

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY



No. B35 of 2018

BETWEEN:

GARY DOUGLAS SPENCE
Plaintiff

and

STATE OF QUEENSLAND
Defendant

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DEFENDANT'S OUTLINE OF ORAL SUBMISSIONS

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Outline of oral submissions
On behalf of the defendant
Form 27F; Rule 44.08.2

Dated: 14 March 2019
Per James Potter
Ref PL8/ATT110/3804/PXJ

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PART I: Internet publication

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

PART II: Outline of propositions

Introduction

2. The omnibus issues raised in these proceedings distil to the following: do the States have the power and prerogative to make laws to protect the integrity of their own systems of representative and responsible government?
3. There is no requirement, legal or constitutional, that political parties have composite objects or that legislatures ensure it remains convenient for them to have composite objects. The parties are already separately organised, but the Qld-based parties also choose to register under the CE Act. In any event, there would be an inconvenience of similar magnitude were the legislative scheme based on sole-object political parties.
4. The 'unallocated middle' ought not be assumed. It is not necessary or inevitable. It does not provide the foundation the plaintiff and Cth assert.

Implied freedom of political communication

5. *Onus*: The State may refer to proceedings in Parliament to discharge its persuasive onus: *Sportodds Systems Pty Ltd v NSW* (2003) 113 FCR 63, 79 [40].
6. *McCloy cannot be distinguished*: The purpose of the impugned provisions is to counter the risk of actual and perceived corruption related to political donations from property developers. The prohibition is rationally connected to that legitimate purpose.
 - *McCloy* (2015) 257 CLR 178, 209 [52]-[53], 250 [191]-[193], 251 [196], 261-2 [233]-[234] [JBA 7, tab 44].
7. The alternative means of achieving the purpose are those which were rejected in *McCloy*: 211 [61]-[62].
8. The plaintiff's attempts to find a factual basis to distinguish the circumstances of this case from those in *McCloy* fail (eg by claiming the plaintiff is different). In any event, the values of certainty and predictability would cause the court to eschew a granular comparison as a means of identifying relevant differences.
 - *Green v The Queen* (2011) 244 CLR 462, 473 [28]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 92-3 [196]-[200] [JBA 9, tab 52].

There is no impliedly exclusive Commonwealth power over federal elections

9. *Smith v Oldham* does not bind the Court to hold that there is an exclusive power. If it does, the Court should overrule that part of the decision: **QR [15]**.
10. Sections 7, 9 and 29 do not support an implied exclusive power over all aspects of federal elections.
11. Nothing in the text of the Constitution denotes that this Commonwealth power is exclusive. Nor is there any secure basis for finding an implication of exclusivity. Section 109 precludes any necessity to imply exclusive power.

- *Burns v Corbett* (2018) 92 ALJR 423, 446 [94]-[95], 457 [146], 462 [175], 463 [179], 479 [260] [JBA 5, tab 25].

12. Unlike the provisions of Ch III, ss 10, 31 and 51(xxxvi) do not exhaustively provide for the Cth's power to make laws with respect to federal elections. The Cth can rely on its concurrent powers with respect to, for example, telegraphic, telephonic and other like services to make laws about aspects of federal elections. Sections 10, 31 and 51(xxxvi) therefore do not support an implication that would deny all State power to make laws with respect to federal elections.

10 13. The States can legislate with respect to subject matters which came into existence at federation.

- *Carter v Egg and Egg Pulp Marketing Board* (1942) 66 CLR 557, 572, 582-3, 589-90, 597-8 [JBA 5, tab 29].

In any event, the Queensland laws deal with the subject matters of State and local government elections. States had power to deal with that subject matter at federation.

14. The States have a clear interest in regulating donations made to political parties which promote candidates in State elections. That interest remains even where political parties have composite objects.

15. An implied exclusive power would also be inconsistent with *Daniell*, in which the plaintiffs relied on an argument that the Cth had exclusive power over the subject of federal elections. The exclusive power argument was necessarily rejected by the Court in deciding the matter under s 109.

- *Daniell* (1920) 28 CLR 23, 25, 31, 33 [JBA 10, tab 57].

16. There is no reverse *Melbourne Corporation* principle. In any event, such a principle would not invalidate the Queensland laws.

30 ***Any implication of exclusivity does not give rise to a 'touches and concerns' test***

17. The analogy with *Bourke* is inapt. The 'formal structure' is not the same. States have plenary power to make laws, not a power to make laws with respect to 'elections, other than federal elections'.

18. The consequences of the Cth's test would be to deprive States of legislative power over a range of subject matters in which they clearly have a legitimate concern, and which the colonies would have been able to regulate before federation: see, eg, CS [33]-[35].

19. Sections 10 and 31 do not support the implication the Cth draws. Those provisions say nothing about electoral laws of the States beyond those relating to elections for the more numerous house of State Parliaments.

20. A touch and concerns test would also be inconsistent with *Daniell*.

If the Commonwealth's power is impliedly exclusive, Queensland's laws are valid because they are not laws with respect to federal elections

21. If the Cth's power is exclusive, *Bourke* suggests a test of sole or dominant characterisation: *Bourke* (1990) 170 CLR 276, 286-8 [JBA 4, tab 23].

22. However, even on ordinary principles of characterisation, Queensland's laws are not laws with respect to federal elections. The laws regulate gifts to political parties that promote candidates in State and local government elections; and their legal operation is the same, whether or not a party also promotes candidates in federal elections.

Section 302CA is invalid for infringing the principle derived from Metwally

23. Section 302CA(3) purports to undo an inconsistency created by s 302CA(1) potentially months, or years, after that inconsistency has been relied upon to give and receive a gift.

10 24. If the immunity conferred by s.302CA(1) is 'contingent', it logically cannot create an inconsistency with State laws at the time the gift is given and received: **QS [89]-[91]**.

25. *Metwally* should not be reopened: **QR [18]**.

If the Commonwealth's power is impliedly exclusive, s 302CA is invalid because it is a law with respect to State elections

26. If it is a defining feature of a polity that it have exclusive power over its own elections, the States necessarily also have such an exclusive power.

- *Smith v Oldham* (1912) 15 CLR 355, 358, 360, 363-365 [**JBA 12, tab 67**].

20 27. The dominant purpose of s 302CA is to override State laws dealing with State elections, and to make it more difficult for the States to regulate political donations to candidates, or parties fielding candidates in State elections. The dominant character of s 302CA is State elections.

Section 302CA is invalid for infringing the Melbourne Corporation principle

28. The Qld laws are designed to protect the integrity of its electoral systems, and systems of representative and responsible government. Queensland has a legitimate concern with all donations received by participants in the electoral processes, because the risk of corruption and clientelism results from the receipt of gifts, not their use.

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29. It is central to the constitutional status of each State, and its capacity to function as a government, that it have the capacity to control its own electoral processes and protect the integrity of those processes.

- *ACTV Pty Ltd v Commonwealth* (1992) 177 CLR 106, 163, 242 [**JBA 3, tab 20**].

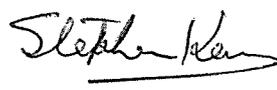
30. Section 302CA impairs those capacities: it applies because of a bare possibility that a gift will be used in a federal election, and makes compliance with Queensland's electoral laws entirely voluntary, even in relation to gifts used in State elections.

40 ***Inconsistency***

31. If s 302CA is valid, ss 275 and 113B are invalid only to the extent of the inconsistency. There is no inconsistency with s 275(4) and (5); or s 113B(4) and (5).

Dated: 14 March 2019.


Peter Dunning QC SG


Stephen Keim SC


Gim Del Villar


Felicity Nagorcka