HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

GARY DOUGLAS SPENCE PLAINTIFF

AND

STATE OF QUEENSLAND DEFENDANT

Spence v Queensland
[2019] HCA 15
Date of Order: 17 April 2019
Date of Publication of Reasons: 15 May 2019
B35/2018

ORDER

The questions raised by the special case and the answers that must be given to them are as follows:

a) *Are the amendments made to the* Electoral Act 1992 *(Qld) by part 3 of the* Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018 *(Qld) invalid (in whole or in part and, if in part, to what extent) because they impermissibly burden the implied freedom of political communication on governmental and political matters, contrary to the Commonwealth* Constitution*?*

Answer: No.

b) *Are the amendments made to the* Electoral Act 1992 *(Qld) by part 3 of the* Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018 *(Qld) invalid (in whole or in part and, if in part, to what extent) because they are beyond the power of the Parliament of Queensland to enact on the basis of an implied doctrine of intergovernmental immunities or on the basis that they impermissibly intrude into an area of exclusive Commonwealth legislative power?*

Answer: No.

c) *Are the amendments made to the* Local Government Electoral Act 2011 *(Qld) by part 5 of the* Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018 *(Qld) invalid (in whole or in part and, if in part, to what extent) because they are beyond the power of the Parliament of Queensland to enact on the basis of an implied doctrine of intergovernmental immunities or on the basis that they impermissibly intrude into an area of exclusive Commonwealth legislative power?*

Answer: No.

d) *Is section 302CA of the* Commonwealth Electoral Act 1918 *(Cth) invalid (in whole or in part and, if in part, to what extent) because it is beyond the Commonwealth's legislative power?*

Answer: The section is wholly invalid.

e) *Is section 302CA of the* Commonwealth Electoral Act 1918 *(Cth) invalid (in whole or in part and, if in part, to what extent) because it purports to operate in a manner that is contrary to the principle derived from* Melbourne Corporation v Commonwealth *(1947) 74 CLR 31?*

Answer: Does not arise.

f) *Is section 302CA of the* Commonwealth Electoral Act 1918 *(Cth) invalid (in whole or in part and, if in part, to what extent) because it purports to operate in a manner that is contrary to the principle derived from* University of Wollongong v Metwally *(1984) 158 CLR 447, namely that a Commonwealth law cannot override the operation of section 109 of the* Constitution*?*

Answer: Unnecessary to decide.

g) *Are the amendments made to the* Electoral Act 1992 *(Qld) by part 3 of the* Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018 *(Qld) invalid (in whole or in part and, if in part, to what extent) pursuant to section 109 of the Commonwealth* Constitution *by reason of their being inconsistent with the* Commonwealth Electoral Act 1918 *(Cth)?*

Answer: No.

h) *Are the amendments made to the* Local Government Electoral Act 2011 *(Qld) by part 5 of the* Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018 *(Qld) invalid (in whole or in part and, if in part, to what extent) pursuant to section 109 of the Commonwealth* Constitution *by reason of their being inconsistent with the* Commonwealth Electoral Act 1918 *(Cth)?*

Answer: No.

i) *Who should pay the costs of the special case?*

Answer: The plaintiff.

Representation

J K Kirk SC and P A Hastie QC with M J Forrest for the plaintiff (instructed by ClarkeKann Lawyers)

P J Dunning QC, Solicitor-General of the State of Queensland, with S J Keim SC, G J D del Villar and F J Nagorcka for the defendant (instructed by Crown Solicitor (Qld))

S P Donaghue QC, Solicitor-General of the Commonwealth, and P D Herzfeld with C J Tran for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales, with E S Jones for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor's Office (NSW))

P J F Garrisson SC, Solicitor-General for the Australian Capital Territory, with H Younan for the Attorney-General for the Australian Capital Territory, intervening (instructed by ACT Government Solicitor)

M E O'Farrell SC, Solicitor-General for the State of Tasmania, with J L Rudolf for the Attorney-General for the State of Tasmania, intervening (instructed by Solicitor-General for the State of Tasmania)

C D Bleby SC, Solicitor-General for the State of South Australia, with K M Scott for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

K L Walker QC, Solicitor-General for the State of Victoria, with M A Hosking for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

J A Thomson SC, Solicitor-General for the State of Western Australia, with J M Misso for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor's Office (WA))

CATCHWORDS

Spence v Queensland

Constitutional law (Cth) – Powers of Commonwealth Parliament – Federal elections – Severance – Where s 51(xxxvi) in application to ss 10 and 31 of *Constitution* conferred legislative power on Commonwealth Parliament with respect to federal elections – Where Commonwealth Parliament enacted s 302CA within Div 3A of Pt XX of *Commonwealth Electoral Act 1918* (Cth) – Where s 302CA relevantly conferred authority on person to make, and on "political entity" to receive and retain, gift not prohibited by Div 3A provided that gift or part of it was "required to be, or may be" used for certain purposes relating to federal elections – Where s 302CA provided for displacement of such authority in circumstances including where State or Territory electoral law required gift or part of it to be kept or identified separately to be used only for purpose of State, Territory or local government election – Whether Commonwealth legislative power with respect to federal elections exclusive or concurrent – Whether s 302CA within scope of Commonwealth legislative power with respect to federal elections – Whether possible to sever s 302CA to preserve part of its operation within scope of Commonwealth legislative power.

Constitutional law (Cth) – Inconsistency between Commonwealth and State laws – Gifts to political parties – Where Queensland Parliament passed amendments to *Electoral Act 1992* (Qld) and *Local Government Electoral Act 2011* (Qld) prohibiting property developers from making gifts to political parties that endorse and promote candidates for election to Legislative Assembly and local government councils – Whether Queensland amendments inconsistent with s 302CA or framework of Pt XX of *Commonwealth Electoral Act* – Whether s 302CA invalid for infringing principle in *University of Wollongong v Metwally* (1984) 158 CLR 447; [1984] HCA 74.

Constitutional law (Cth) – Implied freedom of communication about governmental and political matters – Where amendments to *Electoral Act 1992* (Qld) substantially replicated provisions in *Election Funding, Expenditure and Disclosures Act 1981* (NSW) upheld in *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34 – Whether amendments invalid for infringing implied freedom.

Constitutional law (Cth) – Relationship between Commonwealth and States – Doctrine of inter-governmental immunities – Whether implication expounded in *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31; [1947] HCA 26 operates reciprocally to protect States and Commonwealth from impermissible interference by law of one polity with operations of government in another – Whether s 302CA invalid for contravening *Melbourne Corporation*

principle – Whether Queensland amendments invalid for contravening *Melbourne Corporation* principle.

Words and phrases – "bare attempt to limit or exclude State power", "concurrent power", "electoral expenditure", "electoral matter", "exclusive power", "federal elections", "federalism", "immunity from State laws", "incidental", "inconsistency", "inter-governmental immunities", "political entity", "political party", "required to be, or may be, used for the purposes of incurring electoral expenditure, or creating or communicating electoral matter", "severance", "State elections", "structural implication", "sufficient connection".

Constitution, ss 7, 9, 10, 29, 31, 51(xxxvi), (xxxix), 109.
Acts Interpretation Act 1901 (Cth), ss 13, 15A, 15AD.
Commonwealth Electoral Act 1918 (Cth), ss 4AA, 302CA, Pt XX.
Election Funding, Expenditure and Disclosures Act 1981 (NSW), Pt 6, Div 4A.
Electoral Act 1992 (Qld), Pt 11, Div 8, Subdiv 4.
Local Government Electoral Act 2011 (Qld), Pt 6, Div 1A.
Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018 (Qld), Pts 3, 5.

1 KIEFEL CJ, BELL, GAGELER AND KEANE JJ. This special case in a proceeding in the original jurisdiction of the High Court raises questions concerning the constitutional validity and operability of State and Commonwealth electoral laws each purporting to apply to the making of gifts to political parties.

2 The impugned State and Commonwealth electoral laws are framed against the background that political parties in Australia are typically unincorporated associations organised geographically by State and Territory. The objects of a political party typically include to endorse and promote candidates for election to the Commonwealth Parliament as well as to endorse and promote candidates for election to State Parliaments and Territory legislatures and to local government councils. Because registration of a political party brings benefits, which range from identification of a candidate's party endorsement on ballot papers to having access to public funding for expenditure on elections, political parties endorsing and promoting candidates for election to the Commonwealth Parliament typically choose to be registered under Pt XI of the *Commonwealth Electoral Act 1918* (Cth) ("the Commonwealth Electoral Act"), and those same political parties or State or Territory branches or divisions of them endorsing and promoting candidates for election to State Parliaments and Territory legislatures and to local government councils typically choose also to be registered under corresponding provisions of State and Territory electoral laws.

3 The impugned State electoral laws were introduced by the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018* (Qld) ("the Queensland Amending Act"). They are provisions of the *Electoral Act 1992* (Qld) ("the Queensland Electoral Act") and of the *Local Government Electoral Act 2011* (Qld) ("the Queensland Local Government Electoral Act") framed to prohibit property developers from making gifts to political parties which endorse and promote candidates for election to the Legislative Assembly of Queensland and to local government councils in Queensland.

4 The impugned Commonwealth electoral law is s 302CA of the Commonwealth Electoral Act, which was inserted after the Queensland Amending Act by the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth) ("the Commonwealth Amending Act"). The section is framed to permit a person to make a gift to a political party registered under the Commonwealth Electoral Act, and to permit that political party to receive and retain that gift, despite any State or Territory electoral law, if the gift, or a part of the gift, is required to be used or might be used to incur expenditure for the dominant purpose of influencing voting in an election to the House of Representatives or to the Senate. The section, if valid, would render the

impugned State electoral laws inoperative by force of s 109 of the *Constitution* in their application to a property developer making a gift other than for the purpose of use in a State or local government election to a political party that endorses and promotes candidates for election to the Legislative Assembly of Queensland or to a local government council in Queensland and that is also registered under the Commonwealth Electoral Act.

5 The questions raised by the special case, and the answers to those questions, are set out at the conclusion of these reasons. The gist of those answers is as follows. The impugned Commonwealth electoral law extends beyond the reach of Commonwealth legislative power to the extent that it purports to immunise from State law the making of a gift which merely might be used to incur expenditure for the dominant purpose of influencing voting in a federal election. It is incapable of severance, and it is on that basis wholly invalid. The impugned State electoral laws are not invalid or inoperative on any of the various bases identified in the questions raised in the special case. The impugned State electoral laws, in short, stand valid and operative.

6 Those answers are arrived at through a process of constitutional analysis which is now to be explained. In the same way as has been seen to be important in other cases[1], it is important to emphasise that this process of constitutional analysis is the outworking of the conception of federalism that has prevailed since *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers' Case*")[2]. The *Engineers' Case* "exploded and unambiguously rejected"[3] the doctrines of "reserved powers" and of "implied prohibitions" which had been dominant in the first two decades of our constitutional history. The conception of federalism that has prevailed throughout the century since the *Engineers' Case*, to use the language of its exposition by Dixon J in *Melbourne Corporation v The Commonwealth* ("the *Melbourne Corporation Case*")[4], is essentially that of "a central government and a number of State governments separately organized" in which "power itself" forms no part of "the conception of a government" and in which the distribution and inter-relation of legislative

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1 eg, *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 118-120 [190]-[194]; [2006] HCA 52.

2 (1920) 28 CLR 129; [1920] HCA 54.

3 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 485; [1971] HCA 40.

4 (1947) 74 CLR 31 at 82; [1947] HCA 26.

power is effected chiefly through the operation of ss 51, 52, 107, 108 and 109 of the *Constitution*.

The proceeding and the special case

7 The plaintiff was formerly the president of the Liberal National Party of Queensland, an unincorporated association registered as a political party under both the Queensland Electoral Act and the Commonwealth Electoral Act. Members of the Liberal National Party currently sit as members of the House of Representatives, as senators, as members of the Legislative Assembly of Queensland and as councillors of the Brisbane City Council.

8 The plaintiff commenced the proceeding against the State of Queensland by writ and statement of claim filed after the enactment but before the commencement of the relevant parts of the Queensland Amending Act. By his statement of claim, as it came to be amended following the commencement of the relevant parts of the Queensland Amending Act, the plaintiff sought declarations to the effect that the amendments introduced into the Queensland Electoral Act were invalid as infringing the implied freedom of political communication, and that the amendments introduced into both the Queensland Electoral Act and the Queensland Local Government Electoral Act were invalid as purporting to exercise power exclusively vested by the *Constitution* in the Commonwealth Parliament or infringing the doctrine of inter-governmental immunities or, in the alternative, were inoperative as inconsistent with certain provisions of the Commonwealth Electoral Act as it then stood.

9 The subsequent enactment of the Commonwealth Amending Act added a new dimension to the proceeding. The plaintiff further amended his statement of claim to expand his challenge to the amendments introduced into the Queensland Electoral Act and the Queensland Local Government Electoral Act to claim that they were also inoperative by reason of inconsistency with s 302CA of the Commonwealth Electoral Act. Queensland in turn amended its defence to assert the invalidity of that section.

10 The Attorney-General of the Commonwealth, although formally no more than an intervener in the proceeding under s 78A of the *Judiciary Act 1903* (Cth), became in those altered circumstances a principal protagonist. The Commonwealth supported the validity of s 302CA of the Commonwealth Electoral Act. The Commonwealth chose also to support some aspects of the plaintiff's independent challenge to the validity of the amendments introduced by the Queensland Amending Act. The Attorneys-General of each of the other States and for the Australian Capital Territory also intervened. Each provided a

measure of support for the position taken by Queensland. Some advanced important arguments beyond those advanced by Queensland.

11 The special case came to be agreed between the plaintiff and Queensland with the active participation of the Commonwealth. The numerous questions raised in the special case were no doubt formulated to accommodate the plenitude of the arguments sought to be put by them and by the State and Territory interveners.

12 "[P]re-*Engineers* ghosts"[5] whispered to both sides of the dispute, confusing its resolution with competing arguments of exclusive Commonwealth and State legislative powers and with exaggerated claims to the protection of the doctrine of inter-governmental immunities expounded post-*Engineers* in the *Melbourne Corporation Case*.

13 To attempt to catalogue all of the arguments advanced on behalf of the parties and the interveners at the outset would be unrewarding. More productive is to concentrate on the principal arguments of the Commonwealth and of the plaintiff concerning the reach of and relationship between Commonwealth and State legislative powers in relation to federal and State elections. Resolution of those arguments, as will be seen, has the consequence that a number of other arguments do not need to be addressed and that some of the questions raised in the special case do not need to be answered.

14 The structure of analysis adopted in these reasons is therefore to address in sequence arguments advanced by the Commonwealth and the plaintiff concerning the exclusivity of Commonwealth legislative power, the scope of Commonwealth legislative power, and the severability of s 302CA of the Commonwealth Electoral Act to the extent that the section travels beyond the scope of Commonwealth legislative power. Those arguments having been dealt with, most of the defensive arguments advanced by Queensland and the State interveners fall away. Remaining arguments advanced by the plaintiff alone as to the validity and operability of the amendments introduced by the Queensland Amending Act, on the basis of the implied freedom of political communication and the doctrine of inter-governmental immunities, are able to be addressed discretely and with relative brevity.

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5 *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 530; [1976] HCA 66.

15 To provide context for the requisite analysis, it is useful to recount a little more of the legislative history of the Queensland Amending Act and of the Commonwealth Amending Act. It is appropriate to give some further explanation of the provisions introduced into the Queensland Electoral Act and the Queensland Local Government Electoral Act by the Queensland Amending Act. And it is imperative to examine with precision the legal and practical operation of s 302CA of the Commonwealth Electoral Act.

The Queensland Amending Act

16 The Queensland Amending Act was enacted on 21 May 2018. Parts 3 and 5 of the Queensland Amending Act commenced on 2 October 2018[6]. Part 3 inserted Subdiv 4 into Div 8 of Pt 11 of the Queensland Electoral Act. Part 5 inserted Div 1A into Pt 6 of the Queensland Local Government Electoral Act.

17 The Queensland Electoral Act, as its name implies, makes provision in relation to elections to the Legislative Assembly of Queensland, including in Pt 6 in relation to the voluntary registration of political parties. Within the meaning of the Queensland Electoral Act, a "political party" is "an organisation whose object, or [one] of whose objects, is the promotion of the election to the Legislative Assembly of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part"[7].

18 Subdivision 4 of Div 8 of Pt 11 of the Queensland Electoral Act substantially replicates Div 4A of Pt 6 of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ("the New South Wales Electoral Act"), the operation of which was considered in *McCloy v New South Wales* ("*McCloy*")[8] in the context of rejecting an argument that it infringed the implied freedom of political communication. The other challenges to constitutional validity advanced in the present case were not advanced at all in *McCloy*.

19 The centrally relevant operation of Subdiv 4 is to prohibit the making and receipt of a gift by a "property developer" to or for the benefit of a political party[9]. The subdivision similarly prohibits the making and receipt of such a gift

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6 Section 2 of the Queensland Amending Act; Queensland, *Proclamation*, SL 2018 No 150, 20 September 2018.

7 Section 2 of the Queensland Electoral Act (definition of "political party").

8 (2015) 257 CLR 178; [2015] HCA 34.

9 See ss 273(1)-(2), 274(1)(a)(i) and 275(1), (3) of the Queensland Electoral Act.

to or for the benefit of an elected member of the Legislative Assembly or to or for the benefit of a candidate in an election to the Legislative Assembly[10]. As in the legislation considered in *McCloy*, the expression "property developer" is defined to mean a corporation engaged in a business that regularly involves making statutory applications for planning approval in connection with residential or commercial development of land with the ultimate purpose of sale or lease of the land for profit, and to extend to a close associate of such a corporation[11].

20 The Queensland Local Government Electoral Act, as its name implies, makes provision in relation to the election of Queensland local government councillors. A "political party" within the meaning of the Queensland Local Government Electoral Act is "an organisation or group whose object or activity, or [one] of whose objects or activities, is the promotion of the election of a candidate or candidates endorsed by it, or by a body or organisation of which it forms a part, to an office of councillor of a local government"[12].

21 Division 1A of Pt 6 of the Queensland Local Government Electoral Act follows the same pattern as Subdiv 4 of Div 8 of Pt 11 of the Queensland Electoral Act and adopts an identical definition of "property developer"[13]. The centrally relevant operation of the Division is to prohibit the making and receipt of a gift by a property developer to or for the benefit of a political party[14]. The Division likewise prohibits the making and receipt of such a gift to or for the

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10 Sections 273(1)-(2), 274(1)(a)(ii)-(iii) and 275(1), (3) read with ss 2 (definition of "election") and 197 (definition of "elected member") of the Queensland Electoral Act.

11 Section 273(2) read with sub-s (5) (definition of "relevant planning application") of the Queensland Electoral Act; s 96GB(1) read with sub-s (3) (definition of "relevant planning application") of the New South Wales Electoral Act.

12 Schedule to the Queensland Local Government Electoral Act (definition of "political party").

13 Section 113(2) of the Queensland Local Government Electoral Act.

14 Sections 113(1)-(2), 113A(1)(a)(i) and 113B(1), (3) of the Queensland Local Government Electoral Act.

benefit of a councillor of a local government or to or for the benefit of a candidate or group of candidates in a local government election[15].

The Commonwealth Amending Act

22 The Commonwealth Amending Act was enacted on 30 November 2018. It introduced amendments to the election funding and financial disclosure regime set out in Pt XX of the Commonwealth Electoral Act, most of which commenced on 1 January 2019[16].

23 The election funding and financial disclosure regime set out in Pt XX of the Commonwealth Electoral Act is framed against the background of the provision made in Pt XI of that Act for the voluntary registration of political parties, the operation and validity of which were considered in *Mulholland v Australian Electoral Commission*[17]. Within the meaning of the Act, a "political party" is "an organization the object or activity, or one of the objects or activities, of which is the promotion of the election to the Senate or to the House of Representatives of a candidate or candidates endorsed by it"[18] and a "registered political party" is a party that is registered under Pt XI[19]. Together with a candidate for election to the Senate or to the House of Representatives and with a member of a group of candidates for election to the Senate, a registered political party in the terminology of the Act is a "political entity", as is any branch or division of the registered political party that is organised on the basis of a particular State or Territory[20].

24 Divisions 4, 5 and 5A of Pt XX of the Commonwealth Electoral Act combine to set out a financial disclosure regime applicable to all political entities

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15 Sections 113(1)-(2), 113A(1)(a)(ii)-(iii) and 113B(1), (3) of the Queensland Local Government Electoral Act read with the Schedule (definition of "election").

16 Section 2(1) of the Commonwealth Amending Act.

17 (2004) 220 CLR 181; [2004] HCA 41.

18 Section 4(1) of the Commonwealth Electoral Act (definition of "political party").

19 Section 4(1) of the Commonwealth Electoral Act (definition of "registered political party").

20 Section 4(1) (definition of "political entity") read with s 287(1) (definitions of "election", "group" and "State branch") of the Commonwealth Electoral Act.

as well as to "political campaigners"[21], "third parties"[22] and "associated entities"[23]. In broad terms, the regime operates to compel each of them to furnish periodic returns to the Australian Electoral Commission in which they disclose gifts received by them and "electoral expenditure" made by them. In the case of registered political parties, as in the case of political campaigners and associated entities, the returns are required to be furnished annually and are to set out amounts received or paid during the year and outstanding debts incurred[24].

25 "Electoral expenditure" within the meaning of Pt XX, subject to immaterial exceptions, is "expenditure incurred for the dominant purpose of creating or communicating electoral matter"[25]. "Electoral matter" is defined for the purposes of the Act, subject again to immaterial exceptions, to mean "matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election ... of a member of the House of Representatives or of Senators for a State or Territory"[26].

26 Division 3A of Pt XX was inserted by the Commonwealth Amending Act. The Division operates to prohibit a political entity or political campaigner from receiving a gift of at least $1,000 from a "foreign donor"[27] (such as a body which is not incorporated in Australia and which does not have its principal place of activity or head office in Australia[28]), and to prohibit a third party from receiving from a foreign donor a gift that is of a threshold amount and that is used for the purpose of incurring electoral expenditure or for the dominant purpose of

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21 See s 287(1) of the Commonwealth Electoral Act (definition of "political campaigner").

22 See s 287(1) of the Commonwealth Electoral Act (definition of "third party").

23 See s 287(1) of the Commonwealth Electoral Act (definition of "associated entity").

24 Sections 314AB and 314AEA of the Commonwealth Electoral Act.

25 Section 287AB(1) of the Commonwealth Electoral Act.

26 Section 4AA(1) of the Commonwealth Electoral Act.

27 Section 302D of the Commonwealth Electoral Act.

28 Section 287AA(e) of the Commonwealth Electoral Act.

creating or communicating electoral matter[29]. The Division also operates to prohibit a political entity, political campaigner or third party from knowingly receiving a gift of at least $100 from a foreign donor where either the recipient or the donor intends the gift to be used for the purposes of incurring electoral expenditure or for the dominant purpose of creating or communicating electoral matter[30]. The expressed object of the Division is "to secure and promote the actual and perceived integrity of the Australian electoral process by reducing the risk of foreign persons and entities exerting (or being perceived to exert) undue or improper influence in the outcomes of elections"[31].

27 Section 302CA is located within Div 3A of Pt XX, although that placement of the section cannot be treated as indicating that the section shares the object of the Division. The section was not included within the Bill for the Commonwealth Amending Act in the form in which it was originally introduced into the Senate[32]. An early version of s 302CA was contained in an exposure draft of proposed government amendments which the Minister for Finance and the Public Service provided to the Joint Standing Committee on Electoral Matters, to which the Bill had been referred for consideration[33]. The exposure draft of the amendments was accompanied by an exposure draft of a Supplementary Explanatory Memorandum which explained that the section "clarifies the interaction between similar State and Territory and Commonwealth electoral funding schemes" and "ensures that provisions of State and Territory laws that relate to political donations cannot restrict the making or receipt of donations that could be used for Commonwealth electoral purposes"[34]. The version of the section contained in the exposure draft was amended to take its final form following governmental acceptance of a recommendation of a majority

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29 Section 302E read with s 287(1) (definition of "disclosure threshold") of the Commonwealth Electoral Act.

30 Section 302F(1) of the Commonwealth Electoral Act.

31 Section 302C(1) of the Commonwealth Electoral Act.

32 See *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* (Cth).

33 Exposure Draft GJ160, *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* (Cth), Amendment (114).

34 Australia, Senate, *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*, Supplementary Explanatory Memorandum Exposure Draft at 35 [121].

of the Joint Standing Committee that it be "amended to ensure that Commonwealth laws would not apply to money that is directed towards non-federal campaigns (including state, territory and local government campaigns)"[35].

28 The section in its final form was inserted into the Bill on 15 November 2018 as part of a suite of government amendments in the Senate[36]. The Bill as so amended was subsequently passed by the House of Representatives. The explanation given in a Supplementary Explanatory Memorandum circulated in the Senate[37] and in a Revised Explanatory Memorandum in the House of Representatives[38] was that the section "clarifies the interaction between similar State and Territory and Commonwealth electoral funding schemes" and "ensures that provisions of State and Territory laws that relate to political donations cannot ... restrict the use of a gift for Commonwealth electoral purposes ... or ... restrict the giving, receiving or retaining of donations that could be used for Commonwealth electoral purposes, unless the donation is directed to a purpose relating to a State, Territory or local government election".

29 Section 302CA, including its subheadings and its internal note and example, is best set out in full. Under the heading "Relationship with State and Territory electoral laws", the section provides:

> "*Giving, receiving or retaining gifts*
>
> (1) Despite any State or Territory electoral law, a person or entity may:
>
> (a) give a gift to, or for the benefit of, a political entity, a political campaigner or a third party (a ***gift recipient***); or

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35 Joint Standing Committee on Electoral Matters, *Second advisory report on the Electoral Legislation (Electoral Funding and Disclosure Reform) Bill 2017* (2018) at 49 [4.36] (Recommendation 10).

36 Australia, Senate, *Parliamentary Debates* (Hansard), 15 November 2018 at 8372, 8388-8390.

37 Australia, Senate, *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*, Supplementary Explanatory Memorandum at 40 [132]-[133].

38 Australia, House of Representatives, *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018*, Revised Explanatory Memorandum at 51 [224]-[225].

(b) if the person or entity is a gift recipient – receive or retain a gift; or

(c) on behalf of a gift recipient, receive or retain a gift;

if:

(d) this Division does not prohibit the giving, receiving or retaining of the gift; and

(e) the gift, or part of the gift, is required to be, or may be, used for the purposes of incurring electoral expenditure, or creating or communicating electoral matter, in accordance with subsection (2).

(2) A gift, or part of a gift, is required to be, or may be, used for a purpose of incurring electoral expenditure, or creating or communicating electoral matter, if:

(a) any terms set by the person or entity providing the gift explicitly require or allow the gift or part to be used for that purpose (whether or not those terms are enforceable); or

(b) the person or entity providing the gift does not set terms relating to the purpose for which the gift or part can be used.

Gifts made or retained for State or Territory electoral purposes

(3) Without limiting when subsection (1) does not apply, that subsection does not apply in relation to all or part of a gift if:

(a) any terms set by the person or entity providing the gift explicitly require the gift or part to be used only for a State or Territory electoral purpose (whether or not those terms are enforceable); or

(b) either:

(i) the effect of a State or Territory electoral law is to require the gift or part to be kept or identified separately (or to require the gift or part to be kept or identified separately in order to be entitled to a benefit under that law); or

(ii) the gift recipient keeps or identifies the gift or part separately;

in order to be used only for a State or Territory electoral purpose.

Note: For the purposes of subparagraph (3)(b)(ii), a gift recipient may identify the electoral purpose for which a gift is to be used at any time prior to using that gift. A person who gives, receives or retains a gift that is used for a State or Territory electoral purpose in contravention of a State or Territory electoral law may be liable to a penalty under the State or Territory electoral law.

Example: A gift is given without expressing an intended purpose, and ultimately is used for a State or Territory electoral purpose. The giving, receipt, retention and use of that gift must comply with the State or Territory electoral law.

Using gifts

(4) Despite any State or Territory electoral law, a gift recipient may use, or authorise the use of, a gift for the purposes of incurring electoral expenditure, or creating or communicating electoral matter, if this Division does not prohibit the use of the gift.

(5) Without limiting when subsection (4) does not apply, that subsection does not apply in relation to all or part of a gift if the effect of the State or Territory electoral law is to require the gift or part to be kept or identified separately (or to require the gift or part to be kept or identified separately in order to be entitled to a benefit under that law) in order to be used only for a State or Territory electoral purpose.

When gifts are kept or identified separately

(6) Without limiting paragraph (3)(b) or subsection (5), an amount that is all or part of a gift of money is kept or identified separately in order to be used only for a State or Territory electoral purpose if:

(a) the amount is kept in an account where:

(i) the only amounts deposited into the account are amounts to be used only for a State or Territory electoral purpose; and

(ii) the only amounts paid out of the account are amounts incurred for a State or Territory electoral purpose; or

(b) the amount is designated as an amount that must be used only for a State or Territory electoral purpose."

30 The expression "State or Territory electoral law", used in sub-ss (1), (3), (4) and (5), is defined for the purposes of Pt XX of the Commonwealth Electoral Act to mean "a law of a State or Territory that deals with electoral matters (within the ordinary meaning of the expression)"[39]. The expression "State or Territory electoral purpose", used in sub-ss (3), (5) and (6), is defined to mean "a purpose relating to a State, Territory or local government election (and, to avoid doubt, does not include the purpose of incurring electoral expenditure or creating or communicating electoral matter)"[40].

31 The construction and putative operation of s 302CA are for the most part uncontroversial. Sub-section (1) constitutes a positive conferral of authority on a person to make, and relevantly on a political entity to receive and retain, a gift that is not prohibited by Div 3A provided only that "the gift, or part of the gift, is required to be, or may be, used for the purposes of incurring electoral expenditure, or creating or communicating electoral matter". Sub-section (2) makes clear that a gift will attract that positive conferral of authority unless the person making the gift does so on terms which indicate an intention on the part of the donor that the gift or part of it is to be used for a purpose other than that of incurring electoral expenditure or creating or communicating matter intended to be communicated for the dominant purpose of influencing the way voters vote at a federal election. There can be no doubt that the positive authority conferred by sub-s (1) as amplified by sub-s (2) would, if valid, operate by force of s 109 of the *Constitution* to render a State electoral law inoperative to the extent that the State electoral law would impair or detract from the amplitude of the authority[41].

32 Section 302CA(3) operates to displace the authority conferred by sub-s (1) in three circumstances. The first, referred to in para (a), is where terms set by the

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39 Section 287(1) of the Commonwealth Electoral Act (definition of "State or Territory electoral law").

40 Section 287(1) of the Commonwealth Electoral Act (definition of "State or Territory electoral purpose").

41 *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453 at 464; [1992] HCA 52.

donor of the gift explicitly require the gift or part of it to be used only for a State or Territory electoral purpose. The second, referred to in para (b)(i), is where a State or Territory electoral law requires the gift or part of it to be kept or identified separately in order to be used only for a purpose relating to a State, Territory or local government election. The third, referred to in para (b)(ii), gives rise to the only real issue of construction in the proceeding.

33 Section 302CA(3)(b)(ii), in providing that sub-s (1) does not apply if the recipient of the gift keeps or identifies the gift or part of it separately in order to be used only for a State or Territory electoral purpose, is most naturally read as displacing the authority conferred by sub-s (1) prospectively so as to remove the authority to retain a gift only at and from the time that the recipient chooses to keep or identify the gift or part of the gift separately in order to be used only for a purpose relating to a State, Territory or local government election. However, the note and the example, each of which is to be treated as a part of the Commonwealth Electoral Act as amended[42], indicate that the sub-paragraph must be read as also displacing the authority conferred by sub-s (1) retrospectively so as to remove as well the authority previously conferred by the sub-section to give and receive the gift. An effect of the sub-paragraph is that a person is not authorised to make an unconditional gift to a political entity and the political entity is not authorised to receive the gift if, sometime after the gift is made and received in fact, the entity chooses to keep or identify the gift or part of it separately in order to be used only for a purpose relating to a State, Territory or local government election.

34 That retrospective operation of s 302CA(3)(b)(ii) gives rise to discrete issues explored in argument as to whether the sub-paragraph, if otherwise valid, would infringe the principle accepted in *Western Australia v The Commonwealth (Native Title Act Case)*[43] to have been established by *University of Wollongong v Metwally* ("*Metwally*")[44] that "a law of the Commonwealth cannot retrospectively avoid the operation of s 109 of the Constitution on a State law that was inconsistent with a law of the Commonwealth" and, if so, whether *Metwally* should be reopened and overruled. There is no need to resolve those issues. The retrospective operation of s 302CA(3)(b)(ii), if s 302CA were otherwise valid, can be assumed.

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42 Sections 13(1) and 15AD of the *Acts Interpretation Act 1901* (Cth).

43 (1995) 183 CLR 373 at 454-455; [1995] HCA 47.

44 (1984) 158 CLR 447; [1984] HCA 74.

35 Section 302CA(4) constitutes a further positive conferral of authority relevantly on a political entity actually to use, or authorise use of, a gift received and retained in circumstances where sub-s (1) has applied to the making and receipt of the gift and where sub-s (1) has not been displaced by sub-s (3). Like sub-s (1), sub-s (4) would, if valid, operate by force of s 109 of the *Constitution* to render a State electoral law inoperative to the extent that the State electoral law would impair or detract from the amplitude of the authority.

36 The overall putative operation of the section can be illustrated by postulating the circumstance of a property developer who makes an unconditional gift to a political party that endorses and promotes candidates for election to the Legislative Assembly of Queensland and that is also registered under the Commonwealth Electoral Act. The prohibition in Subdiv 4 of Div 8 of Pt 11 of the Queensland Electoral Act would be inoperative in its application to the making and receipt of the gift unless the political party at the time of the gift or at some time thereafter chose to keep or identify the gift or part of it separately, or a State or Territory electoral law requires the gift or part of it to be kept or identified separately, in order to be used only for a purpose relating to a State, Territory or local government election. Were the political party to choose to use the gift for any other purpose, the prohibition in Subdiv 4 of Div 8 of Pt 11 of the Queensland Electoral Act would remain inoperative as inconsistent with the authority conferred by s 302CA(1). The political party would be free to use the gift to fund expenditure for the purpose of creating or communicating matter aimed predominantly at influencing voters in a federal election, in which case the added authority of s 302CA(4) would render inoperable any provision of the Queensland Electoral Act which might otherwise operate to prohibit or impede that expenditure. However, the political party would also be free to use the gift to fund expenditure for any other purpose unrelated to a State, Territory or local government election. The political party might, for example, choose to use the gift to defray overheads, to fund policy development, to reduce existing indebtedness, to hold an annual conference, to finance acquisition of new party premises (otherwise than for a purpose related to a particular election), or to pay for advertising which promotes the party's views on an issue of concern to it but which does not bear on a particular election.

The concurrent nature of Commonwealth legislative power

37 The principal argument advanced by the Commonwealth and the plaintiff does not depend on s 302CA of the Commonwealth Electoral Act, or on the Commonwealth Electoral Act at all. The argument is that the amendments introduced into the Queensland Electoral Act by Pt 3 of the Queensland Amending Act and into the Queensland Local Government Electoral Act by Pt 5

of the Queensland Amending Act are invalid because they trench upon an exclusive power of the Commonwealth Parliament "to regulate federal elections".

38 The Commonwealth and the plaintiff argue that the existence of such an exclusive area of Commonwealth legislative power is the result of a structural implication which arises from the combination of two main considerations. One is the obvious absence of any colonial legislative power over federal elections capable of being carried forward as State legislative power by s 107 of the *Constitution*. The other is a negative implication which they argue is to be drawn from the limited legislative powers expressly conferred on State Parliaments in ss 7, 9 and 29 of the *Constitution* and from ss 10 and 31 of the *Constitution*. The legislative powers conferred on State Parliaments by ss 7, 9 and 29, they point out, each had an entirely transitional operation with the exception of the specific enduring power conferred on a State Parliament by s 9 to "make laws for determining the times and places of elections of senators for the State". Sections 10 and 31, they also point out, had a self-executing operation which made "the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State" applicable respectively to elections in the State of senators and members of the House of Representatives only until the Commonwealth Parliament otherwise provided. In support of the structural implication for which they contend, the Commonwealth and the plaintiff rely on *Smith v Oldham*[45].

39 Eschewing the test that has been established for determining whether a State law trenches upon an exclusive power expressly conferred on the Commonwealth Parliament by s 52 of the *Constitution* (being whether the Commonwealth Parliament could itself have enacted the State law in the exercise of the exclusive power[46]), the Commonwealth and the plaintiff formulate their own test for determining whether a State law trenches upon what they say is the implied exclusive power of the Commonwealth Parliament to regulate federal elections. Their test involves analogising State legislative power to the express concurrent legislative powers conferred on the Commonwealth Parliament by s 51(xiii) and (xiv) to make laws with respect to "banking, other than State banking" and "insurance, other than State insurance". State Parliaments are, in effect, treated as having power to make laws with respect to "elections, other than

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45 (1912) 15 CLR 355; [1912] HCA 61.

46 See *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89 at 96, 113, 141; [1970] HCA 19; *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 638-640, 673-674; [1996] HCA 58.

federal elections". Under this test, a State law would impermissibly intrude into the forbidden area of exclusive Commonwealth legislative power if it is a law "relating to elections" and if it "touches or concerns"[47] federal elections, and does so more than incidentally.

40 The artificiality of the test so posited and the difficulty of applying it can be highlighted by hypothesising a State law denying access to public schools for use as polling places in a federal election. Applying the posited test, the State law would lie beyond State legislative power if it were a law relating to elections but within State legislative power if it were a law relating to schools. The necessity to engage in just that kind of exercise in characterisation gave rise to the "increasing entanglement and uncertainty" encountered in the application of the doctrine of "reserved powers" in the era before the *Engineers' Case*[48].

41 It is true that *Smith v Oldham* contains statements which provide some support for the notion that the power to regulate federal elections is exclusive to the Commonwealth Parliament[49]. The statements were made, however, in the pre-*Engineers' Case* era in the course of upholding the validity of a Commonwealth law which required articles appearing in newspapers commenting on candidates or political parties during the period of a federal election to be signed by their author[50], in the face of an argument that the subject matter of the law was "within the reserved powers of the States"[51]. To start with the proposition that plenary legislative power is located somewhere in the *Constitution* and then to subtract the supposed scope of State legislative power either to arrive at the scope of Commonwealth legislative power, as did Griffith CJ implicitly[52] and Barton J explicitly[53], or to confirm the scope of

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47 See *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 288-289; [1990] HCA 29; *Attorney-General (Vic) v Andrews* (2007) 230 CLR 369 at 391-392 [11]-[12], 406-407 [78]-[79], 423-428 [138]-[150]; [2007] HCA 9.

48 (1920) 28 CLR 129 at 142.

49 (1912) 15 CLR 355 at 358-361, 365.

50 Section 181AA(1) of the *Commonwealth Electoral Act 1902* (Cth).

51 (1912) 15 CLR 355 at 356.

52 (1912) 15 CLR 355 at 358.

53 (1912) 15 CLR 355 at 361.

Commonwealth legislative power, as did Isaacs J[54], was to adopt a mode of reasoning which did not survive the *Engineers' Case*.

42 *Smith v Oldham* did not raise any question as to the validity of any State law. The conclusion that the Commonwealth law in question in that case was within the reach of Commonwealth legislative power has never been questioned and was undoubtedly correct. At least since the *Engineers' Case*, however, the statements in *Smith v Oldham* about the exclusivity of Commonwealth legislative power cannot be treated as having been necessary to its conclusion.

43 The proposition that a State law relating to elections will intrude into an area of exclusive Commonwealth legislative power merely if it touches or concerns a federal election more than incidentally was in any event contradicted even before the *Engineers' Case* by *R v Brisbane Licensing Court; Ex parte Daniell* ("*Ex parte Daniell*")[55]. There the opinion of the majority was delivered by Isaacs J, who had been party to the decision in *Smith v Oldham* eight years earlier and who would go on four months later to deliver the opinion of the plurality in the *Engineers' Case*.

44 The State law in question in *Ex parte Daniell* provided for the taking of a local poll on the same day as polling for a Senate election[56]. The State law was held invalid, not because it intruded into an area of exclusive Commonwealth legislative power, but because it was inconsistent within the meaning of s 109 of the *Constitution*[57] with a Commonwealth law which provided that on the appointed polling day for an election to the Senate or to the House of Representatives "no referendum or vote of the electors of any State or part of a State shall be taken under the law of a State"[58]. The Commonwealth law was referred to as one that was "incidental to the acknowledged power to legislate as to Commonwealth elections"[59].

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54 (1912) 15 CLR 355 at 365.

55 (1920) 28 CLR 23; [1920] HCA 24.

56 Sections 166 and 172 of the *Liquor Act 1912* (Qld).

57 See (1920) 28 CLR 23 at 29-31.

58 Section 14 of the *Commonwealth Electoral (War-time) Act 1917* (Cth).

59 (1920) 28 CLR 23 at 31.

45 *Smith v Oldham*[60] and *Ex parte Daniell*[61] held, and subsequent cases have confirmed[62], that the power of the Commonwealth Parliament to regulate federal elections is to be found in the express conferral of power in s 51(xxxvi) to make laws with respect to "matters in respect of which [the] Constitution makes provision until the Parliament otherwise provides", the relevant matters being elections of senators and of members of the House of Representatives in each State in respect of which provision is made in ss 10 and 31 of the *Constitution*, as supplemented by the express conferral of power in s 51(xxxix) to make laws with respect to "matters incidental to the execution of any power vested by [the] Constitution in the Parliament". Those conferrals of power are complemented in respect of elections of senators and of members of the House of Representatives in Territories by the express conferral of power in s 122 of the *Constitution* to make laws "for the government of any territory"[63].

46 Given the applicability to the regulation of federal elections of the express conferrals of power in s 51(xxxvi) and (xxxix) of the *Constitution*, the structural implication of exclusive Commonwealth legislative power for which the Commonwealth and the plaintiff contend cannot be drawn from the limited references to State legislative power in ss 7, 9, 10, 29 and 31 of the *Constitution*, and it can be justified neither textually nor structurally. In marked contradistinction to the conferrals of power in s 52 of the *Constitution*, the conferrals of power in s 51 are concurrent with the State legislative power referred to in s 107, any conflict between exercises of Commonwealth and State legislative power being resolved through the operation of s 109 of the *Constitution* and through the doctrine of inter-governmental immunities expounded in the *Melbourne Corporation Case*.

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60 (1912) 15 CLR 355 at 359, 362.

61 (1920) 28 CLR 23 at 31.

62 *Fabre v Ley* (1972) 127 CLR 665 at 669; [1972] HCA 65; *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 57-58; [1975] HCA 53; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 185, 219-220, 225-226, 234; [1992] HCA 45; *Langer v The Commonwealth* (1996) 186 CLR 302 at 315, 317, 339, 348-349; [1996] HCA 43; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 190 [14], 202 [46], 206 [61], 215-216 [83], 231-232 [140], 253-254 [211], 299 [340].

63 *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 233-234, 268-275, 287; [1975] HCA 46.

47 Echoing the words of Griffith CJ in *Smith v Oldham*[64], Dixon J observed in *Nelungaloo Pty Ltd v The Commonwealth*[65] that matters encompassed within s 51(xxxvi), including matters of elections of senators and of members of the House of Representatives, are not matters with which the States could have "any concern" in the sense that, considered as discrete subject matters of legislative power, they were not within the competence of colonial legislatures and so are not within the ambit of the State legislative power that is referred to in s 107 of the *Constitution*. That, however, was at most an observation about State legislative competence. To recognise that there may be limits to the extent of the State legislative power that is referred to in s 107 of the *Constitution* is not to posit the existence of an area of exclusive Commonwealth legislative power into which an exercise of State legislative power cannot intrude. The argument of the Commonwealth and the plaintiff elides that distinction.

48 State legislative power referred to in s 107 of the *Constitution* includes power to regulate State elections, just as colonial legislative power referred to in that section included power to regulate colonial elections. Whatever may be the limits of State legislative power to make laws which regulate State elections, they are not transgressed by a State law regulating State elections in a manner which merely touches and concerns federal elections more than incidentally. In particular, the limits of State legislative power are not infringed by a State electoral law which imposes obligations or prohibitions on participants in a State electoral process where performance of those obligations or observance of those prohibitions might have a practical impact on the ability of those participants also to engage in a federal electoral process.

49 *Ex parte Daniell* illustrates that, if a State law regulating a State electoral process is perceived by the Commonwealth Parliament to have a materially adverse impact on a federal electoral process, the Commonwealth Parliament can protect the federal electoral process by a law enacted within the scope of s 51(xxxvi) or s 51(xxxix) which will be given paramountcy over the State law through the operation of s 109 of the *Constitution*. To what lengths a Commonwealth law can go in affording protection to a federal electoral process is the issue next to be addressed.

50 The amendments introduced by Pts 3 and 5 of the Queensland Amending Act are laws regulating State elections. They may well touch and concern federal

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64 (1912) 15 CLR 355 at 358.

65 (1952) 85 CLR 545 at 564; [1952] HCA 11.

elections more than incidentally. They do not for that reason travel beyond State legislative competence.

The scope of Commonwealth legislative power

51 The fall-back argument of the Commonwealth and the plaintiff is that the amendments introduced by Pts 3 and 5 of the Queensland Amending Act are inoperative by force of s 109 of the *Constitution* to the extent of the application of s 302CA of the Commonwealth Electoral Act.

52 The immediate issue to which the fall-back argument gives rise is whether s 302CA of the Commonwealth Electoral Act is within the scope of Commonwealth legislative power. Although not relied upon by Queensland (which chose to confine itself to arguments that the section infringes the doctrine of inter-governmental immunities expounded in the *Melbourne Corporation Case* or intrudes into what Queensland argued to be an area of exclusive State legislative power over State elections), the issue was squarely raised by some of the State interveners.

53 In considering whether s 302CA of the Commonwealth Electoral Act is within the scope of Commonwealth legislative power, there is no occasion to distinguish between the legislative powers conferred by s 51(xxxvi) and (xxxix) of the *Constitution*. No doubt, s 51(xxxvi), along with other conferrals of legislative power in s 51 of the *Constitution*, "carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter"[66]. Neither the Commonwealth nor the plaintiff argue that s 302CA could be independently supported by s 51(xxxix) to the extent that it could not be supported by s 51(xxxvi) of the *Constitution*. The issue can therefore be addressed by asking whether the section is within the scope of the power conferred by s 51(xxxvi) of the *Constitution*. Section 51(xxxix) of the *Constitution* does not arise for separate consideration.

54 That the power conferred by s 51(xxxvi) of the *Constitution* is capable of being deployed for a protective purpose is similarly not in doubt. As Isaacs J explained in *Smith v Oldham*[67], the power is not confined to parliamentary

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66 *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77; [1955] HCA 6.

67 (1912) 15 CLR 355 at 362.

supervision of the "mechanical process of election"; it is a "plenary power" the limits of which "end only with the subject matter in respect of which it may be exercised"[68]. In exercising it, as Isaacs J went on to explain on behalf of the majority in *Ex parte Daniell*[69], "[t]he Commonwealth Parliament clearly has power to secure, so far as legislation can secure, the fullest opportunity it thinks desirable to the people of the Commonwealth to elect their Parliamentary representatives unconfused by any other public duties required of them as citizens of a particular State". "[T]o say more on that subject", he added, "would be pedantic"[70].

55 Little analysis is accordingly required to hold that s 302CA is within the scope of the power conferred by s 51(xxxvi) of the *Constitution* to the extent that sub-s (1) operates to protect from any impediment arising from the operation of a State electoral law the giving, receipt and retention of a gift earmarked from the outset to be used in creating or communicating matter intended to be communicated for the dominant purpose of influencing voting at a federal election, and to the extent that sub-s (4) operates to provide similar protection in respect of the gift's subsequent use. A sufficient nexus with the power is plainly to be found in the receipt, retention and use of a gift that are the objects of the section's positive grant of authority, being by a participant in a federal electoral process for a purpose relating to a federal election. To the extent that the section so operates, its exclusion of State electoral law can be seen to give effect to a constitutionally permissible judgment on the part of the Commonwealth Parliament that the disclosure regime set out in Pt XX of the Commonwealth Electoral Act is sufficient regulation of the receipt, retention and use of the gift and should be exhaustive of the obligations of the participant relating to that receipt, retention and use.

56 Where difficulty lies is with the breadth of the operation of s 302CA(1) insofar as it extends to protect from the operation of a State electoral law the giving, receipt and retention of a gift in circumstances where, to adopt the description used in argument by the Solicitor-General for Tasmania, the "gift (or part of it) may (or may not) be used for Commonwealth electoral expenditure" and where, at the time it is given and received, use of the gift to create or communicate matter for a purpose of influencing voting at a federal election is nothing more than a bare possibility. Consideration of whether s 302CA, to that

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68 (1912) 15 CLR 355 at 363.

69 (1920) 28 CLR 23 at 31.

70 (1920) 28 CLR 23 at 31.

extent of its operation, is within the scope of the power conferred by s 51(xxxvi) of the *Constitution* requires closer attention.

57 The principles governing characterisation of a Commonwealth law in order to determine whether the law is within the scope of a legislative power conferred by s 51 of the *Constitution* have become "well settled"[71] since the *Engineers' Case* and have even been described as "established, if not trite, constitutional law"[72]. In the language of Latham CJ in *Bank of NSW v The Commonwealth* ("the *Bank Nationalisation Case*")[73]:

> "In determining the validity of a law it is in the first place obviously necessary to construe the law and to determine its operation and effect (that is, to decide what the Act actually does), and in the second place to determine the relation of that which the Act does to a subject matter in respect of which it is contended that the [Commonwealth] Parliament has power to make laws. A power to make laws with respect to a subject matter is a power to make laws which in reality and substance are laws upon the subject matter."

The character of the law must "be determined by reference to the rights, powers, liabilities, duties and privileges which it creates"[74]. The constitutional description of the subject matter of the power must "be construed with all the generality which the words used admit"[75]. The law will then answer the description of a law "with respect to" that subject matter if the legal or practical operation of the law is not "so insubstantial, tenuous or distant" that the law ought not be regarded as enacted with respect to that subject matter[76]. There is no need for the law to be shown to be connected with the subject matter of the power to the exclusion of some other subject matter that is outside

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71 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16]; [2000] HCA 14; *Work Choices Case* (2006) 229 CLR 1 at 103 [142].

72 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 315; [1994] HCA 44.

73 (1948) 76 CLR 1 at 186; [1948] HCA 7.

74 *Work Choices Case* (2006) 229 CLR 1 at 103 [142].

75 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225; [1964] HCA 15.

76 *Melbourne Corporation Case* (1947) 74 CLR 31 at 79.

Commonwealth legislative power, and "if a sufficient connection ... does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice"[77].

58 The sufficiency of the connection of a Commonwealth law with the subject matter of a conferral of legislative power will appear without more if the law has a direct legal operation on the subject matter of the power. In *Huddart Parker Ltd v The Commonwealth*[78], Dixon J, with whom Rich J agreed, explained that a law passed by the Commonwealth Parliament obtains its character as a law with respect to the subject matter of a conferral of legislative power from the circumstance that it creates rights and duties directly regulating something that forms part of that subject matter. Similarly, in *Murphyores Incorporated Pty Ltd v The Commonwealth*[79], Mason J, with whom Gibbs and Jacobs JJ agreed, said that "it is enough that the law deals with the permitted topic" and explained in this regard that "[i]t is now far too late in the day to say that a law should be characterized by reference to the motives which inspire it or the consequences which flow from it". So also in the *Work Choices Case*[80], this Court concluded that a law which prescribes norms regulating the relationship between the kinds of corporation described in s 51(xx) of the *Constitution* and their employees is a law with respect to such corporations, and was no less such a law because it prescribed the means by which such corporations and their employees are to conduct their industrial relations. It must be understood, however, that these cases were concerned with laws that operated directly on the subject matter of a Commonwealth legislative power.

59 Implicit in the standard explanation of the principles governing the characterisation of a Commonwealth law is that the sufficiency of the connection of a Commonwealth law with the subject matter of a conferral of legislative power can turn on questions of degree. The more the legal operation of the law is removed from the subject matter of the power, the more questions of degree will become important. Not inappropriate, although not always helpful, in

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77 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16], quoted in *Work Choices Case* (2006) 229 CLR 1 at 104 [142].

78 (1931) 44 CLR 492 at 515-516; [1931] HCA 1.

79 (1976) 136 CLR 1 at 20; [1976] HCA 20.

80 (2006) 229 CLR 1 at 121-122 [198], referring to *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375 [83]; [2000] HCA 34.

examining those questions of degree is to frame the enquiry in terms of whether the operation of the law is in an area that is "incidental" or penumbral or "peripheral" to the subject matter of the power[81].

60 Determining whether a law is incidental to the subject matter of a power can be assisted by examining how the purpose of the law – what the law can be seen to be designed to achieve in fact[82] – might relate the operation of the law to the subject matter of the power. In the *Bank Nationalisation Case*[83], Dixon J went so far as to say that "in all cases where it is sought to connect with a legislative power a measure which lies at the circumference of the subject or can at best be only incidental to it, the end or purpose of the provision, if discernable, will give the key".

61 That statement of Dixon J in the *Bank Nationalisation Case*, Brennan J said in *Cunliffe v The Commonwealth*[84], "is merely to point out that, by divining the purpose of a law from its effect and operation, its connexion with the subject of the power may appear more clearly". Brennan J went on to explain[85]:

> "Where this is the manner of characterization of a law, its validity is ascertained first by determining its purpose or object – a determination made by reference to what its effect and operation are 'appropriate and adapted' to achieve – and then by looking to the connexion between that purpose or object and the relevant head of power."

62 Applying that manner of characterisation, a law the purpose or object of which is protection of something that is encompassed within the subject matter of a conferral of legislative power may yet not be a law with respect to that subject matter because the law is insufficiently adapted to achieve that purpose, having regard to the breadth and intensity of the impact of the law on other matters. Professors Zines and Stellios have commented in this respect that "the slightness

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81 See *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 317-322; *Leask v The Commonwealth* (1996) 187 CLR 579 at 591, 593-594; [1996] HCA 29.

82 See *Stenhouse v Coleman* (1944) 69 CLR 457 at 471; [1944] HCA 36.

83 (1948) 76 CLR 1 at 354.

84 (1994) 182 CLR 272 at 319.

85 (1994) 182 CLR 272 at 319 (footnote omitted). See also *Leask v The Commonwealth* (1996) 187 CLR 579 at 591.

of the impact on the federal subject" will often be "shown most clearly by contrasting it with a much greater effect on matters outside the subject of power"[86].

63 Thus, it was said in *Davis v The Commonwealth* of the protection against commercial exploitation attempted to be afforded by s 22 of the *Australian Bicentennial Authority Act 1980* (Cth) to words associated with the national program of celebrations and activities to commemorate the bicentenary of European settlement in Australia that "[a]lthough the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too far" in that their "extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power"[87]. Much the same was said in *Nationwide News Pty Ltd v Wills*[88] of the protection attempted to be afforded by s 299 of the *Industrial Relations Act 1988* (Cth) against even fair and reasonable criticism of a member of the Australian Industrial Relations Commission. While use of the concept of proportionality in this context has been criticised[89], the point presently to be made is that consideration of the purposes which the law is or is not appropriate and adapted to achieve may illuminate the required connection to the relevant head of power[90].

64 Of particular relevance to the question of degree that needs to be determined in the present case are observations of Dixon J in *Australian Communist Party v The Commonwealth* ("the *Communist Party Case*")[91] as well

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86 Stellios, *Zines's The High Court and The Constitution*, 6th ed (2015) at 64.

87 (1988) 166 CLR 79 at 100; [1988] HCA 63.

88 (1992) 177 CLR 1 at 33-34, 91, 95, 103-105; [1992] HCA 46.

89 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 87-89; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 320, 359; *Leask v The Commonwealth* (1996) 187 CLR 579 at 591, 593, 599-605, 614-617.

90 See *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 45 [36]; [2014] HCA 22.

91 (1951) 83 CLR 1; [1951] HCA 5.

as aspects of the reasoning of Dixon CJ in *Victoria v The Commonwealth* ("the *Second Uniform Tax Case*")[92].

65 In the *Communist Party Case*, at the commencement of his Honour's reasons for holding invalid the purported dissolution of the Australian Communist Party by s 4 of the *Communist Party Dissolution Act 1950* (Cth), Dixon J said[93]:

> "It is of course true, as a general statement, that the law governing the formation, existence and dissolution of voluntary associations of people falls within the province of the States. The legislative power of the Commonwealth does not extend to the subject as such, and if any part of it may be dealt with constitutionally by Federal statute it is as incidental to some matter falling within the specific powers conferred upon the Parliament of the Commonwealth. To sustain the validity of s 4, it is therefore necessary to find a subject of Federal legislative power to which the enactment of such a provision is fairly incidental."

66 The *Second Uniform Tax Case* concerned the validity of s 221(1)(a) of the *Income Tax and Social Services Contribution Assessment Act 1936* (Cth). Expressed to be "[f]or the better securing to the Commonwealth of the revenue required for the purposes of the Commonwealth", s 221(1)(a) operated to prohibit a taxpayer from paying State income tax until after paying federal income tax. The section was held by majority (Dixon CJ, McTiernan, Kitto and Taylor JJ; Williams, Webb and Fullagar JJ dissenting) to be invalid for want of sufficient connection with the subject matter of the power with respect to "taxation" in s 51(ii) of the *Constitution*. The subject matter of the power was interpreted to encompass not "the whole subject of taxation throughout Australia" but only "federal taxation for federal purposes"[94].

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92 (1957) 99 CLR 575; [1957] HCA 54.

93 (1951) 83 CLR 1 at 175. See also at 209-210, 226-227, 261-263.

94 (1957) 99 CLR 575 at 614, quoting *The Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208 at 232; [1904] HCA 50.

67 Dixon CJ, with whom Kitto J agreed, said[95]:

> "To support s 221(1)(a) it must be said to be incidental to the federal power of taxation to forbid the subjects of a State to pay the tax imposed by the State until that imposed upon them by the Commonwealth is paid and, moreover, to do that as a measure assisting to exclude the States from the same field of taxation. This appears to me to go beyond any true conception of what is incidental to a legislative power and, under colour of recourse to the incidents of a power expressly granted, to attempt to advance or extend the substantive power actually granted to the Commonwealth until it reaches into the exercise of the constitutional powers of the States."

68 Specifically addressing whether a sufficient connection could be found in the legislatively identified purpose of "better securing" revenue required for the purposes of the Commonwealth, Dixon CJ continued[96]:

> "Why should not other debts be postponed too? The resources of a taxpayer are as certainly diminished by making any other payment of like amount ... Would it not strike the mind as absurd if the incidental power arising from s 51(v) and (xxxix) were treated as authorising a law forbidding a subscriber to the telephone services to pay debts or some particular debt whether to the State or to other persons until he had paid his telephone account? Another analogy would be a law as under s 51(xiii) and (xxxix) postponing the payment of the indebtedness of a person happening to be a customer of the Commonwealth Bank until he had cleared off or reduced his overdraft, indebtedness for example to another bank or to take another example, to the State, or again to all or any class of his creditors. Yet, if s 221(1)(a) is to be held valid on the ground that to insure, so far as may be, the payment of taxes is incidental to the power conferred by s 51(ii) and the paragraph contains no more than what may be properly directed to that end, then it would follow that these are examples of what may validly be enacted."

69 In *Gazzo v Comptroller of Stamps (Vict)*[97] Gibbs CJ referred to the *Second Uniform Tax Case* as amongst a number of decisions which showed "that a

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95 (1957) 99 CLR 575 at 614. See also at 658.

96 (1957) 99 CLR 575 at 615.

97 (1981) 149 CLR 227 at 240; [1981] HCA 73.

provision cannot be said to be incidental to the subject matter of a power simply because in a general way it facilitates the execution of the power" and "that in considering whether a law is incidental to the subject matter of a Commonwealth power it is not always irrelevant that the effect of the law is to invade State power". Although the correctness of the decision in *Gazzo* has been questioned[98], there is no reason to doubt the veracity of those observations.

70 Just as the subject matter of the power with respect to "taxation" conferred by s 51(ii) of the *Constitution* is properly identified as "federal taxation", the subject matter of the power conferred by s 51(xxxvi) in its application to ss 10 and 31 of the *Constitution* is properly identified not as "elections" but as "federal elections". The subject matter, specifically, is elections of senators and of members of the House of Representatives in each State. The words "relating to" in ss 10 and 31 do not have the effect of expanding the subject matter of the power. The function of the words "relating to" in ss 10 and 31 is to connote a nexus between State laws and State elections equivalent to the nexus between Commonwealth laws and federal elections connoted by the words "with respect to" in s 51(xxxvi) itself[99].

71 What then is encompassed within the subject matter of federal elections? Although his Honour may have gone too far in conceiving of the power conferred by s 51(xxxvi) in its application to ss 10 and 31 of the *Constitution* as "purposive"[100], Dawson J was correct in *Langer v The Commonwealth*[101] in conceiving of a federal election as a process which has as its object the ascertainment of senators and members of the House of Representatives "directly chosen by the people" within the meaning of ss 7 and 24 of the *Constitution*. An election is the process by which the people exercise that choice. Taking an appropriately broad view of the subject matter of federal elections, and focusing relevantly on the position of political entities, nomination and grouping of candidates for election to the Senate or to the House of Representatives can be

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98 *Fisher v Fisher* (1986) 161 CLR 438 at 453; [1986] HCA 61. See also Stellios, *Zines's The High Court and The Constitution*, 6th ed (2015) at 63.

99 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 254 [211].

100 See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 238-239 [159].

101 (1996) 186 CLR 302 at 324-325.

said to form part of the electoral process[102], and registration of political parties having objects of endorsing and promoting candidates can be said to be incidental to that process[103].

72 That does not mean, however, that everything done by a federally registered political party or a candidate or group of candidates for federal election can be said to form part of or be incidental to the subject matter of federal elections any more than it can be said that everything done by a federal person who is a taxpayer forms part of or is incidental to the subject matter of federal taxation. Unlike, for example, the approach which was long ago taken to registration of participants in the process of "conciliation and arbitration" referred to in s 51(xxxv) of the *Constitution*[104], the Commonwealth Parliament has not provided for incorporation of participants in the federal election process as an incident of which it has defined and so limited their capacities, nor has it sought to confine the activities of any of those participants to activities related to the federal electoral process. The choice of the Commonwealth Parliament to permit registration as a political party under the Commonwealth Electoral Act of an unincorporated association only one of whose objects need be endorsing and promoting candidates for election to the Senate or to the House of Representatives[105] is an acknowledgement that the association and its members retain the capacity to pursue objects and to engage in activities unrelated to federal elections.

73 The mere circumstance that a registered political party or a candidate or group of candidates is the object of the imposition of an obligation or the conferral of an authority under a Commonwealth law must therefore be insufficient to establish the requisite nexus between the operation of the law and

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102 *Sykes v Cleary* (1992) 176 CLR 77 at 99-100; [1992] HCA 60; *Day v Australian Electoral Officer (SA)* (2016) 261 CLR 1 at 13-14 [23]-[24]; [2016] HCA 20; *Re Culleton [No 2]* (2017) 91 ALJR 311 at 315 [13]; 341 ALR 1 at 5; [2017] HCA 4; *Re Nash [No 2]* (2017) 92 ALJR 23 at 28 [23]; 350 ALR 204 at 209-210; [2017] HCA 52.

103 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 205-209 [61]-[67].

104 See *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309; [1908] HCA 95; *Williams v Hursey* (1959) 103 CLR 30 at 68; [1959] HCA 51.

105 See above at [23].

the subject matter of federal elections to bring the law within the scope of s 51(xxxvi) in its application to ss 10 and 31 of the *Constitution*. There is a material distinction between, on the one hand, imposing an obligation or conferring an authority or immunity on a federally registered political party or a candidate for federal election in respect of what they might or might not do in their capacity as a federally registered political party or a candidate for federal election and, on the other hand, imposing an obligation or conferring an authority or immunity on a federally registered political party or a candidate for federal election in respect of what they might or might not do in some other capacity.

74 That distinction is enough to distinguish the present case from *Bayside City Council v Telstra Corporation Ltd*[106], on which the Commonwealth places reliance. There the law[107] held to fall within the scope of the legislative power with respect to "postal, telegraphic, telephonic, and other like services", conferred on the Commonwealth Parliament by s 51(v) of the *Constitution*, went no further than to confer an immunity on a telecommunications carrier from the operation of a State law which discriminated against a telecommunications carrier in its capacity as a telecommunications carrier[108].

75 If s 302CA of the Commonwealth Electoral Act is to be found to have a sufficient connection with the subject matter of federal elections to bring it within the scope of s 51(xxxvi) of the *Constitution* insofar as it purports to immunise from State electoral law the giving, receipt and retention of a gift that might never be used for a federal electoral purpose, that connection cannot be found only in the identity of the object of the authority as a political entity. Nor can a sufficient connection be found in the subjection of the political entity, if the gift were received, to the disclosure regime set out in Pt XX of the Commonwealth Electoral Act.

76 If s 302CA of the Commonwealth Electoral Act is to be found to have a sufficient connection with the subject matter of the power, that connection could only be found by relating the operation of the section to the purpose of the section. Exploring that possibility makes it necessary to turn to the identification of the section's purpose.

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106 (2004) 216 CLR 595; [2004] HCA 19.

107 Clause 44 of Sch 3 to the *Telecommunications Act 1997* (Cth).

108 (2004) 216 CLR 595 at 624 [26].

77 The purpose of the section postulated in argument by the Commonwealth is an extrapolation from the purpose that was identified in the Explanatory Memoranda for the Commonwealth Amending Act. The purpose there identified, as will be recalled, was bipartite. It was in part to clarify the interaction between the funding and disclosure regime in Pt XX of the Commonwealth Electoral Act and State and Territory electoral funding schemes. It was in part to ensure that State and Territory laws relating to political donations could not restrict the giving, receipt and retention of a gift "that *could* be used for Commonwealth electoral purposes"[109], unless the gift is directed to a purpose relating to a State, Territory or local government election.

78 The first part of the purpose so identified in the Explanatory Memoranda adds nothing to the second, and the qualification to the second part of the purpose so identified does not alter its basic thrust. The identified purpose can accordingly be restated as being to protect from impairment by a State or Territory electoral law the giving, receipt and retention of any gift to, relevantly, a political entity where that gift might, or might not, be used to create or communicate matter for the dominant purpose of influencing voting at a federal election.

79 The ultimate purpose of the section can on that basis be generalised as being to protect a source of funds which might, but need not, be deployed by a political entity in a federal electoral process. The Solicitor-General of the Commonwealth expressed that ultimate purpose even more generally as being "to protect the federal electoral process by ensuring that participants in that process are not starved of funds that are able to be used for the dominant purpose of influencing the way electors vote in the federal elections".

80 The difficulty with accepting the purpose so postulated by the Commonwealth lies in the disconformity between that purpose and the breadth of the operation of s 302CA, to which attention has been drawn. The section confers immunity from the application of State and Territory electoral laws that would otherwise limit the availability of funds to political entities to pursue a range of activities having no connection with federal elections. They include activities the regulation of which is within the heartland of State legislative power.

81 The contrast between the slightness of the impact of s 302CA on the subject matter of the federal electoral process and its much greater impact on

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109 See above at [28] (emphasis added).

matters outside that subject matter points strongly to a purpose that cannot be said to be incidental to that subject matter. Indeed, it is difficult not to draw from the operation of s 302CA the inference that its purpose is to ensure that, save for donations earmarked for use in State, Territory or local government election campaigns, political entities may receive donations to fund any activities from any donors who would otherwise be prohibited by State or Territory electoral laws from making those donations. Ensuring the availability to political entities of funding for participation in federal elections appears to be at most an adventitious consequence of this purpose.

82 The connection between the operation of the section and the actual deployment of funds by a political entity in a federal electoral process cannot be described as more than insubstantial, tenuous and distant. The connection between the operation of the section and the subject matter of legislative power, in other words, is at best remote. To adapt one of the examples used rhetorically by Dixon CJ in the *Second Uniform Tax Case*, the connection between the operation of the section and the subject matter of s 51(xxxvi) in its application to ss 10 and 31 of the *Constitution* is no closer than would exist between the subject matter of "telephonic" services within s 51(v) of the *Constitution* and a law immunising a person who is a user of a telephone service from payment of all State taxes. The fact that the immunity would serve to provide the person with a greater source of funds from which the person could choose to pay a telephone bill might be said to constitute some connection with the subject matter of the power. The connection, however, would be insubstantial and tenuous, if not unreal.

83 Having regard then both to the tenuous connection between s 302CA of the Commonwealth Electoral Act and the federal electoral process and to the section's purpose to confer an immunity from State laws in respect of subject matters outside the subject matter of Commonwealth legislative power, the section cannot be supported as a law incidental to federal electoral processes to the extent that it authorises the giving, receipt and retention of a gift that might never be used for any federal electoral purpose. The section is to that extent beyond the scope of the power conferred by s 51(xxxvi) of the *Constitution*.

84 Subject to the question of severance, next to be considered, that conclusion means that issues raised by Queensland and the State interveners as to whether s 302CA infringes the doctrine of inter-governmental immunities expounded in the *Melbourne Corporation Case* or intrudes into a supposed area of exclusive State legislative power over State elections do not arise for consideration. The absence of Commonwealth legislative power to sustain the section in the full amplitude of its purported exclusion of State law stems not

from an implied prohibition or from an exclusion of power but from want of a sufficient connection with an affirmative grant of power.

Severance

85 The Commonwealth and the plaintiff argue that, if s 302CA of the Commonwealth Electoral Act is beyond the scope of the power conferred by s 51(xxxvi) of the *Constitution* insofar as the section purports to authorise the giving, receipt and retention of a gift that might never be used for a federal electoral purpose, the section is to be construed in accordance with s 15A of the *Acts Interpretation Act 1901* (Cth) ("the Commonwealth Interpretation Act") so as to result in severance of that invalid operation.

86 The principles which govern application of s 15A of the Commonwealth Interpretation Act were stated sufficiently for present purposes in *Victoria v The Commonwealth (Industrial Relations Act Case)*[110] with reference to the reasoning of Latham CJ in *Pidoto v Victoria*[111]. The present case is not within the class of case in which the putative application of s 15A is "in relation to general words or expressions" but is rather within the class of case in which its putative application is "in relation to 'particular clauses, provisos and qualifications, separately expressed, which are beyond legislative power'"[112].

87 Adopting the language of Latham CJ in *Pidoto v Victoria*, the interpretative requirement of s 15A of the Commonwealth Interpretation Act can be applied to strike out the invalid parts of s 302CA of the Commonwealth Electoral Act only if two conditions are satisfied. One is that "the operation of the remaining parts of the [section] remains unchanged"[113]. The other is that, if the section "can be reduced to validity by adopting any one or more of a number of several possible limitations", some "reason based upon the law itself can be stated for selecting one limitation rather than another"[114]. Underlying the need to satisfy both of those conditions is that s 15A of the Commonwealth Interpretation

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110 (1996) 187 CLR 416 at 502-503; [1996] HCA 56.

111 (1943) 68 CLR 87 at 108-111; [1943] HCA 37.

112 (1996) 187 CLR 416 at 502, quoting *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 577; [1989] HCA 12.

113 (1943) 68 CLR 87 at 108.

114 (1943) 68 CLR 87 at 111.

Act is an interpretation provision to be applied strictly within the limits of judicial power. The section "does not authorize the Court, by adopting a standard criterion or test merely selected by itself, to redraft a statute or regulation so as to bring it within power and so preserve its validity"[115].

88 The immediate difficulty encountered in attempting to apply s 15A of the Commonwealth Interpretation Act to the severance of s 302CA of the Commonwealth Electoral Act is that s 302CA(1) is expressed to operate in spite of "any State or Territory electoral law". The section is framed to rely on s 51(xxxvi) of the *Constitution* in its application to exclude a State electoral law and on s 122 of the *Constitution* in its application to exclude a Territory electoral law. Although the section reaches beyond the scope of the power conferred by s 51(xxxvi) in its application to exclude a State electoral law, there is and could be no suggestion that the section reaches beyond the scope of the power conferred by s 122 in its application to exclude a Territory electoral law. The section cannot be given a distributive operation which would have it operate in one way in relation to a State electoral law and in another way in relation to a Territory electoral law[116], and there is no basis in the section or elsewhere in the Commonwealth Electoral Act for interpreting it to operate in one way rather than the other.

89 Even if that difficulty were ignored and attention were confined to s 302CA in its application in relation to a State electoral law, the work required to bring the section within the scope of s 51(xxxvi) would amount to major surgery[117]. The work could not simply be confined to striking out the words "or may be" from sub-s (1)(e), given that it is the composite expression "is required to be, or may be, used" that is the subject of explication in sub-s (2). The work then to be done on sub-s (2) would involve deletion of the words "or may be" in the chapeau, deletion of the words "or allow" in para (a) and deletion of the whole para (b). The result would be a different statutory definition of a different statutory expression. Sub-section (3) would become largely redundant. Sub-section (4) could perhaps be left to stand, but it would make little sense without reference to the definition of "gift recipient" in sub-s (1)(a). Sub-section (5), and with it sub-s (6), would become redundant in like manner to para (b)(i) of sub-s (3).

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115 (1943) 68 CLR 87 at 111.

116 See *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 518-519.

117 cf *Bank Nationalisation Case* (1948) 76 CLR 1 at 372.

90 To mix metaphors, severance would involve separating "the woof from the warp" and manufacturing "a new web"[118]. That is not a result which can be achieved as an exercise in statutory interpretation.

91 Section 302CA of the Commonwealth Electoral Act is incapable of severance under s 15A of the Commonwealth Interpretation Act. The section is wholly invalid.

Implied freedom of political communication

92 The plaintiff, but not the Commonwealth, argues that the amendments introduced by Pt 3 of the Queensland Amending Act into the Queensland Electoral Act are invalid on the basis that they impermissibly burden the constitutionally implied freedom of political communication. Tellingly, the plaintiff does not argue that the amendments introduced by Pt 5 of the Queensland Amending Act into the Queensland Local Government Electoral Act are invalid on that basis.

93 Part 3 of the Queensland Amending Act, it will be recalled, inserted into the Queensland Electoral Act a new Subdiv 4 of Div 8 of Pt 11 which substantially replicates Div 4A of Pt 6 of the New South Wales Electoral Act. In *McCloy*, it was held by majority that Div 4A did not impermissibly burden the constitutionally implied freedom of political communication[119]. Taking account of the nature of the business activities of property developers and "the nature of the public powers which they might seek to influence in their self-interest", the burden which Div 4A placed on freedom of political communication was held to be justified as a measure which furthers the general purpose of preventing corruption and undue influence in the government of the State and is therefore "'legitimate' within the meaning given to that term in *Lange*, as are the means adopted to achieve it"[120]. Division 4A was held to be suitable and necessary to the achievement of that purpose and the burden imposed by it to be proportionate to the achievement of that purpose[121]. Division 4A was also held to "support and

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118 cf *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 386; [1930] HCA 52.

119 (2015) 257 CLR 178 at 221 [94], 222 [98], 274 [275].

120 (2015) 257 CLR 178 at 208 [49], 209 [53]. See also at 220-221 [93].

121 (2015) 257 CLR 178 at 209-210 [54]-[56], 210-212 [57]-[63].

enhance equality of access to government, and the system of representative government which the freedom protects"[122].

94 The plaintiff does not seek to reopen *McCloy*, but to distinguish it. The plaintiff argues that the justification for the burden that was accepted by the majority in *McCloy* to apply in New South Wales has no application in Queensland. The inference to be drawn from the facts agreed in the special case, the plaintiff argues, is that Queensland has not had the same recent history of corruption associated with land development applications occurring at the level of State government (as distinct from corruption associated with land development applications occurring at the level of local government) as has New South Wales.

95 The factual basis of the plaintiff's attempt to distinguish *McCloy* is contested. The contest of fact, however, need not be resolved. Unlike *Unions NSW v New South Wales*[123], this is not a case in which an adequate factual foundation for the justification advanced for the burden on freedom of communication is wanting.

96 Apparent from the debate on the introduction and second reading of the Bill for the Queensland Amending Act[124] is that the choice to insert the new Subdiv 4 of Div 8 of Pt 11 into the Queensland Electoral Act was based on lessons learned from the experience in New South Wales. As Nettle J said in *McCloy* itself[125]:

> "[I]t is not illogical or unprecedented for the Parliament to enact legislation in response to inferred legislative imperatives. More often than not, that is the only way in which the Parliament can deal prophylactically with matters of public concern."

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122 (2015) 257 CLR 178 at 221 [93].

123 (2019) 93 ALJR 166; 363 ALR 1; [2019] HCA 1.

124 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 March 2018 at 190; Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 May 2018 at 1105-1106, 1114.

125 (2015) 257 CLR 178 at 262 [233].

Australian States are not so much "little laboratories"[126] that each State is required to conduct its own experiments or rely on its own experiences before it can be justified in taking legislative action to address a risk of harm to its system of government highlighted by occurrences in another State.

97 Together with Div 4A of Pt 6 of the New South Wales Electoral Act, Subdiv 4 of Div 8 of Pt 11 of the Queensland Electoral Act imposes a burden on political communication that is justified. The subdivision does not infringe the constitutionally implied freedom of political communication.

Inter-governmental immunity

98 The plaintiff, but again not the Commonwealth, argues that the amendments introduced by Pts 3 and 5 of the Queensland Amending Act infringe the doctrine of inter-governmental immunities expounded in the *Melbourne Corporation Case*.

99 In a passage in the *Melbourne Corporation Case* to which partial reference has already been made, Dixon J said[127]:

> "The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities."

100 The doctrine of inter-governmental immunities expounded in the *Melbourne Corporation Case* is a structural implication built on that conception. The implication is captured in the proposition articulated by Starke J in that case that "neither federal nor State governments may destroy the other nor curtail in any substantial manner the exercise of its powers or 'obviously interfere with one another's operations'"[128]. His Honour explained that "[i]t is a practical question, whether legislation or executive action thereunder on the part of a Commonwealth or of a State destroys, curtails or interferes with the operations of the other"[129]. The essentially practical nature of the enquiry involved in

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126 See *New State Ice Co v Liebmann* (1932) 285 US 262 at 311.

127 (1947) 74 CLR 31 at 82.

128 (1947) 74 CLR 31 at 74, quoting *Graves v New York; Ex rel O'Keefe* (1939) 306 US 466 at 488.

129 (1947) 74 CLR 31 at 75.

determining whether a law of one polity impermissibly interferes with the operations of government of another is borne out by subsequent cases in which Commonwealth legislation has been held to contravene that structural implication[130].

101 It might be thought that Brennan CJ took too narrow a view of the doctrine in the *Melbourne Corporation Case* when he observed in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* ("*Re Residential Tenancies Tribunal*")[131] that the doctrine "proceeds on the footing that specific legislative powers conferred on the Parliament of the Commonwealth might be exercised to affect the prerogatives of the Crown in right of a State" and "states the limitation which is to be implied from the structure of the Constitution on the scope of the specific legislative powers of the Commonwealth". However, the statement was no more than a prelude to Brennan CJ going on in *Re Residential Tenancies Tribunal* to observe, undoubtedly correctly, that a State law imposing a burden on the enjoyment of the Commonwealth prerogative would be offensive to s 61 of the *Constitution* and that a State law imposing a burden on the enjoyment of a Commonwealth statutory power would be inconsistent with the Commonwealth law conferring the power and therefore inoperative by force of s 109 of the *Constitution*[132].

102 Queensland and South Australia seek to take the second of those observations further. The operation of s 109 of the *Constitution* to give supremacy to a Commonwealth law over a State law, they say, means that there is no need for the operations of the government of the Commonwealth to be impliedly protected from interference by or under any State law. The functioning of federal government, they argue, can always be protected by Commonwealth legislation, including by appropriately tailored legislation enacted under s 51(xxxix) of the *Constitution*. Their argument is not wholly without precedent. It might even be thought to have some support in reasons given for rejecting the old doctrine of implied prohibitions in the *Engineers' Case* itself[133]. But it should not be accepted.

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130 eg *Austin v The Commonwealth* (2003) 215 CLR 185 at 249 [124]; [2003] HCA 3; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 at 298-299 [32]-[34], 305-307 [61]-[66], 312-313 [93]-[95]; [2009] HCA 33.

131 (1997) 190 CLR 410 at 425; [1997] HCA 36.

132 (1997) 190 CLR 410 at 426.

133 (1920) 28 CLR 129 at 155.

103 The supremacy given by s 109 of the *Constitution* to a Commonwealth law enacted in the exercise of a legislative power conferred by s 51 of the *Constitution* over an inconsistent State law means that, in practical terms, there is more scope for a Commonwealth law to interfere with operations of the government of a State than there is for a State law to interfere with operations of the government of the Commonwealth. To observe that the constraint imposed by the structural implication recognised in the *Melbourne Corporation Case* has greater practical significance in its application to a Commonwealth law because of the force that s 109 of the *Constitution* gives to a Commonwealth law that is used as a sword against a State, however, is not to show that the constraint imposed by the structural implication is of no practical significance in its application to a State law that is used as a sword against the Commonwealth. The reciprocal operation of the structural implication is not displaced merely because s 109 allows a Commonwealth law to be used as a shield.

104 The Commonwealth Parliament certainly has power to protect the functioning of the government of the Commonwealth through the enactment of appropriately tailored legislation under s 51(xxxix) of the *Constitution* on which s 109 of the *Constitution* will then operate. Hardly consistent with the conception of our federal system as involving a national government and a number of State governments separately organised, however, is the notion that the legislature of the national government should be forced to protect itself from State laws in order merely to be able to function. To take up an example given by Dixon J in *West v Commissioner of Taxation (NSW)*[134], it should not be necessary for the Commonwealth Parliament to enact a law conferring immunity on Commonwealth public servants in order to ensure that those public servants are not subjected to State laws imposing special liabilities or burdens on them by reason of their status or activities as Commonwealth public servants.

105 Inter-governmental immunities constitute an area of constitutional discourse in which the fundamental nature of the *Constitution* as an enduring framework for federal government must be constantly borne in mind. "We should avoid pedantic and narrow constructions" just as we should not be "fearful about making implications"[135]. Most importantly, we should avoid being driven to entrenched positions.

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134 (1937) 56 CLR 657 at 681; [1937] HCA 26.

135 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 85; [1945] HCA 41.

106 There was a time, even after the *Engineers' Case*, when it was thought that Commonwealth immunity from State legislation was absolute. The depiction of federation portrayed by Dixon J in *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation*[136] – in stating that "[l]ike the goddess of wisdom the Commonwealth *uno ictu* sprang from the brain of its begetters armed and of full stature" at the same instant as the colonies became States lacking "the power to regulate the legal relations of this new polity with its subjects" – was taken so far by Fullagar J in *The Commonwealth v Bogle*[137] as to imply that a State Parliament "has no power over the Commonwealth". That absolute view of Commonwealth immunity was unambiguously rejected in *Re Residential Tenancies Tribunal*. Part of the reason for rejecting it given by at least three members of the majority[138] was that the reciprocal operation of the *Melbourne Corporation* doctrine afforded the operations of the government of the Commonwealth an adequate measure of protection from State legislative interference. That view of the reciprocal operation of the *Melbourne Corporation* doctrine accorded with earlier informed commentary[139].

107 No return to extreme and discredited notions of inter-governmental immunity is therefore involved in recognising that the Commonwealth and the States reciprocally have the benefit of the structural implication recognised in the *Melbourne Corporation Case*. The reciprocal application of that structural implication has been, and should remain, constitutional doctrine.

108 Whilst it is one thing to acknowledge the reciprocal operation of the doctrine of inter-governmental immunities expounded in the *Melbourne Corporation Case* as a limitation on the permissible exercise of State legislative power as well as a limitation on the permissible exercise of Commonwealth legislative power, it is quite another thing to find that limitation to have been transgressed. As explained in *Fortescue Metals Group Ltd v The Commonwealth*[140], insofar as it imposes a limitation on the exercise of

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136 (1947) 74 CLR 508 at 530; [1947] HCA 45.

137 (1953) 89 CLR 229 at 259; [1953] HCA 10.

138 (1997) 190 CLR 410 at 440, 443-444. See also at 509.

139 See Doyle, "1947 Revisited: The Immunity of the Commonwealth from State Law", in Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in honour of Professor Leslie Zines* (1994) 47 at 69-70.

140 (2013) 250 CLR 548 at 609 [130]; [2013] HCA 34.

Commonwealth legislative power, application of the doctrine "requires consideration of whether impugned legislation is directed at States, imposing some special disability or burden on the exercise of powers and fulfilment of functions of the States which curtails their capacity to function as governments". Reciprocally, insofar as it imposes a limitation on the exercise of State legislative power, application of the doctrine requires consideration of whether an impugned State law is directed at the Commonwealth so as to impose some special disability or burden on the exercise of powers and fulfilment of functions of the Commonwealth which curtails the capacity of the Commonwealth to function as a government.

109 The nature of the requisite enquiry need only be stated for its non-application in the present case to be apparent. Subdivision 4 of Div 8 of Pt 11 of the Queensland Electoral Act and Div 1A of Pt 6 of the Queensland Local Government Electoral Act are not directed to the Commonwealth or to any persons or bodies who are uniquely or even primarily participants in a federal governmental process. They do not impose a special disability or burden on the Commonwealth. They do not deny to the Commonwealth the capacity to regulate its own elections. The most that can be said of them is that they deny to some persons and bodies who are participants in federal electoral processes a source of funds that would otherwise be available to be used in such a process.

Inconsistency

110 The final argument of the plaintiff is that the amendments introduced by Pts 3 and 5 of the Queensland Amending Act are inoperative by force of s 109 of the *Constitution* independently of s 302CA of the Commonwealth Electoral Act because they are in any event inconsistent with the broader operation of the election funding and financial disclosure regime set out in Pt XX of the Commonwealth Electoral Act. The plaintiff argues in particular that the subsidiary schemes for the prohibition of gifts by foreign donors in Div 3A and for financial disclosure in Divs 4, 5 and 5A of Pt XX are to be understood as an exhaustive legal framework.

111 As to the plaintiff's reliance on the scheme of Div 3A of Pt XX, it need hardly be said that the Division taken as a whole cannot achieve indirectly and by implication that which s 302CA seeks and fails to achieve directly and expressly. As to the plaintiff's reliance on Divs 4, 5 and 5A of Pt XX, it is sufficient to say that the regime there set out for the disclosure of gifts received by a political entity can hardly be said to be detracted from or impaired by a State electoral law which prohibits the giving and receipt of a gift to which, if received, the disclosure regime would apply.

Conclusion

112 The questions raised by the special case and the answers to them are as follows:

a) Are the amendments made to the Queensland Electoral Act by Pt 3 of the Queensland Amending Act invalid (in whole or in part and, if in part, to what extent) because they impermissibly burden the implied freedom of political communication on governmental and political matters, contrary to the *Constitution*?

Answer: No.

b) Are the amendments made to the Queensland Electoral Act by Pt 3 of the Queensland Amending Act invalid (in whole or in part and, if in part, to what extent) because they are beyond the power of the Parliament of Queensland to enact on the basis of an implied doctrine of inter-governmental immunities or on the basis that they impermissibly intrude into an area of exclusive Commonwealth legislative power?

Answer: No.

c) Are the amendments made to the Queensland Local Government Electoral Act by Pt 5 of the Queensland Amending Act invalid (in whole or in part and, if in part, to what extent) because they are beyond the power of the Parliament of Queensland to enact on the basis of an implied doctrine of inter-governmental immunities or on the basis that they impermissibly intrude into an area of exclusive Commonwealth legislative power?

Answer: No.

d) Is s 302CA of the Commonwealth Electoral Act invalid (in whole or in part and, if in part, to what extent) because it is beyond the Commonwealth's legislative power?

Answer: The section is wholly invalid.

e) Is s 302CA of the Commonwealth Electoral Act invalid (in whole or in part and, if in part, to what extent) because it purports to operate in a manner that is contrary to the principle derived from the *Melbourne Corporation Case*?

Answer: Does not arise.

f) Is s 302CA of the Commonwealth Electoral Act invalid (in whole or in part and, if in part, to what extent) because it purports to operate in a manner that is contrary to the principle derived from *Metwally*, namely that a Commonwealth law cannot override the operation of s 109 of the *Constitution*?

Answer: Unnecessary to decide.

g) Are the amendments made to the Queensland Electoral Act by Pt 3 of the Queensland Amending Act invalid (in whole or in part and, if in part, to what extent) pursuant to s 109 of the *Constitution* by reason of their being inconsistent with the Commonwealth Electoral Act?

Answer: No.

h) Are the amendments made to the Queensland Local Government Electoral Act by Pt 5 of the Queensland Amending Act invalid (in whole or in part and, if in part, to what extent) pursuant to s 109 of the *Constitution* by reason of their being inconsistent with the Commonwealth Electoral Act?

Answer: No.

i) Who should pay the costs of the special case?

Answer: The plaintiff.

NETTLE J.

Donations in the political sphere

113 Parts 3 and 5 of the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018* (Qld) ("the impugned provisions") inserted provisions into the *Electoral Act 1992* (Qld) and the *Local Government Electoral Act 2011* (Qld) closely resembling Div 4A of Pt 6 of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW). Each Act prohibits property developers from making political donations and each thereby burdens the implied freedom of political communication. In *McCloy v New South Wales*[141] a majority of the Court upheld the constitutional validity of Div 4A as reasonably appropriate and adapted to achieving a legitimate purpose of reducing the risk of undue or corrupt influence in an area relating to planning decisions "where such risk may be greater than in other areas of official decision-making"[142]. As is explained in the majority's reasons in this matter, the majority's decision in *McCloy* dictates that the plaintiff's challenge to the impugned provisions must be rejected.

114 To acknowledge the inevitability of that result, however, is not to say that I agree with it. In *McCloy*, I dissented because I considered[143] that the discriminatory nature of the prohibition could not be justified. I remain of that view. Granted, the evidence in *McCloy* disclosed previous instances of property developers bribing politicians in order to procure planning decisions favourable to the developers[144]. It was also open to infer, as it might be here, too, that, as well as or instead of paying bribes, property developers were and are sometimes disposed to make political donations to one or other political party or member of Parliament in the hope or expectation of the donee later making political decisions favourable to the developers. But the fact that property developers might make political donations in the hope or expectation of receiving political favours, exerting political influence or otherwise advancing their own interests does not mark them out as a class so different from other sections of the electorate as to warrant discriminately prohibiting them from making political donations.

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141 (2015) 257 CLR 178; [2015] HCA 34.

142 (2015) 257 CLR 178 at 209 [53] per French CJ, Kiefel, Bell and Keane JJ.

143 (2015) 257 CLR 178 at 270 [257].

144 (2015) 257 CLR 178 at 208-209 [51] per French CJ, Kiefel, Bell and Keane JJ, 250 [194] per Gageler J, 261-262 [233] per Nettle J.

115 Plainly, there are any number of electors who make political donations in the hope or expectation of extracting political favours, exerting political influence or otherwise advancing their own interests. Large corporations which make significant political donations provide an obvious example: because the directors of a corporation cannot lawfully authorise the making of a political donation unless persuaded that it is in the best interests of the corporation. The trade union movement also serves as a clear example: because trade unions make very large political donations avowedly in the hope or expectation of influencing the donees to make political decisions which will advance the interests of the unions and their membership. No one suggests that big business or the union movement should or could be discriminately prohibited from making political donations. What compelling justification is there for the State of Queensland to treat property developers differently[145]?

Unjustified burden

116 The prohibition on property developer political donations is not rationally connected to the prevention of political bribery and corruption. Bribery and corruption are proscribed and punishable as crimes under the *Criminal Code* (Qld)[146]. The premise of the added proscription of political donations in the impugned provisions is that the kind of political donations at which it is aimed lack one or more of the elements of the offences of bribery and corruption. Nor are the impugned provisions rationally connected to lessening the risk of property developers and politicians committing those crimes. If a property developer is prepared to risk prison in order to bribe a politician, or a politician is prepared to risk prison in order to receive a secret commission, the fact that the payment might also be prohibited as a proscribed property developer political donation under the impugned provisions can do nothing in reality further to deter the developer or politician from engaging in that conduct. It might render each of them liable to being convicted of two offences rather than one, but, perforce of the principle of totality[147], the total effective sentence which they receive for the two offences should be substantially the same as for the one.

117 Granted, prohibiting property developer political donations may reduce the risk of property developers exerting non-criminal political "undue influence". But to repeat the question posed[148] in *McCloy*, who is to say what political

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145 cf *Unions NSW v New South Wales* (2013) 252 CLR 530; [2013] HCA 58; *Unions NSW v New South Wales* (2019) 93 ALJR 166; 363 ALR 1; [2019] HCA 1.

146 *Criminal Code* (Qld), ss 60 and 87.

147 See *Pearce v The Queen* (1998) 194 CLR 610 at 623 [40] per McHugh, Hayne and Callinan JJ, 638 [92] per Kirby J; [1998] HCA 57.

148 (2015) 257 CLR 178 at 273 [267] per Nettle J.

influence is *undue*? Most times, the assessment of political undue influence reflects a subjective political point of view. What appears to one side of the political debate as undue presents to the other side as salutary. The examples of big business and the trade union movement earlier cited attest to the point, but they are not the limit of it.

118 For instance, it is not unreasonable to suppose that there is now a significant proportion of the Queensland electorate who believe that the State of Queensland is or would be justified in prohibiting political donations by tobacco companies, the gun lobby or fossil fuel producers, on the basis that any influence that those organisations might exert on anti-smoking or gun control or fossil fuel production policies or legislation would be "undue". There may also be a section of the Queensland electorate who believe that it would be a good thing to prevent political donations by, say, sugar producers or private health insurers or prescription drug or prosthesis manufacturers, on the basis that any influence which those organisations might have on political decisions concerning sugar consumption, the promotion of private health insurance or prescription drugs or prosthetics would be "undue". No doubt at the same time, however, there is also a sizeable section of the Queensland electorate who, rightly or wrongly, hold opposing views. And they are entitled to have their views heard.

119 Discriminately prohibiting entities from making political donations because of the interests which they represent or the policies which they favour is calculated to deny to that part of the electorate which aligns with those interests and policies a considerable measure of the capacity that is enjoyed by their political opponents to make their views heard. As such, it materially distorts the level playing field that is said to be the *raison d'être* of the implied freedom and imposes a significant and potentially dangerous burden upon it[149]. In effect, it amounts to deploying the legislative might of the State to silence points of view which those in power do not wish to be heard. As McHugh J in effect observed[150] in another context, that cannot be justified.

Commonwealth exclusive power in respect of Commonwealth elections

120 As was first held in *Smith v Oldham*[151] and has since repeatedly been held by this Court, perforce of ss 7, 9, 10, 29, 30 and 31 in conjunction with s 51(xxxvi) of the *Constitution*, the Commonwealth has exclusive, plenary power

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149 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 578-579 [137] per Keane J.

150 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 237; [1992] HCA 45.

151 (1912) 15 CLR 355; [1912] HCA 61.

to make laws "in respect of" the election of members and senators of the Commonwealth Houses of Parliament[152], and, perforce of s 51(xxxix), to legislate "with respect to" all matters incidental thereto[153].

121 Some of the States intervening submitted that the Commonwealth does not have exclusive legislative power with respect to Commonwealth elections. The most far reaching of those submissions were those of the Solicitor-General for the State of Western Australia that the decision in *Smith v Oldham* was made "in the context of the fallacy about reserved powers". It was contended that the question for the Court in *Smith v Oldham*, "[a]s the headnote itself accept[ed]", was whether a Commonwealth Act was within power. As such, so it was contended, the decision said nothing binding about State power to legislate with respect to Commonwealth elections. The "real question" in *Smith v Oldham*, it was contended, was about characterisation: whether the Commonwealth law in issue was a law with respect to Commonwealth elections or whether it was a law with respect to the conduct and control of newspapers; for if the latter, it was within a State reserved power, but if the former it was valid. In the result, it was submitted, the question of characterisation in *Smith v Oldham* simply "did not go to the question of trying to analyse the constitutional basis for exclusivity of Commonwealth electoral power".

122 Those submissions should be rejected. *Smith v Oldham* cannot be sloughed off as a product of the now discredited reserved powers doctrine. It had nothing to do with reserved powers. Although counsel for the appellants advanced arguments based on that doctrine[154], the Court did not call on the respondent to answer them. The Court gave judgment for the respondent on the express basis that the Commonwealth has exclusive legislative power with respect to Commonwealth elections. The Court made no mention of reserved powers. Nor is it to be expected that they would do so. The reserved powers

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152 *Smith v Oldham* (1912) 15 CLR 355 at 358 per Griffith CJ, 360-361 per Barton J, 363 per Isaacs J; *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23 at 31 per Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ; [1920] HCA 24; *Judd v McKeon* (1926) 38 CLR 380 at 383 per Knox CJ, Gavan Duffy and Starke JJ; [1926] HCA 33; *Langer v The Commonwealth* (1996) 186 CLR 302 at 317 per Brennan CJ; [1996] HCA 43; *Abbotto v Australian Electoral Commission* (1997) 71 ALJR 675 at 678-679 per Dawson J; 144 ALR 352 at 356-357; [1997] HCA 18; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 14 [8] per French CJ; [2010] HCA 46; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 113 [262] per Gordon J; [2016] HCA 36.

153 *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 per Dixon CJ, McTiernan, Webb and Kitto JJ; [1955] HCA 6.

154 *Smith v Oldham* (1912) 15 CLR 355 at 356.

doctrine was concerned with cutting down the scope of Commonwealth legislative power to ensure that the States retained control of their domestic affairs[155]. It had no application in *Smith v Oldham* because it was considered that Commonwealth elections had nothing to do with the domestic affairs of the States. As Griffith CJ observed[156], the matter was one in which the States as such had no concern, and, as Barton J said[157], no power was given to the States to make laws with regard to Commonwealth elections except until the Commonwealth Parliament otherwise provided, and, since the Commonwealth Parliament had otherwise provided, it was the only authority that could legislate on the subject. Likewise, as Isaacs J explained[158], ss 10, 31 and 51(xxxvi) and (xxxix) empower the Parliament to legislate in respect of Commonwealth elections on the "vital principle" that the "vote of every elector is a matter of concern to the whole Commonwealth".

123 Some of the States intervening referred to individual statements in *Smith v Oldham* as examples of what was contended to be reserved powers reasoning. For instance, the Solicitor-General for the State of South Australia referred to the observation of Barton J that the proposition that the States have, and the Commonwealth has not, power to deal with the conduct of citizens in respect of Commonwealth elections was "too grotesque to be entertained". It was submitted that this statement, read with Barton J's earlier observation that "no power was given to any State", demonstrated that his Honour approached the issue from a reserved powers perspective. Such contentions are misplaced. There is nothing about Barton J's observations, or those of the other members of the Court, which suggests reserved powers reasoning. As the Solicitor-General of the Commonwealth rightly submitted, they merely identified uniformity as a structural reason in support of the conclusion that no power was given to the States over Commonwealth elections.

124 The constitutional basis for the exclusive power of the Commonwealth with respect to Commonwealth elections was the initial election to Parliament and franchise created by ss 7, 8, 9, 10, 24, 29, 30, 31 and 41 of the *Constitution*. It was never conceived of as having anything to do with reserved powers.

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155 *Peterswald v Bartley* (1904) 1 CLR 497 at 507 per Griffith CJ; [1904] HCA 21; *R v Barger* (1908) 6 CLR 41 at 54 per Griffith CJ in argument; [1908] HCA 43; *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 502-503 per Griffith CJ; [1908] HCA 94. See also Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (1985) at 29 [2.6].

156 *Smith v Oldham* (1912) 15 CLR 355 at 358.

157 *Smith v Oldham* (1912) 15 CLR 355 at 359.

158 *Smith v Oldham* (1912) 15 CLR 355 at 362.

As Barwick CJ observed[159] in *King v Jones*, consistently with the constitutional understanding expressed[160] at the time of federation that certain matters falling within s 51(xxxvi) were *ex necessitate* exclusive of any concurrent power in the Parliaments of the States:

> "The Imperial Parliament had to provide in the Constitution for the initial election of the Parliament and for a franchise until such time as the Parliament should legislate to specify the qualifications for electors of the Parliament. This provision was effected by ss 8, 9, 10, 30 and 31 of the Constitution. Section 30 provided both for a franchise for the election of the House of Representatives in the first Parliament and a franchise for election of that House until the Parliament legislated on the matter. Section 31 utilized the colonial electoral machinery continued in force by s 108 of the Constitution as State law, for the purpose of electing the first House of Representatives and thereafter, and if subsequently amended, perhaps, as so amended, until the Parliament passed a Commonwealth electoral law. Sections 8, 9 and 10 of the Constitution made comparable provisions as to the franchise and the procedure for the election of the Senate.
>
> But clearly, in my opinion, it was contemplated from the inception of the Commonwealth that in Australia, unlike the position in relation to the Congress as I think it was thought to be in the United States, the Parliament would determine the franchise for Australia for the election of both the House of Representatives and the Senate."

Queensland and Victoria sought to draw support from the decision in *R v Brisbane Licensing Court; Ex parte Daniell*[161] for the view that the Commonwealth's legislative power with respect to Commonwealth elections is in major respects concurrent with the States. Those suggestions are also misplaced. *Ex parte Daniell* concerned the validity of s 14 of the *Commonwealth Electoral (War-time) Act 1917* (Cth). That section provided that on the day appointed as polling day for an election of the Senate or a general election of the House of

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159 (1972) 128 CLR 221 at 230; [1972] HCA 44. See also *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 260-262 per Gibbs CJ, Mason and Wilson JJ; [1983] HCA 6; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, rev ed (2015) at 532-537; Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 124-126.

160 See Clarke, *Studies in Australian Constitutional Law* (1901) at 74-75. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, rev ed (2015) at 482-483.

161 (1920) 28 CLR 23.

Representatives, no referendum or vote of the electors of any State or part of a State shall be taken under the law of a State. Counsel for the prosecutor advanced two arguments in support of validity of the provision. The first was that s 14 was within the exclusive power of the Commonwealth with respect to Commonwealth elections. The second, alternative argument was that, if the power were not exclusive, it nevertheless prevailed over s 172 of the *Liquor Act 1912* (Qld) (which had appointed a particular date for a local option poll to be taken in the Local Option Area in Queensland) by reason of s 109 of the *Constitution*. In contrast to the prosecutor's arguments, there is no recorded submission of the respondents challenging the authority of *Smith v Oldham*, still less any suggestion that it should be overruled. As appears from the record of argument of the respondents' submissions, it was not concurrent power but the operation of s 9 of the *Constitution*, and the limited power granted to the States under that section, that was of concern to the States[162]:

> "Sec 14 of the *Commonwealth Electoral (War-time) Act* is invalid. The power given by sec 9 of the Constitution to a State Parliament to fix the days on which Senate elections shall be held is exclusive. Sec 14 is an attempt to cut down that power, for under that power the Parliament of Queensland might fix the day for holding an election as the day on which a local option poll was held. If it does not limit the power to fix the day for holding Senate elections, it limits the power to fix the day for holding local option polls, and so is an interference with a State instrumentality."

125 Although the significance of the decision in *Ex parte Daniell* now lies in its precedential value as an example of "direct" inconsistency, its significance at the time of publication, as is explained below, was its response to the respondents' argument that, perforce of s 9 of the *Constitution*, determination of the times and places for the election of senators was understood to be a power "permanently and exclusively vested in the States"[163].

126 After construing the effect of s 14 of the Commonwealth Act, a majority of the Court (Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ) rejected the respondents' contention on the *assumption* that, if the Commonwealth had the power to pass s 14, it would render s 172 of the *Liquor Act* invalid[164]:

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162 *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23 at 26.

163 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, rev ed (2015) at 481.

164 *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23 at 29.

> "Supposing the Commonwealth Parliament competent to enact such a prohibition, the result is not doubtful. There arises upon that construction a conflict, or inconsistency, between the State Act authorizing and commanding the vote on that day and the Commonwealth Act, assumedly competently made, forbidding the vote on that day. Then sec 109 of the Constitution enacts that in such a case the State law, to the extent of the inconsistency, is invalid."

Their Honours then turned to the issue of whether the Commonwealth had power to pass s 14, and emphatically rejected any suggestion that s 14 was beyond power[165]:

> "The respondents, however, strongly contended that such an enactment was beyond the competency of the Commonwealth Parliament. They so contended on two grounds. First they argued that the prohibition of State elections on the same day was not incidental to the acknowledged power to legislate as to Commonwealth elections. We are distinctly of opinion that the argument is unsound. The Commonwealth Parliament clearly has power to secure, so far as legislation can secure, the fullest opportunity it thinks desirable to the people of the Commonwealth to elect their Parliamentary representatives unconfused by any other public duties required of them as citizens of a particular State. It would be pedantic to say more on that subject."

127 As is apparent from their Honours' characterisation of the respondents' argument, as opposed to the way in which it is summarised in the Commonwealth Law Reports, the respondents' contention was that the power to pass laws in respect of the times and places of elections of senators was incidental to the "acknowledged power" of the Commonwealth. And as is apparent from the time and membership of the Court when *Ex parte Daniell* was decided, the "acknowledged power" of the Commonwealth is to be understood in light of the then recent holding in *Smith v Oldham* of exclusive power with respect to Commonwealth elections. The issue was whether that power extended to a law passed pursuant to ss 10 and 51(xxxvi) and (xxxix) of the *Constitution* in respect of a subject matter over which s 9 of the *Constitution* grants exclusive legislative power to the States. The description of the Commonwealth's power as "incidental" was, however, not so much a reference to the incidental power under s 51(xxxix), as to the extent to which the Commonwealth sought to legislate in respect of the times and places of elections of senators; being something lying on the periphery of the exclusive power and, in that sense, "incidental" to the "acknowledged power". The "distinct" view of their Honours was that the Commonwealth Parliament has power to "the fullest opportunity it thinks

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165 *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23 at 30-31.

desirable"; thus echoing Isaacs J's statement in *Smith v Oldham* that the "limits of plenary power end only with the subject matter in respect of which it may be exercised"[166]. That is further confirmed by their Honours' rejection of the respondents' second argument: that by operation of s 9 of the *Constitution* the Parliament of Queensland had exercised its power as to the day of polling and that s 14 of the Commonwealth Act was a "fetter on that power". Their Honours held[167] that the local option poll was not a law falling under s 9 of the *Constitution*, that the State of Queensland was "left absolutely unfettered as to the day of polling for Senators", and so that the passing of s 14 of the Commonwealth Act pursuant to s 10 of the *Constitution*, in combination with s 51(xxxvi) and (xxxix), was not incompatible with what s 9 of the *Constitution* prescribes[168].

128 Properly understood, the decision in *Ex parte Daniell* was on account of the practical overlap of Commonwealth and State laws at the periphery of the Commonwealth's exclusive power, and consequent inconsistency[169]. It was not in any sense an implicit or explicit holding that Commonwealth legislative power over Commonwealth elections was concurrent. Queensland's submission that this case is "not talking about the intersection of State and federal laws on the fringes" should be rejected.

129 Queensland further encouraged this Court to understand *Ex parte Daniell* as a departure from *Smith v Oldham* and to accept that the question was whether this Court now "should or should not reject what was necessarily determined by their Honours in *Daniell*". Unsurprisingly, however, Queensland was unable to point to even one subsequent case or text published in the passage of almost a century since *Ex parte Daniell* was decided which interprets *Ex parte Daniell* as overruling *Smith v Oldham*, or as otherwise inconsistent with it. The Commonwealth Law Reports do not report the case as reversing or (re)considering *Smith v Oldham* and the received understanding after the decision was published was that Commonwealth power over Commonwealth elections was an exclusive power[170]. Queensland's argument to the contrary is without foundation.

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166 (1912) 15 CLR 355 at 363.

167 *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23 at 31.

168 See Knowles, *The Commonwealth of Australia Constitution Act* (1936) at 10.

169 See and compare *Nelungaloo Pty Ltd v The Commonwealth* (1952) 85 CLR 545 at 564 per Dixon J; [1952] HCA 11.

170 See, eg, Kerr, *The Law of the Australian Constitution* (1925) at 102 fn 5.

130 Finally with respect to *Ex parte Daniell*, it is to be observed that, so far from being considered as contradictory of *Smith v Oldham*, the precedential value of *Ex parte Daniell* has long been understood as an example of "direct" inconsistency between State and Commonwealth legislative power. That is immediately apparent in *West v Commissioner of Taxation (NSW)*[171], where Latham CJ described[172] *Ex parte Daniell* as an example of the application of the principle that the Commonwealth Parliament can legislate so as to exclude the operation of a State law in relation to a matter controlled by federal law. Evatt J, after describing unlawful attempts by the Commonwealth "to manufacture 'inconsistency'", stated[173] that the passing of the Commonwealth law in question in *Ex parte Daniell* in order to engage the operation of s 109 was lawful. The direct collision of laws was, in his Honour's view, acceptable because the Commonwealth's legislative power over its own electoral system was "deemed sufficient to enable it" to prevent the awkwardness and confusion which might well result from a simultaneous Commonwealth and State election. Once again, the reference to "sufficient to enable it" is to be understood in terms of the law operating at the periphery of the power for the reasons already explained.

131 For more than a century this Court has applied *Smith v Oldham* without doubt as to its correctness or precedential authority. Long since the abolition of the reserved powers doctrine, this Court has repeatedly invoked[174] *Smith v Oldham* as establishing that the legislative power of the Commonwealth with respect to Commonwealth elections is essentially exclusive. Nothing advanced by any of the States in this matter offers any reason to doubt it.

The plenitude of Commonwealth power over Commonwealth elections

132 Subject to context and contrary indication, the words "in respect of" connote "the widest possible meaning of any expression intended to convey some connexion or relation between two subject-matters"[175]. In s 51(xxxvi) it is apparent that they are intended to have that effect. The Commonwealth Parliament's legislative power to make laws "in respect of" Commonwealth

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171 (1937) 56 CLR 657; [1937] HCA 26.

172 (1937) 56 CLR 657 at 670.

173 *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 707.

174 See fn 152 above.

175 *Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110 at 111 per Mann CJ, quoted in *Powers v Maher* (1959) 103 CLR 478 at 484-485 per Kitto J; [1959] HCA 52.

elections is wide[176]. It extends to enacting laws which in any way relate to Commonwealth elections provided that the connection is not so "insubstantial, tenuous or distant" that it cannot properly be described as a law with respect to that subject matter. It includes making laws which regulate the conduct of persons in relation to elections, and thus the making of laws proscribing bribery or corruption, illegal practices and undue influence in relation to elections[177]. And as is implicit in the Court's previous decisions concerning the legislative power of the States to cap and prohibit State electoral donations[178], it extends to making laws capping and prohibiting donations for Commonwealth electoral purposes. Such laws have a direct and substantial connection with Commonwealth elections[179].

Limited State power over Commonwealth elections

133 By contrast, the States have but narrowly defined specific legislative powers with respect to Commonwealth elections, which, with one exception, are limited to making laws relating to Commonwealth elections until the Commonwealth otherwise provides. The one exception occurs in s 9 of the *Constitution*, which, as has been seen, provides for the Parliament of a State to make laws for determining the times and places of election of senators for the State. Despite, however, the essential exclusivity of the Commonwealth's legislative power to make laws in respect of Commonwealth elections, State laws with respect to subject matters other than elections may operate on and in connection with Commonwealth laws to the extent that they are not inconsistent. Thus, although a State law properly characterisable as a law with respect to Commonwealth elections would be invalid as a State law impinging on a field of exclusive Commonwealth legislative power, a State law properly characterisable as a law with respect to a subject matter other than Commonwealth elections – for example, a State law with respect to crime, defamation, or occupational health and safety – might not be invalid despite its effect on Commonwealth elections. Whether a State law is properly characterisable as a law with respect to Commonwealth elections depends on the degree of its connectedness to

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176 See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 207-208 [66] per McHugh J; [2004] HCA 41.

177 *Sue v Hill* (1999) 199 CLR 462 at 473 [7] per Gleeson CJ, Gummow and Hayne JJ; [1999] HCA 30.

178 *Unions NSW v New South Wales* (2013) 252 CLR 530; *McCloy v New South Wales* (2015) 257 CLR 178; *Unions NSW v New South Wales* (2019) 93 ALJR 166; 363 ALR 1.

179 See and compare *Victoria v The Commonwealth* ("the *Second Uniform Tax Case*") (1957) 99 CLR 575 at 614-615 per Dixon CJ; [1957] HCA 54.

Commonwealth elections: the degree to which it touches or concerns Commonwealth elections. A State law is unlikely to be a law with respect to Commonwealth elections if the degree of its connectedness to Commonwealth elections is no more than adventitious. But the scope for the States to legislate with respect to Commonwealth elections and what is incidental to them remains essentially limited.

Commonwealth power to pass electoral funding laws

134 Given the breadth of the Commonwealth's legislative power relating to Commonwealth elections, and that donations for Commonwealth electoral purposes are so closely connected to the Commonwealth electoral process, the Commonwealth's legislative power with respect to Commonwealth elections includes exclusive legislative power to enact a regime to govern and control Commonwealth election funding and financial disclosure and the giving and receipt of political donations for Commonwealth electoral purposes[180]. It also includes legislative power to exclude the operation of State and Territory laws from the field of operation of that regime[181]. As Mason J remarked[182] in *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation*:

> "although a provision in a Commonwealth statute which attempts to deny operational validity to a State law cannot of its own force achieve that object, it may nevertheless validly evince an intention on the part of the statute to make exhaustive or exclusive provision on the subject with which it deals, thereby bringing s 109 into play".

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180 *Sue v Hill* (1999) 199 CLR 462 at 473 [7] per Gleeson CJ, Gummow and Hayne JJ; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 207-208 [66] per McHugh J.

181 *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 120 per Dixon J; [1948] HCA 13; *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46 at 56-57 per Dixon CJ; [1962] HCA 8; *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453 at 465 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1992] HCA 52; *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 467 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; [1995] HCA 47.

182 (1977) 137 CLR 545 at 563; [1977] HCA 34.

There is no doubt that the Commonwealth Parliament has legislative power to exclude the application of State laws which prohibit political donations that are required to be used for Commonwealth electoral purposes[183].

Sufficient connection with Commonwealth power

135 The critical issue joined in argument was whether the Commonwealth has power to regulate political donations which, although not required to be used for Commonwealth electoral purposes, may be used for those purposes. The Solicitor-General for the State of Victoria, for example, contended that s 302CA does not directly operate on the subject matter of Commonwealth elections but is supported as being incidental to that subject, that the degree of connection between such donations and Commonwealth elections is tenuous, and that where the Constitution creates or recognises a distinction between the Commonwealth and the States in a grant of power, it is necessary to "give a narrowly confined ambit to the incidental power so that that distinction is not obliterated". Reliance was placed on *Gazzo v Comptroller of Stamps (Vict)*[184], in which Gibbs CJ stated[185] that where the exercise of Commonwealth legislative power is incidental to the subject matter of the power it is not always irrelevant that the effect of the law is to invade State power.

136 The rectitude of Gibbs CJ's reasoning in *Gazzo* has rightly been questioned[186]. As Murphy J observed[187] in *Gazzo*:

> "This Court's decision to invalidate s 90 is attributable to what can fairly be described as a revival of the States' reserved powers doctrine."

And similarly, as his Honour reasoned[188] in *Attorney-General (WA) v Australian National Airlines Commission*:

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183 *Abbotto v Australian Electoral Commission* (1997) 71 ALJR 675 at 678-679 per Dawson J; 144 ALR 352 at 356-357.

184 (1981) 149 CLR 227; [1981] HCA 73.

185 (1981) 149 CLR 227 at 240.

186 *Fisher v Fisher* (1986) 161 CLR 438 at 453 per Mason and Deane JJ; [1986] HCA 61; Stellios, *Zines's The High Court and The Constitution*, 6th ed (2015) at 63-64.

187 (1981) 149 CLR 227 at 261.

188 (1976) 138 CLR 492 at 530; [1976] HCA 66.

> "The maintenance of the supposed decision and the further insistence (see *Wragg v New South Wales*) that even the use of the incidental power in s 51(xxxix) cannot obliterate the division, keeps the pre-*Engineers* ghosts walking." (footnote omitted)

137 Possibly Gibbs CJ was not so much suggesting a veiled recourse to reserved powers reasoning as, consistent with the *Engineers Case*[189] and *Melbourne Corporation v The Commonwealth*[190], an analysis directed to ensuring the independent existence of the States. But the distinction is a fine one. And where, as here, there arise questions involving the exercise of exclusive Commonwealth legislative power, it is necessary to be particularly careful in drawing conclusions about "remoteness" and "invading State power". Certainly, at the periphery, the State's concern increases by reason of the inevitable overlap of Commonwealth and State laws. But simply to decide that a Commonwealth law at the periphery may intrude into an area the subject of State law does not mean that the subject matter is not one of real and valued interest to the Commonwealth. As Deane J said[191] in *The Commonwealth v Tasmania*:

> "There are, no doubt, areas within the plenitude of executive and legislative power shared between Commonwealth and States (see *Colonial Sugar Refining Co Ltd v Attorney-General (Cth); Smith v Oldham)* which, while not included in any express grant of legislative power, are of real interest to the Commonwealth or national government alone. Even in fields which are under active State legislative and executive control, Commonwealth legislative or executive action may involve no competition with State authority: an example is the mere appropriation and payment of money to assist what are truly national endeavours." (footnotes omitted)

138 Arguably, a Commonwealth law which did no more than purport to exclude the application of State law to gifts that might be used for Commonwealth electoral purposes would be beyond Commonwealth legislative power. On one view of the matter, the link between the subject matter of Commonwealth elections and a mere possibility of a gift being used for Commonwealth electoral purposes, standing alone, would be too tenuous to conclude that the law was one with respect to Commonwealth elections. As was accepted by the Solicitor-General of the Commonwealth, the situation would be in some respects analogous to the examples of Commonwealth prohibitions

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189 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129; [1920] HCA 54.

190 (1947) 74 CLR 31; [1947] HCA 26.

191 (1983) 158 CLR 1 at 252-253; [1983] HCA 21.

adumbrated[192] by Dixon CJ in the *Second Uniform Tax Case* in support of his Honour's conclusion that a Commonwealth law which purported to prohibit a taxpayer paying State taxation before paying Commonwealth taxation went beyond any true conception of what was incidental to the Commonwealth's power to make laws with respect to taxation. But there are dangers in analogies[193], and as Dixon CJ expressly cautioned[194] in the *Second Uniform Tax Case*:

> "[W]hen you are considering what is incidental to a power not only must you take into account the nature and subject of the power but you must pay regard to the context in which you find the power."

139 Relevantly, the conclusion reached in the *Second Uniform Tax Case* was that the Commonwealth's taxation power could not be construed as power over the whole subject of taxation, and thus that it was to be recognised that the States had concurrent and independent taxation power. By contrast here, the context is one in which the Commonwealth has exclusive legislative power with respect to Commonwealth elections and the States have no interest in Commonwealth elections.

140 Moreover, and more importantly, as Gordon J observes, the exclusion in s 302CA of application of State laws to donations which might be used for Commonwealth electoral purposes does not stand alone. As Gordon J demonstrates, it forms part of the comprehensive legislative regime enacted as Pt XX of the *Commonwealth Electoral Act 1918* (Cth) for the regulation of Commonwealth election funding and financial disclosure. The scheme is analysed in full in Gordon J's judgment. It is also accurately summarised in the simplified outline of the Part which appears in s 286A. For present purposes, it suffices to say that Pt XX deals with the funding of "registered political parties, candidates and groups" and with gifts and other financial matters relating to "parties, candidates, groups, political campaigners, third parties and associated entities". Subject to some exceptions, it prohibits foreign donors from making gifts to registered political parties, candidates, Senate groups, or political campaigners of $1,000 or more for the purpose of incurring electoral expenditure or creating or communicating electoral matter. Significantly, it also imposes obligations to disclose certain gifts made to candidates and members of groups, registered political parties, State branches of registered political parties and political campaigners, and certain expenditure incurred by or with the authority

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192 *Victoria v The Commonwealth* (1957) 99 CLR 575 at 615.

193 See *Federal Commissioner of Taxation v Citylink Melbourne Ltd* (2006) 228 CLR 1 at 43 [151] per Crennan J; [2006] HCA 35.

194 *Victoria v The Commonwealth* (1957) 99 CLR 575 at 614.

of candidates and groups during an election period. And it requires that, each financial year, registered political parties, political campaigners, third parties and associated entities disclose details relating to amounts received by or paid to or incurred by them during the year.

141 As long as a donation made to a Commonwealth electoral participant is made on terms which permit the donation to be used for Commonwealth electoral purposes, the breadth of the Commonwealth's legislative power with respect to Commonwealth elections means that, until and unless the donee determines to use the donation for purposes other than Commonwealth electoral purposes, the Commonwealth Parliament's power to make laws regulating the conduct of persons in relation to Commonwealth elections and, therefore, proscribing bribery and corruption, illegal practices and undue influence in relation to Commonwealth elections includes power to regulate the giving and receipt of the donation and to require the donee to account for it. Were it otherwise, Commonwealth control of donations for Commonwealth electoral purposes could be frustrated by the simple device of donors who intend and expect their donations to be used for Commonwealth electoral purposes stipulating that donations *may* be used for Commonwealth electoral purposes. And for the reasons already given, because that is so it follows that the Commonwealth has legislative power, as part of the regulatory scheme which Pt XX entails, to exclude the operation of State laws from the field of operation of that scheme in its application to donations which may be used for Commonwealth electoral purposes.

142 Does the situation change when and if a donee determines to use such a donation for purposes other than Commonwealth electoral purposes? By its terms, s 302CA has the effect of making Pt XX cease to apply if a donee determines to apply such a donation to a State political purpose. But what if the donee determines to apply such a donation to a purpose which is neither a Commonwealth electoral purpose nor a State electoral purpose?

143 As it appears to me, the answer to that question is that because that possibility is inherent in every donation made on terms that permit but do not require the donation to be used for Commonwealth electoral purposes, Pt XX is a law with respect to both Commonwealth purposes and purposes not within Commonwealth legislative power. But as has long been established, if a law enacted by the Commonwealth Parliament can fairly be described as a law with respect to a grant of Commonwealth legislative power as well as a law with respect to matters left to the States, that will suffice to support its validity as a law of the Commonwealth[195].

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195 *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 192 per Stephen J; [1982] HCA 23; *New South Wales v*

(Footnote continues on next page)

144 In *Actors and Announcers Equity Association v Fontana Films Pty Ltd* Stephen J concluded[196] that the question of whether a "mixed" law may fairly be described as one with respect to a head of power will depend upon the "significance" of the remaining elements:

> "So long as the remaining elements, which do not fall within any such grant of power, are not of such significance that the law cannot fairly be described as one with respect to one or more of such grants of power then, however else it may also be described, the law will be valid."

145 In my view, the possible application of s 302CA to donations which may be but are not required to be used for Commonwealth electoral purposes, and are not used for Commonwealth electoral purposes, is not so significant that the law cannot fairly be described as a law with respect to Commonwealth elections. And since 302CA can thus fairly be described as a law with respect to Commonwealth elections – no matter that it might also be described in its application to donations which may be but are not required to be used for Commonwealth electoral purposes as a law with respect to purposes other than Commonwealth electoral purposes – it is a valid law of the Commonwealth which prevails over inconsistent State laws by reason of s 109 of the *Constitution*.

University of Wollongong v Metwally

146 Queensland contended that s 302CA was invalid as offending the conclusion reached by the majority in *University of Wollongong v Metwally*[197] that, where a State law has been held to be invalid as inconsistent with a valid Commonwealth law, it is beyond the legislative competence of the Commonwealth retrospectively to enact that the Commonwealth law shall be deemed never to have been intended to exclude or to have excluded or limited the operation of the State law.

147 Views differ as to the extent of operation of the decision in *Metwally* but, whatever the correct conception of it, it does not apply to the facts of this matter. Section 302CA does not provide that it shall be deemed never to have been intended to exclude or to have excluded or limited the operation of any State law prohibiting property developer political donations. Nor is s 302CA in any respect retroactive in its operation. It provides simply that if a donation which

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The Commonwealth (2006) 229 CLR 1 at 103-104 [142] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2006] HCA 52.

196 (1982) 150 CLR 169 at 192.

197 (1984) 158 CLR 447; [1984] HCA 74.

may be but is not required to be used for Commonwealth electoral purposes is used for State electoral purposes, s 302CA shall thenceforth cease to apply. It is open to the Commonwealth Parliament to enact when and in what circumstances a provision such as s 302CA will cease to apply. With respect, I agree with what Gordon J has written on the subject.

***Melbourne Corporation* principle**

148 Queensland further contended that s 302CA was "aimed at" the States and thereby offended the principle articulated in *Melbourne Corporation v The Commonwealth*[198] that a Commonwealth law which, looking to its substance and operation, in a significant manner curtails or interferes with the capacity of the States to function as governments is invalid[199]. Attention was directed to the effect of the Revised Explanatory Memorandum to the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018* (Cth), which stated that s 302CA clarified the interaction between State and Territory and Commonwealth electoral laws and that some State and Territory laws would be invalidated to the extent they detracted from the right to give, accept or use a donation under the *Commonwealth Electoral Act*. It was submitted that s 302CA discriminates against the States and has the effect of denying or destroying the application of Queensland's chosen regulatory model, the result of which is that s 302CA impairs the "liberty of action of the State" in exercise of its constitutional functions.

149 There is no merit in that submission. As has been explained, the prevention of the application of Queensland's prohibition of property developer political donations to political donations which must or may be used for Commonwealth electoral purposes in s 302CA is within the ambit of the Commonwealth's legislative power with respect to Commonwealth elections. As is apparent from the text of the provision, s 302CA is designed to ensure the effectiveness of the regime which the Commonwealth has chosen for regulating the conduct of persons in relation to Commonwealth elections. Evidently, it does so without in any significant manner curtailing or interfering with Queensland's legislative freedom. It leaves Queensland free to legislate, as it has, to criminalise corrupt political donations and, apart from prohibiting political donations to Commonwealth electoral participants that must or may be used for Commonwealth electoral purposes, leaves Queensland otherwise free to prohibit

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198 (1947) 74 CLR 31.

199 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 75 per Starke J, 81 per Dixon J; *Austin v The Commonwealth* (2003) 215 CLR 185 at 219 [27] per Gleeson CJ, 265 [168] per Gaudron, Gummow and Hayne JJ, 299 [275] per Kirby J; [2003] HCA 3.

non-criminal property developer political donations. The exclusion of donations which may but need not be used for Commonwealth electoral purposes does not affect the capacity of Queensland to function as a government. Rather, to adopt and adapt the language in *Bayside City Council v Telstra Corporation Ltd*[200], there is no more an attempt in s 302CA to dictate the content of Queensland's State electoral donations laws than there was an attempt in *Australian Coastal Shipping Commission v O'Reilly*[201] or in *Botany Municipal Council v Federal Airports Corporation*[202] to dictate the content of State laws with respect to taxation or the carrying out of relevant works.

150 The substance of the States' submissions that s 302CA was "aimed at" the States elided with objections previously described in this Court as "a bare attempt to limit or exclude State power"[203] or to "manufacture inconsistency"[204]. Regardless of how such objections may be described, however, this Court has repeatedly upheld Commonwealth legislation where supported by a rational policy choice in the manner of federal regulation of a federal subject matter[205].

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200 (2004) 216 CLR 595 at 626 [30] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ; [2004] HCA 19.

201 (1962) 107 CLR 46 at 56-57 per Dixon CJ.

202 (1992) 175 CLR 453 at 465 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

203 See, eg, *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 120 per Dixon J; *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 166-167 [370] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

204 See, eg, *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 707 per Evatt J; *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 627-628 [35]-[36] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ; *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 164 [365] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

205 *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 707 per Evatt J; *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 110 per Latham CJ, 120 per Dixon J; *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46 at 56-57 per Dixon CJ; *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453 at 465 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 467 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 627-628 [35]-[36] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ, 644 [91] per McHugh J; *New South Wales v The Commonwealth* (2006) 229 CLR 1

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Section 302CA is so drafted, in particular by the inclusion of the three qualifications in sub-s (3), as to preserve as far as possible State legislation regulating donations and to limit the effect of inconsistency to the extent of those regulations which interfere with the policy choice sought to be achieved by the Commonwealth electoral funding regime described above. Section 302CA does not attempt to oust State laws beyond what is necessary to give effect to the policy choice reflected in the Commonwealth regime. It cannot be said that s 302CA is "aimed at" the States or is "a bare attempt to limit or exclude State power" or to "manufacture inconsistency". It is rather a provision calculated to achieve the exclusivity of Commonwealth regulation of a matter which is squarely within a head of exclusive Commonwealth legislative power.

Conclusion

151 As mine is a dissenting judgment, it is unnecessary and probably undesirable for me to say anything of other issues raised in the special case. For the reasons I have given, I would agree in the orders proposed by Gordon J.

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at 166-167 [370] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ. See and compare Dour and Taylor, "Manufactured Inconsistency" (2012) 39 *Monash Law Review* 131.

152 GORDON J. In 2018, Queensland and then the Commonwealth passed legislation seeking to regulate political donations – the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018* (Qld) ("the Queensland Amending Act") and the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth) ("the Commonwealth Amending Act").

153 In general terms, the Queensland Amending Act inserted provisions into the *Electoral Act 1992* (Qld) and the *Local Government Electoral Act 2011* (Qld) *prohibiting* political donations by property developers. The Commonwealth Amending Act amended Pt XX of the *Commonwealth Electoral Act 1918* (Cth) to the opposite effect. It inserted into Pt XX s 302CA, which provides that, subject to certain qualifications, "[d]espite any State or Territory electoral law" gifts *may* be given, received or retained as long as Commonwealth electoral law does not prohibit it.

154 Both sets of provisions apply to "political donations" or "gifts" to political parties[206], and define "political party"[207] to include parties whose object (or object or activity), or one of whose objects (or objects or activities), is the promotion of the election of candidates, in the one case for State or local government elected office and, in the other, for election to the federal Parliament. Thus, there is potential for overlap in their application to parties with *multiple* objects or activities. In addition, the Commonwealth legislation applies to "State branch[es]" of Commonwealth registered political parties[208].

155 The questions stated for the Full Court are set out in the reasons of Kiefel CJ, Bell, Gageler and Keane JJ[209]. I would have answered them as follows:

Questions (a)-(f): "No";

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206 *Electoral Act*, s 274(1)(a)(i); *Local Government Electoral Act*, s 113A(1)(a)(i); *Commonwealth Electoral Act*, s 302CA(1)(a), read with s 4(1) para (a) of the definition of "political entity".

207 *Electoral Act*, s 2 definition of "political party"; *Local Government Electoral Act*, s 4 and Sch definition of "political party"; *Commonwealth Electoral Act*, s 4(1) definitions of "political entity", "[p]olitical party" and "[r]egistered political party".

208 *Commonwealth Electoral Act*, s 4(1) para (b) of the definition of "political entity", read with s 287(1) definition of "State branch".

209 Reasons of Kiefel CJ, Bell, Gageler and Keane JJ at [112].

Question (g): "Yes. Section 275 of the *Electoral Act 1992* (Qld) is invalid to the extent that it applies to giving, receiving or retaining gifts where this is permitted by s 302CA(1) of the *Commonwealth Electoral Act 1918* (Cth)";

Question (h): "Yes. Section 113B of the *Local Government Electoral Act 2011* (Qld) is invalid to the extent that it applies to giving, receiving or retaining gifts where this is permitted by s 302CA(1) of the *Commonwealth Electoral Act 1918* (Cth)";

Question (i): "The defendant should pay the costs of the special case".

156 In short, s 302CA of the *Commonwealth Electoral Act* is valid: it is within power, and not otherwise invalid on any of the various bases advanced. In relation to Pts 3 and 5 of the Queensland Amending Act, although the implied freedom of political communication does not invalidate the amendments made by Pt 3 of that Act, and nor does any notion of Commonwealth exclusive power or intergovernmental immunities invalidate the amendments made by Pts 3 and 5, the amendments made by Pts 3 and 5 are inconsistent with s 302CA of the *Commonwealth Electoral Act* and should be held inoperative to the extent of that inconsistency.

157 The challenge to the validity of s 302CA of the *Commonwealth Electoral Act* was founded on complex and elaborate arguments often expressed in terms that concluded the issue. At its core, the argument for invalidity was that s 302CA was "aimed at"[210] the States and sought to give some "immunity" from the operation of State law.

158 It is important, in these circumstances, to begin by identifying the central errors in the arguments for invalidity of s 302CA of the *Commonwealth Electoral Act*.

159 Section 302CA of the *Commonwealth Electoral Act* is supported by s 51(xxxvi), read with ss 10 and 31, of the *Constitution*. It is a law with respect to matters in respect of which the *Constitution* makes provision until the Parliament otherwise provides: laws relating to federal elections of Senators and members of the House of Representatives[211]. These provisions confer on the

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210 See *Fortescue Metals Group Ltd v The Commonwealth* (2013) 250 CLR 548 at 611 [137]; [2013] HCA 34.

211 *Constitution*, ss 10 and 31.

federal Parliament a plenary power over federal elections for the Senate and the House of Representatives[212]. The *Constitution* does not confer on State Parliaments any power to make laws relating to federal elections, other than those powers granted by ss 7, 9 and 29 of the *Constitution*.

160 If s 302CA of the *Commonwealth Electoral Act* is robbed of all of its context, it may appear as some attempt to limit or exclude State law in the exercise of State legislative power. But the provision is not to be robbed of its context[213]. It is to be read in the context of the other provisions in Pt XX that lay down positive rules about who may make contributions to entities and persons that participate in federal elections. The rules provided by the *Commonwealth Electoral Act* in respect of political donations differ from, and are less restrictive than, the Queensland laws. But to describe the result of that difference as giving some immunity from the operation of State law either says too much or says too little – it obscures, rather than clarifies, the interaction of the laws.

161 Section 109 of the *Constitution* operates according to its terms: to the extent of inconsistency between State and Commonwealth laws, the Commonwealth law prevails. Notions of "immunity"[214] may be politically powerful but are at best distracting and may even mislead the constitutional analysis. If State and Commonwealth laws are inconsistent (and here they are), s 109 prescribes the result. "Immunity" and similar expressions assume (wrongly) that the State law operates according to its terms in relation to federal elections or imply (again wrongly) that the federal law is no more than a law with respect to State legislative *power*.

162 The Queensland Parliament and the federal Parliament have made different policy choices about who may contribute money that is or may be used in the elections for each respective Parliament. Put shortly, Queensland has decided that there should be no contributions by property developers. The Commonwealth has decided, first, that there should be no contributions by foreign donors above specific monetary thresholds[215] but, second, that the partial ban on foreign donors is to be the *only* restriction on donations.

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212 See *Langer v The Commonwealth* (1996) 186 CLR 302 at 317; [1996] HCA 43, citing *Smith v Oldham* (1912) 15 CLR 355 at 363; [1912] HCA 61.

213 See *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46 at 70-71; [1962] HCA 8.

214 Australia, House of Representatives, *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018* (Cth), Revised Explanatory Memorandum at 51 [228].

215 See *Commonwealth Electoral Act*, ss 302D, 302E, 302F.

163 Victoria and Tasmania contended that the federal Parliament has no power to make a law providing that the only limit on donations with respect to federal electoral matters is to be the preclusion of foreign donors above the specific monetary thresholds. They said that the Commonwealth law is invalid because, given that political parties are organised as multi-purpose entities, the Queensland prohibition on property developer donations should have effect in any case where the donation is not earmarked or applied for federal electoral purposes. In particular, the argument was that the federal law is not valid in its application to donations that are not earmarked for State electoral purposes but could be (but may or may not be) applied to federal electoral purposes. The argument was that the federal Parliament has no power to make a law that the rules set by the federal Parliament about donations capable of being applied to federal electoral purposes are the complete and comprehensive regulation of that subject.

164 To accept this central proposition denies the long-established doctrine of this Court about the operation of s 109. Dressing the argument, as Victoria and Tasmania did, in the clothes of an argument about legislative power seeks to divert attention from the novelty of the proposition advanced. That proposition is that the federal Parliament, making a law with respect to a subject matter within its legislative powers (here the subject of elections for the House of Representatives and the Senate), cannot provide as part of that law that the provisions made are a complete and comprehensive statement of the applicable law.

165 There was, and could be, no dispute that the federal Parliament has the power to make a law banning foreign donors from making donations above specific monetary thresholds for federal electoral purposes. Equally, then, there can be no dispute that the federal Parliament has power to make a law that banning foreign donors above those thresholds shall operate as the only limitation on donations for federal electoral purposes. Nor can there be any dispute that the federal Parliament has power to provide, as s 302CA does, that all donations which *may* be applied to federal electoral purposes (except those by foreign donors above specific monetary thresholds) are to be permitted.

166 Regulating how federal elections may be funded – for registered political parties, candidates, groups, political campaigners and third parties – is at the core of the relevant legislative power. It is not insubstantial, tenuous or distant.

Commonwealth Electoral Act

167 In 2018, the *Commonwealth Electoral Act* was amended by the Commonwealth Amending Act. In particular, Pt XX of the *Commonwealth Electoral Act*, headed "Election funding and financial disclosure", was amended.

Following that amendment, Pt XX contains a simplified outline of the Part in the following terms[216]:

> "This Part deals with the funding of registered political parties, candidates and groups. It also deals with gifts and other financial matters relating to parties, candidates, groups, political campaigners, third parties and associated entities.
>
> Registered political parties, candidates and groups must have agents. Political campaigners and associated entities must nominate financial controllers. Many of the obligations in this Part are imposed on those agents and financial controllers.
>
> Registered political parties, candidates and groups may be entitled to election funding. The election funding is payable in relation to any candidate who received more than 4% of the total first preference votes cast in the election.
>
> Generally, gifts of at least $1,000 to political entities (who are registered political parties, candidates and Senate groups) and political campaigners must not be made by foreign donors (that is, persons who, broadly, do not have a connection to Australia).
>
> Broadly, gifts to political entities, political campaigners or third parties must not be made by foreign donors for the purpose of incurring *electoral expenditure* or creating or communicating *electoral matter*.
>
> There are obligations to disclose certain gifts made to:
>
> (a) candidates and members of groups; and
>
> (b) registered political parties, State branches and political campaigners.
>
> Certain expenditure incurred by or with the authority of candidates and groups during an election period must also be disclosed.
>
> Each financial year, registered political parties, political campaigners, third parties and associated entities are required to disclose details relating to amounts received or paid or incurred by the parties, campaigners or entities during the year." (emphasis added)

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216 *Commonwealth Electoral Act*, s 286A.

168 Part XX addresses these issues by creating a scheme which provides for registration of political campaigners and associated entities and a Transparency Register[217]; appointment of agents and nomination of financial controllers[218]; public election funding[219]; requirements relating to donations[220]; disclosure obligations for donations[221]; disclosure obligations for electoral expenditure[222]; annual returns by registered political parties and other persons[223]; and machinery or miscellaneous provisions for the operation of the scheme[224].

169 Section 302CA is in Div 3A of Pt XX. Division 3A is headed "Requirements relating to donations". Section 302A explains that Div 3A "regulates gifts that are made to registered political parties, candidates, groups, political campaigners and third parties". Specifically, it notes that there are prohibitions[225] on the giving of certain gifts by foreign donors.

170 The object of Div 3A is "to secure and promote the actual and perceived integrity of the Australian electoral process by reducing the risk of foreign persons and entities exerting (or being perceived to exert) undue or improper influence in the outcomes of elections"[226]. The stated objective is limited. However, s 302CA, headed "Relationship with State and Territory electoral laws", is broader in its reach. For example, s 302CA(1), headed "Giving, receiving or retaining gifts", is in the following terms:

> "Despite any State or Territory electoral law, a person or entity may:
>
> (a) give a gift to, or for the benefit of, a political entity, a political campaigner or a third party (a *gift recipient*); or

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217 *Commonwealth Electoral Act*, Pt XX, Div 1A.

218 *Commonwealth Electoral Act*, Pt XX, Div 2.

219 *Commonwealth Electoral Act*, Pt XX, Div 3.

220 *Commonwealth Electoral Act*, Pt XX, Div 3A.

221 *Commonwealth Electoral Act*, Pt XX, Div 4.

222 *Commonwealth Electoral Act*, Pt XX, Div 5.

223 *Commonwealth Electoral Act*, Pt XX, Div 5A.

224 *Commonwealth Electoral Act*, Pt XX, Div 6.

225 See *Commonwealth Electoral Act*, ss 302D, 302E, 302F.

226 *Commonwealth Electoral Act*, s 302C(1).

(b) if the person or entity is a gift recipient – receive or retain a gift; or

(c) on behalf of a gift recipient, receive or retain a gift;

if:

(d) this Division does not prohibit the giving, receiving or retaining of the gift; and

(e) the gift, or part of the gift, is required to be, or may be, used for the purposes of incurring *electoral expenditure*, or creating or communicating electoral matter, in accordance with subsection (2)." (second emphasis added)

171 Section 302CA(1) permits gifts to, or for the benefit of, a "gift recipient"[227], the receipt or retention of those gifts[228], and receipt or retention on behalf of one of the specified gift recipients[229]. This permission is subject to specific requirements and exceptions. In order for s 302CA(1) to apply, it is necessary that the gifts are not prohibited by Div 3A[230], that the gifts are "required to be" or "may be" used for federal electoral purposes[231], and that the gifts are not subject to an exception for gifts for State or Territory electoral purposes[232]. Each of these aspects requires further explanation.

The gift recipients regulated by s 302CA

172 Section 302CA(1)(a) seeks to regulate gifts to, or for the benefit of, "a political entity, a political campaigner or a third party", collectively referred to as a "gift recipient". The law is limited to those gift recipients. And, as will be seen, each gift recipient is tied to, and defined by reference to, its participation in federal elections. It is necessary to take each "gift recipient" in turn.

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227 *Commonwealth Electoral Act*, s 302CA(1)(a).

228 *Commonwealth Electoral Act*, s 302CA(1)(b).

229 *Commonwealth Electoral Act*, s 302CA(1)(c).

230 *Commonwealth Electoral Act*, s 302CA(1)(d).

231 *Commonwealth Electoral Act*, s 302CA(1)(e) and (2).

232 *Commonwealth Electoral Act*, s 302CA(3).

173 The phrase "political entity"[233] is relevantly defined to include a registered political party and a State branch of a registered political party, as well as a candidate in a House of Representatives or Senate election, or a group of candidates for the Senate[234]. As is apparent, the phrase includes specific participants in federal elections.

174 The first to be addressed are federally registered political parties[235]. A "[r]egistered political party"[236] is defined as "a political party that is registered under Part XI". "Political party"[237] is defined as "an organization the object or activity, *or one of the objects or activities*, of which is the promotion of the election to the Senate or to the House of Representatives of a candidate or candidates endorsed by it" (emphasis added). Section 124 in Pt XI provides for the registration, subject to that Part, of an "eligible political party", which is defined[238] as "a political party that (a) either: (i) is a Parliamentary party; or (ii) has at least 500 members; and (b) is established on the basis of a written constitution (however described) that sets out the aims of the party". In the same provision, "[p]arliamentary party means a political party at least one member of which is a member of the Parliament of the Commonwealth". "[P]olitical entity"[239] also includes a "State branch (within the meaning of Part XX) of a registered political party". "State branch"[240] means "in relation to a political party ... a branch or division of the party that is organized on the basis of a particular State or Territory".

175 The second category of participants picked up by the definition of "political entity" is candidates. The term includes[241] a "candidate (within the meaning of [Pt XX]) in an election (including a by-election)". A candidate is

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233 *Commonwealth Electoral Act*, s 4(1) definition of "political entity".

234 See *Commonwealth Electoral Act*, s 287(1) definitions of "election" and "group", and s 287(9).

235 *Commonwealth Electoral Act*, s 4(1) para (a) of the definition of "political entity".

236 *Commonwealth Electoral Act*, s 4(1) definition of "[r]egistered political party".

237 *Commonwealth Electoral Act*, s 4(1) definition of "[p]olitical party".

238 *Commonwealth Electoral Act*, s 123(1).

239 *Commonwealth Electoral Act*, s 4(1) para (b) of the definition of "political entity".

240 *Commonwealth Electoral Act*, s 287(1) definition of "State branch".

241 *Commonwealth Electoral Act*, s 4(1) para (c) of the definition of "political entity".

"taken to begin to be a candidate" on the earlier of their announcement or nomination[242] in an "election", defined to mean "an election of a member of the House of Representatives or an election of senators for a State or Territory"[243]. Then, unsurprisingly, "political entity" includes "a member of a group (within the meaning of [Pt XX])"[244] where "group" means "a group of 2 or more candidates nominated for election to the Senate who have their names grouped in the ballot papers in accordance with section 168"[245]. A group is "taken to begin to be a group in an election on the day the members of the group make a request under section 168 for their names to be grouped in the ballot papers for the election"[246]. The candidate or group ceases to be a candidate or group at the end of 30 days after the polling day in the election[247].

176 Section 302CA(1) then applies to gifts to, or for the benefit of, a "political campaigner", which is defined as "a person or entity that is registered as a political campaigner under section 287L"[248]. A person or entity (except a "political entity", a member of the House of Representatives or a Senator) must be registered for a specific financial year as a political campaigner, within 90 days after becoming required to be registered[249], if the amount of *electoral expenditure* incurred by or with the authority of the person or entity during that or any one of the previous three financial years is $500,000 or more[250] *or* the amount of *electoral expenditure* incurred by or with the authority of the person or entity during that financial year is $100,000 or more and during the previous financial year that amount of *electoral expenditure* was at least two-thirds of the revenue of the person or entity for that year[251].

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242 *Commonwealth Electoral Act*, s 287(9)(a).

243 *Commonwealth Electoral Act*, s 287(1) definition of "election".

244 *Commonwealth Electoral Act*, s 4(1) para (d) of the definition of "political entity".

245 *Commonwealth Electoral Act*, s 287(1) definition of "group".

246 *Commonwealth Electoral Act*, s 287(9)(b).

247 *Commonwealth Electoral Act*, s 287(9).

248 *Commonwealth Electoral Act*, s 287(1) definition of "political campaigner".

249 *Commonwealth Electoral Act*, s 287F(1) and (2).

250 *Commonwealth Electoral Act*, s 287F(1)(a).

251 *Commonwealth Electoral Act*, s 287F(1)(b).

177 "Electoral expenditure" is relevantly defined in Pt XX[252] as "expenditure incurred for the *dominant purpose* of creating or communicating *electoral matter*"[253] (emphasis added). "Electoral matter" is relevantly defined[254] to mean:

> "(1) ... matter communicated or intended to be communicated for the *dominant purpose of influencing the way electors vote in an election (a federal election) of a member of the House of Representatives or of Senators for a State or Territory*, including by promoting or opposing:
>
> (a) a political entity, to the extent that the matter relates to a federal election; or
>
> (b) a member of the House of Representatives or a Senator.
>
> …
>
> (2) For the purposes of subsection (1), each creation, recreation, communication or recommunication of matter is to be treated separately for the purposes of determining whether matter is electoral matter.
>
> …" (emphasis added)

178 Finally, s 302CA(1) applies to gifts to or for the benefit of a "third party". A "third party" is defined in Pt XX[255] as follows:

> "a person or entity (except a political entity or a member of the House of Representatives or the Senate) is a *third party* during a financial year if:
>
> (a) the amount of *electoral expenditure* incurred by or with the authority of the person or entity during the financial year is more than the disclosure threshold[256]; and

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252 *Commonwealth Electoral Act*, s 287AB(1).

253 Subject to certain exceptions which may be put to one side.

254 *Commonwealth Electoral Act*, s 4AA(1) and (2).

255 *Commonwealth Electoral Act*, s 287(1) definition of "third party".

256 "[D]isclosure threshold" is defined in s 287(1) as $13,800, which is indexed under s 321A.

(b) the person or entity is not required to be, and is not, registered as a political campaigner under section 287F for the year." (second emphasis added)

179 As is readily apparent, the regulation of each gift recipient is tied to, and inextricably linked to, gifts to or for the benefit of that recipient, and *each recipient* is a *participant in federal elections.*

Purpose for which gifts to be used

180 That s 302CA is tied to, and inextricably linked to, federal elections and the regulation of funding for federal elections is addressed further in ss 302CA(1)(e) and 302CA(2). Section 302CA(1)(e) provides that the section regulates gifts where the gift, or part of the gift, is "required to be" or "may be" used for the purposes of incurring electoral expenditure. That condition is explained by s 302CA(2), which provides that a gift or part of a gift is required to be, or may be, used for the purposes of "incurring *electoral expenditure*, or creating or communicating *electoral matter*" if "any terms set by the person or entity providing the gift explicitly require or allow the gift or part to be used for that purpose (whether or not those terms are enforceable)"[257] or "the person or entity providing the gift *does not set terms* relating to the purpose for which the gift or part can be used"[258] (emphasis added).

181 That the gifts are required to be or *may* be used for "electoral expenditure" and, thus, an "electoral matter" means not only that the gifts are tied to federal elections but, more specifically, that the gifts (either expressly or potentially) are to be used for the purpose of matters being communicated, or intended to be communicated, for the dominant purpose of influencing the way electors vote in a federal election.

182 As seen above, s 302CA(1)(e) provides that the permission in s 302CA(1) applies where a gift or *part* of a gift is required to be, or may be, used for federal electoral purposes. Does this mean that the permission in s 302CA(1) attaches to a gift in its entirety if only *part* of that gift – potentially even a small part – is required to be, or may be, used for federal electoral purposes? The answer is no. To read the provision in that way would be to produce an irrational result[259],

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257 *Commonwealth Electoral Act*, s 302CA(2)(a).

258 *Commonwealth Electoral Act*, s 302CA(2)(b).

259 See *Prentice v Nugan Packing Co Pty Ltd* (1950) 81 CLR 558 at 564-565; [1950] HCA 51; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305, 320-322; [1981] HCA 26; *MacAlister v The Queen* (1990) 169 CLR 324 at 330; [1990] HCA 15; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2.

contrary to the context and purpose of s 302CA as providing a permission in respect of gifts for federal electoral purposes. Section 302CA does not apply, and is not intended to apply, to gifts or parts of gifts that are not able to be used for such purposes. As the Commonwealth submitted, where only part of a gift is required to be or may be used for federal electoral purposes, the permission would operate "only in relation to [that] part of the gift".

Exclusions and use of gifts

183 Before turning to address the use of the gifts, it is necessary to outline three exclusions from the operation of s 302CA(1).

184 Section 302CA(3), headed "Gifts made or retained for State or Territory electoral purposes", identifies three exclusions from the operation of s 302CA(1) in relation to gifts for State or Territory electoral purposes: first, where the terms of the gift "explicitly require the gift or part to be used only for a State or Territory electoral purpose"[260]; second, where a State or Territory electoral law requires the gift or part of the gift to be kept or identified separately in order to be used only for a State or Territory electoral purpose[261]; and, third, where the gift recipient keeps or identifies the gift or part separately in order to be used only for a State or Territory electoral purpose[262].

185 Section 302CA(3) provides:

> "Without limiting when subsection (1) does not apply, that subsection does not apply in relation to all or part of a gift if:
>
> (a) any terms set by the person or entity providing the gift explicitly require the gift or part to be used only for a *State or Territory electoral purpose* (whether or not those terms are enforceable); or
>
> (b) either:
>
> (i) the effect of a *State or Territory electoral law* is to require the gift or part to be kept or identified separately (or to require the gift or part to be kept or identified separately in order to be entitled to a benefit under that law); or

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260 *Commonwealth Electoral Act*, s 302CA(3)(a).

261 *Commonwealth Electoral Act*, s 302CA(3)(b)(i).

262 *Commonwealth Electoral Act*, s 302CA(3)(b)(ii).

(ii) the gift recipient keeps or identifies the gift or part separately;

in order to be used only for a *State or Territory electoral purpose*.

Note: For the purposes of subparagraph (3)(b)(ii), a gift recipient may identify the electoral purpose for which a gift is to be used at any time prior to using that gift. A person who gives, receives or retains a gift that is used for a State or Territory electoral purpose in contravention of a State or Territory electoral law may be liable to a penalty under the State or Territory electoral law.

Example: A gift is given without expressing an intended purpose, and ultimately is used for a State or Territory electoral purpose. The giving, receipt, retention and use of that gift must comply with the State or Territory electoral law."[263] (emphasis added)

186 Section 287(1) provides[264] that a "*State or Territory electoral law* means a law of a State or Territory that deals with electoral matters (within the ordinary meaning of the expression)" and a "*State or Territory electoral purpose* means a purpose relating to a State, Territory or local government election (and, to avoid doubt, does not include the purpose of incurring electoral expenditure or creating or communicating electoral matter)".

187 It is in that context that the *use* of gifts, if not prohibited by Div 3A, is then permitted by s 302CA in the following terms:

"(4) Despite any State or Territory electoral law, a gift recipient may use, or authorise the use of, a gift for the purposes of incurring electoral expenditure, or creating or communicating electoral matter, if this Division does not prohibit the use of the gift.

(5) Without limiting when subsection (4) does not apply, that subsection does not apply in relation to all or part of a gift if the effect of the State or Territory electoral law is to require the gift

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263 If an Act includes an example of the operation of a provision, the example is not exhaustive and may extend the operation of the provision: *Acts Interpretation Act 1901* (Cth), s 15AD. A note is part of an Act: see *Acts Interpretation Act 1901* (Cth), s 13(1).

264 *Commonwealth Electoral Act*, s 287(1) definitions of "State or Territory electoral law" and "State or Territory electoral purpose".

> or part to be *kept or identified separately* (or to require the gift or part to be kept or identified separately in order to be entitled to a benefit under that law) in order to be used only for a State or Territory electoral purpose." (emphasis added)

188 The concept of gifts "kept or identified separately" is explained in s 302CA(6) as follows:

> "Without limiting paragraph (3)(b) or subsection (5), an amount that is all or part of a gift of money is kept or identified separately in order to be used only for a State or Territory electoral purpose if:
>
> (a) the amount is kept in an account where:
>
> (i) the only amounts deposited into the account are amounts to be used only for a State or Territory electoral purpose; and
>
> (ii) the only amounts paid out of the account are amounts incurred for a State or Territory electoral purpose; or
>
> (b) the amount is designated as an amount that must be used only for a State or Territory electoral purpose."

189 These provisions identify a key aspect of the way the scheme operates. They recognise that it is not a bare or mere possibility that a gift *may be used* for federal electoral purposes that attracts the operation of s 302CA. To put it in that way overlooks both the character of the recipient as a participant in federal elections, as discussed above, and the fact that exclusions apply if the gift is allocated for State or Territory electoral purposes. The rule permitting a gift recipient, a participant in federal elections, to be funded for the defined "electoral purpose" applies when a gift is earmarked for that purpose by the donor at the time the gift is given; when it is earmarked by the recipient, at the time that it is received, that it will be used for such a purpose; or when it is subsequently earmarked by the recipient that it will be used for such a purpose. If a gift recipient, a participant in federal elections, receives a gift that is not earmarked, then, consistent with a scheme that encourages funding of participants in a federal election in the manner described, the gift is to be treated as if it is to be used for a federal purpose unless and until the gift is earmarked to be used in a way which attracts one of the exclusions from the rule.

190 Thus, practically, the law imposes an obligation on those entities and persons who receive gifts that *may* be used for federal electoral purposes, as well as those who make such gifts, to identify the use for which the gift is to be allocated. This earmarking is a condition of the positive rule that those participants are entitled to receive funding for federal elections.

191 Section 302CA(1) takes effect from the time of giving or receiving the gift. As the Commonwealth submitted, the permission granted by s 302CA(1) is contingent upon s 302CA(3)(b)(ii) – which addresses gifts kept or identified separately by the recipient in order to be used only for a State or Territory electoral purpose – *not applying* (or, put in different terms, s 302CA(3)(b)(ii) not applying is a condition subsequent to the permission). That s 302CA(3)(b)(ii) operates in this way is made clear from the Note and Example to the provision, taking into account that an example may extend the operation of a provision[265].

192 Practically, any issues with s 302CA(3)(b)(ii) operating in those terms can be mitigated. In relation to a gift recipient, they are in control of the way they allocate a gift. If they choose to subsequently keep or identify a gift for a State purpose, notwithstanding the fact that the State law says that they cannot receive such a gift, then the recipient bears and should bear the consequences of their own conduct. Donors are in a different position. However, as the Commonwealth submitted, all a donor needs to ensure is that the recipient of a gift is directed to use the gift for a federal purpose, namely for electoral expenditure or for creating or communicating an electoral matter. If that direction is made by a donor, then s 302CA(2)(a) applies and the gift is subject to the federal regime.

193 If, however, a donor gives a gift to a federal participant and does not allocate the gift to federal purposes, and the gift is subsequently used by the recipient for a State purpose, thereby removing the permission in s 302CA(1) and allowing a State law to render its receipt unlawful, then whether or not the donor's conduct is criminal will depend upon the offence provisions of the relevant State law. The gift, from the time that it was given, would be regulated by any relevant State Act, not the Commonwealth scheme. However, as will be seen, in the context of the Queensland *Electoral Act*, a donor would not commit an offence against s 307A of the *Electoral Act* because an essential element of the offence would be absent, namely that the donor knew or ought reasonably to have known of the facts that resulted in the act or omission (in this case, the making of the donation under s 275) being unlawful, because when the donation was made, it was not unlawful (as it was subject to the permission in s 302CA(1) of the *Commonwealth Electoral Act*).

194 Describing one or more of these circumstances as a "retrospective" application of either the federal or the State law is apt to mislead. The notion of "retrospectivity" is too broad, and imprecise, to make it a useful point from which to commence the argument[266]. The questions will be determined by

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265 *Acts Interpretation Act 1901* (Cth), s 15AD.

266 See, eg, *Attorney-General (Q) v Australian Industrial Relations Commission* (2002) 213 CLR 485 at 492 [6]; [2002] HCA 42.

having regard to the way in which the relevant Act applies to the particular facts and circumstances in issue.

Foreign donors

195 Finally, it is necessary to refer to s 302CA(1)(d), which identifies *one* category of *donor* that is prohibited in Div 3A, namely, foreign donors who make political donations above specific monetary thresholds. That prohibition is effected by ss 302D, 302E and 302F. It is sufficient to refer, by way of example, to s 302D, which prohibits donations made to or for the benefit of an agent of a political entity or a financial controller of a political campaigner during a financial year by a foreign donor in an amount of at least $1,000 (if the gift is not returned to the donor or an equal amount transferred to the donor, or an equal amount transferred to the Commonwealth[267]). Due to s 302CA(1)(d), donations prohibited by s 302D, 302E or 302F would not be subject to the permission in s 302CA(1).

Section 302CA is within power

196 The Commonwealth submitted that s 302CA is supported by s 51(xxxvi), read with ss 10 and 31, of the *Constitution*. It is a law with respect to matters in respect of which the *Constitution* makes provision until the Parliament otherwise provides: laws relating to elections of Senators and members of the House of Representatives[268]. That contention should be accepted.

197 A law of the federal Parliament is made "with respect to" the subject matter of a power "when it relates to or affects that subject matter and the connection is not 'so insubstantial, tenuous or distant' that it cannot properly be described as a law with respect to that subject matter"[269]. The constitutional text is to be construed "with all the generality which the words used admit"[270].

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267 See *Commonwealth Electoral Act*, s 302B definition of "acceptable action".

268 *Constitution*, ss 10 and 31.

269 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 208 [66]; [2004] HCA 41, citing *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 369; [1995] HCA 16, in turn citing *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79; [1947] HCA 26.

270 *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 103 [142]; [2006] HCA 52, citing *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226; [1964] HCA 15 and *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16]; [2000] HCA 14.

198 The character of a law is determined by reference to "the rights, powers, liabilities, duties and privileges which it creates"; the practical as well as the legal operation of the law must be examined[271]. And, consistent with established principle, it is necessary to consider the law in context, as part of any wider scheme of regulation, rather than in isolation, where it might incorrectly be viewed as some bare attempt to limit or exclude State legislative power[272].

199 Here, as outlined, the wider scheme in Pt XX provides for regulation of donations in federal elections through, in particular, a disclosure regime and prohibitions of foreign donations above specific monetary thresholds[273]. Put in different terms, in assessing the practical as well as the legal operation of the law, it is relevant to distinguish between a law which lays down a positive rule and a law seeking to limit State power[274]. On its proper construction, s 302CA, as part of the scheme in Pt XX, lays down a positive rule. That is consistent with the understanding that s 109 of the *Constitution* may operate where the Commonwealth chooses to enact a scheme involving a more detailed form of regulation than State law provides, where the Commonwealth creates a scheme involving less detailed regulation than State law provides, or where the Commonwealth has provided a more detailed scheme than State law in some respects and a less detailed scheme in other respects[275].

200 Describing a power as "exclusive" may or may not be apt to emphasise that a State may have no power to regulate federal electoral matters. But in this case that is not a necessary point at which to begin the analysis. It is sufficient to proceed without deciding the extent to which the power may properly be described as "exclusive". And doing so avoids any unintended endorsement or revival of ideas rejected in the *Engineers' Case*[276].

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271 *Work Choices* (2006) 229 CLR 1 at 103 [142]. See also *Re Dingjan* (1995) 183 CLR 323 at 369; *Grain Pool* (2000) 202 CLR 479 at 492 [16].

272 *O'Reilly* (1962) 107 CLR 46 at 70-71; *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453 at 463; [1992] HCA 52; *Work Choices* (2006) 229 CLR 1 at 166-167 [370].

273 See *Commonwealth Electoral Act*, Pt XX, Divs 3A, 4 and 5.

274 *Lamshed v Lake* (1958) 99 CLR 132 at 147; [1958] HCA 14, quoted in *Work Choices* (2006) 229 CLR 1 at 166 [370].

275 *Work Choices* (2006) 229 CLR 1 at 166-167 [370].

276 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129; [1920] HCA 54.

201 So what is the practical and legal operation of s 302CA?

202 As seen above, it is a provision which lays down a positive rule in the context of a scheme. It provides that "[d]espite any State or Territory electoral law", a person *may give* a gift "to, or for the benefit of, a political entity, a political campaigner or a third party", and those recipients can "receive or retain a gift", if two conditions are met: Div 3A does not prohibit it and the gift or part of the gift is required to be or *may be used* for the purposes of "incurring electoral expenditure, or creating or communicating electoral matter".

203 Specific aspects of the law's operation establish that the connection between the law and the head of power is sufficient. Those aspects are interrelated and interconnected. The first two aspects – the *character* of the recipients it regulates and the *purpose* of the gifts – are positive links with the head of power. The second two aspects – that s 302CA excludes only State or Territory *electoral* laws and then, having made that exclusion, expressly leaves room for State or Territory electoral laws to operate in relation to gifts for State or Territory electoral purposes – are limitations on the scope of the law that support the law being within power. It is necessary to address each in turn.

204 The first aspect is the *character* of the recipients that the law regulates. The law is directed to participants in federal elections – federally registered political parties, federal candidates or groups, federally registered political campaigners, and federal third parties – and only participants in federal elections. A law that regulates such entities and persons cannot be described as having a slight connection with federal power. It is also relevant to observe that the law affects a limited and specific class of participants, those that participate in federal elections, and not a wide section of the Australian community. That the class is limited in this way is an important consideration in finding the law within power.

205 The effect of the law on each "political entity" is not uniform. For example, the effect of the law on a "candidate" is direct and time-limited. It applies for only so long as that individual is a "candidate" in a federal election, until 30 days after polling day[277]. Similar time limitations apply in relation to its application to groups of Senate candidates[278]. It may, indeed, be particularly hard to doubt that the law is within power to the extent that it applies to the receipt of funds by candidates or groups of Senate candidates in a federal election. Victoria and Tasmania, although contending for the invalidity of s 302CA, did not explain why the Commonwealth lacked power to regulate gifts to these persons or groups.

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277 See *Commonwealth Electoral Act*, s 287(9)(a).

278 See *Commonwealth Electoral Act*, s 287(9)(b).

206 Political parties are often organised as multi-purpose entities in the sense that they are organised, run and act in connection with both State and federal elections. They may not keep State and federal electoral activities segregated in watertight compartments. Some political parties may be constituted as unitary bodies participating in State, Territory and federal electoral activities. Some may be organised as a federation of separate State bodies. They may be, and often are, unincorporated associations. Whether or not political parties that are registered at the federal level, and accordingly are participants in federal elections, take the form of unincorporated associations does not alter their relevance to or participation in the federal electoral process. It is not as if the Commonwealth seeks to support s 302CA on the basis of the corporations power in s 51(xx) of the *Constitution*, and as a result must limit itself to incorporated entities. The relevant power is over federal elections. It is not the form of a political party as an entity that matters, but its participation in federal elections.

207 Thus, when directed to political parties, the law does not impose particular operational structures on those organisations. Whatever the manner in which the party is constituted, the Commonwealth electoral law seeks to regulate how those parties federally registered as a participant in federal elections will be funded. It is therefore unsurprising that the legislation should recognise and deal with different organisational structures including, in particular, political parties constituted in one State but which seek to play a role in federal elections.

208 Of course, the character of those to whom the law applies does not necessarily provide, in itself, a basis for *any kind* of regulation of those persons, without limitation. Put in different terms, it is relevant here that the law does not seek to regulate everything that is done by a federally registered political party. It seeks to address the receipt of funds, something so central to the workings of the electoral system that the Act makes provision for some element of public funding of elections[279].

209 The second aspect is the *purpose* for which gifts may be used. In addressing that aspect, it is important to recognise that s 302CA(1) applies where gifts are "required to be, or may be, used for the purposes of incurring electoral expenditure, or creating or communicating electoral matter"[280]. That the gifts are required to be or may be used for "electoral expenditure"[281] and, thus, "electoral matter"[282] means that the gifts not only are tied to federal elections but,

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279 See *Commonwealth Electoral Act*, Pt XX, Div 3.

280 *Commonwealth Electoral Act*, s 302CA(1)(e).

281 *Commonwealth Electoral Act*, s 287AB(1).

282 *Commonwealth Electoral Act*, s 4AA.

importantly, are limited to gifts that are required to be or may be used for the purpose of matters being communicated, or intended to be communicated, for the dominant purpose of influencing the way electors vote in a federal election.

210 In this context, other aspects of the operation of s 302CA should be noted. Gifts allocated to non-electoral purposes are not regulated. For example, gifts allocated to the administrative expenses of a party, or for issue-related advertising between elections, would not be gifts that "may be" used for federal electoral purposes.

211 That s 302CA provides that gifts will fall within the operation of the phrase "may be" used for federal electoral purposes when the gifts are made on terms that explicitly require or allow the gift or part to be used for that purpose[283], or if they are provided on no terms[284], does not alter or detract from that conclusion. It is not the bare or mere possibility of the use of gifts for federal electoral purposes that brings the law within power. The law does not apply to each and every gift that may be used for federal electoral purposes. There are two interconnected facts that must exist for s 302CA(1) to apply: the potential use of the gift for the dominant purpose of influencing the way electors vote in a federal election, coupled with the identity of the recipient as one of a limited set of participants in federal elections to which Pt XX and s 302CA(1) are directed. The two are inextricably interconnected. Put in different terms, those two essential aspects of s 302CA cannot be ignored. Without them, the Part and the section do not and cannot operate.

212 The third and fourth aspects are limitations on the scope of s 302CA. The third aspect is that it confines its exclusion of State or Territory law to State or Territory *electoral* laws: s 302CA(1) applies "[d]espite any State or Territory electoral law", not despite *any* State or Territory law. Section 287 defines "State or Territory electoral law" as "a law of a State or Territory that deals with electoral matters (within the ordinary meaning of the expression)". Thus, s 302CA(1) does not operate to exclude, and was never intended to exclude, State or Territory laws with respect to defamation, bribery or any other criminal conduct. Part XX, and s 302CA in particular, is not concerned with such matters. It is concerned only with aspects of funding of federal elections.

213 The fourth aspect is the room that s 302CA leaves open for State or Territory electoral laws to operate through s 302CA(3), which has been set out earlier[285]. As the Commonwealth submitted, the law operates as a kind of funnel.

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283 *Commonwealth Electoral Act*, s 302CA(2)(a).

284 *Commonwealth Electoral Act*, s 302CA(2)(b).

285 See [183]-[194] above.

It is a provision that starts wide in seeking to permit, and thus generate, funding for the entities and persons who participate in federal elections in order to influence the way electors vote in a federal election. The provision then narrows. One significant narrowing of the funnel is the prohibition on foreign donors above specific monetary thresholds. Another narrowing is the exclusion of any gift that has been allocated for a State or Territory purpose.

214 As just explained, that last narrowing is effected by three distinct exceptions. First, s 302CA(1) "does not apply in relation to all or part of a gift if ... any terms set by the person or entity providing the gift explicitly require the gift or part to be used only for a State or Territory electoral purpose (whether or not those terms are enforceable)"[286]. Second, s 302CA(1) "does not apply in relation to all or part of a gift if ... the effect of a State or Territory electoral law is to require the gift or part to be kept or identified separately (or to require the gift or part to be kept or identified separately in order to be entitled to a benefit under that law) … in order to be used only for a State or Territory electoral purpose"[287]. Third, s 302CA(1) "does not apply in relation to all or part of a gift if ... the gift recipient keeps or identifies the gift or part separately … in order to be used only for a State or Territory electoral purpose"[288].

215 The substantial carve-outs in s 302CA(3), together with the fact that only State and Territory *electoral* laws are excluded under s 302CA(1), significantly undermine any contention that s 302CA intrudes into some "heartland" of State legislative power. The law is, if anything, carefully crafted so as to avoid interfering with State elections and State laws generally. It is incorrect, in any event, to treat a federal law's impact on some predefined concept of State power as a relevant consideration in determining whether the law is within Commonwealth power[289].

216 Thus, the Commonwealth has legislated a scheme governing political donations for federal elections that includes disclosure obligations for donations and expenditure and a prohibition on foreign donors making donations above specific monetary thresholds. Under the Commonwealth regime, foreign donors making donations above those thresholds are the only forbidden class of donor. No one challenged the power of the Commonwealth to prohibit foreign donors in that way. No one challenged that controlling donations relating to federal elections was within the relevant head of power. But the analysis does not stop

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286 *Commonwealth Electoral Act*, s 302CA(3)(a).

287 *Commonwealth Electoral Act*, s 302CA(3)(b)(i).

288 *Commonwealth Electoral Act*, s 302CA(3)(b)(ii).

289 See *Engineers' Case* (1920) 28 CLR 129.

there. The power of the Commonwealth to control donations relating to federal elections is more than simply prohibiting classes of donors. The law is marking out *who* may donate. It is marking out what money "may be ... used" for federal electoral purposes, not "must be used". The operation of the law cannot be made to depend upon tracing the activities of political parties, party organisations or participants in the federal electoral process. Participants in federal elections take many forms and the policy choice made by the Commonwealth, and reflected in the relevant provisions, is an electoral system to which all non-foreign individuals and corporations can donate without restriction.

217 A law that regulates the method of voting in a federal election is a law with respect to federal elections[290]. A law that protects the electoral or voting system is a law with respect to federal elections[291]. A law that assists in the maintenance of the voting system and protects a particular method of voting is a law with respect to federal elections[292]. A law which proscribes conduct that interferes with the electoral system that Parliament has chosen is a law with respect to federal elections[293]. It is then unsurprising that here, a law which forms part of a scheme that, among other things, provides for registration of political campaigners and associated entities connected with federal elections[294], public election funding for federal elections[295], requirements relating to donations[296], and disclosure obligations for donations[297] and electoral

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290 *Mulholland* (2004) 220 CLR 181 at 208 [66], citing *McGinty v Western Australia* (1996) 186 CLR 140 at 244; [1996] HCA 48 and *Langer* (1996) 186 CLR 302 at 333.

291 *Mulholland* (2004) 220 CLR 181 at 208 [66], citing *Langer* (1996) 186 CLR 302 at 349.

292 *Mulholland* (2004) 220 CLR 181 at 208 [66], citing *Langer* (1996) 186 CLR 302 at 318.

293 *Mulholland* (2004) 220 CLR 181 at 208 [66], citing *Langer* (1996) 186 CLR 302 at 339.

294 *Commonwealth Electoral Act*, Pt XX, Div 1A.

295 *Commonwealth Electoral Act*, Pt XX, Div 3.

296 *Commonwealth Electoral Act*, Pt XX, Div 3A.

297 *Commonwealth Electoral Act*, Pt XX, Div 4.

expenditure[298] in relation to federal elections is a law with respect to federal elections.

218 In that context, the extension of s 302CA to gifts that "may be ... used" for federal electoral purposes in s 302CA(1)(e) is not an "insubstantial, tenuous or distant connection"[299]. It reflects the fact that gifts that are given to an entity engaged in the federal electoral process should be able to be used for federal electoral purposes. It is not the bare or mere possibility of use for federal electoral purposes, but, as has been seen, that possibility together with the character of the recipient as a participant in the federal electoral process, qualified by the exclusion of gifts for State or Territory electoral purposes, that brings the law within power. And, unsurprisingly, no one challenged the power of the Commonwealth to regulate participants in the federal electoral process[300].

219 Two further related and interconnected general propositions must be stated. First, as Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ stated in *Work Choices*[301], "a law with respect to a subject matter within Commonwealth power does not cease to be valid because it affects a subject outside power or can be characterised as a law with respect to a subject matter outside power". That is not a new proposition. As Stephen J stated in *Actors and Announcers Equity Association v Fontana Films Pty Ltd*[302], "[i]t will be enough if the law fairly answers the description of a law 'with respect to' one given subject matter appearing in s 51, regardless of whether it may equally be described as a law with respect to other subject matters. This will be so whether or not those other subject matters appear in the enumeration of heads of legislative power in s 51."

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298 *Commonwealth Electoral Act*, Pt XX, Div 5.

299 *Work Choices* (2006) 229 CLR 1 at 113 [174], citing *Melbourne Corporation* (1947) 74 CLR 31 at 79.

300 See *Langer* (1996) 186 CLR 302 at 317.

301 (2006) 229 CLR 1 at 127 [219], quoting *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 285; [1990] HCA 29.

302 (1982) 150 CLR 169 at 194; [1982] HCA 23.

220 Second, as was stated in *Actors Equity*[303]:

> "Once it is recognized that a law may possess several distinct characters, it follows that the fact that only some elements in the description of a law fall within one or more of the grants of power in s 51 or elsewhere in the Constitution will be in no way fatal to its validity. So long as the remaining elements, which do not fall within any such grant of power, are not of such significance that the law cannot fairly be described as one with respect to one or more of such grants of power then, however else it may also be described, the law will be valid. If a law enacted by the federal legislature can be fairly described both as a law with respect to a grant of power to it and as a law with respect to a matter or matters left to the States, that will suffice to support its validity as a law of the Commonwealth."

221 Accordingly, so long as s 302CA fairly answers the description of a law with respect to federal elections (and it does), it does not matter that it may have other possible characterisations. In particular, it does not matter that the law may affect the legislative powers of the States[304]. That federal law can and does affect the exercise of legislative power of the States is a central constitutional tenet which is reflected in s 109 of the *Constitution*[305].

222 When a law is at the "centre or heart of the subject matter of the power", generally speaking the purpose of the law is not relevant[306]. As this Court said in *Plaintiff S156/2013 v Minister for Immigration and Border Protection*, "once a federal law has an immediate operation within a field assigned to the Commonwealth as a subject of legislative power, that is enough ... No further inquiry is necessary"[307]. However, when a law is not at the centre or heart of the power but you "are considering what is incidental to a power not only must you take into account the nature and subject of the power but you must pay regard to

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303 (1982) 150 CLR 169 at 192, quoted in *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 625 [27]; [2004] HCA 19.

304 See also *Engineers' Case* (1920) 28 CLR 129.

305 See *Rizeq v Western Australia* (2017) 262 CLR 1 at 21 [47]; [2017] HCA 23.

306 See Stellios, *Zines's The High Court and The Constitution*, 6th ed (2015) at 42.

307 (2014) 254 CLR 28 at 43 [25]; [2014] HCA 22.

the context in which you find the power"; that is, "you must look at the purpose disclosed by the law said to be incidental to the main power"[308].

223 Here, s 302CA is supported by s 51(xxxvi), read with ss 10 and 31, of the *Constitution*. But if that were not the case, the law would be supported under the implied incidental power or the express incidental power in s 51(xxxix)[309].

224 It is in that context that it is necessary to address the Revised Explanatory Memorandum to the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018*, which stated that the goal of s 302CA is to partially invalidate State and Territory electoral laws in the following terms[310]:

> "New section 302CA clarifies the interaction between similar State and Territory and Commonwealth electoral funding schemes. Broadly speaking, these State and Territory electoral laws will be invalidated 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."

225 That approach is neither surprising nor new. There is nothing problematic about a law that excludes State laws in the context of the policy choice of the manner in which there will be federal regulation of the subject matter. The law outlined in *Work Choices* is just one example. In *Work Choices*, s 16(1) of the *Workplace Relations Act 1996* (Cth), headed "Exclusion of State and Territory laws", provided that "[t]his Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer", listing a series of laws including "a State or Territory industrial law"[311]. The validity of s 16 was upheld[312]. The Commonwealth submitted in that case that s 109 would operate "even though the Commonwealth had not made its own detailed provisions about every matter within that field which State law dealt with, and that it sufficed for the

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308 *Victoria v The Commonwealth* ("the *Second Uniform Tax Case*") (1957) 99 CLR 575 at 614; [1957] HCA 54. See also *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 318-319; [1994] HCA 44; *Leask v The Commonwealth* (1996) 187 CLR 579 at 602-603; [1996] HCA 29.

309 See *Smith* (1912) 15 CLR 355 at 361.

310 Australia, House of Representatives, *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018*, Revised Explanatory Memorandum at 51 [224].

311 (2006) 229 CLR 1 at 159 [346].

312 *Work Choices* (2006) 229 CLR 1 at 169 [377].

Commonwealth to have some provisions dealing with aspects of the field, leaving others unregulated"[313]. Under the heading "No bare attempt to limit or exclude State legislative power", Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ accepted the Commonwealth's submissions[314].

226 There are other examples. *Wenn v Attorney-General (Vict)*[315] concerned Commonwealth and Victorian laws in relation to preference for ex-servicemen in employment. One difference between the Commonwealth and Victorian laws was that the Commonwealth Act required an employer to give preference to ex-servicemen in new engagements or appointments, but not in promotion, as the Victorian Act provided[316]. Section 24(1) of the Commonwealth Act provided that the provisions of the relevant Division would "apply to the exclusion" of State or Territory laws[317]. Section 24 was found to be valid[318]. The exclusion of State law was not any less effective because the Commonwealth Act did not cover *all* the areas addressed by the State Act; rather, as Dixon J wrote, there were "areas of liberty designedly left"[319].

227 In *Australian Coastal Shipping Commission v O'Reilly*[320], the impugned law granted the Commission, a Commonwealth corporation, an exemption from State taxes. This was found to be within power[321]. As Dixon CJ said, "[t]he argument that under a legislative power of the Commonwealth the operation of State laws cannot be directly and expressly excluded has been used without effect in a succession of cases beginning with *The Commonwealth v Queensland*"[322]. And in *The Commonwealth v Queensland*[323], a federal law was

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313 *Work Choices* (2006) 229 CLR 1 at 166 [369].

314 *Work Choices* (2006) 229 CLR 1 at 166 [370].

315 (1948) 77 CLR 84; [1948] HCA 13.

316 *Wenn* (1948) 77 CLR 84 at 102.

317 *Wenn* (1948) 77 CLR 84 at 107.

318 *Wenn* (1948) 77 CLR 84 at 111-112, 114, 120, 122.

319 *Wenn* (1948) 77 CLR 84 at 120.

320 (1962) 107 CLR 46.

321 *O'Reilly* (1962) 107 CLR 46 at 56, 58-59, 61, 70-71.

322 *O'Reilly* (1962) 107 CLR 46 at 56 (footnote omitted).

323 (1920) 29 CLR 1 at 8, 11, 21-22, 26, 28; [1920] HCA 79.

upheld which provided that "[t]he interest derived from stock or Treasury bonds shall not be liable to income tax under any law of the Commonwealth or a State" unless the prospectus declared otherwise.

228 In *Western Australia v The Commonwealth (Native Title Act Case)*[324], s 11(1) of the *Native Title Act 1993* (Cth), which provided that "[n]ative title is not able to be extinguished contrary to this Act" and thus, in effect, granted an immunity from extinguishment by State laws, was upheld as valid under s 51(xxvi) of the *Constitution*.

229 In *Botany Municipal Council v Federal Airports Corporation*[325], a federal regulation authorising licensed contractors to carry out works at Sydney Airport in spite of a New South Wales law "that ... relate[d] to ... environmental assessment" was upheld as valid. The Court stated that "[t]here can be no objection to a Commonwealth law on a subject which falls within a head of Commonwealth legislative power providing that a person is authorized to undertake an activity despite a State law prohibiting, restricting, qualifying or regulating that activity. Indeed, unless the law expresses itself directly in that way, there is the possibility that it may not be understood as manifesting an intention to occupy the relevant field to the exclusion of State law"[326].

230 In *Bayside City Council v Telstra Corporation Ltd*[327], a Commonwealth law providing that a law of a State or Territory had no effect to the extent to which the law discriminated, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally was upheld under s 51(v) of the *Constitution*. As McHugh J stated, "[t]his Court has held on many occasions that, where the Commonwealth has power to regulate an area, it has power to protect entities which operate in that area from the effect of State laws"[328].

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324 (1995) 183 CLR 373 at 468-469; [1995] HCA 47.

325 (1992) 175 CLR 453 at 459, 464-465.

326 *Botany Municipal Council* (1992) 175 CLR 453 at 465.

327 (2004) 216 CLR 595 at 619-620 [13], 624 [26], 647 [101].

328 *Bayside City Council* (2004) 216 CLR 595 at 644 [91].

231 Moreover, as a matter of fundamental principle, it does not matter whether the law "regulates" or confers a permission. As Evatt J said in *Huddart Parker Ltd v The Commonwealth*[329]:

> "Given the appropriate subject matter, the Commonwealth Parliament may prohibit as well as it may restrict; it may remove restrictions, alter restrictions or add restrictions; it may encourage or discourage; it may facilitate or obstruct. The phraseology is political, and question-begging terms necessarily abound."

The issue is the sufficiency of connection, not the nature of the regulation. Here, there is sufficiency of connection. The policy choice made by the Commonwealth is an electoral system to which all non-foreign individuals and corporations can donate without restriction, subject to disclosure requirements. And so long as there is a sufficient connection with the head of power, the policy choice that the Commonwealth makes does not affect the question of validity[330]. As the Commonwealth submitted, to find s 302CA invalid entails "startling" consequences. In particular, were the Commonwealth unable to legislate to *permit* donations to a federally registered political party, it is hard to see how it could *ban* such donations or require *disclosure* of them.

Melbourne Corporation

232 The contention that s 302CA is invalid by reference to fundamental structural considerations identified in *Melbourne Corporation v The Commonwealth*[331] should be rejected. The heart of the contention is no more than a restatement of the argument that the law is directed only to limiting the exercise of State legislative power. For the reasons already given, that contention fails.

233 There are other difficulties with the argument. Section 302CA applies generally to the giving, receiving or retaining of gifts in the context of political donations; it does not single out the States. At most it is noted that it applies "[d]espite" State or Territory laws, but that is because it applies generally despite those laws. Moreover, it is permissive rather than creating a burden. The only

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329 (1931) 44 CLR 492 at 526; [1931] HCA 1, quoted in *Work Choices* (2006) 229 CLR 1 at 127 [218].

330 See *Leask* (1996) 187 CLR 579 at 602; *Grain Pool* (2000) 202 CLR 479 at 492 [16].

331 (1947) 74 CLR 31. See also *Austin v The Commonwealth* (2003) 215 CLR 185; [2003] HCA 3; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272; [2009] HCA 33; *Fortescue Metals* (2013) 250 CLR 548.

"burden" is to potentially create s 109 inconsistency with State laws. But to find that s 109 inconsistency amounts to an effect on the States' capacity to exercise functions or powers would be to "subvert not only the position established by the decision in the *Engineers' Case* but also s 109 of the *Constitution*"[332].

234 There is another and no less fundamental point to be made in answer to the *Melbourne Corporation* argument. The *Commonwealth Electoral Act*, and s 302CA in particular, makes provision for how federal elections will be conducted: all except foreign donors may contribute without restriction. It does not make any provision for how State elections are to be conducted. Money earmarked for use in State elections is subject only to State law. The State determines for itself how elections for its Parliament will be conducted and funded. The fundamental constitutional assumption identified in *Melbourne Corporation* − that the States continue to exist as separate bodies politic having their own institutional arrangements − is neither directly nor indirectly affected by the *Commonwealth Electoral Act*.

235 In short, s 302CA does not deny to the States the capacity to regulate their own elections. *Melbourne Corporation* is not engaged. Section 302CA gives effect to a policy choice by the federal Parliament that all except foreign donors making donations above the specific monetary thresholds may donate for federal electoral purposes. As will be seen, the prohibition created by State law is invalid insofar as it applies to donations which are earmarked for *or could be applied to* federal electoral purposes.

Metwally

236 The decision of *University of Wollongong v Metwally*[333] concerned an amendment to the *Racial Discrimination Act 1975* (Cth) that provided that the Act "is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the [International] Convention [on the Elimination of All Forms of Racial Discrimination] and is capable of operating concurrently with this Act". In a previous decision of this Court[334], certain provisions of the *Anti-Discrimination Act 1977* (NSW) had been found to be invalid due to s 109 inconsistency with the federal Act. There was no question that the *Anti-Discrimination Act* again became operative when the federal Act was amended[335]. However, there was an issue about whether the amendment

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332 *Fortescue Metals* (2013) 250 CLR 548 at 609 [131].

333 (1984) 158 CLR 447 at 453; [1984] HCA 74.

334 *Viskauskas v Niland* (1983) 153 CLR 280; [1983] HCA 15.

335 *Metwally* (1984) 158 CLR 447 at 456.

operated to remove the inconsistency retrospectively. By majority, the Court held that the amendment could not have such retrospective operation[336].

237 Here, Queensland contended that the principle in *Metwally* applies to render s 302CA(3)(b)(ii) invalid, and, by extension, the entirety of s 302CA. That was said to be because s 302CA(3)(b)(ii) may apply to remove the permission in s 302CA(1) on the basis of a *later* action, namely the recipient keeping or identifying a gift separately for State or Territory electoral purposes. However, in this case it is not that s 302CA(3)(b)(ii) is operating retrospectively; rather, it is that the later action determines the application of the law. As discussed above, it is that the permission in s 302CA(1) is contingent upon or subject to a condition subsequent of s 302CA(3)(b)(ii) not applying. Thus, no *Metwally* issue arises because s 302CA(3)(b)(ii) is not a law that seeks to remove s 109 inconsistency retrospectively in the relevant sense. Moreover, even if s 302CA(3)(b)(ii) did retrospectively remove s 109 inconsistency (and it does not), the result would be the same as in *Metwally*: to remove any retrospective operation. It would not render s 302CA(3)(b)(ii) invalid, let alone the entirety of s 302CA.

Conclusion

238 For these reasons, I would have answered questions (d)-(f) stated for the Full Court "No".

Queensland Acts

239 As seen earlier, Pt 3 of the Queensland Amending Act amended the *Electoral Act*, which relates to elections at the Queensland State government level, to introduce a prohibition on certain political donations. Part 5 of the Queensland Amending Act amended the *Local Government Electoral Act*, which relates to elections at the Queensland local government level. The provisions introduced by Pt 5 are, for the most part, the same as those introduced by Pt 3.

Electoral Act

240 The *Electoral Act* makes provision for State elections in Queensland. For example, Pt 2 creates the Electoral Commission of Queensland, Pt 3 addresses electoral districts and redistributions, Pt 4 relates to electoral rolls and enrolment, Pt 6 covers registration of political parties and Pt 7 addresses topics including the calling of elections, nomination of candidates, and who may vote. The *Electoral Act* does not have a relevant purposes provision.

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336 *Metwally* (1984) 158 CLR 447 at 457, 469, 475, 479.

241 Part 11 is headed "Election funding and financial disclosure". It makes provision for appointing and registering agents[337], election funding[338], disclosure of gifts[339] and expenditure[340], returns by registered political parties and associated entities[341], and authorised officers[342].

242 Part 3 of the Queensland Amending Act inserted various provisions into the *Electoral Act*. One of those provisions was s 275, headed "Political donations by prohibited donors", which was inserted into Subdiv 4 of Div 8 of Pt 11, headed "Political donations from property developers"[343].

243 Section 275, one of the key provisions, makes it unlawful for a prohibited donor to make a political donation. It is in the following terms:

> "(1) It is unlawful for a *prohibited donor* to make a *political donation*.
>
> (2) It is unlawful for a person to make a political donation on behalf of a prohibited donor.
>
> (3) It is unlawful for a person to accept a political donation that was made (wholly or in part) by or on behalf of a prohibited donor.
>
> (4) It is unlawful for a prohibited donor to solicit a person to make a political donation.
>
> (5) It is unlawful for a person to solicit, on behalf of a prohibited donor, another person to make a political donation." (emphasis added)

244 For the purposes of Subdiv 4, s 274(1) provides that each of the following is a "political donation":

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337 *Electoral Act*, Pt 11, Div 2.

338 *Electoral Act*, Pt 11, Div 4.

339 *Electoral Act*, Pt 11, Div 7.

340 *Electoral Act*, Pt 11, Div 10.

341 *Electoral Act*, Pt 11, Div 11.

342 *Electoral Act*, Pt 11, Divs 14-19.

343 Queensland Amending Act, s 13.

"(a) a gift made to or for the benefit of –

(i) a political party; or

(ii) an elected member; or

(iii) a candidate in an election;

(b) a gift made to or for the benefit of another entity –

(i) to enable the entity (directly or indirectly) to make a gift mentioned in paragraph (a) or to incur electoral expenditure; or

(ii) to reimburse the entity (directly or indirectly) for making a gift mentioned in paragraph (a) or incurring electoral expenditure;

(c) a loan from an entity other than a financial institution that, if the loan were a gift, would be a gift mentioned in paragraph (a) or (b)."

245 Relevantly, "political party" is defined[344] as "an organisation whose object, *or 1 of whose objects*, is the promotion of the election to the Legislative Assembly of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part" (emphasis added). As seen earlier, that would include an entity or organisation that has multiple objects – for example, objects in relation to both State elections and federal elections.

246 Certain gifts, made in a private capacity, are excluded from the definition of "political donation" in s 274 unless the gift is used for an "electoral purpose". In this respect, the section provides as follows:

"(2) If a gift is made by a person in a private capacity to an individual (the *recipient*) for the recipient's personal use and the recipient does not intend to use the gift for an electoral purpose –

(a) the gift is not a political donation when it is made; but

(b) if any part of the gift is used for an electoral purpose, then, for the purposes of section 275(3) –

(i) that part of the gift is a political donation; and

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344 *Electoral Act*, s 2 definition of "political party".

(ii) the recipient is taken to accept that part of the gift at the time it is used for an electoral purpose.

(3) A reference in subsection (2) to using a gift for an *electoral purpose* is a reference to using the gift to incur electoral expenditure or for the recipient's duties as an elected member."

247 "[E]lectoral expenditure" is relevantly defined[345] as "expenditure incurred for the purposes of a campaign for an election, whether or not the expenditure is incurred during the election period for the election". "[E]lection" means "an election of a member or members of the Legislative Assembly"[346].

248 On the other hand, a gift under s 274 includes certain "fundraising contribution[s]" and payments to political parties as follows:

"(4) Despite section 201(4)(a) and (b), a reference in this section to a gift includes a fundraising contribution, to the extent the amount of the contribution forms part of the proceeds of the fundraising venture or function to which the contribution relates.

(5) Despite section 201(4)(d), a reference in this section to a gift includes any of the following amounts paid by a person to a political party, to the extent the total amount of the person's payments in a calendar year exceeds $1,000 –

(a) an amount paid as a subscription for a person's membership of the party;

(b) an amount paid for a person's affiliation with the party."

249 "[P]rohibited donor" is defined in s 273 to mean:

"(1) ...

(i) a property developer; or

(ii) an industry representative organisation, a majority of whose members are property developers; but

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345 *Electoral Act*, s 197 para (b) of the definition of "electoral expenditure".

346 *Electoral Act*, s 2 definition of "election".

(b) does not include an entity for whom a determination is in effect under section 277.

…"

250 "[P]roperty developer" is in turn defined in sub-ss (2) and (3) of s 273 to mean each of the following persons:

"(2) ...

(a) a corporation engaged in a business that regularly involves the making of relevant planning applications by or on behalf of the corporation –

(i) in connection with the residential or commercial development of land; and

(ii) with the ultimate purpose of the sale or lease of the land for profit;

(b) a close associate of a corporation mentioned in paragraph (a).

(3) For deciding whether a corporation is a corporation mentioned in subsection (2)(a), any activity engaged in by the corporation for the dominant purpose of providing commercial premises at which the corporation, or a related body corporate of the corporation, will carry on business is to be disregarded, unless the business involves the sale or leasing of a substantial part of the premises."

251 "[C]lose associate", "relevant planning application" and "stapled entity" are defined in broad terms by s 273(5), and "director", "officer", "related body corporate" and "voting power" are defined in the same sub-section by reference to the *Corporations Act 2001* (Cth).

252 Under s 277, there is a process for determining that a person is not a "prohibited donor", by applying in writing to the commissioner of the Electoral Commission of Queensland. The commissioner can revoke this determination "at any time" under s 278(1) if the commissioner "ceases to be satisfied" that the entity is not a prohibited donor. Under s 279(1), "[t]he commissioner must keep a register of determinations made under section 277".

253 The scheme includes an obligation to pay the State if a prohibited donation is accepted[347]. If the person "knew it was unlawful to accept the

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347 *Electoral Act*, s 276.

prohibited donation", the amount payable is "twice the amount or value of the prohibited donation"[348], otherwise it is an amount equal to the amount or value of the prohibited donation[349].

254 The prohibition under s 275 is further enforced with three criminal offences. First, under s 307A, there is an offence for the breach of the prohibition:

> "**Offence about prohibited donations**
>
> (1) A person must not do an act or make an omission that is unlawful under section 275 if the person knows or ought reasonably to know of the facts that result in the act or omission being unlawful under that section.
>
> Maximum penalty – 400 penalty units or 2 years imprisonment.
>
> (2) An offence against subsection (1) is a misdemeanour."

255 Second, a "scheme to circumvent" the prohibition is an offence under s 307B. This occurs if a person "knowingly participate[s], directly or indirectly, in a scheme to circumvent a prohibition under division 8, subdivision 4 about political donations". And, third, under s 307C, there is an offence for giving information that the person knows is "false or misleading in a material particular" to the commissioner under s 277 (relating to determinations about prohibited donors).

Local Government Electoral Act

256 The *Local Government Electoral Act* addresses local government elections in Queensland. For example, Pt 3 addresses voters rolls, Pt 4 makes provision for topics including candidates for local government elections, polling, and who may vote, Pt 5 relates to fresh elections, and Pt 7 provides for disputed results. Part 6 is entitled "Electoral funding and financial disclosure". Division 1A of this Part, "Political donations from property developers", contains the prohibition inserted by the Queensland Amending Act. The Part also contains provisions addressing disclosure periods[350], disclosure obligations for candidates[351],

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348 *Electoral Act*, s 276(1)(a).

349 *Electoral Act*, s 276(1)(b).

350 *Local Government Electoral Act*, Pt 6, Div 2.

351 *Local Government Electoral Act*, Pt 6, Div 3.

disclosure obligations for third parties[352], the operation of dedicated accounts[353] and a gifts register[354].

257 Section 113B of the *Local Government Electoral Act* makes unlawful certain political donations in the same terms as s 275 of the *Electoral Act*. The definitions are in substantially identical terms to those in s 273 of the *Electoral Act*. For example, "political donation" is defined in s 113A in slightly different wording from s 274 of the *Electoral Act*, referring to a "councillor of a local government" instead of "an elected member". And "political party" is defined[355] as "an organisation or group whose object or activity, or 1 of whose objects or activities, is the promotion of the election of a candidate or candidates endorsed by it, or by a body or organisation of which it forms a part, to an office of councillor of a local government".

258 The other provisions are the same as the corresponding provisions in the *Electoral Act*. Under ss 113D, 113E and 113F of the *Local Government Electoral Act*, there is a process, identical to ss 277, 278 and 279 of the *Electoral Act*, for determining that a person is not a "prohibited donor". A provision for review of decisions made under Div 1A of Pt 6 is included under s 113G "as if the decision were a decision to which section 277(4)(b) or 278(2) of [the *Electoral Act*] applied". The provision for recovery of prohibited donations in s 276 of the *Electoral Act* is replicated in substantially similar terms in s 113C, with additional provisions in sub-ss (4) and (5) noting that an action to recover an amount due to the State may be brought in the name of the Electoral Commission and a process may be served on the Electoral Commission. The offences provided for by ss 307A, 307B and 307C of the *Electoral Act* are reproduced as ss 194A, 194B and 194C of the *Local Government Electoral Act*.

Rationale for the changes

259 The Explanatory Notes accompanying the introduction of the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018* ("the Queensland Amending Bill") stated that[356]:

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352 *Local Government Electoral Act*, Pt 6, Div 4.

353 *Local Government Electoral Act*, Pt 6, Div 5.

354 *Local Government Electoral Act*, Pt 6, Div 6.

355 *Local Government Electoral Act*, Sch definition of "political party".

356 Queensland, Legislative Assembly, *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018*, Explanatory Notes at 1 (footnotes omitted).

> "The policy objective of the [Queensland Amending Bill] is to implement the Government's response to certain recommendations of the Crime and Corruption Commission's (CCC) report *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government* (the Belcarra Report) to:
>
> 1. reinforce integrity and minimise corruption risk that political donations from property developers has potential to cause at both a State and local government level;
>
> 2. improve transparency and accountability in State and local government; and
>
> 3. strengthen the legislative requirements that regulate how a councillor must deal with a real or perceived conflict of interest or a material personal interest."

260 Specifically, the Bill implements "recommendation 20 [of the Belcarra Report] to ban donations from property developers for candidates, third parties, political parties and councillors. This is extended to Members of State Parliament"[357].

261 The Minister for Local Government explained the Bill in the following terms[358]:

> "To implement the government's response to recommendation 20, the bill bans donations from property developers to candidates, third parties, political parties and councillors. The bill extends the ban to members of state parliament. The provisions are modelled on the New South Wales Election Funding, Expenditure and Disclosures Act 1981. The prohibition addresses the concern identified in the Belcarra report that close connections between councillors and donors can lead to a perception in the community that donors expect to, and do, receive something in return for their support. As the CCC stated, 'These perceptions alone are enough to damage public confidence in the integrity of local government.' Further, the CCC stated, '... continued public concern about the influence of property developer donations on council decision-making demands a stronger response than transparency alone.'"

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357 Queensland, Legislative Assembly, *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018*, Explanatory Notes at 2.

358 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 March 2018 at 190.

262 Though there is no relevant purposes provision in the *Electoral Act*, s 28 of the Queensland Amending Act replaced the purposes provision of the *Local Government Electoral Act* with the following[359]:

> "The purposes of this Act are to –
>
> (a) ensure the transparent conduct of elections of councillors of Queensland's local governments; and
>
> (b) ensure and reinforce integrity in Queensland's local governments, including, for example, by minimising the risk of corruption in relation to –
>
> (i) the election of councillors; and
>
> (ii) the good governance of, and by, local government."

Constitutional challenges

263 All sorts of constitutional issues were raised by the plaintiff and the Commonwealth to contend for the invalidity of the provisions of the *Electoral Act* and *Local Government Electoral Act* that were inserted by the Queensland Amending Act.

264 One of the plaintiff's challenges to the prohibition in the *Electoral Act* – on the basis of the implied freedom of political communication – is readily disposed of because the law is indistinguishable from that upheld in *McCloy v New South Wales*[360].

265 The other constitutional issues are in a different category. They concern what the plaintiff asserted is constitutional invalidity because the Queensland laws breach a reverse *Melbourne Corporation* principle protecting the Commonwealth, as well as the Commonwealth's challenge to the Queensland law on the basis that its power over federal elections is exclusive and therefore the prohibition in the Queensland laws is invalid because it applies even to donations made for express federal electoral purposes.

266 Neither contention should be accepted. There may be valid reasons to consider that the *Melbourne Corporation* principle should protect the Commonwealth, as well as the States, given that the continued existence of both

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359 *Local Government Electoral Act*, s 3.

360 (2015) 257 CLR 178; [2015] HCA 34.

levels of government is assumed in the constitutional structure[361]. But it is unnecessary to decide whether a reverse *Melbourne Corporation* principle exists, beyond that identified in *The Commonwealth v Cigamatic Pty Ltd (In liq)*[362], because any such doctrine would not be infringed by prohibition of a limited class of political donations[363]. Such a prohibition cannot be described as directed at the Commonwealth, nor as imposing some special disability or burden on the exercise of powers and fulfilment of functions which curtails the Commonwealth's capacity to function[364].

267 And to say, as members of this Court have done on several occasions[365], that Commonwealth power over federal elections is "exclusive" is merely to observe an absence of State power over that subject[366]. In this case, the Queensland laws, despite having some operation on gifts for Commonwealth electoral purposes, are laws about State elections. They are not beyond State power.

268 For these reasons, I would have answered questions (a)-(c) stated for the Full Court "No".

Inconsistency with s 302CA

269 Queensland conceded that if s 302CA of the *Commonwealth Electoral Act* was valid, then there was inconsistency under s 109 of the *Constitution* between s 302CA of the *Commonwealth Electoral Act* and the State schemes. More particularly, s 275(1)-(3) of the *Electoral Act* and s 113B(1)-(3) of the

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361 *Melbourne Corporation* (1947) 74 CLR 31 at 82.

362 (1962) 108 CLR 372 at 377; [1962] HCA 40. See also *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 438-440; [1997] HCA 36; cf *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508; [1947] HCA 45.

363 cf *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 163-164; [1992] HCA 45.

364 *Fortescue Metals* (2013) 250 CLR 548 at 609 [130].

365 See *Smith* (1912) 15 CLR 355 at 358, 360, 365; *Nelungaloo Pty Ltd v The Commonwealth* (1952) 85 CLR 545 at 564; [1952] HCA 11; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 14 [8]; [2010] HCA 46; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 113 [261] fn 326; [2016] HCA 36.

366 See also *Carter v Egg and Egg Pulp Marketing Board (Vict)* (1942) 66 CLR 557 at 571; [1942] HCA 30.

Local Government Electoral Act "alter, impair or detract from" the Commonwealth law. There is "direct inconsistency"[367]. The permission in s 302CA(1)(a) of the *Commonwealth Electoral Act* is directly inconsistent with the prohibitions in s 275(1)-(2) of the *Electoral Act* and s 113B(1)-(2) of the *Local Government Electoral Act*. Those prohibitions would apply to the *making* of a political donation by or on behalf of a prohibited donor (for example, a property developer) to a political party, within the State definitions, where the political party is registered at the federal level or is a State branch of a federally registered party. The permission in s 302CA(1)(b) or (c) is directly inconsistent with the prohibitions in s 275(3) of the *Electoral Act* and s 113B(3) of the *Local Government Electoral Act*. Those prohibitions prevent *acceptance* of a political donation in those circumstances. Section 275(1)-(3) of the *Electoral Act* and s 113B(1)-(3) of the *Local Government Electoral Act* are invalid to the extent of that inconsistency.

270 The overlap is not limited to political parties. For completeness, the permission in s 302CA(1)(a) of the *Commonwealth Electoral Act* is directly inconsistent with the prohibitions in s 275(1)-(2) of the *Electoral Act* and s 113B(1)-(2) of the *Local Government Electoral Act* which would apply to the *making* of a political donation by or on behalf of a prohibited donor (for example, a property developer) to a candidate in a local government or State election, or State member or local government councillor, or to other entities, within the State definitions, if they are also a candidate or member of a group of candidates in a federal election, a federally registered political campaigner, or a third party within the relevant federal definition. Moreover, the permission in s 302CA(1)(b) or (c) is directly inconsistent with the prohibitions in s 275(3) of the *Electoral Act* and s 113B(3) of the *Local Government Electoral Act*, which apply to the *acceptance* of a political donation in those circumstances. Thus, s 275(1)-(3) of the *Electoral Act* and s 113B(1)-(3) of the *Local Government Electoral Act* are invalid to the extent of that inconsistency.

271 And s 275(4)-(5) of the *Electoral Act* and s 113B(4)-(5) of the *Local Government Electoral Act* "alter, impair or detract from" s 302CA(1) of the *Commonwealth Electoral Act*. The prohibitions in s 275(4)-(5) of the *Electoral Act* and s 113B(4)-(5) of the *Local Government Electoral Act* on soliciting of political donations from prohibited donors are directly inconsistent with the permission in s 302CA(1)(a) – the soliciting provisions directly impair the operation of the federal law providing that gifts can be given and received. The overall purpose and design of the federal law is directed to preventing only one class of political donations – donations by foreign donors that are above the

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367 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212 at 221 [32]; 363 ALR 188 at 195-196; [2019] HCA 2.

specific monetary thresholds. The ability under s 302CA(1) to receive a gift is at least made more difficult if you cannot ask people for a gift.

Inconsistency with the wider Commonwealth Electoral Act

272 The plaintiff submitted that there was inconsistency between the Queensland laws and the wider *Commonwealth Electoral Act*. That should not be accepted. The Queensland laws are not inconsistent with the wider *Commonwealth Electoral Act*.

273 The prohibition on foreign donations above specific monetary thresholds, as well as the other rules in Pt XX of the *Commonwealth Electoral Act*, and the prohibitions in s 275 of the *Electoral Act* and s 113B of the *Local Government Electoral Act* are cumulative, not inconsistent. The laws can and do work together.

274 Section 302CA does not completely exclude State laws[368]. It clearly indicates that the Commonwealth's intention was not to cover the field, but to manage the interaction of its regime with applicable State laws. There is no indirect inconsistency[369].

Conclusion

275 It is for those reasons that I would have answered the questions stated for the Full Court as follows:

Questions (a)-(f): "No";

Question (g): "Yes. Section 275 of the *Electoral Act 1992* (Qld) is invalid to the extent that it applies to giving, receiving or retaining gifts where this is permitted by s 302CA(1) of the *Commonwealth Electoral Act 1918* (Cth)";

Question (h): "Yes. Section 113B of the *Local Government Electoral Act 2011* (Qld) is invalid to the extent that it applies to giving, receiving or retaining gifts where this is permitted by s 302CA(1) of the *Commonwealth Electoral Act 1918* (Cth)";

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368 See *Commonwealth Electoral Act*, s 302CA(3).

369 *Ex parte McLean* (1930) 43 CLR 472 at 483; [1930] HCA 12; *Outback Ballooning* (2019) 93 ALJR 212 at 221-222 [33]; 363 ALR 188 at 196.

Question (i): "The defendant should pay the costs of the special case".

EDELMAN J.

Introduction

276 When the *Engineers' Case*[370] is "stripped of embellishment and reduced to the form of a legal proposition", it stands for the proposition that "a power to legislate with respect to a given subject enables the Parliament to make laws which, upon that subject, affect the operations of the States and their agencies"[371]. The decision has been criticised, sometimes trenchantly[372]. It has stood for nearly a century but other doctrines have been built around it, mitigating its effect. Those include constitutional implications, relied upon in this case, some of which restrict its otherwise unimpeded operation upon the States. The restrictions were relied upon in this case but they do not invalidate any of the laws in issue. The point that ultimately divides the Court in this case concerns the limit of the Commonwealth's power to make its legislative regimes exclusive of the States.

277 If a donation is made to a political party operating at both State and federal levels, and if the donation could be used for either State or federal electoral purposes, polities at both levels of government can subject the donor or the recipient to regulation. Such untied donations, which directly attract the interests of both polities, were described by the plaintiff in this case as the "unallocated middle". At the heart of this case is the Commonwealth's legislation to make its regime exclusive in respect of that unallocated middle, whilst carving out from that exclusivity a sphere for operation of State laws affecting the interests of that State. The Commonwealth regime thus leaves unaffected in relevant respects the legislative regimes in New South Wales, Victoria, and

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370 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 153-154; [1920] HCA 54 ("*Engineers' Case*").

371 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 78; [1947] HCA 26 ("*Melbourne Corporation*").

372 See, for instance, *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 305-308 [740]-[747]; [2006] HCA 52; Sawer, *Australian Federalism in the Courts* (1967) at 130; Walker, "The Seven Pillars of Centralism: Engineers' Case and Federalism" (2002) 76 *Australian Law Journal* 678 at 686-687; Allan and Aroney, "An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism" (2008) 30 *Sydney Law Review* 245 at 288-289.

South Australia, which are closely tailored to the interests of those States[373]. But it is inconsistent with the much broader regime in Queensland.

278 Section 275 of the *Electoral Act 1992* (Qld) ("the Queensland Electoral Act") and the equivalent provision, s 113B of the *Local Government Electoral Act 2011* (Qld) ("the Queensland Local Government Electoral Act"), make it unlawful for donations to political parties to be solicited by, made by, or received from, a property developer, or on behalf of a property developer. Immediately before Federation, a colonial parliament had power to pass laws of this nature. Section 107 of the *Constitution* continued this power for the parliaments of the States, unless it was exclusively vested in the Commonwealth Parliament or withdrawn from the States.

279 In this special case, the plaintiff, and the Attorney-General of the Commonwealth intervening, submitted that this power was, by implication from the *Constitution*, exclusively vested in the Commonwealth Parliament. The plaintiff also submitted that it was withdrawn from the States either by the application of an implication necessary to preserve the functioning of the Commonwealth as a polity ("the reverse *Melbourne Corporation* implication") or by the implied freedom of political communication. None of these attacks on the existence or extent of State legislative power should be accepted.

280 Part XX of the *Commonwealth Electoral Act 1918* (Cth) ("the Commonwealth Electoral Act") also creates a regime to regulate, amongst other aspects of federal elections, political donations. In some respects, such as in relation to foreign donors, the Commonwealth regime is more restrictive than the Queensland regime. In other respects, it is more permissive. For example, the Commonwealth regime does not prohibit property developers from making donations to registered political parties but subjects property developers to a generally applicable regime of disclosure. Many political parties registered under the Commonwealth Electoral Act operate at both State and federal levels. Section 302CA of the Commonwealth Electoral Act, concerning exclusivity of the regulation of prohibited donors, and s 314B, concerning exclusivity of the regulation of disclosure, make exclusive the Commonwealth regime regulating donations to registered political parties.

281 If s 275 of the Queensland Electoral Act and s 302CA of the Commonwealth Electoral Act are both valid laws then s 275 is inconsistent with s 302CA and therefore rendered inoperative by s 109 of the *Constitution*. The same conclusion follows for s 113B of the Queensland Local Government

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373 *Electoral Funding Act 2018* (NSW), ss 24(2), 37(2)(a), (7); *Electoral Act 2002* (Vic), ss 207F(1), (3), 217D(4); *Electoral Act 1985* (SA), ss 130C, 130K(1), 130L(b), 130M(1a).

Electoral Act. However, the State of Queensland and the intervening State Attorneys-General submitted that, for various reasons, s 302CA of the Commonwealth Electoral Act is beyond the prima facie power of the Commonwealth Parliament or that it falls within an area of intergovernmental immunity and corresponding lack of Commonwealth power. None of the attacks on Commonwealth legislative power should be accepted.

282 The particular issue that divides this Court is whether s 302CA of the Commonwealth Electoral Act is within power. Ultimately, the issue reduces to whether the Commonwealth has the power to make its own regime exclusive, albeit subject to various carve-outs for State legislation. The nature of the State law should make no difference. It would be no different if the Queensland law had sought to *permit* property developers to make entirely unregulated donations to political parties that may be used for State or federal electoral purposes. Such a law would also be inconsistent with a Commonwealth law that had sought to make exclusive a general regime which included regulation of donations by property developers including by disclosure requirements. In my view, the weight of precedent is too heavy, and the stream of legal development has been too clear, to conclude now that Commonwealth exclusivity provisions, tailored closely to Commonwealth interests, are invalid.

283 Section 302CA of the Commonwealth Electoral Act is a valid law. Section 275 of the Queensland Electoral Act and s 113B of the Queensland Local Government Electoral Act are inconsistent with s 302CA of the Commonwealth Electoral Act and are therefore inoperative to the extent of that inconsistency.

The validity of the amendments to the Queensland Electoral Act

(i) *The operation of the Queensland Electoral Act*

284 On 2 October 2018, Pts 3 and 5 of the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018* (Qld) ("the Queensland Amending Act") came into force. The Queensland Amending Act introduced relevantly equivalent provisions into the Queensland Electoral Act, in relation to elections to the Legislative Assembly of Queensland, and the Queensland Local Government Electoral Act, in relation to elections of Queensland local government councillors. The submissions in this case focused upon the amendments to the Queensland Electoral Act on the assumption, which was not in dispute, that, apart from the plaintiff's submission based on the implied freedom of political communication, the legal position was relevantly identical in relation to the Queensland Local Government Electoral Act.

285 The amendments to the Queensland Electoral Act relevantly introduced a new Subdiv 4 to Div 8 of Pt 11. At the heart of the Subdivision, entitled "Political donations from property developers", is s 275, which provides:

"**Political donations by prohibited donors**

(1) It is unlawful for a prohibited donor to make a political donation.

(2) It is unlawful for a person to make a political donation on behalf of a prohibited donor.

(3) It is unlawful for a person to accept a political donation that was made (wholly or in part) by or on behalf of a prohibited donor.

(4) It is unlawful for a prohibited donor to solicit a person to make a political donation.

(5) It is unlawful for a person to solicit, on behalf of a prohibited donor, another person to make a political donation."

286 The essence of the section is to prevent property developers[374] from, directly or indirectly, making gifts for the benefit of a political party, an elected member or a candidate in an election[375]. By the definition in s 2, an organisation will be a political party within the scope of the prohibition provided that one of its objects is "the promotion of the election to the Legislative Assembly of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part".

287 As agreed in the special case, the Liberal National Party, the Labor Party Queensland, Katter's Australian Party, Pauline Hanson's One Nation, and the Queensland Greens hold 92 of the 93 seats in the Legislative Assembly of Queensland. Each party, either directly or through an affiliated or related party, is also represented in the House of Representatives or the Senate, or both. In prohibiting political donations from property developers to political parties with an object of promoting candidates to the Legislative Assembly of Queensland, the Queensland Electoral Act therefore has the incidental effect of removing a source of funding for those parties' activities in the federal sphere.

(ii) *Was power in relation to federal elections exclusively vested in the Commonwealth Parliament?*

288 With some restrictions[376], colonial legislative power was generally as plenary and extensive within each colony as the power of the Imperial

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374 See the definition of "prohibited donor" in s 273(1) and "property developer" in s 273(2).

375 See the definition of "political donation" in s 274(1).

376 Such as the *Colonial Laws Validity Act 1865* (Imp) (28 & 29 Vict c 63), s 2.

Parliament[377]. The colonies plainly had an interest in the exercise of that plenary power in many matters concerning any election held in the colony[378]. The many matters that a colony might have wished to regulate with respect to elections held within the territory of the colony may have included the facilities for polling places, ensuring peaceful and honest conduct during polling, or electoral advertising in the colony. Prior to Federation, some colonial parliaments had passed laws in relation to elections in the colonies which included: (i) restrictions on electoral expenses, including restrictions on payment of electoral expenses by third parties[379]; (ii) bribery, undue influence, or solicitation offences[380]; and (iii) requirements to include in electoral advertising the name and address of the person authorising the advertising[381].

289 Prior to Federation there was evidently no need for the colonies to extend their operative laws to federal elections which did not then exist. The *Constitution* conferred power upon the Commonwealth Parliament to make such laws, by ss 10, 31, and 51(xxxvi), and the incidental power in s 51(xxxix). But until these Commonwealth legislative powers were exercised there would be no laws relating to the time, place or manner of a federal election unless anticipatory laws were passed by colonial or State parliaments[382]. The *Constitution* therefore ensured that there would be no lacuna by providing in ss 10 and 31 that until the Commonwealth Parliament otherwise provided, the

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377 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 9-10; [1988] HCA 55. See *R v Burah* (1878) 3 App Cas 889 at 904; *Hodge v The Queen* (1883) 9 App Cas 117 at 132; *Powell v Apollo Candle Co* (1885) 10 App Cas 282 at 289-290; *Riel v The Queen* (1885) 10 App Cas 675 at 678.

378 Compare *Nelungaloo Pty Ltd v The Commonwealth* (1952) 85 CLR 545 at 564; [1952] HCA 11.

379 *The Electoral Code 1896* (SA) (59 & 60 Vict No 667), ss 146, 147; *The Electoral Act 1896* (Tas) (60 Vict No 49), ss 190, 197, Sch 25.

380 *The Electoral Code 1896* (SA) (59 & 60 Vict No 667), ss 155-161; *The Electoral Act 1896* (Tas) (60 Vict No 49), ss 125-131; *The Criminal Code Act 1899* (Qld) (63 Vict No 9), First Schedule, ss 101-103.

381 *The Electoral Code 1896* (SA) (59 & 60 Vict No 667), s 160(d); *The Electoral Act 1896* (Tas) (60 Vict No 49), s 142; *The Criminal Code Act 1899* (Qld) (63 Vict No 9), First Schedule, s 106(2).

382 See, eg, *Federal Elections Act 1900* (NSW); *The Parliament of the Commonwealth Elections Act and The Elections Act 1885 to 1898 Amendment Act of 1900* (Qld) (64 Vict No 25); *The Federal Elections Act 1900* (Tas) (64 Vict No 59); *Federal Elections Act 1900* (Vic) (64 Vict No 1715).

laws that would apply to federal elections would be those in force in each State relating to elections for the more numerous House of the Parliament of the State. This was neither a conferral of legislative power upon the State parliaments in relation to federal elections nor was it based upon an assumption of an absence of State legislative power in relation to federal elections. Rather, it was to ensure that, from the moment of Federation, there would be an extant regime for federal elections. Central to the Commonwealth's submission that the Commonwealth Parliament has exclusive legislative power concerning federal elections is the decision of this Court in *Smith v Oldham*[383]. That appeal concerned the conviction of the editors of *The Argus* newspaper of an offence contrary to s 181AA of the *Commonwealth Electoral Act 1902* (Cth), which required that any newspaper article commenting upon a candidate, political party, or issue being submitted to the electors must be signed by the author, giving a true name and address. The offence concerned the publication of an unsigned article commenting on various candidates for election. The editors submitted that s 181AA was beyond the legislative power of the Commonwealth Parliament[384]. The Court did not call upon the respondent to make submissions[385]. Judgment was immediately delivered dismissing the appeal. Griffith CJ, Barton J, and Isaacs J all delivered reasons for decision finding that the law was within the core of the power (Barton J)[386], or incidental to the core of the power (Griffith CJ and Isaacs J)[387], of the Commonwealth Parliament in relation to federal elections. And each member of the Court said that the Commonwealth power was exclusive[388].

290 In this Court, Queensland and a number of interveners submitted that the decision in *Smith v Oldham* was based upon the doctrine that the *Constitution*, particularly s 107, reserved powers to the States. That doctrine has been rejected for nearly a century[389]. The submissions of the appellants in *Smith v Oldham* had certainly been put on this basis. Mitchell KC and Irvine KC submitted that the power of the Commonwealth Parliament to legislate in relation to elections must be confined to "the conduct and control of elections" so that a law such as

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383 (1912) 15 CLR 355; [1912] HCA 61.

384 (1912) 15 CLR 355 at 358.

385 (1912) 15 CLR 355 at 357.

386 (1912) 15 CLR 355 at 361.

387 (1912) 15 CLR 355 at 358, 362.

388 (1912) 15 CLR 355 at 358, 360, 365.

389 *Engineers' Case* (1920) 28 CLR 129 at 154.

s 181AA, which they contended was concerned with the "conduct and control of newspapers", was a law concerned with a matter within the reserved powers of the States[390]. But the Court did not rely upon that doctrine for the conclusion that there was an absence of State power. Although Griffith CJ and Barton J had been supporters of the reserved powers doctrine for several years[391], their Honours' reasoning about the absence of State power was not substantially different from that of Isaacs J, who was not a supporter of the doctrine[392]. Indeed, the subtle antagonism towards the reserved powers doctrine that appears in the decision of Isaacs J in *Smith v Oldham*[393] was later echoed in the joint judgments which his Honour delivered in *R v Brisbane Licensing Court; Ex parte Daniell*[394] and the *Engineers' Case*[395].

291 In *Smith v Oldham*, the essence of the reasoning of each member of the Court concerning the absence of State legislative power was, unsurprisingly, not based upon the reserved powers doctrine. The reasoning was simply that the State had no interest in the subject matter of federal elections. Griffith CJ said that the matter was "one in which the States as such have no concern"[396]. Barton J said that "[n]o State has anything whatever to do with" the actions of citizens that affect the result and issues of federal elections[397]. And Isaacs J said that the subject matter of federal elections was "transparently beyond the competency of the State to control"[398]. Neither Griffith CJ nor Isaacs J provided

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390 (1912) 15 CLR 355 at 356.

391 See, eg, *Peterswald v Bartley* (1904) 1 CLR 497 at 507; [1904] HCA 21; *R v Barger* (1908) 6 CLR 41 at 64, 67, 69; [1908] HCA 43; *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 503; [1908] HCA 94; *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 352, 354, 361; [1909] HCA 36.

392 See *R v Barger* (1908) 6 CLR 41 at 83-84; *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 585; *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 390-391.

393 (1912) 15 CLR 355 at 363.

394 (1920) 28 CLR 23 at 31; [1920] HCA 24.

395 (1920) 28 CLR 129 at 153-154.

396 (1912) 15 CLR 355 at 358.

397 (1912) 15 CLR 355 at 361.

398 (1912) 15 CLR 355 at 365.

any further reasoning to support this assumption of an absence of State legislative power. The assumption by Griffith CJ and Isaacs J may have been based on the notion, later expressed by Latham CJ in *West v Commissioner of Taxation (NSW)*[399], that matters specifically relating to the government of the Commonwealth are not laws for the peace, welfare and good government of a State. That reasoning was made explicit by Barton J, who said that no State constitution gave to a State parliament a power to legislate with respect to federal elections[400].

292 With respect, this reasoning confuses two separate matters. On the one hand, there was the colonial plenary legislative power, which supported laws relating to elections held in the colony. On the other hand, there are new facts and circumstances, arising after Federation, upon which that power might operate[401]. The colonial plenary power to make laws concerning requirements for elections included a power to make laws for federal elections to be held in the territory of the colony even though an election of that nature extended beyond the territory and had not previously been held. The existence of new facts or circumstances upon which a power might operate does not change the nature of the power. This is particularly so where, as could have been reasonably foreseen at Federation[402], "[s]ocial, economic and political matters ... are increasingly integrated" and political parties operate "across the federal divide and at federal, State, Territory and local government levels"[403]. Political parties had begun to emerge by the 1890s[404], and Deakin had observed that it was "inevitable" that

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399 (1937) 56 CLR 657 at 669; [1937] HCA 26.

400 (1912) 15 CLR 355 at 360.

401 Meagher and Gummow, "Sir Owen Dixon's Heresy" (1980) 54 *Australian Law Journal* 25 at 28; Doyle, "1947 Revisited: The Immunity of the Commonwealth from State Law", in Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 47 at 62-63.

402 See Gauja, "From Hogan to Hanson: The regulation and changing legal status of Australian political parties" (2006) 17 *Public Law Review* 282 at 285.

403 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 549 [22], 550 [24]; [2013] HCA 58.

404 Jupp and Sawer, "Political parties, partisanship and electoral governance", in Sawer (ed), *Elections: Full, free & fair* (2001) 216 at 217.

political parties in the Senate would "coalesce and throw in their lot with each other ... irrespective of state boundaries altogether"[405].

293 The circumstances of this case are a good example of the underlying fallacy in the factual assumption that no State has an interest in the actions of citizens that affect the issues in federal elections. As the Attorney-General for the State of Western Australia submitted, the interests of the States may even be engaged where a donation is given to a registered political party only for federal electoral purposes. The use for federal electoral purposes might: (i) be on an issue of both federal and State concern; (ii) allow funds that would otherwise have been used for federal electoral purposes to be used for State electoral purposes; or (iii) promote the brand of the political party if it operates at both State and federal level.

294 The more fundamental point about *Smith v Oldham* is that it has no precedential weight. "[Precedents], sub silentio without argument, are of no moment"[406]. The statement by each of Griffith CJ, Barton J, and Isaacs J that the States have no power to legislate in relation to matters incidental to federal elections was neither argued nor was it necessary for the decision. Further, a mere eight years after *Smith v Oldham*, the reasoning of this Court in *R v Brisbane Licensing Court; Ex parte Daniell*[407] cast serious doubt upon the exclusivity reasoning by the Court in *Smith v Oldham*.

295 The provision in question in *R v Brisbane Licensing Court; Ex parte Daniell* was s 14 of the *Commonwealth Electoral (War-time) Act 1917* (Cth) ("the War-time Act"). That section provided that on the polling day for an election of the Senate or a general election of the House of Representatives, "no referendum or vote of the electors of any State or part of a State shall be taken under the law of a State". The issue was the validity of a local option poll

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405 Gauja, "From Hogan to Hanson: The regulation and changing legal status of Australian political parties" (2006) 17 *Public Law Review* 282 at 285, quoting *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 10 September 1897 at 335. See also *Official Report of the National Australasian Convention Debates* (Sydney), 17 March 1891 at 434 (Macrossan).

406 *R v Warner* (1661) 1 Keb 66 at 67 [83 ER 814 at 815]. See *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13]; [2005] HCA 64; Cross and Harris, *Precedent in English Law*, 4th ed (1991) at 158-161. See also *Felton v Mulligan* (1971) 124 CLR 367 at 413; [1971] HCA 39; *Baker v The Queen* [1975] AC 774 at 787-789; *National Enterprises Ltd v Racal Communications Ltd* [1975] Ch 397 at 406; *Barrs v Bethell* [1982] Ch 294 at 308; *In re Hetherington* [1990] Ch 1 at 10; *Coleman v Power* (2004) 220 CLR 1 at 44-45 [79]; [2004] HCA 39.

407 (1920) 28 CLR 23.

held in Queensland, purportedly under s 172 of the *Liquor Act 1912* (Qld), on the day of an election of the Senate.

296 The prosecutor in *R v Brisbane Licensing Court; Ex parte Daniell* relied upon *Smith v Oldham*, asserting that the Commonwealth legislative power in relation to federal elections was exclusive[408]. Alternatively, he submitted, if the power was not exclusive, then s 14 of the War-time Act was enacted pursuant to a concurrent legislative power, based upon s 9 of the *Constitution*, and prevailed over s 172 of the *Liquor Act* due to s 109 of the *Constitution*[409]. The respondents responded by alleging that s 14 of the War-time Act was invalid either because there was no Commonwealth legislative power to pass s 14 or because it was an attempt to cut down the exclusive State legislative power conferred by s 9 of the *Constitution*[410]. The joint judgment of six members of this Court disposed of the respondents' submission rapidly, concluding that the Commonwealth had power to pass s 14 of the War-time Act under all of s 10, s 51(xxxvi), and the incidental power in s 51(xxxix) of the *Constitution*[411]. But that did not answer the questions raised by the prosecutor's submissions of whether s 172 of the *Liquor Act* was invalid either (i) because it trespassed upon an exclusive Commonwealth legislative power or (ii) because it was inconsistent with s 14 of the War-time Act. The first submission was logically anterior to the second because s 109 operates only upon valid, albeit inconsistent, State[412] and Commonwealth[413] laws. The joint judgment implicitly rejected the prosecutor's first submission but accepted the second. Their Honours treated s 172 of the *Liquor Act* as valid but inoperative to the extent of the inconsistency with s 14 of the War-time Act[414].

297 The distinction between the two ways in which the prosecutor had put its case was a distinction with real consequences. If the Commonwealth legislative power over federal elections was exclusive then s 172 of the *Liquor Act* would be

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408 (1920) 28 CLR 23 at 25.

409 (1920) 28 CLR 23 at 25.

410 (1920) 28 CLR 23 at 26, 31.

411 (1920) 28 CLR 23 at 31.

412 See, eg, *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 680; [1996] HCA 58.

413 See, eg, *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 628 [37]; [2004] HCA 19.

414 (1920) 28 CLR 23 at 29; see also at 32. See also *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 670.

invalid, irrespective of the existence of, or any inconsistency with, s 14 of the War-time Act. In contrast, the prosecutor's alternative submission would mean, as Higgins J observed, that s 172 "still lives, subject to the pressure of the Federal Act – like Jack-in-the-box under his lid" and the inoperability would be only to the extent of the inconsistency[415]. Indeed, Higgins J expressed doubt about the extent of the inconsistency expressed in the joint judgment[416]. Without the bedrock of *Smith v Oldham*, either as a precedent or as providing a coherent rationale, there remains to be considered the submission by the Commonwealth of an alternative rationale for the existence of exclusive Commonwealth legislative power over federal elections. The Commonwealth's submission was essentially that the scheme of the *Constitution* gives rise to a structural implication that legislative power over federal elections is exclusively a power of the Commonwealth Parliament. More precisely, the structural submission was said to be that the legislative power over federal elections is exclusively that of the Commonwealth Parliament, other than where the *Constitution* expressly provides for State power, such as by ss 7, 9, and 29.

298 That submission cannot be accepted. A structural implication of exclusive Commonwealth power over federal elections generally is not "logically or practically necessary for the preservation of the integrity of [the constitutional] structure"[417]. An immediate problem for the submission is that such a structural implication for exclusivity of a power over federal elections is contradicted by the structural placement of a necessary component of the Commonwealth Parliament's power over federal elections, s 51(xxxvi). That source of power is located in a section concerned primarily[418] with concurrent powers, and followed by a different section, s 52, setting out those matters upon which the power of the Commonwealth Parliament is exclusive.

299 The alleged structural implication of exclusive Commonwealth legislative power is also said to operate in a manner that is fundamentally different from the exclusive powers expressly conferred on the Commonwealth Parliament by s 52 of the *Constitution*. That express conferral of exclusive power has the effect of

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415 (1920) 28 CLR 23 at 33.

416 (1920) 28 CLR 23 at 36.

417 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 135; [1992] HCA 45; *McGinty v Western Australia* (1996) 186 CLR 140 at 169, 231; [1996] HCA 48; *Austin v The Commonwealth* (2003) 215 CLR 185 at 245 [113]; [2003] HCA 3; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 409 [240]; [2005] HCA 44.

418 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, rev ed (2015) at 587 §160.

invalidating any State law that is "with respect to" the subject of exclusive Commonwealth power[419]. In other words, a State law is invalid if it has a connection with the subject matter that is not "'so insubstantial, tenuous, or distant' that it cannot be regarded as a law with respect to the head of power"[420]. That is because an exclusive power of the Commonwealth Parliament necessarily excludes any State legislative power on that subject matter[421]. Hence, if Commonwealth legislative power in relation to federal elections were exclusive and the same approach to exclusive powers under s 52 of the *Constitution* were applied, then State laws concerning assault, defamation, bribery, fraud, or trespass would be invalid to the extent that they had any real connection with federal elections.

300 Perhaps in an attempt to avoid the absurdity of this result, the Commonwealth submitted that the power over federal elections is exclusive only once the State law is characterised as one concerning elections. It was submitted that the structural implication operates as a constraint upon State power in the same way as the express constraint "other than State banking" in s 51(xiii) and "other than State insurance" in s 51(xiv) of the *Constitution* by limiting Commonwealth power to make laws characterised as those concerning banking and insurance[422]. Hence, on this submission, general State laws concerning assault, trespass, or defamation would not be invalid in their operation upon matters relating to federal elections. A State law concerning assault, trespass, or defamation that is characterised as a law in relation to an election would be

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419 *Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Ltd* (1970) 124 CLR 262 at 269, 279, 288; [1970] HCA 58; *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 671, 676-677; see also at 644.

420 *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 642, quoting Mason J in *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 152; [1983] HCA 21, who in turn was quoting Dixon J in *Melbourne Corporation* (1947) 74 CLR 31 at 79. See also *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 677, citing *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 314; [1994] HCA 44.

421 *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89 at 96, 112, 113, 119-120, 141; [1970] HCA 19; *R v Phillips* (1970) 125 CLR 93 at 129; [1970] HCA 50; *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 638, 670, 676.

422 *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 288-289; [1990] HCA 29; *Attorney-General (Vic) v Andrews* (2007) 230 CLR 369 at 392 [12], 406-407 [78]-[79], 428 [151]; [2007] HCA 9.

invalid unless it "touched or concerned" federal elections only incidentally[423]. In other words, the effect of the Commonwealth's submission was not merely that the alleged structural implication is derived silently from provisions that sit alongside the expressions of exclusivity in s 52. It was that the structural implication of exclusivity operates in a fundamentally different way from the other expressions of exclusivity within the structure upon which it was said to be based. That is not a promising foundation for a structural implication.

301 A final nail in the coffin for the structural implication submission is the lack of any logical or practical necessity for Commonwealth legislative power to be exclusive. The Commonwealth relied upon the express powers in ss 7, 9, and 29 of the *Constitution*, and the failure to include in s 9 the additional words "and manner" contained in cl 1 of Art I, §4 of the United States Constitution[424]. In essence, this was a submission that the express conferral of some powers upon State parliaments in relation to federal elections indicated the exclusion of all other power.

302 It has been said that there are perhaps few maxims of interpretation that "have been more frequently misapplied and stretched beyond their due limits"[425] than the maxim *expressio unius est exclusio alterius*, which treats the express mention of one thing as indicating the exclusion of another. Like all language conventions much depends upon context, including expectations based upon past experience[426]. The context of the conferral of power in ss 7, 9, and 29 does not imply a general exclusion of power over federal elections. Instead, each section was included for specific reasons.

303 The power conferred upon the Queensland Parliament in the second paragraph of s 7 of the *Constitution* was an exemption, due to particular

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423 See *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 288-289; *Attorney-General (Vic) v Andrews* (2007) 230 CLR 369 at 407 [79], 408 [83], 428 [151].

424 Power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives". Compare *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 232 [141]; [2004] HCA 41.

425 *Colquhoun v Brooks* (1887) 19 QBD 400 at 406, quoted in *Rylands Brothers (Australia) Ltd v Morgan* (1927) 27 SR (NSW) 161 at 169 and *George v Federal Commissioner of Taxation* (1952) 86 CLR 183 at 206; [1952] HCA 21. See, further, Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 178-181 [4.33]-[4.35].

426 See also *Federal Commissioner of Taxation v Tomaras* (2018) 93 ALJR 118 at 137 [100]; 362 ALR 253 at 276; [2018] HCA 62.

historical circumstances[427] and until the Commonwealth Parliament otherwise provided, from the constitutional requirements of that section as to the State being a single Senate electorate. The scheme of setting out State legislative powers in s 9 of the *Constitution* operated to distinguish between the concurrent State power to make laws concerning the manner, or "method", of choosing senators and the State power to make laws for determining the times and places of elections of senators for the State[428]. The latter power, like the power in s 12 of the Governor of a State to cause writs to be issued for election of senators for that State, is an exclusive State power[429]. Section 29 of the *Constitution* created a concurrent power[430] of the Commonwealth Parliament in relation to State divisions and the number of members chosen in each division for the House of Representatives "to meet certain contingencies", since the *Constitution* did not "raise any objection to the laws on this subject being made by the various states"[431]. The contingency for which the power was created, although it was not expected that it would be "exercised in any ordinary case", was to avoid the prospect of a "Massachusetts gerrymander"[432]. Both State and Commonwealth legislative power are also restricted by the final sentence, adapted from Art 73 of

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427 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, rev ed (2015) at 473 §70.

428 *Re Australian Electoral Commission; Ex parte Kelly* (2003) 77 ALJR 1307 at 1309 [14]; 198 ALR 262 at 265; [2003] HCA 37, quoting Australia, *Final Report of the Constitutional Commission* (1988), vol 1 at 212 [4.447]-[4.448].

429 *Re Australian Electoral Commission; Ex parte Kelly* (2003) 77 ALJR 1307 at 1309 [13]; 198 ALR 262 at 265; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 232 [140]; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, rev ed (2015) at 481 §79, 484-485 §§81-82.

430 A proposal that the power should be exclusive to the parliaments of the States was not passed: *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 13 September 1897 at 454; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, rev ed (2015) at 530 §118.

431 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 13 September 1897 at 454.

432 *Official Record of the Debates of the Australasian Federal Convention* (Sydney), 13 September 1897 at 454. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, rev ed (2015) at 531 §119.

the Swiss Constitution, which provides that a division shall not be formed out of parts of different States[433].

304 The lack of logical or practical necessity for a structural implication of exclusivity of Commonwealth legislative power over federal elections is reinforced by s 109 of the *Constitution*. For instance, the Commonwealth's submission concerning the "challenge of producing a uniform federal scheme" is met by a Commonwealth law that entirely covers the "field" or subject matter of federal elections. That law would render inoperative any State law on that subject matter[434]. Without any exhaustive Commonwealth law, as Queensland observed, the first federal election was regulated by a diverse range of electoral laws in different States. It does not assist any further in the exercise of interpretation to use, as the Commonwealth attempted in this case, extreme and unlikely examples, such as State legislation that is passed after the Commonwealth Parliament is prorogued, in an attempt to support a different interpretation of Commonwealth power[435].

305 The submission that Commonwealth legislative power over federal elections is exclusive must be rejected.

(iii) *Are the amendments to the Queensland Electoral Act contrary to a reverse Melbourne Corporation implication?*

306 The plaintiff advanced a different argument for the invalidity of s 275 of the Queensland Electoral Act. In a submission that was disclaimed by the Commonwealth, the plaintiff asserted that the *Constitution* contains a limited structural implication of Commonwealth governmental immunity into which

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433 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, rev ed (2015) at 530 §118.

434 *Ex parte McLean* (1930) 43 CLR 472 at 483; [1930] HCA 12; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 524 [40]; [2011] HCA 33. See also *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 466 [52]; [2013] HCA 55; *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212 at 221-222 [33], 227 [65], 236 [106]; 363 ALR 188 at 196, 203, 216; [2019] HCA 2.

435 *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 271, 275; [1975] HCA 46; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 604-605; [1977] HCA 60; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 380-381 [87]-[88]; [1998] HCA 22; *Sue v Hill* (1999) 199 CLR 462 at 480 [26]; [1999] HCA 30; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32]; [2003] HCA 72; *XYZ v The Commonwealth* (2006) 227 CLR 532 at 549 [39]; [2006] HCA 25.

s 275 of the Queensland Electoral Act had trespassed. The immunity upon which the plaintiff relied was not the limited immunity from discriminatory, non-generalised laws affecting Commonwealth executive capacities[436]. It was an assertion of an area of immunity for the Commonwealth polity from State laws and a co-relative limitation of State legislative power.

307 At the heart of the plaintiff's submission was the principle established by the decision of this Court in *Melbourne Corporation*[437]. That principle is a constitutional intergovernmental immunity of the States in the sense that it is co-relative to a lack of Commonwealth legal power[438]. It was described by Stephen J in *Koowarta v Bjelke-Petersen*[439] as a limitation on Commonwealth legislative power derived from "the federal nature of the Constitution and which will serve to protect the structural integrity of the State components of the federal framework, State legislatures and State executives".

308 Although expressed in different ways over the years[440], the *Melbourne Corporation* principle was described most recently in the joint judgment of Hayne, Bell and Keane JJ in *Fortescue Metals Group Ltd v The Commonwealth*[441] ("*Fortescue*") as requiring consideration of "whether impugned legislation is directed at States, imposing some special disability or burden on the exercise of powers and fulfilment of functions of the States which curtails their capacity to function as governments". This formulation of the principle in the joint judgment in *Fortescue* concerned only the effect of the impugned Commonwealth legislation on the States, which was the question in that case. However, in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[442], Brennan CJ expressly confined the principle to a constraint upon Commonwealth legislative power, saying that the *Melbourne*

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436 Established in *The Commonwealth v Cigamatic Pty Ltd (In liq)* (1962) 108 CLR 372 at 378; [1962] HCA 40; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427, 441-442; [1997] HCA 36.

437 (1947) 74 CLR 31.

438 See, generally, Cook, "Hohfeld's Contributions to the Science of Law" (1919) 28 *Yale Law Journal* 721 at 726-727.

439 (1982) 153 CLR 168 at 216; [1982] HCA 27.

440 See *Austin v The Commonwealth* (2003) 215 CLR 185 at 258 [145].

441 (2013) 250 CLR 548 at 609 [130]; see also at 563 [6], 614 [145], 636-637 [229]; [2013] HCA 34.

442 (1997) 190 CLR 410 at 426.

Corporation principle is "irrelevant to the scope of any State legislative power". If that were correct, it would be a sufficient basis, without more, to reject the plaintiff's submission. With respect, Brennan CJ's statement cannot be accepted.

309 The implication established in *Melbourne Corporation* derives from the assumption implicit in the text and structure of the *Constitution*[443] that the Commonwealth and State governments will continue to co-exist as separate entities. There are, therefore, statements in *Melbourne Corporation* that support the symmetrical application of the implication both to protect the States from laws of the Commonwealth or other States[444], and to protect the Commonwealth from laws of the States. For instance, Latham CJ said that the *Constitution* "is based upon and provides for the continued co-existence of Commonwealth and States as separate Governments, each independent of the other within its own sphere"[445]. Dixon J said that the "foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities."[446] Starke J said that "neither federal nor State governments may destroy the other nor curtail in any substantial manner the exercise of its powers or 'obviously interfere with one another's operations'"[447]. And Williams J said that there arises from the very nature of the federal compact "a necessary implication that neither the Commonwealth nor the States may exercise their respective constitutional powers for the purpose of affecting the capacity of the other to perform its essential governmental functions"[448]. The symmetry of this underlying assumption[449] has been repeated in subsequent decisions in this Court[450].

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443 See, eg, *Constitution*, ss 51(xiii), (xiv), (xxxiii), (xxxiv), 100, 102, 104, 112, 123, 128.

444 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 25-26 [15]; [2002] HCA 27.

445 (1947) 74 CLR 31 at 55; see also at 61.

446 (1947) 74 CLR 31 at 82.

447 (1947) 74 CLR 31 at 74, quoting *Graves v New York; Ex rel O'Keefe* (1939) 306 US 466 at 488; see also at 70.

448 (1947) 74 CLR 31 at 99.

449 See, further, Stellios, *Zines's The High Court and The Constitution*, 6th ed (2015) at 523, 534.

450 See *Victoria v The Commonwealth* (1971) 122 CLR 353 at 418; [1971] HCA 16; *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at

(Footnote continues on next page)

310 The assumption upon which the *Melbourne Corporation* principle is based supports an implication that constrains any State or Commonwealth power to make a law that is destructive of the continued co-existence and independence of the Commonwealth and States as separate governments. That assumption, and associated implication, of a co-existing, independent Commonwealth polity is not negated by the existence of s 109 of the *Constitution*[451]. That section, like others in the *Constitution*, is itself premised upon the assumption of the continued existence and independence of the Commonwealth polity. Nevertheless, the existence of s 109 may have an impact upon the magnitude of any burden that a State law imposes upon the Commonwealth polity.

311 As Kirby J observed in *Austin v The Commonwealth*[452], "it is unlikely that a frontal attack upon the existence of the States would arise in the form of federal law". The same is true of a State law that directly attacks the existence of the Commonwealth. The real difficulty in the application of the *Melbourne Corporation* implication arises because neither the implication nor the assumption upon which it is based is limited to the continued existence of the States and the Commonwealth. In two respects, both the assumption and the implication extend beyond ensuring continued co-existence[453]: (i) the destruction of the continued co-existence of *the polity* extends to destruction of a *capacity* of the polity to function as a government; and (ii) *destruction* of that capacity of the polity is further extended to *curtailment* or *weakening* of the capacity of the

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313; [1983] HCA 19; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 134; *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 119-120 [194]; *Fortescue* (2013) 250 CLR 548 at 609 [130].

451 See *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 681; compare *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 507.

452 (2003) 215 CLR 185 at 300 [279].

453 See *Melbourne Corporation* (1947) 74 CLR 31 at 66, 74; *Victoria v The Commonwealth* (1971) 122 CLR 353 at 411, 424-425; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 93; [1982] HCA 31; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 207, 217, 226, 231, 247, 260; [1985] HCA 56; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 163, 243; *Austin v The Commonwealth* (2003) 215 CLR 185 at 217 [24]; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 at 298 [32], 307 [66]; [2009] HCA 33.

polity to function as a government. Sometimes this is expressed merely as an "interference" with the polity's continued functioning as a government[454].

312 The two respects in which the assumption and the implication extend beyond a core implication of continued co-existence represent a significant inroad into the decision in the *Engineers' Case*. However, they were not novel extensions even at the time of the *Melbourne Corporation* decision. Several years after the *Engineers' Case*, in his dissenting judgment in *Pirrie v McFarlane*[455], upon which later decisions relied[456], Isaacs J described the "natural and fundamental principle" restricting the scope of powers conferred by the *Constitution* upon distinct governmental "organisms" that "neither is intended, in the absence of distinct provision to the contrary, to destroy or weaken the *capacity* or *functions* expressly conferred on the other".

313 Despite their longevity, the difficulty in defining the scope of these two broader aspects of the implication has been a substantial reason why the *Melbourne Corporation* principle "has proved insusceptible of precise formulation"[457]. Different expressions of the constraints upon the principle have been made over time. It has been said that the weakening must be of an "essential" governmental function[458]. It has also been said that the other polity must be subject to a "special burden" or "single[d] out" or "aimed at" by the law[459] in the sense that the law's "very object is to restrict, burden or control an

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454 *Albrecht v Federal Commissioner of Taxation* (2014) 228 FCR 177 at 182 [16]. See also *Melbourne Corporation* (1947) 74 CLR 31 at 75; *Victoria v The Commonwealth* (1971) 122 CLR 353 at 392-393; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 163, 242.

455 (1925) 36 CLR 170 at 191; [1925] HCA 30 (emphasis in original). Compare *Federated State School Teachers' Association of Australia v Victoria* (1929) 41 CLR 569 at 584-585; [1929] HCA 11.

456 *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 682; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 439, 451; *Austin v The Commonwealth* (2003) 215 CLR 185 at 278 [213]; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 at 290-291 [17].

457 *Austin v The Commonwealth* (2003) 215 CLR 185 at 258 [145]. See also *Fortescue* (2013) 250 CLR 548 at 610 [134].

458 *Melbourne Corporation* (1947) 74 CLR 31 at 99.

459 *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 206, 217, 229.

activity of the States"[460]. However, such an object is a relevant but not determinative criterion[461]. Emphasis has instead been placed on a difference between a law that affects the capacity of a State to exercise constitutional functions and a law that affects the "ease with which those functions are exercised"[462]. Or, in a formulation which might amount to the same thing, it was said by three Justices in *Austin v The Commonwealth*[463] that the curtailment or weakening must be "significant".

314 All of these formulations can be reduced to a consideration of the magnitude of the burden upon the other polity's capacity to function as a government. That assessment will be one of "evaluation and degree"[464]. The magnitude of a burden has dimensions of both breadth and depth. A burden will be more deeply felt the more that it is targeted at the other polity and the more essential the governmental function that it curtails is to that other polity. For instance, in *Clarke v Federal Commissioner of Taxation*[465], French CJ gave the example of a Commonwealth law imposing a gubernatorial privileges tax that had little financial importance to the States or their Governors but which might nonetheless involve too great a legislative intrusion into the functioning of the States.

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460 *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 207.

461 *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 260, quoted with approval in *Austin v The Commonwealth* (2003) 215 CLR 185 at 217 [24], 249 [125]; see also at 249 [123]-[124], 301 [281]. See also *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 at 299 [34], 306 [65]; *Fortescue* (2013) 250 CLR 548 at 611 [137].

462 *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 481; [1995] HCA 47. See also *Austin v The Commonwealth* (2003) 215 CLR 185 at 259 [146]; *Fortescue* (2013) 250 CLR 548 at 610 [132].

463 (2003) 215 CLR 185 at 265 [168]. See also *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 at 298 [32], 309 [76]. See, further, the references to "substantial" in *Melbourne Corporation* (1947) 74 CLR 31 at 74-75; *Victoria v The Commonwealth* (1971) 122 CLR 353 at 398.

464 *Austin v The Commonwealth* (2003) 215 CLR 185 at 249 [124], quoted by all Justices in *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 at 290 [16], 307 [66], 312 [93].

465 (2009) 240 CLR 272 at 298 [33].

315 A burden will be wider the more that it curtails the operation of the governmental functions of the other polity. The curtailing of the governmental functions of the other polity might arise merely by curtailing the range of legislative policy choices of the other polity. Even more significantly, it might curtail the operation of key governmental institutions of the other polity.

316 If the magnitude of the burden on the other polity's capacity to function as a government is relevant then it should also be relevant to consider the significance of the law for the capacity of the polity enacting it to govern. Hence, in *Austin v The Commonwealth*[466], although dissenting in the result, Kirby J took into account, for the assessment of the significance of the effect of an impugned Commonwealth law upon the States, the importance of the "effective discharge by the Commonwealth of all of its national responsibilities, as envisaged by the Constitution".

317 The burden of the provisions of the Queensland Electoral Act and the Queensland Local Government Electoral Act was not deep. It had only an incidental effect upon a constitutional function of the Commonwealth, namely the regulation of federal elections. The interference was not specifically targeted at the Commonwealth; the "immediate object"[467] of the provisions was not to regulate federal elections.

318 Nor did the provisions of the Queensland Electoral Act and the Queensland Local Government Electoral Act impose a wide burden on the operation of the Commonwealth government. The Queensland Electoral Act imposed no restriction upon the range of Commonwealth legislative policy choices. Further, the plaintiff pointed to no constitutional fact, and made no submission, to establish that the provisions would curtail or weaken the capacity of the Commonwealth to function as a government. For instance, the provisions did not burden the capacity of the Commonwealth to determine the number and identity of, and the terms and conditions of engagement of, high-level public servants[468], judges[469], or politicians[470]. They did not constrain the ability of the

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466 (2003) 215 CLR 185 at 304 [290].

467 Compare *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 241-242. See also *Melbourne Corporation* (1947) 74 CLR 31 at 79.

468 Compare *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 232-233; [1995] HCA 71; *Albrecht v Federal Commissioner of Taxation* (2014) 228 FCR 177 at 184 [22].

469 Compare *Austin v The Commonwealth* (2003) 215 CLR 185 at 219 [28], 260-261 [152], 263 [161]-[162], 264 [165], 283 [229]. See also *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 233.

Commonwealth to conduct the affairs of government through means such as borrowing from and placing funds with private banks[471]. Rather, a central purpose of the Queensland Amending Act was to reduce "the risk of actual or perceived corruption related to developer donations" and thus to increase "transparency and accountability" in State elections[472]. It is unsurprising that the plaintiff made no submission that the functioning of the Commonwealth government was curtailed or weakened by any incidental effect of reducing corruption in federal elections.

319 Finally, the provisions of the Queensland Electoral Act and the Queensland Local Government Electoral Act had a real significance for the capacity of the State to function as a government. Although, as the plaintiff was at pains to emphasise, there were other laws that the Queensland Parliament could have passed to fulfil its legitimate purpose of regulating State elections without impermissibly impairing the constitutional functions of the Commonwealth, the choice of regime to regulate electoral donations was part of the functioning of the State as a government.

320 The plaintiff's submission that the Queensland laws contravened the reverse *Melbourne Corporation* implication must be rejected.

(iv) *Are the amendments to the Queensland Electoral Act contrary to the constitutional implied freedom of political communication?*

321 The plaintiff's submission that the amendments to the Queensland Electoral Act, but not the equivalent amendments to the Queensland Local Government Electoral Act, are invalid by reason of the constitutional implied freedom of political communication can be dealt with briefly. Subdivision 4 of Div 8 of Pt 11 of the Queensland Electoral Act was closely modelled upon equivalent provisions in the *Election Funding, Expenditure and Disclosures Act 1981* (NSW)[473]. It shares the same core underlying purpose of "minimising the

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470 Compare *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 at 299-300 [35]-[36], 305 [62], 315-316 [101]-[102].

471 Compare *Melbourne Corporation* (1947) 74 CLR 31 at 67, 75, 84.

472 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 March 2018 at 190, 192; see also Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 May 2018 at 1104.

473 Queensland, Legislative Assembly, *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018*, Explanatory Notes at 2, 4, 11, 14, 16.

risk of corruption"[474]. A submission that the New South Wales legislation was contrary to the implied freedom was rejected by this Court in *McCloy*[475]. The Explanatory Notes to the Queensland Amending Act[476] noted the reliance that was placed upon the decision of this Court in *McCloy*.

322 The plaintiff did not challenge *McCloy* but, instead, sought to brush aside the decision, not yet four years old, on the basis that the legislative facts upon which that decision was based occurred in New South Wales. In Queensland, so the submission effectively went, things are done differently. The submission is in more than a little tension with the facts in the special case: (i) various findings by the Crime and Corruption Commission and its predecessors, referred to in the Explanatory Notes to the Queensland Amending Act[477], in 1991 and 2006 that candidates for local government elections had received significant donations from property developers; (ii) Crime and Corruption Commission findings in 2017 that one of the key concerns about political donations, namely the increase in the risk of corruption, "is heightened when donors have business interests that are affected by government decisions" and, at local government level, is "particularly associated with property developers"[478]; (iii) investigations by the Fitzgerald Inquiry into a State Minister, Mr Hinze, revealing benefits he derived relating to property developments; and (iv) investigations by the Crime and Misconduct Commission between 2005 and 2010 into payments made to Mr Nuttall, a member of the Legislative Assembly, leading to conviction for offences including official corruption.

323 Even if, as the plaintiff effectively submitted, a metaphorical corruption-proof fence existed between New South Wales and Queensland, and also between local government and State government in Queensland, the plaintiff's submission is still misconceived. A reason why parliaments make laws is to

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474 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 March 2018 at 192. See also *McCloy v New South Wales* (2015) 257 CLR 178 at 209 [53], 221 [93], 241 [165], 261 [232], 291 [351]; [2015] HCA 34 ("*McCloy*").

475 (2015) 257 CLR 178 at 221 [93], 222 [98], 295 [369].

476 Queensland, Legislative Assembly, *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018*, Explanatory Notes at 4, 11.

477 Queensland, Legislative Assembly, *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018*, Explanatory Notes at 3.

478 Queensland, Crime and Corruption Commission, *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government* (2017) at 76.

shape behaviour. They can act prophylactically, by reference to possibilities and probabilities, as well as reactively[479]. They can shape laws by reference to circumstances overseas. And they can, and often should, shape laws by reference to circumstances and conduct in other States. And, when legislating in response to the conduct of those who are not governed, "[t]here is no doubt of it; but in this country it is found good, from time to time, ... to encourage the others"[480].

324 The plaintiff's submission really reduces to a claim that the result in *McCloy* does not dictate the result in this case because the circumstances underlying the same parliamentary purpose are different in Queensland from those in New South Wales. But the different underlying circumstances do not affect whether the law burdens the freedom of political communication. They do not affect the legitimacy of the law's purpose. They do not affect whether the law is suitable, in the sense of having a rational connection with its purpose. Nor do the different underlying circumstances affect whether there were alternative, reasonably practicable, means of achieving the same object but which have a less restrictive effect on the freedom.

325 The assessment of whether the law is adequate in the balance is the only possible area where different underlying circumstances could affect the process of reasoning concerning the implied freedom of political communication. But the plaintiff did not submit, and there is no reason to conclude, that there was any difference in importance placed by the Queensland Parliament from that placed by the Parliament of New South Wales upon the core underlying purpose of removing the risk and perception of corruption[481]. And even if some lesser weight were placed by the Queensland Parliament upon this core purpose, once regard is had to the plurality of values that underlie the *Constitution* this would still be insufficient to establish such a gross or manifest lack of balance between, on the one hand, the foreseeable magnitude and likelihood of the burden upon freedom of political communication and, on the other hand, the importance of the legislative purpose[482].

326 The plaintiff's invitation to distinguish *McCloy* and to hold that the Queensland law infringed the implied freedom in this case is effectively an

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479 See *McCloy* (2015) 257 CLR 178 at 262 [233].

480 Voltaire, *Candide* (1759).

481 See *Clubb v Edwards* [2019] HCA 11 at [496].

482 See *Clubb v Edwards* [2019] HCA 11 at [497].

invitation to "innovate at pleasure" as a "knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness"[483]. It should not be accepted.

The validity of s 302CA of the Commonwealth Electoral Act

(i) *The Commonwealth Electoral Act and s 302CA*

327 Part XX of the Commonwealth Electoral Act is entitled "Election funding and financial disclosure". Considered as a whole, the provisions of Pt XX create a regime for federal electoral purposes including: (i) the registration of political campaigners (Div 1A); (ii) election funding for unendorsed candidates, for unendorsed groups, and for "registered political parties"[484] (Div 3); (iii) disclosure of donations to candidates, political parties, and political campaigners (Div 4); and (iv) disclosure of electoral expenditure (Div 5). The scheme of Pt XX involves two interrelated components: the prohibition upon certain political donations (Div 3A), and the disclosure of most other donations and electoral expenditure (Divs 4, 5, and 5A). The regime aims, by ss 302CA and 314B, to make these two components part of a single regime that regulates donations in relation to federal electoral purposes, although carving out, as far as possible, donations that are made for, or are used for, State electoral purposes.

328 Part XX of the Commonwealth Electoral Act, in the form described above, includes amendments made by the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth) ("the Commonwealth Amending Act"). The Commonwealth Amending Act introduced a suite of changes to electoral funding and disclosure. The Commonwealth Amending Act was described as having an intention to effect significant "reform [of] the electoral funding and disclosure regime in the Commonwealth Electoral Act 1918"[485]. The changes included a new registration regime and disclosure rules for third-party campaigners, designed to achieve greater transparency, and the banning of certain gifts by foreign donors.

329 Part of that suite of changes introduced to the Commonwealth Electoral Act by the Commonwealth Amending Act was the introduction of a new Div 3A

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483 Cardozo, *The Nature of the Judicial Process* (1921) at 141. See also *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 309 [751].

484 "Registered political party" is defined in s 4(1) of the Commonwealth Electoral Act to mean a political party registered under Pt XI: see *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

485 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 November 2018 at 11580.

to Pt XX entitled "Requirements relating to donations". Subdivision A of Div 3A is entitled "Interpretation". It provides an outline of Div 3A, in s 302A, describing the Division as "regulat[ing] gifts that are made to registered political parties, candidates, groups, political campaigners and third parties". It describes the object of Div 3A, in s 302C(1), as to "secure and promote the actual and perceived integrity of the Australian electoral process by reducing the risk of foreign persons and entities exerting (or being perceived to exert) undue or improper influence in the outcomes of elections".

330 Most pertinently to this case, the suite of changes introduced by the Commonwealth Amending Act provides in s 302CA for the relationship between the Commonwealth prohibited donor regime and State and Territory electoral laws. The suite of changes also included the insertion in Div 6, entitled "Miscellaneous", of s 314B, which provides for the relationship between the Commonwealth disclosure regime and State and Territory electoral laws. Section 302CA, contained within the "Interpretation" subdivision of Div 3A, and s 314B provide generally for the extent to which the Commonwealth laws concerning political donations, both the prohibitions on foreign donations in Div 3A and the disclosure regime in Divs 4, 5, and 5A, are intended to regulate exhaustively the subject matter of donations to the relevant political actors.

331 Section 302CA of the Commonwealth Electoral Act is set out in full in other judgments in this case. It suffices to make reference to several key features of the section. First, the removal of State and Territory prohibitions applies to gifts given to, or received or retained by or on behalf of, political entities, political campaigners[486], or third parties[487]. A "political entity" is defined in s 4 to include a registered political party. In testing whether s 302CA is valid, the submissions in this case generally, and conveniently, focused upon the application of s 302CA to registered political parties.

332 Secondly, the removal of State or Territory prohibitions or permissions on donations, and the limiting of the prohibition to those matters in Div 3A, applies only in the context of a federal election to those gifts (i) with terms that require or allow[488] the gift to be used for the purposes of incurring electoral expenditure or creating or communicating electoral matter or (ii) without terms as to the

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486 Defined in s 287(1) as a person or entity registered as a political campaigner under s 287L.

487 Defined in s 287(1) as a person or entity authorising or incurring "electoral expenditure" above the disclosure threshold: see the definition of "electoral expenditure" in s 287(1), read with s 287AB(1), and the definition of "electoral matter" in s 4(1), read with s 4AA.

488 Commonwealth Electoral Act, s 302CA(2)(a).

purpose for which the gift may be used[489]. In relation to those gifts that are not prohibited by Div 3A, but about which State and Territory prohibitions are removed, they remain subject to the applicable rules in Divs 4 and 5A concerning disclosure.

333 Thirdly, s 302CA(3) provides for three circumstances in which the State and Territory laws that would otherwise be excluded by s 302CA(1) will nevertheless operate. These carve-outs from the operation of s 302CA(1) were not included in the original version of s 302CA in the Bill that became the Commonwealth Amending Act. That original version of s 302CA was included in an exposure draft of proposed amendments by the Government to the first version of the Bill. However, the Joint Standing Committee on Electoral Matters heard evidence about the Bill, including from Professor Twomey, that although the Commonwealth Parliament can legislate to exclude State laws requiring disclosure "when the donation goes to the Commonwealth", the Commonwealth should not be "interfering with the state decisions as to how to regulate their own electoral systems"; the interference would be "inappropriate and arguably unconstitutional" if the "amount is actually used to fund state political expenditure"[490]. The Joint Standing Committee recommended, and the Government accepted, that the provisions should be amended expressly to "exclude the application of the Commonwealth law to any funds that are used in a state or territory election", explaining that "these provisions form an important part of the disclosure regime"[491].

334 The first of the three circumstances where State and Territory laws are left to operate, in s 302CA(3)(a), is where the terms of the gift "explicitly require the gift or part to be used only for a State or Territory electoral purpose". The second, in s 302CA(3)(b)(i), is where the State or Territory electoral law requires "the gift or part to be kept or identified separately" in order to be used only for a State or Territory electoral purpose. The third, in s 302CA(3)(b)(ii), is where "the gift recipient keeps or identifies the gift or part separately ... in order to be used only for a State or Territory electoral purpose". A note and an example accompanying s 302CA(3)(b)(ii) make clear, in the interpretation of that sub-paragraph[492], that the sub-paragraph is intended to restrict the removal of

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489 Commonwealth Electoral Act, s 302CA(2)(b).

490 Australia, Joint Standing Committee on Electoral Matters, *Second advisory report on the Electoral Legislation (Electoral Funding and Disclosure Reform) Bill 2017* (2018) at 43 [4.12], 45 [4.19].

491 Australia, Joint Standing Committee on Electoral Matters, *Second advisory report on the Electoral Legislation (Electoral Funding and Disclosure Reform) Bill 2017* (2018) at 48 [4.34]-[4.35]; see also Recommendation 10 at 49 [4.36].

492 See *Acts Interpretation Act 1901* (Cth), ss 13(1), 15AD.

State or Territory regulation of gifts that may be used for federal electoral purposes if the gift is later kept or identified separately for use for State or Territory electoral purposes.

335 The example concerns a circumstance where, at the time that a gift is given, there is no expressed purpose for the gift. In the example, if the gift is kept separately and ultimately used for a State or Territory electoral purpose, then both the donor and the recipient of the gift must comply with State and Territory electoral laws concerning the giving, receipt, retention, and use of the gift[493]. In other words, s 302CA(3)(b)(ii) has the effect of imposing a condition precedent upon State or Territory electoral laws that concern gifts that, when given, may still be used for federal electoral purposes. The condition precedent to the operation of those State or Territory electoral laws is that the gift is later kept separately for ultimate use for a State or Territory electoral purpose. At that later time of keeping it separately the condition precedent will be satisfied and the State or Territory electoral law will have retroactive operation.

(ii) *The purpose of s 302CA of the Commonwealth Electoral Act*

336 In *Unions NSW v New South Wales*[494], I explained the importance of distinguishing between a legislative purpose and legislative effects. This distinction is not novel[495]. But it is important. A purpose is an object or aim. An effect might be foreseen, expected, or even considered inevitable. But foreseeability, or even belief in inevitability, are only factors from which an inference of purpose might be drawn. As with intention, if the inference is not drawn then, no matter how foreseeable or likely the effect, it is not the purpose of the legislation[496]. In *Unions NSW v New South Wales*[497], I concluded that legislative amendments had the purpose, and not merely the effect, of quietening the voices of third-party campaigners relative to political parties and candidates. There was no other discernable reason for the change to the legislative regime.

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493 See also example 2 given in Australia, House of Representatives, *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018*, Revised Explanatory Memorandum at 53.

494 (2019) 93 ALJR 166 at 200-201 [168]-[172]; 363 ALR 1 at 45-46; [2019] HCA 1.

495 *McCloy* (2015) 257 CLR 178 at 205 [40]; *Brown v Tasmania* (2017) 261 CLR 328 at 362 [99]-[100], 392 [209], 432-433 [322]; [2017] HCA 43.

496 See also *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 369 [16], 392-398 [92]-[103]; [2017] HCA 34.

497 (2019) 93 ALJR 166 at 211 [222]; 363 ALR 1 at 59.

337 In this case, ss 302CA and 314B of the Commonwealth Electoral Act, as part of the substantial package of amendments to reform the electoral funding and disclosure regime in that Act, have the effect of creating an exclusive regime of Commonwealth regulation of political donations that may be used for incurring electoral expenditure or creating or communicating electoral matter. Section 302CA was inserted as part of an "Interpretation" subdivision of Div 3A. It would be absurd to try to discern its purpose, or that of s 314B, independently of the remainder of that Division, or independently of the other amendments. The interpretation subdivision and the associated amendments introduced with s 302CA are inextricably linked to the regime of regulation of political donations and electoral expenditure including disclosure requirements and positive prohibitions on foreign donors in particular circumstances. Likewise, the subject matter of s 302CA is also inextricably intertwined with the regime of regulation of political donations and electoral expenditure in federal elections. Read as a whole, the scheme of regulation reveals no basis for an inference of a purpose to impair or weaken the ability of the States and Territories to regulate their own elections.

338 When one considers the aim, object, or purpose of the scheme of exclusive regulation, there may be a number of answers. One might have been to increase certainty by subjecting all domestic donors, but not foreign donors, to the same regime of disclosure as far as possible. Another might have been to strike a single balance between maximising the flow of funds for electoral purposes and encouraging transparency. And, in relation to s 314B, two purposes given in the extrinsic materials were to prevent discouragement of "persons or entities from making or receiving small donations for federal electoral purposes, where such donations are not required to be reported under Part XX of the Electoral Act"[498], and "to ensure that ... the person or entity is not subject to duplicative reporting requirements"[499]. But there is no basis in the materials before this Court from which a conclusion can be drawn that the legislative purpose or aim of an exclusive scheme of regulation of Commonwealth donations, reflected in ss 302CA and 314B, was to impair or weaken the ability of the States and

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498 Australia, Senate, *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*, Supplementary Explanatory Memorandum at 63 [259]; Australia, House of Representatives, *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018*, Revised Explanatory Memorandum at 65 [286].

499 Australia, Senate, *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*, Supplementary Explanatory Memorandum at 63 [259]; Australia, House of Representatives, *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018*, Revised Explanatory Memorandum at 65 [286].

Territories to regulate their own elections. That impairment was an effect of regulating the unallocated middle. But it was not a legislative purpose.

339 Any possible inference that s 302CA had a purpose of impairment of the ability of the States and Territories to regulate their own elections is also substantially undermined by the history of the amendments to the original draft versions of s 302CA and s 314B in response to the concerns of the Joint Standing Committee on Electoral Matters about the "boundaries of [the Commonwealth] disclosure regime"[500]. The introduction of carve-outs for the further operation of State and Territory laws reveals an intention to *reduce* any restrictions upon the ability of the States and Territories to regulate their own elections, in the course of pursuing the exclusive scheme to fulfil legislative objects such as maximising the flows of funds, transparency, and certainty.

(iii) *The attacks on s 302CA of the Commonwealth Electoral Act*

340 For the reasons that I have explained, s 275 of the Queensland Electoral Act is a valid law. However, it is common ground that s 275, although validly made, would be inoperative by s 109 of the *Constitution* as it is inconsistent with s 302CA of the Commonwealth Electoral Act. Queensland sought to avoid that conclusion by submitting that s 302CA of the Commonwealth Electoral Act is invalid. Three reasons were advanced in this respect. First, it was submitted that if the Commonwealth Parliament had exclusive legislative power with respect to federal elections, then s 302CA impermissibly intruded into a corresponding area of exclusive State legislative power with respect to State elections. The premise of this submission, namely exclusive Commonwealth legislative power, has already been rejected. Secondly, it was submitted that s 302CA contravenes the *Melbourne Corporation* implication. Thirdly, relying upon the decision of the majority of this Court in *University of Wollongong v Metwally*[501] ("*Metwally*"), it was submitted that s 302CA purports to override the temporal operation of s 109 of the *Constitution* and is therefore invalid. Aspects of these submissions were supported by each of the intervening State Attorneys-General. The Attorney-General for the State of Victoria, and to some extent the Attorney-General for the State of Tasmania, sought to impugn the connection between s 302CA and federal legislative power in a different manner. First, it was submitted that s 302CA was beyond the core or incidental power of the Commonwealth Parliament. Secondly, in a related but potentially independent

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500 Australia, Joint Standing Committee on Electoral Matters, *Second advisory report on the Electoral Legislation (Electoral Funding and Disclosure Reform) Bill 2017* (2018) at 48 [4.31]. See especially at 48 [4.33].

501 (1984) 158 CLR 447; [1984] HCA 74.

submission, it was suggested that the Commonwealth Parliament had an extraneous purpose in enacting s 302CA which meant that it was beyond power.

(iv) *Section 302CA is within the power of the Commonwealth Parliament*

341 It is necessary at the outset to explain (i) why the Commonwealth Parliament has the power to regulate donations to registered political parties which may be used, but are not required to be used, for federal electoral purposes, and (ii) the close relationship between the laws that collectively seek to make a system of regulation exclusive, which reveals the artificiality of concluding that some are beyond power but others are not.

342 Consider the following fictitious example. Suppose that an investigation revealed widespread corruption and undue influence in federal elections associated with large donations to political parties. The Commonwealth Parliament responds to this evidence of undue influence, in the sense of corrupting influence, by a law requiring donors to disclose their donations to registered political parties of more than $1,000 of funds that are required to be used in federal elections. But the widespread corruption continues. The donors evade the Commonwealth law and make the same donations, intended for use by the same registered political parties in the same way, with the same consequences. They evade the Commonwealth law by giving their donations without restriction. That is, the donations are not tied for use only in federal elections. An amendment to the Commonwealth law, capable of reducing the size of this gaping hole in the legislation, might be to require disclosure of all donations that *may* be used for federal electoral purposes.

343 In this fictitious example, the question of how far the regulation should go in order to combat the menace of corrupting influence is quintessentially a matter for political judgment. The regime hypothesised was one of disclosure only. At another extreme would be a regime of complete prohibition. An intermediate regime might be one of prohibition of some donations (foreign donors) and disclosure of others. The political judgment involved in defining the scope and boundary of the regulation might require balancing of matters such as ensuring a sufficiency of funds for political parties to promote their messages and any deterrent effect of dual systems of regulation of the same donation. The outcome of that balancing process might very well require that the Commonwealth law be made exclusive. That is hardly a judgment which courts are equipped to second-guess.

344 The plenary power of the Commonwealth Parliament relating to federal elections[502], including matters incidental or peripheral to the main subject matter,

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502 See *Smith v Oldham* (1912) 15 CLR 355 at 363; *Judd v McKeon* (1926) 38 CLR 380 at 383; [1926] HCA 33; *Australian Capital Television Pty Ltd v*

(Footnote continues on next page)

plainly permits it to pass such a protective law regulating the use of funds that may be used, but are not required to be used, by political parties contesting federal elections. In *Smith v Oldham*[503], Griffith CJ characterised the subject matter of the Commonwealth plenary legislative power deriving from ss 10, 31, and 51(xxxvi) of the *Constitution* in terms of the "regulation of the conduct of persons with regard to elections"[504]. More precisely, it might be expressed as the conduct of persons with regard to *federal* elections. And, as Griffith CJ also said, "[t]he main object of laws for that purpose [is] to secure freedom of choice to the electors"[505]. That object permits or requires laws that establish the machinery of elections and laws to prevent "intimidation and undue influence"[506]. In other words, the legislative power includes power to make laws that establish an electoral system and laws that regulate that electoral system by proscribing "conduct that interferes with the electoral system that Parliament has chosen"[507]. The power also includes laws that define the boundary or scope of the regulation, and which are therefore necessarily incidental to that regulation. That sense of "incidental" is distinct from the power in s 51(xxxix) of the *Constitution*, which is concerned with "incidental power" in the different sense of extending Commonwealth legislative power to matters that arise in connection with the

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The Commonwealth (1992) 177 CLR 106 at 220; *Langer v The Commonwealth* (1996) 186 CLR 302 at 317; [1996] HCA 43; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 113 [262]; [2016] HCA 36. See also *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23 at 31, 32; *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 57-58; [1975] HCA 53; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 254 [212], 260 [231].

503 (1912) 15 CLR 355 at 358.

504 See also *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23 at 31, 32; *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 57-58; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 220.

505 (1912) 15 CLR 355 at 358.

506 (1912) 15 CLR 355 at 358; see also at 360, 363.

507 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 208 [66]. See also *Smith v Oldham* (1912) 15 CLR 355 at 359-360, 362-363; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 157, 220, 225-226, 234; *Langer v The Commonwealth* (1996) 186 CLR 302 at 339.

execution of its powers[508]. That "express incidental power" does not arise in this case.

345 Subdivision B of Div 3A of Pt XX of the Commonwealth Electoral Act involves provisions that are based upon the power of the Commonwealth Parliament to pass laws concerning funds that may be used, but are not required to be used, by registered political parties for incurring electoral expenditure in relation to federal elections. It includes prohibitions upon foreign donors and recipients of foreign donations, including a prohibition on foreign donors making gifts to registered political parties[509]. There was no dispute that the provisions in Subdiv B are valid. And it was not suggested that those provisions are only valid because of a probability, rather than a possibility, that the foreign donor's donation would be used for the purposes of incurring electoral expenditure.

346 Division 4 of Pt XX is also based upon the premise that the Commonwealth Parliament has power to pass laws concerning funds that may be used, but are not required to be used, by registered political parties for incurring electoral expenditure in relation to federal elections. For instance, s 305B(1) provides that if a person makes gifts above the disclosure threshold to a registered political party during a financial year, the person must provide a return to the Electoral Commission within 20 weeks after the end of the financial year, covering all the gifts that the person or entity made to that political party during the financial year. Disclosure is required irrespective of the use to which the registered political party plans to put the funds, or to which it does put the funds. Although the disclosure regime operates even in circumstances of possible use of funds by registered political parties for electoral expenditure, there was no suggestion in this case that the disclosure regime was beyond the Commonwealth power to regulate the conduct of persons with regard to federal elections. In *Actors and Announcers Equity Association v Fontana Films Pty Ltd*[510], Mason J said that a mere "likelihood of the effect of substantial damage to the business of the corporation" would give rise to a "direct legal operation" upon a corporation sufficient to establish a connection with s 51(xx) of the *Constitution*.

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508 *Le Mesurier v Connor* (1929) 42 CLR 481 at 497; [1929] HCA 41; *Burton v Honan* (1952) 86 CLR 169 at 177-178; [1952] HCA 30; *Gazzo v Comptroller of Stamps (Vict)* (1981) 149 CLR 227 at 236; [1981] HCA 73; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 26-27; [1992] HCA 46; *Rizeq v Western Australia* (2017) 262 CLR 1 at 68-69 [191]; [2017] HCA 23. Compare *G G Crespin & Son v Colac Co-operative Farmers Ltd* (1916) 21 CLR 205 at 214; [1916] HCA 13.

509 Commonwealth Electoral Act, s 302F(2).

510 (1982) 150 CLR 169 at 208; see also at 183, 195, 212, 219; [1982] HCA 23. See also *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 121-122 [198], 140 [260].

347 The submission that the Commonwealth Parliament had no power to pass s 302CA of the Commonwealth Electoral Act is essentially a submission that although the Commonwealth Parliament can regulate the use of funds that may be used for federal electoral purposes, it cannot make that regulation exclusive. The Commonwealth submitted that if it has power to regulate that area then it must have power to make that same regulation exclusive of State and Territory laws. The Commonwealth withdrew an initial submission that it was unnecessary even to determine this question of power because any invalid part of s 302CA could be severed from the remainder and in that severed form s 302CA would nonetheless be inconsistent with the whole of s 275 of the Queensland Electoral Act.

348 The issue is thus whether s 302CA, by defining the boundaries of the Commonwealth laws in relation to donations for federal elections, has a sufficient connection with the plenary Commonwealth power to make laws relating to federal elections. There are two steps[511] involved in the question of sufficiency of connection between s 302CA of the Commonwealth Electoral Act and the subject matter of s 51(xxxvi), picking up ss 10 and 31, of the *Constitution*, being the regulation of the conduct of persons with regard to federal elections.

349 The first step to determine the sufficiency of the degree of connection between the subject matter of a law and the subject matter of the head of power said to support it, is to characterise the subject matter, or essential meaning, of the law. The characterisation is ascertained by the legal relations, rights, duties, obligations, powers, and privileges that it creates[512]. But those legal relations will not reveal the appropriate level of generality at which the law should be characterised and at which the subject matter should thus be identified. One clear guide to the level of generality at which the subject matter or essential meaning should be characterised, particularly in relation to purposive powers, is the purpose of the legislation. Since the level of generality of characterisation will be most important when the law is likely to fall within the incidental part, or periphery, of the head of power, the identification of purpose in those cases

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511 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 368-369; [1995] HCA 16; *Leask v The Commonwealth* (1996) 187 CLR 579 at 601, 621; [1996] HCA 29.

512 *The Tasmanian Dam Case* (1983) 158 CLR 1 at 152; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 368-369; *Leask v The Commonwealth* (1996) 187 CLR 579 at 601-602; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16]; [2000] HCA 14; *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 103 [142].

might often be essential. However, as Brennan J said in *Cunliffe v The Commonwealth*[513]:

> "The central and peripheral aspects of a power do not evoke different tests of validity; it is simply a fact of constitutional reasoning that connexion between a law and a head of power is more frequently revealed by purpose than by effect and operation when the law is on the periphery of the power."

350 Once the subject matter of the law has been characterised at the appropriate level of generality the second step is to assess the degree of connection which that subject matter has with the subject matter of the head of power. The required connection does not need to be strong. A connection will be sufficient if it is not "insubstantial, tenuous or distant"[514]. The real difficulty at this second stage lies in how to assess the sufficiency of connection. It is not necessary in this case to enter into the longstanding debate about the role of proportionality, whatever that term means in this context, in elucidating that connection[515]. It suffices to say that the sufficiency of connection will often be apparent once the subject matter of the law has been characterised. For instance, a law requiring payment of a deposit upon nomination would generally be characterised as a law concerned with the nomination of candidates for election and it would be a law with a clear connection with the head of power for regulating the conduct of persons in relation to federal elections. But the same characterisation of the law might not be made if the legislation prescribed such a vast sum of money as a deposit as to suggest an additional subject matter in the character of the law[516]. It might no longer be a law concerned with the nomination of candidates for election and might no longer have a sufficient

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513 (1994) 182 CLR 272 at 321. See also *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 354; [1948] HCA 7; *Leask v The Commonwealth* (1996) 187 CLR 579 at 602-603, 624.

514 *Melbourne Corporation* (1947) 74 CLR 31 at 79; *The Tasmanian Dam Case* (1983) 158 CLR 1 at 152; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 369; *Leask v The Commonwealth* (1996) 187 CLR 579 at 601-602, 621; *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397 at 413 [35]; [2003] HCA 43; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 208 [66]; *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 143 [275].

515 See the discussion in Stellios, *Zines's The High Court and The Constitution*, 6th ed (2015) at 56-60.

516 *Fabre v Ley* (1972) 127 CLR 665 at 669; [1972] HCA 65.

connection with the head of power for regulating the conduct of persons in relation to federal elections.

351 As to the characterisation of s 302CA of the Commonwealth Electoral Act, the provision does not have a purpose independent of the rest of Pt XX, and particularly not independent of Divs 3A and 4. As I have explained, there could have been a multitude of purposes for s 302CA, and the equivalent s 314B, in creating and defining the exclusivity of the regime of Commonwealth regulation of political donations that may be used for incurring electoral expenditure. The Commonwealth's submission was that s 302CA had three purposes, being: (i) to provide certainty to participants in the federal electoral process about the applicable regulatory rules concerning donations; (ii) to ensure that participants in the federal electoral process are not starved of funds; and (iii) to facilitate participation in public debate through the making of donations.

352 Whether the law had all of these purposes or only some of them, I do not accept the submission of Victoria that the purpose for creating exclusivity of the Commonwealth regime was to intrude into the State sphere or to reduce State legislative power. There is no basis to suppose that this was the aim of the Commonwealth Parliament and every reason to suppose that it was not. Indeed, when the Joint Standing Committee on Electoral Matters expressed concern that the effect of the law might be seen as involving interference by the Commonwealth with State decisions as to how to regulate their own electoral systems[517], three significant exceptions were carved out from the exclusivity of the Commonwealth regime of regulation of donations that may be used for Commonwealth electoral purposes[518]. The submission by Victoria thus impermissibly elevates an effect of the legislation to a purpose. Although it will be relevant if a law has a purpose to restrict a State governmental power, it is irrelevant if a law merely has that effect. As Professor Stellios explains[519]:

> "Clearly any law that is valid because, and only because, it is incidental to a subject of power will always invade an area that would otherwise be solely within State power, because the law, ex hypothesi, does not operate directly on the subject of the power. To bring in the notion of an 'invasion' of State power causes confusion."

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517 Australia, Joint Standing Committee on Electoral Matters, *Second advisory report on the Electoral Legislation (Electoral Funding and Disclosure Reform) Bill 2017* (2018) at 48 [4.33].

518 See Commonwealth Electoral Act, s 302CA(3).

519 Stellios, *Zines's The High Court and The Constitution*, 6th ed (2015) at 63.

353 There may be laws that are passed where there is no possible purpose or object to the law other than its effect[520]. But that is not this case. This point can be clearly made by contrast with *Victoria v The Commonwealth* ("the *Second Uniform Tax Case*")[521], upon which Victoria relied. In the *Second Uniform Tax Case*, a majority of this Court invalidated a provision that prohibited a taxpayer from paying State income tax in any tax year until Commonwealth income tax was paid. The majority held that the Commonwealth provision was not within, or incidental to, the Commonwealth power in s 51(ii) to make laws with respect to taxation[522]. In that case, the prohibition did not depend upon the amount of federal income tax for which the taxpayer was liable[523]. It did not depend upon any competition between claims by the State and the Commonwealth[524]. It was unaffected by solvency considerations[525]. It had no concern with payment by the taxpayer of any other State debts[526]. Dixon CJ thus characterised the purpose of the Commonwealth provision in that case as being "to make it more difficult for the States to impose an income tax"[527], effectively by deferring the time for payment of State income tax[528]. With that purpose, it is unsurprising that the characterised subject matter was too remotely connected with the head of power in s 51(ii). To adapt a rhetorical question posed by Dixon CJ, a purpose to impinge upon State powers might be discerned from the purported use of the telecommunications power in s 51(v) to prohibit a customer from paying a State debt until he or she paid a telephone account[529].

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520 *Monis v The Queen* (2013) 249 CLR 92 at 133-134 [73]; [2013] HCA 4. See also *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557-558 [51]-[52]; *Unions NSW v New South Wales* (2019) 93 ALJR 166 at 201-202 [174]; 363 ALR 1 at 46.

521 (1957) 99 CLR 575; [1957] HCA 54.

522 (1957) 99 CLR 575 at 614-615, 626, 658, 661-662.

523 (1957) 99 CLR 575 at 613.

524 (1957) 99 CLR 575 at 613.

525 (1957) 99 CLR 575 at 613.

526 (1957) 99 CLR 575 at 615.

527 (1957) 99 CLR 575 at 614.

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354 The circumstances of this case, and the purpose of s 302CA, are far removed from those in the *Second Uniform Tax Case*. It could hardly be said of s 302CA that, as Latham CJ said in *Melbourne Corporation*[530], "though referring to a subject of federal power", its purpose (what it "seeks" to do; what it is "aimed at or directed against"[531]) reveals that it is "really legislation about what is clearly a State governmental function" and unconnected to the subject matter of Commonwealth power.

355 Provisions such as s 302CA and s 314B, with purposes that require the creation and definition of the extent of exclusivity of a Commonwealth regime which is within power, are sufficiently connected with the head of power. The purposes of the qualified exclusivity are inseparable from the purpose of the regime. Almost by definition, the exclusivity provision will be incidental to, and supported by, the head of power that supports the regime. Hence, even in the majority in the *Second Uniform Tax Case*, Dixon CJ (with whom Kitto J agreed) and Taylor J indicated that they would have upheld legislation by which the Commonwealth conferred priority to its own scheme for the administration of assets over the scheme of a State or Territory[532]. Similarly, in *Bayside City Council v Telstra Corporation Ltd*[533], five members of this Court said that a "law conferring upon [telecommunications] carriers an immunity from all State taxes and charges would be a law with respect to telecommunications services". The immunity in that case, from discriminatory burdens imposed by State laws, had a "direct and substantial connection with the [telecommunications] power"[534]. As McHugh J said[535], referring to some of the numerous cases in support of this proposition[536]:

> "A s 51 power also authorises a law that expressly limits the operation of a State law in relation to a subject matter authorised, regulated or prohibited under that head of power. This Court has held on many occasions that,

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530 (1947) 74 CLR 31 at 61.

531 (1947) 74 CLR 31 at 62.

532 (1957) 99 CLR 575 at 611-612, 658, 659-660.

533 (2004) 216 CLR 595 at 626 [30].

534 (2004) 216 CLR 595 at 624 [26].

535 (2004) 216 CLR 595 at 644 [91].

536 See also *The Commonwealth v Queensland* (1920) 29 CLR 1 at 11, 21-22, 26-27, 28; [1920] HCA 79; *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 111-112, 114, 120, 122; [1948] HCA 13.

> where the Commonwealth has power to regulate an area, it has power to protect entities which operate in that area from the effect of State laws. The cases, where the Court has so held, include *Australian Coastal Shipping Commission v O'Reilly*[537], *Botany Municipal Council v Federal Airports Corporation*[538] and *Western Australia v The Commonwealth* (*the Native Title Act Case*)[539]."

356 Victoria submitted that the Commonwealth Parliament has no power to regulate registered political parties "in relation to every aspect of what they do". It may be accepted that such a law would be beyond power because its characterisation would be likely to be far removed from the regulation of the conduct of persons in relation to federal elections. It would be analogous to relying upon the external affairs power in s 51(xxix) to support a law requiring all sheep in Australia to be slaughtered if "some international convention ... required the taking of steps to safeguard against the spread of some obscure sheep disease which had been detected in sheep in a foreign country and which had not reached these shores"[540]. But that is far from the operation of s 302CA of the Commonwealth Electoral Act.

357 Section 302CA is a law closely tailored to the subject matter of the Commonwealth prohibited donor and disclosure regime, which is itself within power. As I have explained, the Commonwealth regime extends to donations that may or may not be used for the purposes of incurring electoral expenditure or creating or communicating electoral matter. Section 302CA does not extend beyond that regime. It creates exclusivity for the regime but also *narrows* the exclusivity of the regime in respect of the three significant carve-outs. It is within power.

(v) *Section 302CA is not invalid for having an extraneous purpose*

358 As explained above, the purpose of the Commonwealth Parliament in passing a law is relevant to ascertaining the character of the law in the first step of the process of determining whether there is a sufficient connection between the law and the head of power. As Dawson J said in *Leask v The Commonwealth*[541], although purpose has a role, "the test remains one of

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537 (1962) 107 CLR 46; [1962] HCA 8.

538 (1992) 175 CLR 453; [1992] HCA 52.

539 (1995) 183 CLR 373.

540 *The Tasmanian Dam Case* (1983) 158 CLR 1 at 260.

541 (1996) 187 CLR 579 at 603.

sufficient connection". However, at some points in oral submissions, Victoria appeared to elevate the role of purpose, at least in relation to laws that, when characterised, do not fall within the core of a head of power. Victoria submitted that the purpose of a law might, by itself, supply a sufficient connection to a head of power or, conversely, that some purposes require "much greater scrutiny" of the purported connection of the law to the head of power. In other words, on that submission, a purpose that is extraneous to the head of power might sometimes serve a greater, and more significant, function in acting as a sufficient source of invalidity. It is unnecessary to decide this issue in this case because, as I have explained, the purpose for which the Commonwealth Parliament enacted s 302CA was not as Victoria characterised it. It suffices to make brief observations about a potentially larger invalidating role for the Parliament's purpose in enacting a law in reliance upon a head of Commonwealth legislative power.

359 There are a number of circumstances where the use of a power for an extraneous purpose will invalidate the exercise of the power. In equity, the doctrine of fraud on a power recognises invalidity where "the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power"[542]. A similar doctrine is recognised in administrative law invalidating an exercise of statutory power where a substantial purpose for the exercise of a statutory power is a purpose ulterior to that for which the power was granted[543]. If the command in the *Engineers' Case*[544] were followed, and the meaning of the *Constitution* found by reading the *Constitution* "naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it", then it might be said that this fabric includes an implied constraint upon the use for extraneous purposes of purposive constitutional powers, like the same constraint upon other purposive powers in equity and under administrative law, whether at the core of the power or in its incidental aspects.

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542 *Ngurli Ltd v McCann* (1953) 90 CLR 425 at 438; [1953] HCA 39. See also *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 289-290; [1987] HCA 11; *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 71-72 [29]; [2002] HCA 18; *Australian Securities and Investments Commission v Lewski* (2018) 93 ALJR 145 at 161-162 [75]; 362 ALR 286 at 305; [2018] HCA 63.

543 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 149 [30]; [2000] HCA 5. See also *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 106; [1950] HCA 33.

544 (1920) 28 CLR 129 at 152.

360 However, it may be that such a doctrine would have a limited operation. Such a doctrine could not arise other than in relation to purposive[545] powers. And it might only apply where the predominant or only substantial purpose was the extraneous purpose[546]. In *Melbourne Corporation*[547], Dixon J, although only "speaking generally", said that:

> "once it appears that a federal law has an actual and immediate operation within a field assigned to the Commonwealth as a subject of legislative power, that is enough. It will be held to fall within the power unless some further reason appears for excluding it. That it discloses another purpose and that the purpose lies outside the area of federal power are considerations which will not in such a case suffice to invalidate the law."

361 In circumstances where: (i) s 302CA of the Commonwealth Electoral Act was not enacted for any improper purpose; (ii) there has been some doubt expressed about whether the power to regulate the conduct of persons with regard to federal elections is a purposive power[548]; and (iii) there have not been any direct submissions on a doctrine of extraneous purpose, the existence and operation of such a constitutional doctrine should be left for another case.

(vi) *Section 302CA does not contravene the Melbourne Corporation implication*

362 The *Melbourne Corporation* implication, with its symmetrical operation upon the States and the Commonwealth, has been described earlier in these reasons. The control of the electoral processes of a State is a function of the State, the interference with which could threaten the functioning of the States as independent bodies politic[549]. With their potential for corruption in a broad

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545 On purposive powers, see *Stenhouse v Coleman* (1944) 69 CLR 457 at 471; [1944] HCA 36; *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 136 CLR 1 at 11; [1976] HCA 20; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 353-355. Compare *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77; [1955] HCA 6; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 26-27.

546 Compare this approach to abuse of process: *Williams v Spautz* (1992) 174 CLR 509 at 529, 537; [1992] HCA 34; *Walton v Gardiner* (1993) 177 CLR 378 at 410; [1993] HCA 77.

547 (1947) 74 CLR 31 at 79.

548 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 238-239 [159]; compare at 267 [251], *Smith v Oldham* (1912) 15 CLR 355 at 358, and *Langer v The Commonwealth* (1996) 186 CLR 302 at 324-325.

549 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 242-243; see also at 163-164.

sense, political donations can "sap the vitality, as well as the integrity, of the political branches of government"[550] and "threaten the quality and integrity of governmental decision-making"[551].

363 The regime in Pt XX of the Commonwealth Electoral Act has the effect of imposing some constraints upon the ability of the States to function as governments. Section 302CA and s 314B have this effect by making exclusive the Commonwealth regime not merely in relation to donations that would most directly affect the interests of the Commonwealth but also in the unallocated middle. In the unallocated middle, the gifts may be used for the purposes of expenditure in elections of either polity, so the interests of the Commonwealth and the States are both directly engaged.

364 Given the potential importance of this area to the functioning of States as bodies politic, it may be that a Commonwealth law would be invalid if its effect were to occupy the entirety of this area with a significant detrimental effect upon the States' ability to function as governments. Invalidity would be even more likely if one purpose of the law were to impose a burden upon the States or, in other words, if its "very object" were "to restrict, burden or control an activity of the States"[552].

365 However, there are three key reasons which, although individually insufficient, combine to prevent s 302CA from trespassing over the boundary of impermissibly impairing the capacity of States to function as governments. First, as I have explained, s 302CA is not targeted at the States. Although it has a detrimental effect on State legislative power its purpose is to ensure a single regulatory regime for donations in relation to federal electoral purposes. Whatever the purposes of that regime (whether to provide certainty, to prevent deprivation of funds to participants in the federal electoral process, or to facilitate participation in public debate through the making of donations), the purpose of s 302CA was not to restrict, to burden, or to control the States.

366 Secondly, the effect of the amendments to the original draft that introduced the three carve-outs in s 302CA(3) from the exclusivity of the Commonwealth regime do not merely reinforce the lack of a purpose to restrict or control the States. They also permit the States a significant margin to develop

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550 *McCloy* (2015) 257 CLR 178 at 205 [36].

551 *McCloy* (2015) 257 CLR 178 at 205 [38].

552 *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 207.

their own legislative regimes concerning donations relating to State elections[553]. Section 302CA leaves intact the laws of New South Wales, Victoria, and South Australia[554].

367 Thirdly, there is the significance of the law for the capacity to govern by the polity enacting it, namely the Commonwealth. Just as the States have a significant interest in regulating electoral expenditure to secure the independence of their systems of government, so too does the Commonwealth.

(vii) *Section 302CA is not invalid by reason of the Metwally principle*

368 The next attack upon the validity of the Commonwealth legislation was the submission by Queensland that s 302CA is invalid because it seeks to override s 109 of the *Constitution* by purporting to give operation to State laws when s 109 had rendered them inoperative. This submission relied upon the decision of a majority of this Court in *Metwally*[555].

369 The background to the *Metwally* decision involved a decision by this Court on 18 May 1983[556] that provisions of the *Anti-Discrimination Act 1977* (NSW) ("the New South Wales Act") were rendered inoperative by s 109 of the *Constitution* due to their inconsistency with the *Racial Discrimination Act 1975* (Cth). The effect of that decision was that there was no statutory foundation for an investigation under the New South Wales Act into Mr Metwally's complaints of racial discrimination against him by the University of Wollongong. However, by an amending Act that came into force on 19 June 1983 the Commonwealth Parliament amended the *Racial Discrimination Act* to provide that the *Racial Discrimination Act* "is not intended, and shall be deemed never to have been intended, to exclude or limit the operation" of a category of laws which included the New South Wales Act. Subsequently, Mr Metwally's complaints were upheld on 23 November 1983 by a tribunal established under the New South Wales Act. On the removal of the appeal by

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553 Compare *Austin v The Commonwealth* (2003) 215 CLR 185 at 219-220 [28]-[29], 265 [170], 285 [233]; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 at 297-298 [31], 308-309 [72], 315-316 [101].

554 See *Electoral Funding Act 2018* (NSW), ss 24(2), 37(2)(a), (7); *Electoral Act 2002* (Vic), ss 207F(1), (3), 217D(4); *Electoral Act 1985* (SA), ss 130C, 130K(1), 130L(b), 130M(1a).

555 (1984) 158 CLR 447.

556 *Viskauskas v Niland* (1983) 153 CLR 280; [1983] HCA 15.

the University of Wollongong, a majority of this Court held that the amending Act did not make the New South Wales Act retroactively operative[557].

370 The essential reason for the conclusion of the majority, Gibbs CJ, Murphy, Brennan and Deane JJ, was that although a Commonwealth Act can have retroactive effect, it cannot contradict s 109 of the *Constitution* by retroactively endowing a State law with the operative effect of which it had been deprived by s 109[558]. In the minority, Mason J and Dawson J (with both of whom Wilson J agreed[559]) also did not deny that a Commonwealth Act cannot contradict s 109[560]. But a reason for their dissents was that the *Racial Discrimination Act* had simply removed the inconsistency upon which s 109 operated[561]. Without any inconsistency, the condition upon which s 109 depends was not satisfied.

371 The essential difference between the majority and the minority in *Metwally* is (i) whether "a law of the Commonwealth" in s 109 of the *Constitution* means only the content of that law at the time of the alleged inconsistency or (ii) whether it also includes content arising from subsequent, retroactive Commonwealth laws. The same issue would apply to "a law of a State". On the assumption of validity of retroactive laws, it is difficult to see why the content of laws to which s 109 refers would be confined to the first meaning if the purpose of s 109 is to resolve conflict between laws of different polities. But part of the reasoning of Gibbs CJ and Deane J in the majority was that the purpose of s 109 extends to inform the ordinary citizen which of two inconsistent laws he or she is required to observe[562]. That purpose might support a narrow interpretation of "law" in s 109 as an existing social construct at a particular time upon which people arrange their affairs[563].

372 The Commonwealth directly challenged *Metwally*, relying upon the reasoning of the minority judges. Resolution of that challenge requires consideration of whether the purpose of s 109 extends to ensure that a citizen is

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557 *Metwally* (1984) 158 CLR 447 at 459, 469, 475, 477.

558 (1984) 158 CLR 447 at 457-458, 469, 475, 479.

559 (1984) 158 CLR 447 at 471.

560 (1984) 158 CLR 447 at 460, 485.

561 (1984) 158 CLR 447 at 461-462, 485.

562 (1984) 158 CLR 447 at 458, 477.

563 See, in a different context, *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 89, 100-101; compare at 67; [1994] HCA 61.

aware of the law that he or she is required to observe, or whether that is merely a consequence or effect of s 109 in the usual case, reasonably expected and therefore presumed, of non-retroactive laws[564]. Ultimately, that consideration is unnecessary in this case because Queensland's submission about the invalidity of s 302CA cannot succeed on either view of *Metwally*.

373 Queensland relied upon the retroactive operation of the carve-out from the exclusivity of the Commonwealth regime created by s 302CA in s 302CA(3)(b)(ii). As I have explained, that carve-out has the effect of imposing a condition precedent upon the operation of State or Territory electoral laws concerning gifts which may still be used for federal electoral purposes. Queensland's submission was that s 302CA(3)(b)(ii) thus creates a *contingent* inconsistency with State or Territory law, contrary to s 109 of the *Constitution*, which is concerned only with circumstances when a law of a State is *actually* inconsistent with a law of the Commonwealth. Unlike the answers to the questions given in the decision of the majority in *Metwally*[565], the alleged operation of s 302CA as creating a contingent inconsistency was said to render s 302CA invalid.

374 The most basic reason Queensland's submission cannot succeed is that the condition precedent in s 302CA(3)(b)(ii) does not create or remove any retroactive inconsistency and does not conflict with s 109 of the *Constitution*. Unlike the Commonwealth amendments considered in *Metwally*, s 302CA(3)(b)(ii) is not a subsequent, retroactive law that purports to "expunge the past"[566]. The effect of the provision is to allow State or Territory electoral laws to operate subject to a condition precedent upon gifts that, when given, may be used for federal electoral purposes. That condition precedent is that the gifts are later kept or identified separately in order to be used for a State or Territory electoral purpose. The condition precedent *always* applied, and applies.

Conclusion

375 I would have answered each of the questions in the special case as proposed by Gordon J.

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564 See Juratowitch, *Retroactivity and the Common Law* (2008) at 47-48.

565 See the discussion in *Metwally* (1984) 158 CLR 447 at 470-471.

566 *Metwally* (1984) 158 CLR 447 at 478.