IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **NO B 35 OF 2018**

BETWEEN: **GARY DOUGLAS SPENCE**

Plaintiff

AND: **STATE OF QUEENSLAND**

Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

Filed on behalf of the Intervener by:

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PART I FORM OF SUBMISSIONS

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

PARTS II AND III INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth), in support of the plaintiff as to questions (b) to (h) in the amended special case (**ASC**) and in support of Queensland as to question (a).

PART IV ARGUMENT

A. SUMMARY

10 3. In summary, the Commonwealth advances the following propositions.

4. ***Questions (b) and (c):*** Save as otherwise expressly provided for in ss 7, 9 and 29 of the Constitution, State Parliaments have no power to regulate federal elections, and for that reason the Commonwealth's power to make laws with respect to federal elections is properly described as exclusive. This means that State Parliaments have no power to make laws relating to elections which touch or concern federal elections (except in an insubstantial, tenuous or distant way). Section 275 of the *Electoral Act 1992* (Qld) (**Qld Electoral Act**) and s 113B of the *Local Government Electoral Act 2011* (Qld) (**Qld LG Electoral Act**) are laws relating to elections which directly touch or concern federal elections in so far as they apply to:

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(a) donations that are required by the donor to be used with respect to federal elections; and

(b) donations that may be used with respect to federal elections (because the donor does not specify that they cannot be) to political parties registered under the *Commonwealth Electoral Act 1918* (Cth) (**Cth Electoral Act**), related parties or associated entities, or members of such parties or associated entities.

To this extent, those laws are invalid.

5. ***Questions (d) to (h):*** If the Commonwealth's submissions on questions (b) and (c) are
30 not accepted, s 275 of the Qld Electoral Act and s 113B of the Qld LG Electoral Act are inconsistent with s 302CA of the Cth Electoral Act. That provision is valid (questions (d) to (f)). The inconsistency arises in so far as the Queensland provisions prohibit donations that are required to be, or may be, used for the purposes of incurring

"electoral expenditure" or creating or communicating "electoral matter"[1] and are not to be used, kept or identified separately in order to be used only for a State or Territory electoral purpose. The Queensland provisions are inoperative to that extent by reason of s 109 of the Constitution (questions (g) and (h)).

6. ***Question (a):*** Subdivision 4 of Div 8 of Pt 11 of the Qld Electoral Act does not infringe the implied freedom of political communication. It is indistinguishable from Div 4A of Pt 7 of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (**EFED Act**), the validity of which was upheld in *McCloy v New South Wales*[2] (***McCloy***).

B. QUESTIONS (B) AND (C) – EXCLUSIVE POWER

(i) The existence of Commonwealth exclusive power with respect to federal elections

7. Over a century ago, in *Smith v Oldham*,[3] each member of this Court described the Commonwealth Parliament's legislative power with respect to federal elections as exclusive. Referring to the Commonwealth Parliament, Griffith CJ observed: "It is not disputed that that Parliament has power to make laws for the regulation of federal elections" and that "that power is an ***exclusive*** power".[4] Justice Barton likewise said that the Commonwealth Parliament's power to enact laws as to federal elections "is ***exclusive***".[5] To the same effect, Isaacs J said that the regulation of federal elections was "transparently ***beyond the competency of the State*** to control".[6]

8. Unlike the present case, *Smith v Oldham* did not concern the validity of a State law. It concerned the validity of a provision of the *Commonwealth Electoral Act 1902* (Cth) that required the author of any comment upon a federal candidate or political party, being a comment made on or after the date of issue of a writ for a federal election, to subscribe his or her name and address to the comment. However, the exclusive nature of the Commonwealth's power was central to the reasoning of at least a majority of the

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1 See Cth Electoral Act, ss 4AA, 287AB.

2 (2015) 257 CLR 178.

3 (1912) 15 CLR 355.

4 (1912) 15 CLR 355 at 358 (emphasis added).

5 (1912) 15 CLR 355 at 360 (emphasis added).

6 (1912) 15 CLR 355 at 365 (emphasis added).

Court in upholding the validity of the provision.[7] It therefore forms part of the *ratio*.[8]

9. Since *Smith v Oldham*, the exclusive nature of the Commonwealth's power has never been doubted. Indeed, it has been referred to by judges of this Court in recent times.[9] In those circumstances, the proposition for which *Smith v Oldham* stands as authority should not now be doubted. To the contrary, for the following reasons, it is correct.

(ii) The constitutional text and structure

10. Chapter I of the Constitution concerns "The Parliament", ie the Commonwealth Parliament (see s 1). A number of provisions within that Chapter directly concern the election of senators to the Senate and members to the House of Representatives. Those provisions either directly empower the Commonwealth Parliament to make certain kinds of laws relating to federal elections (see ss 8, 9, 14, 27, 49) or indirectly empower the Commonwealth Parliament to make certain kinds of laws relating to federal elections because the provisions provide for certain matters "until the Parliament otherwise provides", thereby engaging s 51(xxxvi) (see ss 7, 9, 10, 22, 29, 30, 34, 39, 46, 47, 48).[10]

11. Together with the fact that the constitutional prescription of a form of representative government is as spare as it is,[11] these provisions embody a deliberate design to leave the Commonwealth Parliament with considerable freedom to choose from among the many possible permutations of representative government, including in respect of the

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7 (1912) 15 CLR 355 at 361 (Barton J), 365 (Isaacs J).

8 The fact that it may have been only one strand of the reasoning does not deny that it forms part of the *ratio*: see, eg, *Ex parte King; Re Blackley* (1938) 38 SR (NSW) 483 at 490 (Jordan CJ; Davidson and Owen JJ agreeing); *Day v Ocean Beach Hotel Shellharbour Pty Ltd* (2013) 85 NSWLR 335 at 346 [32] (Leeming JA; Meagher and Emmett JJA agreeing); *McBride v Monzie Pty Ltd* (2007) 164 FCR 559 at 562 [6] (Finkelstein J).

9 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 (***Rowe***) at 14 [8] (French CJ); *Murphy v Electoral Commissioner* (2016) 261 CLR 28 (***Murphy***) at 113 [261] n 326 (Gordon J). See also *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545 (***Nelungaloo***) at 564 (Dixon J); *Abbotto v Australian Electoral Commission* (1997) 71 ALJR 675 at 678-679 (Dawson J).

10 As to this power's breadth, see *Sue v Hill* (1999) 199 CLR 462 at 473 (Gleeson CJ, Gummow and Hayne JJ).

11 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 (***Mulholland***) at 188 [6], 194-195 [26] (Gleeson CJ), 206-207 [63]-[65] (McHugh J), 237 [154]-[155] (Gummow and Hayne JJ), 264 [241] (Kirby J), 297 [333] (Callinan J); *Rowe* (2010) 243 CLR 1 at 70 [200] (Hayne J), 121 [386] (Kiefel J); *Murphy* (2016) 261 CLR 28 at 69 [89], 69-70 [93] (Gageler J), 81 [156], 82 [158], 86 [178] (Keane J), 106 [243] (Nettle J), 113 [262]-[263] (Gordon J).

centrally important area of electoral choice.[12] This in-built latitude reflects the fact that the Constitution was framed against a diversity of colonial forms of representative government.[13] As Gummow J observed in *McGinty v Western Australia*,[14] from that diversity the "challenge was to produce uniformity at the new and federal level". Section 9 of the Constitution mandates a measure of uniformity, as it requires Commonwealth laws prescribing the "method of choosing senators" to provide for a "uniform method", which is to be understood as requiring a single uniform system across the States.[15] More generally, the extensive powers conferred upon the Commonwealth Parliament were part of the mechanism to meet the challenge of producing a uniform federal scheme, while leaving room for development in the institutions of representative government.[16]

12. In this light, the Commonwealth Parliament's power to legislate with respect to federal elections is appropriately described as "plenary".[17] In particular, s 51(xxxvi) read with ss 10 and 31 of the Constitution confers a broad legislative power on the Commonwealth Parliament. Focussing, for example, on s 10, it provides:

> Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State.

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12 *McGinty v Western Australia* (1996) 186 CLR 140 at 184 (Dawson J), 269, 280-283 (Gummow J); *Langer v Commonwealth* (1996) 186 CLR 302 (***Langer***) at 343 (McHugh J); *Mulholland* (2004) 220 CLR 181 at 188 [6], 189 [9] (Gleeson CJ), 206 [61], 207 [64], 214 [80] (McHugh J), 236-237 [154]-[156] (Gummow and Hayne JJ), 253-254 [211]-[212], 260 [230] (Kirby J); *Rowe* (2010) 243 CLR 1 at 22 [29] (French CJ), 49-50 [125] (Gummow and Bell JJ), 121 [386] (Kiefel J); *Day v Australian Electoral Officer (SA)* (2016) 261 CLR 1 at 12 [19] (the Court).

13 As to the diversity of colonial regimes, see *Mulholland* (2004) 220 CLR 181 at 234-235 [150] (Gummow and Hayne JJ).

14 (1996) 186 CLR 140 at 270–271, 284 (Gummow J). See also *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 261 (Gibbs CJ, Mason and Wilson JJ).

15 *Day v Australian Electoral Officer (SA)* (2016) 261 CLR 1 at 22 [44] (the Court).

16 Competing views were expressed at the Convention Debates between uniformity of laws relating to electoral matters and local (State) control: see *Official Report of the National Australasian Convention Debates,* Sydney, 2 April 1891, 590-598 (re: s 7), 613-636 (re: s 30); *Official Report of the National Australasian Convention Debates,* Adelaide, 15 April 1897, 672-674 (re: s 9), 715-725 (re: s 30), 725-732 (re s 41); *Official Record of the Debates of the Australasian Federal Convention,* Sydney, 21 September 1897, 987-988 (re ss 9-10); *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 16 March 1898, 2445-2446 (re s 9). The constitutional text reflects the former perspective.

17 *Smith v Oldham* (1912) 15 CLR 355 at 363 (Isaacs J); *Murphy* (2016) 261 CLR 28 at 113 [262] (Gordon J); *Judd v McKeon* (1926) 38 CLR 380 at 383 (Knox CJ, Gavan Duffy and Starke JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 220 (Gaudron J); *Langer* (1996) 186 CLR 302 at 317 (Brennan CJ); *Mulholland* (2004) 220 CLR 181 at 254 [212], 260 [231] (Kirby J).

Read with s 51(xxxvi), the Parliament thus has power "with respect to" the subject matter of "elections of senators for [each] State". Likewise, s 31 read with s 51(xxxvi) gives power "with respect to" the subject matter of "elections in [each] State of members of the House of Representatives". In short, these provisions confer upon the Commonwealth Parliament power to make laws with respect to federal elections.[18] In the usual way, that grant of power carries with it power to legislate with respect to all incidental matters.[19] It is a broader power than that provided by s 9 ("laws prescribing the method of choosing senators").[20] The impugned law in *Smith v Oldham* was upheld on the basis of the power conferred by ss 10 and 31 when read with s 51(xxxvi).

13. In stark contrast to the broad grant of legislative power to the Commonwealth Parliament described above, the State Parliaments are granted specific and limited powers by particular provisions in Ch I of the Constitution,[21] usually subject to contrary laws being made by the Commonwealth Parliament. Thus, subject to this limitation:

    (a) s 7 expressly grants Queensland power to make laws dividing the State into divisions and determining the number of senators to be chosen for each division;

    (b) s 9 expressly grants each State Parliament power to make laws prescribing the method of choosing the senators for that State; and

    (c) s 29 expressly grants each State Parliament power to make laws for determining the divisions in that State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division.

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18 *Smith v Oldham* (1912) 15 CLR 355 at 358 (Griffith CJ), 359–360 (Barton J), 362 (Isaacs J); *ACTV* (1992) 177 CLR 106 at 157 (Brennan J), 220 (Gaudron J), 225–226, 234 (McHugh J); *Langer* (1996) 186 CLR 302 at 317 (Brennan CJ), 339 (McHugh J), 349 (Gummow J); *Rowe* (2010) 243 CLR 1 at 14 [8], 27 [47] (French CJ); *Murphy* (2016) 261 CLR 28 at 47 [26] (French CJ and Bell JJ), 113 [262] (Gordon J). It is sometimes said that the power is to make laws "relating to elections" (see also *Mulholland* (2004) 220 CLR 181 at 233 [143] (Gummow and Hayne JJ), 254 [211] (Kirby J)), but the words "relating to elections" are used in ss 10 and 31 to describe the State laws which those provisions apply. The connection between the subject matter and the head of power is provided by the words "with respect to" in the chapeau to s 51.

19 See, eg, *Smith v Oldham* (1912) 15 CLR 355 at 362 (Isaacs J); *GG Crespin & Son v Colac Co-operative Farmers Ltd* (1916) 21 CLR 205 at 212 (Griffith CJ), 214 (Barton J); *Le Mesurier v Connor* (1929) 42 CLR 481 at 497 (Knox CJ, Rich and Dixon JJ); *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 (Dixon CJ, McTiernan, Webb and Kitto JJ).

20 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 428.

21 Cf *Mulholland* (2004) 220 CLR 181 at 232 [141] (Gummow and Hayne JJ), 253 [209] (Kirby J).

Uniquely, s 9 further grants each State Parliament power to make laws for determining the times and places of elections of senators for that State,[22] and this is not subject to any power of the Commonwealth Parliament to make contrary provision.[23]

14. However, ss 10 and 31 are *not* grants of power to State Parliaments to make laws relating to federal elections. To the contrary, they assume the absence of any such power, and they fill that gap by applying to federal elections certain State laws that in their terms relate to State elections. Accordingly, the only grants of power in ss 10 and 31 (read with s 51(xxxvi)) are grants of power to the Commonwealth Parliament.

15. In light of the above, it is clear that State Parliaments do not have any power to make laws relating to federal elections other than the specific and limited grants of power identified at [13] above. That is so for at least three reasons.

16. ***First***, the States did not have and cannot have had power to make laws relating to federal elections prior to Federation, for the obvious reason that federal elections as a possible subject of legislation did not exist. Thus, in *Smith v Oldham*,[24] Barton J said that the power of the Commonwealth Parliament with respect to federal elections is exclusive "because no State Parliament had under its own Constitution power to legislate as to federal elections". Latham CJ subsequently echoed this statement, observing that "[a]ny State legislation professing to control a Commonwealth department would be invalid, because no State Parliament has or ever has had any power to legislate upon such a subject".[25] Both statements illustrate the observation of Harrison Moore that the exclusivity of a Commonwealth legislative power can "arise from the fact that some of the powers conferred upon the Commonwealth Parliament were not derived from the existing powers of the Colonies".[26] There is simply "an absence of State legislative power".[27] It is that absence of State legislative power that

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22 See *Senators' Elections Act 1903* (NSW); *Senate Elections Act 1958* (Vic); *Senate Elections Act 1960* (Qld); *Election of Senators Act 1903* (SA); *Election of Senators Act 1903* (WA); *Senate Elections Act 1935* (Tas). For predecessor legislation, see Note 6 to the Constitution as printed on 1 January 2012.

23 *Re Australian Electoral Commission; Ex parte Kelly* (2003) 77 ALJR 1307 at 1309 [13] (Gummow J); *Mulholland* (2004) 220 CLR 181 at 232 [140] (Gummow and Hayne JJ).

24 (1912) 15 CLR 355 at 360.

25 *Carter v Egg and Egg Pulp Marketing Board for the State of Victoria* (1942) 66 CLR 557 at 571.

26 Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) at 70.

27 *Rizeq v Western Australia* (2017) 262 CLR 1 (***Rizeq***) at 25 [60] (Bell, Gageler, Keane, Nettle and Gordon JJ).

explains ss 10 and 31 of the Constitution, for it was necessary to apply the State laws to which those provisions refer to the first federal election because State electoral laws could not apply of their own force to that election. As Isaacs J noted in *Smith v Oldham*:[28] "It was the Constitution itself, and not the State Parliament, that applied even as an interim provision the State laws to federal elections".

17. ***Secondly***, except to the specific and limited extents provided for by ss 7, 9 and 29, the Constitution did not confer on State Parliaments any power to make laws relating to federal elections. Not only is that apparent from the absence of any express grant of power broader than the specific grants of power in ss 7, 9 and 29, it is a necessary implication from the limited nature of those express grants. If State Parliaments had broad power to make laws relating to federal elections, the express grants of power by ss 7, 9 and 29 would be otiose and the limited nature of those express grants would be inexplicable. State Parliaments could legislate regardless of those limits. Accordingly, the present context provides yet another illustration of the use in the Constitution of affirmative words appointing or limiting an order or form of things also having negative force to forbid the doing of the thing otherwise.[29]

18. ***Thirdly***, for State Parliaments to have broader powers to make laws relating to federal elections would be inconsistent with the object identified at [11] above. One clear objective of the Constitution was to secure Commonwealth control over the entire subject matter of federal elections, such that it could be dealt with under uniform (Commonwealth) laws. Concurrent State legislative power with respect to federal elections would undermine that object. Concurrent power would subject a peculiarly national subject — federal elections — to potentially diverse State-by-State regulation inimical to that national quality. Further, s 109 would not provide an answer to any such divergence, because of the time it could take the Commonwealth Parliament to legislate in terms that would engage s 109. For example, a State could wait until the

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28 (1912) 15 CLR 355 at 365. See also at 359 (Barton J): "No power was given to any State to make laws with regard to federal elections, but existing State laws as to State elections were made applicable to federal elections during the time which necessarily intervened before the Federal Parliament could legislate on the subject."

29 *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 269 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See also, eg, *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *Alqudsi v The Queen* (2016) 258 CLR 203 at 265-266 [168] (Nettle and Gordon JJ).

Commonwealth Parliament had been prorogued in advance of an election, and then enact legislation that may have a profound impact on the result in the pending federal election. That possibility is avoided only by accepting the (unsurprising) proposition that State Parliaments cannot act in that way for the simple reason that they have no power to make laws with respect to federal elections.

19. For the above reasons, State Parliaments lack legislative power to regulate federal elections, except to the extent expressly permitted by the provisions of the Constitution referred to earlier. The Commonwealth Parliament's power with respect to federal elections is thus properly described as "exclusive".

20. The above submissions are not undermined by the fact that the Commonwealth's power with respect to federal elections is not among those specified as being "exclusive" in s 52 of the Constitution. That section does not purport to be an exhaustive statement of whether powers granted by other sections of the Constitution are exclusive. Thus, for instance, this Court has accepted that power to add to or detract from federal jurisdiction and the power to command the manner of exercise of federal jurisdiction is exclusive to the Commonwealth Parliament,[30] notwithstanding that these are not powers stated by s 52 to be exclusive powers. If, as a matter of proper construction, other grants of legislative power are properly to be construed as exclusive, their omission from s 52 does not deny to them that character. As Quick and Garran explained, there are powers "which, though not, *ex vi termini*, 'declared' to be within its exclusive power, are by necessary implication and intendment withdrawn from the States and vested solely in the Federal Parliament".[31] Thus, to use the language of s 107 of the Constitution, the entire subject matter of the regulation of federal elections is a subject matter of legislative power that is "exclusively vested in the Parliament of the Commonwealth".

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30 *Rizeq* (2017) 262 CLR 1 at 25-26 [59]-[61] (Bell, Gageler, Keane, Nettle and Gordon JJ).

31 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 661. See also Inglis Clark, *Studies in Australian Constitutional Law* (1901) at 72. For other posited examples, see Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 656–657; Inglis Clark, *Studies in Australian Constitutional Law* (1901) at 74-75; Twomey, *The Constitution of New South Wales* (2004), 188-189; Moens and Trone, *Lumb & Moens' The Constitution of the Commonwealth of Australia Annotated* (8th ed, 2012) at 425; *Nelungaloo* (1952) 85 CLR 545 at 564 (Dixon J); *Davis v Commonwealth* (1988) 166 CLR 79 at 104 (Wilson and Dawson JJ). Whether or not the various posited examples are exclusive, the general point underlying the discussion in these sources is sound: namely, that exclusive powers are not limited to those expressly enumerated in s 52 of the Constitution.

(iii) The limits of exclusive power with respect to federal elections

21. The most obvious consequence of the exclusivity identified above is that a State cannot make a law directed solely to federal elections, or in terms expressly regulating federal elections. As Barton J observed in *Smith v Oldham*,[32] a State Parliament cannot make a law on a particular subject matter (say, the regulation of the press) "but in relation to federal elections only". Such a law plainly trespasses into territory in respect of which the State Parliament has no power. Dawson J observed in similar fashion in *Abbotto v Australian Electoral Commission*[33] that "[o]ne may doubt whether a State statute which purported to interfere with the system of voting in federal elections would be within the power of a State legislature".

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22. Importantly, however, the exclusivity of Commonwealth power to make laws with respect to federal elections is a matter of substance rather than form. As such, the observations quoted in the previous paragraph do not describe the full extent of the States' lack of legislative power, because the exclusivity of Commonwealth control over federal elections would be illusory if a State (or, indeed, multiple States) could regulate federal elections simply by passing laws regulating elections *generally*, thus purporting simultaneously to regulate both its own elections and federal elections. That being so, it is necessary to identify the principle to be applied in determining the circumstances in which a State electoral law that is cast in general terms will be invalid because some of its applications purport to regulate federal elections.

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23. Sections 10 and 31 point to the appropriate principle. They recognise that, at federation, State Parliaments had power to make laws relating to their own elections, which power is then preserved by ss 106 and 107 of the Constitution. But they also recognise, as explained above, that State Parliaments did *not* have power to make laws with respect to federal elections. In other words, ss 10 and 31 are premised on the proposition that each State Parliament has power to make laws relating to *elections, other than federal elections*. For the reasons that follow, that suggests that the appropriate principle is that where a State makes a law relating to elections, any operation of that law that touches or

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32 (1912) 15 CLR 355 at 361.

33 (1997) 71 ALJR 675 at 678-679.

concerns federal elections is invalid except to the extent that the connection to federal elections is insubstantial, tenuous or distant.

24. The principle just articulated resembles this Court's approach in the analogous context of s 51(xiii) of the Constitution, which provides that the Commonwealth Parliament has power to make laws with respect to "banking, other than State banking". In *Bourke v State Bank of New South Wales*,[34] this Court unanimously held that the carve out from Commonwealth legislative power embodied in the words "other than State banking" applied to limit Commonwealth power only where a Commonwealth law could be characterised as a law with respect to banking. Once a law could be so characterised, that law could not, *in any particular application*, apply to the excluded subject matter (State banking) unless that application was "so insubstantial, tenuous or distant" that the law cannot be described as one with respect to State banking. As the Court concluded:[35]

> [T]he words of s 51(xiii) still require that, when the Commonwealth enacts a law which can be characterized as a law with respect to banking, that law does not touch or concern State banking, except to the extent that any interference with state banking is so incidental as not to affect the character of the law as one with respect to banking other than State banking ... Put another way, the connexion with State banking must be "so insubstantial, tenuous or distant" that the law cannot be regarded as one with respect to State banking ... Of course, these are the tests used in the familiar process of characterization. ... [I]f a law is not one with respect to banking, it is not subject to a restriction that it must not touch or concern State banking.

Thus, in *Bourke*, a law that applied generally to "financial corporations" was held to be valid except in its particular operation with respect to State banks, because *in that operation* it touched and concerned State banking more than incidentally.[36] That same mode of reasoning was applied to s 51(xiv) in *Attorney-General (Vic) v Andrews*.[37]

25. The focus in the above analysis on the particular *operation* of the impugned law is consistent with this Court's ordinary approach to constitutional limitations on power. That is seen, for instance, in the cases on the implied freedom of political communication, which demonstrate that a law may be invalid in particular operations,

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34 (1990) 170 CLR 276 (***Bourke***).

35 (1990) 170 CLR 276 at 288–289.

36 *Bourke* (1990) 170 CLR 276 at 290 (the Court). See also *Attorney-General (Vic) v Andrews* (2007) 230 CLR 369 at 392 [14] (Gleeson CJ), 424-425 [140] (Kirby J).

37 (2007) 230 CLR 369 at 391–392 [11]–[12] (Gleeson CJ), 407–408 [78]–[79] (Gummow, Hayne, Heydon and Crennan JJ), 423–428 [138]–[150] (Kirby J).

even though most of the operations of that law do not burden political communication at all.[38] The same approach is evident in the authorities concerning ss 52(i),[39] 90[40] and 117[41] of the Constitution, and in relation to the *Melbourne Corporation* principle.[42]

26. Applying the above approach, it follows that a State law with respect to elections cannot validly touch or concern federal elections, in any of its operations, unless the connection with federal elections is insubstantial, tenuous or distant. Importantly, however, a State law that *cannot* be characterised as a law with respect to elections is *not* subject to that limit, because there is nothing in the text or structure of the Constitution to indicate that State laws of that kind cannot apply in the ordinary way (irrespective of whether or not they happen to intersect in some way with a federal election). So, for example, it was not necessary for ss 10 and 31 of the Constitution to apply State criminal laws in order to ensure that a person who assaulted a federal election official during a federal election could be prosecuted. That is because those sections reflect an assumption that applicable State criminal laws would apply in their terms, whether or not the occasion for their application was in some way connected with a federal election (the direct operation of State laws in that way being loosely analogous with the direct application of State laws in matters in federal jurisdiction, except in the area of exclusive Commonwealth power[43]). It is only in the context of State laws *relating to elections* that ss 10 and 31 of the Constitution recognise that such laws cannot apply of their own force to federal elections, with the result that it is only State laws of that kind that are subject to the principle that they cannot validly touch or concern federal elections more than incidentally.

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38 See, eg, *Tajjour v New South Wales* (2014) 254 CLR 508; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 547 [15], 555 [42] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 582-584 [150]-[159] (Keane J).

39 See, eg, *Allders International Pty Ltd v Commissioner of State Revenue (Vic)* (1996) 186 CLR 630.

40 See, eg, *Ha v New South Wales* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ).

41 See, eg, *Street v Queensland Bar Association* (1989) 168 CLR 461 at 487-488 (Mason CJ), 506-507 (Brennan J), 526-528 (Deane J), 589 (McHugh J).

42 See, eg, *Austin v Commonwealth* (2003) 215 CLR 185.

43 *Rizeq* (2017) 262 CLR 1 at 25-26 [61], [63] (Bell, Gageler, Keane, Nettle and Gordon JJ).

(iv) Extent of invalidity in this case

27. Section 275 of the Qld Electoral Act both prohibits prohibited donors (relevantly, property developers) from making a "political donation" and prohibits persons from accepting or soliciting a "political donation" from prohibited donors. Section 274(1) defines "political donation" to mean a gift made to or for the benefit of one of three classes of recipients: (i) a political party; (ii) an elected member; or (iii) a candidate in an election. Equivalent provisions for local government elections, substituting elected members for "a councillor of a local government", are found in ss 113A and 113B of the Qld LG Electoral Act.

28. A "political party" is "an organisation whose object, or 1 of whose objects, is the promotion of the election to the Legislative Assembly of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part" (s 2 of the Qld Electoral Act). An "elected member" is "a member of the Legislative Assembly" (s 197 of the Qld Electoral Act), and a "candidate" is "a person who has become a candidate under section 93(3)[44] and, for the purpose of Pt 11, "includes an elected member or other person who has announced or otherwise indicated an intention to be a candidate in the election" (s 2 of the Qld Electoral Act). There are similar definitions of "political party" and "candidate" in the Dictionary to the Qld LG Electoral Act.

29. "Political parties" under the Qld Electoral Act and Qld LG Electoral Act are not limited to parties that promote candidates only for election to State or local government elections. To the contrary, a "political party" as defined in the Qld Electoral Act may also undertake activities and promote candidates for election in federal elections. Moreover, a "political party" may be registered under both the Qld Electoral Act and the Cth Electoral Act, on the basis that it seeks to promote the election of its candidates to the Legislative Assembly of Queensland ***and*** the election of its candidates to the Commonwealth Parliament. This appears to occur commonly. The agreed facts record that the Liberal National Party, the Labor Party (Queensland), Katter's Australian Party and the Queensland Greens are all registered under both Acts [**ASC [2], [13], [19], [21]**]. While there is no requirement for registration under the Cth Electoral Act for a

[44] Section 93(3) provides: "On the display of the names at the returning officer's office, the persons become candidates for the election for the electoral district".

party to seek to promote candidates for election to the Commonwealth Parliament, that is the usual course, so that the party can obtain the benefits of registration.[45]

30. So too, members of the Legislative Assembly of Queensland, candidates for election to that Assembly, councillors and candidates for election as councillors may be members of parties which seek to promote candidates for election to the Commonwealth Parliament, or members of an affiliated or related party.[46] The agreed facts record that that, too, occurs commonly [**ASC [11], [18], [21], [21A]–[21C]**].

31. As the Qld Electoral Act and the Qld LG Electoral Act are laws relating to elections, for the reasons addressed above they cannot validly have any operation that touches or concerns federal elections more than incidentally. That has the following consequences.

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32. ***Gifts required to be used with respect to federal elections.*** Given the linkages between the recipients regulated by the Queensland provisions and federal elections explained above, it may readily be foreseen that gifts may be made by prohibited donors to each of the recipients regulated by the Queensland provisions on the condition, specified by the donor, that they be used only with respect to federal elections. Sections 275 of the Qld Electoral Act and s 113B of the Qld LG Electoral Act purport to prohibit such gifts. However, the regulation of such gifts is plainly a matter which touches and concerns federal elections in a direct and substantial way. Accordingly, the Queensland provisions are invalid to the extent that they apply to gifts that are provided on condition

20 that they be used only with respect to federal elections.

33. ***Gifts which may be used with respect to federal elections.*** The Queensland provisions also prohibit gifts which, while not *required* by the donor to be used with respect to federal elections, *may be* so used (including because the donor does not specify that they are not to be so used).

34. So far as the recipient of such a gift is a political party registered under the Cth Electoral Act, or a "related party" (s 123(2)) or "associated entity" (s 287H(1)), the Queensland

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45 See, eg, regarding the nomination of candidates (Cth Electoral Act, ss 166, 167(3), 169B), access to the Roll, the habitation index, and voting information (ss 90B(1), 90B(3)), printing a registered political party's names, abbreviations and logos adjacent to a candidate's name on the ballot papers (ss 169, 214(1), 214(2),

30 214A), above the line voting (ss 169, 239(2)), and election funding (s 293).

46 These words are used in **ASC [5], [6], [15]–[16], [21C]**. The notion of an "affiliated" party is not used in either the Cth Electoral Act or the Qld Electoral Act. The notion of a "related" party is used in the Cth Electoral Act (see s 123(2)) and the Qld Electoral Act (see s 5).

provisions purport to regulate parties and entities that have come to play an important role in federal elections.[47] Indeed, the role of such parties in the electoral system is one of the topics that the Constitution leaves open to legislative development by the Commonwealth Parliament.[48] The regulation of gifts to parties and entities of these kinds touches or concerns federal elections in a direct and substantial way. As such, the Queensland provisions are invalid to the extent that they purport to prohibit gifts by prohibited donors to political parties, related parties and associated entities in circumstances where those gifts may be used with respect to federal elections.

35. For the same reason, so far as the gift is to a member of a political party registered under the Cth Electoral Act, or a member of related party or associated entity, the regulation of such gifts touches or concerns federal elections in a direct and substantial way. That is so even if the member is also a member of the Legislative Assembly of Queensland or a councillor, or a candidate for election to such a position. Political donations that can be used with respect to federal elections are not within State legislative competence simply because the recipient is also a member of State Parliament or a local government councillor, or a candidate for election to such a position. State Parliaments do not have any greater power to regulate participation of a person in the federal electoral process just because the person is a local government councillor or a member of the State Parliament. Again, the Queensland provisions purport to prohibit such gifts when made by prohibited donors and they are, to that extent, invalid.

36. In contrast, where a donor makes a gift and does not specify that it *must* be used with respect to federal elections, and it is a gift to a political party that is not registered under the Cth Electoral Act (or a related party or associated entity) or to a member of such a party, the connection to federal elections is too tenuous and insubstantial to come within the exclusive sphere of Commonwealth power. Accordingly, the Queensland provisions are not invalid to the extent that they purport to prohibit such gifts.

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47 *McKenzie v Commonwealth* (1984) 57 ALR 747 at 749; *Day v Australian Electoral Officer (SA)* (2016) 261 CLR 1 at 13-14 [23]-[24] (the Court); *Mulholland* (2004) 220 CLR 181 at 192 [20], 196 [29] (Gleeson CJ), 213-214 [78]-[80] (McHugh J).

48 *McGinty v Western Australia* (1996) 186 CLR 140 at 283-284 (Gummow J), quoted in *Mulholland* (2004) 220 CLR 181 at 207 [65] (McHugh J).

37. ***Gifts which are required to be used only with respect to Queensland elections.*** Finally, so far as the donor specifies that any gift must be used with respect to Queensland elections, the connection to federal elections is tenuous and insubstantial. Accordingly, subject to questions of severance and reading down, the Queensland provisions may validly regulate such gifts no matter who is the recipient of such a gift.

38. ***Severance and reading down.*** Section 9 of the *Acts Interpretation Act 1954* (Qld) provides that Queensland statutes are to be "construed distributively so as to operate validly to the extent" that they do not operate to infringe constitutional limitations on legislative power. Given that provision, it may be that s 275 of the Qld Electoral Act and s 113B of the Qld LG Electoral Act operate validly except to the extent that they are invalid as explained above. The Commonwealth does not seek to make submissions on whether such severance or reading down is possible.

C. QUESTIONS (D) TO (H) – INCONSISTENCY

39. Even if the prohibitions on donations from property developers in s 275 of the Qld Electoral Act and s 113B of the Qld LG Electoral Act were validly enacted, those provisions are inconsistent with s 302CA of the Cth Electoral Act, and they are inoperative to that extent by reason of s 109 of the Constitution.

(i) Principles

40. The relevant principles to be applied are well established. An inconsistency within the scope of s 109 of the Constitution "may arise in a number of ways".[49] It is always necessary to begin by construing the (valid) Commonwealth law and the (valid) State law to discern whether a "real conflict" exists between them.[50] A real conflict exists if the State law "alters, impairs or detracts" from the operation of the Commonwealth law,[51] and in that way "undermines" it.[52] A classic instance of such a conflict — and a

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49 *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500 (***Bell Group***) at 521 [51] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

50 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 (***Jemena***) at 525 [42] (the Court); *Bell Group* (2016) 260 CLR 500 at 521 [51] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

51 *Jemena* (2011) 244 CLR 508 at 524 [39] (the Court).

52 *Jemena* (2011) 244 CLR 508 at 525 [41] (the Court), quoted in *Bell Group* (2016) 260 CLR 500 at 521 [51] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

typical instance of a "direct" inconsistency — is where a State law prohibits what a Commonwealth law expressly permits.[53] For the following reasons, that is so here.

(ii) The Commonwealth law

41. The *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth) recently inserted Div 3A of Pt 2 into the Cth Electoral Act, which prohibits certain donations in relation to federal elections from "foreign donors". It also inserted a provision to deal expressly with the relationship between Commonwealth and State electoral laws. That provision – s 302CA(1) – provides that, despite any State or Territory electoral law, a person or entity may give, receive or retain a gift if Div 3A does not prohibit it, and the gift is required to be, or may be, used for the purposes of incurring "electoral expenditure" or creating or communicating "electoral matter". Those expressions are linked with federal elections: "electoral expenditure" is, relevantly, "expenditure incurred for the dominant purpose of creating or communicating electoral matter" (s 287AB(1)); "electoral matter" is, relevantly, "matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election (a federal election) of a member of the House of Representatives or of Senators for a State or Territory" (s 4AA(1)).

42. Reinforcing the limit of s 302CA(1) to electoral matters pertaining to federal elections, s 302CA(3) provides that s 302CA(1) does not apply in relation to all or part of a gift that is given on terms requiring it to be used, or that is kept or identified separately in order to be used, only for a State or Territory electoral purpose. The subsection recognises that a gift may not and need not be identified as to be used for a State or Territory electoral purpose until immediately before the gift is used. However, at least in a case where a gift remains identifiable, in actually using the gift for a State or Territory electoral purpose, the recipient will necessarily identify it for that use no later than the moment immediately prior to using it. In such a case, s 302CA(3) dis-applies s 302CA(1), with the effect that the donor and recipient of the gift must comply with State and Territory electoral laws as to the giving, receipt, retention and use of gifts.[54]

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53 See, eg, *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151 at 160 (Latham CJ), 161–162 (Starke J), 163 (Williams J); *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258 (Barwick CJ; McTiernan J agreeing).

54 See also Revised Explanatory Memorandum, Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018 (Cth) at 53.

So much is apparent from reading s 302CA(3) in light of the note and example accompanying the sub-section.[55]

43. Section 302CA(3) has the operation just identified even if s 302CA(1) initially applied to *permit* the giving and receipt of the gift. When s 302CA is read as a whole, the permission that is effected by sub-s (1) is always qualified by the possibility that sub-s (3) will apply, in that a gift that *may* be used for the purposes of incurring electoral expenditure or creating or communicating electoral matter under the Cth Electoral Act at the time it was given may ultimately come to be used for a State or Territory electoral purpose. Given the contingent nature of the permission effected by s 302CA(1), donors must conduct themselves alive to the possibility that, if they permit a donation to be used for State or Territory purposes, then if the recipient of the donation uses it in that way the donor may be subject to any relevant State or Territory law electoral law.

44. Section 302CA is a valid Commonwealth law. It is supported by ss 10 and 31 of the Constitution read with s 51(xxxvi) (and the implied or express incidental power). It is a law with respect to a matter in respect of which the Constitution makes provision until the Parliament otherwise provides, namely elections for the Senate and the House of Representatives, because it regulates the conduct of persons with regard to those elections.[56] Who can give, receive and use political donations is "connected with the electoral process".[57] So far as s 302CA expressly permits donations that are not otherwise prohibited by the Cth Electoral Act, it involves the conferral of a freedom upon persons to contribute funds directed (ultimately) towards influencing electors at federal elections. That is a matter of central concern to the conduct of federal elections.[58] In those circumstances, it is open to the Commonwealth Parliament expressly to exclude State laws contrary to the conferral of that freedom.[59]

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55 The note and example form part of the Cth Electoral Act: *Acts Interpretation Act 1901* (Cth), s 13. The example may extend the operation of the provision: s 15AD(b).

56 *Smith v Oldham* (1912) 15 CLR 355 at 358 (Griffith CJ), 360 (Barton J); *ACTV* (1992) 177 CLR 106 at 142 (Mason CJ); *Langer* (1996) 186 CLR 302 at 349 (Gummow J); *Muldowney v South Australia* (1996) 186 CLR 352 at 375-376 (Gaudron J); *Mulholland* (2004) 220 CLR 181 at 205-206, 209–210 (McHugh J).

57 *Mulholland* (2004) 220 CLR 181 at 233 [143] (Gummow and Hayne JJ).

58 *Smith v Oldham* (1912) 15 CLR 355 at 362–363 (Isaacs J); *Evans v Crichton-Browne* (1981) 147 CLR 169 at 206 (the Court); *ACTV* (1992) 177 CLR 106 at 133 (Mason CJ), 156-157 (Brennan J), 234 (McHugh J).

59 See, eg, *Western Australia v Commonwealth* (1995) 183 CLR 373 at 467 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453 at 464-465 (the Court); *New South Wales v Commonwealth* (2006) 229 CLR 1 at 166-169 [370]-

45. So far as s 302CA is said to be invalid on the grounds in Queensland's amended defence, reflected in questions (e) and (f), the Commonwealth will respond to those allegations in its written reply once Queensland has articulated in its submissions the argument that it advances in support of those grounds.

(iii) The inconsistency

46. As explained at [29]–[32] above, s 275 of the Qld Electoral Act and s 113B of the Qld LG Electoral Act relevantly prohibit gifts by property developers made to or for the benefit of political parties, whether or not those gifts are to be used for federal elections or State and local government elections. Where a gift is required to be, or may be, used for the purposes of incurring "electoral expenditure" or creating or communicating "electoral matter" (as respectively defined in ss 287AB and 4AA of the Cth Electoral Act), s 302CA(1) expressly ***permits*** that gift to be given and received, subject to the operation of s 302CA(3). There is a direct inconsistency: the Cth Electoral Act expressly permits that which the Qld Electoral Act and the Qld LG Electoral Act prohibit. The Queensland scheme is inoperative to the extent of that inconsistency by reason of s 109 of the Constitution.[60]

47. Importantly, however, as explained at [42] above, s 302CA(3) qualifies s 302CA(1), thereby limiting the extent of the inconsistency. As a result, s 275 of the Qld Electoral Act and s 113B of the Qld LG Electoral Act will apply to gifts by property developers if those gifts are required to be, or are kept or identified separately in order to be, used only for a State or Territory electoral purpose. If a gift is kept or identified separately, that must occur no later than the point immediately before the gifts are so used. Section 302CA(1) will then cease to apply, with the result that, notwithstanding s 302CA(1), s 275 of the Qld Electoral Act and s 113B of the Qld LG Electoral Act are legally effective in accordance with their terms, and the gift must have complied, and must continue to comply, with them.

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[372] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also *R v Licensing Court of Brisbane; Ex parte Daniell* (1920) 28 CLR 23 at 30-31 (Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ), 32 (Higgins J).

60 To be clear, there would be no inconsistency if the Queensland legislation were drafted so as to apply only to gifts to be used *only* for Queensland electoral purposes.

D. QUESTION (A) – IMPLIED FREEDOM OF POLITICAL COMMUNICATION

48. If the arguments above are accepted, but the invalid operation of the Qld Electoral Act may be severed from its valid operation, there is a question as to whether the remaining aspects of the scheme infringe the implied freedom. The Commonwealth submits that they do not. The scheme is indistinguishable from that which was upheld in *McCloy*.[61]

49. *McCloy* relevantly involved a challenge to the validity of provisions in Div 4A of Pt 6 of the EFED Act that prohibited political donations by property developers on the basis that these provisions contravened the implied freedom. The Court held that Div 4A was not invalid on this basis, accepting that property developers were "sufficiently distinct" from other donors to warrant their specific regulation "in light of the nature of their business activities and the nature of the public powers which they might seek to influence in their self-interest".[62] The burden on the freedom was outweighed by "the public interest in removing the risk and perception of corruption", a risk which was regarded in the context of political donations and property developers as "evident".[63]

50. Subdivision 4 of Div 8 of Pt 11 of the Qld Electoral Act was deliberately modelled on Div 4A.[64] The relevant definitions in Subdiv 4 are the same or very similar to those that were in Div 4A,[65] and the prohibitions on the making, acceptance and solicitation of political donations in relation to property developers are the same in both.[66] The only relevant difference in the legislative schemes is that, when *McCloy* was decided, the EFED Act contained an express objects provision that identified an object of "help[ing] prevent corruption and undue influence in the government of the State", whereas there is no such provision in the Qld Electoral Act. That difference is immaterial, because the purpose of Subdiv 4 can readily be identified from the context, including the legislative

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61 (2015) 257 CLR 178.

62 *McCloy* (2015) 257 CLR 178 at 208 [49] (French CJ, Kiefel, Bell and Keane JJ), 250 [191], [193] (Gageler J), 292 [354] (Gordon J).

63 *McCloy* (2015) 257 CLR 178 at 221 [93] (French CJ, Kiefel, Bell and Keane JJ).

64 See Explanatory Notes, Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 (Qld) at 2, 4, 11, 16; Queensland, Legislative Assembly, *Parliamentary Debates*, 6 March 2018 at 190; Belcarra Report at 78 [**SCB 375**].

65 See, eg, the definitions of "prohibited donor" (Qld Electoral Act, s 273(1)(a); EFED Act, s 96GAA), "property developer" (Qld Electoral Act, s 273(2); EFED Act, s 96GB(1)) and "political donation" (Qld Electoral Act, s 274(1)(a)(i)-(iii); EFED Act, s 85(1)(a)-(c)). Both Acts also tied into their respective State planning and development legislative schemes.

66 Qld Electoral Act, s 275; EFED Act, s 96GA.

history and the fact that it was modelled on Div 4A.

51. While the agreed facts do not reveal Queensland to have had the same recent history of corruption associated with land development applications as New South Wales, that is no reason to find Subdiv 4 invalid. In his second reading speech, the Minister expressly relied on the New South Wales experience to illustrate the need for Subdiv 4.[67] Queensland can rely on the experience in another Australian jurisdiction to inform its legislative choices [**contra PS [30]**]. It did not have to wait before responding to that experience, particularly given the inherent likelihood that political donations from property developers will give rise to a risk and perception of official corruption. A legislature may "respond to felt necessities",[68] including "concerns" that "are more based upon inference than on direct evidence", as "it is not illogical or unprecedented for the Parliament to enact legislation in response to inferred legislative imperatives. More often than not, that is the only way in which the Parliament can deal prophylactically with matters of public concern".[69] This case is unlike *Unions (No 2)*,[70] where there was no evidence to justify the change in electoral expenditure caps.

52. As the plaintiff has not sought to reopen *McCloy*, it is sufficient to reject his arguments on question (a) for the Court to conclude that *McCloy* is indistinguishable.

PART V ESTIMATED TIME FOR ORAL ARGUMENT

53. The Commonwealth estimates that 2.5 hours will be required to present its oral argument (including in respect of matters that will be addressed in its written reply).

Dated: 6 February 2019

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67 Queensland, Legislative Assembly, *Parliamentary Debates*, 6 March 2018 at 190.

68 *McCloy* (2015) 257 CLR 178 at 251 [197] (Gageler J).

69 *McCloy* (2015) 257 CLR 178 at 262 [233] (Nettle J). See also *Brown v Tasmania* (2017) 261 CLR 328 at 421-422 [288] (Nettle J).

70 [2019] HCA 1 at [53] (Kiefel CJ, Bell and Keane JJ), [99]-[102] (Gageler J), [117]-[118] (Nettle J), [149]-[153] (Gordon J).