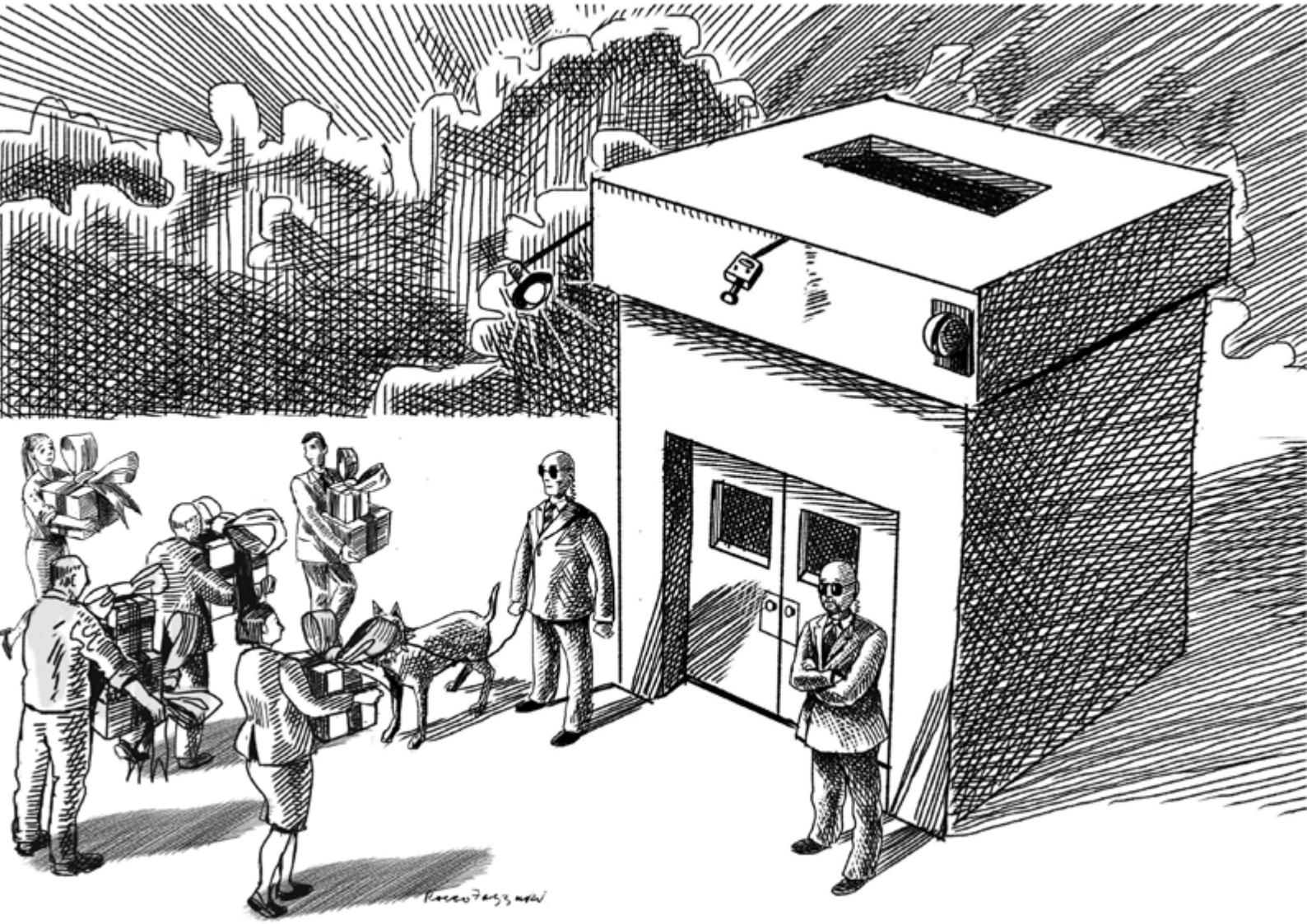

A fresh federal fight about political donations

Alison Hammond reports on *Spence v Queensland* [2019] HCA 15

The High Court once again handed down judgment in a dispute concerning Commonwealth and State government regulation of political donations.

This time, the Court grappled with the validity of, and interaction between, Queensland's ban on political donations from property developers, and the Commonwealth's express authorisation of certain political gifts.

The High Court held that s 302CA of the *Commonwealth Electoral Act 1918* (Cth), which purported to override certain State prohibitions on political funding, was wholly invalid because the legislation was beyond the power of the federal legislature. Accordingly, the relevant provisions of the *Electoral Act 1992* (Qld) and the *Local Government Electoral Act 2011* (Qld), which purported to prohibit specified political donations of property developers, were upheld a*Spence v Queensland* contains a veritable smorgasbord of constitutional issues to be considered: the scope of Commonwealth legislative power, the implied freedom of political communication, s 109 inconsistency, exclusive powers, inter-governmental immunities and even echoes of the long-abandoned doctrine of State reserve powers.

Background

Many political parties promote the election of their chosen candidates to both Commonwealth and State parliaments. Political parties are typically unincorporated associations organised by State. In Queensland, five political parties hold seats in both the Legislative Assembly of Queensland and either the Federal House of Representatives or Senate.

When a political donation is made to one of these parties, a giver may specify that the gift be used for a particular purpose – campaigning for a Federal election, campaigning for a State election, or a non-campaign purpose. Alternatively, a giver may not direct the use of their gift at all, making the gift part of what Edelman J described as the 'unallocated middle'. Gifts will then ultimately be directed towards one or more of these uses at the choice of the party.

The question raised in *Spence* is – to what extent can the Commonwealth, or Queensland, regulate gifts in each category?

The Queensland Law

In 2018, Queensland's government introduced amendments to the Electoral Act and the Local Government Electoral Act. Those amendments banned property developers from making donations to political parties that promoted the election of candidates to the Legislative Assembly or local councils in Queensland (even if they also promoted the election of candidates to the Federal Parliament).

Queensland's ban applies to any donation, regardless of whether or not the donation is earmarked or used for State or local government campaigning.

Queensland's laws are modelled closely on the pre-existing New South Wales ban on donations by property developers. Those laws were themselves the subject of a High Court challenge in 2015. In *McCloy v NSW* (2015) 257 CLR 178, the High Court held that the New South Wales laws did not impermissibly burden the implied constitutional freedom of political communication (as reported in the Summer 2015 issue of *Bar News*).

The Commonwealth Law

In 2018, the Commonwealth government also amended the Commonwealth Electoral Act to introduce s 302CA.

Section 302CA(1) permitted donations to federally registered political parties, 'despite any' State electoral law, if, first, the Commonwealth Electoral Act did not otherwise prohibit the donation, and, second, the gift 'is required to be, or may be, used for the purposes' of influencing voting in a federal election.

Section 302CA(3) provided three explicit exceptions to s 302CA(1). The permission in s 302CA(1) did not apply to:

1. donations given on terms requiring the gift to be used only for State electoral purposes (s 302CA(a));

2. donations that were required by a State law to be kept separately in order to be used only for State electoral purposes (s 302CA(b)(i)); or

3. donations that a gift recipient kept separately to be used only for State electoral purposes (s 302CA(b)(ii)).

In each of those circumstances, State electoral laws would apply to the gifts.

If valid, s 302CA would render Queensland's ban on property developer donations inoperative (by virtue of the inconsistency provision in s 109 of the Constitution) except to the extent donations were earmarked for use in Queensland state or local elections.

Importantly, Queensland's ban would not apply to any donation in the 'unallocated middle' – a donation that '*may be*' used for federal election campaigning, but equally '*may be*' used for State elections.

***Spence v Queensland** is an important decision about the operation of federalism in 21st century Australia. It is a relatively rare example of a 'win' for the States in an area of overlapping regulation.*

The High Court's Decision

The case was brought in the High Court's original jurisdiction by former LNP Queensland president Gary Spence. Mr Spence's role in the property development industry led him to quit his role in the party following Queensland's introduction of the ban (which also prohibited property developers from encouraging others to make political donations).

Mr Spence's challenge to Queensland's laws was supported by the Attorney-General of the Commonwealth, while the Attorneys-General for each other State and the ACT intervened in support of Queensland, making for a very full bar table.

Validity of s 302CA / s 109 Inconsistency

In a joint judgment, Kiefel CJ and Bell, Gageler and Keane JJ held that s 302CA was beyond the scope of the Commonwealth's legislative power. The Commonwealth had identified s 51(xxxvi) of the Constitution, which confers power over 'matters in respect of which [the] Constitution makes provision until the Parliament otherwise provides', as the relevant source of legislative power, observing that the 'matters in respect of which the Constitution makes provision' include federal elections by virtue of ss 10 and 31 of the Constitution.

The vice found with s 302CA was that it purported to apply to donations that merely 'may be', but were not required to be, used for federal electoral purposes. As a result, s 302CA conferred a broad immunity from the operation of State electoral laws, including laws limiting the availability of funds for activities with no connection to federal elections. The significance of this impact, compared to the impact on federal elections, was said to 'point strongly to a purpose that cannot be said to be incidental' to the Commonwealth's power over federal elections (at [81]).

The majority held that the invalid operation of s 302CA was incapable of severance, such that the section was wholly invalid (at [91]).

Given the invalidity of s 302CA, the majority held that Queensland's ban on property developer donations was not inconsistent with the Commonwealth Electoral Act.

In the minority, Nettle, Gordon and Edelman JJ, each writing separately, concluded that s 302CA was within the scope of Commonwealth legislative power. Their Honours would have held that the Queensland ban was inconsistent, and therefore inoperative, with s 302CA to the extent the laws purported to apply to donations not specifically earmarked for state or local government electoral purposes (at [151], [275], and [375]).

Implied freedom of political communication

Mr Spence also submitted that Queensland's ban on property developer donations in State elections impermissibly burdened the implied constitutional freedom of political communication.

The Queensland law, he submitted, was distinguishable from the law upheld in *McCloy* because Queensland did not have the same history of corrupt developer influence in State politics. Interestingly, Mr Spence did not attempt to distinguish *McCloy* as regards Queensland local government elections. At the local level, there was a significant recent history of corrupt influence.

Each member of the High Court rejected the argument that *McCloy* could be distinguished. Even if there was less evidence of corruption, the State parliament was entitled to act prophylactically in enacting the ban (at [95]-[97], [113], [264], and [322]-[326]).

Exclusive power, intergovernmental immunities and Melbourne Corporation

The parties made several interconnected arguments related to the interaction of State and Federal power. First, Mr Spence argued that federal elections are an area of *exclusive* Commonwealth legislative power. This would render the Queensland

ban invalid regardless of the constitutional validity of s 302CA.

The majority, joined on this point by Edelman J, rejected the argument that the Commonwealth's power with respect to federal elections is exclusive (at [46], and [305]). Federal elections are not among the exclusive powers set out in s 52 of the Constitution, and no exclusivity could be implied. In doing so, the Court effectively overruled a 1912 decision which contained statements to the contrary, *Smith v Oldham* (1912) 15 CLR 355.

Second, Queensland argued that s 302CA infringed the doctrine of intergovernmental immunities. Third, Mr Spence argued that the Queensland ban did likewise.

As many readers will recall, since *The Engineers' Case* (1920) 28 CLR 129, constitutional grants of power to the Commonwealth have been construed expansively – they are 'plenary'. One significant qualification to this is the intergovernmental immunities doctrine expounded in the *Melbourne Corporation Case* (1947) 74 CLR 31. *Melbourne Corporation* held that, because the Constitution assumes the existence of both State and Commonwealth governments, 'neither federal nor State governments may destroy the other nor curtail in any substantial manner the exercise of its powers'.

In light of s 302CA's invalidity, the majority found it unnecessary to decide the *Melbourne Corporation* point in relation to s 302CA (at [84]). In relation to the Queensland ban, the majority affirmed that the doctrine of intergovernmental immunities could operate to invalidate a State law, but that in this case, the Queensland ban did not attract its operation. The ban was not directed to the Commonwealth and imposed no special disability or burden on the Commonwealth (at [109]).

Principle in Metwally

Spence raised one final point of interest to constitutional enthusiasts.

In *University of Wollongong v Metwally* (1984) 158 CLR 447, the High Court held that the Commonwealth cannot retrospectively legislate to ensure that a State law is not rendered invalid by s 109. While the Commonwealth can amend federal laws to prospectively remove a s 109 inconsistency, to do so retrospectively was held to undermine the operation of the Constitution.

Section 302CA contained a note on the operation of s 302CA(b)(ii). As explained above, that section preserved the operation of State electoral laws in relation to donations earmarked by a recipient specifically for a State electoral purpose. The note provided that a recipient may identify the intended purpose of a gift at any time prior to using that gift. It then gives an example – if a gift originally has no mandated purpose, and is later used for a State electoral purpose, the 'giving, receipt, retention and use' of that gift must comply with the State electoral law.

As a result, s 302CA(1) may initially apply to a gift, but if it is later earmarked for a State electoral purpose, the operation of s 302CA(b)(ii) means s 302CA(1) will no longer apply.

Queensland suggested that this constituted retrospective removal of a s 109 inconsistency in the manner deemed impermissible by *Metwally*.

Given the invalidity of s 302CA, the majority found it unnecessary to decide the question (at [34]). The minority justices, however, would have upheld s 302CA(b)(ii), holding it imposed a condition precedent on the operation of State electoral laws, instead of entailing any retrospective operation (at [147], [237], and [374]).

Significance

Spence v Queensland is an important decision about the operation of federalism in 21st century Australia. It is a relatively rare example of a 'win' for the States in an area of overlapping regulation.

The decision is also directly relevant to several ongoing disputes about electoral law. For example, at the time of writing, the Queensland Court of Appeal is reserved in the case of *Awabdy v Electoral Commission* (Qld) (CA 3505/18), which concerns the overlapping Commonwealth and Queensland regimes for the disclosure of political donations.

The High Court began 2019 with its decision in *Unions NSW v New South Wales* [2019] HCA 1, which concerned restrictions on election spending. In the circumstances, *Spence* is very unlikely to be the High Court's last word on the subject of electoral regulation.