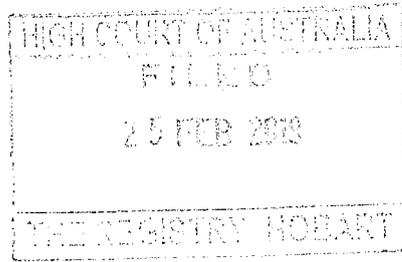


BETWEEN:



GARY DOUGLAS SPENCE
Plaintiff

and

STATE OF QUEENSLAND
Defendant

10

**SUBMISSIONS OF THE ATTORNEY-GENERAL FOR
THE STATE OF TASMANIA, INTERVENING**

Part I:

1. The Attorney-General for the State of Tasmania certifies that these submissions are
20 in a form suitable for publication on the Internet.

Part II & III:

2. The Attorney General for the State of Tasmania intervenes under the *Judiciary Act 1903* (Cth) s 78A, in support of the defendant as to questions (d) to (f) of the amended special case ('ASC'), to argue that s 302CA of the *Commonwealth Electoral Act 1918* ('the Cth Electoral Act') is invalid.

Part IV: Argument

Summary of Argument

3. It is submitted that s 302CA(1) of the Cth Electoral Act is invalid on the basis that:
- (a) it is beyond the Commonwealth's legislative power;
- 30 (b) it operates in a manner that is contrary to the principle derived from *Melbourne Corporation v Commonwealth*;¹ and
- (c) it purports to operate in a manner that is contrary to the principle derived from *University of Wollongong v Metwally*.²

¹ [1947] 74 CLR 31.

Statutory scheme

4. Section 302CA of the Cth Electoral Act is located in Division 3A of Part XX. Part XX is headed ‘Election funding and financial disclosure’; with Division 3A: ‘Requirements relating to donations’. Division 3A was inserted into Part XX by the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth). At the time the Bill for that Act was introduced to the Commonwealth Parliament in 2017 it did not include a proposed s 302CA, nor any similar section. That inclusion came late in 2018.
5. Section 302CA is headed: ‘Relationship with State and Territory electoral laws’. Subsections (1) to (3) of s 302CA relate to ‘*Giving, receiving or retaining gifts*’. Section 302CA(1)(a) purports to grant people and entities a right to make a ‘gift’ to a political entity, a political campaigner or a third party (‘gift recipients’). By application of various definitions, gift recipients have a connection to federal electoral matters, yet they may well also have a connection to State electoral matters (and any other number of matters, e.g. a charitable institution³). Paragraph (b) grants a right to gift recipients to receive or retain gifts, and para (c) grants people the right to receive or retain a gift on behalf of a gift recipient.
6. Those general gift giving and receiving rights are subject to two conditions. First, the giving or receiving of the gift is not prohibited by Division 3A,⁴ which essentially excludes foreign donors. Secondly, at least part of the gift may be used for ‘electoral expenditure’ or creating or communicating ‘electoral matter’;⁵ in other words, it is *possible* for the gift to be used in relation to federal elections.
7. The broad rights purportedly granted by subsection (1) to give and receive gifts which may *or may not* be used in relation to federal elections, may be contrasted with that granted by subsection (4), namely, a right to gift recipients to use gifts in relation to federal elections, so long as Division 3A does not prohibit the use of the gift (i.e. it is not a gift from a foreign donor). It is emphasised that that right applies *only* in relation to actual use of gifts in relation to federal elections.

² (1984) 158 CLR 447.

³ In particular, the definition of ‘third party’, in s 287(1), is essentially anyone who spends over the disclosure threshold (\$13,800) on electoral expenditure during the financial year.

⁴ s 302CA(d).

⁵ s 302CA(e). As the Commonwealth submits, those expressions are linked with federal elections by their definitions in s 287AB(1) and s 4AA(1).

8. The emerging substance and operation of subsection (1) is to make lawful a gift to be given to, or received by, a gift recipient, whether or not it is to be used for federal electoral purposes. But, before the insertion of subsection (1), there was no relevant limitation under any federal law to prevent a gift to a gift recipient for federal electoral purposes. Thus, when properly understood, the only possible purpose and effect of the provision is to affect State law.
9. However, if the Commonwealth is correct in its assertion that a State law with respect to elections cannot validly touch or concern federal elections,⁶ then s 302CA in fact has no ‘actual or immediate operation’⁷ *in relation to federal elections*. The only actions that become authorised by granting the right are those which would otherwise have been prohibited by a *valid* State law, which on the Commonwealth’s argument is a law that does *not* touch or concern federal elections (other than in a way that this insubstantial, tenuous or distant).

10

Beyond the Commonwealth’s power

10. The Commonwealth Parliament’s legislative power in respect of federal elections ends with that subject matter.⁸
11. An example of a law which is clearly with respect to federal elections is s 302E, which prohibits third parties from using gifts from foreign donors in relation to federal elections. The prohibition applies only to money expended in relation to federal elections; it does not trespass beyond that limit. Similarly, the right granted to gift recipients by s 302CA(4) to use gifts in relation to federal elections applies *only* in relation to gifts *actually used* in relation to federal elections.
12. In contrast, s 302CA(1) purports to grant a general right to give gifts to certain people, connected to federal elections,⁹ as long as it is *possible* for the gift to be used in relation to federal elections.¹⁰ The revised explanatory memorandum states that

20

⁶ Commonwealth submissions [26].

⁷ *Melbourne Corporation*, 79 (Dixon J).

⁸ *Smith v Oldham* [1912] 15 CLR 355, 363 (Issacs J).

⁹ But in practice, a class of people who are usually connected to State elections also.

¹⁰ To be more precise, and as discussed above, it is para (a) which grants the right to give, while paras (b) and (c) relate to receiving and retaining gifts. For ease only the right to give is discussed, but the arguments relate to the rights to receive and retain as well.

the '[n]ew s 302CA clarifies the interaction between similar State and Territory and Commonwealth electoral funding schemes.'¹¹ It patently does something different.

13. As submitted at [8] and [9] above, the purpose and effect of s 302CA(1) is only to affect State law. And more precisely, to affect State election laws which are *not* with respect federal elections (because s 302CA has no work to do with respect to State election laws that touch or concern federal elections, which on the Commonwealth's submission are invalid regardless).
14. Thus, while the initial aim of s 302CA may have been as simple as to prevent the application of State electoral laws to the conduct of federal elections, the method
10 which s 302CA(1) employs only has effect upon a subject that is entirely outside the subject of federal elections: viz., State election laws.
15. The subject of s 302CA(1) is further exposed as being outside the subject of federal elections when it is realised that s 302CA neither adds to, nor assists in, the operation of any other provision in Division 3A.¹²
16. It would have been simple enough to limit s 302CA(1) to override State laws so far as they applied to the *use* of donations in relation to federal elections (i.e. similar to the approach of s 302CA(4) and s 302E). That would have been unobjectionable.
17. Thus, s 302CA(1) fails because its purpose and effect is only to control or restrict
20 State action, i.e. the application of State laws. It has no 'actual or immediate operation' in relation to federal elections; or at best, its connection to the subject of federal elections is insubstantial, tenuous or distant, such that it ought not to be regarded as enacted with respect to federal elections.¹³
18. That s 302CA(3) leaves open the possibility that a State can enact legislation requiring gifts to be used only for State electoral purposes to be kept separately says nothing about the actual operation and effect of the federal law and does not alter the fact that the federal law itself is beyond power.
19. Tasmania does not seek to make submissions on whether severance or reading down is possible.

¹¹ Revised Explanatory Memorandum, *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018* (Cth), 51.

¹² In other words, those provisions could have been left to stand on their own, with s 109 to sort out any real inconsistencies with State law.

¹³ *Melbourne Corporation*, 79 (Dixon J).

Melbourne Corporation

20. It is now accepted that consistently with the federal structure established by the Constitution and its express terms,¹⁴ there is a limitation on the powers of the Commonwealth to affect the continued operation and existence of the States.¹⁵
21. The unauthorised reach of s 302CA(1) is especially objectionable because it enters the area of State elections, which is vital to the functioning and continued existence of the States thereby infringing the doctrine in *Melbourne Corporation v the Commonwealth*.¹⁶
- 10 22. The States must have freedom to regulate their own electoral matters¹⁷ pursuant to their own constitutional powers and functions. The powers of the Commonwealth do not extend to interfering in the constitutional and electoral processes of the States.¹⁸ Representative government is a characteristic of State constitutions.¹⁹ That involves the conception of a legislative chamber whose members are elected by the people.²⁰
23. The substance and operation of s 302CA(1) is to curtail or interfere, in a significant manner, the exercise of State constitutional power with respect to State elections.²¹ It is an intrusion upon the functions or powers of the States that is inconsistent with the constitutional assumption about their status as independent entities.²² It weakens the States' ability to regulate their electoral processes.
- 20 24. The Commonwealth is not able to impair the 'integrity or autonomy' of the States.²³ Some areas of power, those which are critical to a State's capacity to function as a government, must be left to the States.²⁴

¹⁴ *Austin v The Commonwealth* (2003) 215 CLR 183, 245 [112] (Gaudron, Gummow & Hayne JJ), *Clarke v Commissioner for Taxation* (2009) 240 CLR 272, 305 [60] (Gummow, Heydon, Kiefel & Bell JJ).

¹⁵ *Austin*, 245 [112], [113].

¹⁶ (1947) 74 CLR 31.

¹⁷ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 242 (McHugh), 163 (Brennan J).

¹⁸ *Ibid*, 242 (McHugh J).

¹⁹ *Ibid*, 163 (Brennan J).

²⁰ *Ibid*, 230 (McHugh J).

²¹ *Austin*, 265 [168] (the plurality). This test was adopted in *Clarke*, 298 [32] (French CJ), 307 [66] (Gummow, Heydon Kiefel and Bell JJ), 312 [93] (Hayne J).

²² *Clarke*, 298 [32] (French CJ).

²³ *Re Australian Education Union; ex parte Victoria* (1995) 184 CLR 188, 232 (Mason CJ, Brennan Deane, Toohey, Gaudron & McHugh JJ).

²⁴ *Ibid*, 229-234.

25. While s 302CA(3) effectively offers States an ‘out’ if they enact legislation requiring gifts to be used only for State electoral purposes to be kept separately, that does not confine the federal law, nor ameliorate its intrusion into an area that must be left to the States. The States should not be required to specifically enact laws to avoid the application of Commonwealth laws into areas beyond the Commonwealth’s power.²⁵ In this regard, s 302CA affects the liberty of action of a State in controlling its electoral processes, being an element of the working of its government structure.²⁶

Metwally

10 26. Should it be necessary for the Court to consider *Metwally*, Tasmania supports the submissions of Queensland: [84-93], however it is submitted that the matter can be decided without consideration of that issue.

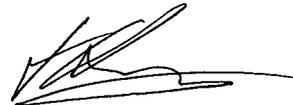
Part V: Estimate Time for Oral Argument

27. Tasmania will need no longer than 15 minutes to present its oral argument.

Dated: 25 February 2019



Michael O’Farrell SC
Solicitor-General of Tasmania
T: (03) 6165 3614
F: (03) 6233 2510
E:solicitor.general@justice.tas.gov.au



Jenny Rudolf
T: (03) 6165 3614
F: (03) 6233 2510
E:solicitor.general@justice.tas.gov.au

20

²⁵ *Austin*, 219-220 [28-29] (Gleeson CJ), 265 [170] (Gaudron, Gummow and Hayne JJ), [233] (Kirby J).

²⁶ *Austin*, 265 [170] (Gaudron, Gummow & Hayne JJ). The element of choice in the manner and exercise of State constitutional power is also apparent from *Clarke*, 308 [72] (Gummow, Heydon, Kiefel & Bell JJ), 316 [101] (Hayne J).