for holding the positions of Councillor and Mayor.

The following questions were transmitted to the High Court by the Senate on 15 November 2017 pursuant to s 377 of the *Commonwealth Electoral Act 1918* (Cth):

- (a) 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 Jacqui Lambie was returned;
- (b) if the answer to Question (a) is "yes", by what means and in what manner that vacancy should be filled;

- (c) what directions and other orders, if any, should the Court make in order to hear and finally dispose of this reference; and
- (d) what, if any, orders should be made as to the costs of these proceedings.

On 17 November 2017 the High Court published a notice advising that it would sit as the Court of Disputed Returns on 8 December 2017 for the purpose of giving directions as to the hearing and determination of the questions referred by the Senate. The notice invited any person who desired to place any evidence before, or make any submission to, the Court to apply setting out their reasons by 30 November 2017. Submissions were received from five applicants.

On 8 December 2017 Justice Nettle, sitting as the Court of Disputed Returns, considered those submissions and made orders that three of the five applicants be entitled to be heard and be deemed to be parties to the reference under s 378 of the *Commonwealth Electoral Act 1918* (Cth), namely the Attorney-General of the Commonwealth (“the Attorney-General”), Mr Steven Leigh Martin and Ms Katrina Melissa McCulloch. Mr Martin was found to be a person interested in the determination of the questions referred to the Court as he was the candidate second to Ms Lambie for the Jacqui Lambie Network on the ballot paper. Ms McCulloch was also found to be a person interested on the basis that she was placed thirteenth in the election of the twelve Senators for Tasmania.

Justice Nettle then answered the questions referred as follows:

- (a) there is a vacancy by reason of s 44(i) of the Constitution in the representation of Tasmania in the Senate for the place for which Jacqui Lambie was returned;
- (b) the vacancy in the representation of Tasmania in the Senate should be filled by a single special count of the ballot papers cast for candidates for the election of twelve senators for the State of Tasmania;
- (c) the special count shall take place in accordance with specified orders and directions;
- (d) the Commonwealth shall pay the costs of Mr Martin and Ms McCulloch of the proceedings.

On 12 December 2017 the Australian Electoral Office (AEO) conducted the special count of the ballot papers. The AEO reported to the Court that as result of the special count, the twelve candidates who would be elected upon application of the Rules set out in s 273 of the *Electoral Act* included Mr Martin in the ninth position.

On 13 December 2017, Justice Nettle reserved the following question for the consideration of the Full Court pursuant to s 18 of the *Judiciary Act*.

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

A Notice of a Constitutional Matter has been filed by the Attorney-General.

The Attorney-General submits that neither office of the Councillor of the Devonport City Council or Mayor of Devonport is an “office of profit under the Crown” within the meaning of s 44(iv) of the Constitution. “Crown” means the Executive government. “Under” means “under the control of”, in the sense of “in the gift of the Executive government”. As both the offices of Councillor and Mayor are elected offices, appointment to them is not “in the gift of the Executive”. Further, the “confined powers” of the Executive to dismiss occupants of those offices or to affect their remuneration “fall far short” of establishing that ongoing occupancy of those offices is “in the gift of the Executive.”

In his submissions Mr Martin submits that the offices are not “under the Crown” because of the high degree of independence of those offices from the Executive government. He sets out the relevant statutory provisions which govern those offices in considerable detail.

The Attorney-General for the State of Victoria has filed submissions in support of Mr Martin.

Ms McCulloch submits that Mr Martin is ineligible for election as the ‘character’ of the offices he holds is as an extension of the Executive. She asserts that the Council’s funding and therefore his remuneration is controlled by the Crown, that there is a threat of dismissal from the offices by the Crown, and that the demands of both offices raise an obvious conflict of duties and interest for Mr Martin. Even though each of Mr Martin’s offices did not “come from” the Crown (because he was elected) each is still “under” the Crown. And further “that the relationship of control between the Executive Government and the Mayor constitutes a real risk of Crown influence on the decision-making of the office-holder”.

