SUPREME COURT OF QUEENSLAND

CITATION:	*Electoral Commission of Queensland v Awabdy* [2018] QSC 33
PARTIES:	**ELECTORAL COMMISSION OF QUEENSLAND** (applicant) **v** **RYTA ANGELA AWABDY** (respondent) **and** **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (intervenor)
FILE NO/S:	SC No 7744 of 2017
DIVISION:	Trial
PROCEEDING:	Originating Application
DELIVERED ON:	1 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	23 February 2018
JUDGE:	Jackson J
ORDER:	**It is declared that sections 290 and 291 of the *Electoral Act* 1992 (Qld) are not inconsistent with sections 314AB and 314AC of the *Electoral Act* 1918 (Cth) within the meaning of section 109 of the Constitution.**
CATCHWORDS:	CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – INCONSISTENCY OF LAWS (CONSTITUTION, s 109) – GENERALLY – TEST FOR INCONSISTENCY – where a Commonwealth Act requires the agent of a State branch of a registered political party to furnish a return with particulars of receipts of more than $13,500 – where a State Act requires the agent of a State registered political party to give a return with particulars of gifts of $1,000 or more – where respondent is agent of a registered political party under both Acts – whether State Act is inconsistent with Commonwealth Act – whether an area of liberty designedly left *Constitution* (Cth), s 109 *Commonwealth Electoral Act* 1918 (Cth), ss 314AB, 314AC *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 (Cth) *Electoral Act* 1992 (Qld), ss 290, 291 *Baker v Campbell* (1983) 153 CLR 52, cited

Bell Group NB v State of Western Australia (2016) 331 ALR 408, cited
Dickson v The Queen (2010) 241 CLR 491, considered
Ex parte McLean (1930) 43 CLR 472, cited
Jemena Asset Management (3) Pty Ltd v Coinvest Ltd (2011) 244 CLR 508, cited
McLindon v Electoral Commission of Queensland (2012) 260 FLR 395, cited
McWaters v Day (1989) 168 CLR 289, cited
Momcilovic v The Queen (2011) 245 CLR 1, cited
R v LK (2010) 241 CLR 177, cited
R v Lowenthal; ex parte Blacklock (1974) 131 CLR 338, cited
R v Winneke; ex parte Gallagher (1982) 152 CLR 211, cited
Victoria v The Commonwealth ("*The Kakariki*") (1937) 58 CLR 618, cited
Wenn v Attorney-General (Victoria) (1948) 77 CLR 84, cited

COUNSEL: L Kelly QC, G del Villar and H Knowlman for the applicant
T Bradley QC and N Ferrett for the respondent
E Wilson QC and F Nagorcka for the Attorney-General for the State of Queensland, intervening

SOLICITORS: Clayton Utz for the applicant
ClarkeKann for the respondent
Crown Solicitor for the Attorney-General for the State of Queensland, intervening

Jackson J:

[1] Because the legislative powers of the Commonwealth are not wholly exclusive of the legislative powers of the States, s 109 of the Constitution provides that:

> "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

[2] The dispute in the present case is whether a law of the State of Queensland that requires the agent of a registered political party under the *Electoral Act 1992* (Qld) ("State Act") to give a return to a State agency ("State return") that must include particulars of gifts from any person or organisation that exceed $1,000 is inconsistent with a law of the Commonwealth that requires the agent of a registered political party under the *Commonwealth Electoral Act 1918* (Cth) ("Commonwealth Act") to furnish a return to a Commonwealth agency ("Federal return") that must include particulars of sums received from any person or organisation that exceed $13,500.

[3] The applicant is the State agency that must be given a State return under the State Act. The Liberal National Party of Queensland ("LNPQ") is a registered political party under the State Act. The respondent is the agent of LNPQ under the State Act. The respondent is the person who must give a State return.

[4] The Australian Electoral Commission is the Commonwealth agency that must be furnished with a Federal return. LNPQ is a State branch of the Liberal Party of Australia and, accordingly, as a State branch of a registered political party under the Commonwealth Act, must give a return. The respondent is the agent of LNPQ under the Commonwealth Act. The respondent is the person who must furnish a Federal return.

[5] Because the question at issue is a matter arising under the Constitution, the Attorney-General of Queensland intervenes.

[6] The submissions made by the parties are wide ranging. Helpful as they are, to some extent they raise matters that are not necessary to consider. When a question of inconsistency under s 109 is to be decided, no question is involved of power of the State Parliament to enact the relevant law of the State or the Commonwealth Parliament to enact the relevant law of the Commonwealth. Section 109 assumes the existence of laws that, apart from any question of inconsistency, are valid. When s 109 applies, because of inconsistency, it does not avoid the law of the State in question. It operates only so that the law of the Commonwealth shall prevail. Only in that sense is the law of the State invalid, and only to the extent of the inconsistency. Hence, if the inconsistent Commonwealth law were repealed, the State law would operate, without any further action required to make it valid. This is what is meant by the provision in s 109 that the law of the Commonwealth shall prevail.

[7] Having regard to both the function and effect of s 109, it is trite to say that it is critical to identify the relevant laws of the State and of the Commonwealth with precision. It is only when the law of the Commonwealth is identified and its operation ascertained, and the same is done for the law of the State, that the question of whether they are inconsistent can be answered.

[8] The relevant law of the Commonwealth is found in s 314AB, as supplemented by s 314AC, of the Commonwealth Act. They provide, in part:

> "**314AB Annual returns by registered political parties**
>
> (1) …the agent of each … State branch of each registered political party must, within 16 weeks after the end of each financial year beginning on or after 1 July 1992, furnish to the Electoral Commission a return…
>
> (2) A return … must set out the following:
>
> (a) the total amount received by, or on behalf of, the party during the financial year, together with the details required by section 314AC…
>
> **314AC Amounts received**
>
> (1) If the sum of all amounts received by, or on behalf of, the party from a person or organisation during a financial year is more than $10,000, the return must include the particulars of that sum.
>
> …
>
> (3) The particulars of the sum required to be furnished under subsection (1) are the amount of the sum and:
>
> (a) if the sum was received from an unincorporated association, other than a registered industrial organisation:

(i) the name of the association; and

(ii) the names and addresses of the members of the executive committee (however described) of the association; or

(b) if the sum was purportedly paid out of a trust fund or out of the funds of a foundation:

(i) the names and addresses of the trustees of the fund or of the foundation; and

(ii) the title or other description of the trust fund, or the name of the foundation, as the case requires; or

(ba) if the sum was received as a result of a loan—the information required to be kept under subsection 306A(3), or the name of the financial institution, as the case requires; or

(c) in any other case—the name and address of the person or organisation."

[9] The word "amount" is defined in s 314AA of the Commonwealth Act to include the value of a gift, loan or bequest, but is not confined to those receipts.

[10] Other provisions "index" the threshold amount of $10,000 provided for in s 314AC(1), so that it should be treated as if it now read $13,500.[1]

[11] I will call the particulars required under s 314AC the "Federal required particulars".

[12] The alleged inconsistent law of the State is in ss 290 and 291 of the State Act that provide, in part:

"**290 Returns by registered political parties**

(1) The agent of a registered political party must give the commission a return if, in a reporting period—
(a) the party receives … a gift from an entity … and the amount or value of the gift is equal to or more than the gift threshold amount; or
(b) the party receives … a loan from an entity, other than a financial institution, and the value of the loan is equal to or more than the gift threshold amount.

(2) The return must—
(a) …
(b) for a gift received by the registered political party, state the following—
(i) the amount or value of the gift;
(ii) the relevant particulars of the entity that gave the gift; and
(c) for a loan received by the registered political party, state the information required to be kept under section 272(3); and
(d) be given to the commission by the day, not more than 8 weeks after the end of the reporting period in which the gift or loan was received, prescribed by a regulation.

(3) …

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[1] *Commonwealth Electoral Act* 1918 (Cth), s 321A(1)(j) and (2).

(4) Also, the agent of a registered political party must, within 8 weeks after the end of a reporting period, give the commission a return, in the approved form, stating—
(a) the total amount received by, or for, the party from all entities during the reporting period, including amounts received before the commencement; and
(b) the total amount paid by, or for, the party to all entities during the reporting period, including amounts paid before the commencement; and
(c) the total outstanding amount, as at the end of the reporting period, of all debts incurred by, or for, the party to all entities, including debts incurred before the commencement.

291 Amounts received
(1) For a return under section 290(4), if the sum of all amounts received by, or for, the registered political party from a particular entity during a reporting period is equal to or more than the gift threshold amount, the particulars of the sum must be included in the return.
(2) In calculating the sum, an amount less than the gift threshold amount need not be counted.
(3) The particulars of the sum required to be given under subsection (1) are the amount of the sum and—
(a) the relevant particulars of the entity that gave the sum; or
(b) if the sum was received as a result of a loan, the information required to be kept under section 272(3) or the name of the financial institution that made the loan, as applicable."

[13] The "gift threshold amount" is defined by ss 2 and 201A of the State Act to be $1,000.

[14] I will call the particulars required under ss 290 and 291 the "State required particulars".

[15] There are a number of differences in the operation of ss 314AB and 314AC, on the one hand, and ss 290 and 291, on the other. To begin with, three may be mentioned.

[16] First, the LNPQ is a political party registered under Part 6 of the State Act ("State registered political party"). The State Act, defines "political party", in s 2, to mean:

> "… an organisation whose object, or 1 of whose objects, is the promotion of the election **to the Legislative Assembly** of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part." (emphasis added)

[17] The LNPQ is also a State branch of the Liberal Party of Australia. That party is registered as a political party under Part XI of the Commonwealth Act ("Federal registered political party"). The Commonwealth Act defines "political party", in s 4, to mean:

> "… an organisation the object or activity, or one of the objects or activities, of which is the promotion of the election **to the Senate or to the House of Representatives** of a candidate or candidates endorsed by it." (emphasis added)

[18] It is because the LNPQ is a State branch of a Federal registered political party, that the operation of s 314AB of the Commonwealth Act obliges the respondent to furnish a

Federal return. And it is because the LNPQ is a State registered political party, that the operation of s 290 of the State Act obliges the respondent to give a State return.

[19] That is to say, ss 314AB and 314AC of the Commonwealth Act are indifferent to whether a State branch of a Federal registered political party's objects include promotion of election of candidates to the Legislative Assembly of the State and ss 290 and 291 of the State Act are indifferent to whether a State registered political party's objects include election of a candidate to the Senate or to the House of Representatives.

[20] It is not an incident of the scheme of either Act that it requires a return containing the required particulars of a "political party" as defined in the other Act. It is only because the LNPQ is both a State branch of a Federal registered political party and a State registered political party that the respondent is subject to both obligations.

[21] Second, each of the Acts provides that the required return, including the required particulars, is to be furnished or given to a different agency. The State Act requires that the return be given to the applicant whereas the Commonwealth Act requires that the return be furnished to the Australian Electoral Commission.

[22] Third, ss 314AB and 314AC require a Federal return to include particulars of all amounts received in excess of the threshold amount, whether by way of gift or otherwise. It does not require the return to include only particulars of gifts received in excess of the threshold amount.

[23] By way of contrast, ss 290 and 291 of the State Act provide that a State return must state the required particulars for a "gift". Sections 197 and 201 of the State Act define "gift" in an extensive way. It is unnecessary to set out the whole of the definition. Section 201(1) provides, in part, that "gift" means:

> "… a disposition of property made by a person to someone else, otherwise than by will, being a disposition made without consideration in money or monies worth or with inadequate consideration."

[24] The primary relief sought by the applicant is in the form of a negative declaration, that there is no inconsistency under s 109. It is the respondent who submits that there is inconsistency. It is convenient to begin with those submissions.

[25] Before doing so, I mention that non-compliance with ss 290 and 291 is an offence under s 307 of the State Act, while non-compliance with ss 314AB and 314AC is an offence under s 315 of the Commonwealth Act. Sometimes, in identifying the relevant law of the State and law of the Commonwealth for the purposes of s 109, it is said to be necessary to identify the substantive provisions that are engaged when any other provisions providing for the norms of conduct (on which the substantive provisions operate) are to be considered. However, none of the submissions of the parties in the present case were directed to any differences that exist by reason of the application of s 307 of the State Act and s 315 of the Commonwealth Act, so it is unnecessary to consider them further.

Alleged inconsistency

[26] At base, the respondent submits that when s 290 obliges an agent of a State branch of a Federal registered political party to include the State required particulars of a gift not in

excess of $13,500 in a State return it is inconsistent with ss 314AB and 314AC of the Commonwealth Act, if the gift was made for the promotion of the election to the Senate or to the House of Representatives of a candidate or candidates endorsed by the political party.

[27] The first point to notice is that the suggested inconsistency is confined to a sub-set of the class of gifts, namely those made for the purpose of the promotion of the election to the Senate or to the House of Representatives. I will call that the "Commonwealth electoral purpose".

[28] Sections 290 and 291 do not distinguish among gifts made to a State registered political party for different purposes. On the ordinary meaning of the text, informed by the defined terms that the sections deploy, and in the context of the other provisions of the State Act, if a gift is equal to or more than the gift threshold amount, ss 290 and 291 require that the State required particulars must be included in a return, whatever the purpose of the gift.

[29] Similarly, ss 314AB and 314AC do not operate by reference to whether an amount received is received by way of gift or, if it is, whether the gift is for the Commonwealth electoral purpose. On the ordinary meaning of the text of ss 314AB and 314AC, informed by the defined terms that they deploy, and in the context of the other provisions of the Commonwealth Act, if an amount received is equal to or more than the threshold amount, s 314AB and 314AC require that the Federal required particulars must be included in a return, whatever the purpose of the value received.

[30] Second, a critical step in the respondent's submissions is the contention that because ss 290 and 291 require the agent of a State registered political party to give a return to the applicant that includes the State required particulars of gifts that exceed $1,000 but are less than $13,500 in value, it would impose an obligation plainly greater than that for which the Commonwealth Act has provided.

[31] In her written submissions, the respondent seeks to extend the discussion beyond the textual operation of ss 290 and 291 of the State Act and 314AB and 314AC of the Commonwealth Act as the relevant laws, to other provisions of the Commonwealth Act that require donors to disclose gifts over the threshold amount in certain circumstances. But, except as context to construe ss 314AB and 314AC, they are not directly relevant. The Commonwealth Act and the State Act respectively make provision for donors to make disclosure in some circumstances. But the laws in question in this case are not those laws.

[32] The reason for the respondent's inclusion of laws relating to disclosure by donors appears from the submission made by the respondent that if ss 265 and 290 of the State Act were allowed to operate, they would defeat the purposes of the threshold amount in the Commonwealth Act's provisions, which they submit were: to exclude from disclosure small individual donations that do not, in the opinion of the Commonwealth Parliament, appear to influence a parliamentarian or a political party's position in the Parliament; to encourage more individuals and small businesses to make donations by alleviating the administrative burden of filing a disclosure for donations that, in the opinion of the Commonwealth Parliament, are relatively small donations; to ensure privacy for such donors; to have a positive impact on the democratic process by encouraging more individuals and business owners to take an active part in that process;

to increase the proportion of party income that comes from smaller donations; and thereby to reduce the dominance of corporate donations that prompt concerns about alleged undue influence in politics.

[33] It will be necessary to consider these submission later, but first it is appropriate to summarise the principles that are engaged when a question of direct inconsistency under s 109 is raised.

Direct inconsistency, an area of liberty and different subject matters

[34] The taxonomy developed by the High Court recognises two classes of inconsistency,[2] described as direct inconsistency and indirect inconsistency. The class of direct inconsistency is most commonly identified with the statement of principle crystallised by Dixon J in 1937 in *The Kakariki*[3] and consistently deployed by the High Court since, including in recent cases.[4] That principle is whether the State law would "alter, impair or detract from the operation of a law of the Commonwealth Parliament".[5]

[35] The respondent submits that the inconsistency between ss 290 and 291, as a law of the State, and ss 314AB and 314AC, as the law of the Commonwealth, is direct inconsistency.

[36] However, by the submission identified above, the respondent urges that to allow the State law to operate would defeat the **purpose** of the Commonwealth law. The respondent's approach does not focus on the operation of the law of the Commonwealth, being in this case ss 314AC and 314AB. It focuses upon the results that the respondent submits the operation of the legislation was intended to achieve.

[37] Generally speaking, the cases that decide that a State law is directly inconsistent with a Commonwealth law do so because of a comparison of the operation of the State law and the operation of the Commonwealth law, not because if the State law were allowed to operate it would undermine or tend to undermine the results that the Commonwealth law was intended to achieve. To reason in that way could make inconsistent a State law that does not alter impair or detract from the operation of the Commonwealth law, as such, but which detracts from the underlying purpose of the Commonwealth law. In cases of direct inconsistency, that has not been the usual way to reason to a conclusion of inconsistency. But there is an important qualification to that observation. In *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd*,[6] the High Court said:

> "The crucial notions of 'altering', 'impairing' or 'detracting from' the operation of a law of the Commonwealth have in common the idea that a State law conflicts with a Commonwealth law if the State law undermines the Commonwealth law. Therefore any alteration or impairment of, or detraction from, a Commonwealth law must be significant and not trivial."[7]

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2 *Pace* Gummow J in *Momcilovic v The Queen* (2011) 245 CLR 1, 110 [240], who divided direct inconsistency into two classes and identified indirect inconsistency as a third class.

3 *Victoria v The Commonwealth* ("*The Kakariki*") (1937) 58 CLR 618, 630.

4 See, for example, *Bell Group NB v State of Western Australia* (2016) 331 ALR 408, 422 [51]; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 523-524 [36]-[39].

5 (2016) 331 ALR 408, 422 [51].

6 (2011) 244 CLR 508.

7 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 525 [41].

[38] It is necessary, however, to go further to deal with the argument presented by the respondent in the present case. A convenient starting point is to recognise that because of the complex extent and operation of modern laws, direct inconsistency cannot be assessed solely by reference to whether both laws can be obeyed. That explains, perhaps, the more nuanced approach of the principle formulated in *The Kakariki*. Even so, Dixon J's principle expressly directs attention to the "operation" of the Commonwealth law when direct inconsistency is to be assessed.

[39] However, that does not end the inquiry in all cases. The respondent relied on *Dickson v The Queen*[8] as showing a wider principle of direct inconsistency. The Commonwealth law in that case was s 11.5 of the *Criminal Code* (Cth), which provided for the Commonwealth offence of conspiracy to commit another Commonwealth offence. The relevant underlying offence was theft of Commonwealth property under s 131.1 of the *Criminal Code* 1995 (Cth). The State law in that case was conspiracy to commit a State offence under s 321(1) of the *Crimes Act* 1958 (Vic). The underlying State offence was theft under s 72 of the *Crimes Act* 1958 (Vic). The facts of the case potentially engaged both conspiracy offences. The question was whether the operation of the Commonwealth laws was inconsistent with the State laws.

[40] The High Court said, in one passage relied on by the respondent:

> "Further, there will be what Barwick CJ identified as 'direct collision' where the State law, if allowed to operate, would impose an obligation greater than that for which the federal law has provided. Thus, in *Australian Mutual Provident Society v Goulden*, in a joint judgment, the Court determined the issue before it by stating that the provision of the State law in question 'would qualify, impair and, in a significant respect, negate the essential legislative scheme of the *Life Insurance Act* 1945 (Cth)'." [9] (footnotes omitted)

[41] In a later passage, the court said:

> "What is immediately important is the exclusion by the federal law of significant aspects of conduct to which the State offence attaches. There are significant 'areas of liberty designedly left [and which] should not be closed up', to adapt remarks of Dixon J in *Wenn v Attorney-General (Vic)*."[10] (footnotes omitted)

[42] The reference to the "areas of liberty designedly left", in *Dickson*, was to the differences between the elements of the Commonwealth and State laws as to the offences and other contextual laws. For example, the making of the agreement to commit the underlying offence constituted a complete offence of conspiracy under the State law, but the Commonwealth law required an additional element of an overt act in furtherance of the agreement.

[43] In the present case, the respondent submits that the area of liberty designedly left is that where the State law in ss 290 and 291 would require that the State return given by the respondent to contain the State required particulars for gifts equal to or more than $1,000, but less than $13,500, and the gift was made for the Commonwealth electoral

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8 *Dickson v The Queen* (2010) 241 CLR 491.

9 *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 76 [27], quoted in *Dickson v The Queen* (2010) 241 CLR 491, 503 [15].

10 *Dickson v The Queen* (2010) 241 CLR 491, 505 [25].

purpose. To the extent of that requirement, the respondent submits that the State law, if allowed to operate, would impose an obligation greater than that for which the federal law has provided.

[44] The textual operation of the laws in question in the present case does not raise any question of particular complexity. Each of ss 290 and 291 on the one hand and ss 314AB and 314AC on the other hand creates an obligation of disclosure by giving information to an identified agency. Each limits the circumstances that engage the obligation by reference to a threshold monetary amount. But neither of them makes any express positive provision that those who are subject to the obligation under the Commonwealth Act are granted immunity from the obligation under the State Act in any relevant respect.

[45] In my view, it is appropriate to speak of "immunity" here, because where the common law recognises a right to refuse to produce information required to be produced under a statute, the right has been described as an immunity.[11] Absent any particular immunity, the circumstances of an ordinary member of the community were described by Deane J in *Baker v Campbell*[12] as follows:

> "A person is obliged to disclose or yield his information or property only to the extent that he is compelled so to do by some applicable common law principle or statutory provision. Where no such compulsion exists, there is no need for any special privilege protecting particular types of information or property from disclosure or seizure. The ordinary entitlement to remain silent and to retain one's information or property only constitutes a special privilege where it is preserved as an exception in circumstances where disclosure or cession would otherwise be compelled. In the absence of any such general compulsion, that entitlement represents no more than the ordinary position of the ordinary citizen under the common law."[13]

[46] The point for present purposes is that the submissions of the respondent seek to characterise the operation of ss 314AB and 314AC as though they grant an immunity to the agent of a State branch of a Federal registered political party, who is required to furnish a return including the relevant particulars under the Commonwealth Act, from having to disclose information of the same kind to other persons, provided the gift is under the threshold amount and made for the Commonwealth electoral purpose.

[47] As indicated in *Dickson*, the source of the concept of "an area of liberty designedly left" is in the reasons of Dixon J in *Wenn*, as follows:

> "To legislate upon a subject exhaustively to the intent that the areas of liberty designedly left should not be closed up is, I think, an exercise of legislative authority different in kind from a bare attempt to exclude State concurrent power from a subject the Federal legislature has not effectively dealt with by regulation, control or otherwise."[14]

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11 *Baker v Campbell* (1983) 153 CLR 52, 112, 117, 123, 125 and 127.
12 (1983) 153 CLR 52.
13 (1983) 153 CLR 52, 111.
14 *Wenn v Attorney-General (Victoria)* (1948) 77 CLR 84, 120.

[48] It should be noted that the distinction made in that passage was not directed to the assessment of inconsistency under s 109, but to the difference between legislation designed to exhaustively deal with a particular subject matter and a bare attempt to exclude State concurrent power.

[49] In my view, the concept of "an area of liberty designedly left", as it was applied in *Dickson*, describes legislation as to a subject matter which, properly construed, excludes further provision upon that matter. It may be difficult to draw a distinction between such a construction and evincing an intention to exclude by covering the subject or field of the relevant matter.

[50] The Attorney-General and the applicant submit that the subject matters of the State Act and the Commonwealth Act, particularly ss 290 and 291, on the one hand, and ss 314AB and 314AC, on the other hand, are different, with the consequence that they are not inconsistent. The Attorney-General relies on *R v Winneke; ex parte Gallagher*[15] to illustrate the distinction. In that case, Mr Winneke QC was appointed as a commissioner under the *Royal Commissions Act* 1902 (Cth) and as a royal commissioner under the prerogative power of the crown in Victoria, in each case to conduct an inquiry into the activities of the Australian Building Construction Employees' and Builders Labourers' Federation in relation to particular matters. Mr Winneke exercised those authorities by conducting the inquiries concurrently. The appellant was summoned to give evidence before the combined inquiries under s 2 of the *Royal Commissions Act* 1902 (Cth) and s 17 of the *Evidence Act* 1958 (Vic). He attended but refused to answer certain questions. He was convicted of an offence under ss 19 and 20 of the *Evidence Act* 1958 (Vic). He appealed against the conviction on the ground that there was s 109 inconsistency because refusal to answer was an offence for which the maximum penalty under s 6 *Royal Commissions Act* 1902 (Cth) differed from the maximum penalty under ss 19 and 20 of the *Evidence Act* 1958 (Vic).

[51] Gibbs CJ said:

> "If the two laws are made for the same purpose – e.g. if they prescribe substantially identical rules on a particular subject but with different penalties for contravention – it will be easy to conclude that the Commonwealth law covers the whole subject-matter, and that there is an inconsistency: see *Hume v. Palmer* and *Reg. v. Loewenthal; Ex parte Blacklock*. However, the two laws may deal with different subject matters, so that each may validly apply in relation to the same set of facts. Dixon J. gave an example of this in *Ex parte McLean*, when he referred to the case of a shearer who unlawfully and maliciously wounded a sheep he was shearing and who might thereby commit an offence both against a Commonwealth award and against the State criminal law."[16] (footnotes omitted)

[52] However, distinguishing between subject matters is not always a bright-line test. In *Gallagher*, Mason J said:

> "…inconsistency in the s 109 sense can arise between Commonwealth and State statutes on different topics, even though they are unrelated, as Commonwealth and Victorian Royal Commissions appear to be. They may contain

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15 (1982) 152 CLR 211.

16 *R v Winneke; ex parte Gallagher* (1982) 152 CLR 211, 218.

> inconsistent provisions on particular matters (*Charles Marshall Pty Ltd v Collins*), although this 'is less likely to occur than it is where the two laws are dealing with the same subject matter' (*Clarke v Kerr*). This is especially so when the difference in the subject matters is such that they are not related to each other. Then the potential area of inconsistency is extremely limited."[17] (footnotes omitted)

[53] Mason J reasoned in *Gallagher* that it was impossible to conclude that the *Royal Commissions Act* 1902 (Cth) was not directed to dealing with joint Commonwealth and State inquiries and that made it impossible to say that it had any intention to cover that field. His Honour observed that the doing of a single act may involve the actor in the commission of an offence against both a law of the Commonwealth and a law of the State without raising s 109 inconsistency, except where the Commonwealth law "evinces an intention to deal with that act to the exclusion of any other law".[18]

[54] The Attorney-General submits that an "area of liberty designedly left" analysis is available only where the laws deal with the same subject matter. I do not accept that submission. In my view, the taxonomy of analysis is not so neatly compartmentalised. There is no simple analytical tool that will distinguish between a case where the Commonwealth law "evinces an intention to deal with that act to the exclusion of any other law" and one where it does not. It is a question of construction of the Commonwealth law.

[55] In construing the Commonwealth law in order to ascertain whether it evinces that intention, the decided cases are of illustrative assistance. The parties referred to a number of examples, including *ex parte McLean*,[19] *R v Lowenthal; ex parte Blacklock*,[20] *McWaters v Day*,[21] *McLindon v Electoral Commission of Queensland*,[22] *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd*[23] and *Momcilovic v The Queen*.[24]

Extrinsic materials

[56] Both the respondent and the Attorney-General made reference to extrinsic materials which preceded some of the relevant legislation.

[57] For its part, the applicant referred in written submissions to extrinsic materials that preceded the 1992 amendments that introduced most of the provisions of the current Div 5A of the *Commonwealth Electoral Act* 1918 (Cth)[25] and that preceded the 2006 amendment[26] to s 314AC that lifted the threshold amount for the Commonwealth required particulars from $1,500, or more, to more than $10,000, with indexation thereafter.

[58] However, to the extent that the respondent relied on extrinsic materials in aid of the construction of ss 314AB and 314AC in her written submissions, the applicant objected

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17 *R v Winneke; ex parte Gallagher* (1982) 152 CLR 211, 220.
18 *R v Winneke; ex parte Gallagher* (1982) 152 CLR 211. 224.
19 (1930) 43 CLR 472, 483.
20 (1974) 131 CLR 338, 346-347.
21 (1989) 168 CLR 289.
22 (2012) 260 FLR 395.
23 (2011) 244 CLR 508, 525
24 (2011) 245 CLR 1, [637].
25 *Commonwealth Electoral Amendment Act* 1992 (Cth), s 12.
26 *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 (Cth).

in oral submissions to its use on the ground that there was no relevant ambiguity to permit that use under s 15AB of the *Acts Interpretation Act* 1901 (Cth).

[59] To deal with the arguments of the parties, it will be necessary to refer to some of these materials, but it must be kept steadily in mind that the range of political considerations that informed the relevant legislation are not to be substituted for the operation of the Commonwealth law in this context, any more than it would in another context.

[60] The respondent relies upon the report of the Joint Standing Committee on Electoral Matters entitled "The 2004 Federal Election: Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto", tabled on 10 October 2005. The report said:

> "[13.61] Since 1991, there have been several attempts to increase the donor and party disclosure thresholds, with proponents arguing that:
>
> > when these amounts were set, it was thought that there were obvious levels below which there should not be any disclosure and that, over time, these levels naturally would increase with the CPI [Consumer Price Index], inflation and other things. (footnote omitted)
>
> …
>
> [13.79] The Committee is concerned that the current low threshold for disclosure exposes donors to potential or feared political intimidation or pressure from opponents of the party to whom an individual or organisation is donating to either cease donating or make a corresponding donation to an opposing party. It agrees with those who argue that the problem of disclosure and intimidation is 'very real' and notes the comments of Senator Warwick Parer who raised his concerns in the Senate in 1992:
>
> > … donors must be protected against coercion and intimidation. Every time I have raised this, people have said to me, 'It does not really exist. You are making it up'. Anyone with any experience of the world out there knows the nonsense involved in that. … A businessman told me that if he gave a $20 donation to the Liberal Party, in his honest opinion, the unions would ensure that $200,000 worth of damage was done to his company. That is not a story that I am throwing around here for political purposes; it is a genuine belief held by people in society … A little old lady pensioner from far north Queensland sent me through the mail a donation of $10 but she said specifically that she did not want a receipt because she did not want anyone to know she had given it to me in case she was singled out for some sort of discrimination in the small country town from which she came. (footnote omitted)
>
> [13.80] The Committee believes that a higher threshold for disclosure would have a positive impact on the democratic process in that it would encourage more people — both individuals and small-business owners — to take an active part in that process. Such an outcome could increase the proportion of candidate and party income that comes from smaller donations, thereby reducing the dominance

> of corporate donations that prompts many of the concerns about alleged undue influence in politics."

[61] When the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2006 (Cth) was introduced, the second reading speeches in both the House of Representatives and the Senate referred generally to the report, although not on this particular topic.[27] As appears below, it was s 3 of the Act that the Bill become that increased the threshold amount in s 314AC(2) from $1,500 to more than $10,000, subject to indexation.

[62] Section 15AB(1) of the *Acts Interpretation Act* 1901 (Cth) permits, subject to subsection (3), consideration to be given to any material not forming part of the Act in question if it is capable of assisting in the ascertainment of the meaning of the provision to be interpreted for particular purposes. One of the purposes is to determine the meaning when the meaning of the provision is ambiguous or obscure.

[63] The applicant submits that the meaning of ss 314AB and 314AC is neither ambiguous nor obscure. The respondent seeks to rely on the report to extend the meaning of those sections to operate as impliedly excluding any provision that would require a Federal registered party to give a return that includes the State required particulars in the case of a gift for the Commonwealth electoral purpose where the gift is below the indexed Commonwealth threshold amount, when, apart from the purposes identified in the report, no ambiguity or obscurity tending to support that conclusion would arise.

[64] The respondent refers to the following passage from *Dickson* as support for regard being had to the report in the present case:

> "Section 11.5 of the *Criminal Code* (Cth) received detailed consideration by this Court in *R v LK*. The extrinsic material considered in *R v LK* indicated that the narrower scope of s 11.5 reflects a deliberate legislative choice influenced by the work of what in *R v LK* were identified as the Gibbs Committee and the Model Criminal Code Officers Committee."[28]

[65] However, the questions of meaning in *Dickson* were somewhat different. It is true that the Commonwealth offence of conspiracy under s 11.5 of the *Criminal Code Act* 1995 (Cth), positively required an overt act as an element of the offence and the MCCOC report said that was to be done on the basis that an agreement without any further action "was insufficient to warrant the attention of the criminal law".[29] However, there was also an underlying question whether the section picked up the common law conception of conspiracy[30] and the admissibility of extrinsic materials was not in dispute.

[66] Having regard to the text and ordinary meaning of ss 314AB and 314AC, it may be doubted that the report in the present case is admissible under s 15AB, but in the result it is unnecessary to finally decide that possibly complex question, or whether, in any

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27 Second Reading Speech of the Parliamentary Secretary to the Minister for Finance and Administration, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 December 2005 and Second Reading Speech of the Minister for the Arts and Sport, Australia, Senate, *Parliamentary Debates* (Hansard), 13 June 2006.

28 (2010) 241 CLR 491, 505 [24].

29 *R v LK* (2010) 241 CLR 177, 205 [55].

30 *R v LK* (2010) 241 CLR 177, 205-206 [57]-[58].

event, the report is admissible at common law. I proceed on the assumption that the report is admissible, but also on the basis that "statements of legislative intention made by a Minister do not overcome the need to consider the text of a statute to ascertain its meaning."[31]

[67] The report does not take the respondent's case far enough, in my view. It does not support the conclusion that in raising the level of the threshold amount the Parliament made a deliberate choice that reflects an intention to exclude any provision of State law that would operate to require a State branch of a Federal registered political party that is also a State registered political party to give a return that includes the State required particulars in the case of a gift for the Commonwealth electoral purpose where the gift is below the indexed Commonwealth threshold amount. I will return to the reasons why, but first it is convenient to refer to some relevant legislative history.

Legislative history

[68] Because of a number of the points already discussed, including the use the respondent sought to make of extrinsic materials, it is necessary to identify the history of the relevant provisions with greater precision. That history is particularly relevant because the anchor to which the respondent's submissions are fastened is an unexpressed intention to create an "area of liberty designedly left" for a gift for the Commonwealth electoral purpose below the amount of $10,000, when the Commonwealth Act was amended in 2006.

[69] From 1992, ss 314AB and 314AC operated in substantially the same way as now, but with the threshold amount in s 314AC(2) of $1,500 or more.

[70] When enacted in 1992, the State Act had no equivalent provisions. Provisions replicating the operation of the Commonwealth Act at the State level were inserted in 1994,[32] with the threshold amount of $1,500 in the equivalent provisions. These provisions were in place in 2006.

[71] From 22 June 2006, s 314AC(2) of the Commonwealth Act was amended by omitting "$1,500 or more" and substituting "more than $10,000". At the same time, the indexing provision was introduced.[33]

[72] Until 19 May 2011, the relevant provisions of the State Act continued to operate with the threshold amount of $1,500. From that date, the State Act was amended by inserting ss 290 and 291 (as they were numbered after the renumbering of provisions which occurred as part of the amendments),[34] to similar effect as the current provisions, with a threshold amount of $1,000.

[73] On 28 May 2014, s 291 of the State Act was amended again in a number of respects. First, the amendments omitted the previous subsection (1) and replaced it with a new sub-section, for present purposes not substantially different in operation from the current sub-section. Second, the amendments omitted the threshold amount "of less

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31 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 527 [50].

32 *Electoral Amendment Act* 1994 (Qld), ss 15 and 21.

33 *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 (Cth), s 3 and Schedule 2, ss 25 and 27.

34 *Electoral Reform and Accountability Amendment Act* 2011 (Qld).

than $1,000" from sub-section (2) and replaced it with "equal to or less than the gift threshold amount". Third, s 2 was amended to introduce a definition of "gift threshold amount" that cross-referred to s 201A. Section 201A was inserted to define the "gift threshold amount" as the "amount applying for a gift under the Commonwealth Electoral Act, section 304(5)(b)(ii) as indexed under s 321A of that Act".[35] The intention expressed by those provisions was to lift the gift threshold amount from $1,000 and to link it to the Commonwealth Act threshold amount (at that time $12,400).[36] The explanatory notes also said as much,[37] but are not needed to ascertain the relevant legislative intention.

[74] On 14 May 2015, s 291 was amended again, but not in a way that materially affects the arguments in the present case. However, s 201A was also amended at that time,[38] to omit the words "amount applying for a gift under the Commonwealth Electoral Act, section 304(5)(b)(ii) as indexed under s 321A of that Act" and insert "$1000" in their place. The intention as expressed by those amendments was to break the link to the Commonwealth Act threshold amount, and to reduce the gift threshold amount for the purposes of ss 290 and 291, inter alia, to the pre-21 November 2013 amount of $1,000.

[75] Four points of present interest emerge from that statutory history. First, from the time when the State Act included provisions to the effect of ss 290 and 291 in a relevant form, they have operated on a threshold amount of $1,500 or, later, $1,000 for relevant amounts received and continued to do so, except for the period between 21 November 2013 (retrospectively adopted on 24 May 2014) and 14 May 2015.

[76] Second, and perhaps more importantly for present purposes, when the Commonwealth Act was amended on 22 June 2006, it did not purport to deal with any inconsistency that lifting the threshold amount under that Act to more than $10,000 might create with the then threshold amount of $1,500 under the State Act or any other comparable State scheme of provisions. On the face of it, and subject to the present argument about inconsistency under s 109 of the Constitution, the Commonwealth and State regimes appeared to continue to operate alongside one another.

[77] Third, at no point during that legislative history did the Commonwealth Act or the State Act require a return that included particulars of amounts received confined to amounts received for the Commonwealth electoral purpose or any corresponding State electoral purpose.

[78] Fourth, unless ss 314AB and 314AC, in the form they took before the amendments made by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 (Cth), s 3, were inconsistent with the earlier forms of ss 290 and 291, it is the operation of ss 314AB and 314AC as amended on 22 June 2006 that raises the alleged inconsistency. So any reference to any admissible extrinsic materials should be directed to the materials that informed those amendments.

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35 *Electoral Reform Amendment Act* 2014 (Qld), ss 4, 24, 65 and 66.

36 These amendments operated retrospectively to 21 November 2013.

37 *Explanatory Notes to the Electoral Reform Amendment Bill* 2013, p 12, cl 65.

38 *Electoral and Other Legislation Amendment Act* 2015 (Qld), s 23.

There is no negative implication

[79] The comprehensive analysis of s 109 case law by Gummow J in *Momcilovic v The Queen*[39] repays the reader in a number of respects. One of them, touched on earlier in the analysis above, is that Commonwealth legislation may by express words exclude the rights or duties which it creates from qualification, wholly or partly, by State laws of a particular description.[40] Another is that in the absence of an express indication to that effect, the detailed character of the Commonwealth legislation may evince a legislative intention to deal completely and thus exclusively with the law governing a particular subject matter.[41] On that point, Gummow J continued:

> "That proposition, which is drawn from what was said by Dixon J in *Ex parte McLean, Stock Motor Ploughs* and *The Kakariki,* may be treated as presenting a 'negative implication' criterion and has been discussed when dealing with class (3) as identified in the submissions in *Whybrow*. The question then is whether the State law is upon the same subject matter as the federal law and, if so, whether the State law is inconsistent with it because it detracts from or impairs that negative implication. But the first question, and what Aickin J called 'the central question', always is one of statutory interpretation to discern legislative 'intent' or 'intention'."[42] (footnotes omitted)

[80] Two relevant points for the present case emerge from that passage. First, it confirms the importance of whether the subject matters are different in determining whether a negative implication of exclusive operation should be found. Second, when the question is whether a negative implication of exclusive operation should be found, the distinction between the tests for direct and indirect inconsistency is blurred.

[81] Although the applicant and the Attorney-General submit that the subject matters of ss 290 and 291 on the one hand and ss 314AB and 314AC on the other hand are wholly distinct, in my view, that approach is too simplistic. The subject matters, in terms of their operations, do overlap. Because a State branch of a Federal registered political party is required to furnish a return under the Commonwealth Act, both ss 290 and 291 and 314AB and 314AC will apply to that State branch, where it is both a State registered political party and a State branch of a Federal registered political party, even though there may be other political parties that do not have such dual registration.

[82] Second, because a State return must include particulars of any gift for the promotion of the election of a candidate to the Senate or to the House of Representatives, and a Federal return must include particulars of any receipt for the promotion of the election of a candidate to the Legislative Assembly, when there is dual registration both the State law and the Commonwealth law require, in substance, that the same information must be provided, subject to the different threshold amounts.

[83] Third, however, the information is to be provided to different agencies.

[84] And last, it should be accepted that, at a higher level of abstraction, the subject and purpose of the State law are to regulate State elections and the subject and purpose of

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39 (2011) 245 CLR 1, 100-121 [206]-[272].
40 *Momcilovic v The Queen* (2011) 245 CLR 1, 115 [260].
41 *Momcilovic v The Queen* (2011) 245 CLR 1, 116 [261].
42 *Momcilovic v The Queen* (2011) 245 CLR 1, 116 [261].

the Commonwealth law are to regulate Commonwealth elections and that the relevant sections are adapted to those respective purposes.

[85] Summarising, in my view, ss 290 and 291 as the law of the State and ss 314AC and 314AC as the law of the Commonwealth have different but overlapping subject matters.

[86] However, in my view, nothing in that subject matter or the operation of the laws supports a negative implication in the operation of ss 314AB and 314AC, to exclude a State law requiring disclosure of gifts made for the Commonwealth electoral purpose. When ss 314AB and 314AC operate, they do not do so by reference to disclosure of gifts made for that purpose. No explanation was given by the respondent as to why there is a negative implication that excludes a State law directed to gifts for the Commonwealth electoral purpose.

[87] Once that point is established, in my view, the respondent's argument for inconsistency becomes more clearly untenable, in the absence of express provision to support it. Shorn of the limit that it is confined to gifts for a Commonwealth electoral purpose, the suggested negative implication would make a State registered political party that is also a State branch of a Federal registered political party immune from any obligation to include the State required particulars in a State return for gifts made only for a State electoral purpose, gifts made for a combined Commonwealth electoral purpose and State electoral purpose and gifts made for no particular purpose, if the relevant gifts are at or below the threshold amount of $13,500.

[88] In my view, properly construed, ss 314AB and 314AC do not operate in that way.

[89] Accordingly, in my view, it follows that ss 290 and 291 of the State Act are not directly inconsistent with ss 314AB and 314AC of the Commonwealth Act.

Relief

[90] The applicant seeks two declarations. First, that there is no inconsistency within the meaning of s 109 of the Constitution between the requirements of ss 290 and 291 of the State Act and the requirements of ss 314AB and 314AC of the Commonwealth Act. On the view I take of the operation of the law of the Commonwealth, there is no dispute that it is appropriate to make that declaration.

[91] The second declaration sought is that pursuant ss 290 and 291 the respondent is required to provide disclosure of gifts where those gifts are intended to be applied for one or more candidates in an election under the Commonwealth Act but are not required to be disclosed pursuant to ss 314AB and 314AC of the Commonwealth Act. The respondent opposes any declaration in that form.

[92] The parties' submissions engaged upon whether no declaration should be made in that form because it would amount to a declaration of past conduct amounting to an offence or whether it should be made as necessary to quell the controversy.

[93] There are a number of points to be made briefly. First, although it is a minor point, "disclosure" is not a word used in the language of ss 290 and 291 of the Queensland Act. Second, as expressed, the literal meaning of the words of the proposed second declaration would include gifts for the stated intention but below the gift threshold amount of $1,000. Redrafting could easily cure that defect, however. Third, of more

importance, the reasons set out above for making the first declaration, squarely deal with what seems to be the point of the proposed second declaration, and the first declaration to be made depends on that reasoning. Fourth, this is not a situation like those under various statutory powers where a declaration of contravention, if made, would operate as a foundation for other ancillary orders in the present or other proceedings.

[94] In my view, it is not necessary to make the second declaration and it should not be made.