IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **NO B 35 OF 2018**

BETWEEN: **GARY DOUGLAS SPENCE**

Plaintiff

AND: **STATE OF QUEENSLAND**

Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Intervener by:

The Australian Government Solicitor
4 National Circuit, Barton, ACT 2600
DX 5678 Canberra

Date of this document: 12 March 2019

File ref: 18006258

Telephone: 02 6253 7147 / 02 6253 7354
Lawyer's E-mail: Vanessa.Austen@ags.gov.au / Emily.Kerr@ag.gov.au
Facsimile: 02 6253 7303

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

I. EXCLUSIVE POWER TO REGULATE FEDERAL ELECTIONS

2. The Commonwealth's power to regulate federal elections is exclusive. This Court so held in *Smith v Oldham* (1912) 15 CLR 355 at 358 (Griffith CJ), 359-361 (Barton J) and 365 (Isaacs J) **(JBA Vol 12, Tab 67)**, and that case should not now be overruled. In any event, it is correct because:

   2.1. The States, as colonies, had no pre-federation power over federal elections, so they lack that legislative power now unless conferred by the Constitution: cf *Carter v Egg and Egg Pulp Marketing Board* (1942) 66 CLR 557 at 571 **(JBA V5:T29)**; *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545 at 564 **(JBA V9:T54)**.

   2.2. The Constitution (in particular ss 7, 9, 10, 29 and 31) assumes that State Parliaments lack the power to make laws with respect to federal elections, and in comparison to the Commonwealth Parliament, States are given specific and limited powers with respect to federal elections by the Constitution.

   2.3. Concurrent state power is inconsistent with the allocation of power effected by the constitutional text, which promotes national uniformity by entrenching some limited elements of the electoral system, and reposing in the Commonwealth the principal power to develop that system.

3. A State law relating to elections will encroach upon the Commonwealth's area of exclusivity if it touches or concerns federal elections more than incidentally.

   3.1. This is an intermediate test which avoids the extremes of Qld's 'sole or dominant character' test, which would render exclusivity illusory, and an exclusivity akin to that conferred by s 52, which would be infringed by <u>any</u> State law in its

application with respect to federal elections, if the Commonwealth could have passed the same law.

3.2. Sections 7, 9, 10 and 31 recognise and presuppose that the States have existing power to make laws regulating State and local government elections but not so as to regulate federal elections save in the respects provided for in the Constitution.

3.3. That each State Parliament has the power to make laws relating to elections, other than federal elections, is analogous to the grant of Commonwealth power with respect to banking, other than State banking: *Bourke* (1990) 170 CLR 276 **(JBA V4:T23)**.

10

II. INVALIDITY OF QUEENSLAND LAWS BY REASON OF S 109

4. ***Operation and history of s 302CA***. Section 109 renders the impugned Queensland electoral laws inoperative to the extent that s 302CA applies. Section 302CA is connected to federal elections through: (i) the character of the recipients it regulates; (ii) the purpose for which gifts may be used; (iii) the fact that it confines its exclusion of State law to State electoral laws; and (iv) the room s 302CA leaves open for State laws to operate. As to that last matter:

4.1. As to s 302CA(3)(b)(i), the concept of ***State electoral purpose*** does not depend on attempting to separate Federal and State topics of political communication. A number of States have legislated on the basis that it is possible to distinguish between State and federal elections: *Electoral Act 1985* (SA) **(JBA V1:T6)**; *Electoral Funding Act 2018* (NSW) **(JBA V2:T8)**; *Electoral Act 2002* (Vic) **(JBA V2:T7)**.

20

4.2. s 302CA(3)(b)(ii) operates retrospectively, in accordance with the note and example accompanying that sub-paragraph. It establishes a defeasible immunity from State law, which serves to maximise the scope for State electoral law to apply.

30

4.3. That construction is confirmed by the legislative history of s 302CA.

5. ***Head of power.*** Section 302CA is supported by ss 10, 31 and 51(xxxvi), applying ordinary principles of characterisation and without resort to any incidental power:

5.1. *Leask v Commonwealth* (1996) 187 CLR 579 at 601-603; *Bayside City Council v Telstra Corp* (2004) 216 CLR 595 at [13], [26]-[33]; *Unions (No 1)* (2013) 252 CLR 530 at [38]-[39], [121] **(V13:T70)**; *ACTV* (1992) 177 CLR 106 at 156-157 **(JBA V3:T20)**; *Mulholland* (2004) 220 CLR 181 at 206-208 **(JBA V9:51)**.

6. ***Melbourne Corporation***. Section 302CA does not interfere with the States' capacity to function as governments.

6.1. Section 302CA is not directed at the States, and does not impose a special disability or burden upon them. It does not deny States the capacity to regulate their own elections. *Melbourne Corporation* does not reverse the operation of s 109: *Fortescue Metals v Commonwealth* (2013) 250 CLR 548 at [130]-[131] **(JBA Vol 6, Tab 35)**; *Bayside City Council v Telstra Corp* (2004) 216 CLR 595 at [13], [29]-[33]. The passages in *ACTV* (1992) 177 CLR 106 (JBA Vol 3, Tab 20) at 242 **(JBA V3:T20)** upon which the States rely are distinguishable.

6.2. The fact that the Cth has left room for certain State laws to operate cannot be equated with impermissibly "inducing" the States to vary their laws: ***Clarke* (2009) 240 CLR 272 (JBA Vol 5, Tab 28)** at 308-309 [72]-[75]

7. ***Metwally.*** Section 302CA is valid notwithstanding *University of Wollongong v Metwally* (1984) 158 CLR 447 **(JBA V13:T73)**.

7.1. *Metwally* contradicts the proposition that s 109 can invalidate a Commonwealth law.

7.2. Section 302CA does not operate retrospectively to remove an inconsistency.

7.3. If *Metwally* results in s 302CA being invalid, then *Metwally* should be reopened and overruled, and the dissenting judgments adopted.

Date: 13 March 2019

Stephen Donaghue **Perry Herzfeld** **Christopher Tran**