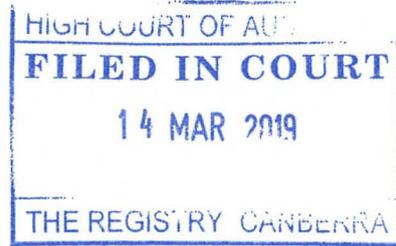


BETWEEN:

GARY DOUGLAS SPENCE  
Plaintiff

and

STATE OF QUEENSLAND  
Defendant



For TAS

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**OUTLINE OF ORAL ARGUMENT ON BEHALF OF THE ATTORNEY-  
GENERAL FOR THE STATE OF TASMANIA, INTERVENING**

20 **Part I: Internet publication**

1. The Attorney-General for the State of Tasmania certifies that this outline is in a form suitable for publication on the Internet.

**Part II: Propositions to be advanced in oral argument**

2. There is no doubt that the Commonwealth has the power to regulate its own elections. However, the power, like any power, ends with that subject matter: *Smith v Oldham* (1912) 15 CLR 355, 363 (Isaacs J) (V12, T67).

*Effect of s 302CA*

3. The *Commonwealth Electoral Act 1918* (Cth), s 302CA operates on State electoral laws in a manner that limits the States' ability to regulate their own electoral processes in three ways.
4. First, s 302CA(1) directly engages with State electoral laws by conferring a freedom on donors of funding to gift recipients "despite any State... electoral law".
5. Secondly, by s 302CA(3), it purports to disengage sub-s (1) in relation to a gift (in whole or in part) in circumstances each requiring quarantining the gift to be used *only* to a State electoral purpose.

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Filed on behalf of Attorney-General for the State of Tasmania

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6. Thirdly, it seeks to control a gift that ‘may be’ used for electoral expenditure in relation to a Federal election. To the extent that an unallocated gift equally (or almost certainly) may be used for State electoral purposes, the immunity granted under sub-s(1) purports to operate to make the donor’s and the donee’s conduct lawful for any purpose, including conduct that poses a threat the electoral process itself: cf., *McCloy v New South Wales* (2015) 257 CLR 178, [33] (French CJ, Kiefel, Bell and Keane JJ), [193], [194] (Gageler J) (V7, T44).

10 7. Section 302CA(1) operates at a transactional level, that is, its purpose and effect is to identify the parties to and terms on which (if any) a gift is given. In a case where a gift (or part if it) may (or may not) be used for Commonwealth electoral expenditure, the section assumes that there will be no terms set for its allocation.

8. Therefore, a State law that seeks to regulate gift transactions not by prohibition of a class of donors or recipients, but by the conduct of the parties to the transaction, for example, by making arrangements, or arriving at understandings that fall short of explicit ‘terms’ will be an ineffective use of the State’s power to regulate its own elections (cf. s 302CA(3)(a)).

20 9. In Tasmania’s case, the operation of s 302CA is quite stark. In the field of action for State elections, the State has at least been excluded from legislating in the manner it might choose for the class of donors who give unallocated gifts, no matter what their conduct, intention, purpose or effect.

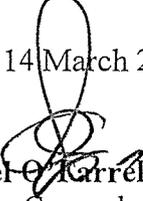
*Section 302CA is not a valid exercise of the Commonwealth’s power to regulate federal elections.*

10. If, as the plaintiff and Commonwealth contend, the power of the Commonwealth to regulate electoral matters is ‘exclusive’ (in whatever sense that is meant) then s 302CA results in no operative change in relation to electoral expenditure (including gifts that may be used for electoral expenditure). That is because, if the power is exclusive, a donor of funds to be used for Commonwealth electoral expenditure is already immune from State laws that trench on that exclusive power.

30 11. If that is so, s 302CA has no ‘actual or immediate operation’ in relation to Federal elections (TS 9). At best its connection to the subject of federal elections is insubstantial, tenuous, or distant. (TS 9, 17)

12. If, on the other hand, the power of the Commonwealth to regulate electoral matters is not exclusive, s 302CA nevertheless represents an attempt to regulate State elections, contrary to the principle in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.(TS 20 ff)

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