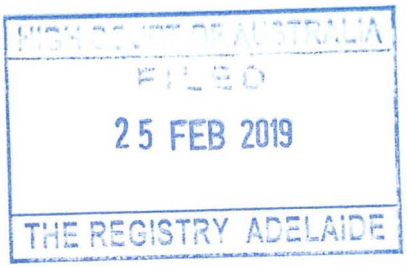
IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **No. B35 of 2018**

BETWEEN: **GARY DOUGLAS SPENCE**

Plaintiff



and

10 **STATE OF QUEENSLAND**

Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

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Part I: Certification

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

Part II: Basis for intervention

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendant.

Part III: Leave to intervene

3. Not applicable.

Part IV: Submissions

4. In summary South Australia submits:

10 4.1. the Commonwealth's power to make laws that provide for political donations to organisations whose objectives or activities include the promotion of the election to a House of a State Parliament and a House of Federal Parliament of candidates they endorse is not exclusive of State legislative power;

4.2. there is no recognised doctrine of intergovernmental immunities that would render Parts 3 and 5 of the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018* (Qld) (**the Queensland amendments**) beyond the power of the Parliament of Queensland;

4.3. on the assumption that s 302CA of the *Commonwealth Electoral Act* (**CE Act**) can be characterised as a law with respect to federal elections supported by ss 10, 31

20 and 51(xxxvi) of the Constitution, it is nonetheless invalid for infringing the *Melbourne Corporation* principle.

Introduction

5. The division of legislative powers, in respect of matters relating to the election of representatives to the various Parliaments of the Commonwealth and the States, within the federal system of government established by the Constitution, occurs in the context of the increasing integration of social, economic and political matters in Australia.[1] The resulting political system is one in which the use of co-operative executive and legislative arrangements makes it difficult to identify subjects not capable of discussion as matters which do, or could potentially concern, a federal government or political

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[1] *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions NSW No 1***) at 549 [22] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571-572; *Wotton v Queensland* (2012) 246 CLR 1 at 15 [26].

matter.[2] It is a system in which national political parties, which operate across the federal divide, deal with issues at various levels of government and co-ordinate responses.

6. The public acceptance of a party's policies at one level of government may have ramifications for the acceptance of those policies at another level.[3] Support for a party at one level of government may influence the public's support for the party more widely.[4] This complex interrelationship between levels of government, issues common to State and federal governments and the levels at which political parties operate has rendered inevitable the conclusion that political communications cannot be categorised as purely "State" or "Commonwealth" communications: discussion of matters at a State, Territory or local level might bear upon the choice that the people have to make in federal elections.[5]

7. Still further, it has been accepted that political donations have an effect on the flow of funds to political parties and in that sense affect their political communications.[6] Bearing all of these factors in mind, it is not possible to separate the effect of political donations for State election purposes from Commonwealth purposes, at least in so far as those donations are made to national political parties and bear on their political communications. An election campaign of a national political party during a State election that is funded by political donations may influence the way electors vote at the State election, and at the same time influence the public's support for that party when operating federally. The converse is also true. It follows that both the States and the Commonwealth have a concern in regulating political donations to organisations whose objects or activities include the promotion of the election to a House of a State Parliament and a House of Federal Parliament of candidates they endorse.

8. The effect of the Attorney-General for the Commonwealth's submissions in the present case is that the Constitution creates a clearly discernible division of legislative power between the Commonwealth and the States: the Commonwealth Parliament has

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[2] *Unions NSW No 1* at 549 [22] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *Hogan v Hinch* (2011) 243 CLR 506 at 543 [48].
[3] *Unions NSW No 1* at 549 [24] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[4] *Unions NSW No 1* at 549 [24] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[5] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 122 citing *Australian Capital Television* (1992) 177 CLR 139 (Mason CJ), at 168-169 (Deane and Toohey) and 215-217 (Gaudron J). See also *Hogan v Hinch* (2011) 243 CLR 506 at 543 [48] (French CJ); *Unions No 1* at 549 [20]-[27] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 582 [152] (Keane J), cited with apparent approval in *Brown v Tasmania* (2017) 261 CLR 328 at 399 [238] (Nettle J).
[6] *McCloy v State of New South Wales* (2015) 257 CLR 178 (***McCloy***) at 273 [271] (Nettle J).

exclusive legislative power to make laws with respect to "federal elections"; the States have no power to enact an electoral law that touches or concerns a federal election, in any of its operations, unless the connection with federal elections is insubstantial, tenuous or distant.[7] On this argument, all that is needed is careful drafting to respect the boundaries of that division of legislative powers; s 302CA of the CE Act being a case in point. However, that submission fails to account for the States' real concern in regulating political donations to all political entities whose objects or activities include the promotion of the election to a House of a State Parliament of candidates they endorse. The principal object of analysis on the questions stated is not a law of the State that seeks to regulate federal elections *per se*, but rather a law of the State that seeks to regulate its own elections.

9. Against that background, and for the reasons that follow, South Australia submits that, whether or not there may be some aspects of the Commonwealth's power to make laws with respect to federal elections that are exclusive, the power to make laws that provide for political donations to organisations whose objects or activities include the promotion of the election to a House of a State Parliament and a House of Federal Parliament of candidates they endorse is not exclusive of State legislative power.

Question (a) – Are the amendments made to the *Electoral Act 1992* (Qld) by Part 3 of the *Local Government Electoral (Implementing Stage 1 of Belcarra) and other Legislation Amendment Act 2018* (Qld) invalid (in whole or in part and, if in part, to what extent) because they impermissibly burden the implied freedom of political communication on governmental and political matters, contrary to the Commonwealth Constitution?

10. South Australia adopts the written submissions of the Attorney-General for the Commonwealth at [48] to [52] and the Defendant at [12] to the effect that the impugned provisions are indistinguishable from those this Court held to be valid in *McCloy*. In addition, the nature of the risk of a New South Wales law burdening the implied freedom to the maintenance of the system of representative and responsible government established by the Constitution is the same as the nature of the risk posed by an equivalent Queensland law. There is then no constitutional basis for denying Queensland the ability to rely on the New South Wales experience to justify a burden of the same nature.

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[7] Commonwealth's Submissions (**CS**) at [26].

Questions (b) and (c) – Are the Queensland amendments beyond the power of the Parliament of Queensland on the basis that they impermissibly intrude into an area of exclusive Commonwealth legislative power?

11. Chapter I of the Constitution vests Commonwealth legislative power in the Parliament of the Commonwealth which is comprised of the Queen, a Senate and a House of Representatives.[8] Sections 7 and 24 of the Constitution are declarations that the Parliament of the Commonwealth is to be a system of representative government: Senators in the Senate are to be directly chosen by the people of the State and members of the House of Representatives are to be directly chosen by the people of the Commonwealth. Those provisions are to be interpreted as referring to an electoral process,[9] though the Constitution does not require the provision of any particular electoral system.[10]

12. In this context, ss 9, 10, 31, 51(xxxvi) and 51(xxxix) of the Constitution are to be seen as conferring legislative power to make laws regulating federal elections, that is, to make laws to facilitate the carrying out of the requirement of representative government. Subject to the Constitution, s 51(xxxvi) of the Constitution confers authority on the Federal Parliament to make laws with respect to *"matters in respect of which this Constitution makes provision until the Parliament otherwise provides."* The Federal Parliament otherwise provided by the *Commonwealth Franchise Act 1902* and the *Commonwealth Electoral Act 1902* (and now the CE Act), replacing the laws in force in each State relating to elections for the more numerous Houses of the Parliaments of the States which had applied since federation, as nearly as practicable, to elections in the States of members of the Senate and House of Representatives.[11]

13. The Commonwealth's legislative power to regulate federal elections is plenary so far as that subject matter permits.[12] The Commonwealth's legislative power has been held to extend to laws *"relating to the franchise, the requirement to enrol to vote, the process*

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[8] Constitution, s 1.
[9] *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 231-232 (McHugh J).
[10] *McGinty v Western Australia* (1996) 186 CLR 140 cited in *Langer v the Commonwealth* (1996) 186 CLR 302 (***Langer***) at 323 (Dawson J).
[11] Constitution, ss 10 and 31 respectively.
[12] *Langer v the Commonwealth* (1996) 186 CLR 302 (***Langer***) at 317 (Brennan CJ) citing *Smith v Oldham* (1912) 15 CLR 355 at 363 (Isaacs J). See also *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 113 [262] (Gordon J); *ACTV* at 220 (Gaudron J) citing *Smith v Oldham* (1912) 15 CLR 355 at 362-363 (Isaacs J), *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23, 31 (Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ), at 32 (Higgins J), *Fabre v Ley* (1972) 127 CLR 665 at 669, *Attorney-General (Cth) (Ex rel. McKinlay) v The Commonwealth* (1975) 135 CLR 1 at 57-58 (Stephen J).

for electing senators and members and the exercise of a right of an elector to vote."[13] It includes regulation of the conduct of persons in connection with elections, for example, by laws to prevent intimidation and undue influence,[14] and laws to prevent interference with or undermining the electoral system that Parliament has chosen for an election.[15] Further this Court has described the electoral process contemplated by s 7 and 24 as including *"all those steps which are directed to the people electing their representatives – nominating, campaigning, advertising, debating, criticizing and voting."*[16] However, the Commonwealth's power to regulate elections is not unlimited.[17] As with the Commonwealth's other legislative powers, it is subject to certain express and implied constitutional limitations as discussed further below at [28] to [51].

14. For the most part, the specific legislative powers conferred on the Commonwealth Parliament are concurrent with the general and residual legislative powers of the State Parliaments. The Constitutions of each State were continued by s 106 of the Commonwealth Constitution, and the plenary legislative power of the States saved by s 107, unless exclusively vested in the Commonwealth Parliament or withdrawn from the Parliament of the States by the Constitution. Windeyer J described the effect of s 107 as *"an expression of an element that is implicit in any federal system in which defined powers are granted to the central authority and the undefined residue remains with the constituent provinces."*[18] The distribution of legislative power under the Constitution is not based on a concept of mutual exclusiveness; the powers granted to the Commonwealth Parliament by s 51 of the Constitution remain available, so far as their subject matter permits, for exercise by the States, subject to the terms of s 109 of the Constitution in the event of inconsistency with a Commonwealth law.

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[13] *Murphy & Anor v Electoral Commissioner & Anor* (2016) 261 CLR 28 (***Murphy***) at 114 [264] (Gordon J).
[14] *Langer* at 334 (Toohey and Gaudron JJ) citing *ACTV* at 142-143 (Mason CJ).
[15] *Langer* at 339 (McHugh J) citing *Smith v Oldham* (1912) 15 CLR 355 at 359-360, 302-363 and *ACTV* at 157, 220, 225-226, 234 (McHugh J).
[16] *ACTV* at 232 (McHugh J).
[17] *ACTV* at 234 (McHugh J) rejecting the dictum in *Fabre v Ley* (1972) 127 CLR at 669.
[18] *R v Phillips* (1970) 125 CLR 93 at 116. His Honour noted that s 107 and s 109 together state the result of the distribution of legislative powers, exclusive and concurrent, between the Commonwealth and the States. See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 213; *Re Residential Tenancies Tribunal of New South Wales; Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 440; *APLA Ltd v Legal Services Commissioner* (NSW) (2005) 224 CLR 322 at 366 [80] (McHugh J).

15. The Constitution does not describe the Commonwealth Parliament's power to legislate with respect to federal elections as an exclusive power.[19] Any exclusivity can only arise if an implication to that effect is necessary having regard to the special and particular nature and the subject matter of the legislative power concerned.[20]

16. It is not necessary for the Court to decide in this case whether, and if so the extent to which, the Commonwealth's legislative power to regulate certain aspects of federal elections is exclusive, nor the test for determining whether a State law intersects with the boundary of any such exclusivity. Even if the Commonwealth has exclusive power in respect of some aspects of federal elections, it does not follow that its power is exclusive of the States as to all matters within the ambit of the Commonwealth's powers. The Constitution allows for legislative powers in relation to certain matters to have both exclusive and concurrent aspects. In *Carter v Egg and Egg Pulp Marketing Board*[21] (***Carter***) this Court accepted that the defence power of the Commonwealth is not exclusive of the powers of the States as to all matters within its ambit.

17. Whether or not the Commonwealth has exclusive power to regulate some aspects of federal elections, an implication that the Commonwealth has exclusive power to regulate political donations received by organisations whose objects or activities include the promotion of the election to a House of a State Parliament and a House of Federal Parliament of candidates they endorse is not necessary.

18. First, this is not a matter of the States having *"an absence of State legislative power"* because *"no State Parliament had under its own Constitution power to legislate as to federal elections"*.[22] It is beyond doubt that at federation the States had legislative power to regulate their own elections. Indeed, there is no reason to conclude that what constituted a law of the States regulating their electoral processes was any narrower than the Commonwealth's electoral processes as considered above at [13]. The States'

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[19] The powers which are described by the Constitution as exclusive are the Commonwealth Parliament's power to make laws with respect to Commonwealth places, matters relating the Commonwealth Public Service, customs, excise and bounties and territories surrendered to the Commonwealth by a State.

[20] Selway, Bradley '*The Constitution of South Australia*', Federation Press (1997), 69-70. See, e.g., *Carter* at 571-572 (Latham CJ); 582-583 (Starke J); 597-598 (Williams J).

[21] (1942) 66 CLR 557 at 572 (Latham CJ), at 582-583 (Starke J) and at 589-590 (McTiernan J), who in so holding did not follow statements in previous decisions of the Court to the effect that the defence power is exclusive to the Commonwealth. See also at 597-598 where Williams J (with whom Rich J agreed) held that while the Commonwealth alone can legislate on subjects which relate exclusively to defence, such as the raising, maintaining, and control of the armed forces of the Commonwealth, the ambit of the defence power is wide enough to embrace "many subjects which do not appertain exclusively to defence" and the States have power to legislate on such subjects not to defend themselves but to carry out the civil policy of the government.

[22] cf *Smith v Oldham* (1912) 15 CLR 355 at 360 (Barton J).

power to make such laws depended not on federal elections being a possible subject for regulation, but rather on such laws relating to the conduct of State elections and, accordingly, being laws for the peace, order and good government of the States.

19. It follows that the Commonwealth's reliance on the observation of Latham CJ in *Carter* 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"* is misplaced.[23] That observation was made in explaining why some aspects of the defence power are exclusive whereas other aspects are concurrent. There is no question that the States had the power to regulate the giving of political donations prior to federation.[24]

20. Second, the States' continuing ability to make laws to regulate political donations is not dependent on there being an express grant of legislative power (such as that found in ss 7, 9 and 29 of the Constitution). The States have power to make such legislation on the basis that laws relating to the conduct of State elections are laws for the peace, order and good government of the States. The mere fact that the political donations regulated by State laws may now also be of concern to federal elections (because they are made to organisations whose objects or activities include the promotion of the election to a House of a State Parliament and a House of Federal Parliament of candidates they endorse), does not alter their character as laws regulating State elections or the States' legislative competence to make such laws.

21. Third, the Commonwealth's legislative powers are paramount by reason of s 109 of the Constitution. Therefore, any assertion that the Commonwealth power in relation to federal elections needs to be, in all aspects, exclusive so as to ensure a uniform federal scheme (assuming for present purposes that was, in fact, the intention) cannot be maintained. The Commonwealth is free to legislate for the conduct of federal elections, including in a manner that covers the field and thereby excludes any inconsistent State legislation, so long as the Commonwealth law is within power and does not infringe any express or implied limitations.

22. Finally, acceptance of the Attorney-General for the Commonwealth's submissions would significantly impair the States' ability to regulate the conduct of their elections and thereby undermine their existence as independent constituent parts of the

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[23] CS at [16].
[24] See *Australian Constitutions Act 1850*, 13 & 14 Vict c 59, s XIV.

federation. It would render the States unable to regulate any aspect of their own elections which also concerns a federal election, unless the connection with federal elections is insubstantial, tenuous or distant. This does not involve an appeal to notions of *"federal balance"*.[25] Rather, an implication that the Commonwealth's power to make laws with respect to federal elections is in all aspects exclusive is not consistent with the Constitution read as a whole (much less necessary), for the Constitution *"predicates* [the States] *continued existence as independent entities"*.[26] A construction of the Constitution that is consistent with the continued existence of the States as independent entities must be preferred over one that is not.

10 23. For these reasons, the powers of the Commonwealth and States to make laws with respect to the regulation of political donations to organisations whose objects or activities include the promotion of the election to a House of a State Parliament and a House of Federal Parliament of candidates they endorse is properly regarded as concurrent. Of course, once it is established that there is an inconsistency between a valid law of the Commonwealth and a valid law of the State, the law of the Commonwealth will prevail to the extent of that inconsistency by virtue of s 109 of the Constitution.

Questions (b) and (c) – Are the Queensland amendments beyond the power of the Parliament of Queensland on the basis of an implied doctrine of intergovernmental
20 **immunities?**

24. Majorities of this Court in *The Commonwealth of Australia & Anor v Cigamatic* (***Cigamatic***)[27] and *Re Residential Tenancies Tribunal (NSW); Ex Parte Defence Housing Authority* (***DHA***)[28] have recognised that State laws may not modify the nature, or deny the existence, of the executive capacities of the Commonwealth.

25. The plaintiff relies upon the Commonwealth's immunity from State laws but contends that the Court does not need to determine the limits to the Commonwealth's immunity. That submission ignores the fact that the Court has already determined those limits. The distinction drawn by the majority in *DHA*, between the executive capacities of the

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[25] cf *New South Wales v Commonwealth* (2006) 229 CLR 1 at [195]-[196] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[26] *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82 (Dixon J). See also *Austin v The Commonwealth* (2003) 215 CLR 185 (***Austin***).
[27] (1962) 108 CLR 372.
[28] *DHA* (1997) 190 CLR 410.

Commonwealth and their exercise, marks the boundary of the necessary implication.[29] Thus while the States may not legislate in a manner inconsistent with the grant of powers under s 61 of the Constitution, it is not necessary, in the relevant sense, that the exercise of those powers be immune from the operation of State laws. Where a State law regulates the exercise of Commonwealth executive power, then, subject to s 118 of the Constitution, the Commonwealth Parliament may legislate inconsistently with any State regulation.[30]

26. The plaintiff's submission that the Commonwealth's immunity from State laws *"would be at least as extensive as that which applies to protect the States"* must be rejected.[31] The limitation on the States' legislative power recognised in *Cigamatic* and *DHA* is distinct from the limitation on the Commonwealth's legislative powers distilled from the principles in *Melbourne Corporation.*

27. That must be so, for each arises by necessary implication having regard to the unique position the Commonwealth and States occupy in the Constitution. The implied curtailment of the otherwise plenary legislative power of the States considered by the Court in *Cigamatic* and *DHA* may be said to arise by necessity because, in its absence, State legislatures would be capable of making laws that alter, or even abolish, those executive capacities that have been expressly conferred by s 61 of the Constitution.[32] No further implication is necessary as the Commonwealth may, subject to any express or implied limitation, legislate inconsistently with any State regulation. In no conceivable way can the Queensland amendments be said to infringe the immunity recognised in *Cigamatic* and *DHA*.

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[29] *DHA* (1997) 190 CLR 410 at 438-439, 442-443, 447 (Dawson, Toohey and Gaudron JJ), see also at 424 (Brennan CJ).

[30] The Commonwealth Parliament is empowered to make laws with respect to *"matters incidental to the execution of any power vested by this Constitution in ... the Government of the Commonwealth ... or in any department or officer of the Commonwealth"* by s 51(xxxix), and s 109 will have the effect of rendering inconsistent State laws inoperative. *DHA* (1997) 190 CLR 410 at 446 (Dawson, Toohey and Gaudron JJ).

[31] PS [57].

[32] The necessity of drawing an implication to protect against the abrogation of Commonwealth executive capacities is most readily apparent in relation to the prerogatives: a State law that abrogates a prerogative power of the Commonwealth necessarily singles out, or discriminates against, the Commonwealth, in a manner regarded by some to be offensive to the federal compact (see, e.g., *Queensland Electricity Commission* (1985) 159 CLR 192; *DHA* (1997) 190 CLR 410) given that the prerogatives of the Commonwealth are by their very designation as such *"singular and eccentrical"* (Blackstone, Commentaries on the Laws of England, Volume I, Chapter 7, page 232).

Question (e) - Is s 302CA of the CE Act invalid (in whole or in part and, if in part, to what extent) because it purports to operate in a manner that is contrary to the principle derived from *Melbourne Corporation v Commonwealth* (1974) 74 CLR 31?

28. South Australia makes no submission on the characterisation of s 302CA of the CE Act as a law with respect to federal elections supported by s 10, 31 and 51(xxxvi) of the Constitution. On the assumption that s 302CA can be so characterised, it is nonetheless invalid for infringing the *Melbourne Corporation* principle.[33] That principle protects the States from the exercise of federal legislative power that would impair the capacity of the States to function as independent constituent parts of the federation. The reason for the limitation is to *"protect the structural integrity of the State components of the federal framework, State legislatures and State executives."*[34]

29. It is a practical question whether the Commonwealth law curtails or interferes with the capacity of the States to function.[35] The assessment begins with analysis of the form, substance and actual operation of the Commonwealth law and then requires consideration of whether the law imposes a special burden on States or curtails the States' capacity to function as governments.[36]

Form, substance and operation of s 302CA of the CE Act

30. Section 302CA(1) of the CE Act permits a person or entity (**a donor**)[37] to give a gift to, or for the benefit of, a political entity,[38] a political campaigner[39] or a third party[40] **(a gift recipient)** that is *"required to be, **or may be**, used for the purposes of incurring electoral expenditure or creating or communicating electoral matter"*.[41] It also permits a gift recipient (and persons or entities acting on their behalf) to receive and retain any such gift made to or for their benefit. The breadth of the term *"gift recipient"* in s 302CA(1)(a) extends the provision to regulate the giving, receipt and retention of gifts to and by political entities, political campaigners and third parties (as defined), including political parties registered under the CE Act and State branches of such

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[33] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (***Melbourne Corporation***).
[34] *Queensland Electricity Commission v State of Queensland* (1985) 159 CLR 192 at 207 (Gibbs CJ) citing *Koowarta v Bjelke Petersen* (1982) 153 CLR 168 at 216 (Stephen J).
[35] *Melbourne Corporation* at 75 (Starke J).
[36] *Austin* at 249 [124] (Gaudron, Gummow and Hayne JJ) citing *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 240; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 249-250; *Industrial Relations Act Case* (1996) 187 CLR 416 at 500.
[37] In most circumstances, s 302CA(1) will not apply to permit gifts by foreign donors – see s 302CA(1)(d) and s 302D of the CE Act.
[38] See CE Act, s 4.
[39] See CE Act, s 287.
[40] See CE Act, s 287.
[41] See s 302CA(1)(e) and s 302CA(4) (emphasis added).

registered political parties whose objects or activities include the promotion of the election to a House of a State Parliament of candidates they endorse (many, if not all, of whom will also be registered under State electoral laws).

31. Section 302CA(1) applies where the gift is required to be, or *may* be, used for incurring *"electoral expenditure"* or creating or communicating *"electoral matter"*. While those concepts have as their defining feature a dominant purpose connected with a federal election,[42] it would be a mistake to assume s 302CA(1) only applies where a gift is in fact for a dominant purpose connected with a federal election.

32. The terms on which a donor chooses to give the gift assume central importance. Section 302CA(2) in effect deems that a gift, or part of a gift, is required to be, or *may be*, used for the purposes of incurring electoral expenditure or creating or communicating electoral matter where the donor sets express terms that *require* the gift to be used for those purposes (even if those terms are unenforceable); where a gift is given on broader terms that *allow* the gift, or part of the gift, to be used for those purposes; and where a gift is given *without terms* expressing the purpose for which the gift can be used. Accordingly, a gift need not in fact be intended to be used for a federal election in order for the terms of s 302CA(1) to be engaged.

33. The permission conferred by s 302CA(1) operates despite any State or Territory law and so confers on donors and gift recipients an *"immunity"*[43] from State and Territory law. The immunity conferred by s 302CA(1) to give, receive and retain a gift does not apply where s 302CA(3) is engaged and a donor is then only permitted to give a gift, and a gift recipient permitted to receive or retain a gift, where to do so is not inconsistent with a State law.[44]

34. However, the circumstances in which the immunity does not apply on account of s 302CA(3) are limited. The exceptions will not be satisfied unless a gift is required by a donor to be used, or is kept or identified separately by a gift recipient to be used, *only*

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[42] *Electoral matter* means matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in a federal election, including by promoting or opposing a political entity, to the extent that the matter relates to a federal election or a member of the House of Representatives or a Senator: s 4AA of the CE Act. *Electoral expenditure* has a corresponding meaning, namely expenditure incurred for the dominant purpose of creating or communicating electoral matter except in some limited circumstances not presently relevant: s 287 and 287AB of the CE Act.

[43] House of Representatives, Revised Explanatory Memorandum, *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018*, page 51.

[44] South Australia assumes for the purpose of this submission, without necessarily accepting, that s 302CA(3) is effective in dis-applying or lifting the permission conferred by s 302CA(1) – Cth Submissions, [42] and [43].

for a State or Territory electoral purpose. That is to say, the immunity is lifted when the terms of a gift set by a donor *explicitly require* the gift, or part of the gift, to be used *only* for a State or Territory electoral purpose; where the effect of a State or Territory law is to *require* the gift, or party of the gift, to be kept or identified separately in order to be used *only* for a State or Territory electoral purpose; and where the gift recipient *chooses* to keep or identify the gift, or part of the gift, separately in order to be used *only* for a State or Territory electoral purpose.[45]

35. It follows that the immunity in s 302CA(1) will not lift where a gift, or part of a gift, is required to be used, or is kept or identified separately to be used, for any purpose other than a State or Territory electoral purpose.[46] The expression *"State or Territory electoral purpose"* means "*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)*".[47] As the words *"relating to"* are of wide import the definition appears broad.[48] However, the carve-outs of purposes of incurring *"electoral expenditure"* or creating or communicating *"electoral matter"* exclude from the definition any gifts for the dominant purpose of federal elections.[49] Gifts that are for that dominant purpose but also have related or incidental State or Territory purposes are not included in the carve-out.

36. Further, use of the term *"only"* before the expression *"State or Territory electoral purpose"* means that the immunity in s 302CA(1) is not lifted where a gift is required to be used, or is kept or identified separately to be used, for both a State or Territory electoral purpose *and* another purpose. That means that if the dominant purpose for which a gift is required to be used, or is kept or identified to be used, relates to a State or local government election, but the gift also has some other purpose, however

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[45] Section 302CA(6) contemplates that the carve-out will apply where a gift is deposited in an account as an amount to be used *only* for a State or Territory purposes and amounts paid out of that account are *only* paid for state or territory electoral purposes.

[46] South Australia assumes, without necessarily accepting, that a recipient will necessarily identify a gift for that use no later than the moment immediately prior to using it – Cth Submissions at [41].

[47] See CE Act, s 287(1).

[48] *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 374 (Toohey and Gaudron JJ).

[49] In some circumstances where a gift is used to communicate matter that expressly promotes or opposes a political party registered under the CE Act, s 4AA(3) of the CE Act will operate to presume (unless the contrary is proved) that the gift is used to communicate "electoral matter"; that is, the matter communicated will be taken to have been communicated for the dominant purpose of influencing the way electors vote in a federal election. In addition, if a gift is used by a political party registered under the CE Act to incur expenditure "in relation to" a federal election, the expenditure will be taken to be "electoral expenditure" by virtue of s 287AB(3) of the CE Act.

incidental, the immunity will not lift. That includes, for example, a purpose connected to a federal election.

37. In addition the immunity will not lift if the purpose for which a gift is required to be used, or is kept or identified to be used, is related neither to a federal election nor a State or local government election. For example, a gift from a non-foreign donor to a political party registered under both the CE Act and a State electoral law, which is given without terms expressing the purpose for which the gift is to be used and which is ultimately used for the purpose of providing personal benefits to its members, would be immune from regulation by State laws and permitted by s 302CA(1) of the Act.

38. Sections 302CA(4) and 302CA(5) operate differently. Those provisions regulate the *use* of gifts rather than the giving, receipt and retention of gifts. Whilst s 302CA(4) permits gift recipients to use gifts, and that permission operates by reference to the actual purpose for which the gift is used, rather than a purpose deemed from its terms, the carve-out for any associated regulation by State laws is again so narrow as to deprive the States substantially of the ability to regulate the use of gifts bearing on State electoral processes. By s 302CA(5), State laws apply only where the effect of a State law is to require the gift to be kept or identified separately in order to be used *only* for a State or Territory electoral purpose. It follows that unless a State or Territory electoral law requires a gift to be used *only* for a State or Territory electoral purpose and no other purpose, the section enables a gift recipient to circumvent a State prohibition on using a gift by channeling the gift through a federal election campaign.

39. Overall, the States are limited in their ability to prohibit and regulate (e.g., by imposing caps on) the giving, receipt, retention and use of a gift made to political parties registered under the CE Act (or State branches thereof) whose objects or activities include the promotion for election to a House of a State Parliament of candidates they endorse unless it is clear that it is to be used *only* for a State or Territory electoral purpose and no other purpose. In practice, given the matters discussed above at [5]-[7], this is likely to preclude the States from prohibiting or regulating any political donations that are ultimately used to make electoral communications, because the electoral communications of a national political party will in most cases be intended to influence the way electors vote at the State election and also be intended to influence the public's support for that party federally and thereby influence the way electors vote

at a federal election. It is likely only to be a narrow band of purposes that can clearly be discerned as being *only* State electoral purposes capable of regulation by State laws.[50]

40. The deprivation of the States' capacity to legislate is not overcome by reference to some continuing ability to establish an electoral scheme which operates to require the quarantining of funds for State electoral purposes. It is a contradiction of terms to suggest that a State law that prohibits the giving, receipt, retention and use of a gift will also require that gift to be kept or identified separately in order to be used *only* for a State or Territory electoral purpose. In any event, for a State law to trigger s 302CA(3)(b)(i) and thereby be effective in lifting the immunity conferred by s 302CA(1), that law must require gifts to be quarantined so as to be used *only* for a State or Territory electoral purpose. It follows that in order for State laws to operate, the States must severely restrict the purposes for which gifts made to political entities can be used.

41. Ultimately, underlying the operation of s 302CA is the incorrect assumption either that the States cannot validly legislate to prohibit or regulate gifts to political entities that may be used for the purpose of a State election and a purpose in some way related to a federal election (or some other unrelated purpose), or that the States have no interest in prohibiting or regulating gifts to political entities for such purposes. Plainly neither assumption is correct for the reasons discussed above at [5]-[7] and [11]-[23].

Capacity of the States to function as governments: impairing the States' ability to secure the integrity of their essential organs by protecting them from corruption and undue influence

42. Having regard to the form, substance and operation of s 302CA of the CE Act as analysed above, s 302CA impermissibly curtails the States' capacity to function as independent constituent parts of the federation.

43. It is critical to the existence and nature of the States that they be free to protect their essential organs – the Governor, the Parliament, the Ministry and the Supreme Court[51] – from corruption and undue influence. As this Court has previously accepted, political donations can and do pose a threat of corruption and undue influence and may *"sap the*

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[50] That may include, for example, the use of political donations to cover the costs of complying with State electoral laws, including costs associated with the nomination of candidates.

[51] *State Chamber of Commerce and Industry v The Commonwealth* (1987) 163 CLR 329 at 362-363 (Brennan J). See also *Austin* at 264 [166] (Gaudron, Gummow and Hayne JJ).

vitality, as well as the integrity, of the political branches of government"[52] and *"threaten the quality and integrity of governmental decision-making."*[53]

44. The Commonwealth law impairs the States' capacity to protect the Parliament and the Ministry as institutions, and the officers who comprise those institutions, from corruption and undue influence by depriving the States of their ability to legislate to regulate or prohibit political donations to organisations whose objects or activities include the promotion of the election to a House of a State Parliament of a candidate or candidates endorsed by them, except where those gifts are to be used *only* for a State or Territory electoral purpose and no other purpose. A gift made to an organisation whose objects or activities include the promotion of the election to a House of a State Parliament of a candidate or candidates endorsed by them does not necessarily pose any lesser threat to the integrity of the essential organs of a State because it is used to fund a federal election campaign or is used for personal gain.

45. The impairment is significant. The Commonwealth law does not affect the capacity of the States in the carrying out of any one particular function; rather, the integrity of the Parliament and the Ministry pervades the exercise of *all* of the States' functions. The Commonwealth law thereby *"represent*[s] *such an intrusion upon the functions or powers of the States as to be inconsistent with the constitutional assumption about their status as independent entities".*[54]

46. The interconnected nature of Parliament, its members, their duties and the effect of corruption and undue influence was highlighted by Brennan J, as he then was, in *ACTV*:[55]

> *"The Parliament chosen by the people – not the courts, not the Executive Government – bears the chief responsibility for maintaining representative democracy in the Australian Commonwealth. Representative democracy, as a principle or institution of our Constitution, can be protected to some extent by decree of the Courts and can be fostered by Executive action but, if performance of the duties of members of the Parliament were to be subverted by obligations to large benefactors or if the parties to which they belong were to trade their commitment to published policies in exchange for funds to conduct expensive campaigns, no curial decree could, and no executive action would, restore representative democracy to the Australian people."*

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[52] *McCloy* at 204-205 [36] (French CJ, Kiefel, Bell and Keane JJ).
[53] *McCloy* at 205 [38] (French CJ, Kiefel, Bell and Keane JJ).
[54] *Clarke v Commissioner of Taxation of the Commonwealth of Australia & Anor* (2009) 240 CLR 272 (***Clarke***) at 298 [32] (French CJ).
[55] *ACTV* at 156.

47. That statement was made in the context of representative democracy at the federal level. It also aptly describes the risk of subversion of the functioning of the Parliament of the State by the undermining of its integrity by corruption and undue influence. Preventing State legislatures from prohibiting political donations by particular donors leaves the States weak to defend their legislative organs as institutions representative of their people. That is so whether or not evidence suggests that particular donor(s) will increase the risk of corruption and undue influence in State Parliaments. To impair the capacity of the States to defend the integrity of their Parliaments in response to felt necessities (and otherwise in accordance with Constitutional limitations on power) is a direct attack on the integrity with which the States continue to function.

48. The significance of the impairment can be highlighted in three particular aspects. First, the Commonwealth law not only impairs the *"liberty of action of the State"* [56] to select the manner and method of protecting their essential organs from the threat of corruption and undue influence, but it deprives the States of their capacity to adopt the best means of protecting those organs from this threat. As the plurality observed in *McCloy,* the nature of the risk of clientelism, in particular, *"is that it is neither easily detected nor practical to criminalise"* such that *"*[t]*he best means of prevention is to identify and to remove the temptation".*[57] In practice, the line between gaining access through political donations to exert persuasion and undue influence is not necessarily bright.

49. Second, several States have legislated to prohibit political gifts by particular persons and entities that pose a threat of corruption and undue influence,[58] including in New South Wales after evidence brought to light the reality of the risk, which is indicative of the significance to the States of their capacity to do so.[59]

50. Third, the centrality of this concern to the integrity of State institutions is illustrated by the Commonwealth's own legislation. In Division 3 of Part XX of the CE Act, the Commonwealth has prohibited gifts from certain donors in order to *"reduce perceived and actual foreign influence on Australian political actors by restricting the ability of foreign money to finance domestic campaigns, and reduce opportunities for election*

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[56] *Austin* at 265 [170] (Gaudron, Gummow and Hayne JJ); *Clarke* at 297 [31] (French CJ).
[57] *McCloy* at 205 [37] (French CJ, Kiefel, Bell and Keane JJ) citing *McConnell v Federal Election Commission* (2003) 540 US 93 at 153.
[58] Special Case Book at 159-160 [101]-[104].
[59] *McCloy* at 208 [51] (French CJ, Kiefel, Bell and Keane JJ).

funding to be used for private gain."[60] The Commonwealth has on the one hand taken steps to proscribe certain gifts to secure the integrity of its own institutions and on the other hand purported to deprive the States of their ability to do the same.

51. For these reasons s 302CA is invalid to the extent it deprives the States of the ability to regulate or prohibit donations made to or for the benefit of organisations whose objects or activities include the promotion of the election to a House of a State Parliament of a candidate or candidates endorsed by them.

Other questions

52. As to the remaining questions stated for the opinion of the Full Court, South Australia adopts the submissions of the Defendant at [78] to [83] and [88] to [93] relying on the decision in *University of Wollongong v Metwally*[61] in answer to the contention of the plaintiff that the Queensland amendments are invalid under s 109 of the Constitution.

Part V:

53. South Australia estimates that 20 minutes will be required for the presentation of oral argument.

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[60] House of Representatives, Revised Explanatory Memorandum to the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*, p 4.
[61] (1984) 158 CLR 447.