

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B35 of 2018

BETWEEN:



GARY DOUGLAS SPENCE
Plaintiff

and

STATE OF QUEENSLAND
Defendant

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OUTLINE OF ORAL SUBMISSIONS
ATTORNEY-GENERAL FOR THE AUSTRALIAN CAPITAL TERRITORY

Part I: Publication

1. I certify that this outline is in a form suitable for publication on the internet.

Part II: Propositions

Protective purpose of the law

- 20 2. The purpose of the prohibition in s 275 of the Queensland Electoral Act is to protect the integrity of the electoral process and of government, more generally, by minimising the risk of actual and perceived corruption (**ACT [31]**), in circumstances where the risk may be greater than in other areas of official decision-making (**ACT [35]**).
3. That “protective purpose” is indisputably legitimate (**ACT [34]-[35]**): *McCloy v New South Wales* (2015) 257 CLR 178 (*McCloy*) at [42], [53], [181]-[184] (**JBA v7:T44**).

Risk evident from another jurisdiction

4. The risk to the integrity of the electoral process and of government is evident from:
 - a. the evidence gathered from the course of inquiry in Queensland; and
 - 30 b. the constitutional facts justifying the law in question in *McCloy*, on which the Queensland law is modelled (**ACT [44], [62]-[63]**).
5. Central to that evidence is the finding of the inherent potential of political donations by property developers to lead to perceptions of corruption (**ACT [12]**).

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6. Accepting that the potential for actual and perceived corruption is *inherent* in the nature of the prohibited activity, there is no reason to distinguish or isolate that risk laterally (i.e. across jurisdictions) or vertically (i.e. across levels of government).
7. It cannot be said that the inferred public concern as to the risk of corruption is peculiar to one jurisdiction and not common to all others (ACT [58]).

Legislative choice to address that risk

8. Once the commonality of the risk is accepted, it becomes a matter of legislative choice to address that risk (ACT [59]).
9. The law in this case imposes an indirect and insubstantial burden on the implied freedom. The measure of the justification therefore needs to be calibrated to the nature and intensity of the burden (ACT [39]).
10. No one alternative put forward by the plaintiff to address that risk is so obviously or compellingly superior that the choice made by Queensland can be said to be unnecessary or outside the field of legislative choice that the implied freedom would permit (ACT [53]-[54]).
11. The legislatures of the States and Territories are entitled to respond to “felt necessities” or “inferred legislative imperatives” in order to protect the integrity of their electoral systems: *McCloy* [197], [233] (JBA v7:T44).
12. Where the “inferred legislative imperative” is the *risk* of actual or perceived corruption, it is not necessary to find corruption within the geographical boundaries of the legislature.

Dated: 14 March 2019



Peter J F Garrisson AM SC

Houda Younan