IN THE HIGH COURT OF AUSTRALIA

***Spence v Queensland* [2019] HCA 15**

Before: Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon & Edelman JJ

Date of Judgment: 15 May 2019

CASE NOTE

Introduction

In *Spence v Queensland*[1], the Court was faced with reciprocal challenges to State and federal legislation, each directed at regulating electoral donations.

On 21 May 2018, the Queensland Parliament passed amendments to the *Electoral Act 1992* (Qld) which prohibited property developers making political donations.[2] The Qld amendments were in materially the same form as those upheld in *McCloy v New South Wales*.[3]

Within two months of the commencement of the Qld amendments, the Commonwealth inserted s.302CA into the *Commonwealth Electoral Act 1918* (Cth) in an attempt to legalise donations to political parties where the purpose of the donation (that is, whether it is for State or federal electoral purposes) was not expressly clarified at the time of making the gift.[4]

The plaintiff sought to impugn the Qld amendments on the basis that they impermissibly trenched upon an exclusive power of the Commonwealth to regulate federal elections, and were thereby invalid as being inconsistent for the purposes of s.109 of the Constitution and a "reverse *Melbourne Corporation*" immunity applicable to the Commonwealth.

The case was decided by a 4:3 majority. The majority held that the Commonwealth amendment was beyond legislative power, whereas the Qld amendments were valid and did not offend the "reverse" *Melbourne Corporation* principle. The case assumes considerable importance as the various judgments consider the proper place of the States within the federal constitutional structure.

[1] [2019] HCA 15.
[2] The *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Act 2018* (Qld) amended the *Electoral Act 1992* (Qld) and the *Local Government Electoral Act 2011* (Qld) (**Qld amendments**).
[3] [2015] HCA 34; (2015) 257 CLR 178.
[4] "**Commonwealth amendment**".

The Parties and their respective Arguments

Gary Spence was the former president of the Liberal National Party of Queensland. He commenced the proceedings contending that the Qld amendments placed an impermissible burden on the implied freedom of political communication by restricting the flow of funds to political parties' election campaigns. Faced with the obstacle of the decision in *McCloy v New South Wales*[5], Spence sought to distinguish the case on the basis of facts which were said to show that Queensland's concerns with corrupting influences in elections were not as acute or preponderate as those which pertained in NSW.[6]

The plaintiff argued that the vice in the Qld amendments was that they did not differentiate between donations made to local councillors, State or federal election candidates. This meant that, on his argument, the Qld amendments were invalid as they purported to intrude upon an area of exclusive Commonwealth legislative competence, namely federal elections. This intrusion upon a significant area of Commonwealth government competence meant that the Qld amendments impermissibly burdened the Commonwealth's capacity to function as a government (referred to as the "reverse *Melbourne Corporation* principle").[7]

The State of Queensland countered these claims by reference to a report from its Crime and Corruption Commission, which highlighted corruption in local government elections arising from donations made by property developers.[8] It followed, on Queensland's argument, that there was a legitimate, protective aim underpinning the Qld amendments, and that any burden on political communication was insubstantial as prohibited donors remained at liberty to communicate on political matters.

What emerges from the facts in the Special Case is that Queensland and the Commonwealth each made different policy choices about who may donate money to election campaigns. Queensland determined that there should be no contributions to political parties in the State by property developers.

By contrast, the Commonwealth sought to make its regime exclusive in relation to donations that would most directly affect its own interests[9], which included establishing an immunity from State laws where donations were made without any specification as to whether they were to be used for Commonwealth or State election purposes. Much of the case turned on these "unallocated" donations, and their amenability to regulation.

The Issues

The critical issue joined in argument was whether the Commonwealth has power to regulate political donations which, although not required to be so used, may be used for Commonwealth electoral purposes.[10]

---

[5] [2015] HCA 34; (2015) 257 CLR 178 (in which the Court upheld NSW legislation indistinguishable from the Qld amendments).
[6] Plaintiff's Written Submissions in No. B 35 of 2018 dated 29 January 2019 at [3], [30],[37]-[46]. In NSW, there were eight reports by ICAC containing findings of corrupt conduct since 1990 which provided a justification for the legislation considered in *McCloy*.
[7] Derived from *Melbourne Corporation v Commonwealth* [1947] HCA 26; (1947) 74 CLR 31.
[8] Defendant's Written Submissions in No. B 35 of 2018 dated 20 February 2019 at [14], [18], [28]-[36].
[9] The only restriction was on foreign donors in respect of donations above certain monetary thresholds: see *Spence v Queensland* at [162] (Gordon J).
[10] Referred to in this Case Note variously as the "**unallocated middle**", or "unallocated donations"; (eg) *Spence v Queensland* at [135] (Nettle J); *Spence v Queensland* at [192]-[193] (Gordon J); [277] (Edelman J).

The main questions dealt with in this Case Note are as follows:

(1) Were the Qld amendments invalid because they are beyond the power of the State of Queensland to enact on the basis of:

(a) an implied doctrine of intergovernmental immunities; or

(b) on the basis that they impermissibly intrude into an area of exclusive Commonwealth legislative power?

(2) Was the Commonwealth amendment valid, and if so, did s.109 of the Constitution render the Qld amendments invalid for inconsistency?

(3) Did the Qld amendments impermissibly burden the implied freedom of political communication?

(4) Was the Commonwealth amendment invalid as being contrary to the principle in *Melbourne Corporation*?[11]

The Reasons

The majority comprised Kiefel CJ, Bell, Gageler and Keane JJ.[12] Nettle J, Gordon J and Edelman J each delivered dissenting reasons.

Q1(a). Were the Qld Amendments invalid for intruding upon an area of exclusive Commonwealth power to regulate federal elections?

Spence and the Commonwealth argued that the Qld amendments impermissibly intruded into a forbidden area of exclusive Commonwealth legislative power as they were laws relating to elections, and because they touched or concerned federal elections more than merely incidentally.[13]

The Majority rejected the notion that any structural implication of exclusive Commonwealth legislative power can be drawn from the limited references to State legislative power in the Constitution.[14]

The power of the Commonwealth to regulate federal elections is found in s.51(xxxvi) of the Constitution.[15] Sections 10 and 31 of the Constitution are provisions dealing with the election of senators and members of the House of Representatives "[u]ntil the Parliament otherwise provides".[16]

[11] A sub-issue was whether the Commonwealth amendment was invalid because it purported to operate in a manner contrary to the principle in *University of Wollongong v Metwally* [1984] HCA 74; (1984) 158 CLR 447, namely that a Commonwealth law cannot override the temporal operation of section 109 of the Constitution? The Majority found it unnecessary to decide the issue. The minority Justices rejected the submission.
[12] "**Majority**".
[13] *Spence v Queensland* at [48] (Kiefel CJ, Bell, Gageler and Keane JJ).
[14] The Commonwealth and Spence placed reliance on ss.7, 9, 10, 29 and 31 of the Constitution.
[15] That is, to make laws with respect to "matters in respect of which [the] Constitution makes provision until the Parliament otherwise provides"
[16] As supplemented by the conferral of incidental power in s.51(xxxix).

The conferrals of power in s.51 are concurrent with the State legislative power referred to in s.107 of the Constitution.[17] It followed that there could be no conclusion of exclusivity drawn from the text or structure of the Constitution.

Spence and the Commonwealth also placed reliance on the authority of *Smith v Oldham*[18] for the proposition that the power to regulate federal elections is exclusive to the Commonwealth. In that case, Griffiths CJ stated that: "It is not disputed that that Parliament has power to make laws for the regulation of federal elections. In my opinion that power is an exclusive power. The matter is one in which the States as such have no concern".[19] The Majority, however, rejected this submission on the basis that *Smith v Oldham* was pre-*Engineers* authority.[20]

The Majority identified *R v Brisbane Licensing Court; Ex parte Daniell* as a case which accepted that there was no exclusivity over the subject matter of federal elections.[21] *Ex parte Daniell* proceeded on the basis that a State law regulating a State electoral process may have a materially adverse impact on the federal electoral process, but that the Commonwealth Parliament can protect itself from that impact through the operation of s.109 of the Constitution.

The Majority found that the Qld amendments might well have touched and concerned federal elections "more than incidentally", but they did not for that reason travel beyond State legislative competence.[22]

Nettle J was of the view that *Smith v Oldham* "cannot be sloughed off as a product of the now discredited reserved powers doctrine" as it had "nothing to do with reserved powers".[23] His Honour observed that the Court has repeatedly invoked *Smith v Oldham* as establishing that the legislative power of the Commonwealth with respect to Commonwealth elections is "essentially exclusive".[24]

Gordon J did not find it useful to decide the issue of whether the Commonwealth power in this area was exclusive. Notably, her Honour stated that, by doing so, "any unintended endorsement or revival of ideas rejected in the *Engineers' Case*" would be avoided.[25] Her Honour did not consider that the Queensland amendments were beyond State legislative power "despite having some operation on gifts for Commonwealth electoral purposes".[26]

Edelman J commenced his analysis with the trite observation that, before Federation, there was no need for the colonies to extend their laws to federal elections "which did not then exist".[27] The subsequent allocation of legislative power under the Constitution "was neither a conferral of legislative

[17] *Spence v Queensland* at [46].
[18] [1912] HCA 61; (1912) 15 CLR 355.
[19] at p.385.
[20] *Spence v Queensland* at [41]; the decision in *Smith v Oldham* was also said to be limited to a recognition that there may be limits to the extent of the State legislative power that is referred to in s.107 of the Constitution, which was a different matter to whether there existed an area of exclusive Commonwealth legislative power into which an exercise of State legislative power cannot intrude: at [47].
[21] [1920] HCA 24; (1920) 28 CLR 23.
[22] *Spence v Queensland* at [50].
[23] *Spence v Queensland* at [122].
[24] *Spence v Queensland* at [131].
[25] *Spence v Queensland* at [200].
[26] *Spence v Queensland* at [267].
[27] *Spence v Queensland* at [289].

power upon the State parliaments in relation to federal elections nor was it based upon an assumption of an absence of State legislative power in relation to federal elections".[28] No structural implications derived from the Constitution demanded such a result.[29]

As to *Smith v Oldham*, Edelman J was of the view that the Court in that case did not rely upon the doctrine of reserved powers for its conclusion that there was an absence of State power over federal elections.[30] Rather, the "essence of the reasoning of each member" of the Court was simply that the States had no interest in the subject matter of federal elections.

However, his Honour observed that the circumstances of the present case exposed "the underlying fallacy" in the assumption that States could have no interest in federal elections. A donation given for federal electoral purposes may nevertheless be used on an issue of both federal and State concern, or to promote the brand of a political party that operates at both levels.[31] It followed that *Smith v Oldham* had no precedential weight.

Edelman J accordingly rejected the notion of Commonwealth exclusivity over federal elections.[32]

The result was that five Justices treated the Commonwealth's power over the subject matter of federal elections as non-exclusive, with only Nettle J being prepared to hold otherwise.[33]

Q1(b). ***Were the Qld Amendments invalid based on a reverse Melbourne Corporation principle?***

Spence argued that the Qld amendments were invalid based on the doctrine of inter-governmental immunities expounded in the *Melbourne Corporation Case*. In *Melbourne Corporation*, Dixon J stated:

"The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities".[34]

The doctrine of inter-governmental immunities expounded in *Melbourne Corporation* is a structural implication built on that conception.

In *Pirrie v McFarlane*[35], it was held that that members of the Commonwealth Armed Forces were subject to State laws regulating driving licences notwithstanding the Commonwealth officer was driving a car without a licence in the course of his duties.[36]

[28] *Spence v Queensland* at [289].
[29] *Spence v Queensland* at [298].
[30] *Spence v Queensland* at [290]-[291].
[31] *Spence v Queensland* at [293].
[32] *Spence v Queensland* at [298]-[305].
[33] Kiefel CJ, Bell, Gageler & Keane JJ, and Edelman J).
[34] [1947] HCA 26; (1947) 74 CLR 31 at p.82.
[35] (1925) 36 CLR 170.
[36] The US Supreme Court had held, on the same facts, that the States had no power to regulate the activities of federal officers in this respect: *Johnson v. Maryland*, 254 US 51 (1920).

Knox CJ reasoned that the Commonwealth had the ability to protect itself from State laws if it chose to do so (that is, by utilising s.109 of the Constitution).[37] Starke J also upheld the State law on the basis that it was "not aimed particularly at the Defence Forces" and because the Commonwealth had ample legislative power to maintain its Forces free from any inconvenient legislation of the States.[38]

In *West v Commissioner of Taxation (NSW)*[39], the Court held that a State could tax the pension of a retired federal public servant. Once again, the various judgments focused on the ability of the Commonwealth to shield itself and its employees from State taxation if it so wished.

In *Uther v Federal Commissioner of Taxation*[40], a majority of the Court decided that the State could limit the Commonwealth prerogative right to priority payment in the case of a liquidation. Dixon J dissented in *Uther* on the basis that it was beyond the competence of the State to abrogate the Commonwealth's priority. Dixon J rejected s.107 of the Constitution as establishing any foundation for the majority's reasoning, arguing that, at the instant the Colonies became States upon Federation, they had no power to regulate the relations between the Commonwealth and its subjects because "it formed no part of the old colonial power".[41]

In *Essendon Corporation v Criterion Theatres Ltd*[42], the issue was whether the Commonwealth was liable to municipal rates in respect of premises which were taken over and occupied by the Commonwealth Defence Forces. Dixon J held that "the State may not levy a tax directly upon the Commonwealth in respect of the execution of its duties or the exercise of its functions".[43] As the Defence Forces were temporary occupants of the properties, the tax was not technically in violation of s.114 of the Constitution.

This, however, raises the issue of whether the doctrine of Commonwealth immunity developed by Dixon J could be said to conform with the spirit of the Federal Constitution which at one level purports to recognise an immunity from taxation in s.114, but upon a strict reading applies the reciprocal immunities to "property" only.[44]

Dixon J, although the sole dissentient *Uther*, carried the day when the issue of Commonwealth priority in liquidation came before the Court in *The Commonwealth v Cigmatic Pty Ltd*.[45] The Court held that a State law could not abrogate a Commonwealth prerogative claim. Dixon CJ rejected the notion that *Cigmatic* was merely the reflection of the application of the *Melbourne Corporation* principle in reverse.[46] To Dixon CJ, what was important was the absence of State legislative power and not on any implication derived from the federal nature of the Constitution.

[37] (1925) 36 CLR 170 at p.184.
[38] (1925) 36 CLR 170 at p.228-229.
[39] (1937) 56 CLR 657.
[40] (1947) 74 CLR 508.
[41] (1947) 74 CLR 508 at pp.530-531.
[42] (1947) 64 CLR 1.
[43] (1947) 64 CLR 1 at p.17.
[44] See Jeremy Kirk, "Constitutional Implications (I): Nature, Legitimacy, Classification, Examples" [2000] *MelbULawRw* 26; (2000) 24(3) *Melbourne University Law Review* 645.
[45] *Cigmatic* [1962] HCA 40; (1962) 108 CLR 372.
[46] *Cigmatic* [1962] HCA 40; (1962) 108 CLR 372 at p.378.

The *Cigmatic* doctrine of implied Commonwealth immunity from State legislation was revisited in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*.[47] In that case the Defence Housing Authority leased property for Defence personnel. The owners of properties leased by the Authority sought to exercise rights to inspect premises pursuant to orders made by the Residential Tenancies Tribunal of NSW. The Authority maintained that it was not bound by orders of a State Tribunal on the basis of the *Cigmatic* immunity. A majority of the Court held that the Authority was subject to the orders of the Tribunal. In doing so, the majority purported to apply the doctrine from *Cigmatic*.[48]

Brennan CJ in *Re Residential Tenancies Tribunal* adopted a similar approach to Dixon CJ in confining the *Melbourne Corporation* principle to a constraint upon Commonwealth legislative power.[49] Brennan J's approach was criticised in *Spence*.[50] His Honour's approach, however, is to be contrasted with the approaches, for example, of Dawson, Toohey and Gaudron JJ. Their Honours employed the language of *Melbourne Corporation* when attempting to assign a foundation to the *Cigmatic* doctrine.[51]

In Dixon J's analysis in *Uther* and later in *Cigmatic*, the federal system "is necessarily a dual system" in which "you do not expect to find either government legislating for the other. But supremacy, where it exists, belongs to the Commonwealth, not the States".[52]

In *Spence*, it was submitted by the States that the operation of s.109 of the Constitution meant there was no need for the Commonwealth to be protected by an implied immunity from interference by State law.

The Majority recognised that, in practical terms, there is more scope for a Commonwealth law to interfere with operations of the government of a State than there is for a State law to interfere with operations of the government of the Commonwealth because of s.109.[53] However, their Honours reasoned that the reciprocal operation of the structural implication was not displaced merely because s.109 allows a Commonwealth law to be used as a shield.

Although couched in the language suggestive of a lack of State power to enact laws that impermissibly burden the Commonwealth, the Court in *Spence* held that there was indeed a "reverse" *Melbourne Corporation* immunity available to the federal government. Without reference to the majority judgments in *Pirrie v McFarlane*, the Majority found that "[t]he reciprocal operation of the structural implication is not displaced merely because s 109 allows a Commonwealth law to be used as a shield".[54]

---

[47] (1997) 190 CLR 410.
[48] However, reformulated in the sense that a distinction was drawn between the "capacities" of the Federal Executive Government and "exercise" of those capacities: pp. 438-439 (Dawson, Toohey and Gaudron JJ).
[49] *Re Residential Tenancies Tribunal* (1997) 190 CLR 410 at p.425.
[50] [2019] HCA 15 at [101] (Kiefel CJ, Bell, Gageler & Keane JJ); at [308] (Edelman J); see also Anne Twomey "*Federal Limitations and Legislative Power of the States and the Commonwealth to Bind One Another*" [2003] *FedLawRw* 20; (2003) 31(3) *Federal Law Review* 507.
[51] *Re Residential Tenancies Tribunal* (1997) 190 CLR 410 at p.443.
[52] *Uther* at p.529; see also *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1 at p.22 (Dixon J).
[53] *Spence v Queensland* at [103] (Kiefel CJ, Bell, Gageler & Keane JJ).
[54] [2019] HCA 15 at [103] (Kiefel CJ, Bell, Gageler & Keane JJ).

The Majority held that the Qld amendments did not impose a special disability or burden on the Commonwealth. The Qld amendments did not deny to the Commonwealth the capacity to regulate its own elections. The most that could be said of the Qld amendments was that they denied to some participants in the federal electoral processes a source of funds that would otherwise be available.[55] In language consistent with that employed in *Fortescue*, the Majority held that the State laws were "not directed to the Commonwealth" and they did "not impose a special disability or burden on the Commonwealth".[56]

Gordon J thought it "unnecessary to decide whether a reverse *Melbourne Corporation* principle exists, beyond that identified in *The Commonwealth v Cigamatic Pty Ltd (In liq)*" as any such doctrine "would not be infringed by prohibition of a limited class of political donations" as the prohibition as not "directed at the Commonwealth" nor did it impose any "special disability or burden on the exercise of powers and fulfilment of functions which curtails the Commonwealth's capacity to function".[57]

Edelman J in his dissent found that the Commonwealth electoral laws were valid. However, his Honour, like the Majority, found "a symmetrical application of the implication" such that the *Melbourne Corporation* principle also applied in reverse.[58]

After setting out the various formulations of the *Melbourne Corporation* principle, Edelman J stated that they could be "reduced to a consideration of the magnitude of the burden upon the other polity's capacity to function as a government. That assessment is one of "evaluation and degree"".[59]

Various factors were identified including whether the law was "targeted at the other polity and the more essential the governmental function that it curtails is to that other polity".[60] Edelman J held that the burden of the provisions of the Qld amendments upon the Commonwealth was not significant, and the interference was not "specifically targeted" at the Commonwealth.[61]

It follows that five Justices identified a structural implication derived from the Constitution characterised as a "reverse-*Melbourne Corporation* principle", but that, in this case, it did not avail Spence or the Commonwealth.

Q2. Was the Commonwealth amendment valid, and if so, did s.109 render the Qld amendments invalid for inconsistency?

The "fall-back argument" of Spence and the Commonwealth was that the Qld amendments were inconsistent with the Commonwealth amendment. The States argued that s.302CA was beyond the scope of s.51(xxxvi) of the Constitution.

[55] *Spence v Queensland* at [109].
[56] [2019] HCA 15 at [109] (Kiefel CJ, Bell, Gageler & Keane JJ).
[57] *Spence v Queensland* at [266] (Gordon J); Nettle J did not deal with the issue.
[58] [2019] HCA 15 at [309] (Edelman J).
[59] [2019] HCA 15 at [314] (Edelman J).
[60] [2019] HCA 15 at [314] (Edelman J).
[61] [2019] HCA 15 at [317] (Edelman J).

The Majority held that the Commonwealth amendment was within the scope of the relevant head of Constitutional power to the extent that it operated to protect a donation earmarked for the dominant purpose of influencing voting at a federal election.[62] However, the breadth of the operation of the Commonwealth amendment extended to the "unallocated middle", where use of the gift for the purposes of a federal election may have been "nothing more than a bare possibility".[63]

For a law to be characterised as falling within the ambit of a Constitutional head of power, "it is enough that the law deals with the permitted topic". However, the law is not characterised based on "the motives which inspire it or the consequences which flow from it".[64]

The Majority accepted that the subject matter of federal elections is the election of candidates to the Senate and to the House, and that the registration of political parties was at least incidental to that subject matter.[65] However, not everything done by a federally registered political party necessarily forms part of the subject matter of federal elections.

The main purpose of the Commonwealth amendment was submitted to be the protection of sources of funds which might be deployed by political entities in the federal electoral process, and to protect the federal electoral process by ensuring that participants were not starved of funds.

The Majority did not accept this contention by the plaintiff, finding instead a "disconformity between that purpose and the breadth of the operation of s.302CA".[66] That is, the Commonwealth amendment conferred immunity from the consequences of State electoral laws whose purpose was to limit the availability of funds to political parties to pursue a range of activities which had no connection with federal elections. Such activities were said to fall within "the heartland of State legislative power".[67]

It followed that the connection between the operation of the Commonwealth amendment and the subject matter of legislative power was at best "remote".[68] The Commonwealth amendment was, accordingly, found by the Majority to be incapable of severance and therefore wholly invalid.

Nettle J held the Commonwealth amendment to be valid. His Honour was of the view that, in contrast to the Commonwealth's "essentially exclusive" power over federal elections, the States have narrowly defined specific legislative powers with respect to Commonwealth elections, which, with one exception[69], are limited to making laws relating to Commonwealth elections until the Commonwealth otherwise provides.[70]

---

[62] *Spence v Queensland* at [55].
[63] *Spence v Queensland* at [56].
[64] *Murphyores Incorporated Pty Ltd v The Commonwealth* [1976] HCA 20; (1976) 136 CLR 1 at p.20 (Mason J; Gibbs J and Jacobs J each agreeing).
[65] *Spence v Queensland* at [72].
[66] *Spence v Queensland* at [81] (the disconformity being "the slightness of the impact of s 302CA on the subject matter of the federal electoral process and its much greater impact on matters outside that subject matter").
[67] *Spence v Queensland* at [80].
[68] *Spence v Queensland* at [82].
[69] The one exception occurs in s.9 of the Constitution, which provides for the Parliament of a State to make laws for determining the times and places of election of senators for the State.
[70] *Spence v Queensland* at [133].

Based on this reasoning, Nettle J found that there was "no doubt" that the Commonwealth had power to exclude State laws which prohibited political donations that were required for Commonwealth electoral purposes.[71]

As to whether there was a sufficient nexus with a Constitutional head of power and the Commonwealth amendment, Nettle J noted that the Commonwealth amendment formed part of the comprehensive legislative regime within the *Commonwealth Electoral Act 1918* (Cth) for the regulation of Commonwealth election funding and financial disclosure. That regime established an exclusive legislative power with respect to Commonwealth elections which the States have no interest in.[72]

Thus, Nettle J reasoned that as long as a donation is made to a Commonwealth electoral participant, even on an unallocated basis, it falls within the Commonwealth's legislative power "until and unless the donee determines to use the donation for purposes other than Commonwealth electoral purposes.[73]

The power to regulate the donations must extend to unallocated donations as, were it otherwise, the Commonwealth regime could be frustrated by the most transparent stratagems of evasion, namely by impressing the gifts with a lack of specificity as to where they were to be directed.[74]

It follows that Nettle J would have found the Commonwealth amendment to be valid law which prevailed over inconsistent Queensland amendments by reason of s.109 of the Constitution.[75]

Gordon J held the Commonwealth amendment to be valid. Her Honour stated the test as follows: a law of the Federal Parliament is made "with respect to" the subject matter of a power "when it relates to or affects that subject matter and the connection is not 'so insubstantial, tenuous or distant' that it cannot properly be described as a law with respect to that subject matter".[76]

Gordon J also identified that the wider scheme in the *Commonwealth Electoral Act 1918* (Cth) provides for regulation of donations in federal elections through a disclosure regime and prohibitions of foreign donations above specific monetary thresholds. It did this through characterisation of the recipients of donation (namely, as participants in federal elections)[77], and through identifying the purpose for which donations may be used (namely, the potential use of the gift for the dominant purpose of influencing the way electors vote in a federal election). [78] It is only once these two interconnected aspects of the Commonwealth amendment are appreciated that it becomes apparent that it is a law with respect to the relevant head of Commonwealth power.

[71] *Spence v Queensland* at [134].
[72] *Spence v Queensland* at [139].
[73] *Spence v Queensland* at [141].
[74] *Spence v Queensland* at [141].
[75] *Spence v Queensland* at [145].
[76] *Spence v Queensland* at [197] (citing *Mulholland v Australian Electoral Commission* [2004] HCA 41; (2004) 220 CLR 181 at 208 [66], citing *Re Dingjan; Ex parte Wagner* [1995] HCA 16; (1995) 183 CLR 323 at 369 in turn citing *Melbourne Corporation v The Commonwealth* [1947] HCA 26; (1947) 74 CLR 31 at 79).
[77] *Spence v Queensland* at [204]-[208].
[78] *Spence v Queensland* at [209]-[211].

Thus, her Honour concluded that as long as s.302CA fairly answers the description of a law with respect to federal elections (and it did, in her opinion), it does not matter that the law may affect the legislative powers of the States.[79]

Edelman J also held the Commonwealth amendment to be valid.[80] His Honour concentrated his reasoning on the distinction between legislative purpose and legislative effects.[81] His Honour found "no basis" for a conclusion that the Commonwealth amendments had an improper purpose, namely to establish an exclusive scheme of regulation of Commonwealth donations in order to weaken the ability of the States to regulate their own elections.[82] The fact there was an impairment was an effect of regulating the unallocated middle, but it was not the legislative purpose.

The Commonwealth amendments were closely tailored to the subject matter of the Commonwealth prohibited donor and disclosure regime found in the *Commonwealth Electoral Act 1918* (Cth) and accordingly valid.[83]

As can be seen from this analysis, the Majority took a very different view of the validity of the Commonwealth amendments to each of the Justices in the minority. The Majority's decision appears to turn on what was perceived to be "the breadth of the operation of s.302CA", whereas the minority took the view that the provision was "narrowly tailored" and within power.

Q3. Did the Qld amendments impermissibly burden the implied freedom of political communication?

Spence argued that the Qld amendments were invalid on the basis they impermissibly burdened the constitutionally implied freedom of political communication.

The plaintiff sought to distinguish *McCloy* on the basis that the factual underpinnings in that decision did not pertain in Queensland. The Majority rejected the notion that any distinction could be drawn on the materials before the Court.[84]

The Majority found that the Qld amendments imposed a burden on political communication that was justified, and so did not infringe the constitutionally implied freedom of political communication.[85] Both Gordon J and Edelman J also found *McCloy* to be indistinguishable and similarly rejected Spence's attack on this ground.[86]

Nettle J had dissented in *McCloy* because he considered that the discriminatory nature of the prohibition could not be justified, and so would have upheld the plaintiff's submissions on this point.[87] The fact that property developers might make political donations in the hope of receiving political

[79] *Spence v Queensland* at [221], [231].
[80] *Spence v Queensland* at [339]-[340], [357].
[81] *Spence v Queensland* at [336].
[82] *Spence v Queensland* at [338], [361].
[83] *Spence v Queensland* at [357].
[84] *Spence v Queensland* at [94].
[85] *Spence v Queensland* at [97].
[86] *Spence v Queensland* at [264] (Gordon J); at [326] (Edelman J).
[87] *Spence v Queensland* at [113].

favours did "not mark them out as a class so different from other sections of the electorate as to warrant discriminately prohibiting them from making political donations".[88] His Honour thought that distorting the playing field in this respect could not be justified.[89]

Q4. Was the Commonwealth amendment invalid as being contrary to the principle in Melbourne Corporation?

As the Majority concluded that the Commonwealth amendment was invalid, there was no need to determine whether it infringed the doctrine of inter-governmental immunities expounded in *Melbourne Corporation*.

Nettle J held that there was "no merit in that submission" that the Commonwealth amendment offended the *Melbourne Corporation* principle as there was no significant curtailing or interfering with Queensland's legislative freedom. The State was free to legislate to criminalise corrupt political donations apart from donations to Commonwealth electoral participants that must or may be used for Commonwealth electoral purposes.[90]

Gordon J would also have found the Commonwealth amendment to be valid as it applied generally to the giving, receiving or retaining of gifts in the context of political donations, but it did not single out the States.[91] The only "burden" was the prospect of s.109 inconsistency, but that consequence would not deny the States the capacity to regulate their own elections. *Melbourne Corporation* was, accordingly, not engaged.[92]

Edelman J similarly rejected the attack on the Commonwealth amendment under the *Melbourne Corporation* principle. This was because the federal law was not "targeted" at the States; the amendment permitted the States a significant margin to develop their own legislative regimes concerning donations relating to State elections; and there was a significant interest regulating electoral expenditure to secure the independence of the Commonwealth systems of government.[93]

Conclusion

The *Engineers Case* "exploded and unambiguously rejected" the doctrines of "reserved powers" and of "implied immunities" which endured in the first two decades following Federation.[94]

The doctrine of implied immunities has undergone a revival since the *Engineers Case* was decided. Not long after *Engineers*, Dixon J began to make inroads into the literalist approach confirmed in

[88] *Spence v Queensland* at [114].
[89] *Spence v Queensland* at [119].
[90] *Spence v Queensland* at [149].
[91] *Spence v Queensland* at [233].
[92] *Spence v Queensland* at [235].
[93] *Spence v Queensland* at [365]-[367].
[94] *Strickland v Rocla Concrete Pipes Ltd* [1971] HCA 40; 1971; 124 CLR 468 at p.485.

1920.[95] He did so on the basis that "strict and complete legalism"[96] did not foreclose the use to be made of implications derived from the Constitutional text and its structure.[97]

A clear majority of the members of Court in *Spence* have now confirmed the existence of both a *Melbourne Corporation* implied immunity applicable to laws of the Commonwealth, as well as the reverse doctrine applicable to invalidate laws of the States.

No doubt attuned to the fact that the existence of reciprocal immunities might be thought to be recrudescent pre-*Engineers* heresies[98], the Majority stated that "[n]o return to extreme and discredited notions of inter-governmental immunity" was involved in recognising that the Commonwealth and the States reciprocally have the benefit of the structural implication recognised in *Melbourne Corporation*.[99] This was said despite, or possibly because of, the Majority's conclusion that the Commonwealth amendment was invalid on the ground that it sought to regulate activities that were at "the heartland of State legislative power".[100]

What is left, however, is arguably a doctrine of reciprocal immunities with uncertain doctrinal foundations.

In the case of State immunity from Commonwealth interference, the possible doctrinal justifications on the road to the present formulation appear to be manifold. Following *Melbourne Corporation*, focus was centred around Dixon J's formulation with discrimination alone being recognised as a ground for invalidity. Discrimination was applied to invalidate a Commonwealth law in *Queensland Electricity Commission v The Commonwealth*[101] and featured in Mason J's two-limbed characterisation of the principle.[102]

In the years that followed *QEC*, there was a shift away from Dixon J's formulation and towards that of Starke J's in *Melbourne Corporation.* This in turn involved a move away from Mason J's characterisation in *QEC* and instead centred on Dawson J's single limb test in *QEC*, which embraced Starke J's original exposition.[103]

The reframed doctrine as expounded in *Austin v The Commonwealth* arguably set the bar at a level beyond that which the legislation in either *Melbourne Corporation* or *QEC* was required to meet. This is because Dixon J in *Melbourne Corporation* rested the principle upon the singling out of States for

[95] *Spence v Queensland* at [276] (Edelman J).
[96] Owen Dixon, "Address upon taking the oath of office in Sydney as Chief Justice of the High Court of Australia on 21st April, 1952" in "Jesting Pilate – and other papers and addresses" (Sweet & Maxwell Ltd, London, 1965) at p.247; see also Albert Venn Dicey, "Introduction to the Study of the Law of the Constitution" (10th ed, 1959) at p.175 ("Legalism.. means Federalism").
[97] *Australian National Airways Pty Ltd v Commonwealth* [1945] HCA 41; (1945) 71 CLR 29 at 85 (Dixon J); *Lamshed v Lake* [1958] HCA 14; (1958) 99 CLR 132 at pp.144-145 (Dixon CJ; Williams, Webb, Kitto & Taylor JJ agreeing).
[98] R.P. Meagher & W.M.C. Gummow, "Sir Owen Dixon's Heresy" (1980) 54 *Australian Law Journal* 25 at p. 29 ("In truth, the *Cigmatic* doctrine, in its various formulations is but a revival in fresh garb of one aspect of the immunity of instrumentalities doctrine, which in both of its operations was discarded in the *Engineers'* case"); see also Greg Craven, "Heresy as Orthodoxy: Were the Founders Progressivists?" [2003] *FedLawRw* 3; (2003) 31(1) *Federal Law Review* 87; Nicolee Dixon "Limiting the Doctrine of Intergovernmental Immunity" [1993] *QUTLawJI* 1; (1993) 9 *Queensland University of Technology Law Journal* 1.
[99] *Spence v Queensland* at [107] (Kiefel CJ, Bell, Gageler & Keane JJ).
[100] *Spence v Queensland* at [80] (Kiefel CJ, Bell, Gageler & Keane JJ).
[101] [1992] HCA 45, (1985) 159 CLR 192 (***QEC***).
[102] *QEC* [1985] HCA 56; (1985) 159 CLR 192 at p.217 (Mason J).
[103] *Cf Austin v The Commonwealth* (2003) 215 CLR 185 at pp.281-282, [223] (McHugh J).

special burdens which would not necessarily amount to an existential threat to the functions of the State itself. However, the test in respect of impairment in *Austin* was applied such that an abrogation of choice in respect of important State government functions was more readily able to be made out such as to give rise to invalidity.

The *Melbourne Corporation* principle now "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 a capacity to function as governments".[104] The Court in both *Fortescue* and *Spence* applied this test and gave consideration to whether the law was "aimed at" the States, thus reintroducing discrimination into the calculus.

In the case of Commonwealth immunity from State interference, there appears to be no compelling reason for its existence.[105] Encroachment by way of taxation by a State on Commonwealth property is prevented by s.114 of the Constitution. Moreover, the Commonwealth is well-armed to protect itself from any State interference through the use of s.109 of the Constitution. However, following the result in *Spence v Queensland*, it might legitimately be thought that the prophylactic pathway cleared by s.109 may not always guarantee immunity.[106]

Tom Dixon

State Chambers

Date: 22 July 2019

……

[104] *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548 at p.609 [130] (Hayne, Bell & Keane JJ); *Spence v Queensland* [2019] HCA 15 at [108] (Kiefel CJ, Bell, Gageler & Keane JJ); at [308] (Edelman J).
[105] Ronald Sackville, "The Doctrine of Immunity of Instrumentalities in the United States and Australia: A Comparative Analysis" Volume 7, *Melbourne University Law Review* 15 at p.63; Catherine Penhallurick "Commonwealth Immunity as a Constitutional Implication" [2001] *FedLawRw* 8; (2001) 29(2) *Federal Law Review* 151.
[106] *Spence v Queensland* [2019] HCA 15 at [104] (Kiefel CJ, Bell, Gageler & Keane JJ).