IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. B 35 of 2018

BETWEEN

GARY DOUGLAS SPENCE
Plaintiff

and

10 **STATE OF QUEENSLAND**
Defendant

PLAINTIFF'S OUTLINE OF ORAL ARGUMENT

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Date 12 March 2019

PART 1 PUBLICATION ON THE INTERNET

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

PART 2 PROPOSITIONS TO BE ADVANCED

The Legislative Schemes/Inconsistency

2. The practical effect of the Amending Act demonstrates an attempt by the State to regulate the whole field of political donations from property developers to political parties in Queensland. There is no space provided for a Commonwealth law to operate (**PS [9]-[19]**).

3. Divisions 3A, 4 and 5 of the CE Act regulate the giving and receiving of donations in a limited and careful way. A conclusion that the Commonwealth's regulation of this area is meant to be exhaustive can be drawn, even apart from s 302CA (**PS [60]-[65], PR [48]**).

4. The Defendant errs in suggesting that s 302CA undermines such a conclusion (**PR [49]**). The core aim of s 302CA is to preserve the operation of State and Territory laws and to moderate conflict between these laws and the CE Act (**PR [32]**). The Defendant's argument that the subject matter regulated by both Acts is not co-extensive is not to the point. In practice, the Commonwealth has exhaustively addressed a subject matter that the State seeks to regulate (**PS [69]**).

Within Commonwealth Power/Exclusive Power

5. There appears to be no dispute that there is inconsistency between s 302A and the Amending Act (**PR [47]**). Rather, the State seeks to establish its invalidity on three bases, the first of which is absence of power.

6. Section 302CA is within power, as it: (a) delineates an area where federal law is exhaustive and exclusive regarding gifts; (b) applies to entities that have a significant federal link; (c) leaves an area for State or Territory laws to operate where a gift is directed to a State or Territory electoral purpose; (d) overrides State or Territory laws in the area of the unallocated middle, which the Commonwealth is entitled to do under s 109 (**PR [28]-[32]**).

7. There is no basis in authority for the Defendant's propositions that State power over State elections is exclusive and a sole or dominant characterisation test should apply. Any notion of exclusivity results, at highest, from the State's immunity under the *Melbourne Corporation* principle. The Defendant's argument is similar to that put in *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548, 605-606 [119]-[120].

8. The Commonwealth's power is one "relating to elections": ss 10, 31 Constitution; *Mulholland v AEC* (2004) 220 CLR 181, 207 [66] (**PR [28]**). There is no warrant to take a narrow approach. Attempting to define the exclusivity does not sufficiently acknowledge that both levels of government have a legitimate interest in regulating this area (**PR [24]**): *Mulholland.*

9. In any case, the "dominant character" of s 302CA is not that of a law with respect to State election (**PR [28]**). Further, the law in *ACTV* was quite different (**PR [29]**).

10. The purpose of s 302CA is not to make it more difficult for the States to regulate political donations to candidates or parties fielding candidates in a State election and the *Second Uniform Tax Case* (1957) 99 CLR 575 can be distinguished (**PR [28]-[29], [32]**).

Intergovernmental Immunity Protecting the Commonwealth

11. There is an immunity protecting the Commonwealth from State laws that mirrors the *Melbourne Corp* immunity protecting State laws from the Commonwealth (**PS [53] – [59]**):

Melbourne Corporation (1947) 74 CLR 31, 55, 74-75, 82-83; *Re Residential Tenancies Tribunal (NSW)* (1997) 190 CLR 410, 425-6, 443, 457-8, 507-8; *Austin v The Commonwealth* (2003) 215 CLR 185, 249 [124].

12. The question is whether a State law is directed at the Commonwealth, imposing some special disability or burden on the exercise of powers and fulfilment of functions of the Commonwealth which curtails its capacity to function as a government (**PS [56]**): note *Fortescue Metals,* 609 [130].

13. The immunity exists despite the power of the Commonwealth to protect itself by legislation aided by s 109 (**PR [22]-[23]**). The extent of the Commonwealth immunity is at least equivalent to the State immunity (**PS [57], PR [22]**).

14. Parts 3 and 5 of the Amending Act infringe the Commonwealth immunity and curtail the Commonwealth's capacity to function as a government (**PS [59]**). Parts 3 and 5 interfere in the federal electoral process by purporting to regulate the solicitation, giving and receipt of political donations by parties which operate at both State and federal level. In contrast to s 302CA, the Queensland law makes no attempt to restrict itself to persons acting at the Commonwealth level (**PS [59]**).

15. The interference effected by the Queensland law is significant and the ability of political parties to re-order their affairs to avoid the Queensland law is not a cure (**PS [59]**): note *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 233; *Austin*; *Clarke v Commissioner of Taxation* (2009) 240 CLR 272, 305 [63].

States' Claims of Intergovernmental Immunity

16. The intergovernmental immunity of the States is not infringed because s 302CA allows for the continued operation of State laws (**PR [28]-[38]**).

17. First, the immediate object of s 302CA is not to control the States and their people in the exercise of their constitutional functions (**PR [34]**): *ACTV* (1992) 177 CLR 106. To the extent there is any dispute about gifts not allocated to the State or federal level, the Commonwealth is entitled to predominance by virtue of s 109 (**PR [29], [31]**).

18. Secondly, the operation of s 302CA means that if a gift is actually used for a State electoral purpose, State law applies. Compliance with State law is not voluntary (**PR [36]-[37]**).

19. Thirdly, both levels of government have a legitimate interest in regulating donations (**PR [24]**). Section 302CA preserves the operation of State laws with respect to donations for State electoral purposes without requiring States to provide for separate campaign accounts (**PR [30], [33], [38]**).

20. Fourthly, s 302CA is not "aimed at" the States, it delineates how far the Commonwealth seeks to go in addressing a subject matter pursuant to s 109 (**PR [32]**).

Metwally

21. *Metwally* can be distinguished because s 302CA is not a retrospective deeming provision that seeks to re-enact a State law: *University of Wollongong v Metwally* (1984) 158 CLR 447 at 453, 457, 469, 475, 478-9. Section 302CA provides prospectively for the operation of law (**PR [40]-[43]**).

22. If necessary, s 302CA(3)(b)(ii) can be read down if the requirement for the recipient to keep or identify the gift or part separately is read as requiring such action at the time of receipt. If such action does not occur, the gift or part goes into the federal channel. This is supported by s15A of the *Acts Interpretation Act 1901* (Cth) (**PR [44]**).

23. Alternatively, s 302CA(3)(b)(ii) can be severed without giving the permission in s 302CA(1) a radically different character (**PR [45]**).

24. Finally, if the point is reached, *Metwally* should be overturned (**PR [46]**).

Infringement of the *Implied* Freedom of Political Communication

25. The freedom rests on elections. Campaigning is an essential part of communication (**PS [21], [24]**): *Unions NSW v NSW (No. 1)* (2013) 252 CLR 530, 574 [121]. By restricting the funds available to political parties, Part 3 imposes a burden (**PS [22]**). It is of not assistance to say that the burden is indirect and insubstantial (see *Brown v Tasmania* (2017) 261 CLR 328, 361 [94]), as it does not level the playing field - it has a material effect on one viewpoint (**PS [28], PR [5]**). It restricts the extent to which developers can participate in political communication (**PS [24]**).

26. It is thus discriminatory (**PS [27]**). It distorts the political process (**PS [27]**): *Unions (No.1),* 386 [167]-[168].

27. The defendant has to provide a clear and compelling justification for the burden imposed by Part 3 (**PS [29]-[30], PR [6]**): *ACTV*, 145; *Brown*, 369 [127]; *Unions NSW v NSW (No.2)* (2019) 93 ALJR 166, 177 [45].

28. The justifications offered by the Minister are limited to a reference to the report by the CCC, the desire to apply the same rules as local government to the State, the State's role in planning and the reports by ICAC. There is no reference in the Minister's speech to historical events at State government level.

29. The reports by ICAC provide no justification for the amending act in Queensland. They were to do with actual corruption mostly at local level (**PS [30]**).

30. The findings by the CCC were quite different and the CCC did not recommend a ban at State level (**PS [35], PR [10]**). The facts should be examined: *Unions (No. 2),* 174 [26], 191 [117]. The CCC and its predecessors did not find corruption at local level (**PS [36]-[37]**). The corruption identified at State level was unrelated to political donations (**PR [13]**).

31. The facts do not justify preventative action in this case: c.f. *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 268, 277.

32. Most planning decisions are made at local government level (**PS [41]**). Those of the State government are at high level, constrained by law, mostly by the coordinator general and for large projects (**PS [41]-[43], PR [14]**). They are unlikely to be decisions at risk by reason of donations by property developers (**PS [44], PR [20]**).

33. The Act cannot be justified. Its purpose is accordingly not compatible with the freedom (**PS [46]**). It is not suitable and it is not necessary as no corruption at State government level has been identified (**PS [32]-[46], PR [17]**) and the imposition of monetary caps is a practical alternative (**PS [48]**). It is not adequate in its balance as it disfavours one political viewpoint and there is no risk of corruption at State level identified (**PS [46], PR [19]**).

12 March 2019

J K Kirk SC

P A Hastie QC