IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B35 of 2018

B E T W E E N:

GARY DOUGLAS SPENCE
Plaintiff

AND

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STATE OF QUEENSLAND
Defendant

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ORAL OUTLINE OF ARGUMENT OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

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Part 1: Publication

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

Part II: Outline

Section 275 of the Queensland Electoral Act ("QEA")

2. Section 275 of the QEA prohibits donations by or on behalf of property developers to a political party which has an object of promoting the election of candidates to the Queensland Parliament. It also prohibits a person from accepting such a donation, and the solicitation of such donations.

3. Consequently, a donation by a property developer to a political party, which also has an object of promoting federal candidates for an election, is prohibited by the terms of s.275. Such donations are prohibited even where they are only for the purposes of Commonwealth electoral expenditure ("**Commonwealth Donation**") or for unspecified electoral expenditure ("**Untied Donation**"). Such donations cannot be used for "electoral expenditure", which may occur within or outside the context of electoral campaigns: ss.282A and 272 of the QEA.

4. Where a political party receives a Commonwealth or Untied Donation which is applied for federal electoral expenditure, this may lead to the promotion of candidates by the political party for State elections as follows: (a) the donation allows the party to allocate other Untied Donations to State electoral expenditure; (b) the donation may be used to promote issues common to both State and federal electoral campaigns; (c) the donation may be used to promote the party brand generally; and (d) the donation may be spent upon common party facilities.

5. Hence, Commonwealth and Untied Donations may have substantial flowback effects for State elections. Section 275, by its terms, prevents these flowback effects from Commonwealth and Untied Donations.

State Power to Prohibit Commonwealth and Untied Donations

6. The flowback effects of Commonwealth and Untied Donations concern the peace, order and good government of the State of Queensland. These are matters within the legislative competence of the State.

7. The Commonwealth argues that it has exclusive power to legislate for donations which the donor has specified are to be used for Commonwealth electoral expenditure; or which have no specified use and may be used for Commonwealth

electoral expenditure, ie Commonwealth and Untied Donations. If so, s.275 is beyond the State's legislative power.

8. The Commonwealth's argument should be rejected. The Commonwealth's power generally to make laws "relating to elections" is derived from the power in s.51(xxxvi), read with ss.10 and 31, subject to ss.7, 9 and 29. The Constitution does not constitutionally prescribe that power to make laws with respect to elections is exclusive, in the same way it does for the powers contained in ss.52 and 90. No implication of exclusive power is justified, given that s.51(xxxvi) is a concurrent head of power.

9. Relying upon ***Smith v Oldham***, the Commonwealth contends that its legislative power is exclusive because the States have no interest in, or constitutional basis, to legislate for Commonwealth elections. That argument depends upon the States' constitutions, not the Commonwealth Constitution. Consequently, questions of characterisation of a law do not properly arise for the purposes of the analysis in ***Bourke***. The only question is whether State legislation is within State legislative competence. Any conflicts are resolved between s.109 and intergovernmental immunities.

10. The Commonwealth's argument that States have no interest in federal elections ignores the States' vital interest in the flowback effects of Commonwealth and Untied Donations. The States and Commonwealth do not operate in entirely separate environments, but as part of a federated nation. In ***Smith***, the Court said that States have no interest in federal elections. That was based upon the fallacy of legislative powers having to be distributed separately between the Commonwealth and States.

11. The only question in ***Smith*** was whether a Commonwealth Act was within power. It says nothing binding about State power to legislate with respect to a federal election. As well, the argument was about characterising whether a law was with respect to regulation of: (a) a federal election; or (b) newspapers. It was accepted (at 358) that if it was with respect to a federal election, it was within power.

No Commonwealth Power to Undermine Capacity of Queensland Parliament

12. The ***Melbourne Corporation*** doctrine prevents the Commonwealth making laws which specially burden, curtail or undermine the integrity and operation of State

institutions, including Parliament. Whether this has occurred is a matter of substance and actual operation of federal law. See ***Austin*** [124].

13. The purpose of s.275 of the QEA is to protect the integrity and operation of the State's Parliament. It represents the judgment of the Queensland Parliament about the best way to protect the integrity of State elections. The Commonwealth has no power to undermine the Queensland Parliament. It is irrelevant that the Commonwealth says that there are other ways that Queensland could have enacted legislation to achieve the same end. See ***Austin*** at [155]-[157].

Section 302CA of the CEA breaches *Melbourne Corporation*

14. Section 302CA(1) of the Commonwealth Electoral Act ("**CEA**") positively permits Commonwealth and Untied Donations to be made to political parties who have an object of promoting candidates in a Queensland State election, despite s.275 of the QEA. This permits the flowback consequences of such donations which are prevented by s.275 of the QEA. That is enough to strike down s.302CA.

15. There may be a further reason why s.302CA is invalid. On one view, it entirely sterilises the effect of s.275 in respect of Untied Donations. If a property developer makes an Untied Donation, the acts of making and receiving the gift are permitted by s.302CA(1). A political party is then subsequently permitted to keep or identify the gift for State electoral expenditure: s.302CA(3)(b)(ii). From the point when that occurs, s.302CA(1) "does not apply": s.302CA(3).

16. Nothing in s.302CA says that when "it does not apply" to a gift any longer, it is also taken "never to have applied" to that gift. No words state that a donor may become subject to criminal or civil liability due to the unilateral action of a recipient. Very clear words would be required to do so.

17. Hence, by its subsequent unilateral decision, a political party may determine that all Untied Donations from property developers can be used for State electoral expenditure, without the donor or the party attracting any criminal or civil liability. That would entirely negate the effect of s.275 for Untied Donations.

J. A. Thomson SC

J. M. Misso