IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B35 of 2018

BETWEEN:

GARY DOUGLAS SPENCE
Plaintiff

and

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STATE OF QUEENSLAND
Defendant

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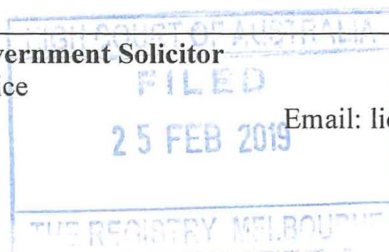
SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)



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PART I: CERTIFICATION

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

PARTS II & III: INTERVENTION

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

PART IV: ARGUMENT

A. INTRODUCTION AND SUMMARY

3. A State Parliament plainly has the power to enact a law directed to protecting the integrity of State and local government decision-making, including a law prohibiting certain persons from donating money to a candidate for a State election, or to a political party that fields candidates for a State election, or prohibiting the candidate or party from receiving the donation. The principal question in this case is whether the fact that a political party also fields candidates in a federal election means that a State law of the kind described above does not apply to the party or its candidates. Victoria contends that the answer to that question is "no": the State law is valid and is capable of applying to a party that fields candidates in a federal election, and to that party's candidates for State elections. That is so even where the Commonwealth purports to exclude the operation of the State law.

4. In summary, Victoria makes the following submissions.

5. ***Question (a)***: Subdivision 4 of Div 8 of Pt 11 of the *Electoral Act 1992* (Qld) (**Qld Electoral Act**) does not infringe the implied freedom of political communication. It is indistinguishable from the regime held to be valid in *McCloy v New South Wales*.[1]

6. ***Questions (b) and (c)***: The regulation of federal elections is not a subject matter of legislative power that is "by [the] Constitution exclusively vested in the Parliament of the Commonwealth".[2] Certain limits on State legislative power may have the effect that a State cannot legislate with respect to some matters relating to federal elections. Those limits are:

   (1) the requirement that a State law have the necessary connection with the State;

   (2) the limit recognised in *Commonwealth v Cigamatic Pty Ltd (in liq)*;[3] and

   (3) a limit derived from the principle recognised in *Melbourne Corporation v Commonwealth*.[4]

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1 (2015) 257 CLR 178.

2 Constitution, s 107.

3 (1962) 108 CLR 372.

4 (1947) 74 CLR 31.

In those ways only, Commonwealth legislative power in respect of particular matters relating to federal elections may, in a sense, be described as "exclusive". However, none of those limits prevented the Queensland Parliament from enacting the provisions of the Qld Electoral Act or the *Local Government Electoral Act 2011* (Qld) (**Qld LG Electoral Act**) that are at issue in this case.

7. ***Question (d)*:** Section 302CA of the *Commonwealth Electoral Act 1918* (Cth) (**Cth Electoral Act**) is beyond the legislative power of the Commonwealth because it is neither within the main power to make laws with respect to the election of senators and members of the House of Representatives,[5] nor incidental to that power.[6]

10 8. ***Question (e)*:** Section 302CA of the Cth Electoral Act infringes the principle recognised in *Melbourne Corporation*. It curtails the Queensland Parliament's ability to protect the integrity of decision-making in State and local government, and thus interferes in a substantial manner with the exercise of State constitutional power.

9. ***Question (f)*:** Section 302CA(3)(b)(ii) of the Cth Electoral Act infringes the principle identified in *University of Wollongong v Metwally*,[7] with the result that s 302CA in its entirety is invalid (because s 302CA(3)(b)(ii) cannot be severed). However, Victoria contends that *Metwally* should be overruled. The reasoning of the minority in that case was correct. If *Metwally* is overruled, then the answer to question (f) is "no".

B. QUESTION (A) — THE IMPLIED FREEDOM

20 10. Victoria submits that question (a) should be answered "no", for the reasons given by Queensland and the Commonwealth, and adds the following submissions.

11. The plaintiff seeks to distinguish *McCloy* on the basis that Queensland has not had the same recent history of corruption associated with planning applications as New South Wales, and therefore cannot justify the burden that the Qld Electoral Act imposes on political communication [**PS [30]**]. Victoria accepts that a State that asserts a justification for a burden on political communication imposed by its legislation bears the persuasive onus of establishing that justification.[8] But, in order to discharge that onus, it is not necessary in every case for the State to demonstrate that the mischief that the legislation seeks to address has in fact arisen within the territorial limits of the State.

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5 Constitution, s 51(xxxvi), read with ss 10 and 31.

6 By parity of reasoning with *Victoria v Commonwealth* (1957) 99 CLR 575 (***Second Uniform Tax Case***), 614 (Dixon CJ).

7 (1984) 158 CLR 447.

8 *Unions NSW v New South Wales* [2019] HCA 1 (***Unions (No 2)***), [93] (Gageler J). See also [45], [53] (Kiefel CJ, Bell and Keane JJ), [151] (Gordon J). See further *McCloy* (2015) 257 CLR 178, 201 [24] (French CJ, Kiefel, Bell and Keane JJ).

(1) In some cases, the State may discharge its persuasive onus without adducing any evidence to support its asserted justification. The justification may be "self-evident", or may "appear with relative clarity without the need for extensive if indeed any evidence on the point",[9] or may appear from the legislative record.

(2) In some cases, the State may discharge its onus by placing material before the court showing a <u>risk</u> that a particular matter will eventuate. A State need not wait for a particular risk to manifest before passing a law to ameliorate that risk. It may act "prophylactically", in response to "inferred legislative imperatives".[10]

(3) In some cases, particularly those concerned with risk, the State may discharge its onus by adducing evidence of events in other jurisdictions. This Court has never held that a State may only justify a burden by reference to matters that have occurred within the State. There is no reason to impose such a requirement.

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12. It is open to Queensland to justify the burden that Subdiv 4 of Div 8 of Pt 11 of the Qld Electoral Act imposes on political communication by placing before the Court material concerning the history of corruption associated with planning applications in New South Wales. That evidence shows, among other things, that political donations from property developers give rise to both a risk and a perception of official corruption. There is nothing relevantly different about New South Wales which might indicate that the same risk and perception of corruption would not arise in Queensland. To the contrary, the evidence of the New South Wales experience is consistent with:

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(1) the inherent likelihood that political donations from property developers will give rise to a risk and perception of corruption;[11]

(2) the evidence that such a risk and perception already exist in Queensland at a local government level [**SCB 149 [79(g)]**];[12] and

(3) the evidence of past corruption in Queensland at the State government level [**SCB 136 [76(a)], QS [17]**].

C. QUESTIONS (B) & (C) — EXCLUSIVE POWER

13. For the reasons that follow, Victoria submits that questions (b) and (c) should each be answered "no".

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9 *Unions (No 2)* [2019] HCA 1, [117] (Nettle J). See also [101] (Gageler J).

10 *McCloy* (2015) 257 CLR 178, 262 [233] (Nettle J). See also 251 [197] (Gageler J); *Brown v Tasmania* (2017) 261 CLR 328, 421-422 [288] (Nettle J), 463 [422] (Gordon J).

11 See *McCloy* (2015) 257 CLR 178, 208 [49]-[50] (French CJ, Kiefel, Bell and Keane JJ), 250 [193] (Gageler J), 292 [354] (Gordon J).

12 It is not to the point that this evidence relates to planning applications considered by local governments, rather than the State government. The same was true of the evidence relied on in *McCloy*: see *McCloy* (2015) 257 CLR 178, 209 [52] (French CJ, Kiefel, Bell and Keane JJ).

14. The plaintiff and the Commonwealth submit that provisions of the Qld Electoral Act and the LG Electoral Act introduced by Parts 3 and 5 of the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018* (Qld) (**donation provisions**) are invalid to the extent that they "touch or concern" federal elections because Commonwealth legislative power with respect to federal elections is "exclusive". The plaintiff also relies on an intergovernmental immunities argument.

C-1 "Exclusive" power

15. There are several possible reasons why Commonwealth legislative power with respect to a subject matter may be described as "exclusive". Those reasons include that:

10 (1) in the words of s 107 of the Constitution, the subject matter "is by [the] Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State";

(2) State laws that deal with the subject matter are beyond State legislative power, by reason of the operation of one or more limits on that power (other than the limit referred to in paragraph (1)); or

(3) there is a valid Commonwealth law that is properly construed as an exhaustive statement of the law with respect to the subject matter, so that s 109 of the Constitution renders invalid a State law to the extent it deals with the subject matter.

16. Only by identifying <u>why</u> Commonwealth legislative power with respect to a particular
20 subject matter is said to be "exclusive" is it possible to determine whether a State law that touches or concerns that subject matter is beyond State legislative power.

17. Decisions of this Court that have described Commonwealth legislative power with respect to federal elections as "exclusive" have either directed attention to an absence of State legislative power with respect to that subject matter, or have offered no explanation for describing Commonwealth legislative power in that way.

18. In *Smith v Oldham*, Griffith CJ said that the power to make laws for the regulation of federal elections was an "exclusive power" because "[t]he matter is one in which the States as such have no concern".[13] Isaacs J said that "[t]he subject matter of the present enactment is transparently beyond the competency of the State to control",[14] but gave no explanation
30 of why that was so. Similarly, Barton J said:[15]

> Since the Federal Parliament has legislated upon the subject its legislation relating to elections has displaced that of the States, and its power to pass such legislation is exclusive, because **no State Parliament had under its own Constitution power to legislate as to federal elections**.

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[13] (1912) 15 CLR 355, 358.

[14] (1912) 15 CLR 355, 365.

[15] (1912) 15 CLR 355, 360 (emphasis added).

19. In *Nelungaloo Pty Ltd v Commonwealth*, Dixon J said, by way of *obiter*:[16]

> Paragraph (xxxvi) confers a power by reference to a number of sections of the Constitution concerning matters with respect to which the Parliament may provide: see ss 3, 7, 10, 22, 24, 29, 30, 31, 34, 39, 46, 47, 48, 65, 66, 87, 96, 97. They are **not matters with which the States could have any concern** and, if a common boundary between the Federal power over them and State power is conceivable at all, it would, I suppose, be found to be a boundary between a State power and a Federal exclusive power.

20. On the few subsequent occasions when members of this Court have described Commonwealth legislative power with respect to federal elections as "exclusive",[17] none has explained (or needed to explain) why that was so.

21. Significantly, no member of this Court has held that Commonwealth legislative power with respect to federal elections is "exclusive" because, in the words of s 107 of the Constitution, the subject matter of federal elections is "by [the] Constitution exclusively vested in the Parliament of the Commonwealth".

22. Victoria submits that, to the extent that Commonwealth legislative power with respect to federal elections can accurately be described as "exclusive", it is because of the operation of the limits on State legislative power identified in Part C-2 below. That proposition is consistent with the text and structure of the Constitution, and with authority.

23. Victoria submits that, for the reasons given in Part C-3 below, the donation provisions do not infringe any of those limits on State legislative power. Those provisions are therefore within the otherwise plenary power of the Queensland Parliament to enact. Whether those provisions are invalid by reason of s 109 of the Constitution is a separate question.

24. By contrast, the Commonwealth submits that its legislative power with respect to federal elections is "exclusive" because "the entire subject matter of the regulation of federal elections is ... 'exclusively vested in the Parliament of the Commonwealth'" **[CS [20]]**. For the reasons given in Part C-4 below, the Court should not accept that proposition.

C-2 Limits on State legislative power

25. As noted above, decisions of this Court that have described Commonwealth legislative power with respect to federal elections as "exclusive" have either directed attention to an absence of State legislative power with respect to that subject matter, or have offered no explanation for describing Commonwealth legislative power in that way.

26. Beyond referring to federal elections as a matter with which the States could not have "any concern",[18] even the decisions of this Court that have directed attention to an absence of

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[16] (1952) 85 CLR 545, 564 (emphasis added).

[17] See *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 14 [8] (French CJ); *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 113 [261] n 326 (Gordon J). See also *Abbotto v Australian Electoral Commission* (1997) 71 ALJR 675, 678-679 (Dawson J).

[18] *Nelungaloo* (1952) 85 CLR 545, 564 (Dixon J); *Smith* (1912) 15 CLR 355, 358 (Griffith CJ).

State legislative power have not explained what limits on State legislative power might prevent a State Parliament from making laws that touch or concern the election of senators and members of the House of Representatives.

27. Victoria submits that there are three relevant limits on State legislative power that might have that effect:

(1) the requirement that a State law have the necessary connection with the State;[19]

(2) the limit recognised in *Cigamatic*; and

(3) a limit derived from the principle recognised in *Melbourne Corporation.*

28. The first two of those limits have long been recognised by this Court. It is necessary to say
10 something further about the third.

29. This Court has not yet held a State law to be invalid on the basis that it infringes the principle recognised in *Melbourne Corporation* (as distinct from the narrower limit recognised in *Cigamatic*). However, members of the Court have referred to that principle as giving rise to a limit on State legislative power.[20] Expressed at a high level of abstraction, it may be accepted that State legislative power would not extend to making a law which denied a fundamental premise of the Constitution: that there will continue to be a Commonwealth government separately organised.[21]

30. For the purposes of this case, it is not necessary to determine the precise ambit of that limit. Rather, it is enough to accept, for the purposes of argument, that, in the absence of an
20 express grant of power, a State law that disclosed "'an immediate object of controlling' the processes by which the people of the [Commonwealth] elect their governments"[22] would infringe that limit.

31. Understood in that way, the limits on State legislative power referred to above are capable of explaining why a State Parliament could not make a law "professing to control a Commonwealth department",[23] or a law in respect of "the functions of the Governor-

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[19] See *Constitution Act 1867* (Qld), s 2. See also *Constitution Act 1975* (Vic), s 16, which provides that "[t]he Parliament shall have power to make laws in and for Victoria in all cases whatsoever".

[20] See *Melbourne Corporation* (1947) 74 CLR 31, 61 (Latham CJ), 70, 74-75 (Starke J), 99 (Williams J); *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253, 288 (McHugh and Gummow JJ); *Commonwealth v Western Australia* (1999) 196 CLR 392, 435-436 [122] (Gummow J); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 (***DHA***), 507-508 (Kirby J). See also Leslie Zines, *The High Court and the Constitution* (5ed, 2008), 506-507. Cf *Re Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 520 (Latham CJ).

[21] *Austin v Commonwealth* (2003) 215 CLR 185, 246 [115] (Gaudron, Gummow and Hayne JJ).

[22] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (***ACTV***), 242 (McHugh J), quoting *Melbourne Corporation* (1947) 74 CLR 31, 79 (Dixon J).

[23] *Carter v Egg and Egg Pulp Marketing Board for the State of Victoria* (1942) 66 CLR 557, 571 (Latham CJ).

General in relation to the summoning and dissolution of the Commonwealth Parliament",[24] or a law "which purported to interfere with the system of voting in federal elections".[25] They are also capable of explaining why, in the absence of an express grant of power, a State Parliament could not make a law for dividing the State into divisions and determining the number of senators to be chosen for each division (s 7), prescribing the method of choosing the senators for the State (s 9), or determining the divisions in the State for which members of the House of Representatives may be chosen (s 29). They either lack the necessary connection with the State, or purport to restrict or modify the executive capacities of the Commonwealth,[26] or purport to control the processes which determine the
10 composition of the Commonwealth Parliament.

32. The Commonwealth suggests a further limit on State legislative power, derived from the fact that "federal elections as a possible subject of legislation did not exist" at Federation **[CS [16]]**. No such limit should be recognised by this Court.[27] To recognise such a limit, this Court would need to accept that States can only legislate in respect of subject matters that were in existence at Federation. This would have the absurd result of limiting State legislative power to "persons of extraordinary longevity and to corporations of respectable antiquity", and would deny "the undoubted proposition that the States have plenary power to legislate in respect of any subject-matter from time to time within that power".[28]

C-3 The donation provisions

20 33. Victoria submits that the limits on State legislative power referred to above do not apply to the donation provisions.

34. ***Necessary connection with the State***. In their terms, the donation provisions are directed to regulating:

(1) the giving of money to: an organisation that has, as one of its objects, the promotion of the election of candidates to the Legislative Assembly; or a member of the Legislative Assembly; or a candidate in an election for the Legislative Assembly;[29]

(2) the receipt of money by such an organisation, member or candidate; and

(3) the giving of money to "another entity", where that money is given to enable the entity to: give money to an organisation, member or candidate of the kind described

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[24] *Uther* (1947) 74 CLR 508, 521 (Latham CJ).

[25] *Abbotto* (1997) 71 ALJR 675, 678-679 (Dawson J).

[26] *DHA* (1997) 190 CLR 410, 440 (Dawson, Toohey and Gaudron JJ).

[27] But see *Uther* (1947) 74 CLR 508, 530-531 (Dixon J).

[28] R P Meagher and W M C Gummow, "Sir Owen Dixon's Heresy" (1980) 54 *Australian Law Journal* 25, 28.

[29] Qld Electoral Act, ss 2 ("election", "political party"), 197 ("elected member"), 274(1)(a) and 275.

above; or incur expenditure for the purposes of a campaign for an election of members of the Legislative Assembly.[30]

35. The donation provisions plainly have the necessary connection with Queensland; they are properly described as being for the peace, welfare and good government of that State.[31]

36. ***Cigamatic and Melbourne Corporation***. The donation provisions are not, in their terms, directed to organisations that promote the election of candidates to the Senate or the House of Representatives, or to the giving and receipt of money that may be used to incur expenditure for a federal election. However, Victoria accepts that the donation provisions are capable of applying to those organisations, and to the giving and receipt of money that may be used for that purpose. The relevant question is whether, because the donation provisions are capable of operating in that way, they infringe limits on State legislative power recognised in *Cigamatic* or derived from the *Melbourne Corporation* principle.

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37. Victoria submits that the donation provisions do not infringe the limit recognised in *Cigamatic*. Those provisions do not seek to "control or abolish a federal fiscal right",[32] or "deprive the Crown in right of the Commonwealth of its prerogative rights",[33] or otherwise "restrict or modify the executive capacities of the Commonwealth".[34] The donation provisions are not directed to, and do not apply to, the Commonwealth Government at all.

38. Victoria also submits that the donation provisions do not infringe any further limit on State legislative power that might be derived from the principle recognised in *Melbourne Corporation*. Even if that principle were held to impose a limit on State legislative power in the same terms as the limit that it imposes on Commonwealth legislative power,[35] the donation provisions would not infringe that limit.

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39. Putting the matter at its highest, the practical effect of the donation provisions is to:

(1) prohibit a property developer from giving money to an organisation that promotes the election of candidates to the Senate or the House of Representatives, if that organisation has, as one of its objects, the promotion of the election of candidates to the Legislative Assembly;

(2) prohibit such an organisation from receiving donations from property developers; and

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(3) prohibit a property developer from giving money to another entity, which might be used to incur expenditure for the purposes of a federal election, if that money was

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30 Qld Electoral Act, ss 2 ("election"), 197 ("electoral expenditure"), 274(1)(b) and 275.

31 *Constitution Act 1867* (Qld), s 2.

32 *Cigamatic* (1962) 108 CLR 372, 378 (Dixon CJ). See also 381 (Kitto J), 390 (Windeyer J).

33 *Cigamatic* (1962) 108 CLR 372, 389 (Menzies J). See also 381 (Kitto J), 390 (Owen J).

34 *DHA* (1997) 190 CLR 410, 440 (Dawson, Toohey and Gaudron JJ).

35 See paragraph 74 below.

given to enable the recipient to: give the money to an organisation, member or candidate of the kind described in paragraph 34(1) above; or incur expenditure for the purposes of a campaign for an election of members of the Legislative Assembly.

40. The donation provisions are not directed to, and have no effect on, the Commonwealth Government. They are not directed to, and have no effect on, the method of voting in federal elections. The most that could be said is that the donation provisions might reduce the amount of money available for use by political parties and candidates in a federal election. But it is not "critical to [the Commonwealth's] capacity to function as a government"[36] for political parties and candidates who participate in a federal election to
10 have no restrictions on the sources from which they may receive funds.

41. Further, unlike the State parliamentarians affected by the Commonwealth law considered in *Clarke v Federal Commissioner of Taxation*,[37] it is within the power of political parties whose national party or candidates for Commonwealth office are affected by the donation provisions to avoid the operation of those provisions by re-ordering their affairs.[38] Thus, the donation provisions do not, in any sense, curtail or interfere with the exercise of Commonwealth constitutional power.

C-4 Section 107 of the Constitution

42. If the Queensland donation provisions do not infringe any of the limits on State legislative power addressed above, the final question is whether the powers to make laws with respect
20 to the election of senators and members of the House of Representatives are, within the meaning of s 107 of the Constitution, "by [the] Constitution exclusively vested in the Parliament of the Commonwealth". Victoria submits that they are not.

43. Several provisions of the Constitution confer power to make laws with respect to the election of senators and members of the House of Representatives. Many confer power on the Commonwealth Parliament; some confer power on State Parliaments.

44. Of the provisions that confer power on the Commonwealth Parliament, some do so directly. Those provisions confer power to make laws:

(1) prescribing the method of choosing senators, but so that the method shall be uniform for all the States (s 9); and

30 (2) increasing or diminishing the number of members of the House (s 27).

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36 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 (***Re AEU***), 233 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

37 (2009) 240 CLR 272.

38 A party could, for example, establish branches that are not registered under the Qld Electoral Act, so that those branches, and their candidates for the Commonwealth Parliament, will not be subject to the Qld Electoral Act and can receive donations from property developers. See QS [8].

45. Others do so through s 51(xxxvi), which confers power on the Commonwealth Parliament to make laws with respect to "matters in respect of which this Constitution makes provision until the Parliament otherwise provides". Those provisions confer power to make laws with respect to:

(1) dividing each State into electorates for the purpose of choosing senators (s 7);

(2) altering the number of senators for each State, subject to certain restrictions (s 7);

(3) the qualifications of electors of senators (s 30, applied to senators by s 8) and of members of the House of Representatives (s 30);

(4) elections of senators (s 10) and of members of the House (s 31);

10 (5) the qualifications of senators (ss 16 and 34) and members of the House (s 34); and

(6) determining the divisions in the State for which members of the House may be chosen, and the number of members to be chosen for each division (s 29).

46. Section 51(xxxix) also confers power on the Commonwealth Parliament to make laws "incidental to the execution of any power vested by [the] Constitution in the Parliament", including the powers referred to above.

47. All of the provisions of the Constitution that confer power on State Parliaments with respect to the election of senators and members of the House of Representatives do so directly. Those provisions confer power to make laws:

(1) in the case of the Queensland Parliament only, until the Commonwealth Parliament
20 otherwise provides, dividing the State into divisions and determining the number of senators to be chosen for each division (s 7);

(2) subject to any Commonwealth law prescribing a uniform method of choosing senators, prescribing the method of choosing senators for the State (s 9);

(3) for determining the times and places of elections of senators for the State (s 9); and

(4) until the Commonwealth Parliament otherwise provides, determining the divisions in the State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division (s 29).

48. Of the powers set out above, the broadest are those conferred on the Commonwealth Parliament to make laws with respect to the election of senators and the election of
30 members of the House of Representatives (s 51(xxxvi), read with ss 10 and 31). The subject matter of those powers extends to the way in which the people of the Commonwealth choose their representatives — that is, the machinery for elections.[39]

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[39] *ACTV* (1992) 177 CLR 106 at 220 (Gaudron J): "Ch I confers power only with respect to particular aspects of the election process: it does not confer power with respect to elections generally, or with respect to election advertising or campaigning"; see also 225 (McHugh J).

49. Of course, the express powers carry with them the power to make laws incidental to the subject matter. The law upheld in *Smith* — which required publication of the name of a person commenting on a candidate or party between the issue and the return of the writs for an election — was upheld as incidental to the regulation of elections.[40]

50. Victoria submits that a law regulating political donations can only be within the scope of Commonwealth legislative power on the basis that the regulation of political donations is incidental to the powers conferred by s 51(xxxvi), read with ss 10 and 31. Like political advertising, political donations are not, themselves, part of the machinery for an election.

51. Thus, Victoria submits that the power to make laws incidental to the subject matter of the election of senators and members of the House of Representatives is the only power broad enough that, if it were exclusive of State legislative power, might prevent the Queensland Parliament from enacting the donation provisions. However, for the reasons given below, that power is not relevantly exclusive of State legislative power.

52. ***No express grant of exclusive power.*** Section 52 of the Constitution provides expressly for certain matters in respect of which the Commonwealth Parliament has exclusive power to make laws. Neither the election of senators nor the election of members of the House of Representatives (nor matters incidental to such elections) is a matter included in s 52. Nor are those matters elsewhere "declared by [the] Constitution to be within the exclusive power of the Parliament".[41]

53. ***No implied grant of exclusive power.*** Although it is possible for legislative power with respect to a particular subject matter to be exclusively vested in the Commonwealth Parliament by implication from the text and structure of the Constitution,[42] this Court should not recognise an implication that the power to make laws with respect to the election of senators and members of the House (or matters incidental to such elections) is "by [the] Constitution exclusively vested in the Parliament of the Commonwealth".

54. *First*, such an implication would be contrary to the provisions of Ch I that expressly confer power on State Parliaments with respect to the election of senators and members of the House of Representatives (ss 7, 9 and 29). Those provisions — particularly the continuing power of State Parliaments to make laws "for determining the times and places of elections

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40 See *Smith* (1912) 15 CLR 355, 358 (Griffith CJ), 362 (Isaacs J). Cf Barton J at 361, who considered the law to fall within the main power, but held that alternatively, the matter would be covered by s 51(xxxix). See also *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23, 31.

41 Constitution s 52(iii). Cf Constitution, s 90.

42 This Court has held that Ch III of the Constitution impliedly confers exclusive power on the Commonwealth Parliament to make laws with respect to the subject matter of federal jurisdiction: see *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 575 [111] (Gummow and Hayne JJ); *Rizeq v Western Australia* (2017) 262 CLR 1, 24-26 [58]-[61] (Bell, Gageler, Keane, Nettle and Gordon JJ).

of senators for the State" (s 9) — reveal an intention that the Commonwealth Parliament is not to be the sole body with the power to make laws with respect to those matters.

55. *Second*, such an implication would be contrary to the accepted understanding that, subject to the Constitution and to other recognised limits on State legislative power, the Commonwealth Parliament and the State Parliaments have concurrent power to make laws with respect to the matters set out in s 51.[43]

56. *Third,* such an implication would give the Commonwealth exclusive power to make laws with respect to a subject matter of uncertain ambit. The only other subject matter with respect to which the Commonwealth has been held to have exclusive power to make laws

10 by reason of an implication from the text and structure of the Constitution is federal jurisdiction.[44] Like the seat of government of the Commonwealth (s 52(i)), places acquired by the Commonwealth for public purposes (s 52(i)), departments transferred to the Commonwealth under s 69 of the Constitution (s 52(ii)), and duties of customs and excise (s 90), federal jurisdiction is, in a sense, binary. A matter is either in federal jurisdiction, or it is not.[45]

57. By contrast, "federal elections", and matters incidental to them, are not binary in that way. As this Court has recognised, the issues relevant to political discussion at the federal level frequently overlap with those relevant to political discussion at the State level.[46] Similarly, political parties operate across the levels of government, and are commonly registered

20 under both Commonwealth law and State law [**SCB 114-118**].[47] At some times, those parties will promote the election of candidates to the Commonwealth Parliament; at other times, they will promote the election of candidates to State Parliaments. A person may make a donation to a political party, or another entity, without specifying the purpose for which the donation is to be used. Such a donation might be used in connection with a federal election; or it might not. This Court should not lightly recognise, by implication, exclusivity of a power to make laws in relation to such donations.

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43 See *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 191 (Stephen J). Cf *Graham v Paterson* (1950) 81 CLR 1, 18-19 (Latham CJ), 24 (Williams J); *Nelungaloo* (1952) 85 CLR 545, 564 (Dixon J).

44 See n 42 above.

45 See *Felton v Mulligan* (1971) 124 CLR 367, 373 (Barwick CJ), 411-412 (Walsh J); *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457, 479 (Stephen, Mason, Aickin and Wilson JJ); *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1, 21 [53] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

46 See *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions (No 1)***), 549 [20] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571-572; *Coleman v Power* (2004) 220 CLR 1, 45 [80] (McHugh J), 78 [197] (Gummow and Hayne JJ). See also QS [56].

47 *Unions (No 1)* (2013) 252 CLR 530, 550 [24] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

58. *Fourth,* such an implication is not "necessary" for any of the reasons that the Commonwealth suggests.

59. The Commonwealth submits that ss 7, 9 and 29 of the Constitution give rise to a "necessary implication" that the Commonwealth Parliament has exclusive power to make laws with respect to federal elections because, if State Parliaments had power to make such laws, the "limited nature" of the express grants of power in ss 7, 9 and 29 "would be inexplicable" [**CS [17]**]. That submission should not be accepted. The express grants of power to State Parliaments in ss 7, 9 and 29 (and the provisions applying State laws to elections of senators and members of the House of Representatives (ss 10, 16, 30 and 31)) can be explained, first as simply making practical provision for the early period of the federation and, second, as being necessary to ensure that other limits on State legislative power (such as the now rejected doctrine of immunity of instrumentalities,[48] or the limits referred to in Part C-2 above) would not prevent State Parliaments from making laws with respect to those matters.[49] No "necessary implication" arises.

60. The Commonwealth also submits that an implication of exclusive Commonwealth legislative power with respect to federal elections is necessary to give effect to an asserted "objective of the Constitution" that elections of senators and members of the House of Representatives should be governed by uniform Commonwealth laws [**CS [18]**]. While it may be accepted that the machinery for the election of senators and members is, ultimately, intended to be governed by uniform laws, the broader aspect of that submission should not be accepted.

61. This Court has never identified an "objective of the Constitution" as the basis for an implication of exclusive legislative power. Any implication from the Constitution must be "securely based" in the constitutional text and structure.[50] But the express grants of power to State Parliaments in ss 7, 9 and 29 (and the provisions applying State laws to the first elections of senators and members (ss 10, 16, 30 and 31)) refute any claim that it is an "integral element"[51] of the Constitution that <u>only</u> uniform Commonwealth laws may govern the election of senators and members of the House.[52] To the extent that the Constitution does disclose an "objective" that elections of senators and members will (ultimately) be governed by uniform Commonwealth laws, that uniformity is guaranteed

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48 See *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

49 In the context of State laws affecting the capacities of the Commonwealth executive, see *DHA* (1997) 190 CLR 410, 440 (Dawson, Toohey and Gaudron JJ).

50 As to the requirement that an implication be "securely based", see *ACTV* (1992) 177 CLR 106, 134-135 (Mason CJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 453 [389] (Hayne J), 484-485 [469]-[470] (Callinan J).

51 *ACTV* (1992) 177 CLR 106, 135 (Mason CJ).

52 cf Constitution, s 9, which expressly requires that any Commonwealth law "prescribing the method of choosing senators" must prescribe a uniform method for all the States.

by the operation of s 109, together with the limits on State legislative power referred to in Part C-2 above. No implication of any broader exclusivity is necessary.

62. Finally, the Commonwealth submits that such an implication is necessary to "protect" the Commonwealth from State laws enacted after the Commonwealth Parliament has been prorogued in advance of an election **[CS [18]]**. But no implication is necessary for that reason. A possibility that the States will abuse a power is no basis for denying power on that topic.[53] Further, to the extent that such "protection" could be said to be necessary, it is provided by the limits on State legislative power referred to in Part C-2 above.

63. ***No basis in authority for an express or implied grant of exclusive power.*** This Court has
10 never held, except in *obiter dicta*,[54] that Commonwealth legislative power with respect to federal elections is exclusive of State legislative power. More particularly, as noted above, this Court has never held that the power to make laws with respect to the election of senators and members of the House of Representatives is "by [the] Constitution exclusively vested in the Parliament of the Commonwealth". Rather, in the few cases that have considered the issue, Commonwealth legislative power has been described as "exclusive" for some other reason.[55]

64. In this respect, it is instructive to consider the contrast between *Nelungaloo* and *Boilermakers*. In *Nelungaloo*, Dixon J directed attention to the limits of State legislative power — rather than any constitutional implication conferring exclusive Commonwealth
20 power — as the reason for describing Commonwealth legislative power with respect to federal elections (and various other matters) as being "exclusive".[56] By contrast, in *Boilermakers*, decided only four years later, Dixon CJ, McTiernan, Fullagar and Kitto JJ explained that Commonwealth legislative power with respect to federal jurisdiction was exclusive because of the "negative force" of the words of Ch III of the Constitution.[57]

65. For all of those reasons, Victoria submits that there is no basis to accept the Commonwealth's submission that the powers to make laws with respect to the election of senators and members of the House of Representatives are "exclusively vested in the Parliament of the Commonwealth" by the Constitution **[CS [20]]**. Thus the answer to questions (b) and (c) is "no". Because the donation provisions do not infringe any of the
30 relevant limits on State legislative power, Victoria submits that those provisions are within the otherwise plenary power of the Queensland Parliament to enact.

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53 See *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 24 [12] (Gleeson CJ); QS [64].

54 See *Smith* (1912) 15 CLR 355. That case did not concern a State law. The only question for the Court was whether a Commonwealth law was within Commonwealth legislative power.

55 See paragraphs 17 to 20 above.

56 (1952) 85 CLR 545, 564. A similar observation can be made about the references to "exclusive" power in *Graham* (1950) 81 CLR 1, 19 (Latham CJ), 24 (Williams J).

57 (1956) 94 CLR 254, 270.

66. Finally, if, contrary to Victoria's principal submission, Commonwealth legislative power with respect to the election of senators and members of the House of Representatives is "exclusively vested in the Parliament of the Commonwealth", Victoria submits that the power "exclusively vested" extends only to matters within the main power — that is, the machinery of elections — and does not encompass incidental matters, such as political donations. No implication of a wider exclusive power could be necessary.

67. There is, of course, a separate question whether the donation provisions are invalid by reason of s 109 of the Constitution. That question first requires consideration of whether s 302CA of the Cth Electoral Act is valid: the subject of questions (d), (e) and (f).

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D. QUESTION (D) — COMMONWEALTH POWER TO ENACT S 302CA?

68. For the reasons that follow, Victoria submits that question (d) should be answered "yes".

69. As noted above, Victoria submits that a Commonwealth law regulating donations to candidates in a federal election, or to political parties that field candidates in such an election, can only be within power on the basis that the regulation of political donations is incidental to the powers conferred by s 51(xxxvi) of the Constitution, read with ss 10 and 31. Thus, like the other provisions in the Cth Electoral Act regulating political donations,[58] Victoria submits that s 302CA of the Cth Electoral Act can only be justified as something incidental to the main power over federal elections. It is not, directly, a law with respect to the subject matter of elections of senators and members of the House.

20 70. The question that arises is whether s 302CA is a valid exercise of the Commonwealth's power to make laws incidental to that subject matter. Victoria submits that it is not, based on the analysis of Dixon CJ in the *Second Uniform Tax Case*.[59]

71. In that case Dixon CJ said that "when you are considering what is incidental to a power not only must you take into account the nature and subject of the power but you must pay regard to the context in which you find the power".[60] Here, the powers are those in relation to elections in a federal system of government. Further, he said that "you must look at the purpose disclosed by the law said to be incidental to the main power". Here, the purpose is to make it more difficult for the States to regulate political donations to candidates or parties fielding candidates in a State election. To support s 302CA it must therefore be
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incidental to the Commonwealth's power over federal elections to expressly permit persons to make donations to a candidate, or a party fielding candidates, in a State election (albeit where the party is registered under the Cth Electoral Act, or the candidate is a member of such a party). Moreover, s 302CA is directed to excluding the States from regulating such donations, unless they do so in a particular manner. This goes "beyond any true conception

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58 See Cth Electoral Act, Div 3A of Pt XX.

59 (1957) 99 CLR 575.

61 *Second Uniform Tax Case* (1957) 99 CLR 575, 614.

of what is incidental to a legislative power and, under colour of recourse to the incidents of a power expressly granted, [attempts] to advance or extend the substantive power actually granted to the Commonwealth until it reaches into the exercise of the constitutional powers of the States".[61]

72. Thus Victoria submits that s 302CA is not supported by the main power conferred on the Commonwealth Parliament in relation to federal elections, nor by the incidental power.

E. QUESTION (E) – *MELBOURNE CORPORATION* AND S 302CA

73. For the reasons that follow, Victoria submits that question (e) should be answered "yes".

74. The *Melbourne Corporation* principle has been expressed in different ways.[62] In *Austin*, Gaudron, Gummow and Hayne JJ held that the test of validity is whether, "looking to the substance and operation of the federal laws, there has been, in a significant manner, a curtailment or interference with the exercise of State constitutional power".[63]

75. It is necessary to begin by examining the substance and operation of s 302CA of the Cth Electoral Act. That provision has the effect that, despite the Qld Electoral Act and the Qld LG Electoral Act, so long as s 302CA(3) does not apply, a property developer may give money to (each a **relevant entity**):

(1) an organisation that has, as one of its objects, the promotion of the election of candidates to the Legislative Assembly;

(2) a member of the Legislative Assembly or a candidate in an election for the Legislative Assembly; or

(3) a local government councillor or a group of candidates in a local government election,

provided that: in the case of an organisation, the organisation is a political party registered under the Cth Electoral Act, or a "related party" (s 123(2)) or "associated entity" (s 287H(1)) of such a political party; or, in the case of a person, the person is a member of a political party registered under the Cth Electoral Act, or a member of a "related party" or "associated entity" of such a political party [**see CS [34]-[36]**]. If a party has more than 500 members there is no requirement that the party have any purpose related to federal elections to be registered as a political party under the Cth Electoral Act.[64] It is therefore

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[61] *Second Uniform Tax Case* (1957) 99 CLR 575, 614.

[62] See, eg, *Austin* (2003) 215 CLR 185, 249 [124], 265 [168] (Gaudron, Gummow and Hayne JJ); *Clarke* (2009) 240 CLR 272, 299 [34] (French CJ), 307 [66] (Gummow, Heydon, Kiefel and Bell JJ); *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548, 609 [130] (Hayne, Bell and Keane JJ).

[63] *Austin* (2003) 215 CLR 185, 265 [168] (Gaudron, Gummow and Hayne JJ).

[64] See Cth Electoral Act, ss 123 and 124.

not difficult for any significant Queensland party to bring itself within the operation of s 302CA, even without having any direct connection to Commonwealth elections.

76. In Queensland, the circumstances in which s 302CA(3) will not apply (and, therefore, the circumstances in which the prohibition in the Qld Electoral Act and the Qld LG Electoral Act will not apply) include where:

(1) the property developer requires the money to be used for a Commonwealth electoral purpose (whether or not that requirement is enforceable); or

(2) the property developer does not specify the purpose for which the money is to be used and:

10 (a) the recipient does not keep or identify the money separately; or

(b) the recipient keeps and identifies the money separately and in fact uses it for a Commonwealth electoral purpose.

77. Thus, any property developer giving money to a relevant entity may avoid the operation of the donation provisions simply by specifying that the money is to be used for a Commonwealth electoral purpose.

78. Victoria submits that, by allowing certain candidates, and political parties fielding candidates, for election in Queensland to receive donations from property developers, the practical effect of s 302CA is to increase the risk and perception of corruption in both State and local government in Queensland, to prevent the Queensland Parliament from making
20 laws it has decided are necessary to address that risk and perception of corruption, and to compel the Queensland Parliament to alter the design of its laws governing electoral expenditure. In doing so, Victoria submits that s 302CA impairs both the "integrity" and the "autonomy" of the State of Queensland,[65] and interferes in a substantial manner with the exercise of State constitutional power.

79. ***Section 302CA increases the risk and perception of corruption in both State and local government in Queensland.*** This is so for at least two reasons.

80. *First*, the risk of corruption arises from the fact that a person receives a benefit, not the purpose for which the benefit may be used. Regardless of the purpose for which money given by a property developer may be used, the practical effect of s 302CA is to enable the
30 property developer to give, and a relevant entity to receive, the money. It is the giving and receipt of the money, not the use of it, that gives rise to "the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the

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[65] See *Re AEU* (1995) 184 CLR 188, 232 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); and see *ACTV* (1992) 177 CLR 106, 163-4 (Brennan J), 241-4 (McHugh J).

wishes of those who have made large financial contributions valued by the officeholder".[66] A member, candidate or councillor who receives money from a property developer (or is a member of a party that receives money from a property developer) is more likely to be favourably disposed towards the property developer, regardless of the purpose for which the money is (or can be) used.

81. *Second*, the perception of corruption arises from the fact that a person is seen to receive a benefit, not the purpose for which the benefit may be used. A member, candidate or councillor who receives money from a property developer (or is a member of a party that receives money from a property developer) is more likely to be perceived to be favourably disposed towards the property developer, regardless of the purpose for which the money is used. In many cases, it is unlikely that any person other than the property developer and the recipient would be aware of any restriction on the use of the money.

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82. ***Section 302CA prevents the Queensland Parliament from making laws it has decided are necessary to address that risk and perception of corruption.*** To address the risk and perception of corruption referred to above, the Queensland Parliament has decided that it is necessary to make laws to prohibit property developers from making political donations to participants in the Queensland electoral system. Those laws are directed to protecting both the integrity of, and public confidence in, State and local government in Queensland. The practical effect of s 302CA is to prevent the Queensland Parliament from making laws that are effective to achieve that end.

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83. It is "critical to a State's capacity to function as a government"[67] that it have the ability to protect the integrity of decision-making in State and local government. It is therefore critical to that capacity that a State be able to determine what measures are necessary to protect the integrity of such decision-making, and make laws giving effect to those measures. A Commonwealth law that deprives a State of that ability curtails or interferes in a substantial manner with the exercise of the State's constitutional power.

84. ***Section 302CA effectively compels Queensland to alter its laws governing electoral expenditure.*** Section 302CA will not apply to a gift if the effect of a State or Territory 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.[68] Victorian law currently has this effect,[69] but the Qld Electoral Act does not. If s 302CA is valid, then to preserve as much as possible of its prohibition on political donations from property developers, Queensland will be compelled

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66 *McCloy* (2015) 257 CLR 178, 204 [36] (French CJ, Kiefel, Bell and Keane JJ), quoting *McConnell v Federal Election Commission* (2003) 540 US 93, 153. See also *McCloy* (2015) 257 CLR 178, 242 [167], 246 [175], 250-251 [193]-[196] (Gageler J), 294 [365] (Gordon J).

67 *Re AEU* (1995) 184 CLR 188, 233 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

68 Cth Electoral Act, s 302CA(3)(b)(i) and (5).

69 See *Electoral Act 2002* (Vic), s 207F.

to amend the Qld Electoral Act to provide for separate campaign accounts. The need to make this amendment "demonstrates the interference" with the exercise of the State's constitutional power.[70] The State's "liberty of action ... in these matters, that being an element of the working of its governmental structure, thereby is impaired".[71]

F. QUESTION (F) – *METWALLY* AND S 302CA

85. Victoria submits that, for the reasons given in paragraphs 84 to 93 of the submissions of Queensland, s 302CA(2)(b)(ii) infringes the principle in *Metwally*. However, for the reasons that follow, Victoria submits that *Metwally* was wrongly decided and should be overruled, and that question (f) should therefore be answered "no".

10 86. The reasoning of the members of the Court who constituted the majority in *Metwally* (Gibbs CJ, Murphy, Brennan and Deane JJ) depended, in essence, on two key propositions:

(1) *first*, because a Commonwealth law "cannot prevail over the Constitution", it cannot "retrospectively deprive s 109 of the Constitution of its operation";[72] and

(2) *second*, that a purpose of s 109 is to ensure that a person "know[s] which of two inconsistent laws he is required to observe",[73] and to protect against "the injustice of being subjected to the requirements of valid and inconsistent laws of the Commonwealth and State Parliaments on the same topic".[74]

87. The first of those propositions was relied on (in various formulations) by all members of the majority. However, Victoria submits that it does not follow from the (undoubted) 20 premise that a Commonwealth law cannot prevail over the Constitution that such a law could not operate to give the provisions of a State law a valid operation before the commencement of the Commonwealth law.

88. As Dawson J explained in *Metwally*:[75]

> Retrospective repeal cannot change the operation of s 109, but it may change the situation from one upon which s 109 previously operated to one upon which it has ceased to have an operation. Similarly, to deem the Parliament to have had an intention which it did not have at the time the Commonwealth law was enacted, as s 6A does in this case, is to do no more than change the circumstances which govern the applicability of s 109 when it comes to be applied ... [I]t is in the nature of a retrospective law that it changes things in the past and **if in so doing** 30 **it removes a past inconsistency then it removes the circumstance upon which s 109 operated and so denies its present application.**

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70 *Austin* (2003) 215 CLR 185, 220 [29] (Gleeson CJ). And see QS [112].

71 *Austin* (2003) 215 CLR 185, 265 [170] (Gaudron, Gummow and Hayne JJ).

72 *Metwally* (1984) 158 CLR 447, 457 (Gibbs CJ). See also 469 (Murphy J), 474-475 (Brennan J), 478-479 (Deane J).

73 *Metwally* (1984) 158 CLR 447, 458 (Gibbs CJ).

74 *Metwally* (1984) 158 CLR 447, 477 (Deane J).

75 (1984) 158 CLR 447, 485 (emphasis added). See also 460-461 (Mason J).

89. Victoria respectfully submits that the reasoning of Mason, Wilson and Dawson JJ on this point is correct, and should be preferred to that of the majority.

90. The second proposition outlined in paragraph 86 above does not provide an alternative basis on which to uphold the decision in *Metwally*. That proposition was not accepted by a majority of justices in that case and, although it has since been cited by this Court,[76] it has not formed part of the *ratio* of any decision. Retrospective laws may have consequences that are unfair and unjust. But an aversion to those consequences is no basis for construing s 109 of the Constitution as a source of individual rights.[77] What the Parliament can enact prospectively in the exercise of its legislative powers it can also enact retrospectively.[78] Any protection against the consequences of a retrospective law must come from a source other than s 109.

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91. If the Court accepts that *Metwally* was wrongly decided, Victoria submits that there is no barrier to it now being overruled. The decision in *Metwally* did not depend on a principle carefully worked out in a succession of cases; nor has it been relied on in subsequent cases in a manner that militates against reconsideration.[79]

PART V: ESTIMATE OF TIME

92. Victoria estimates approximately 30 minutes for the presentation of oral submissions.

Dated: 25 February 2019

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[76] See *Croome v Tasmania* (1997) 191 CLR 119, 129-130 (Gaudron, McHugh and Gummow JJ); *Dickson v The Queen* (2010) 241 CLR 491, 503-504 [19].

[77] *Metwally* (1984) 158 CLR 447, 461-3 (Mason J).

[78] See *R v Kidman* (1915) 20 CLR 425; *Metwally* (1984) 158 CLR 447, 461 (Mason J).

[79] See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).