IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **NO B35 OF 2018**

BETWEEN: **GARY DOUGLAS SPENCE**

Plaintiff

AND: **STATE OF QUEENSLAND**

Defendant

ATTORNEY-GENERAL OF THE COMMONWEALTH'S NOTE ON SEVERANCE

Filed on behalf of the Attorney-General of the Commonwealth (intervening) by:

The Australian Government Solicitor
4 National Circuit, Barton, ACT 2600
DX 5678 Canberra

Date of this document: 29 March 2019

File ref: 18006258

Telephone: 02 6253 7147 / 02 6253 7354
Lawyer's E-mail: Vanessa.Austen@ags.gov.au / Emily.Kerr@ags.gov.au
Facsimile: : 02 6253 7303

PART I FORM OF SUBMISSIONS

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

PART II SEVERANCE

General principles

2. Section 15A of the *Acts Interpretation Act 1901* (Cth) "reverse[s] the presumption that a statute is to operate as a whole, so that the intention of the legislature is to be taken prima facie to be that the enactment should be divisible and that any parts found constitutionally objectionable should be carried into effect independently of those which fail".[1]

10

3. This "new presumption" will be displaced if "the otherwise unobjectionable provision would operate differently upon the persons, matters or things falling under it or in some other way would produce a different result",[2] or if there is "a positive indication [which] appears in the enactment that the legislature intended it to have either a full and complete operation or none at all".[3] The presumption of severability is not, however, displaced merely by "a legislative aspiration that the enactment is to operate fully in the terms in which it is expressed".[4] It is necessary to go further and conclude that the legislative intention was that, if the enactment did not operate fully in the terms in which it is expressed, it was not to operate at all.[5]

20

---

1 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 371 (Dixon J). See also *Harrington v Lowe* (1996) 190 CLR 311 at 326-328 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ); *Ruhani v Director of Police (Nauru) [No 2]* (2005) 222 CLR 580 at 586 [20] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 374 (Isaacs CJ).

2 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 371 (Dixon J).

3 *Cam & Sons Pty Ltd v The Chief Secretary of New South Wales* (1951) 84 CLR 442 at 454 (Dixon, Williams, Webb, Fullagar and Kitto JJ). See also *Knight v Victoria* (2017) 261 CLR 306 at 325 [35] (the Court); *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

30

4 *Knight v Victoria* (2017) 261 CLR 306 at 325 [35] (the Court); *Tajjour v New South Wales* (2014) 254 CLR 508 at 585 [169] (Gageler J).

5 *Knight v Victoria* (2017) 261 CLR 306 at 325 [35] (the Court).

Severance if s 302CA is beyond legislative power or contrary to *Melbourne Corporation*

4. If the Court concludes, contrary to the Commonwealth's submissions, that s 302CA(1) of the Cth Electoral Act is:

   (a) valid in so far as it applies to funds that are "required to be" used for the purposes of incurring electoral expenditure or creating or communicating electoral matter; but

   (b) invalid in so far as it applies to funds that "may be" so used;

   then the Commonwealth submits that this invalid operation can be severed. That is so whether the invalid operation arises because in that operation s 302CA(1) is beyond Commonwealth legislative power, or because it is contrary to the *Melbourne Corporation* principle.

5. In that event, all that would be required to preserve the validity of s 302CA is the severance (meaning "blue-pencilling") of the words marked in strike-through below:

> **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.~~

6. Section 15A has been recognised as having particular application "in relation to 'particular clauses, provisos and qualifications, separately expressed, which are beyond legislative power'".[6] That is the case here: the words to be severed are readily identified, and their identification follows closely from the limitation on power that (by hypothesis) results in the invalid operation of those severed words.[7] In such a case, "the question usually is whether the operation or effect of the remainder of the Act upon the persons or things to which it would apply would be changed if the clauses, provisos and qualifications held bad were excised".[8] Here, "the operation of the substantive provisions of the Act [namely, s 302CA] is correspondingly limited but their operation is otherwise unaffected".[9] Following severance of the kind identified above, s 302CA(1) would operate only to permit the giving, receiving and retention of a gift which is required to be used for the purposes of incurring "electoral expenditure" (as defined in s 287AB) or creating or communicating "electoral matter" (as defined in s 4AA). With respect to gifts of that kind, the operation of s 302CA(1) would be entirely unaffected by the severance of the identified words. It would not "operate differently upon the persons, matters or things falling under it".[10]

7. No intention to displace s 15A, so as to prevent the severance identified above, is evident in the statutory text. Nor does any such intention emerge from the extrinsic materials. To the contrary, the Revised Explanatory Memorandum accompanying the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018 (Cth) described s 302CA as ensuring that State and Territory laws do not, among other things, "restrict the use of a gift for Commonwealth electoral purposes".[11] That being a central purpose of the provision, it can be readily inferred that Parliament would have intended the balance of the section to operate even if the severed part could not. There is

---

6 *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (emphasis added).

7 See *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502-503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

8 *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652 (Dixon J).

9 *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

10 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 371 (Dixon J).

11 Revised Explanatory Memorandum, Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018 (Cth) at 51 [225].

certainly no basis to draw the contrary inference (that being the inference that would need to be drawn to exclude s 15A), because the part of s 302CA that would remain following severance would concern gifts required to be used for federal electoral purposes, and would therefore fall squarely within the stated purpose of the provision.

8. If the identified words were severed, s 302CA(1) would not apply to permit the giving, receiving or retention of an untied gift. That means the giving, receipt or retention of such a gift could be prohibited by State or Territory law, and in that event the gift would not be available to be used by a person in one of the classes identified in s 302CA. If, however, the giving, receipt or retention of an untied gift was not prohibited by State or Territory law, and such a gift was received and kept by a person in one of the classes identified in s 302CA, then s 302CA(4) would validly apply to permit the use of that untied gift for the purposes of incurring "electoral expenditure" or creating or communicating "electoral matter". Queensland accepted in its written submissions in chief at [114], and the Commonwealth agrees, that s 302CA(4) is valid and severable from any invalid operation of s 302CA(1) and (2).

9. There is no reason to sever s 302CA(3). That sub-section would not be invalid on either of the bases referred to at [4] above, so it would be invalid only if its operation cannot be separated from that of the severable words identified above. However, while the severance of those words would substantially reduce the occasions on which s 302CA(3) would operate,[12] s 302CA(3)(b)(ii) would retain a residual operation in relation to gifts that are donated on terms that require them to be used for the purposes of incurring "electoral expenditure" or creating or communicating "electoral matter" (thereby engaging s 302CA(2)(a)), but which are at any subsequent time kept or identified by the gift recipient to be used only for State or Territory electoral purposes. That is a real possibility, given that the terms on which the gift is provided may not be enforceable (as s 302CA(2)(a) expressly acknowledges). If s 302CA(3) had been severed, there would be nothing to roll back the operation of s 302CA(1) so as to permit the operation of State or Territory electoral law in cases where a gift was provided on terms that it be used for federal electoral purposes, but was later identified for use for State or Territory electoral purposes.

[12] Transcript of Proceedings, *Spence v Queensland* (HCA No B35/2018, 15 March 2019) at 248, lines 11089-11095.

10. Finally, the statutory text and extrinsic materials suggest s 302CA is intended to treat State and Territory laws alike. Therefore the Commonwealth does not contend that s 302CA should be given its full operation with respect to Territory electoral laws, if it cannot have that operation with respect to State electoral laws.

Consequences of severance

11. The declaration which the plaintiff seeks in his further amended statement of claim concerns the validity of, in effect, s 275 of the Qld Electoral Act and s 113 of the Qld LG Electoral Act. The validity of s 302CA only arises insofar as that bears upon the validity of those two Queensland provisions.

10 12. In its oral reply submissions, Queensland confirmed that it did not contend that any part of s 275 of the Qld Electoral Act (and, one infers, s 113 of the Qld LG Electoral Act) would remain operative if any part of it was inconsistent with s 302CA of the Cth Electoral Act.[13] In those circumstances, it follows that it is sufficient for the Court to resolve the challenge to the Queensland provisions for it to conclude that those provisions are inconsistent with at least some valid operation of s 302CA. As the Queensland provisions plainly purport to prohibit donations even if those donations are made on terms that require them to be used for federal electoral purposes,[14] they are inconsistent with the valid operation of s 302CA(1) identified above. The Queensland provisions are therefore invalid in their entirety, *irrespective* of whether or not s 302CA
20 validly applies to untied donations.

13. In light of the above, this is a case in which the Court should address severance as a threshold point,[15] because provided the Court holds on a final basis that severance of any potentially invalid aspect of s 302CA would be possible, it necessarily follows that s 302CA(1) has sufficient valid operation to invalidate the Queensland provisions. In those circumstances, the Court need not, and therefore should not,[16] determine the

---

13 Transcript of Proceedings, *Spence v Queensland* (HCA No B35/2018, 15 March 2019) at 269-270, lines 12054-12058.

14 As is implicitly accepted in Queensland's reading down submissions: Transcript of Proceedings, *Spence v Queensland* (HCA No B35/2018, 14 March 2019) at 194, lines 8640-8646; see also Transcript of
30 Proceedings, *Spence v Queensland* (HCA No B35/2018, 15 March 2019) at 244-245, lines 10905-10921.

15 *Knight v Victoria* (2017) 261 CLR 306 at 326 [37] (the Court); *Tajjour v New South Wales* (2014) 254 CLR 508 at 589 [176] (Gageler J).

16 *Duncan v New South Wales* (2015) 255 CLR 388 at 410 [52] (the Court).

constitutional questions that it would need to decide in order to determine whether any part of s 302CA is invalid, for to do so would go beyond what is necessary to decide this case.[17]

14. Accordingly, while the questions reserved in the special case are expressed in a form that invites the Court to determine the extent of any invalidity of s 302CA, the Court may consider it unnecessary and therefore inappropriate to answer any reserved question concerning the invalidity of s 302CA.

Metwally

15. The Commonwealth relies on its oral submissions[18] on the question of reading down in the event that, contrary to the Commonwealth's submissions, the retrospective operation of s 302CA(3)(b)(ii) is invalid by reason of any principle in *University of Wollongong v Metwally*.[19]

Dated: 28 March 2019

.....	.....	.....
Stephen Donaghue	**Perry Herzfeld**	**Christopher Tran**
Solicitor-General of	Eleven Wentworth	Castan Chambers
the Commonwealth	T: (02) 8231 5057	T: (03) 9225 7458
T: (02) 6141 4139	pherzfeld@elevenwentworth.com	christopher.tran@vicbar.com.au
stephen.donaghue@ag.gov.au		

[17] *Knight v Victoria* (2017) 261 CLR 306 at 324-325 [33] (the Court).

[18] Transcript of Proceedings, *Spence v Queensland* (HCA No B35/2018, 14 March 2019) at 155-156, lines 6894-6912.

[19] (1984) 158 CLR 447.