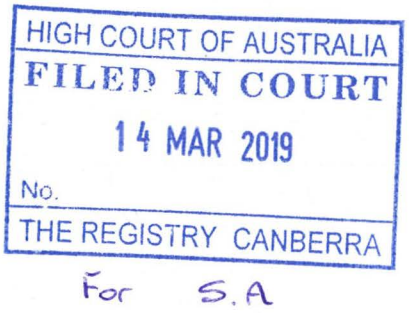
IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **No. B35 of 2019**

BETWEEN:



GARY DOUGLAS SPENCE

Appellant

and

10 **STATE OF QUEENSLAND**

Respondent

OUTLINE OF ORAL ARGUMENT OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

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Part I:

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

Part II:

2. The Commonwealth submits that State Parliaments do not have any power to make laws *"relating to federal elections"*, other than the specific and limited grants in ss 7, 9 and 29 of the Constitution (CS [13]; [15]). However, each of ss 7, 9, 10, 29 and 31 together with s 51(xxxvi) give the Commonwealth Parliament paramountcy on the topics they regulate. The Commonwealth submissions then transpose these topics to claim exclusive power in the broadest of fields, *"in relation to federal elections"*. This transposition fails to accommodate (WS, [14], [20]-[22]):
   2.1. State plenary power to make laws relating to the conduct of State elections and the protection of the States' essential organs;
   2.2. the paramountcy of Commonwealth laws by reason of s 109; and
   2.3. the basal Constitutional premise that powers are concurrent, together with the saving power of State parliaments.

   Smith v Oldham JB 12, tab 67 is distinguishable. Alternatively, its blanket proposition as to State concern in federal elections does not accommodate contemporary exigencies.

3. The *Melbourne Corporation* principle has no application to the question of Commonwealth immunity from State laws. (WS, [24]-[27])

4. In an area of concurrent power, it is possible to draw a workable line between State and Federal elections (CS Reply, [38]). Such a line will often represent a "reasonable accommodation" of the "competing interests" of the Commonwealth and the States (CS Reply, [36]).

5. A workable line is simply a policy decision of the relevant legislature as to the desirable sphere of regulation. That workable line operates in the context of political parties operating at both State and federal level. Constitutional limits on Commonwealth legislative power nonetheless remain: there is no practical imperative that validity of electoral Acts be determined on the fact that political parties are organised across different levels of government (PS Reply, [3]).

6. Where a Commonwealth law regulates donations to an organisation that promotes the election of candidate(s) to a House of a State Parliament, that law may be liable to transgress the constitutional limit on legislative power arising from *Melbourne*

Corporation. That is the case even if the law has a dominantly federal area of regulation.

7. The Commonwealth's written submissions address all of the States' *Melbourne Corporation* submissions together. Its summary of "the States" position (CS Reply, [35]) does not accurately reflect South Australia's submission.

8. Nor can South Australia's submission be reduced to the proposition at CS Reply, [43]. The question is not whether the State law pursues a legitimate purpose in burdening the freedom. It is whether the Commonwealth law undermines the States' capacity to function as governments by impairing the States' ability to protect the integrity of their institutions (WS, [42]-[51]).

9. Section 302CA impairs the States' ability to secure the integrity of their essential organs by protecting them from corruption and undue influence. The integrity of the States' institutions of government is distinct from the electoral processes that determine the make-up of those institutions (*McCloy*, [7], [34], [38], JB 7, tab 44).

10. The risk of subversion of the functioning of a State's Ministry and Parliament by undermining the integrity of those institutions by corruption and undue influence was aptly described by Brennan J in *ACTV* at 156 (WS, [46], JB 3, tab 20, p 1180).

11. By depriving the States of their ability to prohibit political donations to organisations whose objects or activities include the promotion of the election to a House of a State Parliament of candidates endorsed by them, s 302CA impairs the States' capacity to protect their institutions from that threat.

12. That occurs primarily by the interaction between the breadth of the permission that s 302CA(1), as expanded in s 302CA(2), confers on donors to give gifts, and to gift recipients to receive and retain them, and the narrow scope remaining to State laws to regulate, by virtue of the limited carve-out in s 302CA(3).

    12.1. First, the States are prevented from prohibiting gifts that are required to be used, or are kept or identified separately to be used, for any purpose other than a "State electoral purpose". The scope of s 302CA(2) incorporates gifts that are capable of giving rise to party-based clientelism within State parliaments and governments (*McCloy* at [37]; WS [48], JB 7, tab 44). A gift does not necessarily pose a lesser threat to the integrity of the essential organs of a State because it is or may be used to fund a federal election campaign, is used to

defray a party's ordinary overhead expenses, or is used for the personal gain of a candidate or party member (WS, [44]).

12.2. Whatever the scope of the limited exception in s 302CA(3), and in particular the words *"only for a State or Territory electoral purpose"*, the States remain unable to prohibit donations to dual-registered parties that have the capacity to corrupt its institutions through party-based clientelism (WS [35]). Section 302CA(3)(b)(i) only allows the State to regulate by prohibition if it first requires the gift to be kept or identified separately only for a State or Territory electoral purpose. That would be a nonsense (WS, [40]).

10 12.3. Second, s 302CA(1) deprives State laws of operation unless a gift is to be used *only* for a State or Territory electoral purpose and no other purpose (WS [36]). In so far as the Commonwealth submits that a gift will be kept "*only*" for a "*State or Territory electoral purpose*" so long as the *dominant* purpose is not to influence votes in a federal election (CS [38]), it appears to conflate the limited carve-out in the definition of "*State or Territory electoral purpose*" in s 287, with the word "*only*" in s 302CA(3)(b). In consequence, it gives the latter no work to do. This is not the apparent intention of the section (Revised Explanatory Memorandum, p 51, JB 14, tab 90, p 5852).

13. Section 302CA consequently significantly impairs the State's capacity to function.
20 The integrity of the Parliament and the Ministry pervades the exercise of *all* of the States' functions (WS, [45]).

14. That does not deny the effectiveness of s 109 of the *Constitution* to countenance the existence of concurrent powers with respect to federal elections (cf Cth Reply [41], WS [21]). However, the constitutional limits to the Commonwealth's legislative powers cannot be used to justify the Commonwealth having exclusive legislative power with respect to federal elections.

Dated: 14 March 2019

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Solicitor-General for the State of South Australia