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

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ANNOTATED REPLY SUBMISSIONS OF MS KATRINA MELISSA McCULLOCH

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PART I

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

PART II

2. First, it is unsurprising that the position of local councillors did not feature in the minds of the Framers when considering s 44(iv). The Framers would have understood the office as not being one "of profit", but one of altruistic service to the local community. As at 1900, there was no practice of local councillors being entitled to any salary, indeed there was no power given to councils to pay councillors (other than the Mayor or his or her equivalent) in many of the statutes that incorporated the major cities of the Colonies (see eg *Sydney City Incorporation Act* 1842 (NSW), s 66, *Hobart Town and Launceston Municipal Corporations Act* 1852 (Vict)). This continued well after Federation. Sections 28 and 29 of the *Local Government Act* 1919 (NSW), as enacted, show the prohibition, on pain of disqualification, on councillors receiving a salary and a discretion within a particular council to grant a salary to the Mayor. Councillors were only to receive travelling expenses, which the Cth A-G, with respect correctly, accepts at CS[12] is not relevantly "profit". The position was the same in Victoria (s 62 of the *Local Government Act* 1928 (Vic)). In 1963, in debating the *Local Government Bill,* the NSW A-G examined the lengths that councillors had gone to in order to secure salaries. Councillors being paid a salary is a relevantly recent, and not uniformly occurring development. The Cth A-G's submission at CS [62] that there was a parliamentary practice of dual office holders at any particular time needs to be treated with caution. Recent experience shows that parliamentary ignorance of constitutional disqualification provisions is immaterial. Also, Cth A-G does not assert that either Mr Chifley or Mr Calwell were entitled to "profit" by virtue of their position as councillors. As the position of local councillor has developed to become more party political, with candidates running on party political tickets, and with councillors now being paid a salary, it is easy to see how the position of a local councillor can now arouse issues concerning s 44(iv) that may not have excited comment in 1900. Local councillors may now fall within s 44(iv), in much the same way that the evolving relationship with the United Kingdom has citizens of that nation fall within s 44(i).

3. Secondly, by reference to CS[11], *some* level of evaluation is unavoidable if that constitutional provision is to have substantive operation. The purpose of the disqualification must obviously inform (though it cannot replace) the application (or extent, or operation) of the provision.[1] Contrary to the Commonwealth's submission at CS[65], this is not "reading words into the provision"[2], or imposing a "significant gloss on the constitutional language"[3], or imposing an "impressionistic approach rather than the constitutional text".[4] rather than being "impressionistic" or "evaluative", the purposes of s 44(iv) identified by Ms McCulloch are the only sure guide in evaluating the position of local councillors. The matters raised by Ms McCulloch reveal both the character of the office of a local councillor and the constitutional context. It is the Cth A-G who wishes to substitute non-constitutional text, the circular "gift" for the words of the section. "Under" the Crown, as "under" the Commonwealth, bespeaks of a constitutional relationship that addresses issues beyond conception, as the Cth A-G seems to concede, while placing emphasis on appointment. It is the degree of the relationship that is important. So much was accepted for s 116 in *Williams*. Indeed, complete independence after appointment offends the purposes of s 44(iv) identified in *Sykes v Cleary*, much less than a continued relationship which can influence the continuing behaviour of the parliamentarian.

4. Thirdly, the reason why no question of severance arose in the *Melbourne Corporation* case (CS [70]) was because as Latham CJ said at 44, it would not have made any difference to the outcome. Had the impugned legislation been confined only to local government authorities, it would still have failed. Indeed, Dixon J commenced his reasons at 76 by indicating that none of the usual care had to be taken with the issue of severance because it was a "simple provision" which "applied to the conduct of the banking business of a State". That latter reference was not to some broader notion of the State as the "body politic", but for the very discrete reason that interference with the right of local government authorities to bank was an interference with the Executive Government of the States to administer their finances (Dixon J at 84). The

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1 *Re Day (No 2)* (2017) 91 ALJR 518, 535 [100] (Gageler J)

2 *Re Day (No 2)* (2017) 91 ALJR 518, 529 [53] (Kiefel CJ, Bell and Edelman JJ)

3 *Re Day (No 2)* (2017) 91 ALJR 518, 535 [98]-[100] (Gageler J)

4 *Re Day (No 2)* (2017) 91 ALJR 518, 142 [156] (Keane J).

Melbourne Corporation doctrine, and the other constitutional material relied on by Ms McCulloch, reveal the unique constitutional character of local government authorities as being legislative and executive components of the State in a particular geographical area. They stand apart from other statutory authorities. When a local government deals with the banking and disbursement of the rates of the local inhabitants, it is conducting the business of the Crown viz the Executive Government. They are not statutory corporations carrying on mere, specific, commercial transactions.

5. Fourthly, although not expressed as such, the Cth A-G's fundamental issue with the position taken by Ms McCulloch seems to be that powerful as her identification of the conflicts of duties and interest may be, those matters are not alleged to prove the point that the office is one "under the Crown" and that the conflicts would exist either way. That is wrong. The very real, concerning ways in which a Commonwealth Parliamentarian who is also a local councillor would have conflicting interests and duties do not exist independently of the fact that a local council is "under the Crown", but because of it. They share the same essential attributes, but of a higher order than those identified by this Court in *Sykes v Cleary* in respect of an ordinary, non-executive State schoolteacher. Ms McCulloch has identified very real ways in which the State Crown can interfere with the activities of a local councillor (not least the size and geographical boundaries of her or his council) which separate the matter from conflicts that might otherwise exist. The position of a State Parliamentarian is not affected by the State Executive, in the manner in which a local councillor is "under the Crown". The State Parliamentarian is "over the Crown": cf MS [62], CS [68].

6. Fifthly, at CS [14], the Cth A-G asserts the importance of distinguishing between control over the "office" as opposed to the "officeholder". This elision has no relevance. Control over the officeholder by virtue of his or her occupation of the office, and the conflicts it creates, constitutes relevant constitutional control over the office. The concern of the Act of Settlement provision, as it developed into s 44(iv), was that "[the] King might also influence individual members [of the Parliament] by inducements of personal advantage": Anson, *Law and Custom of the Constitution* (1935), Vol II, Pt 1. 48.

7. Some specific responses to the submissions of the other parties. By reference to the UK *Report from the Select Committee on Offices or Places of Profit under the Crown*,

House of Commons (1941), Mr Martin at MS[44] observes that in the early twentieth century, elected councillors were not "thought to infringe upon the prohibition on persons holding an office of profit under the Crown sitting in the House of Commons." But whatever the position then in the United Kingdom, in Australia, with its very different history during the nineteenth century of executive reliance on local councils and semi-government entities, it may be observed that the position was less clear: Twomey, *The Constitution of New South Wales* (2004), Federation Press, at page 436 (example of a significant dispute regarding a mayor in the NSW colonial parliament, with councillors not being paid).

8. The Cth A-G at CS[34] and [56] notes the possibility that the electorate (unlike for Commonwealth and State elections) need not be confined to Australian citizens, but includes owners and occupiers of land (which can include foreign nationals). This is a common feature of local government elections across the nation, such that – on Mr Martin's case, supported by the Cth and Vic A-Gs - a councillor might sit in the *Commonwealth* parliament simultaneously owing electoral *representational* duties to foreign, and not just Australian, citizens.

9. At CS[37] and [58] the Cth A-G speaks of the 'ultimate control' of the Tasmanian parliament over the Minister's control of a councillor's remuneration (see also VS[48]). "Control" in any relationship can be manifested by anticipatory direction and/or supervisory veto. What the Cth A-G calls "ultimate control" is a supervisory veto, while the Minister's control over remuneration can be anticipatory. The existence of the former does not preclude the simultaneous existence of the latter. In the same way, much of the Tasmanian Executive's control over Tasmanian councils (and indeed councillors, including mayors) is supervisory (see for one example VS[36](a) – concerning Ministerial pre-approval of council spending and borrowing).

10. The test of control is derived from and anchored in the explicit words of the provision. In determining the extent of control (or, put otherwise, the application of that common ground test) evaluation is unavoidable, and the application of that test to councils is informed by and sensitive to the unique *legislative* nature of those bodies. It is an acknowledgement that membership of those bodies (and not necessarily others) comfortably brings them within that additional purpose acknowledged by this Court in

Sykes v Cleary of incompatibility with the public duty owed by a member of the Commonwealth Parliament.[5] Indeed, it is difficult to think of a more iconic example.

11. The Vic A-G at VS[27] observes the breadth in the concept of the Commonwealth or a State (as bodies politic) compared to that of the 'Crown' (as the Executive) in its s 44(iv) context. The Vic A-G then uses that distinction to state that the question whether an office is "under the Crown" cannot be the same as whether an office is "part of the Commonwealth or a State". None of this matters. If an office is to be "under" the Crown, some overlap in its Constitutional status with the concept of the Crown in the third sense used in *Sue v Hill* is inevitable. It is the latter on which Ms McCulloch fastens by reference to the authorities.

12. At VS[28] the Vic A-G states that the issue of characterisation under s 44(iv) must be with reference to indicia outlined in VS[24] and VS[25] of those same submissions. Those paragraphs (and those indicia) nowhere mention the indicia of remuneration, despite the express words "profit" and "pension" in the section and the immediate Constitutional context of the focus on private pecuniary or monetary interests (44(ii) and (v) and 45 (ii) and (iii)).

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[5] It also follows that there is no basis to the Commonwealth's assertion at CS[65] that Ms McCulloch contends for "a general prohibition on the holding of any office that conflicts with "the public duty of loyalty to the Parliament."