HIGH COURT OF AUSTRALIA

15 May 2019

GARY DOUGLAS SPENCE v STATE OF QUEENSLAND
[2019] HCA 15

This matter concerns the validity and operation of Commonwealth and Queensland laws that each purport to regulate the making of gifts to political parties. On 17 April 2019, the High Court published orders declaring the Queensland laws to be valid and a provision of the Commonwealth law to be invalid. Today the Court published its reasons for those orders.

The plaintiff, Mr Gary Douglas Spence, is a former president of the Liberal National Party of Queensland. In May 2018, the Queensland Parliament passed amendments to the *Electoral Act 1992* (Qld) and the *Local Government Electoral Act 2011* (Qld) which prohibit property developers from making gifts to political parties that endorse and promote candidates for election to the Legislative Assembly and to local government councils in Queensland. In November 2018, the Commonwealth Parliament passed legislation inserting Div 3A into Pt XX of the *Commonwealth Electoral Act 1918* (Cth). Relevantly, this new Division restricts the making and receipt of gifts from "foreign donors" to "political entities", which include political parties registered under Pt XI. The new division also included s 302CA, which made provision for the relationship between State, Territory and Commonwealth electoral laws.

Section 302CA of the *Commonwealth Electoral Act* relevantly conferred authority on a person to make, and on a political entity to receive and retain, a gift that is not prohibited by Div 3A, provided only that "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". The terms "electoral expenditure" and "electoral matter" were each defined by reference to certain conduct directed at influencing voting at a federal election. The section provided that the authority it conferred would be displaced in particular circumstances, including where a State or Territory electoral law required the gift or part of it to be kept or identified separately in order to be used only for the purpose of a State, Territory or local government election.

The plaintiff commenced proceedings against the defendant, the State of Queensland, in the High Court's original jurisdiction, seeking declarations that the Queensland amendments were invalid on several grounds. As for the amendments to the *Electoral Act*, the plaintiff said that they infringed the implied freedom of political communication. As for the amendments to both the *Electoral Act* and the *Local Government Electoral Act*, the plaintiff said that they were purported exercises of a legislative power vested by the *Constitution* exclusively in the Commonwealth Parliament and also that they infringed the doctrine of inter-governmental immunities. The plaintiff argued in the alternative that the amendments were inoperative because they were inconsistent with s 302CA or Pt XX of the *Commonwealth Electoral Act*. The defendant in turn challenged the validity of s 302CA on several grounds. The plaintiff and the defendant agreed on a special case stating nine questions, covering these and other issues, for the Court's opinion. The Attorney-General of the Commonwealth intervened to support the validity of s 302CA. The Attorneys-General for each of the other States and for the Australian Capital Territory intervened in support of the defendant.

By majority, the High Court held that s 302CA of the *Commonwealth Electoral Act* was invalid for going beyond the limits of the Commonwealth's legislative power, conferred by s 51(xxxvi) in its

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application to ss 10 and 31 of the *Constitution*, over federal elections. Section 302CA did so by protecting from the operation of a State electoral law the giving, receipt and retention of a gift that merely "may", and therefore might never, be used for the purpose of influencing voting at a federal election. Accordingly, other aspects of the defendant's challenge to the section's validity did not arise for consideration, and the Queensland amendments could not be inoperative by reason of inconsistency with s 302CA. Although a minority would have held that the amendments were to some extent inoperative by reason of inconsistency with s 302CA, the Court unanimously held that the Queensland amendments were otherwise valid. The amendments to the *Electoral Act*, which reflected legislation upheld in *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34, did not infringe the implied freedom of political communication. The amendments to both the *Electoral Act* and the *Local Government Electoral Act* did not intrude into an area of exclusive Commonwealth legislative power, did not infringe the doctrine of inter-governmental immunities and were not inconsistent with the framework of Pt XX of the *Commonwealth Electoral Act*.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*