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1. Introduction 1
2. Previous reforms 1
3. The 2012 Act 2
4. The implied freedom 3
5. High Court's decision 3
6. Comments by experts 5
7. Conclusion 6

The High Court's decision in the electoral funding law case

by Lenny Roth

1. Introduction

On 18 December 2013, the High Court handed down its decision in *Unions NSW v New South Wales*. The Court ruled that electoral funding provisions enacted in NSW in 2012 were invalid because they infringed upon the implied freedom of political communication in the Commonwealth Constitution. This e-brief outlines the decision and considers its implications.

2. Previous reforms

Electoral funding laws in NSW have been the subject of debate over a number of years. The main issue has been community concern about corruption and undue influence in NSW politics. Parliamentary inquiries were established in response to this debate and a number of reforms were enacted.

In 2008, following a report from a Legislative Council Select Committee on Electoral and Political Party Funding, new legislative requirements were introduced governing the disclosure of political donations and electoral expenditure.[1]

In 2009, laws were enacted that prohibited the receipt of political donations from property developers.[2] When introducing these reforms, then Premier, Nathan Rees, stated that they were a first step, and it was intended that the next State election would be conducted under a public funding model.[3] This issue of public funding was then referred to the Joint Standing Committee on Electoral Matters for inquiry and report.

In 2010, in response to the Committee's report, wide ranging electoral funding law reforms were introduced including:

- *Caps on donations:* Political donations to registered parties and groups were capped at $5,000; and political donations to other parties, elected members, candidates, and "third-party campaigners" were capped at $2,000.

- *Banning political donations from other sources:* The prohibition on receiving political donations from property

developers was extended to the tobacco, liquor and gambling industries.

- *Caps on electoral expenditure:* Caps on electoral expenditure were imposed on political parties, candidates, and "third-party campaigners". The caps apply from 1 October prior to an election to the end of polling day for the election.

- *Increased public funding of electoral expenditure:* The amount of public funding available to political parties, groups and candidates was increased in order to partly compensate for the loss in revenue arising from the caps on donations.[4]

3. The 2012 Act

The *Election Funding, Expenditure and Disclosures Amendment Act 2012* (NSW) made two main changes to the Act. First, it made it unlawful for a political donation to a party, elected member, group, candidate or third-party campaigner to be accepted unless the donor was an individual who was enrolled to vote (section 96D). The Premier, Barry O'Farrell stated:

> … the only way that you can ensure that the public is going to have confidence about our electoral system is to limit [donations] to the individuals who are on the electoral roll. It must be limited to those Australian citizens who are enrolled, not overseas citizens and non-residents, because of course those people do not get the vote. They do not have a stake in the system and they should not be able to influence the system—and nor should unions, third party interest groups and corporations…[5]

Second, for the purposes of the caps on electoral expenditure, the Act provided for the aggregation of electoral expenditure of political parties and their affiliated organisations (section 95G(6)). The Act defined an "affiliated organisation" of a political party to mean:

> …a body or other organisation, whether incorporated or unincorporated, that is authorised under the rules of that party to appoint delegates to the governing body of that party or to participate in pre-selection of candidates for that party (or both)" (section 95G(7)).

The Premier explained the rationale for these provisions:

> Unfortunately, [the existing] party expenditure caps are not currently affected by the expenditure of organisations that are affiliated with a political party. This leads to organisations intimately involved in the governance of a political party, sometimes even with office bearers in common, campaigning on behalf of a party with no corresponding offset to the party's own ability to spend.
>
> The Government believes that this is an unfair loophole that undermines the integrity of the whole scheme. The bill closes this loophole by combining the electoral communication expenditure of affiliates with the expenditure of political parties for the purpose of determining whether a party has exceeded the applicable expenditure cap.[6]

The provisions clearly applied to the Labor Party and trade unions.

4. The implied freedom

When the 2012 reforms were enacted, there was much debate about whether they infringed the implied freedom of political communication on in the Commonwealth Constitution.[7] This implied freedom was first recognised by the High Court in 1992.[8] Twomey explains that:

> …For a short period this implication was broadly based upon the requirements of a system of representative government, but in 1996–97 the High Court pulled back from this position, firmly grounding the implied freedom in the text of the *Commonwealth Constitution* and in particular sections 7 and 24 of the *Constitution* which provide that members and senators are to be 'directly chosen by the people' and section 128 which provides that voters must approve constitutional amendments by way of referendum before they can be made.
>
> The High Court held that the choice made by electors in Commonwealth elections and referenda must be a free and informed choice, which can only be the case if voters are free to make and receive communications about political matters. In *Lange,* the High Court observed that 'sections 7 and 24 and the related sections of the *Constitution* necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors' in Commonwealth elections or referenda.[9]

In a 1997 decision of *Lange v Australian Broadcasting Corporation,* the High Court outlined a two-part test for determining whether a law is invalid for infringing the implied freedom. It stated:

> …two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people… If the first question is answered "yes" and the second is answered "no", the law is invalid.[10]

In the 2004 decision of *Coleman v Power,* the High Court made a minor modification to the second part of the test, replacing the words "the fulfilment of which" with the words "in a manner which".[11]

Prior to the Unions NSW case, there were the only two cases in which the High Court had struck down laws on the basis of the implied freedom (both in 1992). In one case, it ruled invalid an offence of making statements calculated to bring a member of the Industrial Relations Commission into disrepute;[12] and in the other, it declared invalid restrictions on political advertising on radio and television during a federal election period.[13]

5. High Court's decision

On 12 August 2013, the parties submitted a special case for the High Court to answer. As noted earlier, the Court delivered its decision on 18 December 2013.[14] The Court was comprised of the Chief Justice and five other judges (Justice Gageler having removed himself from hearing the

case). The Chief Justice and four other judges issued a joint judgment, while Justice Keane delivered a separate judgment (reaching the same conclusions). The joint judgment is summarised below.

Application in State context: The State of NSW argued that the implied freedom of political communication in the *Commonwealth Constitution* might not apply to communication arising in the course of a *State election*, as it "might not illuminate or affect the choice to be made by electors at federal elections or the opinions they may form as to governance at the federal level".[15] Rejecting this argument, the judgment stated:

> The complex interrelationship between levels of government, issues common to State and federal government and the levels at which political parties operate necessitate that a wide view be taken of the operation of the freedom of political communication. As was observed in *Lange,* these factors render inevitable the conclusion that the discussion of matters at a State, Territory or local level might bear upon the choice that people have to make in federal elections and in voting to amend the Constitution, and upon their evaluation of the performance of federal Ministers and departments.[16]

The judgment added that "generally speaking, political communication cannot be compartmentalised to either that respecting State or that respecting federal issues".[17] The conclusion on this point made it unnecessary for the judgment to consider whether there was an implied freedom of political communication in the *NSW Constitution*.

Sources of political communication: The joint judgment also made it clear that the freedom of political communication was not confined to communications between electors and elected representatives, candidates or parties. The judgment stated that:

> …There are many in the community who are not electors but who are governed and affected by decisions of government. Whilst not suggesting that the freedom of political communication is a personal right or freedom, which it is not, it may be acknowledged that such persons and entities have a legitimate interest in governmental action and the direction of policy. The point to be made is that they, as well as electors, may seek to influence the ultimate choice or the people as to who should govern. They may do so directly or indirectly through the support of a party or candidate who they consider best represents or expresses their viewpoint…[18]

Validity of section 96D: The judgment applied the two-stage test in *Lange* to determine whether the prohibition in section 96D of the 2012 Act was valid (i.e. the prohibition in respect of political donations). It concluded that this provision imposed a burden on the implied freedom of political communication (and thereby satisfied the first part of the test) because:

> ….That section effects a restriction upon the funds available to political parties and candidates to meet the costs of political communication by restricting the source of those funds. The public funding provided by the EFED Act is not equivalent to the amount which may be paid by way of electoral communication expenditure under the Act. It is not suggested that a party or candidate is likely to spend less than the maximum allowed. The party or candidate will therefore need to fund the gap.[19]

The judgment also concluded that the provision was not appropriate and adapted to serve a legitimate end (the second part of the test) because "it is

not possible to attribute a purpose to s 96D that is connected to, and in furtherance of, the anti-corruption purposes of the Act".[20] In other words, there was no apparent legitimate end. The judgment contrasted section 96D with the other provisions in Part 6 of the Act for capping donations and electoral communication expenditure:

> …the connection of the other provisions of Pt 6 to the general purposes of the EFED Act is evident. They seek to remove the need for, and the ability to make, large-scale donations to a party or candidate. It is large-scale donations which are most likely to effect influence, or be used to bring pressure to bear, upon a recipient. These provisions, together with the requirements of public scrutiny, are obviously directed to the mischief of possible corruption. The same cannot be said of s 96D, in its wide-ranging prohibition on the sources of donations.[21]

Validity of section 95G(6): The judgment reached similar conclusions in respect of section 95G(6) (i.e. the aggregation provision for the caps on electoral expenditure). It stated that section 95G(6) effected a burden on political communication "in restricting the amount that a political party may incur by way of electoral communication expenditure in a relevant period". In considering the second stage of the *Lange* test, the judgment first commented on the definition of an "affiliated organisation":

> It may be wondered how, logically, it could be said that affiliation of this kind is effective to identify an industrial organisation as the same source of funds for the making of electoral communication expenditure. Moreover, it would appear to assume that the objectives of all expenditure made by the party on the one hand and the organisation on the other are coincident. The criterion applied for the operation of s 95G(6) may be useful to identify industrial organisations as affiliates of political parties, but it does not reveal why or how they are to be treated as the same organisation for the purposes of expenditure on electoral communications.[22]

The judgment then said that these observations could be put to one side. Ultimately, section 95G(6) was invalid for the same reason as section 95D: that is, because "there was nothing in the provision to connect it to the general anti-corruption purposes of the EFED Act". [23]

6. Comments by experts

According to a media article on the day of the High Court's decision, Professor George Williams suggested that the decision could open up further attacks on the electoral funding laws.[24] This might include challenges to the caps on donations, the limits on electoral expenditure and the ban on certain industries from making political donations.

Professor Anne Twomey recently commented on the implications of the decision for electoral funding laws, stating:

> While the High Court accepted that caps on political donations and expenditure did amount to burdens on political communication, it also hinted that such laws would be regarded as reasonably appropriate and adapted to achieve the legitimate end of avoiding the risk or perception of corruption and undue influence. Keane J also suggested that caps might be seen to 'enhance the prospects of a level playing field'. Such laws would therefore most likely survive, if challenged…

> Laws that ban all political donations are likely to be invalid unless it can be shown that it is a proportionate response to actual cases of corruption.
>
> Laws that ban certain groups from donating will depend for their validity on whether they can be shown to advance a legitimate end. Hence, it is possible that the laws that ban property developers from making political donations are valid, but it would need to be shown that such laws are still reasonably appropriate and adapted to the avoidance of corruption in the light of the existence of caps upon donations.[25]

7. Conclusion

Premier O'Farrell said that the Government would "take the High Court's decision into account when we re-draft the State's electoral acts in response to this year's report of the Joint Standing Committee on Electoral Matters".[26] The Premier stated, in particular, that the Government would revisit the issue of the electoral expenditure aggregation provisions. Any further reforms in this area will be closely scrutinised by participants in the political process and constitutional law experts.

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1 NSW Legislative Council, Select Committee on Electoral and Political Party Funding, Electoral and Political Party Funding in New South Wales, Report 1, June 2008; *Election Funding Amendment (Political Donations and Expenditure) Act 2008* (NSW)

2 *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009* (NSW)

3 N Rees, NSW Parliamentary Debates, 17 December 2009

4 NSW Joint Standing Committee on Electoral Matters, Public Funding of Election Campaigns, Report 2/54, March 2010; *Election Funding and Disclosures Amendment Act 2010* (NSW)

5 B O'Farrell, NSW Parliamentary Debates, 12 September 2011

6 B O'Farrell, NSW Parliamentary Debates, 12 September 2011

7 See NSW Legislative Council Select Committee on the Provisions of the Election Funding, Expenditure and Disclosures Amendment Bill, Inquiry into the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 Report 1, February 2012. See also these two Parliamentary Research Service papers: Banning political donations from third party interest groups: a summary of constitutional issues, E-brief 1/2012; and Proposed changes relating to caps on electoral expenditure by political parties: a summary of constitutional issues, E-brief 2/2012.

8 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106

9 A Twomey, The application of the implied freedom of political communication to State electoral funding laws (2012) 35(3) *UNSW Law Journal* 625 at 626

10 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568

11 *Coleman v Power* (2004) 220 CLR 1

12 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1

13 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. In one other case in 2013, the High Court split 3:3 on whether an offence in the criminal code breached the implied freedom: see *Monis v The Queen* [2013] HCA 4

14 *Unions NSW v New South Wales* [2013] HCA 58 (18 December 2013)

15 [2013] HCA 58 at [18]

16 [2013] HCA 58 at [25]

17 [2013] HCA 58 at [27]

18 [2013] HCA 58 at [30]

19 [2013] HCA 58 at [38]

20 [2013] HCA 58 at [60]

21 [2013] HCA 58 at [53]

22 [2013] HCA 58 at [63]

23 [2013] HCA 58 at [64]-[65]

24 P Bibby, N Hasham, High Court rules NSW political donations laws invalid, *Sydney Morning Herald,* 18 December 2013

[25] A Twomey, *Unions NSW v Sate of New South Wales [2013] HCA 58*, Address at the Gilbert and Tobin Centre for Public Law's 2014 Constitutional Law Conference, Sydney, 14 February 2014, p12-13

[26] B O'Farrell, High Court decision on donations laws, Media release 18 December 2013

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