

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY



No. B35 of 2018

BETWEEN:

GARY DOUGLAS SPENCE
Plaintiff

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and

STATE OF QUEENSLAND
Defendant

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**OUTLINE OF ORAL ARGUMENT OF THE ATTORNEY-GENERAL
FOR THE STATE OF VICTORIA (INTERVENING)**

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED

	The Commonwealth's legislative power to regulate political donations stems from the implied and express incidental powers	
1.	<p>The “core” of the Commonwealth’s power to make laws with respect to federal elections extends to what may be described, in a shorthand way, as the “machinery” for such elections.</p> <p>The Commonwealth may also regulate the giving and receipt of political donations related to federal elections by reason of the incidental power (both implied and found in s 51(xxxix)).</p> <ul style="list-style-type: none">• <i>Australian Capital Television Pty Ltd v Commonwealth</i> (1992) 177 CLR 106, 220 (Gaudron J); 225-6 (McHugh J)• <i>Smith v Oldham</i> (1912) 15 CLR 355, 358 (Griffith CJ), 362 (Isaacs J)• <i>R v Brisbane Licensing Court; Ex parte Daniell</i> (1920) 28 CLR 23, 31	VS [48]-[49]
	Question (d): Section 302CA is beyond the legislative power of the Commonwealth	
2.	<p>(a) Section 302CA does not directly operate on the subject matter of elections of senators and members of the House of Representatives. It could only be supported as being incidental to that subject matter.</p> <p>(b) However, s 302CA is not a valid exercise of the power to make laws incidental to federal elections.</p> <p>(c) In determining whether a law which “can at best be only incidental to [a subject matter]” has a sufficient connection to that subject matter, it is necessary to consider the nature and subject matter of the power, and the purpose of the law.</p> <ul style="list-style-type: none">• <i>Second Uniform Tax Case</i> (1957) 99 CLR 575, 614 (Dixon CJ)• <i>Burton v Honan</i> (1952) 86 CLR 169, 177-8 (Dixon CJ)• <i>Leask v Commonwealth</i> (1996) 187 CLR 579, 602-603, 605 (Dawson J) <p>(d) Where the Constitution creates or recognises a distinction between the Commonwealth and the States in a grant of power, it is necessary “to give a narrowly confined ambit to the incidental power so that that distinction is not obliterated”.</p> <ul style="list-style-type: none">• <i>Attorney-General (WA) v Australian National Airlines Commission</i> (1976) 138 CLR 492, 508-9 (Stephen J), quoting <i>Wragg v New South Wales</i> (1953) 88 CLR 353, 385-6 (Dixon CJ)• <i>Gazzo v Comptroller of Stamps (Vic)</i> (1981) 149 CLR 227, 236, 239-40 (Gibbs CJ), 244 (Stephen J)	VS [48]-[51], [69]-[72]; CS [44], but cf CRS [32]

	<p>(e) The Constitution confers power on the Commonwealth to make laws with respect to <u>federal</u> elections, not State elections, and so relevantly distinguishes between the two levels of government.</p> <ul style="list-style-type: none"> • <i>Australian Capital Television Pty Ltd v Commonwealth</i> (1992) 177 CLR 106, 225-6 (McHugh J) <p>(f) Section 302CA is directed to excluding the States from regulating political donations, unless they do so in a particular manner. This goes “beyond any true conception of what is incidental to a legislative power and, under colour of recourse to the incidents of a power expressly granted, [attempts] to advance or extend the substantive power actually granted to the Commonwealth until it reaches into the exercise of the constitutional powers of the States.”</p> <ul style="list-style-type: none"> • <i>Second Uniform Tax Case</i> (1957) 99 CLR 575, 614 (Dixon CJ) 	
	Questions (b) and (c): The Commonwealth’s power to regulate political donations is not exclusive	
3.	Victoria relies on its written submissions for the proposition that the Constitution does not make the Commonwealth’s power to make laws with respect to federal elections exclusive, either expressly or by implication.	VS [32], [52]-[65]
4.	However, if Commonwealth legislative power with respect to elections of senators and members of the House of Representatives is exclusive, that exclusivity extends only to matters within the “core” of the power — the “machinery” of elections — and does not encompass the incidental reach of the power, such as the regulation of political donations.	VS [66]

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