20 November 2013

MEMORANDUM:

The Honourable the Attorney-General and Minister for Justice

Qld & Commonwealth Electoral Acts

You have requested advice about the constitutional validity of particular proposed amendments to the *Electoral Act 1992* (Qld) (the 'Queensland Act') which would require candidates, registered political parties and associated entities to make monthly returns in relation to certain gifts. I am briefed with a draft Electoral Reform Amendment Bill 2013 (v 01I, 14 November 2013, 5:01 pm) which includes but is not limited to the particular amendments the subject of your request for advice.

In my opinion, if challenged, a Court is more likely than not to hold that the monthly reporting requirements of the proposed ss 261 and 262 of the Queensland Act are inconsistent with the *Commonwealth Electoral Act 1918* (Cth) ("the Commonwealth Act") and to that extent are invalid.

Background

The draft Bill would make significant amendments to Part 11 (Election funding and financial disclosure) of the Queensland Act. Of particular relevance here are proposed ss 261 and 262.

Candidates, political parties and associated entities

The new ss 261 and 262 would replace existing donation disclosure requirements. The new s 261 would require candidates,[1] political parties[2] and associated entities[3] to give to the Electoral

[1] ***Candidate*** is defined by s 2 of the Queensland Act effectively to mean a properly nominated candidate for election to the Legislative Assembly.
[2] ***Political party*** is defined by s 2 effectively to mean an organisation whose objects include the promotion of its candidates for election to the Legislative Assembly.

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Commission of Queensland (***ECQ***) by the 21st day of each month a return stating the total amount of all gifts[4] received during the previous month, and the other details under the new s 261(3). However, some details are not required in relation to gifts of less than $12,400 (indexed).[5]

Donors

The new s 262 would require a third party[6] who makes a gift to a candidate, registered political party or associated entity during a month, where all the third party's gifts to that entity for the financial year total $12,400 (indexed) or more, to give the ECQ by the 21st day of the next month a return that complies with s 263.

Section 307 of the Queensland Act makes it an offence to fail to make any of the returns described above, among others. The offence is punishable by a fine of 100 penalty units ($11,000) for the agent of a registered political party or 20 penalty units ($2200) otherwise.

Advice

I am asked to advise whether the proposed 'continuous disclosure', or monthly returns, in respect of gifts would be inconsistent with the Commonwealth Act and thus invalid under s 109 of the *Constitution*.

Inconsistency under s 109 of the Constitution

Section 109 states 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.

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[3] ***Associated entity*** is defined by s 197 effectively to mean an entity that is controlled by or operates for the benefit of a registered political party. A ***registered political party*** is one that is registered under part 6.

[4] ***Gift*** is defined by s 201 effectively to mean any disposition of property or provision of a service by one person to another without consideration in money or money's worth, or with inadequate consideration. ***Disposition of property*** is defined by s 197 to mean 'a conveyance, transfer, assignment, settlement, delivery, payment or other alienation of property'.

[5] New s 201A would provide for the indexation of the $12,400 threshold for the purposes of part 11 generally.

[6] ***Third party*** is defined by s 197 to mean an entity other than a registered political party, an associated entity or a candidate.

In this context, 'invalid' means 'suspended, inoperative and ineffective'.[7]

A direct inconsistency will arise where it is not possible to obey both the Commonwealth and State laws, or where the State law would 'alter, impair or detract from' the operation of the Commonwealth law.[8] It is not necessary here to consider the other categories of indirect inconsistency or operational inconsistency.

A State law may 'alter, impair or detract' from a Commonwealth law where there is a 'direct collision' between the two laws – that is, 'where the State law, if allowed to operate, would impose an obligation greater than that for which the federal law has provided': *Blackley v Devondale Cream (Vic) Pty Ltd.*[9]

In *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd*, the High Court explained those concepts in this way:[10]

> 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.[11]
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> Although the utility of accepted tests of inconsistency, based on recognising different aspects of inconsistency for the purposes of s 109, is well established as Mason J observed in *Ansett Transport Industries (Operations) Pty Ltd v Wardley*,[12] it is not surprising that different tests of inconsistency directed to the same end are interrelated and in any one case more than one test may be applied in order to establish inconsistency for the purposes of s 109. All tests of inconsistency which have been applied by this Court for the purpose of s 109 are tests for discerning whether a "real conflict"[13] exists between a Commonwealth law and a State law.

The circumstances in which a State law establishing a criminal offence would, but for s 109 of the *Constitution*, alter, impair or detract from the operation of a Commonwealth law were discussed in *Dickson v The Queen*.[14] In that case, the *Criminal Code* (Cth) and the *Crimes Act 1958*

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[7] *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 464-465. See also *Momcilovic v The Queen* (2011) 245 CLR 1, 105 [223].

[8] *Victoria v Commonwealth* (1937) 58 CLR 618, 630; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 76.

[9] (1968) 117 CLR 253, 258.

[10] (2011) 244 CLR 508, 525 [41-42].

[11] See *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 642-643, 651; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76 [27].

[12] (1980) 142 CLR 237 at 260.

[13] See, eg, *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 553.

[14] (2010) 241 CLR 491.

(Vic) criminalised the act of conspiring to commit a theft, but the Commonwealth law applied in a narrower set of circumstances than the Victorian law. The appellant was convicted of an offence against the Victorian *Crimes Act*, although the Commonwealth law would also have applied to the facts as found. The High Court held that s 109 of the *Constitution* invalidated the Victorian law. The High Court said:[15]

> The direct inconsistency in the present case is presented by the circumstance that s 321 of the *Crimes Act* (Vic) renders criminal conduct not caught by, and indeed deliberately excluded from, the conduct rendered criminal by s 11.5 of the *Criminal Code* (Cth). In the absence of the operation of s 109 of the Constitution, the Crimes Act (Vic) will alter, impair or detract from the operation of the federal law by proscribing conduct of the appellant which is left untouched by the federal law. The State legislation, in its application to the presentment upon which the appellant was convicted, would undermine and, to a significant extent, negate the criteria for the existence and adjudication of criminal liability adopted by the federal law. No room is left for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury. To adapt remarks of Barwick CJ in *Devondale Cream*,[16] the case is one of "direct collision" because the State law, if allowed to operate, would impose upon the appellant obligations greater than those provided by the federal law.
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> ...
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> What is immediately apparent 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 the remarks of Dixon J in *Wenn v Attorney-General (Vic)*.[17]

McLindon v Electoral Commission of Queensland[18] considered s 109 issues in the context of the Commonwealth and Queensland Acts. There, Katter's Australian Party challenged the constitutional validity of provisions of the Queensland Act relating to the approval of parties' registered names and abbreviated names on the basis of inconsistency with the corresponding provisions of the Commonwealth Act. The Court of Appeal said:[19]

> As noted, the applicants' reliance upon s 109 of the *Constitution* requires the construction of the relevant federal and State laws to determine whether the State law alters, impairs or detracts from the federal law. The State Act does not purport to operate with respect to the registration of political parties for the purposes of the Commonwealth Act or the use of the names of registered political parties, or abbreviations of their names, in federal elections. It operates with respect to the subject matter of an election of a member or members of the Legislative Assembly of Queensland, including the registration of a political party that intends to promote the election of its endorsed candidate at such an election, the registration of the name of that political party and, if the political party wishes to use an abbreviation of its name on ballot papers, the registration of that abbreviation. The provision for the

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[15] (2010) 241 CLR 491, 504-505 [22-25].
[16] (1968) 117 CLR 253 at 258. See also at 272 per Menzies J.
[17] (1948) 77 CLR 84 at 120.
[18] (2012) 260 FLR 395.
[19] (2012) 260 FLR 395, 404-405 [40].

> abbreviation contained in the register to be printed on ballot papers relates, like the rest of the State Act, to an election of a member of the Legislative Assembly.

The Court found as follows:[20]

> We have not accepted the construction of the relevant provisions of the Commonwealth Act for which the applicants contend. Upon its proper construction, the operation of the Commonwealth Act is more limited. Contrary to the applicants' submissions, it does not evince an intention to proscribe the use of a name or abbreviation of a political party name for the purposes of a State election. It relates to the conduct of federal elections, including the use of the names of registered political parties and abbreviations of their names on ballot papers for federal elections.
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> The relevant provisions of the State Act, in particular ss 71, 73 and 102, do not alter, impair or detract from the operation of Pt XI of the Commonwealth Act. They certainly do not undermine the Commonwealth law because the relevant provisions of the Commonwealth Act and the State Act do not operate with respect to the same subject matter. In simple terms, the provisions of the State Act operate in respect of State elections and the provisions of the Commonwealth Act operate in respect of federal elections.

Application of principle to donation disclosure laws

It is true to say that the general principles of inconsistency under s 109 are relatively settled, but it can be difficult to predict with confidence how a Court will apply them to particular legislation in a particular scenario. Subject to that proviso, for the following reasons, I have concluded that there is a direct inconsistency between the continuous disclosure provisions of the Queensland Act as amended by the draft Bill and the Commonwealth Act.

As the Court of Appeal noted in *McLindon*, the Queensland Act operates primarily by reference to State elections. The Act appears to assume that parties might also contest federal elections without making any express provision about how the two Acts might apply to parties that contest both State and federal elections.[21]

Part XX of the Commonwealth Act regulates election funding and financial disclosure. It operates primarily by reference to federal elections. The Commonwealth Act appears to assume that parties might also contest State elections, but it also makes no express provision about how the two Acts might apply to parties that contest both State and federal elections, either generally or in relation to donation disclosure.

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[20] (2012) 260 FLR 395, 405-406 [44-45].

[21] The provision for the joint administration of Commonwealth and State electoral rolls (pt 4, div 1, s 62) does not affect other aspects of the Act, including donation disclosure requirements.

The distinction between State and Federal elections that was drawn in *McLindon* generally applies in relation to candidates. That is, the Queensland Act's requirements that candidates and donors disclose donations to candidates in Queensland elections do not affect candidates in Federal elections. However, the same is not true of political parties and associated entities. Thus, leaving candidates aside, new ss 261 and 262 apply to and in relation to Queensland-registered political parties and associated entities. However, most if not all Queensland-registered political parties are also Commonwealth-registered political parties. Similarly, an associated entity that is controlled by or operates to benefit a Queensland-registered party is likely to be controlled by or operate to benefit a Commonwealth-registered party. To that extent, the *McLindon* distinction between Queensland and Federal elections is not as clear to the extent that ss 261 and 262 apply to and in relation to a Queensland-registered party that is also a Commonwealth-registered party. The scope for s 109 inconsistency therefore arises because ss 261 and 262 will apply to entities which are also subject to various requirements under the Commonwealth Act.

Monthly returns: candidates, parties and associated entities

As noted, under the new s 261 candidates, political parties and associated entities will be required to make monthly returns. Leaving candidates aside for the reasons just given, the closest analogues in the Commonwealth Act are the following:

- Section 314AB requires registered political parties and State branches to give the Australian Electoral Commission (***AEC***) annual returns within 16 weeks after the end of the financial year. Where the sum of all amounts received from an entity during the financial year exceeds $12,400,[22] the return must include the particulars required by s 314AC.
- Section 314AEA requires associated entities[23] to give the AEC annual returns. Section 314AC applies to an associated entity's return in the same way as a political party.

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[22] The relevant provisions refer to an amount of $10,000 but that is subject to indexation: s 321A. According to the AEC website (accessed 19 November 2013), the 2013-14 threshold is $12,400: http://www.aec.gov.au/Parties_and_Representatives/public_funding/threshold.htm.

[23] ***Associated entity*** is defined by s 287(1).

In relation to amounts received, if all amounts received from *any one* person or organisation exceed $12,400, the return must include details of the amount (s 314AC(1)). The details generally are the name and address of the donor or its office-bearers (s 314AC(3)). However, in calculating whether the $12,400 threshold is met, individual payments of less than $12,400 are disregarded (s 314AC(2)).

Section 315 of the Commonwealth Act makes it an offence, among other things, to fail to provide the returns required by these provisions and others mentioned below. The offence is punishable by a fine of $5000 (for a political party or State branch) or $1000 (for any other person): s 315(1).

However, the analogy between those provisions of the Commonwealth Act and new s 261 of the Queensland Act is imperfect. Sections 314AB and 314AEA are better understood as the counterparts not of the new s 261, but of ss 290 (which will deal with returns by registered political parties) and 294 (which will deal with returns by associated entities). That understanding is fortified by s 314AC of the Commonwealth Act which supports ss 314AB and 314AEA in the same way that s 291 of the Queensland Act supports ss 290 and 294.

On that view of things, s 261 imposes new obligations that have no counterpart in the Commonwealth Act. That factor supports the proposition that s 261 closes up an area of liberty which the Commonwealth Act designedly leaves open.

So far as Commonwealth-registered parties and associated entities are concerned, the area of liberty which the Commonwealth Act leaves is that returns are required only annually. The new s 261 would close that up to the extent of requiring monthly returns.

Monthly returns: donors

Under the draft Bill, donors may also be subject to monthly return requirements. New s 262 will require a donor who makes a gift to a candidate, registered political party or associated entity during a month, where all the third party's gifts to that entity for the financial year total $12,400 or more, to give the ECQ a return by the 21st day of the next month. The closest analogues in the Commonwealth Act are the following:

- Section 305A requires a donor who gives more than $12,400 to a candidate during the disclosure period for an election to give the AEC a return within 15 weeks of polling day.
- Section 305B requires a donor who gives more than $12,400 to a registered political party in a financial year to give the AEC a return within 20 weeks of the end of the financial year.

So far as gifts to candidates are concerned, I see little scope for inconsistency for reasons already given. In relation to registered political parties, again, the analogy between s 262 and s 305B is not perfect, but the fit is better than that relating to s 261. Nevertheless, the effect is similar: particularly in light of the accompanying requirement that returns be made in each month in which the threshold is exceeded, on pain of criminal penalty, the draft Bill would close up an area of liberty which the Commonwealth Act designedly leaves open.

The area of liberty is that a donor may make a donation to a Commonwealth-registered political party of over $12,400 (indexed) and is not be required to disclose it more than once per financial year, and even then not until 20 weeks after the relevant day. Proposed s 262, to the extent that it would apply to a Queensland-registered political party that is also a Commonwealth-registered political party, would close up that liberty to the extent of requiring disclosure much more frequently (that is, monthly), and within a much shorter period.

I have considered an argument that the frequency with which donations over the threshold must be reported is trivial and not significant,[24] and therefore does not give rise to an inconsistency with the Commonwealth Act under s 109 of the *Constitution*. However, on balance, I think the Court is more likely to take the view that the areas of liberty which I have described above are significant.

Conclusion

I previously made the point that whilst the general principles for deciding inconsistency under s 109 are relatively settled, it can be difficult to predict with confidence how a Court would apply them to particular legislation in a particular scenario.

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[24] *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 525 [41-42], referred to above.

Nonetheless, in my opinion, if a particular fact scenario which directly engaged the relevant provisions of the Queensland and Commonwealth Acts was presented for the consideration of a Court it is more likely than not that a Court would hold that the monthly reporting requirements of proposed ss 261 and 262 are inconsistent with the Commonwealth Act and to that extent are invalid.

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