IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B 35 of 2018

BETWEEN:

GARY DOUGLAS SPENCE
Plaintiff

and

STATE OF QUEENSLAND
Defendant

PLAINTIFF'S SUBMISSIONS IN REPLY

PART 1 PUBLICATION ON THE INTERNET

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

PART 2 SUBMISSIONS IN REPLY

2. It is appropriate to respond to two of the prefatory observations made by the defendant.[1] First, the plaintiff bases its freedom case on the law that the implied freedom protects political communication.[2] The paragraphs PS [24]-[25], criticised at DS [6] and ACT [27], make the point that representative democracy depends on free communication between all persons,[3] restricting the means of communication by some does not introduce a level playing field[4] and political parties are an aspect of political communication.[5]

3. Secondly, the validity of the CE Act and the Amending Act is to be determined on the fact that political parties are organised across different government levels[6] and on their practical effect. It is not to the point DS [7]-[8] to say that political parties should organise themselves differently to accommodate Commonwealth or State legislation; especially if there is no proper justification for them being required to do so. Moreover, political parties are commonly unincorporated associations,[7] and the law of Queensland, like that of the Commonwealth (and eg NSW), sets significant minimum

1 Defendant's submissions (DS), 1-2 [5]-[10].
2 Plaintiff's submissions (PS), 5 [21], 7 [26]-[27].
3 *ACTV v Commonwealth* (1992) 177 CLR 106 (*ACTV*), 138-139.
4 *ACTV*, 146.
5 *Unions NSW v NSW (No. 1)* (2013) 252 CLR 530 (*Unions (No. 1)*), 550 [24]-[26], 560-561 [61]-[65].
6 *Unions (No. 1)*, 550 [24].
7 See eg Amended SC, SCB, 114 [2], 116 [12].

ClarkeKann
Level 23
240 Queen Street
Brisbane Qld 4000

Phone 07 3001 9222
Fax 07 3001 9299
Email s.williamson@clarkekann.com.au
Ref Shane Williamson
Date 1 March 2019

membership requirements for registration as a party (although in Queensland and at the Commonwealth level this does not apply to a party with a sitting member).[8] It is not merely coincidental that most parties in Queensland are registered under both the State and federal laws – it reflects a practical imperative, as the unincorporated grouping of members are the same.

The Part 3 Amendments Impermissibly burden the Implied Freedom

Burden

4. The defendant contends DS [24] that the burden is indirect and insubstantial because it merely regulates funds and leaves prohibited donors at liberty to communicate on matters of politics and government. The submission understates the significance of the burden. The Amending Act regulates funds. Funds are important to campaigning,[9] and hence political communication. It was the (unjustified) regulation of funding which was the basis for the decisions in *Unions (No.1)*[10] and *Unions (No.2)*.[11]

5. Contrary to DS [25], the Amending Act does not enhance political speech by levelling the playing field given the material extent to which funds from developers are directed to the political party represented by the plaintiff.[12] The plaintiff is not submitting that the burden is substantial because it discriminates against property developers (cf DS [26]). The discrimination is against one political view point. Any such discrimination against disfavoured voices, and the concomitant distortion of the political battlefield, requires a clear and compelling justification, especially when the practical effect of such is to benefit the governing party over its main opponent.

Compatibility / justification

6. That the amendments made by Part 3 were equivalent to the provisions which were upheld in *McCloy* are not to the point.[13] The provisions were upheld specifically

---

8 *Electoral Act 1992* (Qld), ss 2, 71; *Electoral Act 2017* (NSW), s 59; *Commonwealth Electoral Act 1918* (Cth), ss 123, 126.
9 *Unions (No. 1)*, 574 [120] (Keane J).
10 *Unions (No. 1)*, 201 [24].
11 *Unions NSW v NSW* [2019] HCA 1 (*Unions (No. 2)*), [53] (Kiefel CJ, Bell and Keane JJ).
12 DS, 6 [25]; SCB 119 [27].
13 DS, 2 [12]; SA [10]; Cth [48].

because of the history and circumstances which existed in that State.[14] Absent a factual justification for a law which burdens the freedom it will be invalid.[15]

7. The argument at DS [20], Cth [51], SA [10], NSW [10], WA [12], Vic [11], ACT [65] that the law is justified by the risk of corruption and that it is entitled to "act prophylactically"[16] does not justify a burden on political communication. Where a clear and compelling justification is required for a distorting law, as here, it is not enough to point to a problem that has arisen in another State (without denying that that evidence might be relevant). The law *at issue*, with *its* distorting effect, must be justified. Treating like cases alike (DS [12]) depends on it being established that the cases are alike.

8. Further, an analogy may be drawn with an argument rejected in the *Communist Party* case.[17] The Court held that the circumstances asserted in that case – the Berlin Blockade, the passage of China into communist control, the Korean War and serious dislocations of industry that occurred in Australia[18] – did not justify the law (said to be prophylactic) banning the Communist Party. Similarly, here.

9. Contrary to what is asserted at DS [13]-[23], the facts do not justify the law.

10. First, the findings of the CCC relating to a risk or perceived risk of corruption were at local government level and not at State government level; and the CCC later specifically stated that it did not contemplate reform at State level without a further review,[19] implicitly to determine whether the facts justified it. There was no suggestion that the prohibition should extend to the federal level. The submissions to the CCC upon which the defendant relies at DS [14] about similar risks existing at State level were from two mayors of local Councils;[20] one of who stated that "to ban developer donations and not ban union donations at the same time was a fundamental breach of fairness".[21]

11. Secondly, the CCC in referring to prior investigations merely stated that the recurring nature of the issues highlighted the inherent potential to cause "concerns about

---

14 *McCloy v NSW* (2015) 257 CLR 178 (*McCloy*), 208 [49]-[50], [50]-[51] (French CJ, Kiefel, Bell and Keane JJ), 250 [194] (Gageler J).
15 *Unions (No. 2)*, [44] (Kiefel CJ, Bell and Keane JJ).
16 SCB, 132-133.
17 *The Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 19.
18 *The Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 197.
19 SCB, 393.
20 SCB, 384-386, 387-389.
21 SCB, 388.

corruption",[22] not the existence of actual corruption (unlike NSW). Importantly, the predecessors of the CCC in 1991, 2006 and 2015 did not make any recommendation for the banning of donations by property developers.[23]

12. Thirdly, the findings of ICAC were in relation to various local governments.[24] Contrary to what is asserted at DS [16], except as regards the finding of the inquiry in 1990 in relation to State government public servants,[25] there were no findings of corruption relating to donations from property developers at State government level. The existence of a particular problem in one State does not justify a burden being imposed upon the freedom in another.

13. Fourthly, Mr Nuttall was guilty of serious corruption. It was unrelated to donations from property developers.[26] The corruption identified by the Fitzgerald Inquiry in relation to Mr Hinze was also serious. It resulted in recommendations for the consideration of the establishment of a register of political donations,[27] not a recommendation for the imposition of a prohibition against political donations by property developers.[28] Contrary to what seems to be asserted at DS [17], the fact that allegations were made, not adverse findings made, about corruption/favouritism shortly after the establishment of the CJC (not CCC) affords no proof of the need for the prohibition made here. Contrary to DS [19], there is a significant difference between findings of actual corruption and the present circumstances, which amount to no more than a fear it might occur sometime in the future because it occurred in another State (as appears from DS [16] and [20]).

14. Fifthly, notwithstanding the claim at DS [18] that the State has a significant role in the State's planning framework, the practical realities are that the State has a very limited role,[29] and its role is severely circumscribed by the enabling powers[30] and by a parliamentary reporting obligation.[31] Many of the relevant State powers are exercisable by a senior public servant, not the Minister.[32] Many of the developments

---

22 SCB, 149 [79(g)(i)].
23 SCB, 143 [79(a)(xviii)], 144 [79(b)(vi)] and 148 [79(f)(vi)].
24 SCB, 152-155.
25 SCB, 152 [82(a)]
26 SCB, 145 [79(c)].
27 SCB, 137 [76(c)].
28 SCB, 137 [76(f)].
29 SCB, 134-135 [74].
30 SCB, 123 [43]–[44], 124-125 [46 (a) and (c)], 129 [55],
31 SCB, 125 [46(b)], 126 [46 (d)], 130 [59].
32 SCB, 123-124 [44]-[46], 128 [52], 131 [63]

relate to state infrastructure and public works;[33] matters quite outside the scope of the local council planning framework which was the subject of the reports in NSW.[34] No similar factual matters were identified in *McCloy*.[35]

15. It is not suggested by the plaintiff that a formal recommendation from an extra-parliamentary body to impose the burden is essential: contra DS [21], [22] and [23], NSW [10]. The findings in NSW, however, were an important part of the factual basis for the imposition of the burden in *McCloy*.[36] The absence of those facts further differentiates this case from that of *McCloy*.

16. **Compatibility:** Given the history of inquiries into local government elections in Queensland, a prohibition of donations in that sphere is legitimate (and not challenged). No such justification, the issue to be determined when considering compatibility,[37] exists for a similar ban for state (let alone federal) electoral purposes. It can hardly be the explanation given by the Minister introducing the bill, namely that the Premier "will not make rules for local government that she is not prepared to follow herself".[38] In all the circumstances here, the impugned provisions cannot be characterised as having a legitimate purpose (note PS [46]).

17. **Suitability:** The prohibition against donations from developers was held to be rationally connected to their legitimate purpose in *McCloy* because there was a strong factual basis for the perception of a risk of corruption following seven reports from ICAC.[39]

18. **Necessity:** The reliance placed upon *McCloy* at DS [33] is misplaced. The plurality's statement that disclosure was important, but "not as effective as capping",[40] was not directed towards the prohibited donor regime. The plurality did not make any finding that capping was not a reasonably practicable alternative.[41] The laws at issue were

---

33 SCB, 128 [52(d) and (e)], 129 [55], 130 [58], 131 [61]
34 SCB, 152-155 [82]; *McCloy*, [52] and [233].
35 *McCloy*, 208 [49] (French CJ, Kiefel, Bell and Keane JJ), 2 [191] (Gageler J), (French CJ, Kiefel, Bell and Keane JJ) 292 [354] (Gordon J).
36 *McCloy,* 208 [51], 244-245 [173]-[174], 250 [194].
37 *Brown v Tasmania* (2017) 261 CLR 328, 363 [102].
38 Queensland, Legislative Assembly, *Parliamentary Debates,* 6 March 2018 at 190.
39 *McCloy*, 208 [50]-[51] (French CJ, Kiefel, Bell and Keane JJ), 261 [232]-[233] (Nettle J).
40 *McCloy*, 211 [61].
41 *McCloy*, 211 [63].

different: there are no caps on donations or expenditure in Queensland and there is real time disclosure.[42]

19. **Adequacy of Balance:** Contrary to DS [35], it is not a question of comparing the importance of dealing with the risk of corruption at State level with the importance of dealing with the risk of corruption at the local level.[43] The point is that there is an established risk of corruption at local government level that has not been established to exist at State government level in Queensland.

20. Contrary to what is asserted at DS [35], there is no evidence that more significant planning decisions are made at the State level. Whilst special legislation exists for developments which have significant impacts,[44] no implication in favour of the Amending Act can be drawn from it. Decisions thereunder are made by the co-ordinator general (not the Minister), have been few in number,[45] and are not the kind of decisions identified in NSW as likely to be the source of corrupt conduct. Moreover, many of them are not likely to be sought by developers.[46] The quality, as well as the quantity, of decisions taken at this level show that the prohibition is not adequate in its balance.

Exclusive Power / Federal Intergovernmental Immunity

21. The defendant is critical of *Smith*[47] at DS [50]-[56]. Both the reasoning and the decision have been adopted subsequently and it has never been overruled. The decision reflects the text of ss 7, 9, 10, 24, 29, 30 and 31 of the Constitution: the States have power to make laws with respect to the election of its members only until the Parliament otherwise provides. The observation in *Smith*[48] that thereafter the States lacked power to make laws regarding federal elections is correct. The defendant itself submits that "it is a defining feature of a self-governing democratic polity that it has the power to regulate the conduct of its elections" (DS [95]). That the colonies or the States have an interest in federal affairs (DS [59] and [56]) does not alter that.

22. The defendant makes no real attempt to grapple with how the plaintiff (as opposed to the Commonwealth) puts his argument with respect to exclusive power and the

---

42 SCB, 119 [29].
43 DS, 8 [35].
44 SCB, 128 [52] and see also SCB, 129-132 [53]-[64].
45 SCB, 135 [74].
46 SCB, 129 [53], 130 [58] and 131 [61]; and see also SCB, 135 [75].
47 *Smith v Oldham* (1912) 15 CLR 355 (*Smith*).
48 *Smith*, 360.

intergovernmental immunity. The main point made by the defendant is that there is no structural imperative for any immunity protecting the Commonwealth because it may protect itself from interference by legislation, which is given priority by s 109 (DS [7]). That the Commonwealth may legislate does not remove the structural imperative for an immunity, and the correlative exclusivity of power with respect to elections. The issue of immunity/exclusivity arises logically prior to any particular exercise of power by the Commonwealth. If anything, the case law of this Court has tended to a *wider* immunity at federal level than applies to protect the States.[49] It is not necessary to determine here the metes and bounds of the federal immunity. But as put at PS [57], it should be at least as extensive as the immunity of the States.

23. Further, the Commonwealth power to legislate is not a sufficient salve. Temporal issues may arise, where a State legislates in some particular interfering way, with deleterious consequences for the Commonwealth prior to it being able to enact overriding legislation. Further, any such legislation must pass through both chambers of the federal Parliament, something which is never assured.

Section 302CA, Claimed Exclusive State Power, and the State *Melbourne Corp* argument

24. The Commonwealth and each of the States has an obvious legitimate and constitutional interest in regulating political donations (and related matters) in relation to their respective political and electoral systems.

25. As noted above, political parties in Australia commonly are registered at both State and federal level. It is inevitable that there is an area of potential overlap, where both levels of government may wish to regulate donations. That includes where a donation is given to a party but not directed by the donor to one or other level. The defendant complains at DS [111] that a donation may not be directed to a particular purpose, may be kept in a "mixed" bank account, and may be used with respect to State elections. No doubt that is so, but that merely identifies the issue; it does not establish invalidity.

26. Where the Commonwealth has (validly) legislated, its legislation takes precedence by virtue of s 109. Federal legislation is subject to the *Melbourne Corporation* principle. On the plaintiff's submission, State legislation is subject to a similar constitutional constraint.

---

[49] See *Commonwealth v Cigamatic Pty Ltd (In Liq)* (1962) 108 CLR 372.

27. Here, the plaintiff's case is that the Queensland legislation infringes this immunity (and area of exclusive power) because it imposes a per se restriction on the solicitation and receipt of donations by parties and the provision of donations to parties, including for parties registered at the federal level, and including even with respect to donations which include a condition that they be expended at federal level. In that way it interferes in the federal electoral system, and in the Commonwealth's exclusive area of concern as a polity.

28. In contrast, that is *not* what s 302CA does. The dominant character of s 302CA is clearly not a law with respect to State elections: cf DS [103]. Section 302CA regulates donations at the federal level; it is a law with respect to the subject matter of elections of senators and members of the House: cf Vic [68]-[72].[50] The section then moderates the operation of the federal law with respect to interaction with State and Territory laws. It does not direct States to regulate donations in a particular manner: cf Vic [71]. The law seeks to ensure that State legislation does not intrude upon the law relating to federal elections, and not to make it more difficult for States to regulate political donations to candidates or parties fielding candidates in a State election: cf Vic [71].

29. Section 302CA allows ample room for States to exercise their legitimate interest in regulating their own electoral and political system. Insofar as the dispute is about the middle overlap territory – eg unallocated donations – the Commonwealth is entitled to take precedence if it chooses to do so.

30. The defendant complains that a purpose and effect of s 302CA is to induce the State to vary its method of legislation: DS [112]. As the defendant acknowledges at DS [106], a multi-factorial approach is to be employed in this area. And that is but one factor. As noted, this is an area where both levels of government have legitimate interests, and some degree of overlap may occur if both seek to regulate donations not specifically directed to their own level of government. That being so, it is probably inevitable that the States will need to choose their regulatory pathway with a degree of care. Moreover, of importance here are issues of the form, substance and actual

---

50 In *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 233 [143] Gummow and Hayne JJ held that a law requiring registration of a political party before advantages or privileges may be enjoyed is a law "relating to" to elections within the meaning of ss 10 and 31 of the Constitution.

operation of the law.[51] The practical burden on the States here of having to choose their regulatory pathway with a degree of care is a limited one.

31. In that regard, it is important to have regard to what s 302CA does. It does not impose a per se and across the board regime of the kind the Queensland law does (that being the problem with that law, as regards immunity issues). By virtue of s 109, it would be open to the Commonwealth to legislate exclusively with respect to the middle area of unallocated donations. It has chosen not do so.

32. Rather, the section carefully carves out an area in which State and Territory laws may apply – to the benefit, it should be noted, of those States and Territories. There is nothing unconstitutional about the Commonwealth taking such an approach, and this cannot be seen as a law imposing a special or discriminatory burden on the States, nor curtailment of their ability to function: cf DS [106] and [113]; Tas [20]-[25]; WA [41]-[52]; SA [28]-[51]; NSW [16]-[26]; Vic [73]-[84]). The only other entities which may pass laws with respect to these matters are the States and Territories. It is not uncommon, and is entirely appropriate, for the Commonwealth to spell out in various ways to what extent its law is intended to be overriding. Sometimes these provisions involve some complexity. Notable examples include ss 26-30 of the *Fair Work Act 2009* and ss 5D-5I of the *Corporations Act 2001*. Section 302CA is not "aimed at"[52] the States, and at impairing the choices available to them in relation to the discharge of a constitutional function (the regulation of elections),[53] rather it is aimed at ensuring that State legislation does not intrude upon the law relating to federal elections, whilst allowing some room for continued application of State and Territory laws.

33. Here, pursuant to s 302CA(3)(b) the recipient may avoid the effect of s 302CA(1) either by placing the donation in a separate account provided for under State/Territory law, or by the recipient simply opting to do so and thereafter keeping the donation separately for use for State/Territory purposes. This provision does not require the States to legislate in some particular way. It simply recognises that some of them, such as NSW, have done so.

---

51 *Austin v Commonwealth* (2003) 215 CLR 185 (*Austin*), 249 [124] (Gaudron, Gummow and Hayne JJ); *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 , 298-299 [32] - [34] (French CJ), 305 – 307 [61]-[66] (Gummow, Heydon, Kiefel and Bell JJ), 312 [90], 312-313 [93]-[95] (Hayne J).

52 *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548, 611 [137] (Hayne, Bell and Keane JJ).

53 DS, [113]; WA, [47]; SA, [48]; NSW, [26]; Vic, [78], [80] - [83].

34. Ultimately, where a donation is used for a State or Territory electoral purpose, under s 302CA, any valid State or Territory electoral law will apply. As a result, s 302CA regulates donations for federal electoral purposes only and it is not a law the object of which is to control the processes by which the people of the States elect their governments.[54]

35. Western Australia's submission at WA [48]-[50] that pursuant to s 302C, the definition of "electoral expenditure" contained in the CE Act would enable circumvention of any State laws which would otherwise prevent the giving and receipt of donations from particular persons or groups of persons, can be answered by reference to s 109. Where expenditure is incurred for the "dominant purpose"[55] of creating or communicating electoral matter[56] generally, a Commonwealth law dealing with this expenditure is connected to the Commonwealth's legislative power with respect to elections and prevails to the extent of any inconsistency with State law. The suspension or delay of the force and effect of a State prohibition on a donation described at NSW [22] is also supported by s 109.

36. Contrary to DS [111], s 302CA does not render compliance with Queensland's electoral laws entirely voluntary, even in relation to gifts ultimately used for a State election. In outlining when an amount is "kept or identified" separately in order to be used only for a State or Territory electoral purpose, s 302CA(6) includes the words "[w]ithout limiting paragraph 3(b)". As a result, in the situation that DS [111] and NSW [21] describe, where a gift of money is placed in a mixed bank account and then spent on a State election, the "identification" of the gift would necessarily occur no later than the moment immediately prior to using it. In those circumstances s 302CA(1) would not apply and the donor and recipient of the gift must comply with any valid State or Territory electoral laws as to the giving, receipt, retention and use of gifts.[57]

---

54 Cf *ACTV*, 242 (McHugh J).

55 "Electoral expenditure" is defined in new s 287AB to mean, in essence, (with certain exceptions), expenditure incurred for the dominant purpose of creating or communicating electoral matter.

56 "Electoral matter" is defined in new s 4AA to mean in essence, (with certain exceptions), matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in a federal election.

57 Revised Explanatory Memorandum, Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018 (Cth), 53; this is also apparent when the note and example contained in s 302CA(3) are read together.

37. Further, the inclusion of the words "[w]ithout limiting when subsection (1) does not apply" in s 302CA(3), means that this section does not purport to outline every situation where s 302CA(1) does not apply. Once a gift of money placed in a mixed account is spent on a State election (or anything that is not for the "dominant purpose"[58] of creating or communicating electoral matter), s 302CA(1) no longer applies to exclude the operation of a valid State or Territory electoral law because the gift is no longer "required to be, or may be, used for the purposes of incurring electoral expenditure, or creating or communicating electoral matter".[59] As a result, s 302CA does not operate in the way suggested at SA [36]–[51].

10 38. Because s 302CA(3) does not purport to outline every situation where s 302CA(1) does not apply, rather than seeking to "induce the State[s] to vary the method of"[60] regulating their own elections, s 302CA(3) merely further defines and protects the area in which s 302CA does not apply: cf DS, 29 [112]; Tas, [25]; Vic, [78], [84].

***Metwally* and s 302CA**

39. The defendant asserts that s 302CA is invalid because of the principles established in *University of Wollongong v Metwally*:[61] see DS [79]-[83], also Tas [26]; WA [11(c)]; SA [52]. The arguments should be rejected.

40. First, *Metwally* can be distinguished. It involved a new Commonwealth law, enacted with retrospective effect, after this Court had held that there was a s 109 inconsistency
20 between the federal law in question and a State law. The new law sought to *deem* the law to have been something other than what it was. There is no such deeming here, no "legal fictions".[62] Section 302CA applies prospectively. Let it be accepted (subject to the arguments below) that s 302CA(3)(b)(ii) may disapply s 302CA(1) at a time after a gift is given or received. That is still a prospective operation of s 302CA, albeit with potential retroactive effect in some circumstances. What the provision does is modulate the extent to which the federal law applies from the time it commenced.

41. What it *does not* do is seek in substance to re-enact a State law which had in the past been rendered invalid by the combined operation of s 109 and a federal law. Thus it

---

58 See s 287AB, CE Act.

59 See s 302CA(1)(e) and the definitions of "electoral expenditure" in new s287AB and "electoral matter" in new s 4AA.

60 *Austin*, 265 [170] (Gaudron, Gummow and Hayne JJ).

61 (1984) 158 CLR 447.

62 Quote from *University of Wollongong v Metwally* (1984) 158 CLR 447 (*Metwally*), 478 (Deane J).

cannot be said here that that the federal law purported to "endow a State law with the force and effect of which s 109 deprived it before the retrospective Commonwealth law was enacted".[63] Such a law might in one sense be seen as the Commonwealth seeking to give effect to State law, in a manner which might well run beyond federal power. In the present case, the State law ceases to be inconsistent under s 109 because of a change in circumstances which removes a criterion of operation of the federal law, not because of the enactment of a new Commonwealth law.

42. The complaints about uncertainty that may arise (eg DS [88]-[90]) do not advance the argument. Neither the defendant nor any of the interveners has put the submission that the State and/or Commonwealth cannot enact retrospective laws. If they can do so, as they can,[64] then there is no constitutional principle which requires that the law is always certain and invariable from time to time.

43. The defendant contends at DS [88] that the Commonwealth purports to give operation to State laws, in circumstances where s 109 has rendered them inoperative. Where s 302CA(3)(b)(ii) disapplies s 302CA(1) at a time after a gift is given or received, "the inconsistency ceases, the sterilizing effect of s 109 ceases and the State law is, or is again, of full force and effect".[65] As a result of the temporal aspect of s 109, a State law is inoperative only for so long as the inconsistency exists.[66] Contrary to DS [89], the purpose of s 302CA is to clarify, "the interaction between similar State and Territory and Commonwealth electoral funding schemes [and to invalidate State and Territory electoral laws] to the extent that they would detract from the right to give, accept or use a donation under the Electoral Act for Commonwealth electoral purposes".[67]

44. Secondly, and in the alternative, the complaint made about the operation of s 302CA(3)(b)(ii) falls away if it is construed as having no retroactive effect, that is, if it is construed as applying only where the gift recipient "keeps or identifies the gift or part separately" *at the time of receipt*. That is an entirely open reading of the language. The defendant relies on the note to the provision (DS [87]). No doubt that

---

63 *Metwally*, 475 (Brennan J), see also 457 (Gibbs CJ), 469 (Murphy J), 479 (Deane J).
64 Eg *Duncan v ICAC* (2015) 256 CLR 83, [19]-[26].
65 *Metwally*, 473 (Brennan J).
66 *Metwally*, 473 (Brennan J), see also 456 (Gibbs CJ), 477 (Deane J); *Butler v Attorney -General (Vic)* (1961) 106 CLR 268, 283 (Taylor J).
67 Revised Explanatory Memorandum, Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018 (Cth), 51 [224].

may be taken into account in construing the section, noting ss 13 and 15AD(b) of the *Acts Interpretation Act 1901*. But that section cannot be taken to trump s 15A of the same Act, pursuant to which "[e]very Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth".

45. Alternatively, s 302CA(3)(b)(ii) could be severed without violence to the section. It is somewhat fanciful to suggest that the federal Parliament would be taken to have intended validity of the whole section to depend upon one permutation by which that Parliament allowed the continued application of State/Territory law: cf DS [93]. The defendant's attempted distinction of subsections (4)-(6) in this regard is unpersuasive.

10 46. Thirdly, and in the further alternative, the authority of *Metwally* is open to challenge (Vic [85]-[91]). The plaintiff understands that the Commonwealth intends to develop that point in reply, and assuming that to be so, he relies on those submissions.

Parts 3 and 5 are inoperative under s 109

47. The defendant does not seem to dispute that if s 302CA is valid, then Parts 3 and 5 are invalid pursuant to s 109.

48. The plaintiff maintains that there is inconsistency and s 109 invalidity even if s 302CA is invalid. Contrary to the DS [115], even without s 302CA, the whole scheme of the CE Act supports an interpretation that it constitutes a complete statement of the laws relating to donations for federal election purposes.[68]

20 49. The defendant refers to Dixon J's comments in *Grain Elevators Board (Vic) v Dunmunkle Corporation*[69] at DS [115] to support their assertion that the enactment of s 302CA confirms an assumption by the Commonwealth Parliament that the CE Act contains no "implicit negative stipulation". This case can be distinguished because it relates to the interpretation of the *Grain Elevators Act 1942* (Vic) in light of an express provision inserted into another act, the *Income Tax Act 1928* (Vic), after the original cause of action arose. Dixon J declined to give the prior legislation a *wider* interpretation than the later express provision allowed for and his comments do not assist the defendant.[70]

---

68 PS, 18 [63] - [65].

69 (1946) 73 CLR 70, 86.

70 *Grain Elevators Board (Vic) v Dunmunkle Corporation* (1946) 73 CLR 70, 86 (Dixon J).

1 March 2019

J K Kirk SC
T: 02 9223 9477
kirk@elevenwentworth.com

P A Hastie QC
T: 07 3229 6737
phastie@qldbar.asn.au

M Forrest
T: 07 3333 9940
mforrest@qldbar.asn.au