IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B35/2018

BETWEEN:

GARY DOUGLAS SPENCE
Plaintiff

and

STATE OF QUEENSLAND
Defendant

DEFENDANT'S NOTE ON SEVERANCE OF SECTION 302CA

Defendant's Reply
Filed on behalf of the defendant

Dated: 5 April 2019
Per James Potter
Ref PL8/ATT110/3804/PXJ

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Part I: Certification

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

Part II: Severance

Severance cannot be treated as a 'threshold issue'

2. The Commonwealth Attorney-General ('Cth A-G') contends that Queensland, in oral reply submissions, had conceded that s 275 of the *Electoral Act 1994* (and, by inference, s 113B of the *Local Government Electoral Act 2011*) would be rendered entirely inoperative if any part of it is inconsistent with s 302CA.[1] It is said to follow that, even if s 302CA is read down so as to apply only to gifts 'required to be used' for a purpose of incurring electoral expenditure or creating or communicating electoral matter ('federal electoral purposes'), s 275 and s 113B are invalid in their entirety. On that basis, the Cth A-G submits that severance should be addressed as a 'threshold point'.[2]

3. Those submissions should be rejected, for the following reasons.

4. First, Queensland did not make, and should not be taken to have made, any such concession. The Queensland Solicitor-General said:[3]

> An issue was raised in relation to the reading down in that it did not apply in relation to section 109. I thought we made clear, but if we had not, that the reading down argument pressed was only in response to exclusive power. We had not made the submission, I did not understand, in relation to the section 109 point.

5. The point made was that Queensland's reading down submission, which relied on s 9 of the *Acts Interpretation Act 1954* (Qld),[4] responded only to the argument that s 275 was invalid for entering an area of exclusive Commonwealth power. The reading down submission was confined in that way because s 9 'does not speak to the situation where the issue is not one of the absence of State legislative power, but is one of the extent of inconsistency, by operation of s 109 of the *Constitution*, of a State law made in exercise

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1 Cth A-G's note on severance, 5 [12].
2 Cth A-G's note on severance, 5-6 [11]-[14].
3 Transcript of Proceedings, *Spence v Queensland* [2019] HCATrans 47, 12054-12058.
4 Transcript of Proceedings, *Spence v Queensland* [2019] HCATrans 46, 8642-8646. The sentence at 8647-8648 ('It is not a reading-down point ... ') is clearly directed to a separate point about the operation of s 109 in respect of s 275(4), which continues at 8650. That is also evident from the AV recording for 14 March 2019 at 3:17:10 to 3:17:56.

of a concurrent power'.[5] In the context of s 109, the question is about the 'extent of the inconsistency',[6] not whether the State law can be 'read down'.

6. It was necessary for Queensland to make that point in reply because the Commonwealth Solicitor-General had earlier appeared to suggest that Queensland had relied on s 9 in the context of s 109.[7] The submission made by Queensland in reply said nothing about 'the extent of the inconsistency' for the purposes of s 109.

10 7. The Cth A-G asserts no principled basis upon which it might be concluded that s 275 is entirely inoperative if s 302CA is read down. The submission[8] instead relies entirely on Queensland's purported concession. As Queensland made no concession, the submission should be rejected.

8. Second, there is no basis for concluding that, if s 302CA is read down, the 'extent of the inconsistency' would render s 275 entirely inoperative.[9] To the contrary, the relevant principles dictate the opposite conclusion.[10]

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9. Section 109 'does not render an inconsistent State law invalid to the extent that the State law has an operation consistent with the Commonwealth law provided that the State law operating to that more limited extent remains an expression of the legislative will of the State Parliament'.[11] If s 302CA(1) validly permits the making and receipt of gifts which are 'required to be used' for a federal electoral purpose, s 275 will be rendered inoperative to the extent it prohibits the making and receipt of such gifts. However, it

30 would remain an 'expression of the legislative will' of the Queensland Parliament that s 275 continue to operate in relation to gifts to which s 302CA(1) did not apply, including gifts expressed to be for State electoral purposes, and 'untied' gifts. Further, as

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40 [5] *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500, 527 [71] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ); *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298, 317 [13] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[6] *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84, 122 (Dixon J).

[7] Transcript of Proceedings, *Spence v Queensland* [2019] HCATrans 47, 11460-11471.

[8] Cth A-G's note on severance, 5 [12].

[9] That is not to suggest that if s 302CA is *not* read down, s 275 *will be* entirely inoperative.

[10] Even if Queensland had made a concession, it could not bind the Court to an incorrect understanding of the law: see *Roberts v Bass* (2002) 212 CLR 1, 54 [143] (Kirby J).

[11] *Bell Group NV v Western Australia* (2016) 260 CLR 500, 532 [77] (Gageler J), referring to *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84, 122 (Dixon J). The same point is made at 527 [71] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

the Cth A-G's submissions suggest, s 275 may also have a continued operation if s 302CA(3) operates to displace the right conferred by s 302CA(1).[12]

10. Third, severance issues can, generally, only be decided once the 'nature and extent of the excess of legislative power' is known.[13] In some cases, as in *Knight*, the 'nature and extent' of any excess of legislative power, if established, will be clear. Consequently, it will be possible in those cases to consider whether the provision could be read down to sever that excess, if it were necessary to do so.[14] In cases of that kind, it may be appropriate to treat reading down as a threshold issue, because the Court will be able to conclude that the impugned provision will, undoubtedly, be valid in its relevant application.[15]

11. In this case, however, if s 302CA exceeds Commonwealth legislative power, the nature and extent of that excess is not clear and needs to be determined. To take one example, *Melbourne Corporation* may invalidate s 302CA entirely, only to the extent that it applies to 'untied' gifts, or not at all. Accordingly, in this case, it is not possible to treat severance as a threshold issue.

Severance of s 302CA

12. The Court may conclude that s 302CA exceeds Commonwealth legislative power to the extent that it applies to gifts other than those which are 'required to be used' for federal electoral purposes.[16] If the Court were to reach that conclusion, it would be necessary to consider how, and whether,[17] s 302CA could be read down so as to preserve its valid operation.

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[12] See Cth A-G's note on severance, at 4 [9], where it is submitted that if the section is read down, s 302CA(3) would still 'roll back' s 302CA(1) 'so as to permit the operation of a State or Territory electoral law in cases where a gift was provided on terms it be used for federal electoral purposes, but was later identified for use for State or Territory electoral purposes.' That submission cannot be reconciled with the proposition that s 275 would be rendered entirely inoperative by a read-down s 302CA.

[13] *Tajjour v New South Wales* (2014) 254 CLR 508, 561 [74] (Hayne J).

[14] *Knight v Victoria* (2017) 261 CLR 306, 326 [36]-[37] (the Court).

[15] *Knight v Victoria* (2017) 261 CLR 306, 324-5 [32]-[33] (the Court).

[16] Section 302CA might be invalid to that extent if it is unsupported by a head of Commonwealth legislative power, or it infringes the *Melbourne Corporation* principle. If s 302CA is invalid for infringing the principle derived from *University of Wollongong v Metwally* (1984) 158 CLR 447, it cannot be read down for the reasons given at Qld's written submissions, 24 [93].

[17] Queensland maintains its primary submission that s 302CA could not be severed if it were invalid to that extent, save in respect of s 302CA(4) and (5) (and (6) to the extent it applies to (5)). The severance required would alter the operation of the remaining provisions: see *Pidoto v Victoria* (1943) 68 CLR 87, 108 (Latham CJ); *Victoria v Commonwealth* (1996) 187 CLR 416, 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). See Transcript of Proceedings, *Spence v Queensland* [2019] HCATrans 46, 8662-8685, and Qld's written submissions, 29 [114].

13. Queensland submits that, in those circumstances, it would be necessary to sever the words of s 302CA which are shown below as struck-through:

> **302CA Relationship with State and Territory electoral laws**
>
> *Giving, receiving or retaining gifts*
>
> (1) Despite any State or Territory electoral law, a person or entity may:
>
> (a) give a gift to, or for the benefit of, a political entity, a political campaigner or a third party (a ***gift recipient***); or
>
> (b) if the person or entity is a gift recipient—receive or retain a gift; or
>
> (c) on behalf of a gift recipient, receive or retain a gift;
>
> if:
>
> (d) this Division does not prohibit the giving, receiving or retaining of the gift; and
>
> (e) the gift~~, or part of the gift,~~ is required to be~~, or may be,~~ used for the purposes of incurring electoral expenditure, or creating or communicating electoral matter, in accordance with subsection (2).
>
> (2) A gift~~, or part of a gift,~~ is required to be~~, or may be,~~ used for a purpose of incurring electoral expenditure, or creating or communicating electoral matter, if:
>
> (a) any terms set by the person or entity providing the gift explicitly require~~ or allow~~ the gift~~ or part~~ to be used for that purpose~~ (whether or not those terms are enforceable); or~~
>
> ~~(b) the person or entity providing the gift does not set terms relating to the purpose for which the gift or part can be used~~.

'Part of a gift'

14. If the references to 'part of a gift' were not severed, s 302CA(1) would continue to confer a right to give and receive all of a gift, where only part of the gift is 'required to be used' for a federal electoral purpose.[18] In respect of the 'untied' part of the gift, the provision would continue to operate in excess of the Commonwealth's legislative competence. Accordingly, those words must be severed.

'Whether or not those terms are enforceable'

15. Where a gift is subject to an unenforceable term that it be used for a federal electoral purpose, that gift 'may be used' for that purpose, or another purpose. The Cth A-G appears to accept as much, because he notes there is a 'real possibility' that a gift made subject to an unenforceable term that it be used for a federal electoral purpose may at a subsequent time be used for a State electoral purpose.[19]

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[18] An example would be a gift of $1,000, of which only $100 was required to be used for a federal electoral purpose.

[19] Cth A-G's note on severance, 4 [9].

16. The purpose of the proposed severance is to excise those parts of s 302CA which purport to confer a right to give, receive and retain a gift which 'may', but need not, be used for a federal electoral purpose.[20] Section 302CA therefore must be confined to gifts subject to an enforceable term requiring that they be used for a federal electoral purpose. The words 'whether or not the terms are enforceable' should be severed. The words 'required to be ... used' should then be understood as referring to gifts subject to an enforceable term.

It is unnecessary to sever sub-s (3), the note and example

17. If s 302CA(1) is confined so as to confer only a right to give, receive and retain a gift which is subject to an enforceable term that it be used for a federal electoral purpose, s 302CA(3) would no longer operate to disapply the right conferred by s 302CA(1).[21] Nonetheless, it would not be necessary to sever subsection (3) because it would accurately identify some of the circumstances in which s 302CA(1) does not apply, 'without limiting' those circumstances.

18. Similarly, the note and the example would simply be statements as to when a person may be liable for a penalty under a State or Territory law, and when a person must comply with State and Territory laws.

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[20] Cth A-G's note on severance, 2 [4].

[21] In oral submissions, the Commonwealth Solicitor-General submitted that 'where the donor has required the gift to be used only for the federal electoral purpose then it is not possible for any of the paragraphs under (3) to bring the operation of the State law back into play': Transcript of Proceedings, *Spence v Queensland* [2019] HCATrans 45, 5366-5370. Similar submissions were made in the Commonwealth's written reply submissions: 8 [24]. The Cth A-G appears now to have abandoned that position, at least insofar as it relates to gifts subject to an unenforceable term: Cth A-G note on severance, 4 [9]. Queensland's position is that s 302CA(3) can disapply s 302CA(1), unless a gift is subject to an enforceable term that it be used for a federal electoral purpose: see Qld's written submissions, 22 [88].