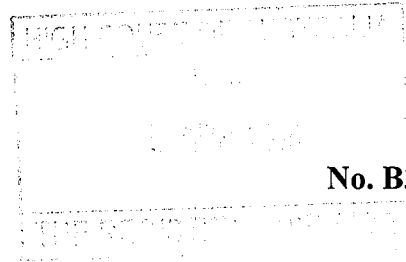


**IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY**



No. B35 of 2018

BETWEEN:

GARY DOUGLAS SPENCE

Appellant

and

10

STATE OF QUEENSLAND

Respondent

**ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA'S NOTE IN
REPLY TO THE ATTORNEY-GENERAL FOR THE COMMONWEALTH'S
NOTE ON SEVERANCE**

Part I:

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

Part II:

Severance as a threshold question

2. It is not appropriate to determine severance as a threshold question in this case.¹ The question of whether a law of the Commonwealth is invalid (whether by virtue of the *Melbourne Corporation* principle or otherwise) necessarily precedes the question of whether any inconsistency arises by reason of s 109 of the *Constitution*. Two otherwise valid laws are required to engage s 109.² The submission of the Attorney-General for the Commonwealth (**Commonwealth**) that even if the identified words were severed, s 302CA of the *Commonwealth Electoral Act 1918* (Cth) would be sufficient to invalidate s 275 of the *Electoral Act 1992* (Qld) (*Qld Electoral Act*) such that the invalidity of s 302CA in its entirety does not arise for the Court's consideration,³ is incorrect. That latter question is squarely in issue,⁴ not hypothetical,⁵ and is necessary for the Court to decide.
3. In any event, the Commonwealth's submissions pay insufficient regard to the scope of the submissions of the Attorney-General for the State of South Australia (**South Australia**) as to the invalid operation of s 302CA by reason of the *Melbourne Corporation* principle.
4. South Australia does not accept that s 302CA is valid in its entire application to gifts that are "*required to be*" used for the purposes of incurring electoral expenditure or creating or communicating electoral matter. As submitted both orally and in writing,⁶ the States' capacity to prohibit gifts being received by organisations whose objects or activities include the promotion of the election to a House of a State Parliament of a candidate or candidates endorsed by them, where such gifts have the potential to corrupt and unduly influence a States' essential organs, is integral to the States' continued capacity to function. Section 302CA is invalid to the extent it deprives the States of the ability to protect the capacity of their essential organs to function by

¹ Attorney-General of the Commonwealth's Note on Severance (**Cth Note**) at [13].

² *Momcilovic v The Queen* (2011) 245 CLR 1 at 105 [222] (Gummow J).

³ Cf Cth Note at [11]-[12].

⁴ See Question (e) of the Case Stated for the Opinion of the Full Court, Special Case Book (**SCB**), p 162.

⁵ Cf *Knight v State of Victoria* (2017) 261 CLR 306 at 326 [37].

⁶ Transcript of Proceedings, *Spence v Queensland* (HCA No B 35/2018, 14 March 2019) (**Transcript**), page 205, lines 9142-9165; Annotated Submissions of the Attorney-General for the State of South Australia (**WS(SA)**) at [43] to [51].

prohibiting donations made to or for the benefit of those organisations, no matter the purpose for which a donation may be used.⁷

5. South Australia's submissions as to invalidity based on *Melbourne Corporation* deny any possibility of severance. Neither the text of the law, nor the nature of the subject matter with which the law deals, provides a standard criterion or test by which the invalid operation of s 302CA could be severed.⁸ On South Australia's submissions, sub-sections 302CA(1) to (3) are invalid in respect of some, but not all, gifts that are "required to be" or that "may be" used for the purposes of incurring electoral expenditure or creating or communicating electoral matter. Further, sub-sections 302CA(1) to (3) are invalid in respect of gifts made to or received by some, but not all, gift recipients.
6. Even if it were possible to sever words from s 302CA, or read down some aspect of the section, or engage in a combination of both such as to give the section valid operation, it would be a necessary requirement of that exercise that s 302CA not confer immunity from the application of s 275 of the *Old Electoral Act*. The latter is a law which prohibits donations by property developers to organisations whose objects include the promotion of the election to a House of a State Parliament of a candidate or candidates endorsed by them. This Court has accepted that such gifts have the potential to corrupt and unduly influence State institutions of government and their members.⁹ In those circumstances s 302CA cannot deny Queensland the ability to protect its essential organs from such threats.
7. It follows that this is not a case where even if "*severance of any potentially invalid aspect of s 302CA would be possible*", it "*necessarily follows that s 302CA(1) has sufficient valid operation to invalidate s 275 of the Old Electoral Act...*"¹⁰ The Commonwealth's submissions assume the answer to the balance of the constitutional challenge to the validity of s 302CA. Severance should not be determined as a threshold question.

Severance of donations that "may be used" for federal electoral purposes

8. Should the Court find that s 302CA is invalid in its application to gifts that "may be" used for a purpose of incurring electoral expenditure or creating or communicating

⁷ Transcript, page 205, lines 9145-9155; WS(SA) at [44].

⁸ *Re Dingjan; Ex Parte Wagner* (1995) 183 CLR 323 at 339 (Brennan J), *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111 (Latham CJ).

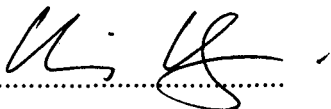
⁹ *McCloy v New South Wales* (2015) 257 CLR 178.

¹⁰ Cf Cth Note at [13] (emphasis added).

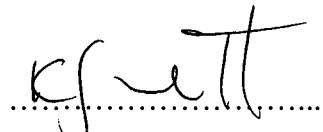
electoral matter, the Commonwealth's proposed severance that leaves the words "required to be" in the text, together with the associated deletions, would not be effective to limit the operation of s 302CA to an identifiably valid operation. This is because s 302CA(1) would continue to apply to a gift given on terms that *purport* to require the gift to be used for such a purpose, but which are unenforceable.

9. As the Commonwealth acknowledges, in such a case there is a "real possibility, given that the terms on which the gift is provided are not enforceable", that a gift may "at any subsequent time be kept or identified by the gift recipient to be used only for State or Territory electoral purposes".¹¹ So too there is a real possibility, given that unenforceability, that a gift might subsequently be kept, identified or used by a gift recipient for some *other* purpose, including to defray a party's ordinary overhead expenses.
10. That s 302CA would, on the Commonwealth's proposed "blue-pencilling", still permit a gift to be used for some such other purpose, demonstrates that s 302CA would not be confined to gifts that are as a matter of law "required to be" used for the purposes of incurring electoral expenditure or creating or communicating electoral matter. To the extent that s 302CA applies to gifts given on unenforceable terms for a purpose of incurring electoral expenditure or creating or communicating electoral matter, the words "required to be" mean no more than that a gift "may be" used for such a purpose. The Commonwealth's proposal does not have the effect of confining the provision to its (alternatively) valid operation.

Dated: 5 April 2019



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¹¹ Cth Note at [9].