

BETWEEN

GARY DOUGLAS SPENCE

Plaintiff



AND

THE STATE OF QUEENSLAND

Defendant

OUTLINE OF ORAL ARGUMENT OF ATTORNEY GENERAL FOR NSW

10 **PART I PUBLICATION**

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

PART II PROPOSITIONS

Implied freedom of political communication

2. In order to discharge its persuasive onus of justifying impugned provisions, a polity asserting that a burden on the implied freedom of political communication is justified need not, in every case, produce direct evidence of the mischief to which the law is directed actually occurring. There will be cases where the justification for the impugned provisions is apparent or self-evident from the terms and purpose of the legislation itself. This is such a case.
- 20 3. Without need for prior investigation, it may readily be inferred or anticipated that:
 - a. Allowing participants in the electoral process to receive payments of large sums of money by way of political donation involves a risk of corruption or undue influence: McCloy v State of New South Wales (2015) 257 CLR 178

(“McCloy”) at [38], [46] (French CJ, Kiefel, Bell and Keane JJ), [227] (Nettle J), [322] (Gordon J);

- b. Property developers, by reason of the nature of the business they conduct as property developers, have a particular incentive to seek to influence public decision-making and may seek to do so by way of political donations: McCloy at [49]-[50] (French CJ, Kiefel, Bell and Keane JJ), [193] (Gageler J), [354]-[355] (Gordon J); and
- c. To effectively guard against this particular risk, it is necessary to prohibit political donations by property developers.

10 4. In this case, the Queensland legislature acted upon evidence of a risk of corruption and undue influence, or a perception thereof, arising in relation to local government in Queensland and arising also in New South Wales. In the absence of such evidence, the justification for the impugned provisions could be made out on the logic of the above propositions. The burden imposed on the implied freedom by the impugned provisions, which is indirect and insubstantial in any event, is justified.

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

- 5. In the view of the Queensland legislature, it is necessary to prohibit political donations by property developers in order to protect the integrity of, and public confidence in, government and public decision-making. The protective interest of the State in that regard is engaged at the point the political donation is given and received.
- 20 6. Unless a donor expressly limits the use of a gift to State electoral purposes, or a State law of the kind described in s 302CA(3)(b)(i) exists, the effect of s 302CA of the Commonwealth Electoral Act 1918 (Cth) is to suspend a State prohibition on such donations – either entirely or for however long the donation is held before its use (or other identification for use for State electoral purposes).
- 7. Section 302CA interferes with the capacity of the States to function as governments by undermining measures chosen by a State to enhance and protect its electoral and governmental processes.

Date: 14 March 2019

30



M G Sexton SC SG



E S Jones