IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B35 of 2018

BETWEEN:

Gary Douglas Spence
Plaintiff

and

State of Queensland
Defendant

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I Certification

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

Part II Basis of Intervention

2. The Attorney General for New South Wales intervenes in these proceedings pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the defendant.

Part III Argument

Implied freedom of political communication

3. The plaintiff challenges the validity of the prohibition on political donations by property developers in Part 11, Division 8, Subdivision 4 of the Electoral Act 1992 (Qld) as enacted by Part 3 of the Local Government Electoral (Implementing

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Stage 1 of Belcarra) and Other Legislation Amendment Act 2018 ("the impugned provisions") on the basis that the impugned provisions impermissibly burden the implied freedom of political communication.

Whether implied freedom effectively burdened

4. In their terms, operation and effect, the impugned provisions burden the implied freedom: Brown v State of Tasmania (2017) 261 CLR 328 ("Brown") at [61], [150] (Kiefel CJ, Bell and Keane JJ), [180] (Gageler J), [237] (Nettle J). The impugned provisions restrict the sources of funds available to meet the costs of political communication: McCloy v State of New South Wales (2015) 257 CLR 178 ("McCloy") at [24] (French CJ, Kiefel, Bell and Keane JJ), [158] (Gageler J), [347] (Gordon J). The restriction imposed on the ability of property developers to make substantial donations or to access politicians does not form part of the relevant burden: McCloy at [25]-[30] (French CJ, Kiefel, Bell and Keane JJ), [348] (Gordon J); cf at [248] (Nettle J).

Whether purpose compatible with constitutionally prescribed system of government

5. Protecting the actual and perceived integrity of government and reducing the risk of corruption or undue influence in relation to government decision-making are plainly legitimate purposes, in the sense of being compatible with the constitutionally prescribed system of government: Unions NSW v State of New South Wales (2013) 252 CLR 530 ("Unions No 1") at [49], [53] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); McCloy at [5], [7], [53] (French CJ, Kiefel, Bell and Keane JJ), [181]-[184] (Gageler J), [218] (Nettle J).

6. The plaintiff contends that no justifying purpose for the impugned provisions can be established in the absence of evidence of corruption on the part of property developers in relation to State government in Queensland (PS [31]). However, at this stage of the analysis, it is sufficient that the impugned provisions are capable of being explained as a legislative attempt to pursue the abovementioned legitimate purposes: Unions NSW v State of New South Wales [2019] HCA 1 ("Unions No 2") at [80] (Gageler J); see also Brown at [121] (Kiefel CJ, Bell and Keane JJ). That is the case here. So much follows from McCloy: at [56]

(French CJ, Kiefel, Bell and Keane JJ), [197] (Gageler J), [232], [234] (Nettle J), [354]-[355] (Gordon J).

Whether impugned provisions are reasonably appropriate and adapted

7. It is useful first to consider the nature and extent of the burden in the present case. As the defendant has pointed out in its submissions (DS [24]), the burden imposed by the impugned provisions is indirect and not substantial, restricting sources of funds available to meet the costs of political communication but leaving prohibited donors free to communicate on government and political matters: McCloy at [93] (French CJ, Kiefel, Bell and Keane JJ), [364], [367] (Gordon J).

8. The plaintiff's submission to the contrary rests on the discriminatory effect of the impugned provisions (PS [29]). However, a law "may effect a discriminatory burden but impose only a slight, or a less than substantial, burden on the freedom": Brown at [94] (Kiefel CJ, Bell and Keane JJ). The plurality in Brown described the law in McCloy as an example of such a law, stating (at [94]):

> The provisions of the statute there in question included provisions prohibiting the making or accepting of a political donation by a 'prohibited donor', where the definition of 'prohibited donor' singled out certain groups, such as property developers. The provisions were not considered to effect a substantial burden on the freedom because their effect was indirect, given that their direct effect was to enhance freedom of political speech generally by levelling the playing field, and there were many other available methods of communicating on matters of politics and government, including influencing politicians to a point of view.

9. The burden imposed by the impugned provisions, which were modelled on the law considered in McCloy (see Queensland Parliament, Hansard, 6 March 2018 at 190), can only be similarly characterised. There are "many other available methods" by which property developers may continue to communicate on matters of politics and government in Queensland, including spending money to promote their views in State elections, either alone or in combination with other developers, without any expenditure cap (DS [24]).

10. The plaintiff does not challenge the cognate prohibition on political donations by property developers in the context of local government elections. It can be

inferred from his argument (especially at PS [35]-[37], [41]) that the absence of such a challenge is attributable to material in the special case providing, in his view, sufficient justification for the enactment of that prohibition. It does not follow, however, that a legislature cannot identify a need to act in relation to similar problems or risks that may manifest at the State level unless there is equivalent material relating to that level of government. The State in question does not have to produce direct evidence that the mischief to which a law is directed is actually occurring: Unions No 2 at [117] (Nettle J); Brown at [288] (Nettle J). Nor is it necessary that there be a recommendation, external to Parliament, that a legislative response to the mischief is required.

11. A legislature may, logically and justifiably, infer a need to act having regard to emergent difficulties and problems in other jurisdictions, or analogous circumstances. The Independent Commission Against Corruption reports on which the defendant successfully relied in McCloy, for example, to justify the enactment of the prohibition on political donations by property developers in New South Wales, also dealt primarily with development applications processed by local councils: see at [52] (French CJ, Kiefel, Bell and Keane JJ), [233] (Nettle J). To adopt the narrower approach for which the plaintiff contends would be inconsistent with the recognised scope for legislatures to respond to "felt necessities" or "inferred legislative imperatives": McCloy at [197] (Gageler J), [233] (Nettle J); Brown at [288] (Nettle J), [422] (Gordon J).

12. In the present case, the risk, or perceived risk, of corruption and undue influence which motivated the enactment of the impugned provisions was "reasonably anticipated" by reference to experience at the local level of government in Queensland, and the experience in New South Wales, having regard to the significant role of the State level of government in Queensland's planning framework: Unions No 2 at [113] (Nettle J); see also Queensland Parliament, Hansard, 6 March 2018 at 190. There may be cases in which a gap in the factual substratum upon which a legislature acts requires the relevant polity to produce evidence to satisfy the Court that the legislative action taken was rationally connected to its purpose, or struck the right balance: Unions No 2 at [53]

(Kiefel CJ, Bell and Keane JJ), [99], [101] (Gageler J), [117]-[118] (Nettle J), [149]-[150] (Gordon J). The present is not such a case.

13. It was accepted in McCloy that as a category of potential donors property developers are "sufficiently distinct to warrant specific regulation": at [49]-[50] (French CJ, Kiefel, Bell and Keane JJ), [354] (Gordon J). As Gageler J observed (at [193]), the nature of their business is "[b]y definition ... a profit-making business which is dependent on the exercise of statutory discretions by public officials" and this gives "corporate property developers a particular incentive to exploit such avenues of influence as are available to them, irrespective of how limited those avenues of influence might be". The same reasoning applies in this case.

14. The plaintiff's submissions in support of the necessity criterion not being satisfied involve the type of "free-ranging enquiry as to whether the legislature should have made different policy choices" against which Kiefel CJ, Bell and Keane JJ cautioned in Brown (at [139]). As the defendant observes, none of the posited hypothetical alternatives would be as effective or practicable in achieving the identified legitimate purposes of the impugned provisions (DS [33]).

15. On a proper evaluation of the impugned provisions, the burden on the implied freedom that they entail more than adequately balances the evident purpose and benefit sought to be achieved by their enactment, namely, a reduction in the risk and perception of corruption and undue influence in government. The impugned provisions do not contravene the implied freedom.

Principle derived from Melbourne Corporation v Commonwealth (1947) 74 CLR 31

16. The Melbourne Corporation principle "requires consideration of whether impugned legislation is directed at States, imposing some special disability or burden on the exercise of powers and fulfillment of functions of the States which curtails their capacity to function as governments": Fortescue Metals Group Ltd v Commonwealth (2013) 250 CLR 548 ("Fortescue") at [130] (Hayne, Bell and Keane JJ). The aspect of the principle that is engaged here directs attention to whether the laws in issue interfere with, or impair, the governmental capacities of

the States: Austin v Commonwealth (2003) 215 CLR 185 ("Austin") at [24] (Gleeson CJ), [116]-[124] (Gaudron, Gummow and Hayne JJ); Clarke v FCT (2009) 240 CLR 272 ("Clarke") at [92] (Hayne J). The inquiry "turns upon matters of evaluation and degree": Austin at [124] (Gaudron, Gummow and Hayne JJ); Clarke at [65]-[66] (Gummow, Heydon, Kiefel and Bell JJ), [93] (Hayne J); see also Melbourne Corporation at 75 (Starke J).

17. In this respect, there are two notable features of s 302CA of the Commonwealth Electoral Act 1918 (Cth) ("the CE Act").

18. First, and significantly, s 302CA of the CE Act permits political donations from prohibited donors even where such donations may be used, ultimately, for the purposes of a State election. Section 302CA(1) sanctions a person or entity giving a gift, or receiving a gift, to, or for the benefit of, a political entity, political campaigner or third party, subject to two conditions:

a. Division 3A of Part XX of the CE Act does not prohibit the giving, receiving or retaining of the gift (s 302CA(1)(d)); and

b. the gift, or part of the gift, is required to be, or may be, used for the purposes of incurring electoral expenditure, or creating or communicating electoral matter, in connection with federal elections in accordance with s 302CA(2) (s 302CA(1)(e); see also ss 4AA(1), 287AB(1)).

19. In so far as s 302CA(1)(e) is concerned, s 302CA(2) provides that the gift, or part thereof, is required to be, or may be, used for the purposes identified in that paragraph if any terms set by the donor explicitly require or allow the gift to be used for that purpose, or the person or entity providing the gift does not set terms relating to the purpose for which the gift or part thereof can be used.

20. Section 302CA(3), which disapplies s 302CA(1), operates where:

a. the donor explicitly requires the gift or part thereof to be used only for a State or Territory electoral purpose (s 302CA(3)(a));

b. the effect of a State or Territory electoral law is to require the gift or part thereof to be kept or identified separately in order to be used only for a State or Territory electoral purpose (s 302CA(3)(b)(i)); or

c. the gift recipient keeps or identifies the gift or part thereof separately in order to be used only for a State or Territory electoral purpose (s 302CA(3)(b)(ii)).

21. Accordingly, unless the donor expressly limits the use of the gift to a State or Territory electoral purpose, or there is a law requiring a formal, identifiable accounting for gifts for a State or Territory electoral purpose, or the recipient undertakes such an account immediately upon receipt (having regard to the fungible nature of donations), s 302CA(3) does not disapply the broad permission in s 302CA(1). It follows that s 302CA operates to permit, in the context of a State election, something which the State legislature has sought to prohibit. As the defendant has observed in its submissions (DS [111]), a gift recipient who deposits gifts in a multi-purpose account, funds from which are expended in relation to State and federal elections, will be unable to identify particular donations as having been used for a particular purpose.

22. Even if a political donation could, at some later point, be identified for use for a State electoral purpose, s 302CA will suspend or delay the force and effect of a State prohibition on that donation potentially for many months after the donation has been made and accepted. The donation will stand to the credit of a State political actor during that period, in circumstances where the giving and receipt of that donation has been assessed by the State legislature as giving rise to a risk or perception of corruption and undue influence at the State level of government.

23. Whatever power the Commonwealth may have to regulate federal elections, its power does not extend to this kind of interference with State electoral processes: Australian Capital Television v Commonwealth (1992) 177 CLR 106 ("ACTV") at 242 (McHugh J). The impairment of a State's capacity to function as a government is "at the heart" of the Melbourne Corporation principle: Austin at [24] (Gleeson CJ); Fortescue at [130] (Hayne, Bell and Keane JJ). That is because one of the central operating assumptions of the Constitution is the "continued existence

as independent entities" of "State governments separately organized": Melbourne Corporation at 82 (Dixon J). In turn, the electoral process by which the legislature and executive of a State are constituted is at the heart of the State's continued functioning as a democratic polity. The plaintiff makes the same submission in respect of the Commonwealth (PS [57]).

24. In ACTV, Brennan and McHugh JJ held that the Commonwealth prohibition on political advertising during State elections burdened the functioning of the States. The comments of Brennan J are apposite (at 163-164):

> [A] law which purports to control, for good or ill, political discussion relating to State elections purports to burden the functioning of the States with the constraints it imposes. The functions of a State include both the machinery which leads to the exercise of the State's powers and privileges and the machinery by which those powers and privileges are exercised. Some functions are performed by electors, some by officials of the State. Among the functions of the State I would include the discussion of political matters by electors, the formation of political judgments and the casting of votes for the election of a parliament or local authority. Laws which affect the freedom of political discussion in matters relating to the government of a State, whether by enhancement or restriction of the freedom, are laws which burden the functioning of the political branches of the State.

25. The connectedness of anti-corruption measures, in particular, to a State's capacity to function as a government can further be seen from this Court's acceptance in McCloy that such measures tend to enhance the constitutionally prescribed system of representative government: see at [5], [93] (French CJ, Kiefel, Bell and Keane JJ), [218] (Nettle J), [365], [368] (Gordon J). Anti-corruption measures are also protective of the machinery of government in so far as they serve to maintain public confidence in its integrity: McCloy at [34], [65] (French CJ, Kiefel, Bell and Keane JJ).

26. The practical effect of s 302CA of the CE Act is either to undermine measures chosen by the State to enhance and protect its electoral processes, or to restrict the legislative choice of the State in relation to such measures by otherwise requiring the State to pass a law for the separate keeping of political donations for State electoral purposes so as to engage s 302CA(3)(b)(i) of the CE Act: see Clarke at [72] (Gummow, Heydon, Kiefel and Bell JJ), [101]-[102] (Hayne J).

Section 302CA of the CE Act thus interferes with the capacity of the States to exercise, independently, their functions as governments.

Part IV Estimate of time

27. It is estimated that 20 minutes will be required for the making of oral submissions on behalf of the Attorney General for New South Wales.

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