ORIGINAL

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

C27 OF 2017

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



# ANNOTATED SUBMISSIONS OF MS KATRINA MELISSA McCULLOCH

## PART I: FORM OF SUBMISSIONS

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

## PART II: ISSUES

2. The question reserved for consideration by the Full Court is whether Mr Martin is "incapable of being chosen or of sitting as a Senator by reason of s 44(iv) of the Constitution."

3. This reference raises the issue whether at any time during the relevant period, Mr Martin held an office of profit under the Crown by reason of his being the Mayor of Devonport and a local councillor.

## PART III: SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

4. The Attorney-General has given sufficient notice of this hearing.

## PART IV: JUDGMENT OF COURT BELOW

5. There is no judgment below to be cited.

Filed on behalf of Katrina Melissa McCulloch by:

Holman Webb Lawyers
Level 17, 123 Pitt Street,
Sydney NSW 2000

Date of this document: 15 January 2018
Contact Name: Alexander John Wakefield
File Ref: MCC04036/086887
Telephone: 02 9390 8302
Fax: 02 9390 8390
Email: john.wakefield@holmanwebb.com.au

## PART V: FACTS

6. The material facts for this hearing are the agreed facts filed with the Court on 22 December 2017. [1]

7. Briefly, during the whole of the relevant period (9 June 2016 to the present), Mr Martin was and is an elected councillor and was and is an elected Mayor in the City of Devonport (in Tasmania). [2] In those two roles Mr Martin was and is entitled to receive (and did and does receive) a substantial allowance and the reimbursement of his costs.[3]

## PART VI: ARGUMENT

### A. Summary of argument

10 8. It is plain that Mr Martin, by holding the positions of local councillor and Mayor of Devonport, holds "offices", and the substantial right to remuneration attached to those offices relevantly cause them to be characterised as "offices of profit".

9. The central disputed question before the Court is whether those offices of profit, or either of them, are "under the Crown" for the purposes of s 44(iv) of the Constitution.

10. The literal meaning of the phrase is obscure and incapable of exhaustive definition. For constitutional purposes it requires a relevant relationship between the office and the State Government, being the Executive as distinct from the legislative branch of argument, viz the Ministry and the administrative bureaucracy. There is no magic in the word "under", aside from its historical breadth in distinction to "from". What is sought
20 is a connection or relationship between the office held and the Executive that, when properly characterised, is of a nature that answers to the purpose of the constitutional provision, including as revealed by its history and context and the mischief sought to be avoided.

11. Consideration of those matters compels the conclusion that the Mayoralty of Devonport is such an office. A person holding offices of public trust simultaneously in two tiers of government carries with it the capacity for an injurious effect on the proper functioning of all three tiers of government and damage to both offices.

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[1] CB at 97-102.
[2] CB at 99-100, [13]-[14] and [19].
[3] CB at 100-101, [21]-[28].

12. Further, the demands of the both offices raise an obvious conflict of duties and of duties and interest. The practical demands of each of office are of themselves enough for incompatibility, but are relatively pedestrian concerns next to the scope for larger matters of conflict.

13. 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. This influence is ascertained, *inter alia*, by the Crown's power to control, directly or indirectly, the remuneration attached to the office, or the Mayor's receipt of it. It is not the State Parliament that sets the level of remuneration of the Mayor and councillors, but the Executive.

14. Crown-control of other aspects of office such as tenure, capacity for reappointment, and control over the functions attached to the office are also relevant to the extent such control directly or indirectly affects the remuneration attached to the office, or the office-holders' receipt of it, as well as the conflicts of interest and duty that arise by a person occupying offices in two tiers of government. .

15. Perversely, the potential prestige and power that attaches to membership of the Commonwealth Parliament by the Mayor, carries with it the real risk of determining the financial assistance that flows to both the State and municipal areas within that State through the common use of s 96 of the Constitution, thereby potentially influencing the dealings and distorting the relationship between the State Government and the Mayor in his capacity as a local representative.

16. Apart from avoiding the incompatibility of offices, the other significant purpose of s 44(iv) is to ensure the supremacy of the Commonwealth Parliament over the Crown (in whichever of its manifestations), by preventing the Executive from gaining control of the Parliament.

17. The Crown's statutory power at any time to vary Mr Martin's remuneration is at large (perhaps subject only to judicial review). Additionally, the Crown in right of Tasmania has wide statutory powers at any time to suspend and eventually remove Mr Martin from office. Moreover, the *Local Government Act* 1993 (Tas) (the **LGA**) permits the Crown strongly to interfere in the functions and duties of Mr Martin's office of councillor, in Mr Martin's functions and duties in his office as Mayor, in the functions

and duties of his council's General Manager, and in the relationship and interaction between Mr Martin as Mayor and his council's General Manager.

18. The realities of that side of the relationship raise the spectre that the Crown can use its powers of patronage over local councillors to suborn members of the Parliament and thereby undermine the independence of the institution.

19. In the case of dual political offices, there is also present the potential for a further undermining of the constitutional system of government that arises from the other side of the relationship, a potential far greater than would exist in the case of a public servant like a school teacher. The powers of patronage that a Commonwealth parliamentarian may enjoy, could suborn members of State Parliaments and the Executive, and other municipal councils, in order for the Commonwealth Parliamentarian to influence the patronage received in their capacity as a local councillor from the State Parliament or Executive, and to influence their prospects of re-election and receive favourable treatment for their council as well as securing the position of political allies.

20. The potential for these risks and conflicts engages the operation of s 44(iv) to the offices of local councillor and Mayor.

**B. The argument**

*The legislative scheme and the relationship between the office and the Executive*

21. It is convenient to commence with an identification of the sense in which the concept of "the Crown" is employed in s 44(iv). In *Sue v Hill* (1999) 199 CLR 462, the joint judgment of Gleeson CJ, Gummow and Hayne JJ identified five senses in which the expression "the Crown" is used in Australian constitutional theory as derived from the United Kingdom. It is undoubtedly the third sense identified by their Honours which s 44(iv) adopts. At 499 [87], their Honours said:

> Thirdly, the term "the Crown" identifies what Lord Penzance in *Dixon* 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 (footnotes omitted).

22. For the purposes of the present inquiry, it is imperative to identify the nature of the relationship or connection between the office of Mayor and the Executive so as to answer the question of whether a Mayor holds "an office of profit under the Crown".

23. The statutory office of councillor which Mr Martin holds is created by s 25 and Schedule 5 of the LGA. The key present features of that office are:

a. An entitlement to a prescribed allowance is attached to that office by s 340A of the LGA, which gives the Minister through regulation 42 and Schedule 4 of the *Local Government (General) Regulations 2005* (the **Regulations**) broad control of the amount and timing of that allowance.

b. The functions attached to that office are outlined in s 28 of the LGA, albeit with a Ministerial capacity for override described in s 28AA of the LGA.[4]

c. Generally, councillors take office via election pursuant to ss 25(1) and 45 of the LGA, in conformance with the procedures for election detailed in Part 15 of the LGA, for a maximum term of four years (s 46 of the LGA).

24. The statutory position of Mayor which Mr Martin holds is described by s 26(1) of the LGA as the "chairperson of a council". Apart from the aspect of appointment[5] and the absence of any separate office explicitly created by the statute, it is a position that conforms to standard judicial definitions of an 'office'[6] in that:

a. The position has an entitlement to an (additional) prescribed allowance attached to it (s 340A(2) of the LGA), the amount and timing of which is within the broad control of the Minister (regulation 42 and Schedule 4 of the Regulations).

b. The position has public functions attached to it (s 27 of the LGA), albeit with a Ministerial capacity for override described in s 27A of the LGA.

c. Mayors are elected for a maximum term of four years (s 44 of the LGA).

25. Since 1997, local government has been recognised in the Tasmanian Constitution.[7] Those provisions assume elections as the normal manner of selecting councillors, but those provisions are not entrenched, and in any event permit the currently extensive provisions in the LGA of non-elected councillors and administrators at the instigation and intervention of the Crown (see below).

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4 The functions and powers of councils (as distinct from councillors) are outlined in s 20 of the LGA.

5 Generally, it is a position to which one is elected pursuant to s 40 and Part 15 of the LGA.

6 See the plurality in *Sykes v Cleary* (1992) 176 CLR 77 at 95 for a discussion of the concept of "office". Although in a different context, see also for example *R v Murray and Cormie; Ex Parte Commonwealth* (1916) 22 CLR 437 at 452 (a position "of some conceivable tenure, and connotes an appointment, and usually a salary"), and *R v Boston* (1923) 33 CLR 386 at 402.

7 Sections 45A-45C of the Tasmanian Constitution.

26. Remuneration of councillors and mayors is broadly under the control of the Crown. The LGA states that councillors and mayors are entitled to a prescribed 'allowance'. Prescribed allowance means an allowance as prescribed in any regulations made under s 349 of the LGA. Section 349(1) of the LGA states that the Governor may make regulations for the purpose of the LGA. Regulation 42 of the Regulations states that allowances for councillors and mayors are as set out in Schedule 4 of the Regulations, if necessary adjusted for inflation.

27. Additionally, even if elected, councillors cannot take their seat, exercise any functions and duties, and receive any income without first making a "declaration of office" in the prescribed form (s 321 of the LGA), the content of which is set out in Schedule 2 of the Regulations. The content of that declaration of office is a matter of the very broad discretion of the Crown.

28. The Crown also has direct and indirect control over the tenure of councillors. Most importantly, the LGA permits the Minister to appoint a member of the Tasmanian public service to the office of 'Director of Local Government' (s 334 of the LGA) whose functions include administration of the LGA subject to any direction by the Minister (s 335 of the LGA). In particular, the Director of Local Government may recommend to the Minister that he or she issue to any councillor a "performance improvement direction" which the Minister in his or her discretion may then do, failure to comply with which permits the Minister to suspend the councillor for a period of six months (Part 12B of the LGA).

29. The LGA also contains provisions empowering control by the Minister via executive order over the functions of the Mayor (s 27A of the LGA), the General Manager (s 62A of the LGA), the relationship between these two (s 62B of the LGA), and councillors (s 28AA of the LGA).The LGA also contains extensive powers of the Crown to suspend councillors or whole councils (s 214E of the LGA) as a result of investigative processes initiated by the Crown pursuant to Part 12A of the LGA (headed "Local Government Board") and to Part 13, Division 1 of the LGA (headed "Board of Inquiry"), and in the interim arrange for the performance of the affected council's functions by a Commissioner appointed by the Minister (Division 2 of Part 13 of the LGA).

30. In the context of these investigations, the Minister can dismiss councils and call new elections (s 214E of the LGA), and determine or vary the new term of any councillor consequently elected (s 46 (2C) of the LGA).

31. Nor is this of mere theoretical interest. The Governor (upon recommendation by the relevant Minister) has in the last two years issued orders for the suspension of Huon Valley Council and the dismissal of the councillors of Glenorchy City Council after a Board of Inquiry report under the LGA.[8] This is a use of power that has become increasingly common throughout the nation.

*Office of Profit Under the Crown*

32. The only decision of this Court to consider the meaning of the phrase "office of profit under the Crown" is *Sykes v Cleary* (1992) 176 CLR 77. At 95, Mason CJ, Toohey and McHugh JJ (with whose reasons Brennan J at 108, Dawson J at 130, and Gaudron J at 132 agreed on the s 44(iv) issue), said that the meaning of the expression "is obscure".

33. The provision must be read as a whole, in an unrestricted fashion, and in its constitutional context: *Sykes v Cleary* at 96-97; and see *Williams v The Commonwealth* (2012) 248 CLR 156 at 223 [109]-[110] per Gummow and Bell JJ; at 333-335 [442]-[446] per Heydon J (on the expression "office under the Commonwealth" within s 116).

34. The conclusion can be reached with some ease that Mr Martin holds "offices" and they are "of profit". In the present sense, an office is a position under constituted authority, of a public character, to which duties are attached (*R v Boston* (1923) 33 CLR 386 at 402 (and see *Bowes v City of Toronto* (1858) 14 ER 770; *Wood v Little* (1921) 29 CLR 654 for matters concerning the public trust placed in a councillor).

35. An office is one "of profit" when some form of remuneration (however described in an instrument of grant or in an Act) attaches to it. The remuneration can be small or nominal,[9] and it need not be paid out of the public revenue.[10] The remuneration need

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[8] For the dismissal order for Huon City Council in 2016, see *Local Government (Huon Valley Council Dismissal) Order 2016*. See also *Brooks v Easther (No 3)* [2017] TASSC 54 and *Branch-Allen v Easther* [2016] TASSC 29. The dismissal of the Glenorchy councillors was achieved by way of the *Glenorchy City Council (Dismissal of Councillors) Act 2017* (Tas).

[9] Twomey, *The Constitution of New South Wales* (2004), Federation Press, at page 435 (referring to the centuries-old Crown sinecure 'Chiltern Hundreds' - still-utilised by members of the Commons as a necessary means of resigning and causing a by-election).

[10] See *Hodel v Cruckshank* (1889 3 QLJ 141 and *Clydesdale v Hughes* (1934) 36 WALR 73 at 75, 85 (though in that case the relevant provision was "from the Crown"). In the agreed facts it is admitted that councillors and Mayor of the City of Devonport are paid out of funds partly raised by the council itself

not be accepted, or can be waived or received without depriving the office of the status of "of profit".[11]

36. Contention seems to be generated by a consideration of the concluding words "under the Crown". Any difficulty can be alleviated by concentrating on the constitutional context and the history and purpose of s 44(iv). The numerous and various cases that deal with complicated disputes concerning whether a statutory authority is entitled to the "rights, privileges or immunities" of the Crown or "represents" the Crown or is a "servant" of the Crown for the purposes of certain statutory schemes are not helpful in that context[12].

37. In the constitutional context, there is ample authority for the proposition that municipal authorities are a manifestation of the Executive of the State for the purpose of delegating administrative functions at a local level to geographic locales within the broader law area of the State.

38. Local councils are considered "the State" for the purposes of s 114 of the Constitution. As O'Connor J said in the *The Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208 at 240 "*[t]he State, being the repository of the whole executive and legislative powers of the community, may create subordinate bodies, such as municipalities, hand over to them the care of local interest, and give them such powers of raising money by rates or taxes as may be necessary for the proper care of these interests. But in all such cases these powers are exercised by the subordinate body as*

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and retained by the council as a corporation (rather than becoming a part of the State's consolidated revenue). This raising of funds by the council is pursuant to various provisions in the LGA (such as, for example, in Part 9 of the LGA) which are mostly delegations of State taxing power. As such, councillors can be said partly to be paid out of State taxes (or revenue). Of course, liability for payment lies with the council.

[11] See *Bowman v Hood* (1899) 9 QLJ 272 at 278 and *Sykes v Cleary* (1992) 176 CLR 77 at 97-98, 117. (See also s 340A(3) of the LGA).

[12] To give just one example: whether, pursuant to specific wording in a NSW statute, certain employees of a non-Crown government entity could be said to come within the phrase "otherwise in the service of the Crown:" *Sydney Corp v Reid* (1994) 34 NSWLR 506. To be "in the service of the Crown", given the master-servant connotation of that phrase, may have been an appropriate conclusion for the concerns of an employment statute, but not for the concerns addressed by a constitutional provision such as s 44(iv). While in a different context, see also the attempted list of 'characteristics' of an "office of profit under the Crown" (no actual definition was attempted), in an opinion by the then UK Attorney-General which was appended to the Report referenced with approval by this Court in *Sykes v Cleary* (1992) 176 CLR 77 at 95 (in footnotes 30 and 32), namely, the *Report from the Select Committee on Offices or Places of Profit under the Crown*, House of Commons, (1941) (the **1941 UK Report**) Appendix 1, Third Memorandum Mr Attorney-General. That list of characteristics included "who appoints, who controls, who dismisses, and the nature of the duties". Note also that he refers shortly after to the fact that the office must be a paid one.

*agent of the power that created it".* See also *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51 especially at 76 [47] per Gummow J.

39. Moreover, the very ratio of this Court's watershed decision in *Melbourne Corporation v the Commonwealth* (1947) 74 CLR 31, was that the provision of the Commonwealth legislation that prevented a bank doing business with the City of Melbourne Council (the plaintiff), except with the consent of the Commonwealth Treasurer, was unconstitutional precisely because it impermissibly curtailed the exercise by the State of its executive governmental power, including through the municipal collection of rates.

40. Given the place of s 44(iv) in the Constitution, it is to be expected that local councils will be distinguished from the myriad of other statutory authorities and easily seen as an extension of the executive authority of the State. Historically, day to day examples for that can be seen by, for example, Mayors of Hobart and Launceston in Van Diemen's Land and subsequently Tasmania sitting in police courts as Justices of the Peace by virtue of their office as Mayor[13].

41. In a related sense, the fact that the implied freedom of political communication has been determined as extending to matters concerning local government elections due to the national concerns involved, adds further weight to the notion of the interconnectedness of the "three tiers" of government, and why the purpose of s 44(iv) would include the consideration of the incompatibility of holding political offices simultaneously in more than one tier: see e.g. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571-572; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 550 [25] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; at 583-584 [157]-[159] per Keane J.

42. In *Local Government Association of Queensland (Incorporated) v State of Queensland* [2003] 2 Qd R 354, the Queensland Court of Appeal was considering provisions of Queensland legislation which sought to prevent local councillors from standing for Commonwealth Parliament. The parties agreed that such persons were not already incapable by reason of s 44(iv) and the Court acted on the agreement. The case was decided on s 109 grounds in that the Queensland law was adjudged to be inconsistent with the *Commonwealth Electoral Act* 1918 (Cth).

43. In the course of her Honour's reasons, McMurdo P said at 364-365 [14] "*[a]lthough it is not contended that s 44(iv) Constitution applies to local government councillors,*

[13] e.g. s 24 of 16 Vict No 17 (*Hobart Town and Launceston Municipal Corporations Act* 1852 (Vict)).

*some analogy can be drawn between a local government councillor and the class of persons referred to in s 44(iv): see* Sykes v Cleary *and* Oklahoma State Election Board v Coats (1980) Ok 65".

44. With respect to her Honour, that observation is correct and the history and purpose of s 44(iv) as identified in *Sykes v Cleary* leads to the conclusion that s 44(iv) does so apply.

*The history and purpose of s 44(iv)*

45. By the time of Australian federation, disqualifying disabilities (and exceptions thereto) in the United Kingdom were scattered throughout United Kingdom Acts, judgments and norms of practice of the House of Commons.[14] Erskine May, in his famous treatise of parliamentary practice (the 1893 edition), merely listed the major disabilities, admitting he could not discuss them all.[15] A subset of these disabilities were in turn selected by the drafters of the Australian Constitution to be included in that document, sometimes with variation in wording, either at the time of drafting or during debates, to reflect changed or additional purposes felt to underpin the disability.[16] Remaining disabilities were left to the future Commonwealth Parliament to enact, which it duly did as part of the *Commonwealth Electoral Act 1918*.

46. This Court has already stated[17] that the disability of "office of profit under the Crown" found in s 44(iv) of the Constitution "is modelled on a provision of the *Act of Settlement 1701*,[18] which was repealed[19] and replaced by provisions of the *Succession to the Crown Act 1707*."[20] The 1707 Act introduced a distinction between "offices from the Crown" and "offices under the Crown", the former considered to be those within the immediate

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[14] In the United Kingdom, the 1941 UK Report eventually led to the unification of all disqualification laws into one law, then called the *House of Commons Disqualification Act 1957*, now called the *House of Commons Disqualification Act 1975*: Oonagh Gay, *Disqualification for membership of the House of Commons*, Publication of the House of Commons Library, Standard Note PC/3221 (13 October 2004) ("Historically, this has been the basis of the great majority of disqualifications."); The list of disqualified offices is contained in Parts 1 and 2 of Schedule 1. It is a long list which changes frequently, requiring only the tabling of a motion by a Minister in the Commons: Blackburn, *The Electoral System in Britain* (1995) McMIllan's Press at pages 164-165.

[15] May, *A Treatise on the Law, Privileges, Proceedings and Uses of Parliament* (10th ed) (1893) William Clowes & Sons (**Erskine May**), at pages 27-34 and Chapter XXIII.

[16] *Re Day [No 2]* [2017] HCA 14 at [30].

[17] *Sykes v Cleary* (1992) 176 CLR 77 at 95. This case, *Free v Kelly* (1996) 185 CLR 296 and *Re Nash [No 2]* [2017] HCA 52 are the only reported cases on s 44(iv) of the Constitution. In *Free v Kelly* the issue was conceded so that disqualification was common ground, such that the merits and law were not (and did not need to be) canvassed in the judgment.

[18] 12 and 13 Wm. III c.2.

[19] 4 and 5 Anne c.20, s.28.

[20] 6 Anne c.41, ss.24 and 25.

patronage of the Crown, whereas the latter applied to all offices connected with the public service[21].

47. It is uncontroversial that, in the past, the primary purpose of such a disability was to ensure Parliament's supremacy over the Crown.[22] That required that Ministers sit in the Commons (a minimum crown-office requirement), and that *only* Ministers (and a capped number at that) sit in the Commons, and not any other type of Crown office-holders (a maximum crown-office requirement).[23] By the time of federation that was still a paramount purpose (and of course continues to be).

48. In explication of the purpose of s 44(iv) of the Constitution, *Sykes v Cleary* repeated with approval the three purposes contained in the prior 1941 UK Report and said to underpin the disability which is the subject of that report.[25]

49. Of those three purposes, only the last two purposes can be said to embody the traditional purpose of ensuring Parliament's supremacy over the Crown.[26]

50. The first purpose, rather, is concerned with avoiding a conflict of interest with what is now often called the public duty of loyalty to the Parliament.[27]

51. Nothing in the Convention debates contradicts this explication of the purpose underpinning s 44(iv) of the Constitution.[28] Indeed, the disability in s 44(iv) can be seen

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[21] Rogers on Elections, 14th edn 1885, Vol 2 at 578.

[22] Notorious is the history of the tactics employed by the Crown during the eighteenth and into the nineteenth centuries in order to ensure chamber-majorities for its policies ('placeman', rotten boroughs, Crown pensions and sinecures, and so on): Doig, *Corruption and Misconduct in Contemporary British Politics* (1984). Penguin, at pages 36-67 (general history); Erskine May at Chapter 23; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), Angus & Robertson (**Quick and Garran**) at page 308 (discussing 'rotten boroughs' and the *Reform Act 1832*]; *Sue v Hill* (1999) 199 CLR 462, per Gaudron J at 508 [116].

[23] Both the Commonwealth Constitution (s 65) and the Tasmanian Constitution (s 8A) contained and/or contain provisions capping the number of Ministers of the Crown in the Parliament. The number of UK Parliament is also capped at 95 in the *House of Commons Disqualification Act 1975*.

[25] *Report from the Select Committee on Offices or Places of Profit under the Crown*, House of Commons, (1941), at page xiv.

[26] The second purpose is concerned with needing to cap the number of Crown-influenced office-holders in the House of Commons ("[T]he need to limit the control or influence of the executive government over the House by means of an undue proportion of office-holders being members of the House": *Sykes v Cleary* (1992) 176 CLR 77 at 95). The third purpose is concerned with ensuring a minimum (as opposed to a maximum) number of Ministers of the Crown to ensure responsible government ("[T]he essential condition of a certain number of Ministers being members of the House for the purpose of ensuring control of the executive by Parliament": *Sykes v Cleary* (1992) 176 CLR 77 at 95).

[27] "[T]he incompatibility of certain non-ministerial offices under the Crown with membership in the House of Commons (here, membership must be taken to cover questions of a member's relations with, and duties to, his or her constituents)": *Sykes v Cleary* (1992) 176 CLR 77 at 95 [emphasis added].

as part of a common suite of related disabilities, which includes sections 44(v) and 45(iii).[29] All of them are concerned with assuring the integrity of the Parliament by ensuring that private interests or other public duties (such as the obligations and duties that may arise from allegiance to a foreign power)of members of Parliament do not conflict with their public duty to the Parliament.[31]

52. In each case, as the express language of each of these provisions indicates, the nature of the private interest sought to be guarded against involves some form of monetary or pecuniary interest or preventing public or private conflicts that lead to the incompatibility of a status with membership of the Parliament.[32]

10 *Purposive construction of s 44(iv)*

53. This Court has stated that the provisions in s 44 of the Constitution are to be construed both in their specific constitutional context, and also in the context of the Constitution as a whole.[33] This Court has often emphasised in, for instance, the jurisprudence on the implied freedom of political communication, that the Australian Constitution is one which, structurally, enshrines representative *and* responsible government in Chapters I and II of the Constitution. A provision such as s 44(iv) (by analogy with s 44(v)) can be said to enjoy a "special status" due to its function of protecting matters fundamental to the Constitution.[34]

54. Among the characteristics of an "office of profit under the Crown" listed by the then
20 UK Attorney-General in the opinion appended to the 1941 UK Report, the constitutional context of s 44(iv) requires a focus on the characteristic of remuneration. Whatever may

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[28] Despite the urgency of the case and the availability of just over one day for the hearing, this Court in that case did have access to relevant parts of the transcripts of debates, and to the Adelaide and Melbourne constitutional drafts (and other documents): *Re Canavan* [2017] HCATrans 201 at lines 10306-10349.

[29] *Re Day [No 2]* [2017] HCA 14 at [48] ("Recalling that s 44(v) should be construed in the context of the Constitution as a whole, it may also be observed that this wider purpose is consistent with s 44(iv) of the Constitution.").

[31] *Re Day [No 2]* [2017] HCA 14 at [49]-[50] (and the High Court cases referenced therein, including *Wilkinson v Osborne* (1915) 21 CLR 89 and *Horne v Barber* (1920) 27 CLR 494).

[32] *Egerton v Brownlow* (1852) 10 ER 359 at 423 ("In the framing of laws it is his duty to act according to the deliberate result of his judgment and conscience, uninfluenced, as far as possible, by other considerations, and least of all by those of a pecuniary nature." [emphasis added]). See also *Cattanach v Melchior* (2003) 215 CLR 1 at 29 [62] per Gleeson CJ (describing *Egerton v Brownlow* as "the great case", and citing the same early post-federation Australian High Court cases which applied it, and which were referenced in *Re Day [No 2]* [2017] HCA 14 at [49]-[50], and adding *Wood v Little* (1921) 29 CLR 564).

[33] *Re Day [No 2]* [2017] HCA 14 at [14], [247].

[34] *Re Day [No 2]* [2017] HCA 14 at [72] ("there is much to be said for the view that the provision has a special status, because it is protective of matters which are fundamental to the Constitution, namely representative and responsible government in a democracy").

be the situation in other constitutional or statutory contexts, the express words of s 44(iv) force recognition of importance of Crown control of remuneration, and the importance of the other characteristics identified.

55. A key element is the extent of control, direct or indirect, over remuneration. It is the real risk of Crown *influence* over the decision making of a member of the Commonwealth Parliament (via remuneration) that is a central vice that s 44(iv) of the Constitution exists to guard against.[36] Where such a showing is made, inquiry need proceed no further.

56. For the purpose of this case, that aspect of the relationship between a councillor and the Executive is supplied by examining the statutory control by the Crown (in right of Tasmania) over the remuneration attached to an office (and, if necessary, over other aspects of the office like reappointment and duration of tenure, to the extent control over those aspects can be said to constitute direct or indirect control over remuneration). If such statutory power exists according to orthodox statutory construction of the relevant statute, a real risk of Crown influence on the decision-making of the office-holder has been shown to exist.

*The duty of loyalty and the conflict of public duties to different legislatures and the conflict with private interests*

57. While textual considerations suggest that, in the first of the three purposes referenced by this Court in *Sykes v Cleary* as underpinning s 44(iv) of the Constitution (as discussed above), that concern is with guarding against conflicts of *private* interests in a pecuniary sense with a member's public duty of loyalty to the Parliament, it is worth considering a different aspect of the same purpose, but now focused on a concern with guarding against conflicts of *public* duties of loyalty and conflicts between duties and interest..

58. An argument from elections and democratic accountability cuts both ways. Precisely because local government councillors are elected to their office, they would have a conflict in their public duties when simultaneously sitting in multiple legislatures without overlapping electorates, and when they may wish to achieve re-election for both offices.

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[36] A real risk of influence is but a modern formulation of earlier High Court judicial preference for the word (and the concept they took it to denote, stretching back in 19th century UK cases) of 'tendency': *Horne v Barber* (1920) 27 CLR 494; *Wood v Little* (1921) 29 CLR 564.

59. This Court referred to this issue in *Sykes v Cleary* when it emphasised the "incompatibility" of performance of legislative representation and public service.[37] This Court gave three factors for that concern.

a. 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.

b. 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.

c. Thirdly, membership of the House would detract from the performance of the relevant public service duty.[38]

60. It is worth noting that Mr Cleary was declared ineligible in circumstances where he was a school teacher who did not hold a senior position in the public service, and, even if it could be said that there was a considerable risk that through employment in the public service he would thereby share the political opinions of the Minister (a proposition which may be thought to be attended by some doubt as a presumption for every school teacher), as a public servant of the State his patronage would not extend over the Commonwealth Parliament. Nonetheless, this Court, with respect, correctly held that the purposes of s 44(iv) necessitated Mr Cleary's disqualification.

61. Compare this to the much greater risk of injury, both actual and perceived, in having a Mayor elected to the Commonwealth Parliament. There is a serious risk of deleterious interaction at all three tiers.

62. First, the State Executive could control the remuneration of the Mayor, or use powers under the LGA to interfere in the local council, in an attempt to control the Mayor's activities in the Commonwealth Parliament to secure patronage in turn for the State, thereby curtailing his free and independent judgment. It is trite that the Mayor could rise to an important position in the Commonwealth Executive or even have an important cross-bench vote.

63. Secondly, the position above could be reversed and it may be the Mayor/MP who instigates the conduct so as to secure the relevant financial and non-financial

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[37] *Sykes v Cleary* (1992) 176 CLR 77 at 96 ("a recognition of the incompatibility of a person at the one time holding such an office and being a member of the House").

[38] *Ibid.*

accommodations, or to assist political allies at a State level. Further, the preferential access to the State Executive that a Commonwealth Parliamentarian would have over his fellow local councillors presents a further conflict.

64. Thirdly, with so much of the funds received by local councils now coming from the Commonwealth by way of s 96 grants[39], a local councillor could favour his or her council with Commonwealth grants in an attempt to secure re-election or other benefits, such as once again assisting political allies.

65. Fourthly, it is difficult to see how even an honest and diligent person could attend properly to the duties both of an MP and of a Mayor.

*The lack of utility of the mere fact of appointment by election to the application of s 44(iv)*

66. None of these matters, which point to the relationship between the Mayor and Executive, is gainsaid by the fact that the Mayor was elected and not appointed. The relevantly concerning aspects of the control over the Mayor and supervision by the Executive generate the necessary relationship that brings the matter within s 44(iv).

67. Even though the office did not come "from" the Crown, it is still one "under" the Crown.

68. Historically, offices under the Crown could still be so even where a person was elected to it. To give just one example, the office of sheriff was traditionally an important one in the history of English local government. Until the sixteenth century it was, as a matter of common law, an elected office under the Crown, but by the reign of King Edward VI the manner of selection had been changed to Crown selection of one for each county from among three candidates per county initially chosen by high officers assembled in the Exchequer on St Martin's morning.[40]

69. The manner of appointment (or fact of appointment by the Crown) only raises a *presumption* of Crown control.[41] In the context of s 44(iv) of the Constitution, it is

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[39] See also *Local Government (Financial Assistance) Act* 1995 (Cth).

[40] Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820), Butterworths (**Chitty on Prerogatives**) at pages 78-79 ("As the power of electing Sheriffs was originally in the people, the statutes which vest the right of appointment in others . . . "].

[41] In 1941 the then UK Attorney-General thought that a Crown appointment merely *raised a presumption* of Crown control, and that "[i]f the duties are duties under and controlled by the Government then the office is, *prima facie*, at any rate, an office under the Crown, and the appointment would normally be made by a Minister or by someone who clearly held an office under the Crown." 1941 UK Report, AG Opinion [emphasis added].

unclear how the manner of appointment (or selection) *alone* materially assists in answering the constitutional question posed by that provision.

70. Certainly nothing in *Sykes v Cleary* suggests that the lack of direct appointment by the Crown precludes the applicability of s 44(iv). The relationship required by the provision can be generated by sufficiently controlling indicia that may stem from the capacity to "appoint, select, approve or dismiss" as well the duties imposed by the office: see e.g. *Williams v The Commonwealth* at 223 [110] per Gummow and Bell JJ; at 334-335 [444]-[445] per Heydon J. As this Court in *Sykes v Cleary* emphasised at 95 by reference to Blackstone's understanding, the rights to exercise the functions of the office and the duties that come with it are the concern of the provision.

71. It is the character of the relationship that the office shares with the Executive that is determinative. The conditions under which the relationship endures and operates are surely more important than the manner of its formation. The Crown has very broad powers of control, directly and indirectly, over the remuneration attached to Mr Martin's local government offices. The Crown can even modify for particular councils whether the election of a Mayor is to be by the electors or by fellow councillors ( see e.g. Local Government (Election of Mayors ) Order (No 2) 1998), as well as altering the number of councillors for each individual council (see e.g. Local Council (Number of Councillors) Order 2014. Such power within the Executive may have dramatic consequences for the fortunes of any particular aspirant for a council or mayoral position. It is also within the remit of the Crown to convert a mayor to a Lord Mayor with its appurtenant privileges and prestige. The capacity and scope for serious conflicts of duty and interest in simultaneously holding the local and Commonwealth office is inconsistent with s 44(iv).

72. The ability to control and supervise the performance of functions while in office as well as remuneration, and exercise the threat of dismissal, are potentially more important indicia of whether the relevant relationship exists to make the office one "under" as opposed to "from" the Crown. The character of the office as an extension of the Executive and the conflicts contained in holding both offices also reveal the character of the relationship for the purposes of the constitutional context more than the mere fact of appointment ever could.

73. While Mr Martin may have no intention of simultaneously sitting in the Senate and on the Devonport City Council, and while it is possible that he may well have intended to resign his two offices in Tasmanian local government prior to taking a place in the Senate,[42] the law required that he resign from his current offices prior to nomination for the Senate.[43] This he did not do. Additionally, he holds his twin local government offices while the election is not yet completed.[44]

## PART VII APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

74. The applicable Acts (as in force) are as follows:

    a. Commonwealth Constitution, ss 44, 96 and 116.

    b. Constitution Act 1934 (Tas), Part IVA

    c. *Local Government Act 1993* (Tasmania) (whole Act in current form to be supplied)

    d. *Local Government (General) Regulations 2015* (Tas), reg 42, Schs 2 and 4

## PART VIII ORDERS SOUGHT

75. Ms McCulloch seeks the following orders:

    a. A declaration that Mr Martin is incapable of being chosen or of sitting as a Senator by reason of s 44(iv) of the Constitution.

    b. The summons filed by the Attorney-General on 12 December 2016 be dismissed.[45]

## PART IX TIME FOR ORAL ARGUMENT

76. Up to 1.5 hours will be required by Ms McCulloch in oral submissions.

[42] Section 47 of the LGA.
[43] *Re Canavan* [2017] HCA 45 at [3].
[44] *Re Nash* [No 2] [2017] HCA 52.
[45] CB at 73.

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ALEXANDER JOHN WALKER ECS

**Robert Newlinds**
T: (02) 8239 0228
F: (02) 8226 2305
E: newlinds@banco.net.au

**Peter Kulevski**
T: (02) 9376 0611
F: (02) 9210 0636
E: peter.kulevski@banco.net.au

**Richard Scheelings**
T: (02) 9224 9799
F: (02) 9224 9711
E: scheelings@pghelychambers.com.au

10 Counsel for Ms Katrina Melissa McCulloch