SUPREME COURT OF QUEENSLAND

CITATION:	*Awabdy & Anor v Electoral Commission of Queensland & Anor* [2019] QCA 187
PARTIES:	**RYTA ANGELA AWABDY** **(appellant)** **ATTORNEY-GENERAL OF THE COMMONWEALTH** **(intervener)** **v** **ELECTORAL COMMISSION OF QUEENSLAND** (first respondent) **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (second respondent)
FILE NO/S:	Appeal No 3505 of 2018 SC No of 7744 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 33 (Jackson J)
DELIVERED ON:	13 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	26 October 2018
JUDGES:	Sofronoff P and Fraser JA and Douglas J
ORDERS:	**1. Appeal dismissed.** **2. The appellant and the Attorney-General for the Commonwealth pay the respondents' costs.**
CATCHWORDS:	CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – INCONSISTENCY OF LAWS (CONSTITUTION, S 109) – GENERALLY – TEST FOR INCONSISTENCY – where the primary judge made a declaration that ss 290 and 291 of the *Electoral Act* 1992 (Qld) are not inconsistent with ss 314AB and 314AB of the *Commonwealth Electoral Act* 1918 (Cth) within the meaning of s 109 of the Constitution – where the provisions concern the disclosure to officials of payments made to political parties – where the Court has to consider the meaning and effect of the Queensland and Commonwealth provisions – whether the Queensland and Commonwealth provisions are directly or indirectly inconsistent with each other *Commonwealth Electoral Act* 1918 (Cth), s 314AB, s 314AC *Electoral Act* 1992 (Qld), s 290, s 291

The Constitution (Cth), s 109

Blackley v Devondale Cream (Vic) Pty Ltd (1968) 117 CLR 253; [1968] HCA 2, distinguished
Melbourne Corporation v Commonwealth (1947) 74 CLR 31; [1947] HCA 26, cited
Momcilovic v The Queen (2011) 245 CLR 1; [2011] HCA 34, explained
Spence v Queensland (2019) 93 ALJR 643; [2019] HCA 15, considered
Victoria v The Commonwealth (1937) 58 CLR 618; [1937] HCA 82, cited

COUNSEL: T J Bradley QC, with N H Ferrett, for the appellant
S Donoghue QC SG, with K O'Gorman, for the intervener
B Dunphy (*sol*) for the first respondent
E S Wilson QC, with G Del Villar and F J Nagorcka, for the second respondent

SOLICITORS: ClarkeKann for the appellant
Australian Government Solicitor for the intervener
Clayton Utz for the first respondent
Crown Law for the second respondent

[1] **SOFRONOFF P**: On 1 March 2018, Jackson J made the following declaration on the application of the first respondent, the Electoral Commission of Queensland:

> "It is declared that sections 290 and 291 of the *Electoral Act* 1992 (Qld) are not inconsistent with sections 314AB and 314AC of the *Commonwealth Electoral Act* 1918 (Cth) within the meaning of section 109 of the Constitution."[1]

[2] The appellant was the respondent to that application and now appeals against that order. The Attorney-General of Queensland intervened in aid of the Electoral Commission at first instance pursuant to s 78A(1) of the *Judiciary Act* 1903 (Cth). The Attorney-General of the Commonwealth has intervened in this appeal in support of the appellant.

[3] The appellant submits that the Commonwealth Parliament has exclusive power to legislate with respect to elections for the House of Representatives and the Senate.[2] She argues that the *Electoral Act* 1992 (Qld) ('the Queensland Act'), in its general terms, applies to amounts given to political parties registered under the *Commonwealth Electoral Act* 1918 (Cth) ('the Commonwealth Act') and, "[i]n the circumstances, the Commonwealth Provisions operate to the exclusion of the State Provisions with respect to the disclosure of gifts received by a party registered under the Commonwealth Act for the purposes of promotion of the party's candidates in federal elections".[3]

[4] The appellant also submits that "the State Provisions are widely drawn, without relevant qualifications or exemptions" and "do not have regard to whether a gift was made to a party registered under the Commonwealth Act, or indeed to the purpose of a gift". She submits that it "follows that they purport to operate to regulate the

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1 *Electoral Commission of Queensland v Awabdy* [2018] QSC 33 ('Reasons').
2 Appellant's Outline [16].
3 Appellant's Outline [33].

same conduct that the Commonwealth Provisions regulate",[4] and, as a consequence, they "alter, impair or detract from the Commonwealth Provisions"[5] and are inoperative pursuant to s 109 of the Constitution.[6]

[5] The Commonwealth submits that the Queensland Parliament has no power to enact a law to regulate Federal elections and, because ss 290 and 291 of the Queensland Act "touch or concern the regulation of Federal elections more than incidentally", they are invalid.[7] Second, the Commonwealth submits that ss 290 and 291 of the Queensland Act are directly inconsistent with ss 314AB and 314AC of the Commonwealth Act because they alter, impair or detract from it.[8] Third, it submits that the Commonwealth Act is a "complete or exhaustive statement of the law concerning donations available to be used to fund a party's participation in the Federal electoral process with the result that the Qld Act is inconsistent with the Commonwealth Act to the extent that it addresses that subject".[9]

[6] Queensland submits that, assuming that the Queensland Parliament has no power to legislate with respect to Federal elections, the Queensland Act is not an Act with respect to that subject matter.[10] Second, it submits that the Commonwealth does not have exclusive legislative power with respect to Federal elections.[11] Third, Queensland submits that the two Acts are neither directly nor indirectly inconsistent having regard to their subject matter.[12] Finally, Queensland submits that if the Queensland Act is to be read in the way that the Commonwealth invites the Court to construe it, then so too must the Commonwealth Act be read in that way. It would follow, it was submitted, that the Commonwealth Act would offend the *Melbourne Corporation* principle and would be invalid for that reason.[13]

[7] Section 109 of the Constitution provides:

> "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."

[8] In *Victoria v The Commonwealth*[14] Dixon J said:

> "When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid. Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent."[15]

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4 Appellant's Outline [48].
5 Appellant's Outline [49].
6 Appellant's Outline [51].
7 Commonwealth Outline [1.1].
8 Commonwealth Outline [1.2(i)].
9 Commonwealth Outline [1.2(ii)].
10 Queensland Outline [10].
11 Queensland Outline [26].
12 Queensland Outline [46], [53]-[56].
13 Queensland Outline [61]; see *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.
14 (1937) 58 CLR 618.
15 *ibid*. at 630.

[9] That statement was approved by a unanimous High Court in *Telstra Corporation Ltd v Worthing*[16] and in *Dickson v The Queen.*[17] The first category of inconsistency referred to by Dixon J is direct inconsistency; the second category is indirect inconsistency.[18]

[10] A consideration of indirect inconsistency requires the "terms, the nature or the subject matter" of the Commonwealth enactment to be determined. Cases of direct inconsistency also require the determination of the nature of the Commonwealth law in order to determine whether it is supplementary to or cumulative upon the State law in question.[19] A proper understanding of the policy and purpose of the statute underpins the task of construing it and identifying its operation.[20]

[11] Before this determination can be made, it is necessary to identify with precision what is the "law of the State" and what is the "law of the Commonwealth" that are to be compared. I respectfully agree with Jackson J that the judgment of Gummow J in *Momcilovic v The Queen*[21] repays the reader in a number of respects. In that case Gummow J pointed to the continuing relevance, for present purposes, of the Austinian notion of a law as a command.[22] The concept is important because some discrete statutory provisions constitute the relevant "law" for the purposes of s 109 only when taken together with other provisions. In *Momcilovic* itself, this process of analysis meant that the relevant "laws" to be compared were not restricted to a single section of the relevant State Act and a single section of the relevant Commonwealth Act. Those sections drew their meaning, both legal and linguistic, from other statutory provisions and they had to be considered within that whole context.[23]

[12] Gummow J also emphasised that in applying s 109 one has to construe the Federal law in question in accordance with the body of doctrine concerning the content of the expressions "upon its true construction" and "having regard to the subject, scope and purpose". It is only when that has been done that it is appropriate to consider whether a State law is "inconsistent" with a Commonwealth law.[24]

[13] The parties all asserted, or perhaps assumed, that ss 290 and 291 of the Queensland Act and ss 314AB and 314AC of the Commonwealth Act were the relevant "laws" to be considered in the application of s 109 of the Constitution. Such a limited field of inquiry cannot be justified. Each of those provisions depends upon other provisions for its meaning and effect. Further, the whole of Part 11 of the Queensland Act and the whole of Division 5A of Part XX of the Commonwealth Act bear upon the "nature or subject matter" of the sets of provisions that are directly in issue.

[14] When it was originally enacted, the *Commonwealth Electoral Act* 1918 (Cth) was almost entirely concerned with the mechanics of the conduct of elections. An exception to this devotion to one subject matter was Part XVI of the Act which

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16 (1999) 197 CLR 61, at [28].
17 (2010) 241 CLR 491, at [13].
18 *ibid*. at [14].
19 *cf. Telstra*, *supra*, at [27] and *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330, at 335.
20 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, at [45].
21 (2011) 245 CLR 1.
22 *ibid*. at [229]-[233].
23 *ibid*. at [236] and *cf.* [206].
24 *ibid*. at [258].

limited the amount of money a candidate could spend by way of electoral expenses[25] and limited what that money could be used for.[26] Donations, in the form of gifts, were prohibited but only when it was the candidate who made the gift.[27] Otherwise, candidates, as well as associations backing candidates, had to file a return disclosing their electoral expenses.[28]

[15] In 1983 the Act was amended substantially by the *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth) which was a reaction to the growing cost of elections and to perceptions about corruption.[29] The Electoral Commission was reformed and a new system of public funding of Federal elections was also established. The Act created an entitlement for a candidate to receive a payment of 60 cents for each first preference vote in a House of Representatives election and 30 cents for each first preference vote in a Senate election held on the same day as an election for the House of Representatives.[30] Payment was conditional upon two things. First, the candidate must have secured at least four per cent of the votes polled in favour of all candidates.[31] Second, the candidate must be "an eligible candidate". That expression was defined, relevantly, to mean either a candidate who had registered as a candidate under the Act or a candidate who had been endorsed by a political party that had registered under the Act.[32]

[16] Part IXA of the Act provided that "an eligible political party" could apply to the Electoral Commission for registration.[33] A "political party" was defined to mean an organisation the object or activity, or one of the objects or activities, of which was the promotion of the election to the Senate or to the House of Representatives of a candidate endorsed by it.[34] An "eligible political party" was defined as:

1. a Parliamentary party; or

2. a political party, other than a Parliamentary party, that has at least 500 members.[35]

[17] The term "Parliamentary party" was defined to mean a political party at least one member of which is a member of the Parliament of the Commonwealth, the Parliament of a State, the Legislative Assembly of the Northern Territory or the Australian Capital Territory House of Assembly.[36] A "candidate", who was defined as a person who had announced an intention to be a candidate in a Federal election,[37] was also entitled to register with the Commission.[38]

[18] The legislative corollary of this entitlement to receive Commonwealth money was an obligation on "each political party" and "each State political party" (neither of which had to be registered) to disclose, in an approved form, the total of the amount

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25 s 145: £250 for a Senate election and £100 for a House of Representatives election.
26 s 146: printing etc addresses by candidates, stationary, rent of premises and scrutineers.
27 s 150.
28 s 152.
29 see Second Reading Speech, Hansard, 2 November 1983 (House of Representatives).
30 ss 152 of the Amended Commonwealth Act. Otherwise, the amount was 45 cents per vote if the Senate election was held not on the same day.
31 s 153B.
32 s 152.
33 s 58D.
34 s 5.
35 s 58A.
36 s 58A.
37 s 58V.
38 ss 58X and 58Z.

or value of all gifts received during the period beginning on the day after the polling day of the immediately preceding election and ending on the polling day of the current election.[39] The party had to disclose the amount or value of each gift, the date on which the gift was made and the name and address of the donor.[40] The same obligation was placed upon a candidate in an election who had received a gift.[41] The Act qualified the otherwise general obligation to disclose all gifts received by a political party by excluding from its operation two categories of gifts to political parties (or State branches of parties). The first category was gifts that had been made "on the condition that it be used by the party or branch for a purpose other than a purpose related to an election … and the party or branch has used, or will use, the gift accordingly".[42] The second category was gifts of an amount or value less than $1,000.[43] There was no obligation to reveal the fact that the party had made such a judgment and had decided not to disclose the gift.

[19] Section 153L made it an offence for a political party or a State branch of a party, or a person acting on their behalf, to receive a gift made to the party or for its benefit of an amount or value of $1,000 or more unless the name and address of the donor was known or unless the gift was made on condition that it be used for a purpose other than a purpose related to an election.

[20] In June 1989 the Parliamentary Joint Standing Committee on Electoral Matters reported upon problems that had emerged in the operation of the Act.[44] The Electoral Commissioner had informed the Committee that the Commission did not know how many disclosures the disclosure provisions were catching.[45] He explained in his evidence:

> "… what happens under the present arrangements would be that the recipients of donations stand to one side of the table with three walnut shells, only one of which is transparent if it is labelled 'A donation to the next Federal election'. There are two other walnut shells which are completely opaque and it is up to us to guess which walnut shell the pea is under. If it is not under the transparent one, they merely say, 'wrong', and that is the end of the matter."[46]

[21] In 1991 the *Political Broadcasts and Political Disclosures Act* 1991 (Cth) was enacted as a response to this report and, in the course of his Second Reading Speech, the Minister referred to the Commissioner's evidence.[47] The Commonwealth Act was amended so that a party's obligation to disclose amounts that it had received was no longer limited to its receipt of gifts. Section 153J(1)[48] of the Act, which obliged all political parties to disclose to the Commission gifts it had

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39 s 153J(1).
40 s 153J(4).
41 s 153J(2).
42 s 153J(5)(a)(i).
43 s 153J(5)(a)(ii); in the case of candidates, the cut-off value was $200.
44 *Who pays the piper calls the tune: minimising the risks of funding political campaigns – Inquiry into the conduct of the 1987 Federal election and the 1988 referendums*, Report Number 4 of the Joint Standing Committee on Electoral Matters, June 1989.
45 *ibid*. at [7.9].
46 *ibid*. at [7.12].
47 Second Reading Speech, Hansard, 9 May 1991 (House of Representatives), at 3477-3478.
48 The Act was renumbered by the *Commonwealth Electoral Legislation Amendment Act* 1984 (Cth) so that s 153J(1) became s 304(1).

received above the value of $1,000, was repealed[49] and replaced by s 314AA within a new Division 5A of Part XX that required *registered* political parties to furnish to the Commission returns of all amounts it had received, paid and the debts it had incurred.

[22] After several subsequent amendments with which it is not necessary to deal, Part XX of the Act, entitled "Election Funding and Financial Disclosure", now contains elaborate provisions within Divisions 4, 5 and 5A that impose obligations upon registered political parties and candidates, as well as upon certain donors, to make periodic disclosures about financial matters. The obligation imposed by s 314B is tantamount to an obligation to furnish audited financial statements. The candidates affected are candidates for election either to the House of Representatives or to the Senate. The political parties affected are, with just a few exceptions,[50] parties that have two characteristics. First, the party must have, as one of its objects, the promotion of the election to the Senate or to the House of Representatives of a candidate endorsed by it. Second, the party must be one that is registered with the Commonwealth Electoral Commission. Part XX contains provisions that make it unlawful for certain gifts to be received.[51] There are provisions that oblige persons other than candidates, and who spend money on "electoral expenditure", to furnish returns to the Commission disclosing details about those expenditures.[52] A failure to comply with these obligations is an offence.[53] Amounts received contrary to the Act may be recovered as debts due to the Commonwealth.[54] The Act confers wide powers of investigation upon Commonwealth officers.[55]

[23] The purpose of Part XX is, evidently, to prevent, or at least to reduce, the potential for political corruption of the Commonwealth Parliament by reducing the possibility of secret donations and secret deals. However, the protection of the integrity of members of the Commonwealth Parliament has wider ramifications. Because, in a sense, the Federal Cabinet is a sub-committee of the Parliament,[56] the protection of the integrity of members of Parliament also protects the integrity of members of the Executive. Moreover, because of the indirect power possessed by Parliament and the Executive in relation to the Judiciary, in terms of appointments to courts, applicable legislation and funding, the same measures that protect the Commonwealth Parliament indirectly protect the integrity of the Judiciary.

[24] None of these provisions operates in isolation and, as a consequence, they cannot be considered piecemeal. The provisions addressed by the parties, ss 314AB and 314AC, are only part of a larger set of provisions. The relevant "Commonwealth Law" that has to be considered is Part XX. The subject matter of that law is the integrity of the Parliament and the Act addresses that issue by reference to a category of potential threats to that integrity, namely the corruption of members of Parliament

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49 Section 304(1) was repealed but not replaced so that s 304 in its current form begins mysteriously with s 304(2).

50 see ss 306, 306A and 306B that apply to political parties generally.

51 ss 306 and 306A.

52 ss 308, 309 and 314EB.

53 s 315.

54 ss 299(6), 306(5) and 315A.

55 s 316.

56 Walter Bagehot, *The English Constitution* (Kegan Paul Trench & Co, 4th ed, 1885), at 10-16.

by the making of large anonymous donations for their election.[57] All of the provisions of Part XX concerning disclosure, as well as those containing prohibitions against receiving certain payments, are directed to this perceived threat.

[25] The versatile nature of money as a tool of corruption means that the scope of the provisions has to be wide and general to be effective. Thus, to begin to address the immediate issue in this appeal, it is easy to appreciate that a payment made ostensibly for one purpose may have another covert purpose. A significant donation to a State branch of a party in aid of a State political purpose might well serve to evoke a willingness to give improper assistance in the Federal political sphere.

[26] In the domain of political freedom of speech it has been recognised that:

> "The interrelationship of Commonwealth and State powers and the interaction between various tiers of government in Australia, the constant flow of political information and debate across the tiers of government and the absence of any limit capable of definition to the range of matters that may be relevant to debate in the Commonwealth Parliament and to its workings make unrealistic any attempt to confine the freedom to matters relating to the Commonwealth government."[58]

[27] The same interrelationship, interaction and flow of political information means that the Commonwealth Parliament, in securing its own protection, has to consider more than just the limited class of payments that had been the subject of the original 1983 enactment. It will be recalled that its first excursion into this field addressed gifts only and even then gifts were excluded from scrutiny if the recipient political party privately held that the gift had been made on condition that it be used for a purpose other than a purpose related to a Federal election.[59] The Act now requires a registered political party to disclose all amounts received by it, all payments made by it and all debts incurred by it. This will include some financial dealings by a State branch of a registered political party that, on their face, pertain only to local purposes. However, many strictly local matters are matters of Australian concern also and, for that reason, despite first appearances, may be matters that rightly fall within the consideration of the Commonwealth Government.[60] For such reasons, the Commonwealth law that seeks to protect members of the Commonwealth Parliament from the risk of corruption has looked beyond the very narrow class of donations for strictly Federal election purposes because the threat can come from beyond that class.

[28] By enacting this law, Parliament has chosen to place the sentinels who are to guard against such threats at some distance from Parliament itself. The protections operate at the point at which candidates seek entry (or re-entry) into the legislature and at the point at which a political party seeks to support such candidates. The provisions operate in their area in addition to, and in aid of, the objects of existing

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57 Second Reading Speech, Hansard, 9 May 1991 (House of Representatives), at 3478: "To allow large secret donations to political parties or candidates is but one step removed from allowing large secret deals with political parties or candidates."

58 *Theophanous v Herald & Weekly Times* (1993) 182 CLR 104, at 122 *per* Mason CJ, Toohey and Gaudron JJ.

59 Commonwealth Act as at 1983, s 153J(1) and (5).

60 *eg, Tasmania v Commonwealth* (1984) 183 CLR 1.

laws against direct corruption of members of Parliament.[61] Consequently, in the present context, a law that addresses payments of any nature and for any purpose to a Commonwealth registered political party is a law with respect to Federal elections whose subject matter is the integrity of the Federal electoral process.

[29] The subject matter of the Commonwealth law is not the protection of the Queensland Parliament nor is it the protection of the Queensland electoral process. In the present legislative setting, the Commonwealth has an interest in Queensland political activity because the Commonwealth is concerned with national elections. But its interest is limited to such matters as they may affect Federal elections.

[30] To the extent that the Act is concerned with payments to political parties that have been made for State election purposes or for Federal election purposes, its sole concern in the context of this Act lies in their potential to affect Federal elections. Consequently, while the Commonwealth Act undoubtedly covers the field of Federal elections in this and all other respects, it has nothing to say about State elections or about how payments of any kind might affect State elections. That is a matter solely for the State legislature.

[31] The Act has nothing to do with such payments in any other context than Federal elections. However, such payments might have many other ramifications, including upon the integrity of State elections. The Commonwealth Act is not concerned with such ramifications. For this reason, the obligations that it imposes are upon persons registered as agents with the Commonwealth Electoral Commission.[62] The Commonwealth law affects only a political party if it is registered with the Commonwealth Electoral Commission. The Commonwealth law requires disclosure of a party's financial affairs to a Commonwealth officer. That officer will consider the disclosure insofar as what is disclosed might impinge upon the integrity of Commonwealth elections. That officer will give no consideration to the question whether such payments, or any payments, might impinge upon the integrity of State elections. The Commonwealth Electoral Commission has no duty or power to inform a State about matters known to the Commission that might affect State elections. The precise class of payments specified for consideration by the Act are those that, as a matter of Commonwealth political policy, have been determined by the Commonwealth Parliament to be material to Federal elections, informed by Parliament's consideration of factors it considered material for Federal elections. The determination of a threshold for reporting is such a matter.

[32] It follows that the *Commonwealth Electoral Act* 1918 (Cth) has nothing to say about Queensland elections. Insofar as it includes within its purview payments made to a Queensland State branch of a political party registered with the Commonwealth Electoral Commission, that is because such a payment might incidentally bear upon the integrity of a Commonwealth election. No part of the Commonwealth Act concerns Queensland elections or their integrity.

[33] Like its Commonwealth counterpart, the original election legislation in Queensland was concerned strictly with the mechanics of elections. In the Second Reading Speech in the Commonwealth Parliament in 1983, the Commonwealth Minister had observed that, at that time, only the Commonwealth and New South Wales had enacted any laws about disclosure of political gifts. He said that he anticipated that

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61 *Criminal Code Act* 1995 (Cth) ch 7.

62 Commonwealth Act ss 304, 314AB and 314AC.

the Commonwealth Government would offer its own law as a model for uniform State laws to be passed.[63] The *Electoral Amendment Act* 1994 (Qld) inserted s 126B into the *Electoral Act* 1992 (Qld) as follows:

> "**Law about electoral funding and financial disclosure**
>
> **126B.**
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> **(1)** The Schedule provides the law about electoral funding and financial disclosure.
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> **(2)** The Schedule is based on Part XX of the Commonwealth Electoral Act and, for that reason, uses the same numbering as the Commonwealth Electoral Act.
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> **(3)** Changes to the text of the Commonwealth Electoral Act in the Schedule have been made, or are noted, in italics.
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> **(4)** Despite subsection (2), the Schedule is not a mere adoption or application of the Commonwealth Electoral Act."

[34] The Schedule recited Part XX of the *Commonwealth Electoral Act* 1918 (Cth) with necessary contextual changes.

[35] It is not necessary to recount the ensuing process of amendments that led to the Queensland Act in its current form. Part 11 is now headed "Election Funding and Financial Disclosure" in the same way as Part XX of the Commonwealth Act. It still largely follows the form of Part XX of the Commonwealth Act.

[36] The analysis of the Commonwealth law set out earlier applies, *mutatis mutandis*, to the State law against which it is to be compared. The State law is a law with respect to the Queensland Parliament and, specifically, the integrity of the election of members of Parliament insofar as payments to political parties and candidates might improperly interfere with the integrity of elected members. Just as in the Commonwealth sphere, the Queensland Act treats payments made for any purpose to a State registered party with a State election agenda as payments that might bear upon the integrity of a State election and, therefore, should be subject to scrutiny. The Queensland Act will inevitably be concerned with many of the same actual payments as the Commonwealth Act.

[37] This is not a case like *Blackley v Devondale Cream (Vic) Pty Ltd*[64] in which a Commonwealth award fixed a minimum wage for a particular worker and a State award fixed a higher award. The State law obliged the employer to pay a larger sum than the employer was obliged to pay by the Commonwealth law. The State law conflicted with the Commonwealth law because obedience to the Commonwealth law would have meant disobedience to the State law. In the present case, a political party that has registered with the State must disclose to a State official gifts that it has received above a certain value and, if the party is also registered

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63 Second Reading Speech, Hansard, 9 May 1991 (House of Representatives), at 3478; it is ironic that, having invited Queensland to join in "uniform legislation", the Commonwealth now argues that the result of Queensland's acceptance of that invitation is invalid legislation. However, as recent painful experience has shown, even the most emphatic and clear Ministerial statements made in the course of a Second Reading Speech may not ensure that the resulting legislation is effective, much less that it is necessarily valid: *cf Lacey v Attorney-General for Queensland* (2011) 242 CLR 573 at [30], [86].

64 (1968) 117 CLR 253.

with the Commonwealth, it must disclose gifts only above another value. The obligations can both be complied with. Disclosure to the State official does not require disobedience of the obligation owed to the Commonwealth official and vice versa.

[38] Inconsistency can exist even if both laws can be obeyed simultaneously.[65] However, inconsistency does not lie in the mere coexistence of two laws that are susceptible of simultaneous obedience. Rather, in such a case the existence of inconsistency depends upon the intention of the Commonwealth legislature, the dominant legislature, to express by its enactment, completely, exhaustively, or exclusively what shall be the law governing the particular conduct or matter to which its attention is directed.[66] It is necessary to inquire whether the Commonwealth law evinces an intention to cover its particular subject-matter to the exclusion of any other law.[67]

[39] The subject matter of Part XX is the prevention or reduction of corruption in Federal elections by means of placing obligations upon political parties to disclose financial transactions to a Commonwealth officer. The subject matter of Part 11 has nothing to do with Federal elections and does not trespass upon the obligations imposed upon a party to furnish returns to a Commonwealth official. Its subject matter is the prevention or reduction of corruption in State elections, albeit also by the imposition of an obligation to disclose financial transactions. Although disclosure of the same payments may be required, that disclosure is in each case required in order to achieve different purposes, neither Act being concerned with the purpose addressed by the other.[68] The obligation under each Act is different. As Jackson J pointed out,[69] the required disclosures are required to be made to different officials of different polities. The disclosure may have to be made on behalf of the same political party, but it will be a mere coincidence that is not dictated by the legislation itself if the agent registered under each Act happens to be the same person. The criteria that applies to render political parties subject to the obligation are different under each law. In one, the party must have, as one of its objects, the promotion of the election of candidates to the Commonwealth Parliament. In the other, that criterion does not apply. Instead, the relevant criterion is that the party has, as one of its objects, the promotion of the election of candidates to the State Parliament. In one, the party must be one registered with the Commonwealth Electoral Commission. In the other, that criterion does not apply; the criterion is that the party must be one registered with the State Electoral Commission.

[40] The Commonwealth Act cannot be construed as purporting to lay down the whole legislative framework within which political payments have to be reported for all purposes.[70] It lays down the framework within which political payments are to be dealt with for the singular purpose of protecting Federal elections. Because the Commonwealth Act does not purport to prescribe the limit of the obligation to make disclosure of the receipt of gifts generally, it cannot be said that the Commonwealth Act is a law of general application to such payments. It follows that I agree with

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65 *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, in which Knox CJ and Gavan Duffy J at 478 and Isaacs J at 488 accepted Dixon KC's argument to that effect: see at 471.

66 *Ex parte McLean* (1930) 43 CLR 472, at 483 per Dixon J.

67 *McWaters v Day* (1989) 168 CLR 289, at 296.

68 *ibid.* at 297.

69 Reasons at [83].

70 *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 161 CLR 47, at 57.

Jackson J, for the reasons his Honour gave, that the higher threshold does not confer a general liberty to be enjoyed by political parties not to disclose gifts of lesser value.[71] One Act requires that, if certain conditions exist, a defined person must inform a Commonwealth officer about certain things. The other requires that, if certain other conditions exist, that a differently defined person must inform a different person, a Queensland officer, about certain things.

[41] For these reasons, the appellant's submission that the Queensland Act regulates the same conduct as does the Commonwealth Act cannot be accepted. Nor can the submissions of the appellant or the Commonwealth that the Queensland Act is a law with respect to Federal elections be accepted. Because I have come to that conclusion, I need not consider whether a State legislature has power to make a law with respect to Federal elections. For the reasons that I have given, I would also reject the submission of the Commonwealth that there is either a direct or indirect inconsistency between the two laws.

[42] I accept the submission made on behalf of the Attorney-General for Queensland that the two Acts are neither directly nor indirectly inconsistent with each other having regard to their respective subject matter. It is not necessary to consider Queensland's submission based upon the *Melbourne Corporation* principle.

[43] Since these reasons were prepared, the High Court has given judgment in *Spence v Queensland*.[72] This Court invited the parties to make further submissions, if they wished, in light of the judgments in that case. All parties delivered written submissions.

[44] *Spence* concerned a challenge to the validity of certain Queensland statutory provisions that prohibited political donations by land developers in the context of State elections and local government elections in Queensland. A Commonwealth law, enacted after the enactment of the Queensland law, expressly permitted the giving of gifts to "political entities" and others "despite any State or Territory law". Relevantly,[73] the High Court had to decide whether the State provisions prohibiting gifts by land developers were invalid as beyond the legislative power of Queensland because they impermissibly intruded into an area of exclusive Commonwealth legislative power.

[45] The majority[74] held that a State law that regulates State elections did not exceed the limits of State legislative power if the law "merely touches and concerns Federal elections [no] more than incidentally".[75] In particular, said the majority, the limits of State legislative power are not infringed by a State electoral law which imposes obligations on participants in a State electoral process where performance of those obligations might have a practical effect on the ability of those participants also to engage in a Federal electoral process.[76]

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71 Reasons at [46]-[49]; *cf. Wenn v Attorney-General (Vic)* (1948) 77 CLR 84, at 118, 120 *per* Dixon J.

72 [2019] HCA 15.

73 There were also arguments that the State provisions were invalid because they interfered with the freedom of political communication, were beyond power because they intruded within an implied governmental immunity and were inconsistent with the Commonwealth law. The first of these is irrelevant in this case. The second does not need to be decided. The third ground was rejected because the Commonwealth law was held to be invalid.

74 Kiefel CJ, Bell, Gageler and Keane JJ.

75 *Spence v Queensland*, *supra*, at [48].

76 *ibid*.

[46] Nettle J, who dissented, came to a similar conclusion. His Honour observed that a State electoral law was unlikely to transgress into the field of Commonwealth legislative power over Federal elections if "the degree of its connectedness to Commonwealth elections is no more than adventitious".[77] Gordon J, who also dissented, also rejected the submission that the impugned Queensland provisions impermissibly intruded into the Commonwealth's legislative sphere concerning Federal elections because the State laws, despite "having some operation on gifts for Commonwealth electoral purposes", were laws about State elections.[78] Edelman J, who was also in dissent, was of the view that the Commonwealth did not have exclusive power to legislate with respect to Federal elections.[79]

[47] The appellant acknowledged that *Spence* precluded reliance upon the ground that the Commonwealth's power to legislate with respect to Federal elections was exclusive. Otherwise, she maintained her submission that the Commonwealth law created an "area of liberty" that was relevant to the issue of indirect inconsistency.

[48] The Attorney-General for the Commonwealth withdrew his submissions about exclusive power and about indirect inconsistency. He submits that *Spence* did not affect his submissions otherwise. He particularly submits that *Spence* has nothing to say about whether the Commonwealth law in this case created an "area of liberty", with consequences for inconsistency. I agree.

[49] The Attorney-General for Queensland has submitted that the reasons of the majority in *Spence* "strongly suggest" that it would be beyond the scope of Commonwealth legislative power to enact an "area of liberty" of the kind for which the Commonwealth contends in this case. In his reply to the written submissions of the Attorney-General for Queensland, the Attorney-General for the Commonwealth has reiterated and has further embellished his submissions that the Commonwealth law has created an "area of liberty". For the reasons that I have given, I do not accept that the Commonwealth provisions had that effect. It is, therefore, unnecessary to consider whether the Commonwealth had power to make a law having that effect or whether, as the Attorney-General for Queensland has submitted, *Spence* is relevant to the question of power in that respect.

[50] *Spence* is helpful to the present case in one respect. It is true that some participants in the Commonwealth electoral process may prefer to keep some information secret about donations that they have received and to keep secret the identity of the donors. It is true that the State law may require the disclosure of some of that information. *Spence* confirms[80] that, just because a State electoral law might have a practical impact upon participants in Federal elections, it does not follow that the State law is a law about Commonwealth elections.

[51] I would dismiss the appeal. The appellant and the Attorney-General for the Commonwealth should pay the respondents' costs.

[52] **FRASER JA:** I agree with the reasons for judgment of Sofronoff P and the orders proposed by his Honour.

[53] **DOUGLAS J:** I agree with the President.

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77 *ibid*. at [133].
78 *ibid*. at [267].
79 *ibid*. at [305].
80 *ibid*. at [48]; and *cf*. Nettle J at [133], Gordon J at [267] and Edelman J at [317]-[319].