SPENCE *v* QUEENSLAND: CALIBRATING AUSTRALIAN FEDERALISM FOR A SECOND CENTURY

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I am delighted to have been asked to speak today about the recent decision of *Spence v Queensland*.[1] It was my privilege to run this case for the State of Queensland whilst I was its Solicitor-General earlier in the year. I should mention, however, that some weeks ago, Professor Nick Aroney observed of my performance in *Spence* that he did not realise you could lose so many points and still win the case.

I will confess that I thought of renaming this speech '*Heartland*',[2] because that word has attracted such significant attention since the delivery of the decision in the case. Yet I have stayed with the current topic, because there is an anterior point that I consider needs to be made.

What I hope to demonstrate is that the reasoning of the majority in *Spence* (being the joint judgment of Kiefel CJ, Bell, Gageler and Keane JJ) should be seen as an orthodox outcome, and should not be viewed as surprising, as some people have suggested, nor a return to some pre-*Engineers* heresy, another epithet I have heard offered by some in the constitutional law establishment.

There are three essential matters that I wish to develop. First, that the test of characterisation of the majority, and the minority (being each of Nettle, Gordon and Edelman JJ who wrote separately in dissent), in *Spence* did not substantially differ. What differed was the conclusion when the ultimate test

was applied, and relatedly, how the answer to that ultimate enquiry might be arrived at.

Second, the place of purpose in applying that test, and ultimately the hint of a proportionality analysis as an interesting feature to watch for the future.

Third, the result should not be seen as startling. To the extent it is startling, it is due to a somewhat dogmatic perception of what *Engineers*[3] stood for, what Windeyer J had meant in *the Payroll Tax Case*,[4] and how Windeyer J's reasoning had been restated in *the Work Choices Case*.[5] In fact, I would go as far as to suggest that triumvirate has joined, among others, Magna Carta, as authorities so more often cited than read that they develop a common perception of what they stand for that drifts from what they actually held.

I BACKGROUND

In May 2018, Queensland passed laws prohibiting property developers from making political donations to political parties which promote candidates in Queensland (and local government) elections. The laws commenced in October 2018.

The Queensland laws were challenged by Mr Spence, then the President of the Liberal National Party, in the original jurisdiction of the High Court. One main basis of challenge was that the law infringed the implied freedom of political communication. That aspect of the challenge always faced the significant hurdle that the High Court had upheld the New South Wales ban on property developer political donations in *McCloy v New South Wales*[6] and it was ultimately unsuccessful.

There was another significant basis of the challenge. It arose this way: almost invariably, Queensland political parties are also federal political parties — that is, they also promote candidates

in federal elections. The donations that a party receives may therefore be used for campaigning in either kind of election — or, perhaps, on some other purpose such as administrative costs. The Queensland ban, however, applies to all donations received by a political party which promotes candidates in Queensland elections, irrespective of whether the donation is intended by the donor, or by the party, for use in State or federal elections.

This aspect of the Queensland laws gave rise to additional challenges to validity, which were that the laws: (a) intruded into an area of exclusive Commonwealth legislative power about federal elections; (b) infringed an implied immunity protecting the Commonwealth from the operation of State legislation; and (c) were indirectly inconsistent with the regime for the regulation and disclosure of donations under the *Commonwealth Electoral Act 1918* (Cth).

The Commonwealth intervened in support of the plaintiff. Its main argument was that, to the extent the Queensland laws prohibited the making and receipt of donations which were earmarked for use in federal elections, or which were available for use in federal elections, the Queensland laws were invalid for intruding into an area exclusively reserved to the Commonwealth.

However, the Commonwealth obviously foresaw that their exclusive power argument was not bullet-proof because, in December last year, the Commonwealth Parliament amended the *Commonwealth Electoral Act* to insert s 302CA. It was clearly designed to override the Queensland laws. It purported to permit property developers to make donations to political parties if the donations are required to be, or *may* be, used for federal electoral purposes, despite any State or Territory law. The immunity was then removed if the donation is used for State electoral purposes.

Queensland conceded that if s 302CA was valid, there was an inconsistency between s 302CA and the State's prohibited donor provisions. However, Queensland challenged the validity of s 302CA on the following grounds: (a) s 302CA is not a law with respect to federal elections and hence lacks a sufficient connection with any head of Commonwealth legislative power; and (b) the operation of s 302CA offends the principle derived from *University of Wollongong v Metwally*[7] and s 302CA breaches the *Melbourne Corporation v Commonwealth*[8] doctrine.

As Gageler J remarked at one of the directions hearings, the case 'bristled' with constitutional questions. Those questions were all, essentially, about the nature of the Australian federation.

II THE CHARACTERISATION TEST

Ultimately, the test of characterisation adopted by the majority and the minority were as explained in the following aspects of their respective reasons.

The test of characterisation applied by the majority in their judgment can be found in the following passage:[9]

> The principles governing characterisation of a Commonwealth law in order to determine whether the law is within the scope of a legislative power conferred by s 51 of the Constitution have become "well settled" since *the Engineers' Case* and have even been described as "established, if not trite, constitutional law" … The character of the law must "be determined by reference to the rights, powers, liabilities, duties and privileges which it creates". The constitutional description of the subject matter of the power must "be construed with all the generality which the words used admit". The law will then

> answer the description of a law "with respect to" that subject matter if the legal or practical operation of the law is not "so insubstantial, tenuous or distant" that the law ought not be regarded as enacted with respect to that subject matter. There is no need for the law to be shown to be connected with the subject matter of the power to the exclusion of some other subject matter that is outside Commonwealth legislative power, and "if a sufficient connection ... does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice".

The majority then explained that the sufficiency of the connection of a Commonwealth law with the subject matter of a conferral of legislative power can turn on questions of degree, and that the more the legal operation of the law is removed from the subject matter of the power, the more questions of degree will become important.[10]

Turning to the characterisation of s 302CA, the majority then said:[11]

> The contrast between the slightness of the impact of s 302CA on the subject matter of the federal electoral process and its much greater impact on matters outside that subject matter points strongly to a purpose that cannot be said to be incidental to that subject matter. Indeed, it is difficult not to draw from the operation of s 302CA the inference that its purpose is to ensure that, save for donations earmarked for use in State, Territory or local government election campaigns, political entities may receive donations to fund any activities from any donors who would otherwise be prohibited by State or Territory electoral laws from making those donations. Ensuring the availability to political

> entities of funding for participation in federal elections appears to be at most an adventitious consequence of this purpose.

The majority then concluded that having regard both to the tenuous connection between s 302CA of the *Commonwealth Electoral Act* and the federal electoral process and to the section's purpose to confer an immunity from State laws in respect of subject matters outside the subject matter of Commonwealth legislative power, s 302CA could not be supported as a law incidental to federal electoral processes to the extent that it authorised the giving, receipt and retention of a gift that might never be used for any federal electoral purpose. As a consequence, the section was to that extent beyond the scope of the power conferred by s 51(xxxvi) of the Constitution.[12]

In relation to the minority, for the purposes of this argument, I will adopt the reasoning of Nettle J as representative of the position of the minority, as follows:[13]

> Arguably, a Commonwealth law which did no more than purport to exclude the application of State law to gifts that might be used for Commonwealth electoral purposes would be beyond Commonwealth legislative power. On one view of the matter, the link between the subject matter of Commonwealth elections and a mere possibility of a gift being used for Commonwealth electoral purposes, standing alone, would be too tenuous to conclude that the law was one with respect to Commonwealth elections. As was accepted by the Solicitor-General of the Commonwealth, the situation would be in some respects analogous to the examples of Commonwealth prohibitions adumbrated by Dixon CJ in the *Second Uniform Tax Case* in support of his Honour's conclusion that a Commonwealth law

> which purported to prohibit a taxpayer paying State taxation before paying Commonwealth taxation went beyond any true conception of what was incidental to the Commonwealth's power to make laws with respect to taxation. But there are dangers in analogies, and as Dixon CJ expressly cautioned in the *Second Uniform Tax Case*: "[W]hen you are considering what is incidental to a power not only must you take into account the nature and subject of the power but you must pay regard to the context in which you find the power." …
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> As it appears to me, the answer to that question is that because that possibility is inherent in every donation made on terms that permit but do not require the donation to be used for Commonwealth electoral purposes, Pt XX is a law with respect to both Commonwealth purposes and purposes not within Commonwealth legislative power. But as has long been established, if a law enacted by the Commonwealth Parliament can fairly be described as a law with respect to a grant of Commonwealth legislative power as well as a law with respect to matters left to the States, that will suffice to support its validity as a law of the Commonwealth.
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> In *Actors and Announcers Equity Association v Fontana Films Pty Ltd* Stephen J concluded that the question of whether a "mixed" law may fairly be described as one with respect to a head of power will depend upon the "significance" of the remaining elements.

It may be seen that the majority lay the basis to answer the question of a sufficient connection in the negative, as follows:[14]

> Where difficulty lies is with the breadth of the operation of s 302CA(1) insofar as it extends to protect from the operation of a State electoral law the giving, receipt and retention of a gift in circumstances where, to adopt the description used in argument by the Solicitor-General for Tasmania, the "gift (or part of it) may (or may not) be used for Commonwealth electoral expenditure" and where, at the time it is given and received, use of the gift to create or communicate matter for a purpose of influencing voting at a federal election is nothing more than a bare possibility. Consideration of whether s 302CA, to that extent of its operation, is within the scope of the power conferred by s 51(xxxvi) of the *Constitution* requires closer attention.

If Nettle J had characterised the legislation in that way, his Honour would have come to a like conclusion as to the result, applying the test of characterisation that his Honour had adopted as set out above.

Thus, it may be seen that the difference between the majority and the minority was not as to the ultimate test to be applied, but how their Honours characterised the legislation in question in the answer to that ultimate enquiry.

III THE PLACE OF PURPOSE IN APPLYING THE MAJORITY TEST OF CHARACTERISATION

It is in this regard that distinction, perhaps contra-distinction, as to approach might readily be discerned between the majority and the minority.

The approach of the majority in turning to purpose for answering that enquiry may be seen as follows:[15]

> Determining whether a law is incidental to the subject matter of a power can be assisted by examining how the purpose of the law – what the law can be seen to be designed to achieve in fact – might relate the operation of the law to the subject matter of the power. In *the Bank Nationalisation Case*, Dixon J went so far as to say that "in all cases where it is sought to connect with a legislative power a measure which lies at the circumference of the subject or can at best be only incidental to it, the end or purpose of the provision, if discernable, will give the key". …
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> Applying that manner of characterisation, a law the purpose or object of which is protection of something that is encompassed within the subject matter of a conferral of legislative power may yet not be a law with respect to that subject matter because the law is insufficiently adapted to achieve that purpose, having regard to the breadth and intensity of the impact of the law on other matters. Professors Zines and Stellios have commented in this respect that "the slightness of the impact on the federal subject" will often be "shown most clearly by contrasting it with a much greater effect on matters outside the subject of power".
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> Thus, it was said in *Davis v The Commonwealth* of the protection against commercial exploitation attempted to be afforded by s 22 of the *Australian Bicentennial Authority Act 1980* (Cth) to words associated with the national program of celebrations and activities to commemorate the bicentenary of European settlement in Australia that "[a]lthough the statutory regime may be related to a constitutionally

legitimate end, the provisions in question reach too far" in that their "extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power". Much the same was said in *Nationwide News Pty Ltd v Wills* of the protection attempted to be afforded by s 299 of the *Industrial Relations Act 1988* (Cth) against even fair and reasonable criticism of a member of the Australian Industrial Relations Commission. While use of the concept of proportionality in this context has been criticised, the point presently to be made is that consideration of the purposes which the law is or is not appropriate and adapted to achieve may illuminate the required connection to the relevant head of power. …

In *Gazzo v Comptroller of Stamps (Vict)* Gibbs CJ referred to the *Second Uniform Tax Case* as amongst a number of decisions which showed "that a provision cannot be said to be incidental to the subject matter of a power simply because in a general way it facilitates the execution of the power" and "that in considering whether a law is incidental to the subject matter of a Commonwealth power it is not always irrelevant that the effect of the law is to invade State power". Although the correctness of the decision in *Gazzo* has been questioned, there is no reason to doubt the veracity of those observations. …

If s 302CA of the *Commonwealth Electoral Act* is to be found to have a sufficient connection with the subject matter of the power, that connection could only be found by relating the operation of the section to the purpose of the section. Exploring that possibility makes it necessary to turn to the identification of the section's purpose.

However, the kicker, so to speak, is to be found in the following passages of the majority: [16]

> The ultimate purpose of the section can on that basis be generalised as being to protect a source of funds which might, but need not, be deployed by a political entity in a federal electoral process. The Solicitor-General of the Commonwealth expressed that ultimate purpose even more generally as being "to protect the federal electoral process by ensuring that participants in that process are not starved of funds that are able to be used for the dominant purpose of influencing the way electors vote in the federal elections".
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> The difficulty with accepting the purpose so postulated by the Commonwealth lies in the disconformity between that purpose and the breadth of the operation of s 302CA, to which attention has been drawn. The section confers immunity from the application of State and Territory electoral laws that would otherwise limit the availability of funds to political entities to pursue a range of activities having no connection with federal elections. *They include activities the regulation of which is within the heartland of State legislative power*. (emphasis added)

I note my friend the Solicitor-General for New South Wales, Mr Sexton SC, in the audience, and whilst I know he is not given to difficulty sleeping, it would be fair to say that if you were a State or Territory Solicitor-General or Crown Solicitor, and experiencing difficulty in finding inner peace at night to go to sleep, keeping this passage about "heartland" by your bedside table would offer a sure and certain comfort.

In fact, in my opinion, these matters might fairly be observed in relation to how the majority employed purpose in their reasoning.

First, purpose can, not must, assist in characterising the relevant connection to Commonwealth power.

Second, whether a law is sufficiently adapted to achieve its purpose may also bear upon this enquiry.

Third, consequently, there is the real prospect that notions proportionality testing, as are now employed by some judges in the implied freedoms sphere,[17] will be employed in this characterisation exercise.

Fourth, as the majority have employed the criterion of sufficient adaptation in their reasoning, it would seem to be no higher than a tool of analysis[18] for arriving at that characterisation conclusion.

IV A STARTLING RESULT?

The result in *Spence* should not be seen as a startling one. To explain why this is so involves, in my view, some analysis of the reasoning of the plurality in the *Work Choices Case*.

In particular, the majority of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ reasoned as follows:[19]

> Underlying all these arguments there was a theme, much discussed in the authorities on the corporations power, that there is a need to confine its operation because of its potential effect upon the (concurrent) legislative authority of the States. The Constitution distinguishes in s 107 and s 109 between legislative powers exclusively vested in the Parliament of the Commonwealth and inconsistency between federal and State laws made in exercise of concurrent powers.

> Section 107 does not vest exclusive powers in the State legislatures.

The majority next quoted the following passage from Windeyer J's judgment in the *Payroll Tax Case*:[20]

> The Colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense; and certainly the Constitution did not make them so. They were self-governing colonies which, when the Commonwealth came into existence as a new Dominion of the Crown, lost some of their former powers and gained no new powers. They became components of a federation, the Commonwealth of Australia. It became a nation. Its nationhood was in the course of time to be consolidated in war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations. With these developments the position of the Commonwealth, the federal government, has waxed; and that of the States has waned. In law that is a result of the paramount position of the Commonwealth Parliament in matters of concurrent power. And this legal supremacy has been reinforced in fact by financial dominance. That the Commonwealth would, as time went on, enter progressively, directly or indirectly, into fields that had formerly been occupied by the States, was from an early date seen as likely to occur. This was greatly aided after the decision in the *Engineers' Case*, which diverted the flow of constitutional law into new channels.

The majority then said as follows:[21]

> These were the observations of a distinguished legal historian. References to the "federal balance" carry a misleading implication of static equilibrium, an equilibrium that is disturbed by changes in constitutional doctrine such as occurred in the *Engineers' Case*, and changes in circumstances as a result of the First World War. The error in implications of that kind has long been recognised. So much is evident from Alfred Deakin's Second Reading Speech on the Judiciary Bill in 1902 and his comparison between the difficulty of amending the Constitution by referendum, and this Court's differing but continuing role in determining the meaning and operation of the *Constitution*.

There has, in my opinion, been a tendency to read only one side of Justice Windeyer's passage in the *Payroll Tax Case* as cited in the *Work Choices Case*. However, as may be demonstrated, that is not in fact what the plurality did in *Work Choices*. In particular, Windeyer J in the *Payroll Tax Case* spoke to the circumstances to the end of 1960s and his Honour's passage, so often referred to, needs to be understood in that context.

Windeyer J did not suggest that there would for all time be a trajectory of the diminution of State legislative power in favour of Commonwealth power, such that inexorably the States would be rendered some legislative rump. Rather, his Honour recorded what had happened in the period of 1901-70. What his Honour had made clear and, what had been adopted by the plurality in the *Work Choices Case,* was that there should be no assumed constitutional balance or an assumed equilibrium between the Commonwealth and the States; implicit in this is that there should be no assumption of ever more enfeebled State legislative

power. Rather, the *Constitution* provided the means to regulate and determine such matters in the context in which they presented themselves over time.

So much is, respectfully, plainly correct when considering the operation the *Constitution* as a document for the ages, entrenching the federal government and the States and Territories as constituent institutions of the Commonwealth of Australia, and regulating their interactions both to resolve conflicts between them, yet preserve their perpetual operation.

None of this is, or need be, any collateral attack on the legal supremacy, in areas of concurrent power, provided by s 109, or of the reasoning in *Engineers*. Less still is it some back-door attempt to breathe life into the surely dead reserve powers doctrine. Rather it comes to the question of resolving a conflict between Commonwealth and State legislative power from a position of neutrality, consonant with the text and structure of the *Constitution*, applying orthodox canons of characterisation, and shorn of pre-conceptions that the Commonwealth must prevail, lest there be a return to some form of reserve powers doctrine.

In that regard the majority's reasoning in the *Work Choices Case* is apposite:[22]

> As Windeyer J rightly pointed out in the *Payroll Tax Case*, the *Engineers' Case* is not to be seen "as the correction of antecedent errors or as the uprooting of heresy". There is no doubt that, as he continued, "[t]o return today to the discarded theories would indeed be an error and the adoption of a heresy". But the *Engineers' Case* was both a consequence of developments outside the law courts (not least a sense of national identity emerging during and after the First World War) and a cause of future developments.

> As Windeyer J went on to say: "That is not surprising for the Constitution is not an ordinary statute: it is a fundamental law. In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances. This does not mean that courts have transgressed lawful boundaries: or that they may do so."

Respectfully, those who are so startled fail to appreciate the rigor and astuteness of our common law tradition and method to ensure fidelity not only to the text of the *Constitution*, and what it does and does not confer on the Commonwealth, but also its structure.

By the time of the *Payroll Tax Case*, the first 70 years of federation had been punctuated by two of the most dramatic world wars that the world had ever seen. These events were inevitably going to expand Commonwealth power.

Moreover, the fact that the Commonwealth commenced in 1901 with, obviously, no pre-existing functions or powers, explains why during the first century of federation it was to be expected that the Commonwealth would commence and continue to fill out its function and legislative remit in accordance with the *Constitution*.

However, the fact of that significant reduction in State power at the expense of the increase in Commonwealth power over that period through to 1970 did not warrant the conclusion that there would be an ever-continuing diminution of State power in favour of the Commonwealth. Rather, both the act of the Commonwealth filling out its function and legislative remit, and changing context and imperatives, gainsays such a proposition.

Indeed, the *Work Choices Case* made that sufficiently clear as follows:[23]

> What was discarded in the *Engineers' Case* was an approach to constitutional construction that started in a view of the place to be accorded to the States formed independently of the text of the *Constitution*. The *Engineers' Case* did not establish that no implications are to be drawn from the *Constitution*. So much is evident from *Melbourne Corporation* and from the *Boilermakers' Case*. Nor did the *Engineers' Case* establish that no regard may be had to the general nature and structure of the constitutional framework which the Constitution erects. As was held in *Melbourne Corporation*: "The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities." And because the entities, whose continued existence is predicated by the Constitution, are polities, they are to continue as separate bodies politic each having legislative, executive and judicial functions. But this last observation does not identify the content of any of those functions. It does not say what those legislative functions are to be.

At federation what was created was not only the Commonwealth government but the former colonies became constituent permanent parts of the Australian constitutional infrastructure. True it is that certain powers they previously exercised as colonies were now to be exercised by the Commonwealth, and there was scope for that to expand over time, but their continued existence was a significant and permanent feature of federation.

It ought not to have been that surprising that there would come a point where a significant extent of the Commonwealth's legislative power under the *Constitution* had been filled out and that it would not continue to erode the position of the State as materially as it had previously.

Indeed, it is as well to look to minority statements in judgments as often illuminating, by way of contrast sometimes, of what can be found in the majority. In that regard the concluding remarks of Justice Callinan in dissent in the *Work Choices Case* are apposite, where his Honour, quoting Justice Windeyer in another case, said: 'The question whether an enactment truly answers to the description of a law with respect to a given subject matter must be decided as it arises in any particular case in reference to the facts of that case.'[24]

V CONCLUSION

Ultimately, in my view, the decision in *Spence* did not produce some marked shift in judicial attitude to federal state relations. The *Work Choices Case* tells us to eschew any preconceptions of a particular federal-state balance. Rather, one goes to the text and structure of the *Constitution* for its proper construction according to orthodox canons of construction and that will give an answer in an individual case as it did in *Spence*.

That said, whereas the first century of our federation was marked by an apparent ever-decreasing area of state power and increasing area of Commonwealth power, the reductions in state power and the accretion of commonwealth power might not nearly be as marked in the second century, and more nuanced and nicer questions will arise for consideration in relation to the preserving of states as polities created by the *Constitution*.

Endnotes

[1] *Spence v Queensland* (2019) 367 ALR 587.

[2] Ibid [80].

[3] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[4] *Victoria v Commonwealth* (1971) 122 CLR 353, [395]-[396].

[5] *New South Wales v Commonwealth* (2006) 229 CLR 1.

[6] *McCloy v New South Wales* (2015) 257 CLR 178.

[7] *University of Wollongong v Metwally* (1984) 158 CLR 447.

[8] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

[9] *Spence v Queensland* (2019) 367 ALR 587, [57].

[10] Ibid [59].

[11] Ibid [81].

[12] Ibid [83].

[13] Ibid [138], [143]-[144].

[14] Ibid [56].

15 Ibid [60], [62]-[63], [69], [76].

16 Ibid [79]-[80].

17 See, e.g., *McCloy v NSW* (2015) 257 CLR 178.

18 See *Brown v Tasmania* (2017) 261 CLR 328, [158]-[159] per Gageler J, [473] per Gordon J, see also [125] per Kiefel CJ, Bell and Keane JJ.

19 *New South Wales v Commonwealth* (2006) 229 CLR 1, [54].

20 *Victoria v The Commonwealth* (1971) 122 CLR 353, 395-396

21 *New South Wales v Commonwealth* (2006) 229 CLR 1, [54].

22 Ibid [193]

23 Ibid [194]

24 Ibid [912].