IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B35/2018

BETWEEN:

GARY DOUGLAS SPENCE
Plaintiff

and

STATE OF QUEENSLAND
Defendant

DEFENDANT'S SUBMISSIONS IN REPLY

Defendant's Reply
Filed on behalf of the defendant

Dated: 6 March 2019
Per James Potter
Ref PL8/ATT110/3804/PXJ

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Part I: Certification

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

Part II: Reply

2. ***Essential issues***: Fundamentally, this case is about whether Australia's constitutional arrangements allow the States the power and prerogative to legislate to protect the integrity of their systems of representative and responsible government. Specifically, can States legislate to guard against identified risks (here, the risk being the influence of money from certain members of an identified cohort that has proved insidious in the past) to those systems, by regulating, rather than banning, the use of such funds in the State's electoral processes?

3. Resolution of that ultimate question now distills to the following.

4. First, does the QE Act infringe the implied freedom of political communication? The dispute between the plaintiff and all the other parties is, at bottom, not about identifying the appropriate legal test, but rather the factual controversy as to whether the perceived risks in Queensland are so different to those identified in *McCloy* as to warrant distinguishing it.

5. Second, are the Queensland laws invalid as trenching upon a putative exclusive Commonwealth power in relation to federal elections? To hold the Queensland laws invalid on this basis, the Court must answer all of the following questions in favour of either the plaintiff or the Commonwealth:

(a) Whether the Commonwealth has an exclusive power over federal elections? Conspicuously, the plaintiff, effectively in terms, does not support the reasoning of the Commonwealth as to why such power is said to be exclusive.

(b) Whether the Commonwealth's proposed test as to the scope and operation of such exclusivity, drawn as it is from a case not concerning exclusive power, is the correct one; or alternatively, the test proposed by the plaintiff?

(c) Whether, properly characterised, the Queensland laws offend either test? Those laws are clearly concerned with the use by participants in State elections of funds donated by property developers.

6. As neither the plaintiff nor the Commonwealth can succeed on all of the matters necessary to prove invalidity on this basis, this part of the challenge fails.

7. Third, is s 302CA of the CE Act invalid? That provision will be invalid unless the plaintiff and the Commonwealth is successful in resisting all of these arguments:

(a) The law offends the principle in *Metwally*. There is no good reason for reconsidering and overruling *Metwally*. Moreover, the fiction involved in how the Commonwealth

provision purports to work reinforces the soundness of the reasoning in *Metwally*.

(b) As the plaintiff essentially accepts, the concomitant of accepting an exclusive Commonwealth power over federal elections is that there is an exclusive State power over State elections. That being so, once s 302CA is properly characterised, it is in truth a Commonwealth law regulating conduct in respect of an exclusive State power.

(c) The Commonwealth law in its operation offends *Melbourne Corporation*. It does so because the States' capacity to protect their systems of representative and responsible government is fundamental to their constitutionally entrenched independent existence.

8. ***Implied freedom***: The plaintiff attempts to distinguish the facts of *McCloy* by pointing to irrelevant differences.[1] As in *McCloy*, there is value in addressing the perception of corruption quite apart from actual corruption, and the risk of corruption at the State level applies to decisions made by 'relevant State departments' as much as by Ministers (PR [11], [14], [20]).[2]

9. The plaintiff posits that the burden has a greater incidental impact on the LNP compared to other political parties (PR [5]). Yet a law will not discriminate between political parties where its incidental effect 'has a rational connexion with an objective unrelated to' the party.[3] The risk of corruption posed by property developers does not differentiate between political parties. Thus, to pursue its legitimate end rationally, the Queensland law cannot differentiate between parties. In any event, property developers donate to parties other than the LNP.[4]

10. ***Exclusive power***: The Commonwealth claims its power is exclusive because the States lack legislative power 'with respect to subject matters brought into existence by the Constitution' (CR [7]) (emphasis added). That proposition should be rejected: it is, for example, inconsistent with the settled position in relation to the defence power.[5] But in any event, the subject matter of s 275 of the QE Act[6] is plainly Queensland elections, not federal elections, nor 'elections generally' (CR [14]).[7] That political parties promote candidates in both

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[1] Like cases must be treated alike subject only to *relevant* differences: *Green v The Queen* (2011) 244 CLR 462, 473 [28] (French CJ, Crennan and Kiefel JJ).

[2] *McCloy* (2015) 257 CLR 178, 209 [52], 212 [65] (French CJ, Kiefel, Bell and Keane JJ).

[3] *Street v Queensland Bar Association* (1989) 168 CLR 461, 510 (Brennan J).

[4] Eg *McCloy* (2015) 257 CLR 178, 247 [177] (Gageler J) (Minister Hallam, member of the ALP); SCB, 144, [79(b)(iii)], 287, 296 ('independent' candidates), 153 [82(e)], 506-11 (Deputy Mayor McCormick, member of the ALP), 154-5 [82(h)], 543, 558, 562 (councillors Zanotto, Jonovski, Gigliotti and Esen, members of the ALP).

[5] 'The naval and military defence of the Commonwealth' is a subject matter 'brought into existence by the Constitution'. Yet, except to the extent provided by ss 52, 69 and 114, it is not exclusive: *Carter v Egg & Egg Pulp Marketing Board* (1942) 66 CLR 557. See also *Burns v Corbett* (2018) 92 ALJR 423, 442 [72] (Gageler J).

[6] The submissions here advanced apply, mutatis mutandis, to s 113B of the LGE Act.

[7] Section 275 prohibits donations to political parties which promote candidates in Queensland elections. Queensland has a regulatory concern with such donations, irrespective of the uses to which they are ultimately put (Vic [80]-[81]; SA [44]).

Queensland and federal elections says nothing about the subject matter of s 275.[8]

11. In effect, the Commonwealth would have the Court recognise not an exclusive power but a substantial immunity from State electoral laws for participants in federal and State elections.[9] Neither the constitutional text nor *Smith* suggests such an immunity.

12. *Bourke* sets out a test for determining whether a Commonwealth law can be characterised as a law with respect to the subject matter of 'banking, other than State banking'. This case does not present 'the same formal structure' (cf CR [14]), because the States do not have a head of power with respect to 'elections, other than federal elections'. The Queensland Parliament has power to make laws for the peace, welfare and good government of Queensland. The test in *Bourke* is thus inapt. That difficulty cannot be avoided by observing that 'exclusive' can have different meanings (CR [13]), for none of the possible meanings of 'exclusive' is 'non-exclusive'.

13. That a test of sole or dominant characterisation would not do as much as the Commonwealth might like (CR [16]) is not a reason to reject it. That test was rejected in *Bourke* because it was inconsistent with the express words of s 51(xiii).[10] Here, no express words militate against adopting that test.

14. In contrast to the Commonwealth, the plaintiff describes both the reasons for exclusivity and the applicable test as deriving from a principle of intergovernmental immunities (PR [22]). His suggestion that there is a *wider* immunity at federal level is inconsistent with the *Defence Housing Case*.[11] In any event, any reverse-*Melbourne Corporation* principle could go no further than that suggested by Victoria (Vic [29]-[31]), and hence would not result in the invalidity of the Queensland laws.

15. Four more points should be made regarding exclusivity. *First*, if the absence of State power with respect to federal elections was a 'critical step in the reasoning of a majority' in *Smith* (CR [2]), then *Smith* conflicts with well-established principles regarding characterisation

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[8] Respectfully, the submission that there is a 'practical imperative' for political parties to register under both Acts because the membership is the same is irrelevant (because the application of s 275 does not depend on registration) and wrong (PR [3]). The '500 rule' does not apply to parliamentary parties and does not prevent different organisations with the same membership registering under each Act. Further, the submission is inconsistent with the agreed fact that the State-based political parties are registered under the Commonwealth Act, separately from the federal political parties: SCB 114-115 [2], 116 [13], 117 [19], 5 [20], [21]. The fact that the QE Act permits 'political parties' to have objects additional to promoting candidates in State elections can hardly result in an excess of legislative power (cf PR [27]).

[9] See, eg, the remarkable proposition at CS [35], that regulation of gifts made to members of the Legislative Assembly is outside Queensland's legislative competence if the gift 'can be used' in federal elections.

[10] (1990) 170 CLR 276, 287.

[11] (1997) 190 CLR 410, 425-426 (Brennan CJ), 443-4, 446 (Dawson, Toohey and Gaudron JJ), 469-470, 472-4 (Gummow J), 503-9 (Kirby J).

of Commonwealth laws,[12] and to that extent should be regarded as wrongly decided. *Second*, four judges of the Court held in *Burns* that the capacity of the Commonwealth to exclude the operation of State laws is relevant when considering a claim for exclusive Commonwealth power.[13] *Third*, s 7 of the *Parliament of the Commonwealth Elections Act 1900* (Qld) not only proscribed plural voting, but punished it (s 7(3)) (CR [6]), in response to a gap which had been identified during the Convention Debates.[14] *Fourth*, it is implicit in the Court's reasons in *Daniell*[15] that the concept of exclusivity did not render the State law invalid, notwithstanding that the connection with federal elections was direct and substantial (cf CR [15] fn 16).

16. ***Head of power***: Alternatively, if the Commonwealth's power is exclusive, the basis for that exclusivity is essentially sourced in the defining features of a polity. Hence, as the plaintiff appears to accept (PR [21]-[22]), the same exclusivity must attach to the equivalent State power. The Commonwealth's attempt to dismiss that submission by the use of pejorative labels (CR [33]) fails to engage with the point, or meet its rationale.

17. ***Metwally***: Queensland's reliance on *Metwally* is not misconceived (cf CR [19]-[20]), for the reasons given at Qld fn 159. The Commonwealth fails to respond to Qld [89]-[92].

18. *Metwally* should not be reopened (cf CR [28]; Vic [91]). A constructional choice was presented in *Metwally*, about which reasonable minds might have differed. But the Court made its choice, with harmonious reasoning among the majority. No Justice may ignore that choice 'as though the pages of the law reports were blank'.[16] '[C]ontinuity and consistency in the law'[17] require that *Metwally* be followed. It has not caused inconvenience because, as the Commonwealth notes (CR [28]), the same outcome may be achieved by the polities acting together.[18] *Metwally* has been affirmed in subsequent cases, and independently acted upon by the Commonwealth Parliament in designing legislation.[19]

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[12] These principles make clear that there need only be a sufficient connection with a head of power: see, for example, *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 104 [142].

[13] As four judges recognised in *Burns v Corbett*: (2018) 92 ALJR 423, 446-7 [94]-[95] (Gageler J), 456 [141], 457 [146] (Nettle J), 465-7 [189]-[200] (Gordon J), 479 [260] (Edelman J).

[14] *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 15 April 1897, 675 (John Quick). The Commonwealth's suggestion that s 7 does not undermine its argument for exclusivity because s 7 would have been invalid against that area of exclusivity merely begs the question (CR [6]).

[15] (1920) 28 CLR 23. The Commonwealth's attempt to explain the Court's reliance on s 109 as a shortcut in reasoning runs counter to its position that exclusivity is 'logically anterior' to s 109: CR [11], [15].

[16] *Queensland v Commonwealth* (1977) 139 CLR 585, 599 (Gibbs J) ('*Second Territory Senators Case*').

[17] *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 19 [28] (French CJ, Kiefel, Bell, Gageler and Keane JJ), 45 [131] (Gordon J agreeing), quoting *Wurridjal* (2009) 237 CLR 309, 352 [70] (French CJ).

[18] See, eg, the past acts regime under the *Native Title Act 1993* (Cth).

[19] See Explanatory memorandum, Native Title Bill 1993 (Cth) 13-4; *Western Australia v Commonwealth* (1995) 183 CLR 373, 454-5 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 105 [223] (Gummow J).

19. The alternative construction proposed at PR [44] is not available. Section 15A applies only if, but for its application, an initial construction of the provision would exceed power.[20]

20. ***Melbourne Corporation*:** Queensland does not contend that the States' capacity to regulate their own electoral processes must be protected 'at the cost of depriving the Commonwealth of that same capacity with respect to federal elections'. Nor does Queensland submit that the Commonwealth cannot permit gifts the States have chosen to prohibit, even when they are made and used for federal elections (CR [35], [41]). The Commonwealth could have validly done so. It could have established a system of federal campaign accounts, or required that parties which promote candidates in federal elections have no other objects or activities. Either would have immunised donations for federal purposes from State prohibitions, without the vice which engages *Melbourne Corporation* here. That vice is that s 302CA makes compliance with Queensland prohibition voluntary even where the donations are ultimately spent on State elections. Instead of choosing a regulatory method which would have insulated donations for federal purposes, the Commonwealth has instead legislated with a view to forcing States to change their own method of regulating their own elections (or to suffer the consequence of the State law becoming ineffective, even in relation to spending on State elections).[21] That is why the immediate object of s 302CA is accurately described as being to control the States in the exercise of their constitutional functions (Qld [105]).

21. There is no 'asymmetry' in the arguments presented by Queensland and the intervenors (CR [40]-[41]). If political parties are to have composite objects, and the Commonwealth wishes to confer a right on political parties to receive donations from property developers for federal purposes, it may do so. What it may not do is confer that right in such a way that it renders State laws completely ineffective, even where donations are for State purposes.

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[20] *Tajjour v New South Wales* (2014) 254 CLR 508, 561 [74] (Hayne J).

[21] The Commonwealth appears to concede that s 302CA renders compliance with Queensland laws voluntary, unless Queensland enacts new laws to regulate the use of gifts: CR [37]. Contrary to PR [37], see Qld fn 199.