IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B35 of 2018

BETWEEN:

GARY DOUGLAS SPENCE
Plaintiff

and

STATE OF QUEENSLAND
Defendant

DEFENDANT'S SUBMISSIONS

Defendant's submissions
Filed on behalf of the defendant

Dated: 20 February 2019
Per James Potter
Ref PL8/ATT110/3804/PXJ
Doc No 8890191

HIGH COURT OF AUSTRALIA
FILED
20 FEB 2019
THE REGISTRY BRISBANE

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PART I: Certification

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

PART II: Issues

2. The issues are the questions stated in the Special Case (SC).

PART III: Certification as to notice under s 78B of *Judiciary Act 1903* (Cth)

3. The defendant certifies that it considers that no further notice is necessary.

PART IV: Facts found or admitted

4. The material facts are set out in the amended special case.

PARTS V AND VI: Argument

5. The following prefatory observations are relevant.

6. First, the implied freedom protects political communication.[1] It is not a constitutional protection of political parties *per se*. Yet in many respects the plaintiff's complaint approaches the argument from that perspective.[2] In fact, the plaintiff, or any property developer in Queensland, is free to spend an unlimited amount of money to participate in political discourse in Queensland. The only limitation is that he may not make a donation to a political party.

7. Second, neither the *Commonwealth Electoral Act 1918* (Cth) (CE Act), nor the impugned Queensland Acts require a political party to promote candidates in State and local government elections and also in Commonwealth elections. It is not to the point that, traditionally, political parties in Australia have organised themselves to have the composite objects of electing members to both the Commonwealth Parliament, and State and local parliaments. That was no doubt convenient when there were relatively homogeneous electoral laws in relation to funding throughout Australia. However, as circumstances change, and differing risks are identified by different polities, there is no legal requirement that those electoral laws remain homogeneous. Nor is there any legal, much less constitutional, impediment to a State or the Commonwealth passing laws which may make it less convenient for political parties to have those composite objects.

8. In fact, the Liberal National Party of Queensland or any party in Queensland with composite objects is at liberty to reconstitute itself as two separate entities – one with the

[1] The authorities relied on in the Plaintiff's Submissions (PS), 5 [21], 7 [26-7], in terms, acknowledge as much.
[2] PS, 6-7 [24]-[25].

object of promoting candidates in federal elections only, and one with the object of promoting candidates in State and local elections only. The entity with the object of promoting federal candidates would not be caught by the Queensland legislation.

9. Third, this case, arguably for the first time, calls for a careful analysis of the Commonwealth's power with respect to federal elections, and its interaction with State legislative power. The proper approach identifies the extent of the respective legislative power, and then considers questions of exclusivity. It is, with respect, wrong to begin with a presumption of exclusivity.[3]

10. Finally, the following appears to be common ground. It is a defining feature of a self-governing polity that it has power to make laws with respect to its own elections.[4] Neither the Commonwealth nor the plaintiff asserts that s 302CA of the CE Act can be characterised a law with respect to any head of legislative power other than ss 10, 31 and 51(xxxvi) of the Constitution. Respectfully, Queensland submits that approach is correct.

Queensland's laws

11. The plaintiff seeks to impugn amendments made by pts 3 and 5 of the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018* (Qld) (the Amending Act).[5] The Amending Act made amendments to the *Electoral Act 1992* (Qld) (QE Act) and *Local Government Electoral Act 2011* (Qld) (LGE Act), respectively, which are set out at PS [9]-[19].[6]

The Part 3 amendments permissibly burden the implied freedom

12. ***McCloy:*** Like cases must be treated alike, lest the *Lange* test be reduced to a case-specific analysis, incapable of giving rise to a general rule to guide parliaments in the future.[7] The Queensland Parliament relied upon this Court's guidance in *McCloy v New South Wales* when enacting pt 3 of the Amending Act.[8] The amendments made by pt 3 are, moreover, indistinguishable from equivalent provisions in the *Election Funding, Expenditure and*

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[3] Cf CAGS, 5-6 [13]; PS 15 [53].
[4] PS 16-7 [57]; CAGS, 9-10 [22]-[23].
[5] Parts 3 and 5 of the Amending Act were automatically repealed on 4 December 2018, being the day after all the provisions of the Amending Act had commenced: *Acts Interpretation Act 1954* (Qld) s 22C.
[6] Nothing turns on the small inaccuracies in the plaintiff's summary.
[7] On this potential, see Adrienne Stone, 'The limits of constitutional text and structure: Standards of review and the freedom of political communication' (1999) 23 *Melbourne University Law Review* 668, 691. See also *McCloy v New South Wales* (2015) 257 CLR 178, 216 [74] (French CJ, Kiefel, Bell and Keane JJ) (citing Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012) 379); 238 [151] (Gageler J).
[8] Explanatory note, Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 (Qld) 4, 11.

Disclosure Act 1981 (NSW), which were upheld in *McCloy*. As that is so, pt 3 of the Amending Act must be held to impose a permissible burden on the implied freedom. The plaintiff's attempts to distinguish *McCloy* should be rejected.

13. ***Constitutional facts:*** In *Unions NSW v New South Wales [No 2]*, the plaintiffs discharged their 'burden of pleading'[9] by pointing to the higher expenditure caps that previously existed, and New South Wales failed to offer any explanation for why that alternative was not equally practicable and effective to achieve the ends sought.[10] By contrast, in this case, the State has demonstrated the following constitutional facts which are more than adequate to discharge its persuasive onus.[11]

14. First, in 2017, following an investigation into local government elections in 2016, the Crime and Corruption Commission (CCC) found a risk or perceived risk of corruption at the local government level arising from political donations from property developers.[12] Although the CCC's investigation centred on the local government level, it did receive submissions which pointed out that similar risks exist at the State level.[13] Ultimately, the CCC recommended banning donations from property developers at the local government level, using the same model as the New South Wales laws upheld in *McCloy*.[14] In doing so, it stated that '[t]he Queensland Government may consider it appropriate to also adopt these recommendations at the state government level.'[15]

15. Second, as the CCC and the Queensland Parliament noted,[16] the CCC's 2017 findings are similar to findings by the CCC (and its predecessors) in 1991, 2006 and 2015.[17]

16. Third, in New South Wales, the Independent Commission Against Corruption has made findings of corruption relating to donations from property developers at both State and local government levels.[18] The Queensland Parliament relied upon that evidence.[19] One virtue of a

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[9] Barak, above n 7, 449.
[10] [2019] HCA 1, [44] (Kiefel CJ, Bell and Keane JJ) (*Unions [No 2]*).
[11] *Unions [No 2]* [2019] HCA 1, [45], [53] (Kiefel CJ, Bell and Keane JJ), [93] (Gageler J), [117] (Nettle J), [151] (Gordon J).
[12] SCB, vol 2, 360, 364, 373. See also SC, 36-7 [79(g)(iv), (v), (vii)].
[13] SC, 37 [79(g)(viii)]; SCB, vol 2, 385, 388.
[14] SC, 37 [79(g)(x)(B)]; SCB, vol 2, 375.
[15] SC, 38 [79(g)(xi)]; SCB, vol 2, 349.
[16] SC, 36 [79(g)(i)]; SCB, vol 2, 347; Explanatory note, Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 (Qld) 3.
[17] SC, 27-31 [79(a)-(b)].
[18] SC, 39-42 [82].
[19] Explanatory note, Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 (Qld) 3; Queensland, *Parliamentary Debates*, Legislative Assembly, 6 March 2018, 190 .

federation is that States may learn from the experience of other States.[20]

17. Fourth, the Fitzgerald Inquiry investigation into former State Minister Mr Hinze and the Crime and Misconduct Commission investigation into former State Minister Mr Nuttall make plain that official corruption at the State level is an historical reality in Queensland, well within living memory.[21] In the case of Mr Hinze, the Fitzgerald Inquiry revealed gifts and loans made by entities involved in significant commercial and residential property developments which, if they occurred today, would appear to fall within the scope of the prohibition.[22] Indeed, complaints involving allegations of corruption or favouritism at State government level, including in relation to development, have been received since shortly after the CCC's establishment.[23] The risk of corruption or undue influence at the State level has consistently been acknowledged or raised throughout the CCC's investigations.[24]

18. Fifth, the risk of corruption and undue influence at the State level can be logically inferred,[25] as it was in *McCloy*,[26] from 'the state's significant role in the state's planning framework'[27] and the Minister's oversight role under the *Planning Act 2016* and other Acts.[28]

19. The plaintiff's argument that these constitutional facts are somehow deficient because some do not involve a finding of corrupt conduct, and none involve a specific formal recommendation to ban donations from property developers at the State level, is unsound.[29]

20. The basis for justifying pt 3 of the Amending Act is evidence of the risk, or perceived risk, of corruption and undue influence, not evidence of actual corruption and undue influence. Parliament need not wait until corruption occurs and is detected before it will have an evidential basis for legislating. That the Parliament is entitled to 'respond to felt necessities' and to 'act prophylactically' is not to relieve the State of its persuasive onus.[30] The State may need to present constitutional facts which go to the importance of responding

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[20] *New State Ice Co v Liebmann*, 285 US 262, 311 (1932) (Brandeis J); *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343, 369 [61] (Heydon J).
[21] SC, 23 [76(a)], 32 [79(c)], Annexure C, 104-5 (SCB, vol 1, 221-2).
[22] SC, Annexure C, 91-104; SCB, vol 1, 208-21.
[23] SC, 25 [78(a)-(b)], SCB, vol 1, 138.
[24] SC, 28 [79(a)(ix), (x), (xii)], 32 [79(d)], 33 [79(e)(vi)-(vii)], 35 [79(f)(v)]; SCB, vol 1, 141-2, 145, 146, 148.
[25] *Maloney v The Queen* (2013) 252 CLR 168, 299 [353] (Gageler J).
[26] *McCloy* (2015) 257 CLR 178, 209 [52] (French CJ, Kiefel Bell and Keane JJ).
[27] Queensland, *Parliamentary Debates*, Legislative Assembly, 15 May 2018, 1106 (SJ Hinchliffe).
[28] See SC, 11-21 [46]-[73]. See also Queensland, *Parliamentary Debates*, Legislative Assembly, 6 March 2018, 190; 15 May 2018, 1106; Explanatory note, Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 (Qld) 3-4, 11.
[29] PS, 9-11 [35]-[39].
[30] *McCloy* (2015) 257 CLR 178, 251 [197] (Gageler J), 261-2 [233] (Nettle J); *Brown* (2017) 261 CLR 328, 421-2 [288] (Nettle J), 463 [422] (Gordon J). Cf PS, 8 [30].

to an identified risk or which show that the risk is 'reasonably anticipated'.[31] The numerous reports and the nature of planning powers make plain that the risk of corruption is reasonably anticipated.

21. As to the absence of a specific formal recommendation, with respect, a recommendation from an extra-parliamentary body is not the only, or even the best, evidence of a constitutional fact capable of justifying a burden. Evidence of, and logical inferences pointing to, the risk or perceived risk of corruption posed by property developers are far more important than a recommendation about how to deal with that risk.

22. Nothing turns on the CCC's observation to a parliamentary committee that pt 3 of the Amending Act went beyond its specific recommendations focused at the local government level or that the CCC 'did not contemplate that the proposed reforms' at State level would be introduced without a further review.[32] Parliament is not bound by the CCC's view of desirable legislative processes. More important than the CCC's observation about process was its acknowledgment that, 'given the State's significant role in Queensland's planning framework, the risk of corruption and undue influence similarly is present in respect of donations by property developers at the state level.'[33]

23. Were the existence of a recommendation decisive, Parliament would be required to delegate, and effectively abdicate, its function of determining how social ills are to be addressed. The implied freedom does not require so much.[34] The absence of a specific recommendation is therefore not a gap in the factual framework.

24. ***Burden:*** There is no dispute that the ban on political donations from property developers and related entities limits the funds available to political parties and therefore imposes an effective burden on political communication.[35] However, it is important to emphasise at the outset[36] that the burden is indirect and insubstantial. This is because the provisions regulate funds, not speech, and leave prohibited donors at liberty to communicate 'on matters of politics and government, including influencing politicians to a point of view'.[37]

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[31] *Unions [No 2]* [2019] HCA 1, [113] (Nettle J).
[32] Cf PS, 10 [35].
[33] SCB, vol 2, 392-3.
[34] Cf *Cobb & Co Ltd v Kropp* [1967] 1 AC 141, 157 (Lord Morris for the Privy Council).
[35] Amended Defence, 8-9 [31]. See also *McCloy* (2015) 257 CLR 178, 201 [24] (French CJ, Kiefel, Bell and Keane JJ), 290 [347] (Gordon J).
[36] *Tajjour v New South Wales* (2014) 254 CLR 508, 579 [147] (Gageler J); *Brown v Tasmania* (2017) 261 CLR 328, 378-9 [165] (Gageler J), 398-9 [237] (Nettle J), 460 [411] (Gordon J).
[37] *Brown* (2017) 261 CLR 328, 361 [91] (Kiefel CJ, Bell and Keane JJ). See also *McCloy* (2015) 257 CLR 178, 220-1 [93] (French CJ, Kiefel, Bell and Keane JJ).

In fact, prohibited donors remain at liberty to spend money directly in State elections to promote their political views (third party expenditure being unregulated in Queensland). Thus the plaintiff's assertion that the burden is direct must be rejected. Further, prohibited donors remain free to engage in political communication through the medium of a political party. They are prohibited from soliciting donations, but solicitation does not amount to political communication (though, of course, use of those donations may).

25. Further, the effect of the provisions is 'to enhance freedom of political speech generally by levelling the playing field', such that the net impact on the implied freedom is positive rather than negative.[38] The burden is thus insubstantial.

26. The plaintiff's submission that the burden is substantial because it discriminates against property developers is contrary to authority,[39] in particular *McCloy*. That the indirect impact of the burden may affect one political party more than another does not take the matter any further: 'The law affects those whom the law affects.'[40]

27. Moreover, the plaintiff has not pointed to any difference in the factual or legal context which might show that the effect of the laws in New South Wales is different to the effect of the indistinguishable laws in Queensland. To the contrary, the plaintiff implicitly accepts that the nature and extent of the burden is the same.[41] Accordingly, the risk posed to the constitutionally prescribed system of government is low. Whatever tools of analysis are employed, justification analysis must be undertaken in light of that low systemic risk.

28. ***Compatibility:*** The mischief[42] to which the prohibited donor provisions are directed is 'the risk of actual or perceived corruption related to developer donations' in State elections.[43] The purpose of minimising that risk of corruption – and concomitantly improving transparency and accountability in State elections and State government – is derived from: the text of the provisions, the wider statutory context (including the *Planning Act*),[44] the extrinsic material,[45] and the CCC's findings which informed the development of the Amending Act.[46]

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[38] *Brown* (2017) 261 CLR 328, 361 [94] (Kiefel CJ, Bell and Keane JJ), citing *McCloy* (2015) 257 CLR 178, 220-1 [93] (French CJ, Kiefel, Bell and Keane JJ).
[39] *Brown* (2017) 261 CLR 328, 361 [94] (Kiefel CJ, Bell and Keane JJ). Cf PS, 7 [27].
[40] *McCloy* (2015) 257 CLR 178, 287 [334] (Gordon J). Cf PS, 7-8 [28].
[41] PS, 8 [29] where the plaintiff equates the burden in this case with the burden found to be justified in *McCloy*.
[42] *Brown* (2017) 261 CLR 328, 363 [101] (Kiefel CJ, Bell and Keane JJ), 391-2 [208]-[209] (Gageler J), 432 [321] (Gordon J); *Unions [No 2]* [2019] HCA 1, [171] (Edelman J).
[43] Queensland, *Parliamentary Debates*, Legislative Assembly, 6 March 2018, 189 (SJ Hinchliffe).
[44] SC, 7-22 [30]-[75]. See also *Integrated Resort Development Act 1987* (Qld) ss 5, 7, 12-3.
[45] Explanatory note, Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 (Qld) 1-4, Queensland, *Parliamentary Debates*, Legislative Assembly, 6 March 2018, 189-90; 15 May 2018, 1104, 1106.

29. The anti-corruption purpose of the prohibited donor provisions also coheres with the wider purposes[47] of the QE Act which include securing and promoting the actual and perceived integrity of the Queensland Parliament and government[48] and, at a higher level of abstraction, 'regulat[ing] State elections'.[49]

30. Given this Court's decision in *McCloy*,[50] it cannot be doubted that these purposes are legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[51] Not only are these purposes compatible, they 'enhance' that system.[52]

31. The plaintiff asserts that the facts in this case are somehow relevantly different from those in *McCloy* and, for that reason, the purposes which were legitimate in *McCloy* are not legitimate in this case.[53] But legitimacy turns on a criterion which applies equally to all Australian jurisdictions: compatibility with the maintenance of the constitutionally prescribed system of government. *McCloy* cannot be distinguished.

32. ***Suitability:*** Following *McCloy*, it is clear that the prohibited donor provisions are rationally connected to their legitimate purposes.[54] The plaintiff points out that people other than property developers also pose a risk of corruption. But the law's rational connection is not severed by underinclusiveness.[55] Nor does it matter if the risk of corruption is higher at the local government level because most planning decisions are made at that level.[56] The point is there remains a risk at the State level.

33. ***Necessity:*** The plaintiff has advanced a number of hypothetical alternatives.[57] As *McCloy* shows, none would be 'as effective' nor 'as practicable' in achieving the legitimate

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[46] Crime and Corruption Commission, *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government* (October 2017), the relevant extracts of which are at SCB, vol 2, 342-89.
[47] See *Unions [No 2]* [2019] HCA 1, [32] (Kiefel CJ, Bell and Keane JJ).
[48] As with the equivalent New South Wales legislation at the time considered in *Unions NSW v New South Wales* (2013) 252 CLR 530, 545-6 [8] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (*Unions [No 1]*).
[49] *Electoral Commission of Queensland v Awabdy* (2018) 330 FLR 384, 400 [82] (Jackson J).
[50] *McCloy* (2015) 257 CLR 178, 209 [53] (French CJ, Kiefel, Bell and Keane JJ), 292 [355] (Gordon J).
[51] *Brown* (2017) 261 CLR 328, 363-4 [104] (Kiefel CJ, Bell and Keane JJ), 375-6 [156] (Gageler J), 416 [277] (Nettle J).
[52] *McCloy* (2015) 257 CLR 178, 196 [5], 221 [93] (French CJ, Kiefel, Bell and Keane JJ).
[53] PS, 8 [31].
[54] *McCloy* (2015) 257 CLR 178, 210 [56] (French CJ, Kiefel, Bell and Keane JJ), 261 [231]-[232] (Nettle J), 291-2 [353]-[355] (Gordon J). Cf PS, 9 [32].
[55] 'The Parliament is not relegated by the implied freedom to resolving all problems of corruption and undue influence if it resolves any': *McCloy* (2015) 257 CLR 178, 251 [197] (Gageler J). See also at 262 [234] (Nettle J). See also *Brown* (2017) 261 CLR 328, 395 [222] (Gageler J). Cf PS, 11 [40].
[56] PS, 11-3 [41]-[45].
[57] The plaintiff has pleaded other alternatives, in addition to those addressed here. In the absence of submissions advancing them, those alternatives are presumed abandoned.

purpose of minimising corruption.[58] They therefore cannot be said to be 'obvious and compelling', and do not qualify as true alternatives.[59] *Disclosure:* Whilst provisions requiring disclosure of donations[60] are no doubt important, they could not be said to be as effective as the prohibited donor provision in achieving the anti-corruption purpose.[61] *Caps:* A donation cap[62] cannot be as effective in addressing the risk of corruption as an outright ban. Further, it is not clear that a general cap on donations or a cap on expenditure would impose a lesser burden. To the contrary, it would appear that they would limit the funds available to candidates and political parties to a greater extent.[63] Moreover, in *McCloy*, this Court did not find that capping was a reasonably practicable alternative, even at the State level.[64] *Bribery:* The submission that an alternative would be to tighten bribery laws and penalties should be rejected for the reasons given in *McCloy*.[65] Further, the prohibited donor provisions address the *objective* tendency of particular donations to corrupt, rather than the *subjective* intention of the donor.

34. ***Adequacy of balance:*** On one side of the scales, the burden is indirect and insubstantial. On the other side of the scales, 'the public interest in removing the risk and perception of corruption is evident.'[66]

35. The plaintiff attempts to diminish the importance of removing the risk of corruption at the State level by pointing out that most planning decisions are made at the local government level.[67] But adequacy of balance does not compare the importance of dealing with the mischief sought to be addressed (the risk of corruption at the State level), with the importance of dealing with some other mischief (the risk of corruption at the local government level). In any event, that more significant planning decisions are made at the State level suggests that the risk of corruption at the State level carries greater consequences. The percentages of different types of planning decisions do not reveal the monetary value or economic

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[58] *Tajjour* (2014) 254 CLR 508, 565-6 [90] (Hayne J), 571 [114] (Crennan, Kiefel and Bell JJ).
[59] *Tajjour* (2014) 254 CLR 508, 550 [36] (French CJ), 571-2 [115] (Crennan, Kiefel and Bell JJ); *McCloy* (2015) 257 CLR 178, 211 [58] (French CJ, Kiefel, Bell and Keane JJ), 285-6 [328] (Gordon J).
[60] PS, 13 [47].
[61] *McCloy* (2015) 257 CLR 178, 211 [61] (French CJ, Kiefel, Bell and Keane JJ), 249 [187] (Gageler J), 286 [331] (Gordon J).
[62] PS, 13-4 [48]-[49].
[63] Similar to the 'paradox' identified by Gordon J in *Brown* (2017) 261 CLR 328, 464 [427].
[64] *McCloy* (2015) 257 CLR 178, 211-2 [63] (French CJ, Kiefel, Bell and Keane JJ), 250 [196] (Gageler J).
[65] *McCloy* (2015) 257 CLR 178, 211 [62] (French CJ, Kiefel, Bell and Keane JJ), 270-1 [259] (Nettle J), 286 [330], 293 [361] (Gordon J).
[66] *McCloy* (2015) 257 CLR 178, 221 [93] (French CJ, Kiefel, Bell and Keane JJ).
[67] PS, 11-3 [41]-[45]. The figures upon which the plaintiff relies are in any event inapt, because they encompass *all* planning decisions made in Queensland. The figures do not show what percentage of 'relevant planning applications' made by 'property developers' are decided by local governments or State government: SC, 22 [75].

significance of planning decisions made at a State level as against a local government level.[68] The quantity of planning decisions at the State level is thus not an accurate measurement of the importance of insulating them from the risk, or perceived risk, of corrupting influences.

36. Moreover, the role of Ministers and the State government in planning decisions in New South Wales was not so different in *McCloy*[69] that it can be said that the importance of reducing the risk of corruption at the State level in Queensland is somehow any less. Given that the importance of the implied freedom is constant throughout Australia, the two sides of the scales in *McCloy* were no different than they are here. The burden is 'more than balanced',[70] and certainly not 'grossly disproportionate' to,[71] the benefits sought to be achieved.

37. ***Other approaches to the* Lange *test:*** The above submissions are based on the 'tools of analysis' of structured proportionality.[72] Were a different approach adopted, such as a calibrated approach, the same result would obtain: 'the restrictions on political communication imposed by the provisions are no greater than are reasonably necessary to be imposed in pursuit of a compelling statutory object.'[73]

Exclusive power

38. Both the plaintiff and the Cth AG contend that pts 3 and 5 of the Amending Act are invalid because they trespass on an exclusive Commonwealth legislative power to make laws with respect to federal elections. They do so, however, in different ways.

39. The Cth AG submits that 'where a State makes a law relating to elections, any operation of that law that touches or concerns federal elections is invalid except to the extent that the connection to federal elections is insubstantial, tenuous or distant'.[74] Because, he says, pts 3 and 5 of the Amending Act are laws relating to elections that touch and concern federal elections more than incidentally, they are invalid.[75] The plaintiff does not rely on any 'touches and concerns' test. Instead, he essentially submits the amendments made by pts 3 and 5 of the

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[68] SC, 22 [75], SCB, vol 1, 135.
[69] See *McCloy* (2015) 257 CLR 178, 209 [52] (French CJ, Kiefel, Bell and Keane JJ). Compare *Environmental Planning and Assessment Act 1979* (NSW) ss 26, 37, pt 3, div 4, 89D-89E; *State Development and Public Works Organisation Act 1971* (Qld) ss 76E, 77, pt 5A, div 3, subdiv 3; *Planning Act 2016* (Qld) ss 26-7, 95, 102-5.
[70] *McCloy* (2015) 257 CLR 178, 221 [93] (French CJ, Kiefel, Bell and Keane JJ).
[71] *Brown* (2017) 261 CLR 328, 422-3 [290] (Nettle J).
[72] *McCloy* (2015) 257 CLR 178, 213 [68], 215 [72] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2017) 261 CLR 328, 376 [158]-[159] (Gageler J), 417 [280] (Nettle J), 476-7 [473], 478 [479] (Gordon J).
[73] *McCloy* (2015) 257 CLR 178, 222 [98] (Gageler J). See also at 249-52 [190]-[200] (Gageler J), 291-5 [349]-[369] (Gordon J).
[74] CAGS, 9-10 [23].
[75] CAGS, 12-5 [27]-[37].

Amending Act are invalid because they infringe an intergovernmental immunity akin to the *Melbourne Corporation* principle.[76] For the reasons outlined below, neither of these submissions should be accepted.

40. ***Commonwealth's test is inapposite***: It is convenient to begin with the submissions of the Cth AG regarding the 'touch and concerns' test. That test is purportedly derived, by analogy, from this Court's approach in *Bourke v State Bank of New South Wales* (*Bourke*) to the Commonwealth's power to make laws with respect to 'banking, other than State banking'.[77] There is no analogy.

41. *Bourke* concerned a limit on Commonwealth legislative power explicit in the text of s 51(xiii); namely, 'banking, other than State banking'. The Court formulated the appropriate test for determining whether a Commonwealth law was a law with respect to State banking in light of two considerations. First, if s 51(xiii) only restricted laws that were in substance about State banking, or were aimed at State banking, then the Commonwealth could subject State banking to the same regulation as all other banking.[78] Notwithstanding the language of s 51(xiii), the Commonwealth could control State banking and override any inconsistent law about that topic under s 109 merely by enacting a general law about banking. Second, an exclusive State power preventing Commonwealth law from touching or affecting banking in any way found no support in the express words of the Constitution and would conflict with the 'intended generality of other grants of legislative power contained in s 51'.[79]

42. Given these considerations, the Court in *Bourke* said that the 'only satisfactory solution' was to accept that there was no exclusive State power to make laws with respect to State banking.[80] However, the express limit in s 51(xiii) also required that, when the Commonwealth enacted a law which was properly characterised as a law with respect to banking, that law could not 'touch or concern' State banking, except where the connection with State banking was 'insubstantial, tenuous or distant'.[81] If the Commonwealth law, so characterised, touched or concerned State banking and the connection was more than 'insubstantial, tenuous or distant', it was invalid.

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[76] PS, 14-7 [51]-[59].
[77] (1990) 170 CLR 276. See CAGS, 10 [24].
[78] *Bourke* (1990) 170 CLR 276, 287.
[79] *Bourke* (1990) 170 CLR 276, 287-8.
[80] *Bourke* (1990) 170 CLR 276, 288.
[81] *Bourke* (1990) 170 CLR 276, 288-9.

43. The considerations which led the Court in *Bourke* to this conclusion, however, do not apply in relation to determining whether a State law strays into what the Cth AG contends is an exclusive field of Commonwealth legislative power. The Commonwealth claims to have an exclusive power with respect to federal elections, whereas (as *Bourke* makes clear) s 51(xiii) does not give the States exclusive power over State banking. Equally important, it is impossible to see how federal elections could be regulated, even incidentally, by any State law (general or otherwise) that the Commonwealth Parliament was unwilling to countenance. Subject to the Constitution, the Commonwealth could override any inconsistent State law.

44. No authority supports the adoption of the 'touches and concerns' test urged by the Cth AG. *Smith v Oldham* (*Smith*)[82] says nothing about it. As explained above, moreover, the 'touches and concerns' test in *Bourke* was adopted as a result of the need to identify the scope of an express limit on Commonwealth legislative power with respect to banking, which limit was defined by reference to a non-exclusive State legislative power. Such a test cannot be transposed to identify the scope of permissible State law-making where there is an exclusive Commonwealth legislative power over federal elections.

45. The 'touch and concerns' test is also irreconcilable with the reasoning in *R v Brisbane Licensing Court; Ex parte Daniell* (*Daniell*).[83] The Court there accepted that the Commonwealth's power over federal elections enabled it to pass legislation precluding State referenda or elections being held on the same day as federal elections.[84] The Court made it clear that such legislation would prevail over State law because of s 109 of the Constitution.[85] In *West v Commissioner of Taxation*, Evatt J described the outcome of *Daniell* as follows: '[T]he Commonwealth's legislative power over its own electoral system was deemed sufficient to enable it to prevent the awkwardness and confusion which might well result from a simultaneous Commonwealth and State election.'[86]

46. If the Cth AG's test were correct, an analysis based on s 109 would be inexplicable. Laws requiring State elections or electoral referenda to be held on the same day as federal elections plainly would be laws relating to elections, whatever else they might be. They would, moreover, have a connection with federal elections that was more than 'insubstantial,

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[82] (1912) 15 CLR 355.
[83] (1920) 28 CLR 23. In that case, it was argued, in reliance on *Smith*, that the Commonwealth's power over federal elections was exclusive: (1920) 28 CLR 23, 25. Yet the Court did not refer to exclusive power and decided the case under s 109.
[84] (1920) 28 CLR 23, 31 (Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ), 32 (Higgins J).
[85] (1920) 28 CLR 23, 29 (Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ), 32 (Higgins J).
[86] (1937) 56 CLR 657, 707 (emphasis added).

tenuous or distant' because of their potentially disruptive impact on such elections. The logical consequence of applying the Cth AG's test would be that States have never had the power to enact such laws. *Daniell,* however, assumes the contrary.

47. Further, the suggested test lacks any secure textual basis in the Constitution. On the approach urged by the Cth AG, the first step is to ascertain whether the impugned State law relates to elections; if not, then it cannot infringe the Commonwealth's exclusive power. This consequence is said to follow from the terms of ss 10 and 31.[87] Those provisions, however, do not support the first step of the Cth AG's test. They refer only to State laws in force in each State 'relating to elections for the more numerous House of the Parliament of the State'. They say nothing about other electoral laws of the States, including laws about local government. They therefore cannot give rise to an implication that all State electoral laws are subject to a requirement that they must not touch and concern federal elections. Yet the Cth AG plainly intends to treat State laws prohibiting donations in local government indistinguishably from equivalent laws relating to State elections, for he submits that both are invalid.[88] That illustrates how far removed from the text of the Constitution the Cth AG's test is.[89]

48. Accordingly, even assuming for the sake of argument that Commonwealth power over federal elections is exclusive, the 'touches and concerns' test must be rejected. So must his submissions for the invalidity of pts 3 and 5 of the Amending Act.

49. ***Commonwealth power is not exclusive*:** In any event, the premise underlying both the plaintiff and the Cth AG's submissions is incorrect: the power of the Commonwealth Parliament to make laws with respect to federal elections is not exclusive.

50. The plaintiff and the Cth AG rely on *Smith* to support their contentions that the Commonwealth's power to make laws for federal elections is exclusive. The Cth AG goes further in claiming that the *ratio* of *Smith* is that the States lack power to make laws about federal elections.[90] These submissions should not be accepted.

51. The question in *Smith* was whether s 181AA of the *Commonwealth Electoral Act 1902* (Cth) was a valid Commonwealth law. This required the author of political material to sign the material and include his or her name and address on it. The Court concluded that s 181AA

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[87] CAGS, 11 [26].
[88] See CAGS, 1 [4], 13-4 [31]-[37].
[89] By contrast, the terms of s 51(xiii) support the view that the first step in determining if a Commonwealth law transgresses the limitation on State banking is to ask whether the Commonwealth law can properly be characterised as a law with respect to banking.
[90] PS, 15 [54], CAGS, 2-3 [7]-[8].

was valid because the Commonwealth Parliament could make laws to protect electors from misrepresentation or undue influence.[91] In so holding, it rejected submissions from the plaintiff that the law was *ultra vires* because it dealt with a matter reserved to the States; namely, the conduct and control of newspapers.[92]

52. Griffith CJ's conclusion that the provision was within the scope of the Commonwealth Parliament's power to make laws for the regulation of federal elections did not rest on his observation that that power was exclusive and one in which 'the States as such [had] no concern'.[93] That observation was clearly an *obiter dictum.*

53. So too was Isaacs J's observation that the subject matter of s 181AA was 'transparently beyond the competency of the State to control'.[94] His Honour had already concluded that the Commonwealth's power with respect to federal elections extended to the power to protect voters from intended deception said to be brought about by anonymous political material.[95] No more was necessary to support the validity of s 181AA.

54. It follows that the observations in *Smith* that the States lacked power to make laws relating to federal elections were *obiter dicta.* Regardless, it is respectfully submitted that the Court should not regard those views as correct.[96]

55. First, Griffith CJ's observation that '[t]he matter is one in which the States as such have no concern' was no more than an assertion.[97] His Honour did not elaborate further. Such a conclusory statement lacks any reasoning to support it.[98]

56. Second, contrary to what is suggested by Griffith CJ, State Parliaments do have a legitimate concern in enacting laws which may impact on federal elections, especially if that concept be understood as broadly as the Cth AG suggests. In Australia, State facilities are often used to house polling places; State authorities may be called upon to ensure the peace is maintained in and around the polling places; and the States, as participants in the Commonwealth created by the Constitution, have an interest in federal elections producing the responsible and representative government for which the Constitution provides. State electors are also federal electors; '[s]ocial, economic and political matters ... are increasingly

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[91] *Smith* (1912) 15 CLR 355, 358 (Griffith CJ), 362-5 (Isaacs J).
[92] *Smith* (1912) 15 CLR 355, 356 (recording the submission).
[93] *Smith* (1912) 15 CLR 355, 358.
[94] *Smith* (1912) 15 CLR 355, 365.
[95] *Smith* (1912) 15 CLR 355, 362-3.
[96] Queensland does not submit that any other aspect of *Smith v Oldham* is wrong.
[97] *Smith* (1912) 15 CLR 355, 358.
[98] Further, it overlooks the plenary nature of State power: *Union Steamship Co v King* (1988) 166 CLR 1, 9.

integrated';[99] and national political parties operate 'across the federal divide and at federal, State, Territory and local government levels'.[100] In addition, the failure to discourage the corruption of decision-making by federal elected representatives and the parties which endorse them has a potential to increase the risk of corruption at the State level. Moreover, States plainly have a legitimate interest in regulating the operations of political parties which promote candidates in State elections. That interest extends to enacting laws prohibiting certain donations being made to those parties, even if those parties may also be registered as political parties under Commonwealth electoral law.[101]

57. Third, Barton J's reasoning that the Commonwealth power is exclusive 'because no State Parliament had under its own Constitution power to legislate as to federal elections'[102] is, respectfully, inconsistent with the history immediately before federation as well as the nature of State legislative power.

58. New South Wales, Queensland, Tasmania and Victoria passed Acts that were directed to federal elections shortly before the Commonwealth came into existence.[103] The provisions of those Acts cannot all be explained as proleptic exercises of the powers that were conferred under ss 7, 9 or 29 of the Constitution. For example, s 2 of the *Federal Elections Act 1900* (NSW) and *Federal Elections Act 1900* (Vic) and s 8(1) of the *Commonwealth Elections Act 1900* (Qld) provided for the appointment of returning officers for Senate elections. It is not obvious that such provisions could be supported by the strict terms of ss 7, 9 or 29 of the Constitution. Section 7 of the *Commonwealth Elections Act 1900* (Qld), moreover, proscribed voting more than once at an election for the Senate or for the House of Representatives.[104] The subject matter of that provision falls outside ss 7, 9 and 29 of the Constitution. In addition, given that s 7 purported to apply directly to Senate elections, it would not have been picked up by ss 10 and 31 of the Constitution.[105] It could only have applied of its own force.

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[99] *Unions [No 1]* (2013) 252 CLR 530, 549 [22] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[100] *Unions [No 1]* (2013) 252 CLR 530, 550 [24]-[25] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[101] Contrary to PS, 14 [51], the State laws do not 'designedly' capture parties which also have the object of electing Senators or members of the House of Representatives. They capture such parties only because of the way in which such parties have chosen to organise their affairs.
[102] *Smith* (1912) 15 CLR 355, 360 (Barton J).
[103] *Federal Elections Act 1900* (NSW) (No 73, 1900); *Parliament of the Commonwealth Elections Act and The Elections Acts 1885 to 1898 Amendment Act 1900* (Qld) (64 Vic No 25); *Federal Elections Act 1900* (Tas) (64 Vic No 59); *Federal Elections Act 1900* (Vic) (64 Vic 1715).
[104] Such a law, if enacted today, may be inoperative under s 109 of the Constitution as inconsistent with s 339(1A)-(1D) of the CE Act, which make it an offence to vote more than once in the same election.
[105] Although ss 8 and 30 of the Constitution provide that electors in Commonwealth elections shall vote only once, they impose no criminal sanction. Any such sanction would have been left to the relevant Parliament to enact. Prior to the first federal election, that could only be the colonial Parliaments.

59. The enactment of such provisions illustrates that the colonies had a legitimate interest in the conduct of the first federal election and exercised their legislative powers so as to assist in its smooth running.

60. In any case, the claim that States cannot have had the power to make laws relating to federal elections before federation[106] overlooks the fact that State legislative power is plenary and applies to subject matters, bodies and polities that did not exist before that time.[107] It is mistaken to reason, as Barton J did, that because the power to regulate federal elections did not reside in the colonies, the legislative power of the States cannot extend to that topic.

61. Fourth, no factors tend against overruling the exclusive power aspect of *Smith*.[108] The views expressed did not depend upon a principle carefully worked out in a significant succession of cases. They were logically irrelevant to the holding that the impugned provision was valid.[109] The reasons of the members of the Court were not all the same; and the decision has not been acted upon in a way that would militate against reconsideration.

62. Quite apart from these difficulties with the judgments in *Smith*, there are at least four other reasons for concluding that the power over federal elections in not exclusive. First, in contrast to provisions such as ss 52 and 90, nothing in the text of the Constitution expressly gives the Commonwealth exclusive power to regulate federal elections.[110]

63. Second, there is no secure basis[111] to imply that the power of the Commonwealth Parliament to regulate federal elections must be exclusive. The Commonwealth's ability to rely on s 109 to displace State laws removes any need for such an implication.[112] Section 109

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[106] See also CAGS, 6-7 [16].

[107] Compare Meagher and Gummow, 'Sir Owen Dixon's Heresy' (1980) 54 *Australian Law Journal* 25, 28; Doyle, '1947 Revisited: The Immunity of the Commonwealth from State Law' in Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 47, 62-3. See also *Re Residential Tenancies Tribunal of New South Wales; Ex parte Defence Housing Authority* (1997) 190 CLR 410, 504 (Kirby J).

[108] See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438-9.

[109] Indeed, it would now be regarded as erroneous to determine whether a law was with respect to a head of Commonwealth legislative power by first asking if the States had power to enact an equivalent law.

[110] *Local Government Association of Queensland v State of Queensland* [2003] 2 Qd R 354, 369 [35]-[36] (Davies JA) (*LGAQ*).

[111] Any implication must be securely based in the text or structure of the Constitution: see *ACTV* (1992) 177 CLR 106, 134-5 (Mason CJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 453 [389] (Hayne J), 484-5 [469]-[470] (Callinan J); *McCloy* (2015) 257 CLR 178, 283 [318] (Gordon J). At least where an implication is structural, it must be logically or practically necessary for the preservation of the constitutional structure: see *ACTV* (1992) 177 CLR 106, 135 (Mason J); *McGinty v Western Australia* (1996) 186 CLR 140, 169 (Brennan CJ).

[112] *LGAQ* [2003] 2 Qd R 354, 370-1 [37]-[41] (Davies JA); *Burns v Corbett* (2017) 92 ALJR 423, 446 [94]-[95] (Gageler J), 457 [146] (Nettle J), 462 [175], 463 [179] (Gordon J), 479 [260] (Edelman J) (regarding the ability of the Commonwealth to legislate to exclude State law as relevant to the existence of an implication); *Ontario Public Service Employees Union v A-G (Ontario)* [1987] 2 SCR 2, 19 (Dickson CJ).

also addresses any concerns about variable State laws, if uniformity is desired.[113] The potential for 'a multitude of legislative voices' is therefore no reason for drawing an implication that Commonwealth legislative power must be exclusive.[114]

64. Any suggestion that s 109 would be inadequate because the States could enact legislation that would commence while the Commonwealth Parliament is prorogued[115] is, respectfully, fanciful. In any event, a theoretical possibility that the States will abuse a power is no basis for denying power on that topic.[116]

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65. Further, it is wrong to claim that if State Parliaments had the power to make laws with respect to federal elections, the grants in ss 7, 9 and 29 would be otiose.[117] Those sections deal only with specific aspects of federal elections, and the express grants in them are explicable and serve limited purposes. Without an express grant of power, Queensland would have been bound by the requirement in the first paragraph of s 7 that the Senate shall vote as one electorate. Without the grants of power in s 9, it would have been impossible to distinguish

20 between the exclusive State power to make laws for determining the times and places for elections[118] and the concurrent power to make laws prescribing the method of choosing senators for that State. The express grant in s 29 also clarified the position with respect to divisions of the House of Representatives. To infer from these provisions that States lack power to make laws that may affect all other aspects of federal elections is not warranted.[119]

66. Third, apart from *Smith*, the authorities cited by the plaintiff and the Cth AG do no more than state, without analysis and generally by reference to *Smith*, that the Commonwealth's

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[113] CAGS, 3-4 [11]. The first federal election was subject to a diverse range of State electoral laws on topics extending well beyond the qualifications of electors and the scope of the franchise. Eg in SA and Tas, electoral expenditure caps and third party expenditure bans applied: *Electoral Code 1896* (SA) (59 & 60 Vic No 667), ss 146, 147, 160(c); *Electoral Act 1896* (Tas) (60 Vic No 49) ss 190, 197, sch 25. In Qld, SA and Tas, electoral advertising had to include the details of the person authorising it: *Criminal Code Act 1899* (Qld) (63 Vic No 9) sch, s 106(2); *Electoral Code 1896* (SA) (59 & 60 Vic No 667) s 160(d); *Electoral Act 1896* (Tas) (60 Vic No 49) s 142. Sections 10, 31 and 51(xxxvi) of the Constitution left it to the Commonwealth Parliament to decide whether to produce a uniform federal scheme. It was not required to exercise that power.

[114] Cf PS, 15-16 [54].

[115] CAGS, 7-8 [18].

[116] See *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 24 [12] (Gleeson CJ); *Shaw v Minister for*

40 *Immigration and Multicultural Affairs* (2003) 218 CLR 28, 43 [32] (Gleeson CJ, Gummow and Hayne JJ); *XYZ v Commonwealth* (2006) 227 CLR 532, 549 [39] (Gummow, Hayne and Crennan JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 240 [151] (Heydon J).

[117] CAGS, 7 [17].

[118] *Re Australian Electoral Commission; Ex parte Kelly* (2003) 77 ALJR 1307, 1309 [13] (Gummow J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 232 [140] (Gummow and Hayne JJ).

[119] Sections 10 and 31 do not support any implication of the sort advanced by the Cth AG. They established a default rule: certain State electoral laws (which were expressed to apply only to State electoral processes, without any reference to federal elections) automatically applied. This was done to ensure that there would be no lacuna in the law governing federal elections. The existence of the default rule, however, does not logically entail that the Commonwealth's power is exclusive.

powers as to federal elections are exclusive.[120] The passage from McHugh J in *McGinty v Western Australia* cited by the plaintiff as authority for this proposition is not relevant;[121] it is authority for the different proposition that neither a Commonwealth nor a State law can undermine the efficacy of the system for federal elections prescribed in the Constitution. Further, the observation of Dawson J in *Abbotto v Australian Electoral Commission*, quoted by the Cth AG, merely expresses doubt 'whether a State statute which purported to interfere with the system of voting in federal elections would be within the power of a State legislature'.[122] His Honour did not elaborate on that view and indeed left open the possibility that s 109 would resolve any inconsistency between the federal voting system and State law. The additional authorities therefore do not advance the case for exclusivity.

67. Finally, the plaintiff's apparent reliance on a reverse *Melbourne Corporation* doctrine is misplaced.[123] Such a principle cannot be a necessary implication of the federal structure, given the availability of s 109 to protect the Commonwealth from State legislation which might purport to curtail its functions as a government.[124] In short, the Commonwealth can legislate to protect its electoral processes. Indeed it has purported to do so.

68. ***State laws do not relate to federal elections in any event:*** If, contrary to the submissions above, the Commonwealth did have exclusive power with respect to federal elections, pts 3 and 5 of the Amending Act are not invalid for infringing that power. Those provisions do not have the predominant characteristic of laws relating to federal elections.

69. The unanimous reasons in *Bourke*[125] are consistent with the notion that, if there is an area of exclusivity in relation to federal elections, a State law will be invalid only if it can be said to have the sole or dominant character of a law relating to those elections.

70. The Court in *Bourke* identified two potential tests for giving effect to a conferral of exclusive power on one polity within a federation. The first test rendered invalid laws of the other polity which had the 'sole or dominant characterisation' of the excluded matter.[126] The

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[120] PS, 15 [54]; CAGS, 3 [9], citing *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545, 564 (Dixon J); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 14 [8] (French CJ); *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 112-3 [261] n 326 (Gordon J).
[121] (1996) 186 CLR 140, 231 (McHugh J). See PS, 15 n 106.
[122] *Abbotto v Australian Electoral Commission* (1997) 71 ALJR 675, 678-9. See CAGS, 9 [21].
[123] PS, 16-7 [56]-[57]. It is unclear whether the plaintiff contends that the power is exclusive but is informed by the implication or there is a separate implication. There would seem to be no practical difference.
[124] See *LGAQ* [2003] 2 Qd R 354, 373 [49] (Davies JA); *Uther's Case* (1947) 74 CLR 608, 520 (Latham CJ).
[125] (1990) 170 CLR 276.
[126] (1990) 170 CLR 276, 286 (the Court).

second test rendered invalid laws of the other polity which 'touched or affected' the excluded subject matter 'in any way'.[127] Each was rejected in the context of s 51(xiii).[128]

71. It was because neither test could be applied that the Court concluded that the States do not have an exclusive power over State banking.[129] If, however, the Commonwealth's power over federal elections is exclusive, it becomes necessary to consider the tests said by the Court in *Bourke* to be relevant in that context.

10 72. The second of the tests in *Bourke* is clearly inapplicable here: a conclusion that State laws could not 'touch or affect federal elections in any way' would be inconsistent with the settled position that justified State laws may affect federal elections by restricting the flow of communication necessary for the choice of electors in federal elections.[130] It would also be inconsistent with *Daniell*.[131]

73. That leaves the first test identified in *Bourke*, one of 'sole or dominant characterisation'. Such a test is erroneous in the ordinary context of the characterisation of Commonwealth
20 laws,[132] but that does not mean it is inapplicable where the question is whether a State law transgresses a constitutional boundary. So much follows from *Bourke*, where the Court quoted[133] Barwick CJ's comments in *Victoria v Commonwealth* ('the *Pay-roll Tax Case*') that 'the decision of what is the subject matter of the law may be approached somewhat in the manner the validity of a law claimed to be within one of the two mutually exclusive lists in the Canadian Constitution is determined'.[134] Such a law, his Honour explained, could be upon one or other of the subjects, but not on both. As the Court said in *Bourke*, those comments
30 'have greater force' when understood in the context of exclusive powers.[135]

74. Further, to the extent *Smith* is authority that the Commonwealth power is exclusive, its reasoning suggests the application of a 'sole or dominant characterisation' test. When *Smith* was decided, whether a Commonwealth law was within a head of power turned on the law's

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[127] (1990) 170 CLR 276, 288 (the Court).

[128] The first test would have done too little to give effect to the words of s 51(xiii), as it would have left the Commonwealth free to legislate on the topic of State banking, by making general laws with respect to banking.
40 The second test would have abstracted too much from Commonwealth legislative power and conflicted with the grants of legislative power contained in s 51: (1990) 170 CLR 276, 287-8 (the Court).

[129] (1990) 170 CLR 276, 288 (the Court).

[130] See, eg, *McCloy* (2015) 257 CLR 178; *Tajjour* (2014) 254 CLR 508.

[131] (1920) 28 CLR 23. See the discussion in [47] above.

[132] See, eg, *New South Wales v Commonwealth* (2006) 229 CLR 1, 72 [51] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[133] (1990) 170 CLR 276, 286-7.

[134] (1971) 122 CLR 353, 372-3 (Barwick CJ). The Canadian test remains one of 'pith and substance': *Rogers Communications Inc v Châtequguay* [2016] 1 SCR 467, 485-6 [35-7], 489 [47], 490 [50] (Wagner and Côté JJ).

[135] (1990) 170 CLR 276, 287.

'true nature and character', a test which drew upon decisions of the Privy Council in relation to the Canadian Constitution.[136] The observations in *Smith* may be understood to suggest that what is 'exclusive' to the Commonwealth is the power to make laws the 'substantial' or 'true nature and character' of which is federal elections. The obverse is that only State laws that have such a character can trespass into the exclusive federal power.[137]

75. On the test of 'sole or dominant characterisation' identified in *Bourke*, the exclusivity of the Commonwealth's power with respect to federal elections does not invalidate pts 3 and 5 of the Amending Act. On no view could it be said that they are laws solely or in the main about federal elections. On the contrary, the prohibitions operate only where a political party has an object of promoting candidates in State or local government elections.[138]

76. Accordingly, if there is an exclusive Commonwealth legislative power over federal elections, pts 3 and 5 do not trespass into that area. They are valid.

Section 302CA is invalid

77. Section 302CA is invalid because:

(a) *First*, it removes the immunity *ab initio* if the gift is later identified for use only for a State or Territory electoral purpose, and thus purports to override the temporal operation of s 109, contrary to *University of Wollongong v Metwally* (*Metwally*).[139]

(b) *Second*, the dominant characterisation of s 302CA is as a law with respect to State elections, not federal elections. If Commonwealth and State powers to make laws with respect to elections are mutually exclusive, s 302CA is invalid.

(c) *Finally*, s 302CA impairs the capacity of States to control their own electoral systems, contrary to the *Melbourne Corporation* principle.

78. Section 302CA cannot be understood in isolation from s 109.

79. ***The purpose and operation of s 109***: In *Metwally*, Brennan J observed that s 109 can be divided into two parts: 'that which governs its operation ("When a law of a State is inconsistent with a law of the Commonwealth") and the operative provision ("the latter shall

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[136] See, eg, *R v Barger* (1908) 6 CLR 41, 65, 73, 77 (Griffith CJ, Barton and O'Connor JJ).
[137] (1912) 15 CLR 355, 361 (Barton J).
[138] It is well established that the character of a statute depends on the nature of the rights, duties, powers and privileges which the statute changes, regulates or abolishes: see *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 561 [12] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). See also *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, 7 (Kitto J).
[139] (1984) 158 CLR 447.

prevail, and the former shall, to the extent of the inconsistency, be invalid")'.[140]

80. The governing provision has both a substantive and a temporal aspect. Pointing to both, Taylor J recognised in *Butler v Attorney-General (Vic)*[141] that s 109 deals 'with instruments having the force of law and which are intended during the period of their operation to create rights and duties and to impose obligations according to their tenor'.

81. Section 109 thus requires identification of the 'rights, privileges or powers, and duties or obligations' created by a Commonwealth law,[142] and an analysis of whether a State law would alter, impair or detract from those legal relations.[143] If the State law does so, s 109 is engaged in 'the period during which the condition which governs its operation is satisfied';[144] that is, *when* there is an inconsistency.

82. As to the operative provision of s 109, it has no effect upon the Commonwealth law, but a State law that s 109 makes inoperative 'is incapable of creating or affecting legal rights or obligations: its force and effect are sterilized'.[145] Section 109, and not the Commonwealth law,[146] has the effect that 'a legal right or obligation that would have arisen under the State law had it been operative does not arise'.[147] Consequently, once the condition governing s 109 is satisfied, it is beyond the power of the Commonwealth Parliament to 'retrospectively endow a State law with the force and effect of which s 109 deprived it'.[148]

83. That orthodox understanding of the operation and effect of s 109 underscores four central points for the determination of this case:

(a) *First*, as has been repeatedly[149] and unanimously[150] recognised in this Court, the provisions of s 109 are 'of great importance for the ordinary citizen, who is entitled to know which of two inconsistent laws he is required to observe'.

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[140] *Metwally* (1984) 158 CLR 447, 473.
[141] (1961) 106 CLR 268, 283. See also *Momcilovic* (2011) 245 CLR 1, 106 [226]-[228] (Gummow J).
[142] *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011) 244 CLR 508, 523 [37] (the Court).
[143] The question can always be framed as one of altering, impairing or detracting: *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J); *Momcilovic* (2011) 245 CLR 1, 111 [242] (Gummow J), 141 [339] (Hayne J); *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2, [67], [70], [72] (Gageler J), [105] (Edelman J).
[144] *Metwally* (1984) 158 CLR 447, 473 (Brennan J).
[145] *Metwally* (1984) 158 CLR 447, 473 (Brennan J).
[146] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 157 (Knox CJ, Isaacs, Rich and Starke JJ) (*Engineers*); *R v Railways Appeals Board (NSW); Ex parte Davis* (1957) 96 CLR 429, 439 (Dixon CJ, Williams and Kitto JJ); *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545, 563 (Mason J).
[147] *Metwally* (1984) 158 CLR 447, 473 (Brennan J).
[148] *Metwally* (1984) 158 CLR 447, 475 (Brennan J). See also 457-8 (Gibbs CJ), 469 (Murphy J), 478 (Deane J).
[149] *Metwally* (1984) 158 CLR 447, 458 (Gibbs CJ), 477 (Deane J); *Croome v Tasmania* (1997) 191 CLR 119, 129-30; *Momcilovic* (2011) 245 CLR 1, 143 [347] (Hayne J).

(b) *Second*, s 109 operates to sterilise a State law only *when* there is an inconsistency.

(c) *Third*, when s 109 has sterilised the effect of a State law, it is beyond the capacity of the Commonwealth Parliament unilaterally to undo that operation of s 109.

(d) *Fourth*, it is axiomatic that a purpose of s 109 is to secure paramountcy of Commonwealth laws over conflicting State laws,[151] and that, where it is engaged, s 109 prescribes no consequences for the Commonwealth law. Neither of those propositions deny the conclusion that s 109 marks a boundary of Commonwealth legislative power.[152] It is plainly correct, for example, that the Commonwealth cannot provide directly for the validity or invalidity of a State law, but can only 'mark[] the limits' of inconsistency.[153]

84. ***Intended operation of s 302CA*:** Section 302CA(1) purports to confer a right to give, receive and retain gifts to or for the benefit of political entities, political campaigners and third parties, where the giving, receiving and retaining is not otherwise prohibited by div 3A, and 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).'[154] Subsection (2) applies where the donor sets terms which explicitly require or allow the gift or part to be for such a purpose (whether or not enforceable), or where the donor sets no terms. The right conferred by s 302CA(1) applies '[d]espite any State or Territory electoral law'.

85. Section 302CA(3) provides that s 302CA(1) 'does not apply' to all or part of a gift if: the donor sets terms, whether enforceable or not, that the gift or part be used only for a State electoral purpose (s 302CA(3)(a)); a State law requires the gift or part to be kept separately to be used only for a State electoral purpose (s 302CA(3)(b)(i)); or the gift recipient keeps or identifies the gift or part separately in order to be used only for a State electoral purpose (s 302CA(3)(b)(ii)).[155] The note to the subsection clarifies that for the purposes of s 302CA(3)(b)(ii), the recipient may identify the gift or part separately to be used for a State electoral purpose at any time until it is used.

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[150] *Dickson v The Queen* (2010) 241 CLR 491, 503-4 [19] (the Court).
[151] *Metwally* (1984) 158 CLR 447, 460 (Mason J).
[152] Cf *Metwally* (1984) 158 CLR 447, 461 (Mason J), 471 (Wilson J).
[153] *Engineers* (1920) 28 CLR 129, 157 (Knox CJ, Isaacs, Rich and Starke JJ).
[154] Subject to various exceptions, 'electoral expenditure' is 'expenditure incurred for the dominant purpose of creating or communicating electoral matter': s 287AB. 'Electoral matter' is, essentially, 'matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote' in a federal election: s 4AA.
[155] See also s 302CA(6).

86. Where s 302CA(3)(a) applies, s 302CA(1) is lifted at the time the gift is proposed to be made. Similarly, the existence of a law of the kind described in s 302CA(3)(b)(i) is ascertainable at the time the gift is proposed to be made, although where a State law imposes an absolute prohibition, s 302CA(3)(b)(i) will never be engaged.

87. In contrast, the consequence of s 302CA(3)(b)(ii) is that a person or entity who exercises a right under s 302CA(1) may have that right retrospectively removed sometime after – perhaps months or even years after – the right has been exercised. The intention appears to be that if, but for the right, the act would have occurred in contravention of a State law, then, at a later point in time, the Commonwealth law may have the effect that the act *was* done in contravention of State law. Moreover, at least in the case of a donor, the right is removed consequent upon the action of another person. That interpretation is confirmed by the note and the example which follow s 302CA(3), which form part of the CE Act,[156] and may extend its operation.[157]

88. ***Commonwealth cannot override s 109***: It is only necessary to state the intended operation of s 302CA(3)(b)(ii), to see that it seeks to override the condition governing the operation of s 109. It purports to give operation to State laws, in circumstances where s 109 has rendered those State laws inoperative. Moreover, it defeats one of the constitutional purposes of s 109 by rendering it impossible for ordinary citizens to know which of two conflicting laws apply to their conduct. That is not overcome by the suggestion that, unless donors impose legally enforceable terms that the gift be used for a federal purpose, they must 'conduct themselves alive to the possibility' that either law might apply.[158] It follows that s 302CA(3)(b)(ii) is invalid.[159]

89. The Cth AG seeks to avoid the conclusion that s 302CA(3) purports to enliven inoperative State laws retrospectively, by characterising s 302CA(1) as conferring a 'contingent permission'. It is evident that he does not mean the *continuation* of the permission is contingent: but rather that if the contingency fails, the permission never existed. In other

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[156] *Acts Interpretation Act 1901* (Cth) s 13.
[157] *Acts Interpretation Act 1901* (Cth) s 15AD(b).
[158] Cf CAGS, 17 [43].
[159] *Metwally* does not suggest that s 302CA is 'ineffective' rather than 'invalid'. In that case, it was unnecessary for the Court to decide the validity of s 3 of the *Racial Discrimination Amendment Act 1983* (Cth), because the real question was the validity of the State law under which Mr Metwally had complained: 459 (Gibbs CJ), 467 (Murphy J), 475 (Brennan J), 481 (Deane J). Further, the ineffective retrospective operation of s 3 did not alter its prospective operation. Here, the validity of s 302CA is directly challenged, and the ineffectiveness of the retrospective operation of s 302CA(3) fundamentally alters s 302CA's whole operation. Finally, if *Metwally* suggests a meaningful difference between 'ineffective' and 'invalid' in this context, it should not be followed.

words, instead of a crystallised right which may be retrospectively removed, s 302CA(1) is said to confer a right which is 'always qualified' by the possibility that s 302CA(3) will apply.[160] The Cth AG's alternative characterisation should be rejected. It posits a construction on which s 302CA would fail to achieve its only purpose: to create an inconsistency with State law in order to engage s 109, and sterilise the obligations in State laws.

90. If the existence of the right granted by s 302CA(1) is, at the time the right is relied upon to act in contravention of a State law, *contingent* on later events, then it follows that the inconsistency with State law is also, at that time, *contingent*. On that characterisation, it is impossible to conclude, at the time the gift is given or received, that the State law 'alters, impairs or detracts from' a right conferred by the CE Act, and s 109 is not engaged.[161] Section 109 does not sterilise the obligations in State laws at a time when those laws *might*, later, detract from a right retrospectively conferred by a Commonwealth Act. Section 109 by its terms is engaged only '*When* a law of a State *is* inconsistent with a law of the Commonwealth' (emphasis added).

91. If, as the Commonwealth suggests, s 302CA(1) confers a permission which is 'contingent' on later events, then the section purports to confer a right to act contrary to State law, *before* s 109 has been engaged to sterilise the State prohibition. It is obvious that a Commonwealth law cannot do so much. The Commonwealth cannot, by exercise of its own legislative power, 'rid itself of any State legislative "interference" or "impediment"', except 'expressly or impliedly by marking limits conflicting with State legislation which is valid except for the operation of s 109'.[162]

92. The Cth AG also submits that s 302CA(3) operates merely to 'limit[] the extent of the inconsistency'.[163] But that characterisation must also be rejected. It is the existence, and not the extent, of the right (and therefore the inconsistency) upon which s 302CA(3) operates. The Cth AG's alternative characterisations of s 302CA do not save it from invalidity.

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[160] CAGS, 17 [43].

[161] In logic, a contingent proposition is one that is neither necessarily true nor false: EJ Lowe, 'Contingent and necessary statements' in Ted Honderich (ed), *The Oxford Companion of Philosophy* (2nd ed, 2005). Thus, if the permission in s 302CA(1) is contingent, then the relevant conduct in breach of a State law is neither necessarily permitted nor not permitted, such that an inconsistency with the State law neither necessarily arises nor does not arise. That is, logically, it is not possible to say that an inconsistency has arisen.

[162] *West v Commissioner of Taxation (NSW)* (1936) 56 CLR 657, 701-2 (Evatt J), citing *Engineers* (1920) 28 CLR 129, 157 (Knox CJ, Isaacs, Rich and Starke JJ). See also *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 81 (Dixon J).

[163] CAGS, 18 [47].

93. The conclusion that s 302CA(3)(b)(ii) is invalid leads to the conclusion that sub-ss (1), (2), (3) and (6) (to the extent it applies to sub-s (3)(b)), are also invalid, as they cannot be severed in reliance upon s 15A of the *Acts Interpretation Act 1901* (Cth). The permission in sub-s (1) would have a radically different character in the absence of sub-s (3)(b)(ii). The relation between sub-ss (1), (2) and (3) is such that the Commonwealth Parliament clearly 'intended [them] to have either a full and complete operation or none at all.'[164] However, the distinct permission created by sub-ss (4), (5) and (6) (to the extent it applies to sub-s (5)) operates independently of the objectionable parts of s 302CA. Those provisions are severable.

94. ***Section 302CA is not a law with respect to federal elections:*** If contrary to the submissions made above at [38] to [67], the Commonwealth's power over federal elections is exclusive, the following alternative submissions are made.

95. '[I]n a completely self-governing Constitution it is to be taken for granted a power naturally appertaining to the self-government conferred is contained somewhere within it'.[165] Put another way, it is a defining feature of a self-governing, democratic polity that it has the power to regulate the conduct of its elections to ensure that the governed have a fair opportunity to select who is to govern them.

96. Each of the Commonwealth and the several States self-govern pursuant to their respective constitutions, the creation of each being established by the will of the Australian people in the lead up to federation and enshrined in the Act of the Imperial Parliament which created the Constitution. The continued existence of each is then ensured by the Constitution.[166]

97. One polity has no interest or concern in the regulation of the elections of another polity:[167] 'The Commonwealth Parliament has no general power to make laws for the peace, order and good government of the people of Australia [but rather only] with respect to [the

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[164] *Cam & Sons Pty Ltd v Chief Secretary (NSW)* (1951) 84 CLR 442, 454 (Dixon, Williams, Webb, Fullagar and Kitto JJ). See also *Knight v Victoria* (2017) 261 CLR 306, 325 [35] (the Court).

[165] *Smith v Oldham* (1912) 15 CLR 355, 365 (Isaacs J), citing *Colonial Sugar Refining Co Ltd v A-G (Cth)* (1912) 15 CLR 182, 214-5 (Isaacs J), in turn citing *A-G (Ontario) v A-G (Canada)* (1912) AC 571, 583 (Lord Loreburn LC). See also *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 590-1 (Deane J), *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82-3 (Dixon J); *New South Wales v Commonwealth* (2006) 229 CLR 1, 120 [195] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Work Choices Case*').

[166] *Victoria v Commonwealth* (1971) 122 CLR 353, 394-7 (Windeyer J) 369-71 (Barwick CJ); *Work Choices Case* (2006) 229 CLR 1, 119-20 [194] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Melbourne Corporation* (1947) 74 CLR 31, 50, 55 (Latham CJ), 65-6 (Rich J), 70 (Starke J), 82 (Dixon J).

[167] *Smith* (1912) 15 CLR 355, 358 (Griffiths CJ), 360-1 (Barton J), 363 (Isaacs J).

matters enumerated in s 51]'.[168] The States are not subordinate to the Commonwealth except in respect of particular matters.[169] It is a necessary incident of a federal structure that the Commonwealth is paramount within its defined areas of operation under the Constitution, and incompetent outside them.[170]

98. Inferentially, the consequence of the distribution of legislative powers effected by the Constitution is that, as no other enumerated power in the Constitution obtains in the present case, the Commonwealth has exclusive legislative power over the regulation of persons with regards to Commonwealth elections; but not otherwise as the subject matter of the power conferred on the Commonwealth under the Constitution plainly goes no further than this; and thus, residually, a State has exclusive legislative power over the regulation of persons with regards to that State's elections.[171]

99. In particular, the power to legislate with respect to Commonwealth elections is contained in ss 10, 31 and 51 (xxxvi) and (xxxix) of the Constitution.[172] Plainly, those provisions in the Constitution are concerned only with the conduct of Commonwealth elections. Nothing in them denotes a conferral of legislative power beyond the subject matter of election of members to the Commonwealth Parliament.

100. In the context of electoral laws, the necessary obverse, or residue, of the Commonwealth legislative power just described, is that both before and after federation, each colony and then State was the repository of the legislative power in relation to that colony or State's elections. That the Constitution entrenched rather than altered that finds significant textual support in the Constitution, especially ss 25, 41, 106 and 107.[173] The determination of the State franchise, as ss 25 and 41 strongly suggest, is for the State alone.

101. Thus, from federation, a law relating to elections was either founded on the legislative power of the Commonwealth, where its subject matter was federal elections, or alternatively the legislative power of a State where its subject matter was some other kind of election.[174] In other words, except as expressly provided for in the Constitution, the power of both polities to

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[168] *Melbourne Corporation* (1947) 74 CLR 31, 47 (Latham CJ).
[169] *Melbourne Corporation* (1947) 74 CLR 31, 50 (Latham CJ), 66 (Rich J).
[170] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 267 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).
[171] *Smith* (1912) 15 CLR 355, 360-1 (Barton J); *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 589-590 (Deane J); *Melbourne Corporation* (1947) 74 CLR 31, 60 (Latham CJ), 73-4 (Starke J), 83 (Dixon J); *Work Choices Case* (2006) 229 CLR 1, 118 [190], 119-20 [194] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[172] *Smith* (1912) 15 CLR 355, 356 (Mitchell KC and Irvine KC, during argument), 359 (Barton J), 362 (Isaacs J).
[173] Sections 7, 9, 10, 30 and 31 are also supportive.
[174] *Smith* (1912) 15 CLR 355, 360 (Barton J), 365 (Isaacs J).

make laws regarding their elections was exclusive, and mutually exclusive of the other. For that reason, the usual test of characterisation for Commonwealth laws does not apply. The test is instead one of sole or dominant characterisation.[175]

102. The exclusive power that each polity has encompasses the regulation of conduct of persons with regard to elections, the main object of which is to secure the freedom of choice of electors.[176] The Commonwealth or States can respectively enact legislation to prevent or suppress intimidation, undue influence, bribery, treating, coercion, misrepresentation or concealment of material circumstances; and 'more insidious, and, in many respects, the more dangerous [assaults on the purity and reality of elections in the] form of winning [electors'] assent by acts apparently fair and disinterested, but which may be so only on the surface'[177] All justices in *Smith* emphasised those threats to democracy that had featured in the 19th century electoral experience. But the laws regulating conduct clearly are not limited to such examples. Such freedom of choice may be influenced by the weight attributed by electors to views expressed in the political discourse by whether electors know the authors of such views, or having material circumstances, even innocently, concealed from them.[178]

103. Parts 3 and 5 of the Amending Act are laws designed to safeguard the freedom of choice of electors by removing a risk of corruption or undue influence. Section 302CA(1) purports to render those provisions invalid except where s 302CA(3) applies. Importantly, as explained in the preceding section on s 109, s 302CA(1) operates in that way, even if gifts are made without any express requirement that they be used in federal elections, and even if those gifts are in fact used in State elections. The dominant character of s 302CA is therefore that of a law with respect to State elections. For that reason it is invalid.

104. The dichotomy between exclusive legislative power in respect of federal elections, and State exclusive legislative power in respect of State elections being as described above; and in circumstances where the issues only arise for a political party if it decides to have composite objects of fielding State and federal candidates; s 302CA is on the subject matter of, in terms, impeding upon State electoral laws in relation to donations.

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[175] See paragraphs [68]-[76].
[176] *Smith* (1912) 15 CLR 355, 358 (Griffiths CJ), 360 (Barton J).
[177] *Smith* (1912) 15 CLR 355, 358 (Griffiths CJ), 360 (Barton J), 362-3, 365 (Isaacs J).
[178] *Smith* (1912) 15 CLR 355, 358 (Griffiths CJ), 362-3 (Isaacs J).

105. ***Section 302CA infringes the Melbourne Corporation doctrine***: The immediate object of s 302CA is to control the States and their people in the exercise of their constitutional functions.[179] It infringes the *Melbourne Corporation* doctrine and is invalid.

106. The *Melbourne Corporation* doctrine arises from the federal structure of the Constitution.[180] It is an implied limit on federal power which recognises that the Constitution is premised on the States continuing as independent bodies politic with their own constitutions and representative legislatures.[181] Application of the principle 'requires consideration of whether impugned legislation is directed at States, imposing some special disability or burden on the exercise of powers and fulfilment of functions of the States which curtails their capacity to function as governments'.[182] That task involves a 'multifactorial assessment',[183] of the form, substance and actual operation of the Commonwealth law.[184] That process here reveals the invalidity of s 302CA.

107. First, the regulation of its electoral processes by each State is not merely an exercise of legislative power: it is the performance of a constitutional function central to the existence and status of each State as an independent polity and component of the federation.[185] States are not merely 'accustomed'[186] to legislating for State elections: they must do so. As McHugh J pointed out in *Australian Capital Television Pty Ltd v Commonwealth*, the conception of the States as independent bodies politic, each with their own constitutions and institutions of representative and responsible government, requires the conclusion that control of each State's electoral system is singularly a matter for the State.[187] The necessary 'inference to be drawn' is that:[188]

> subject to a plain intention to the contrary, the powers of the Commonwealth do not extend to interfering in the constitutional and electoral processes of the State. It is for the people of the State, and not for the people of the Commonwealth, to determine what modifications, if any, should be made to the Constitution of the State and to the electoral processes which determine what government the State is to have.

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[179] Cf *ACTV* (1992) 177 CLR 106, 241 (McHugh J).
[180] *Austin v Commonwealth* (2003) 215 CLR 185, 245 [112] (Gaudron, Gummow and Hayne JJ).
[181] *ACTV* (1992) 177 CLR 106, 242 (McHugh J), *Melbourne Corporation* (1947) 74 CLR 31, 82 (Dixon J).
[182] *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548, 609 [130] (Hayne, Bell and Keane JJ).
[183] *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, 299 [34] (French CJ).
[184] *Clarke* (2009) 240 CLR 272, 290 [16] (French CJ), 307 [66] (Gummow, Heydon, Kiefel and Bell JJ); *Austin* (2003) 215 CLR 185, 249 [124] (Gaudron, Gummow and Hayne JJ).
[185] *Clarke* (2009) 240 CLR 272, 298 [32] (French CJ); *Austin* (2003) 215 CLR 185, 217 [24] (Gleeson CJ, explaining that it is the 'impairment of constitutional status, and interference with capacity to function as a government' which gives rise to the invalidity of the Commonwealth law).
[186] Cf *Western Australia v Commonwealth* (1995) 183 CLR 373, 477 (*Native Title Act Case*).
[187] (1992) 177 CLR 106, 242 (McHugh J).
[188] (1992) 177 CLR 106, 242 (McHugh J). See also at 163 (Brennan J).

108. Further, the electoral processes of a State extend to measures regarding transparency and integrity of the State electoral systems, including, centrally, the regulation of sources of money actually used by political parties, candidates and others in State and local government elections.[189]

109. Second, the effective exercise of the Commonwealth's legislative power found in ss 10, 31 and 51(xxxvi) of the *Constitution*, does not necessitate the Commonwealth's control of the States' exercise of legislative power over their own elections.[190] Hence there is no 'contrary intention', which would displace the implied limit on those legislative powers arising from *Melbourne Corporation.*

110. Third, where the question is the alleged impairment of the constitutional capacity of a State, the fact that the Commonwealth Act affects State legislation does not entail the consequence that the answer to the interaction of the two laws is found in s 109.[191] It is clear that *Melbourne Corporation* 'protects legislatures as well as executive governments',[192] and that s 109 operates only between valid laws.

111. Fourth, the plaintiff is wrong to suggest that s 302CA merely 'regulates donations for federal electoral purposes'.[193] An analysis of the substance and actual operation of s 302CA(1) reveals that it destroys the operation of Queensland's laws not only where a gift *may* be used in State elections, but also in respect of gifts which are *actually used* in State elections.[194] That is so even if, contrary to the submissions made above, s 302CA(3)(b)(ii) can validly remove the right conferred by s 302CA(1) retrospectively. Subsection (3)(b)(ii) applies only where, 'the gift recipient keeps or identifies the gift or part separately ... in order to be used only for a [State] electoral purpose.' Plainly, however, where a gift of money is placed in a mixed bank account, it may be spent on a State election without ever being 'kept or identified separately' for that purpose. The expenditure of money need not 'identify' a gift in the relevant way.[195] In its actual operation, s 302CA(1) therefore renders compliance with Queensland's electoral laws entirely voluntary, even in relation to gifts ultimately used for a

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[189] See also (1992) 177 CLR 106, 163 (Brennan J, holding that the functions of a State include 'the discussion of political matters by electors, the formation of political judgments and the casting of votes for the election of a parliament or local authority').
[190] *ACTV* (1992) 177 CLR 106, 199-200 (Dawson J). See also *West* (1937) 56 CLR 657, 707 (Evatt J).
[191] *Clarke* (2009) 240 CLR 272, 306 [64] (Gummow, Heydon, Kiefel and Bell JJ).
[192] *Queensland Electricity Corporation v Commonwealth* (1985) 159 CLR 192, 217 (Mason J), cited in *Native Title Act Case* (1995) 183 CLR 373, 476 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ); *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 216 (Stephen J).
[193] PS, 20 [71].
[194] Section 302CA(4) has no relevant interaction with Queensland's laws.
[195] Cf CAGS, 18 [47].

State election. A prohibition complied with only by volunteers is not a prohibition. Control over the integrity of the State electoral system is thus removed from the State.

112. Fifth, the impairing effect of s 302CA(1) is not ameliorated because it would have a different interaction with State laws which regulate 'gifts that are kept or identified separately to be used exclusively for a State or Territory electoral purpose', for example, by establishing a system of State campaign accounts.[196] Rather, that tends to highlight that a purpose and effect of s 302CA is to 'induce the State[s] to vary the method of'[197] regulating their own elections.[198] Section 302CA(1) destroys the application of Queensland's chosen regulatory model, even in relation to gifts actually used for State elections, and imposes an imperative to change that model.[199] The result is to impair the 'liberty of action of the State' in exercise of its constitutional functions.[200]

113. Sixth, the last point also demonstrates that s 302CA discriminates against the States in the relevant sense. Section 302CA is not a law of general application which operates on the States in the same way that it operates on all other persons. It is 'aimed at'[201] the States, and at impairing the choices available to them in relation to the discharge of a constitutional function, the regulation of elections. That is so despite s 302CA(1) purporting to confer rights on 'a person or entity': the right is only meaningful if understood as an immunity from the application of State laws.

114. Section 302CA is thus inconsistent with the constitutional assumption about the States' continuing existence and status as independent bodies politic, and is invalid. It cannot be read down to save its validity, save in respect of the separate permission in sub-s (4).

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[196] Revised Explanatory Memorandum, Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018 (Cth), 52 [230]; Supplementary Explanatory Memorandum, Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018 (Cth), 41 [138]; CAGS, 18 n 60.

[197] *Austin* (2003) 215 CLR 185, 265 [170] (Gaudron, Gummow and Hayne JJ). See also *Clarke* (2009) 240 CLR 272, where the federal legislation left the States with 'no real choice but to adopt' the legislative model dictated by the Commonwealth: 308-9 [72] (Gummow, Heydon, Kiefel and Bell JJ), 315-6 [101]-[102] (Hayne J).

[198] The Revised and Supplementary Explanatory Memorandums suggest that States can avoid the operation of s 302CA(1) by adopting legislation 'along the lines of NSW electoral law'.

[199] Apparently the words '[w]ithout limiting when subsection (1) does not apply' in sub-s (3), 'are intended to make clear that subsection (3) does not purport to limit what a [State] could do' to regulate gifts for exclusively State electoral purposes: Supplementary Explanatory Memorandum, Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018 (Cth) 41 [140]. However, where s 302CA(1) operates to confer a right, it is hard to see how it could 'not apply' in circumstances other than those set out in sub-s (3).

[200] *Austin* (2003) 215 CLR 185, 265 [170] (Gaudron, Gummow and Hayne JJ). Section 302CA cannot be explained as an attempt to quarantine gifts made and used for federal election purposes from the operation of State laws. That purpose could have been achieved without controlling the States, by the obvious means of establishing federal campaign accounts.

[201] *Fortescue Metals* (2013) 250 CLR 548, 611 [137] (Hayne, Bell and Keane JJ).

Parts 3 and 5 are not inoperative by s 109

115. The plaintiff submits that, construed in the absence of s 302CA, the CE Act constitutes a 'complete statement of the laws relating to donations for federal purposes.'[202] That submission is irrelevant unless it suggests that, if s 302CA is invalid, there is residual inconsistency with the remainder of the CE Act. That submission should be rejected. *First*, far from making an 'implicit negative stipulation ... expressly clear',[203] the purported enactment of s 302CA confirms an assumption by the Commonwealth Parliament of the opposite.[204] *Second*, apart from s 302CA, the CE Act says nothing about who may make and receive donations for federal electoral *purposes*.'[205] Instead, the CE Act regulates the making of gifts to participants in federal elections.[206] Queensland's laws say nothing about that topic: they regulate gifts to participants in State or local government elections. As the subject matters are different, there can be no indirect inconsistency.[207] The plaintiff cannot avoid this conclusion by reframing his argument as one about an 'area of liberty designedly left'.[208]

Conclusion

116. The questions stated in the special case should be answered accordingly.

PART VII: Estimate of hours

117. The Defendant estimates 3.5 hours for oral argument and 30 minutes in reply.

Dated: 20 February 2019.

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[202] PS, 17 [65].
[203] PS, 18 [65]-[66].
[204] See, by analogy, *Grain Elevators Board (Vic) v Dunmunkle Corporation* (1946) 73 CLR 70, 86 (Dixon J).
[205] *Outback Ballooning* [2019] HCA 2, [34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
[206] See s 302A, which explains that div 3A 'regulates gifts that are made to registered political parties, candidates, groups, political campaigners and third parties'. Divisions 4 and 5A are irrelevant.
[207] *Outback Ballooning* [2019] HCA 2, [33] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [143] (Edelman J).
[208] PS, 18 [65], relying upon *Dickson* (2010) 241 CLR 491, 505 [25]. See, eg, *McWaters v Day* (1989) 168 CLR 289, 299 (the Court); *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 218 (Gibbs CJ); *Viskauskas v Niland* (1983) 153 CLR 280, 290 (the Court); *Jemena* (2011) 244 CLR 508, 525 [42], 526 [47], 527 [51], 528 [56], 529 [60] (the Court).