



RE MS JACQUI LAMBIE
Reference under s 376 of the *Commonwealth
Electoral Act 1918* (Cth)

**OUTLINE OF ORAL ARGUMENT OF THE ATTORNEY-GENERAL FOR THE
STATE OF VICTORIA (INTERVENING)**

PART I: CERTIFICATION: This outline is in a form suitable for publication on the internet.

10 **PART II: OUTLINE**

- 1 The parties agree that the expression “the Crown” in s 44(iv) refers to the Executive Government of the Commonwealth or a State, ie the third sense discussed in *Sue v Hill* (1999) 199 CLR 462 at 499 [87].
VS [15]
McCS [21]
MS [61]
CS [13]
- 2 Characterisation of an office as “under the Crown” is to be informed by the “principal mischief” to which s 44(iv) is addressed — namely, eliminating or reducing influence of the Executive Government over the Parliament.
VS [23]
- 3 The fact that an office is created under an Act for a public purpose does not compel the conclusion that it is an office “under the Crown”. In order for an office to be “under the Crown” it will be necessary to identify sufficient connection and/or control of the office by the Executive, by reference to the Act in question.
VS [7],
[22]-[23].
- 4 Relevant indicia include:
VS [22]-[25]
 - (a) By whom is the office appointed?
 - (b) Who has the power of removal, and in what circumstances?
 - (c) To whom is the office holder accountable?
 - (d) How is the remuneration for the office determined and altered?
 - (e) Is the holder of the office is subject to the direction or control of another in the performance of his or her functions?

The weight given to each factor may vary depending on the nature of the office. For example, a power of removal at will may point strongly to the office being one “under the Crown” so that other factors are less important.
- 5 The question whether a particular office is an office “under the Crown” is not the same as either—
VS [26]-[27].
 - (a) the question whether that office is entitled to the privileges and immunities of the Crown, or
 - (b) whether that office is part of “the Commonwealth” or “a State”.

- 6 Local government is distinct tier of government exercising delegated legislative power through elected representatives of the local community. VS [37], [40], [45]
- 7 The offices of councillor and mayor under the *Local Government Act* are not properly characterised as offices “under the Crown” within the meaning of s 44(iv). VS [30]-[33], [36]-[39] [40]-[43], [48]
- (a) **Appointment** is not within the control of the Executive Government of Tasmania — it is within the control of the electors.
- That the holder of an office is elected by popular suffrage is a compelling factor in favour of the conclusion that the office is not “under the Crown”.
- (b) The Executive has limited powers of **removal**, and the limits on those powers are enforceable by judicial review.
- (c) A councillor or mayor is primarily **accountable** to the electors of his or her municipality, not the Executive.
- (d) **Remuneration** for a Councillor occurs through regulation and is thus ultimately subject to Legislative control, not Executive control.
- Further, any regulation setting remuneration for councillors must be general in nature (not directed to a particular councillor) and made for a proper purpose.
- (e) Councillors and mayors are not subject to the **direction or control** of the Executive Government of Tasmania in the performance of their functions.
- 8 It is consistent with the purposes of s 44(iv) identified in *Sykes v Cleary* to conclude that the offices of councillor and mayor under the *Local Government Act* are not offices “under the Crown”, particularly given their elected nature. VS [47]-[52]
- (a) In light of the statutory scheme, there is little reason to suppose that allowing a councillor/mayor to sit in Parliament would give the Executive any influence over the Parliament.
- (b) A councillor or mayor would not necessarily share in the political opinions of the Executive Government.
- (c) Holders of elected offices in local government are not required or expected to be politically neutral.
- (d) The capacity of the holder of an office to attend to the duties of a member of Parliament cannot govern the meaning of the words “under the Crown”.
- 9 Any difficulties associated with a councilor or mayor serving in the Commonwealth Parliament may be addressed by the Parliaments. VS [53]

Dated: 6 February 2018


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MARK HOSKING