IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B35 of 2018

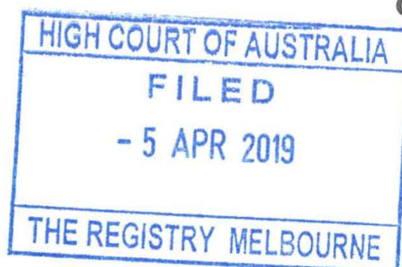
BETWEEN:

GARY DOUGLAS SPENCE
Plaintiff

and

10

STATE OF QUEENSLAND
Defendant



NOTE OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA ON THE QUESTION OF SEVERANCE AND s 302CA

PART I: CERTIFICATION

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

PART II: NOTE ON SEVERANCE AND S 302CA

2. This note addresses the consequences that would flow for s 302CA of the *Commonwealth*
20 *Electoral Act 1918* (Cth) if the Court accepts that s 302CA is invalid to the extent that it operates in relation to gifts that "may be" used for incurring Commonwealth electoral expenditure, or creating or communicating Commonwealth electoral matter (**Commonwealth electoral purposes**).

3. The Court may accept that s 302CA is invalid to that extent if it accepts that:

(1) the bare possibility that a gift "may be" used for Commonwealth electoral purposes is not enough to give s 302CA a sufficient connection to the subject matter of elections of senators and members of the House of Representatives, given that s 302CA purports to exclude the operation of State laws that would otherwise prohibit the giving and receipt of the gift;[1] or

30 (2) s 302CA is invalid by reason of the principle recognised in *Melbourne Corporation,* but only to the extent that it purports to permit the giving and receipt of gifts that "may be", but are not required to be, used for Commonwealth electoral purposes.

[1] See Transcript, 15 March 2019, 10147-10399, especially 10177-10194. Victoria did not submit that the Commonwealth has no legislative power over "untied" gifts generally — Victoria's submissions were confined to s 302CA.

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4. If the Court accepts that s 302CA is invalid to the extent referred to in paragraph 2 above, Victoria submits that, in order to give s 302CA a valid operation to the extent to which it is not in excess of Commonwealth legislative power, it would be necessary to sever the words in s 302CA(1) and (2) that are struck through below:

> (1) Despite any State or Territory electoral law, a person or entity may:
>
> > (a) give a gift to, or for the benefit of, a political entity, a political campaigner or a third party (a ***gift recipient***); or
> >
> > (b) if the person or entity is a gift recipient—receive or retain a gift; or
> >
> > (c) on behalf of a gift recipient, receive or retain a gift;
>
> if:
>
> > (d) this Division does not prohibit the giving, receiving or retaining of the gift; and
> >
> > (e) the gift~~, or part of the gift,~~ is required to be~~, or may be,~~ used for the purposes of incurring electoral expenditure, or creating or communicating electoral matter, in accordance with subsection (2).
>
> (2) A gift~~, or part of a gift,~~ is required to be~~, or may be,~~ used for a purpose of incurring electoral expenditure, or creating or communicating electoral matter, if:
>
> > (a) any terms set by the person or entity providing the gift explicitly require~~ or allow~~ the gift~~ or part~~ to be used for that purpose~~ (whether or not those terms are enforceable); or~~
> >
> > ~~(b) the person or entity providing the gift does not set terms relating to the purpose for which the gift or part can be used.~~

5. It is uncontroversial that, if s 302CA is to be severed, the words "or may be", "or allow" and the whole of s 302CA(2)(b) must be struck through.[2] However, the Commonwealth does not consider that any further severance is required. It is thus necessary to explain the reasons for the additional severance proposed by Victoria.

Severance of references to "part of the gift"

6. If the Court accepts that s 302CA is invalid for either of the reasons identified in paragraph 3 above, Victoria submits that it would follow that s 302CA is beyond Commonwealth legislative power to the extent that it purports to permit the giving and receipt of:

   (1) any gift that "may be", but is not required to be, used for Commonwealth electoral purposes; or

   (2) any "part of a gift" that is not required to be used for Commonwealth electoral purposes (where another part of the gift is required to be used for Commonwealth electoral purposes).

7. The second proposition in paragraph 6 follows from the first, for the following reasons:

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[2] See Commonwealth's Note on Severance dated 28 March 2019, [5].

(1) In its terms, s 302CA(1) purports to permit the giving or receipt of "a gift" (sub-pars (a), (b) and (c)) in circumstances where only "part of the gift" (sub-par (e)) is required to be, or may be, used for Commonwealth electoral purposes.

(2) So, for example, if a gift of $10,000 is given on condition that $1,000 is to be used for Commonwealth electoral purposes, then, read according to its terms, s 302CA purports to permit the whole of the $10,000 to be given, received and retained.

(3) If the bare possibility that the whole of a gift "may be" used for Commonwealth electoral purposes is not enough to supply a sufficient connection to the relevant subject matter, then the same must be true for a part of a gift.

10 (4) Thus, Victoria contends that the fact that $1,000 of a $10,000 gift is required to be used for Commonwealth electoral purposes is not enough to give s 302CA a sufficient connection to the subject matter of elections of senators and members of the House of Representatives, in so far as the section purports to permit the giving and receipt of the other $9,000.

8. Given the text of s 302CA(1), Victoria submits that it is not possible to understand the reference in s 302CA(2) to "part of a gift" being required to be used for Commonwealth electoral purposes as having the effect that s 302CA(1) authorises the giving and receipt of that part of the gift only, and not the entirety of the gift.[3] That would be to re-write s 302CA(1), not to sever it or read it down.

20 **Severance of the words "whether or not those terms are enforceable"**

9. The Commonwealth appears to accept that the severance exercise is directed to ensuring that s 302CA(1) does not apply to permit the giving, receipt or retention of an "untied gift".[4] Victoria agrees. However, Victoria contends that to achieve that end it is necessary to sever the words "whether or not those terms are enforceable". That is because, if the terms were not enforceable, the gift would in substance be one that "may be" used for Commonwealth electoral purposes, not one that is "required to be" used for such purposes.

10. In short, if the terms are not enforceable, then the giver can impose a term as to the use of the gift, the political entity can receive the gift, but the political entity can then, as a matter of law, ignore the term.

30 (1) There is no prohibition on the use of the gift that is enforceable as between the giver and the recipient, either in contract or otherwise.

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3 Cf the oral submissions for the Commonwealth on the work done by the words "part of the gift" in s 302CA(1): Transcript, 15 March 2019, 11078-11082. Victoria submits that the construction there advanced is not supported by the text of the provision.

4 Commonwealth's Note on Severance dated 28 March 2019, [8].

(2) Nor is there a prohibition in the *Commonwealth Electoral Act* on using the gift for purposes other than Commonwealth electoral purposes — s 302CA(4) permits such use, but no provision within s 302CA prohibits any form of use.

(3) And nor, in relation to a gift that is prohibited from being given under State law, will State law impose any prohibition on the use of the gift once its giving and receipt is permitted under s 302CA(1).

(4) Thus the gift would be, notwithstanding the "terms", lawfully able to be used for any purpose. It would not be "required to be" used for Commonwealth electoral purposes.

10 (5) If the words "whether or not those terms are enforceable" are severed, then the remaining words "required to be ... used" should be read so as to require an enforceable obligation only to use the gift for Commonwealth electoral purposes.

No need for severance of sub-sections (3), (4), (5) or (6)

11. If ss 302CA(1) and (2) are severed as set out above, it may be that s 302CA(3) has little work to do.[5] However, that subsection is expressed as identifying the circumstances in which s 302CA(1) does not apply, without limiting those circumstances. It would remain an accurate identification of some of the circumstances in which s 302CA(1) would not apply. Thus it is not necessary to sever s 302CA(3) in order to give s 302CA a valid operation.

20 12. Nor is it necessary to sever s 302CA(4). That subsection only operates to authorise the use of gifts for Commonwealth electoral purposes. It does not operate to exclude State laws that prohibit the use of a gift for State electoral purposes or purposes other than Commonwealth electoral purposes. And, likewise, s 302CA(5) would remain an accurate identification of some of the circumstances in which s 302CA(4) would not apply, and so need not be severed or read down. For similar reasons it is not necessary to sever or read down s 302CA(6).

Extent of proposed severance

13. Given the extent of the severance Victoria contends is required, it may be arguable that this would "produce a result upon the persons and matters affected different from that 30 which the entire enactment would have produced upon them, had it been valid".[6] However, Victoria does not so contend. Rather, Victoria accepts that severance is possible, but disagrees with the Commonwealth about the extent of the severance required.

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5 See Transcript, 15 March 2019, 11089-11095.

6 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 371 (Dixon J). See also *Pidoto v Victoria* (1943) 68 CLR 87, 110 (Latham CJ).

Consequences of severance

14. The Commonwealth contends that severance should be addressed as a threshold issue, and that, if this Court concludes that s 302CA has some valid operation, then the consequence is that s 275 of the *Electoral Act 1992* (Qld) is entirely invalid and it becomes unnecessary for the Court to answer any questions in the Special Case directed to the validity of s 302CA.[7] That submission was based on an interpretation of the oral submissions in reply by Queensland.

15. Victoria contends that that argument is incorrect, and that it is necessary for the Court to resolve the extent of the invalidity of s 302CA.

10 16. It is not at all clear that Queensland "confirmed that it did not contend that any part of s 275 of the Qld Electoral Act would remain operative if <u>any part</u> of it was inconsistent with s 302CA".[8] Rather, what Queensland said in reply was that it did not put a reading down argument in relation to s 109 of the Constitution.[9] In any event, even if Queensland had conceded that s 275 was wholly inoperative if any part of s 302CA was valid, this Court should not resolve a constitutional case on the basis of a concession by a party.[10]

17. In the context of s 109, reading down is not the starting point. The effect of s 109 is not to cause a State law to be invalid, let alone entirely invalid. The effect of s 109 is to cause a State law to be inoperative "<u>to the extent of the inconsistency</u>".[11] It is thus necessary, in a s 109 context, to ascertain the extent of the inconsistency in order to determine the extent
20 to which the State law is invalid. That exercise requires ascertaining the valid operation of the Commonwealth law — it is only the valid operation of a Commonwealth law that can cause a State law to be inoperative under s 109.

18. Thus it is necessary for this Court to answer those questions in the Special Case directed to the validity of s 302CA (that is, questions (d) and (e) and possibly (f)), in order to determine the extent to which s 275 is inconsistent with a valid law of the Commonwealth.

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7 Commonwealth's Note on Severance dated 28 March 2019, [13]-[14].

8 Commonwealth's Note on Severance dated 28 March 2019, [12].

9 What was said by the Solicitor-General for Queensland (Transcript, 15 March 2019, 12054-12058) was this:

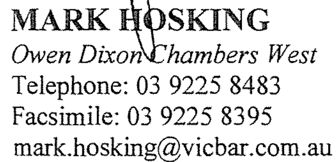
> An issue was raised in relation to the reading down in that it did not apply in relation to section 109. I thought we made clear, but if we had not, that the reading down argument pressed was only in response to exclusive power. We had not made the submission, I did not understand, in relation to the 109 point.

10 See, eg, *Roberts v Bass* (2002) 212 CLR 1, 54 [143] (Kirby J).

11 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212, 221 [29] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

19. In the present case, if s 302CA is valid only in so far as it applies to gifts that are required to be used for Commonwealth electoral purposes, then s 275 is inoperative by reason of s 109 of the Constitution only to the extent that it applies to such gifts. That will be the "extent of the inconsistency". Section 275 will remain operative in so far as it applies to both untied gifts and gifts required to be used for a State electoral purpose.

Dated: 5 April 2019



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