IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **NO B35 OF 2018**

BETWEEN: **GARY DOUGLAS SPENCE**

Plaintiff

AND: **STATE OF QUEENSLAND**

Defendant

REPLY SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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PART I FORM OF SUBMISSIONS

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

PART II REPLY

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

(i) The challenge to *Smith v Oldham* should be rejected

2. Contrary to **Qld [52]–[54]** and **Vic [63]**, the statements in *Smith v Oldham*[1] about the exclusivity of Commonwealth power with respect to federal elections were not *dicta*. One of the reasons both Barton J[2] and Isaacs J[3] gave for their conclusion that the impugned Commonwealth law was valid was that, since State Parliaments lacked power to make a law of the kind in issue, the Commonwealth Parliament must have the requisite power. The absence of State power with respect to federal elections was thus a critical step in the reasoning of a majority, and was therefore part of the *ratio*. If anything, the fact that Griffith CJ expressed a concurring view on this point without needing to do so strengthens (certainly, it does not reduce) the force of *Smith v Oldham*.

3. In light of *Smith v Oldham*, the Commonwealth does not begin with a 'presumption of exclusivity' (cf **Qld [9]**). It begins with a decision of this Court that has stood for over a century and been followed by the Queensland Court of Appeal.[4] This Court should decline to reopen and overrule that decision for the following reasons.

4. ***First***, Queensland criticises the reasons of Griffith CJ as conclusory (**Qld [55]**), but it ignores the reasons of the other members of the Court who gave more detailed reasons for concluding that the States lack power to make laws with respect to federal elections.[5]

5. ***Secondly***, Queensland asserts that 'State Parliaments do have a legitimate concern in enacting laws which may impact on federal elections' (**Qld [56]**, emphasis added). This misses the point. The Commonwealth does not submit that any law that 'may impact

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1 (1912) 15 CLR 355.

2 (1912) 15 CLR 355, 360–361.

3 (1912) 15 CLR 355, 365.

4 *Local Government Association of Queensland (Incorporated) v Queensland* [2003] 2 Qd R 354, 364 [12] (McMurdo P). See also 377–378 [70]–[72] (Williams JA).

5 Criticism of Isaacs J's judgment is unwarranted (**Vic [18]**). Justice Isaacs regarded this subject matter as beyond State legislative power because it was only by force of the Constitution's own provisions that State electoral laws applied to federal elections: see (1912) 15 CLR 355, 365.

upon' federal elections is beyond State legislative power; indeed, it accepts that even State electoral laws may impact on federal elections, so long as they do not touch or concern federal elections in more than an insubstantial, tenuous or distant way.

6. ***Thirdly***, Queensland refers to colonial legislation enacted in 1900 to facilitate the conduct of the first federal election as evidence of State interest in federal elections (**Qld [58]–[59]**). But each of those statutes is of a kind contemplated by s 9 of the Constitution, given the capacious expression 'method of choosing senators' used in that provision.[6] How often people may vote and the appointment of returning officers are essential elements in the machinery of an election. The only provision that Queensland points to as travelling beyond s 9 is s 7(2) of the *Parliament of the Commonwealth Elections Act 1900* (Qld), which purported to proscribe plural voting at an election of the House of Representatives.[7] The provision in this respect was in all likelihood invalid, but in any event plural voting was prohibited by ss 8 and 30 of the Constitution.

7. ***Fourthly***, to recognise that Queensland had no legislative power with respect to federal elections prior to Federation, and to observe that the Constitution granted it no plenary power on that subject matter, is not to limit State legislative power to those persons and things that existed prior to Federation (cf **Vic [32]**). Resort to the general proposition that 'State legislative power is plenary and applies to subject matters, bodies and polities that did not exist before [federation]' (**Qld [60]**) likewise does not assist. For subject matters brought into existence by the Constitution, the States have only those 'new legislative powers'[8] conferred upon them by the Constitution.

8. ***Fifthly***, *John v Federal Commissioner of Taxation*[9] tends strongly against overruling *Smith v Oldham* (cf **Qld [61]**). The reasoning of the members of the Court as to the exclusivity of Commonwealth power was not materially different. Further, the exclusive nature of Commonwealth legislative power has been referred to with approval on a number of subsequent occasions (**Cth [9] fn 9**), while the fact that *Smith v Oldham* did not rest upon a succession of previous cases is readily explained on the basis that it was

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6 See generally Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 425–426. They are listed as such in Note 6 to the Constitution as printed on 1 January 2012.

7 Section 9 of the Constitution would have supported that aspect of s 7(1) relating to Senate elections.

8 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 936–937. See also the cases cited in [10] below.

9 (1989) 166 CLR 417, 438–439.

decided early in the life of this Court. Indeed, the fact that the decision has stood, unchallenged, for over a century is a strong factor against its now being overruled.

(ii) Other submissions against exclusive power should be rejected

9. The other submissions advanced against the existence of exclusive Commonwealth legislative power with respect to federal elections should be rejected.

10. ***First***, while 'nothing in the text of the Constitution expressly gives the Commonwealth exclusive power to regulate federal elections' (**Qld [62]; Vic [52]; WA [17]**), the same is true of the Commonwealth's power to command the manner of exercise of federal jurisdiction,[10] or to confer jurisdiction to issue mandamus against an officer of the Commonwealth.[11] This Court's acceptance that those powers are exclusive demonstrates that the absence of express words is not determinative.

11. ***Secondly***, the paramountcy of Commonwealth laws for which s 109 of the Constitution provides is not to the point (cf **Qld [63]–[64], Vic [61]**). The existence of State legislative power is 'logically anterior' to any question of inconsistency.[12] Further, s 109 gives paramountcy to <u>all</u> Commonwealth laws. If paramountcy is substitutable for exclusivity, no Commonwealth power would need to be exclusive. The Constitution plainly was not drafted on that basis. In fact, for the reasons in **Cth [18]**, paramountcy is inadequate to secure the constitutional objective of Commonwealth control over the subject matter of federal elections. A mundane example is the unexpected need to hold a by-election: it may be practically impossible in the relevant time-frame to enact a Commonwealth law overriding a State law, particularly if that law is newly enacted[13] and even if it has a profound effect on the conduct of a federal by-election. That does not involve interpreting the Constitution by reference to extreme examples (**Vic [62]**). It simply acknowledges the limitations of the paramouncy of Commonwealth law.

12. ***Thirdly***, Queensland interprets ss 7, 9 and 29 of the Constitution in an unduly narrow fashion (**Qld [65];** cf **Vic [31]**). So much is especially clear in Queensland's treatment of s 9 as a mere drafting technique to allow the Constitution to distinguish between

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10 *Rizeq v Western Australia* (2017) 262 CLR 1, 25–26 [60]–[61] (plurality).

11 See *Ex parte Goldring* (1903) 3 SR (NSW) 260; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 620 [27], 621 [30] (Gleeson CJ, Gummow and Hayne JJ).

12 *Burns v Corbett* (2018) 92 ALJR 423, 430 [4] (Kiefel CJ, Bell and Keane JJ).

13 Eg the Qld Act was passed on 21 May 2018 shortly before the Longman (Qld) by-election on 28 July 2018.

concurrent power with respect to the method of choosing senators (the first paragraph) and exclusive State power with respect to the time and place for elections (the second paragraph). Section 9 does draw that distinction. But if that was its only object, it would have been sufficient for s 9 simply to confer (or refer to) the latter power. There would have been no need to refer at all to the former, still less to do so in the language of a conferral of power. So too, the grant of power in s 29 is neither in form nor in substance merely a clarification or exception from some other overriding constitutional provision. Even the grant of power in the second paragraph of s 7 is cast as a conferral of power.

(iii) Criticisms of Commonwealth test for identifying infringements of exclusive power

13. According to Queensland, *Bourke* offers no assistance in identifying the boundaries of the Commonwealth's exclusive power with respect to federal elections because '[t]he Commonwealth claims to have an exclusive power with respect to federal elections, whereas (as *Bourke* makes clear) s 51(xiii) does not give the States exclusive power over State banking' (**Qld [43]**). However, the Commonwealth does not contend that its legislative power with respect to federal elections is 'exclusive' in the sense in which that word is used in s 52 (which is the sense considered in *Bourke*). So much is implicitly acknowledged by **Qld [70]–[72]**, where it identifies the two tests considered in *Bourke* for giving effect to a conferral of exclusive power, neither of which is the test advanced by the Commonwealth. The Commonwealth does not contend that its legislative power with respect to federal elections is exclusive in the sense that it abstracts from another grant of power, but instead that the Constitution proceeds from the premise that the States have no legislative power with respect to federal elections except to the extent that such power is specifically granted to them by the Constitution. The result, which is that the Commonwealth alone has power to regulate federal elections (subject to those specific grants of power), is aptly described as involving 'exclusive power', albeit not in the s 52 sense (**Cth [15]–[19]**; see also **Vic [64]**).

14. Once the applicable sense of the word 'exclusive' is understood, the analogy with *Bourke* is apt, because that case required the Court to confront a situation where the Constitution recognised that a polity (the Commonwealth) had power with respect to one subject matter (banking), but not another that was a subset of it (State banking). This case presents that same formal structure: the States have power with respect to elections, but not federal elections (save in the limited respects provided for in ss 7, 9 and 29 of the Constitution). Further, the reasons for the Court's conclusion in *Bourke*

that are highlighted at **Qld [41]** apply equally in the present context: if the absence of State legislative power were limited to laws that are, in substance, about federal elections or are aimed at federal elections, States could regulate federal elections by enacting general laws about elections (as Qld has purported to do);[14] conversely, there is no support in the constitutional text or structure for the proposition that the States lack legislative power in relation to all laws to the extent that they touch or concern federal elections (as would be the case if the Commonwealth's power was 'exclusive' in the s 52 sense). The approach in *Bourke* reflects an intermediate approach, framed so as to give meaningful effect to an absence of power in a specific area, without inappropriately confining legislative power with respect to other topics. The analogy with *Bourke* is close, so the approach taken there provides a useful guide.

15. *R v Brisbane Licensing Court; Ex parte Daniell*[15] does not stand as authority against the Commonwealth's argument (**cf Qld [45]–[46]**). While the Commonwealth's exclusive power with respect to federal elections was mentioned in argument of that case, it appears not to have been argued that the Queensland legislation in question was invalid because the Queensland Parliament lacked power to make it.[16] The main argument was that Queensland legislation was inconsistent with Commonwealth legislation.[17] Given the obvious inconsistency, it is not surprising that the Court resolved the case on that basis.[18] As the point now advanced by the Commonwealth was neither argued nor decided, *Daniell* does not stand as authority against it.[19]

(iv) Queensland's proposed 'sole or dominant' test should be rejected

16. Queensland's alternative submission, that any exclusive legislative power should be limited to laws whose 'sole or dominant' character are laws with respect to federal elections (**Qld [68]–[75]**; see also **WA [39]**) should be rejected. States could scarcely be described as lacking power with respect to federal elections if all that means is that they

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14 The same issue afflicts Victoria's argument that the absence of State power is limited to laws with the 'immediate object' of controlling federal elections (**Vic [30], [62]**).

15 (1920) 28 CLR 23.

16 The Court held that the Queensland provisions were not seeking to regulate when a Senate election could be held, so any connection with federal elections was at most incidental: (1920) 28 CLR 23, 31.

17 (1920) 28 CLR 23, 25.

18 (1920) 28 CLR 23, 29 (Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ).

19 *CSR Ltd v Eddy* (2005) 226 CLR 1, 11 [13]; *Bitumen and Oil Refineries (Aust) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200, 212; *Coleman v Power* (2004) 220 CLR 1, 44 [79].

may not pass laws with the 'sole or dominant' character of laws with respect to federal elections. On that approach the absence of State power on this subject matter would be illusory. States could enact general laws with a substantial connection to federal elections falling short of the 'sole or dominant' standard (**Cth [22]**). These are the same considerations which led to the rejection of a 'sole or dominant' character test in *Bourke*. To introduce a test of this kind would effectively reintroduce into constitutional jurisprudence a 'single characterisation' approach which has long been rejected for its difficulties, fine distinctions and reasonably open differences of view.

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

17. Queensland apparently concedes that, if s 302CA of the Cth Electoral Act is valid, the impugned Queensland provisions are inconsistent with it (questions (g) and (h)). It seeks to avoid that result only by contending that s 302CA is invalid on the grounds identified in questions (d), (e) and (f). Section 302CA is not invalid on those grounds.

(i) *Metwally* (Question (f))

18. Queensland contends that s 302CA is invalid because s 302CA(3)(b)(ii) purports to override the temporal operation of s 109 contrary to *University of Wollongong v Metwally* (***Metwally***).[20] That submission should be rejected for three reasons. ***First***, even if *Metwally* was correctly decided, the principle for which it stands does not lead to the invalidity of a Commonwealth law. ***Secondly***, the operation of s 302CA does not fall within any principle for which *Metwally* stands. ***Thirdly***, if the point is reached, *Metwally* should be re-opened and overruled.

19. ***Metwally does not result in invalidity of the Commonwealth law.*** Queensland's reliance on *Metwally* to attack the validity of s 302CA is misconceived. That case turned on the operation of s 109 of the Constitution, but neither the text of s 109, nor the actual decision in *Metwally*, support the proposition that s 109 can invalidate a Commonwealth law.[21] In that regard, the answers given to the questions reserved in *Metwally* are significant. The first question was:

> Whether the enactment of the provisions of s. 3 of the *Racial Discrimination Act 1983* [inserting s 6A into the RDA] was beyond the power of the Parliament of the

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20 (1984) 158 CLR 447.

21 See also *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 465 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

> Commonwealth in so far as those provisions purport to have retrospective operation or effect for the reason that in purporting to do so they deny the operation of s. 109 of the Constitution upon an inconsistency which prior to their enactment existed between the *Racial Discrimination Act 1975* and the racial discrimination provisions of the *Anti-Discrimination Act 1977*. (emphasis added)

20. This question was 'not answered'.[22] As Murphy J explained:[23]

> Parliament is entitled to spell out its intention retrospectively and to enact what it might validly have enacted originally. The purported retrospective operation or effect of the provisions of s.3 does not deny the operation of s.109, and s. 3 is not invalid for such a reason. Strictly therefore, the answer to question 1 should be "No". To answer this, and therefore not to answer question 2 would be misleading.[24] Question 1 should not be answered. Section 109 of the Constitution is directed to the invalidity of State law, not federal law. The real question is whether the State Act is valid, taking into account the existence of *the Racial Discrimination Act* and the Amendment Act. Section 3 of the Amendment Act does not render valid the provisions of the State Act prior to the passage of the Amendment Act. (emphasis added)

It was evidently because the first question assumed (incorrectly) that the validity of the Commonwealth law was in issue that Gibbs CJ (with whom Brennan and Deane JJ relevantly agreed) said: 'The questions are not felicitously phrased'.[25]

21. In contending that *Metwally* leads to the invalidity of s 302CA (**Qld [77(a)]**), Queensland must explain how s 109 can render a Commonwealth law invalid. Not only does *Metwally* not support that proposition, it is directly contrary to it. On that basis alone, no 'principle derived from' *Metwally* can result in the invalidity of s 302CA.

22. ***Metwally does not apply.*** Further or alternatively, any principle derived from *Metwally* is not engaged in this case. After this Court had concluded that a State law was inconsistent with the *Racial Discrimination Act 1975* (Cth) (**RDA**) because the RDA covered the field,[26] the Commonwealth amended the RDA to state that it was not intended, and was to be deemed never to have been intended, to exclude or limit the operation of State and Territory laws. The deeming provision operated retrospectively in the true sense of that word.[27] A narrow majority of this Court held that a Commonwealth law could not retrospectively remove an inconsistency that had resulted

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22 (1984) 158 CLR 447, 487.

23 (1984) 158 CLR 447, 470.

24 Question 2 was expressly premised on the answer to Question 1 being "yes".

25 (1984) 158 CLR 447, 459.

26 *Viskauskas v Niland* (1983) 153 CLR 280.

27 See generally *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1, 15 [26]–[27], 21 [48]–[50].

in a State law being rendered inoperative by reason of s 109 of the Constitution.[28]

23. Section 302CA is not a law of the kind at issue in *Metwally* because, when construed in the manner explained in **Cth [43]**, it does not purport retrospectively to remove inconsistency between Commonwealth and State law. Instead, it confers a freedom from inconsistent State law that is contingent or defeasible, depending on subsequent events.

24. *Metwally* says nothing about such a law,[29] not least because a reason for the majority's conclusion — the importance of an ordinary citizen knowing which of two inconsistent laws he or she is required to observe[30] — is absent. As explained in **Cth [43]**, the contingent or defeasible nature of the permission conferred by s 302CA(1) means that any citizens who make a donation that they permit to be used for State or Territory purposes knows that they may be subject to State or Territory electoral law. If he or she wishes to avoid that prospect, he or she can set terms (whether or not enforceable: cf **Qld [88]**) that the donation be used only for federal electoral purposes (s 302CA(2)(a)).

25. ***Metwally should be re-opened and overruled.*** If the point is reached, the reasoning of the minority in *Metwally* should be preferred to that of the majority.[31] The minority's reasoning proceeds upon an orthodox understanding of three principles. ***First***, the Commonwealth Parliament can make retrospective laws.[32] ***Secondly***, the Commonwealth Parliament can address the relationship between Commonwealth and State laws expressly.[33] ***Thirdly***, the operation of s 109 turns upon a close examination of the meaning of the Commonwealth and State laws that are said to be inconsistent.[34] Consistently with those principles, Mason J, who wrote the leading dissent,[35] reasoned that 'there is no objection to the enactment of Commonwealth legislation whose effect is not to contradict s 109 of the Constitution but to remove the inconsistency which attracts the operation of that section'.[36] '[I]n removing the inconsistency, s 6A does not

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28 (1984) 158 CLR 447, 457 (Gibbs CJ), 469 (Murphy J), 474 (Brennan J), 478 (Deane J).

29 See *Doyle v Queensland* (2016) 249 FCR 519, 530 [48] (the Court).

30 (1984) 158 CLR 447, 458 (Gibbs CJ); see also 477 (Deane J).

31 See Leeming, *Resolving Conflicts of Laws* (2011), 175–176; Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015), 626–628; Lee, "Retrospective Amendment of Federal Laws and the Inconsistency Doctrine in Australia" (1985) 15 *Federal Law Review* 335, 342–343.

32 *Mabo v Queensland* (1988) 166 CLR 186, 211–212; *Polyukovich v Commonwealth* (1991) 172 CLR 501.

33 See *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2, [35] (plurality).

34 *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2, [34] (plurality).

35 See also (1984) 158 CLR 447, 485–487 (Dawson J), 471–472 (Wilson J).

36 (1984) 158 CLR 447, 460.

attempt to contradict the operation of s 109. What the statutory provision does is to eliminate the basis on which s 109 can operate'.[37]

26. The majority judgments have long been criticised, including because they involve 'some confusion regarding "truth", "reality" and "fictions" together with the view that s 109 is to a degree a safeguard for the citizen'.[38] For example, as Gibbs CJ said:[39]

> [T]he Parliament has attempted to exclude the operation of s 109 by means of a fiction. The short answer to the submissions of the respondents is that the Parliament cannot exclude the operation of s 109 by providing that the intention of the Parliament shall be deemed to have been different from what it actually was and that what was in truth an inconsistency shall be deemed to have not existed.

The difficulty with that reasoning is that, once the possibility of retrospective legislation is acknowledged, it must be accepted that the law applicable to past events can change (whether as a result of the retrospective repeal of a law, an amendment, or a provision deeming a law always to have had a different legal meaning). That is not a fiction. It simply means that a court that was previously required to apply law X with respect to acts committed at a particular time may subsequently, by reason of retrospective legislation, be required to apply law Y in respect of those same events. Once the validity of retrospective legislation is accepted, a court deciding a case after a retrospective amendment to legislation has commenced cannot properly find inconsistency to exist just because—prior to that amendment—inconsistency would have existed. That is not to assert that legislation can override s 109 of the Constitution. It is simply to recognise that the operation of s 109 depends on the legal meaning of intersecting Commonwealth and State laws, so that if that meaning is changed with retrospective effect then that necessarily alters how s 109 operates on those laws.[40]

27. Contrary to the reasoning of the majority, s 109—a provision designed to achieve the paramountcy of Commonwealth law—is not a partial protection from retrospective laws. If it were, it would create a limitation on Commonwealth legislative power of variable and uncertain content, as the limitation would vary depending on whether and

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37 (1984) 158 CLR 447, 461 (Mason J).

38 Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015), 627. See also Rumble, "Manufacturing and Avoiding *Constitution* Section 109 Inconsistency: Law and Practice" (2010) 38 *Federal Law Review* 445, 459–460.

39 (1984) 158 CLR 447, 457. See also 474 (Brennan J) and 478 (Deane J).

40 Leeming, *Resolving Conflicts of Laws* (2011), 175.

how the various States chose to legislate. The better view is that s 109 is not 'a source of protection to the individual against the unfairness and injustice of a retrospective law'.[41]

28. There is no reason not to overrule *Metwally*. ***First***, it does not rest upon a principle carefully worked out in a significant succession of cases. To the contrary, the majority judgments sit uneasily with the orthodox principles identified at [25] above. ***Secondly***, there was a difference in the reasons of the majority. Justices Murphy and Deane (but not Gibbs CJ) considered that the Commonwealth could retrospectively occupy a field that had previously been vacated.[42] ***Thirdly***, *Metwally* does not achieve a useful result and is apt to cause considerable inconvenience. Any concern for those subject to the law to know which laws apply to them is imperfectly protected, in part because the reasons of at least Murphy and Deane JJ leave room for the Commonwealth and the States, acting together, to achieve the same outcome, and in part because the real source of this concern is retrospective laws. *Metwally* prevents Commonwealth legislation that is designed to re-enliven State laws that the Commonwealth had not intended to render inoperative. There is no reason to thwart that beneficial outcome. ***Fourthly***, *Metwally* has not been acted on in a manner which militates against its reconsideration.

29. ***Reading down.*** Even if a retrospective Commonwealth law cannot have the effect of reviving a State law by amending or repealing a previously inconsistent Commonwealth law, at most that could be relevant to the efficacy of s 302CA(3)(b)(ii). If any question of validity arises (which is denied), it is limited to that operation of s 302CA, having regard to s 15A of the *Acts Interpretation Act 1901* (Cth) (cf **Qld [88], [93]**).

(ii) Lack of connection to a head of power (Question (d))

30. If the Commonwealth's power with respect to federal elections is exclusive, Queensland contends that: (a) the States have exclusive power with respect to State elections; and (b) s 302CA is beyond power because its dominant character is that of a law with respect to State elections (**Qld [94]–[104]**). Queensland submits that the Commonwealth cannot make a law with the sole or dominant character of a law with respect to State elections, because the States have 'exclusive legislative power over the

41 (1984) 158 CLR 447, 463 (Mason J).

42 (1984) 158 CLR 447, 469 (Murphy J), 480 (Deane J); cf 457 (Gibbs CJ).

regulation of persons with regards to that State's elections' as the 'residue' left exclusively to the States (**Qld [98], [100]–[101]**). That argument should be rejected.

31. ***First***, the Commonwealth's power to legislate with respect to federal elections is conferred by s 51(xxxvi), read with ss 10 and 31 (**Cth [12]**). In determining whether those provisions support s 302CA, there is no reason to apply anything other than the ordinary approach to characterisation of federal laws. Thus, 'if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice';[43] and '[i]f a law fairly answers the description of being a law with respect to two subject matters, one a subject matter within s 51 and the other not, it is valid notwithstanding there is no independent connection between the two subject matters'.[44] Applying this approach, s 302CA is a law with respect to federal elections (**Cth [41]–[44]**).

32. Section 302CA does not depend upon any incidental power (**Vic [68]–[72]**); it has a sufficient connection with federal elections.[45] Further, its purpose is not to 'make it more difficult for the States to regulate political donations to candidates or parties fielding candidates in a State election' (cf **Vic [71]**). Nor is its 'immediate object … to control the States and their people in the exercise of their constitutional functions' (cf **Qld [105]**). Both propositions are untenable, given s 302CA's focus on gifts that may be used for the dominant purpose of influencing electors in a federal election.

33. ***Secondly***, acceptance of Queensland's submission would reintroduce the doctrine of reserved powers, albeit within the specific context of electoral laws (**Qld [98]**).

34. ***Thirdly***, even if Queensland's approach to characterisation were adopted, there is no foundation for its submission that the 'sole or dominant' character of s 302CA is that of a law with respect to State elections. On its terms, it applies only to donations which either must be or may be used for the purposes of incurring 'electoral expenditure' or creating or communicating 'electoral matter', both of which are defined as involving expenditure for the 'dominant purpose' of influencing the way electors vote in federal

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43 *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 104 [142] (plurality).

44 *Work Choices Case* (2006) 229 CLR 1, 103–104 [142] (plurality).

45 To the extent that Victoria suggests (**Vic [48]**) that the Commonwealth's power to regulate elections under ss 10, 31 and 51(xxxvi) is confined to 'the machinery for elections', it misreads *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 220. The power to regulate elections under ss 10, 31 and 51(xxxvi) is broad and extends to regulating political donations: see cases cited in Cth [44].

elections (s 302CA(1)(e)). Further, the freedom which s 302CA(1) confers with respect to giving, receiving or retaining a gift is disapplied if a donation is required to be used only for, or is in fact kept or identified separately in order to be used for, a State electoral purpose (s 302CA(3)). Additionally, the freedom it confers to 'use' a gift is further confined to gifts actually used for the dominant purpose of influencing the way electors vote in a federal elections. Plainly, s 302CA(1) is not solely or predominately concerned with donations for State electoral purposes. To the contrary, it is predominantly concerned with federal elections.

(iii) *Melbourne Corporation* principle (Question (e))

35. *Melbourne Corporation* 'requires consideration of whether impugned legislation is directed at States, imposing some special disability or burden on the exercise of powers and fulfilment of functions of the States which curtails their capacity to function as governments'.[46] The States contend that it is essential to their capacity to function as governments that they have substantially unfettered choice in the regulation of gifts bearing on State electoral processes, even if they choose to regulate such gifts in a way that directly affects the funds available for use in federal elections (**Qld [111]–[112]; NSW [26]; Vic [84]; SA [47]–[48]; WA [50]–[51]**). They assert that *Melbourne Corporation* protects their capacity to regulate their own electoral processes even at the cost of depriving the Commonwealth of that same capacity with respect to federal elections. That follows because they assert that the Commonwealth cannot permit donations that the States have chosen to prohibit, even when they are made and used for the dominant purpose of influencing federal elections (such donations plainly falling within s 275 of the Qld Electoral Act and s 113B of the Qld LG Electoral Act).

36. If *Melbourne Corporation* extends so far, it 'would subvert not only the position established by the decision in the *Engineers' Case* but also s 109 of the *Constitution*'.[47] Section 302CA represents a reasonable accommodation of competing interests. For the following reasons, it does not infringe the *Melbourne Corporation* principle.

37. ***First***, s 302CA(1) focuses on gifts that are required to be, or may be used 'for the

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46 *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548, 609 [130] (Hayne, Bell and Keane JJ). See also *Austin v Commonwealth* (2003) 215 CLR 185, 265 [168] (Gaudron, Gummow and Hayne JJ).

47 *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548, 609 [131] (Hayne, Bell, Keane JJ).

dominant purpose of influencing the way electors vote in a [federal] election'.[48] Its legal operation is to permit persons and political entities to give and receive donations for that purpose. It is not directed at the States, and it does not impose a special disability or burden upon them. Where a gift is required to be used, or is kept or identified for use, or is in fact used, only for a State electoral purpose (as defined), then s 302CA(1) will not apply. As the note and example to s 302CA(3)(b) make plain, compliance with State law concerning the giving, receiving or retaining of gifts is required for any gift that is kept or identified (at any time) for a State electoral purpose. Further, s 302CA(4) ensures that States are free to regulate the use of any gift, except those actually used for the dominant purpose of incurring federal electoral expenditure.[49] As such, s 302CA leaves substantial room for State laws to operate. That demonstrates that it does not seek to control 'political discussion relating to State elections',[50] and that Queensland is incorrect in asserting that it renders compliance with its electoral laws 'entirely voluntary, even in relation to gifts ultimately used for a State election' (**Qld [111]**). To the extent gifts deposited in mixed accounts may fall outside of s 302CA(3) (a matter requiring factual inquiry), the States may prevent the use of such accounts if they wish.[51] And, if the capacity to "re-order its affairs" to avoid the operation of a State law means that there is no curtailment or interference with the Commonwealth's powers (**Vic [41]**), the same must be true for the States.

38. While it may be accepted that 'political communication cannot be categorised as purely "State" or "Commonwealth" communication' (**SA [6]**), that does not deny that it is possible to draw a workable line between State and federal elections. Legislation in several States (including South Australia) draws that very line.[52] That reveals the error in drawing upon the interrelationship of political communication to conclude that s 302CA 'preclude[s] the States from prohibiting or regulating any political donations that are ultimately used to make electoral communications' (**SA [39]**). That submission assumes that a gift will not fall within the exception in s 302CA(3) for gifts used 'only for a State electoral purpose' unless the purpose itself can only be a State purpose

48 See the definition of 'electoral matter' in s 4AA.

49 As is acknowledged at **Tas [7]**; cf **Qld [111], SA [38]–[39]**.

50 Cf **NSW [24]**, quoting *ACTV* (1992) 177 CLR 106, 163–164 (Brennan J).

51 Several States already provide for separate campaign accounts for State elections [**SCB 48**].

52 See, eg, *Electoral Act 1985* (SA), ss 130C, 130K(1), 130L(b), 130M(1a); *Electoral Act 2002* (Vic), ss 207F(1), 207F(3), 217D(4); *Electoral Funding Act 2018* (NSW), ss 24(2), 37(2)(e), 37(7).

(being a small category). But that is not so. 'State electoral purpose' is defined in s 287 as 'a purpose relating to a State, Territory or local government election (and, to avoid doubt, does not include the purpose of incurring electoral expenditure or creating or communicating electoral matter)'. The words in parenthesis exclude only expenditure or communications with the dominant purpose of influencing electors in a federal election (ss 4AA, 287A). So, a gift will be kept 'only' for a 'State electoral purpose' if it is kept for use in relation to a State election, even if the gift is used in a State election to fund communication on a topic that is also relevant to federal electoral choices (provided that it is not for the dominant purpose of influencing votes in a federal election).

39. ***Secondly***, the fact that s 302CA(3) seeks to limit any impact of s 302CA upon the States does not exacerbate its effect on the States (cf **Qld [112]**). Leaving room for State laws to operate cannot be conflated with an impermissible 'induce[ment]' to a State to alter its own laws.[53] In any area of concurrent power, Commonwealth law may confine the capacity of State laws to operate validly, and will therefore constrain State choice. For that reason, *Melbourne Corporation* cannot be understood as preserving to the States unfettered choice to implement their 'chosen regulatory model', particularly if the chosen model impacts upon the Commonwealth's legitimate interests.

40. It cannot be essential for the States to prohibit donations to federal political parties,[54] even where the donation is to be used in relation to a federal election, simply because those parties also have, as an object, the election of candidates to State Parliaments.[55] If the capacity of the States to regulate such gifts is critical their functioning as governments, then it is to be expected that an equivalent capacity would be critical to the Commonwealth. Yet the States assert that *Melbourne Corporation* denies the Commonwealth this very capacity. The asymmetry is startling, as is the attempt to use *Melbourne Corporation* to reverse the supremacy of Commonwealth law arising from s 109. Also striking is Victoria's submission that regulating political donations to candidates or political parties in a federal election is not even a law with respect to federal elections (**Vic [69]**), yet regulating political donations for State electoral

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53 Cf *Austin v Commonwealth* (2003) 215 CLR 185, 265 [170] (Gaudron, Gummow and Hayne JJ).

54 Section 302CA does not extend to donations to parties that do not have any purpose or activity related to federal elections: see s 4 (definition of 'political party'); cf **Vic [75]**.

55 Several States ignore this consequence by limiting their submissions to donations that 'might' or 'may' be used for federal elections, thus underplaying the Qld law (**Vic [36], [57]; NSW [18]; SA [20]; Tas [6]–[7]**).

purposes is so vital to the 'integrity' and 'autonomy' of State institutions that any reduction in State legislative choices over that subject substantially impairs its capacity to function as a government (**Vic [84]**).

41. ***Thirdly***, Queensland understates the necessity for the Commonwealth to have the power to preserve a uniform system of regulation for federal elections (**Qld [109]**). Achieving uniformity was a purpose for conferring broad legislative power on the Commonwealth Parliament with respect to federal elections (**Cth [18]**). Queensland would deny the efficacy of that conferral not only by dismissing its exclusive character, but also by denying the Commonwealth the capacity to legislate to preserve the uniformity of the system of regulation it enacts. That highlights the inconsistency in the arguments in this proceeding. On the one hand, Queensland and the interveners point to s 109 to conclude that the Constitution can safely countenance concurrent power with respect to federal elections (**Qld [43], [63]–[64]**). But they then invoke *Melbourne Corporation* to deny s 109 meaningful operation in the context of State electoral laws.

42. ***Fourthly***, s 302CA does not 'discriminate[] against the States in the relevant sense', or indeed in any sense at all (cf **Qld [113]**). Section 302CA is a law of general application, directed to persons or entities generally. The fact that the Cth Electoral Act expressly deals with its relationship with State ***laws*** which regulate the same persons or entities does not amount to discrimination against the States as ***polities***.

43. ***Fifthly***, the argument that the Commonwealth contravenes the *Melbourne Corporation* principle because s 302CA renders inoperative a law regarded by Queensland as reasonably necessary to protect against the risk and perception of corruption should be rejected (**Vic [79]–[83]; NSW [23]–[26]; SA [40]**). The fact that a State may legitimately burden freedom of political communication for a particular purpose does not immunise any and every State law pursuing that purpose from inconsistent Commonwealth legislation, particularly where a State law affects the judgments made by the Commonwealth Parliament as to its own electoral system.

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