IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B35 of 2018

BETWEEN:

GARY DOUGLAS SPENCE
Plaintiff

AND

STATE OF QUEENSLAND
Defendant

SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

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PART I: SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia ("Western Australia") intervenes pursuant to s 78A of the *Judiciary Act 1903* (Commonwealth) in support of the Defendant.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

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PART IV: SUBMISSIONS

Summary

Queensland legislation

4. The effect of s 275 of the *Electoral Act 1992* (Qld) (**Qld Electoral Act**) is to prohibit "political donations" by property developers. The definition of "political donation" in s 274 encompasses gifts made to or for the benefit of a political party, an elected member of the Queensland Legislative Assembly or a candidate in an election of members for the Queensland Legislative Assembly. In so far as s 275 proscribes donations to a "political party" (defined in s 2), the provision does not distinguish between donations made to political parties active at the State or local level, and political parties which are active in elections to the Commonwealth Parliament.

5. Section 113A of the *Local Government Electoral Act 2011* (Qld) (**LGE Act**) imposes a similar prohibition on "political donations", defined to encompass gifts made to or for the benefit of a political party, a councillor of a local government, or a candidate or group of candidates in a local government election.

Commonwealth legislation

6. Section 302CA of the *Commonwealth Electoral Act 1918* (Cth) (**Commonwealth Electoral Act**) is expressed to operate despite any State or Territory electoral law. It provides that a person or entity may give a gift to or for the benefit of a political entity, political campaigner or third party, if:

   (a) the provisions of Division 3A of Part XX of the Commonwealth Electoral Act do not prohibit such a gift; and

   (b) the gift is required to be, or may be, used for the purposes of incurring electoral expenditure or creating of communicating "electoral matter" in respect of elections to the Commonwealth Parliament.

7. The term "electoral matter" is defined to mean matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election to the Commonwealth Parliament.[1] The term "electoral expenditure" is defined to mean expenditure for the dominant purpose of creating or communicating electoral matter.[2]

8. Section 302CA(3) provides that s 302CA(1) does not apply in relation to gifts explicitly required to be used only for a State or Territory electoral purpose, or where the gift or part of the gift is kept or identified separately in order to be used for a State or Territory electoral purpose.

10 *WA's submissions in respect of Questions in Amended Special Case ("ASC")*

9. In respect of question (a), Western Australia submits that the Queensland provisions permissibly burden the implied freedom of political communication on governmental and political matters, and are not contrary to the Commonwealth Constitution.[3] This is generally for the reasons set out in the Defendant's written submissions and other submissions which support the legislation.[4]

10. Resolution of the remaining questions requires analysis of the respective legislative powers of the States and the Commonwealth with respect to Commonwealth elections. Western Australia submits that the relevant
20 analysis should be as follows:

(a) There are limits on the power of both the Commonwealth and State Parliaments with respect to Commonwealth elections which arise from the constitutionally prescribed system of representative government.[5] For example, neither the Commonwealth Parliament nor a State Parliament could pass a law which disenfranchised the entire population of State, because to do so would infringe the

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[1] Commonwealth Electoral Act s 4AA.
[2] Commonwealth Electoral Act s 287AB.
[3] ie s 275 of the Electoral Act and s 113A of the LGE Act.
[4] Refer to [12] to [16] below.
[5] *Roach v Electoral Commissioner* (2007) 233 CLR 162 (***Roach***), 199 [85] (Gummow, Kirby and Crennan JJ).

requirement that members of the House of Representatives and Senate be "directly…chosen by the people";[6]

(b) The States and Commonwealth each possess wholly concurrent legislative power to legislate with respect to Commonwealth elections, which is only limited by the constitutional imperative of choice by the people of parliamentary representatives,[7] by other implications drawn from the Constitution and by the operation of s 109 of the Commonwealth Constitution;

(c) Alternatively, if the Commonwealth and States have parallel but exclusive power with respect to their own electoral processes, the extent of that exclusivity is narrow and relates only to the *machinery* of their own electoral processes. The States and the Commonwealth still have concurrent legislative power with respect to the circumstances in which an election of candidates may occur. The Queensland legislation is about the circumstances of an election, not the machinery of the electoral process. It does not impermissibly intrude into any area of exclusive Commonwealth legislative power;

(d) Section 302CA of the Commonwealth Electoral Act operates in a manner that, in practice, curtails a State's legislative capacity to protect its own electoral process, and its interest in the Commonwealth electoral process, because of the potential for political donations to indirectly affect the integrity of State elections.

11. As a result of these submissions, Western Australia submits that the substantive questions should be answered as follows:

(a) In respect of questions (b) and (c), the Queensland provisions are valid and do not impermissibly intrude into the area of exclusive Commonwealth legislative power;

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[6] Constitution ss 7 and 24.
[7] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 [348] (Crennan J); *Roach* [24] (Gleeson CJ).

(b) In respect of questions (d) and (e), s 302CA of the Commonwealth Electoral Act is invalid because it is beyond the Commonwealth's legislative power as it purports to operate in a manner contrary to the *Melbourne Corporation* doctrine, but not because the Commonwealth does not have legislative power with respect to the funding of electoral expenditure for electoral matters in Commonwealth elections;

(c) In respect of question (f), WA generally supports the Defendant's submissions about *Metwally* but does not make any separate submissions;

10 (d) In respect of questions (g) and (h), the Queensland provisions are not inconsistent with s 302CA, even if the Commonwealth provisions are valid. The Queensland provisions are limited to State elections, while the Commonwealth provisions are, in terms, limited to Commonwealth elections (although their effect is to impermissibly burden the conduct of State elections contrary to the *Melbourne Corporation* doctrine).

Question (a) – implied freedom of political communication

12. Western Australia generally supports the submissions of the Defendant in relation to question (a) of the special case. In particular, evidence in relation to a specific risk to the integrity of the political system in one jurisdiction
20 (such as the risk of corruption stemming from political donations by a particular class of persons) is capable of justifying prophylactic[8] restrictions on the implied freedom imposed by the Parliament of another State, to prevent the occurrence of a similar risk to that State.

13. Were it otherwise, property developers prohibited from making donations in one State would be able shift their business to another, where they might take advantage of looser restrictions on their expenditure on political donations. A major risk of political donations is that a donor expects to obtain favourable political treatment by funding a campaign. It would be odd if property developers were free to move their capital from State to State depending on

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[8] *McCloy v New South Wales* (2015) 257 CLR 178 (***McCloy***) [197] (Gageler J), [233] (Nettle J).

where the most favourable donation laws exist, until they had in fact corrupted the political system of a State.

14. As submitted by the Defendant,[9] the evidentiary burden on States when justifying a burden on the implied freedom may be discharged by showing that the risk is reasonably anticipated, based on the experience of another State, without the need to specifically identify evidence of corruption or undue influence in the enacting State.

Questions (b) and (c) – exclusivity of Commonwealth legislative power with respect to elections to the Commonwealth Parliament

15. The Commonwealth Parliament has power to make laws with respect to matters in respect of which the Constitution makes provision until the Parliament otherwise provides.[10] Sections 10 and 31 of the Constitution, read with s 51(xxxvi), confer on the Parliament the power to make laws relating to the election of Senators and Members.[11]

16. The scope of a State's capacity to legislate with respect to such matters has not been previously determined. In *Smith v Oldham*,[12] each member of the High Court described the Commonwealth's legislative power relating to elections as "exclusive". However, the issue before the Court in that case was whether Parliament had power to regulate the conduct of persons with regard to elections.[13] The Court did not have to consider whether the scope of the exclusive power extended to matters such as the regulation of donations or gifts given for political purposes.

17. The text of the Constitution itself does not provide that the Commonwealth has exclusive legislative power with respect to elections for the Commonwealth Parliament.

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[9] Submissions of the Defendant [20].
[10] Constitution s 51(xxxvi).
[11] *Sue v Hill* (1999) 199 CLR 462, 473 (Gleeson CJ, Gummow and Hayne JJ).
[12] (1912) 15 CLR 355.
[13] *Smith v Oldham* (1912) 15 CLR 355, 358 (Griffith CJ), 360 (Barton J), Isaacs J (362).

18. There are limits which protect the Commonwealth electoral process which are constitutionally enshrined. Sections 7 and 24 require that members of the Commonwealth Parliament must be chosen directly by the people of the Commonwealth. Uniform and proportionate representation is specifically contemplated by these provisions. Uniformity of laws establishing the franchise,[14] and concerning certain machinery aspects of the conduct of elections for the Commonwealth Parliament, is necessary.

19. The Constitution itself provides the fundamental basis for elections for members of the Commonwealth Parliament. As this basis is constitutionally protected, there is no specific need for the Constitution to confer exclusive legislative power upon the Commonwealth Parliament. Neither the Commonwealth Parliament nor the State Parliaments can affect the constitutional protections for elections to Commonwealth Parliament.

20. The basis of the Commonwealth's power to make laws with respect to elections derives from s 51(xxxvi), read with ss 10 and 31 of the Constitution. Section 51 enumerates concurrent powers of the Commonwealth, not exclusive powers. Exclusive powers are the province of s 52 of the *Constitution.* The scope of the law enacted by the Commonwealth pursuant to a head of power contained in s 51 will determine what, if any, aspects are left to be dealt with by State law.[15] Where there is inconsistency between Commonwealth and State provisions, s 109 of the Constitution will operate, as it does in other areas of concurrent Commonwealth and State legislative power, so as to "adjust the relations"[16] between the legislatures of the Commonwealth and the States and make clear which of two inconsistent laws is to prevail.

21. Sections 10 and 30 of the Constitution contemplate that State laws would initially apply to Commonwealth elections and would continue to do so until the Commonwealth Parliament otherwise provided. This is against any

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[14] See *R v Pearson, ex parte Sipka* (1983) 152 CLR 254 (***Sipka***), 261 (Gibbs CJ, Mason and Wilson JJ).
[15] See *Sipka*, 260-261 (Gibbs CJ, Mason and Wilson JJ).
[16] *University of Wollongong v Metwally* (1984) 158 CLR 447, 458 (Gibbs CJ).

implication that the power of the Commonwealth Parliament with respect to Commonwealth elections was exclusive when the Constitution was first effective.

22. That is also supported by considering the nature of the matters that are the subject of s 52 of the Constitution. This provision conferred exclusive legislative power upon the Commonwealth with respect to matters related solely to the machinery of the operation of the Commonwealth government once it was brought into existence (the seat of government and Commonwealth government departments).

23. Subject to any Commonwealth laws providing otherwise, State Parliaments were conferred with specific power to make laws prescribing the method of choosing the Senators for that State,[17] and the times and places of elections of Senators for the State.[18] The State Parliament was also conferred with power to make laws determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division.[19]

24. The Governor of a State is still charged with the responsibility for causing writs to be issued for elections of Senators for the State.[20] The Parliament of the State is responsible for choosing a person to fill the place of a senator for that State which becomes vacant before the expiration of the senator's term of service.[21]

25. The initial role of the State in Commonwealth electoral matters is, once again, against an implication that the Commonwealth has exclusive legislative power in respect of the election of members to the Commonwealth Parliament. The continuing role of the State is also particularly against any implication that the State's power to legislate in respect of Commonwealth

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[17] Constitution s 9.
[18] Constitution s 9.
[19] Constitution s 29.
[20] Constitution s 12.
[21] Constitution s 15.

elections was simply transitional, and became wholly spent upon the first Commonwealth laws being passed.

26. The Commonwealth suggests that the omission from s 52 of power to make laws as to Commonwealth elections is of no moment in determining whether such power is exclusive to the Commonwealth.[22] The Commonwealth points to its power with respect to federal jurisdiction as an indicator that s 52 is not exhaustive. However, exclusivity of Commonwealth legislative power with respect to federal jurisdiction existed from the commencement of the Constitution. It also rests on firm textual foundations in Chapter III of the Constitution. The same is not true with respect to the distinct sub-topic of legislative power, in respect of elections for the Commonwealth Parliament.

Scope of exclusive legislative power

27. Even if, contrary to the above submissions, the Commonwealth is regarded as having exclusive legislative capacity with respect to Commonwealth elections, the scope of that power is not settled.[23]

28. The scope of any exclusive Commonwealth legislative power would be implied. It should therefore be confined as strictly as possible to what is necessary.[24] Further, it should conform with the express provisions of the Constitution referred to above, which contemplate that the States have an ongoing role in providing for some aspects of the election of members of the Commonwealth Parliament. The powers expressly conferred on the Commonwealth Parliament are to legislate with respect to "elections for Senators for [each] State"[25] and "elections in [each] State of members of the House of Representatives".[26]

29. As explained, the exclusive legislative powers of the Commonwealth in s 52 of the Constitution relate to the machinery of the operation of government,

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[22] Submissions of the Attorney General of the Commonwealth [20].
[23] See *Local Government Association of Queensland (Inc) v State of Queensland* [2003] 2 Qd R 3544, 369-373 [33] – [50] (Davies JA).
[24] *Re Gallagher* [2018] HCA 17; (2018) 92 ALJR 502 at [58] (Edelman J).
[25] Constitution s 10 read with s 51(xxxvi).
[26] Constitution s 31 read with s 51(xxxvi).

once it has been brought into existence. In these circumstances, the scope of any exclusive legislative power of the Commonwealth should be of the same nature, ie limited to the machinery of the election of Commonwealth members of Parliament.

30. The Commonwealth can still make other laws with respect to Commonwealth elections. It just does not do so under an implied exclusive power, but rather pursuant to the more orthodox application of the concurrent legislative head of power contained in s 51(xxxvi), read with ss 10 and 30.

31. If it is objected that it is unlikely that the Constitution impliedly provides a second source of exclusive legislative power in respect of elections, in addition to s 51(xxxvi) read with ss 10 and 30, that confirms Western Australia's first submission: the Commonwealth does not have any exclusive legislative power with respect to elections.

32. The impugned provisions of the Queensland law specifically relate to political donations in Queensland. In particular, s 275 of the Qld Electoral Act and s 113A of the LGE Act are primarily laws that relate to political donations made to benefit candidates for elections for the Queensland Parliament and local government elections within Queensland.

33. Whilst the Queensland laws prohibit property developers from making political donations to political parties which may be active at both State and Commonwealth level, they are not, in substance, laws in respect of the election of members to the Commonwealth Parliament. They are not laws in respect of the machinery of the electoral process, and therefore outside the power of the State legislature.

34. It is necessary to address a particular Commonwealth submission, which relates to the scope of the Commonwealth's implied legislative power with respect to elections. The Commonwealth says that this exclusive power is extensive, based upon a characterisation test drawn from an analogy with the test applied by the High Court in *Bourke v State Bank of New South Wales*.[27]

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[27] (1990) 170 CLR 276.

It submits that any operation of a State law relating to elections that touches or concerns Commonwealth elections is invalid except to the extent that the connection to Commonwealth elections is "insubstantial, tenuous or distant".[28]

35. In effect, this submission makes the scope of the implied power depend upon the characterisation test which is adopted. Rather, as a matter of principle, the Court ought to consider the constitutional scope of the implied power, and then adopt a characterisation test which is confined to what is strictly necessary for the implication.

36. Further, the High Court has never considered the appropriate test for characterising whether a State law is a law with respect to federal elections, and therefore exceeds the State's legislative power.

37. It is notable that the Commonwealth's test, that a law is with respect to federal elections if it has more than an insubstantial or incidental connection with a federal election, is based upon a test of characterisation for non-exclusive Commonwealth powers in s 51. Where a non-exclusive power is concerned, such a characterisation test does not imply a corresponding reduction in State legislative powers.

38. In any event, the Commonwealth's test is not directly supported by *Bourke v State Bank of NSW*.[29] Any characterisation test needs to be considered in a case which actually involves competing State and Commonwealth laws. Western Australia submits that the test is inapposite, and on this issue adopts the submissions of the Defendant at [40] – [48] and [68] – [76].

39. As the Queensland laws do not solely or mainly relate to Commonwealth elections, they do not impermissibly intrude into the area of exclusive Commonwealth legislative power with respect to "Commonwealth elections".

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[28] Submissions of the Attorney General of the Commonwealth [23] – [24].
[29] (1990) 170 CLR 276 at 288-289

40. For the above reasons, Western Australia respectfully submits that questions (b) and (c) of ASC should be answered "No".

Questions (d) and (e) – limits on Commonwealth legislative power

41. It is beyond the legislative competency of the Commonwealth Parliament to legislate so as to "impair the capacity of the States to exercise for themselves their constitutional functions"; that is, their capacity to function effectually as independent units.[30] The machinery by which the electors of a State exercise their powers and privileges forms part of the constitutional functions of a State.[31]

42. The "practical question" to be determined is whether the legislation of the Commonwealth curtails or interferes in a substantial manner with the exercise of constitutional power by the other, depending upon the character and operation of the legislation.[32]

43. The stated object of division 3A of Part XX of the Commonwealth Electoral Act is to "secure and promote the actual and perceived integrity of the Australian electoral process by reducing the risk of foreign persons and entities exerting (or being perceived to exert) undue or improper influence on the outcomes of elections".[33]

44. The character and operation of s 302CA of the Commonwealth Electoral Act, however, extends beyond the prevention of undue or improper influence by foreign persons and entities.

45. The implied limits on Commonwealth legislative power under the *Melbourne Corporation* doctrine preserve both the capacity of a State to protect State electoral processes.

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[30] *Queensland Electricity Corporation v The Commonwealth* (1985) 159 CLR 192, 260 (Dawson J); *Austin v Commonwealth* (2003) 215 CLR 185 (***Austin***), 217 [24] (Gleeson CJ).
[31] *Australian Capital Television v The Commonwealth* (***ACTV***) (1992) 177 CLR 106, 163-164.
[32] *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, 75 (Starke J); *Austin* 218; [26] (Gleeson CJ).
[33] Commonwealth Electoral Act s 302C.

Section 302CA curtails a State's capacity to protect its electoral process

46. Section 302CA(1) expressly permits, despite any State or Territory electoral law, the giving, receipt and retention of gifts to political entities, except where prohibited under Division 3A of the Commonwealth Electoral Act. In terms, s 302CA(3) excludes from the operation of s 302CA(1) gifts explicitly required to be used only for State or Territory electoral purposes, and gifts subsequently identified by the recipient for State or Territory electoral purposes.

47. Whilst, as a matter of form, s 302CA purports to regulate electoral expenditure only for the purposes of elections for the Commonwealth Parliament, Western Australia submits that, as a matter of practical operation, the law has the prospect of curtailing the ability of a State parliament to implement measures at a State level to prevent the drowning out of voices by the distorting influence of money.[34]

48. The practical effect of the provision is that gifts may be made to a political party active at Commonwealth, State and local government levels. Unless the gift is specified for State or local government purposes, it is able to be used by the political party for Commonwealth electoral expenditure. The concept of electoral expenditure is wide enough to cover certain classes of expenditure, which may benefit the party generally, allowing it to pursue State and local government campaigns more effectively. Electoral expenditure is expenditure incurred for the dominant purpose of creating or communicating electoral matter, but it need not be for the dominant purpose of creating or communicating *particular* electoral matter: s 287AB(1) and (2) of the Commonwealth Electoral Act.

49. To the extent that permitted electoral expenditure under the Commonwealth Electoral Act enables donations which generally benefit a party campaigning at State or local government level, it enables circumvention of any State laws

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[34] *Unions NSW v New South Wales* [2019] HCA 1 (***Unions No. 2***) [30] (Kiefel CJ, Bell and Keane JJ).

which would otherwise prevent the giving and receipt of donations from particular persons or groups of persons.

50. Such benefits could arise in many ways, such as the following:

(a) *Intersecting issues*[35] of common concern to State and Commonwealth governments,[36] and the complex interrelationship between the levels of government in Australia, mean that a candidate for a State election could obtain an electoral benefit by aligning themselves with a political campaign funded by donations made specifically for the purposes of communicating "electoral matter" within the meaning of the Commonwealth Electoral Act.

(b) A candidate in a State election might obtain electoral benefits by being associated or aligned generally with the *"brand"* of a political party which is promoted by electoral expenditure of Commonwealth members of Parliament or candidates.

(c) *Indirect benefits* may accrue to a State candidate as a result of gifts to Commonwealth candidates, for example, the provision of office space at minimal rent, or the acquisition of other facilities or assets for the purposes of a Commonwealth electoral campaign. Likewise, because of the close similarities in the methods of political campaigning at Commonwealth and State level, gifts given for the purpose of a Commonwealth electoral campaign can also conceivably be used for purposes which benefit a State electoral campaign (such as, for example, recruitment and training of volunteers and establishment of voter mailing lists).

51. Western Australia submits that, for these reasons, s 302CA substantially interferes with the ability of the States to control an important aspect of their electoral processes, namely the receipt of the benefits of political donations,

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[35] For example, the prohibition of live sheep exports, or major urban infrastructure projects.

[36] *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions No. 1***) [25] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

and thereby impairs the functioning of the States as independent bodies politic.[37] That may be of particular importance where a difficulty is prevalent in one State, but not in others or at a national level.[38] For example, the matters referred to in *McCloy v New South Wales*.[39]

52. For the reasons set out above, s 302CA is invalid to the extent that it purports to operate in manner that is contrary to the principle derived from *Melbourne Corporation*.

Question (f) - principle in *University of Wollongong v Metwally*

53. Western Australia does not seek to make any additional submissions in relation to question (f) of the ASC.

Questions (g) and (h) – section 109 of the Constitution

54. In terms, the area of operation for the Commonwealth legislation is restricted to Commonwealth elections, while the Queensland provisions do not seek to govern that area at all. Consequently, if the Commonwealth legislation does not represent an impermissible burden upon the States, due to its practical operation, it follows that both the Commonwealth legislation and the Queensland provisions are valid. They operate in different areas.

PART V: LENGTH OF ORAL ARGUMENT

55. It is estimated that the oral argument for the Attorney General for Western Australia will take 15 minutes.

Dated: 25 February 2019

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[37] *ACTV* 243 (McHugh J).
[38] *McCloy* [79] – [87] (French CJ, Kiefel, Bell and Keane JJ).
[39] *McCloy* [51] – [53] (French CJ, Kiefel, Bell and Keane JJ).