Free Speech and Brown Paper Bags

Kieran Pender surveys the campaign finance regulation landscape in Australia post-Unions NSW v New South Wales and considers the potential impact of forthcoming litigation.

Introduction

If campaign finance regulation is the 'Vietnam' of free speech theory in the United States,[1] then war has broken out in Australia. Having vexed courts across the globe for several decades, the constitutionality of regulating electoral contributions and expenditure has finally confronted the judiciary in this country.

While initial skirmishes may have occurred in an early implied freedom of political communication case, *Australian Capital Television Pty Ltd v Commonwealth*,[2] the battleground has been relatively quiet for over 20 years. Now, after a string of amendments to the *Electoral Funding, Expenditure and Disclosures Act 1981 (NSW)*, several plaintiffs have recommenced the fight.

The *Unions NSW v New South Wales* litigation in 2013 brought to the fore several unresolved questions.[3] Does money constitute speech? Should political donations receive constitutional protection? Does any such protection extend to contributions from corporations as well as individuals?

Yet the High Court, as is often the case, did not directly address these key questions and delivered a narrow pronouncement with few hints at any broader jurisprudential trend. Not content to let academics squabble over the judgment's ramifications for another two decades, and perturbed by recent adverse Independent Commission Against Corruption hearings, former Newcastle Mayor Jeff McCloy has further challenged the legislation's validity.

While the *McCloy* litigation may result in nothing more than a limited decision with *Unions NSW*-underpinnings, the dilemma before the bench is normatively challenging and could provoke deeper judicial thinking, including perhaps an answer to the 'is money speech?' question.

Upholding a ban on political donations from property developers, in light of proven corruption, is unlikely to garner much public opprobrium. Yet Division 4A of the *Electoral Funding, Expenditure and Disclosures Act* – which prohibits electoral contributions from particular industries – is beset by a slew of practical enforcement difficulties, and appears to overstep the line between justifiable regulation and illegitimate encroachment on freedom of expression. It may be overly dramatic to declare that fundamental democratic values are at stake, but, at the very least, a judgment upholding Division 4A's validity would be troubling for proponents of free speech.

After providing a brief background to the topic, this article will focus on the forthcoming *McCloy v New South Wales* litigation and its potential ramifications.[4] It will suggest that the legislation in contention is not reasonably appropriate and adapted to serve a legitimate end.

From Buckley to Unions NSW

The origins of modern campaign finance controversy stem back to the 1976 post-Watergate US Supreme Court decision in *Buckley v Valeo*.[5] In that case a distinction was drawn between limitations on political donations and expenditure. The former, aimed at a 'sufficiently important' governmental interest in 'the prevention of corruption and the appearance of corruption',[6] was compatible with the First Amendment. The latter, on the other hand, 'fails to serve' any such interest, and was thus invalid.[7] While *Buckley* continues to provoke litigation in America (indeed it was only in April that the Supreme Court's latest decision on the matter was delivered in *McCutcheon v Federal Election Commission*),[8] until recently the High Court has been untroubled by such controversies.

The High Court equivocated in Unions NSW as to whether the act of donating money could be considered political communication

In *Unions NSW*, though, several plaintiffs sought to strike down amendments to the *Electoral Funding, Expenditure and Disclosures Act* that prohibited political donations 'unless the donor is an individual who is enrolled on the roll of electors'.[9] As the recent judgment has been discussed elsewhere in this edition (see article by Sophie Dawson and Rose Sanderson entitled 'Keeping it in proportion: recent cases on the implied freedom of speech'), this article will only briefly outline the decision's salient features.

In their submissions, the *Unions NSW* plaintiffs drew on the *Buckley* aphorism that donations serve 'as a general expression of support for the candidate and his views' to assert that 'both the making, and acceptance, of a "political donation" constitutes communication'.[10] In other words, the plaintiffs alleged that political donations were tantamount to expression,[11] and therefore deserved protection under the implied freedom of political communication. While

1 Robert Post, 'Regulating Election Speech Under the First Amendment' (1999) 77 *Texas Law Review* 1837, 1837.

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

3 (2013) 88 ALJR 227 ('*Unions NSW*').

4 Jeffery McCloy, 'Writ of Summons', Submission in *McCloy v New South Wales*, S211/2014, 28 July 2014 ('*McCloy*').

5 424 US 1 (1976) ('*Buckley*').

6 *Citizens United v Federal Election Commission*, 558 US 310, 339 (2010) (Kennedy J) ('*Citizens United*').

7 Ibid.

8 *McCutcheon v Federal Election Commission* (12-536, 2 April 2014) slip op ('*McCutcheon*').

9 s 96D(1).

10 Unions NSW, 'Plaintiffs' Written Submission', Submission in *Unions NSW v New South Wales*, S70/2013, 18 September 2013, 3 [15].

11 See, eg, *Buckley*, 424 US 1 (1976).

offering no emphatic rejection of this argument, the High Court in *Unions NSW* was unpersuaded.

Instead, the Court was prepared to accept that the donation prohibition constituted a communicative burden because donations enable recipients to engage in political communication. As public funding did not meet any shortfall, it followed that 'the freedom is effectively burdened'[12] and thus the first limb of *Lange v Australian Broadcasting Corporation* – the accepted test since that seminal 1997 case – was satisfied.[13] However, when applying the second element of *Lange:* that the law must be 'reasonably appropriate and adapted to serve a legitimate end' compatible with the constitutionally prescribed system of government,[14] the plurality judgment did not consider the relevant provisions as 'calculated to promote the achievement of those legitimate [anti-corruption] purposes.'[15] Without even venturing to the final stage of reasoning, French CJ, Hayne, Crennan, Kiefel and Bell JJ simply found that, in effect, 'the Emperor has no clothes'.[16]

While it may seem somewhat wishful thinking, the forthcoming litigation could perhaps necessitate a more developed examination of whether donations do, indeed, constitute speech

The other noteworthy aspect of the legislation under scrutiny in *Unions NSW* was its politically unbalanced nature: it prohibited union affiliation fees, and thus could be seen as an attack on the Australian Labour Party.[17] As Professor Anne Twomey observed, 'the case provides a lesson for governments not to try to be too clever in manipulating electoral laws to their advantage… [courts] do not take kindly to such action.'[18]

The Vexing Question: Is Money Speech?

Since *Buckley* the US Supreme Court has held that money constitutes speech, and therefore deserves First Amendment protection.[19] It is, effectively, 'a form of putting one's money where one's mouth is.'[20] This proposition was upheld most recently in *McCutcheon*,[21] and notwithstanding strident criticism from dissenters including that 'money is property; it is not speech',[22] the "contribution as communication equation" represents the current American position.

In Australia, the answer is not so clear. While expression does not need to be verbal to be protected – the display of dead ducks in *Levy v Victoria* is a good example[23] – the High Court equivocated in Unions NSW as to whether the act of donating money could be considered political communication.

The five-judge plurality judgment instead noted that the implied freedom is not a personal right, and continued that if the plaintiffs' proposition intimated otherwise, 'it may blur the distinction referred to above.'[24] Yet the decision failed to elucidate why a "money as speech" equation might necessarily be considered as a right, rather than a protection. Keane J, in concurrence, simply observed 'how [this] question is to be answered does not depend on the proposition that a political donation is a form of political expression.'[25]

This puzzling issue therefore remains unresolved. The High Court instead found that the legislation affected a communicative burden for other reasons, and thus perhaps 'in practical terms' the answer 'doesn't matter.'[26] The result is intellectually unsatisfying, however, and the dynamics of forthcoming litigation may force reconsideration.

McCloy

With the New South Wales government still smarting from its loss in *Unions NSW*, former Newcastle Mayor Mr McCloy lobbed a further salvo in the campaign finance war.[27] McCloy is challenging Division 4A of the *Electoral Funding, Expenditure and Disclosures Act*, which makes it 'unlawful for a prohibited donor to make a political donation',[28] and similarly unlawful to accept such donations. A prohibited donor is defined as a 'property developer', tobacco, liquor or gambling 'industry business entity', or representative organisation thereof, with broad definitions that encompass directors, officers, spouses and large shareholders.

McCloy alleges, per *Lange*, that this section 'is not reasonably appropriate and adapted to achieving a legitimate end in a manner compatible with the maintenance of the system of representative and responsible government'.[29] Alternatively, McCloy argues that

12 *Unions* (2013) 88 ALJR 227, 236 [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

13 (1997) 189 CLR 520 ('*Lange*').

14 *Unions* (2013) 88 ALJR 227, 247 [115] (Keane J).

15 Ibid 238 [51] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

16 Anne Twomey, '*Unions NSW v State of New South Wales* [2013] HCA 58' (Paper presented at Gilbert + Tobin Centre for Public Law Constitutional Law Conference, Sydney, 14 February 2014) 12.

17 Ibid 2.

18 Ibid 13.

19 See, eg, *McCutcheon* (12-536, 2 April 2014) slip op; *Citizens United*, 558 US 310 (2010).

20 Anne Twomey, 'Political Donations and Free Speech' (Paper presented at Free Speech 2014 Symposium, Sydney, 7 August 2014) 1.

21 McCutcheon (12-536, 2 April 2014) slip op.

22 *Nixon v Shrink Missouri Government PAC*, 528 US 377, 400 (2000) (Breyer J).

23 (1997) 189 CLR 579.

24 *Unions* (2013) 88 ALJR 227, 236 [37] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

25 Ibid 246 [112].

26 Twomey, '*Unions NSW*', above n 16, 6.

27 Jeffery McCloy, 'Statement of Claim', Submission in *McCloy*, S211/2014, 28 July 2014.

28 s 96GA.

29 McCloy, 'Statement of Claim', above n 27, 8.

the legislation 'has the effect of directing, limiting or otherwise interfering with' the constitutional requirement that parliament be 'directly chosen by the people',[30] and is therefore invalid.

The challenge is significant in several respects, but perhaps most prominently because it may force the Court to grapple once again with the 'is money speech?' question. The *Unions NSW* conclusion that the implied freedom was effectively burdened because access to donations was limited has been criticised. In particular Twomey has argued that although unions and corporations could not contribute under the impugned legislation, this still left a large pool of potential donors to fill the approximately 25% differential between the expenditure limit and public reimbursement.[31]

Such criticism is even more persuasive when the quantity of excluded donors is reduced solely to narrow categories of individuals and corporations. To suggest that the availability of campaign funds is still burdened in those reduced circumstances appears to be an abstract rather than practical analysis. Although *Unions NSW* attempted to parry these attacks – 'the defendant's submissions that s 96D places "no material burden" on the freedom … are beside the point. [Q]uestions as to the extent of the burden … arise later',[32] – it is unclear whether this approach can withstand continued scrutiny. Recent comments from Gageler J in *Tajjour v New South Wales*, that 'a law does not effectively burden such communication "unless … it *directly and not remo*tely restricts or limits"' the communication,[33] could assist such arguments. Thus while it may seem somewhat wishful thinking, the forthcoming litigation could perhaps necessitate a more developed examination of whether donations do, indeed, constitute speech.

Ramifications

Regardless of the Court's position on that question, the bench will be forced to seriously consider the difficult issue of whether Division 4A can be seen as reasonably appropriate and adapted to a legitimate end. Unlike in *Unions NSW*, the legislation has an unmistakeable connection to a legitimate anti-corruption purpose – an intent borne out in parliamentary debate and committee reports, and reasonably evident on its face. Division 4A is intended to prevent corruption brought about by contributions from prohibited donors, and it does so by preventing such donations. Evidently, the emperor in *McCloy* is not lacking for clothes.

However, the reasonably appropriate and adapted question is not so easily answered. On one hand, the legislation seems particularly targeted: it does not prohibit all corporate donations to rid the scourge of property developer donation corruption (demonstrated by ICAC with worrying regularity). Rather, it focuses solely on developers and several analogous industries. On this reading, Division 4A may withstand *Lange* scrutiny.

Yet such an approach ignores the troublesome impact the provisions have of excluding numerous individuals and entities from the political process. Whether viewed from a *Lange* perspective or considered from a more normative angle as to whether Division 4A legitimately balances competing anti-corruption and political participation values, the legislation in question appears heavy-handed. Excluding a spouse from involving themselves in the political process simply because their husband or wife is a property developer worryingly excludes citizens from the political process. The argument that they have other methods to demonstrate political support for a candidate, meanwhile, has not been accepted by courts as a valid defence.[34] Accordingly, counsel for Unions NSW Bret Walker SC submitted recently that 'there is something deeply anti-democratic about allowing a school teacher to donate $1,500 to a party but prohibiting his or her neighbour, who happens to be a real estate developer, from the same conduct.'[35]

The guns of war are likely to continue to fire over campaign finance regulation in Australia

Such a conclusion is supported by the availability of a less restrictive method for achieving this desired policy outcome. Noted electoral regulation expert Associate Professor Joo-Cheong Tham has commented that Division 2A's donation restrictions – which cap contributions at certain moderate amounts – render Division 4A 'redundant'[36], while several parliamentary committees echo this view[37]. Although Keane J in *Unions NSW* was troubled by the extent to which the *Lange* test might engage in this type of reasoning, which he alleged 'would seem to countenance a form of decision-making having more in common with legislative than judicial power',[38] the availability of less restrictive measures certainly indicates the chosen approach may not be considered reasonably appropriate and adapted. Although the presence or absence is not necessarily decisive, 'alternative means of achieving the end which are less burdensome on communication on governmental or political matter have long been recognised as relevant to the inquiry.'[39]

Division 4A is also beset by practical difficulties. The New South Wales Electoral Commissioner has labelled the determination of a prohibited donor as a 'tortuous process', which 'fails the compliance-oriented regulation test.[40]' This problem is amplified

30 Ibid 8–9.

31 Twomey, above n 20, 4.

32 (2013) 88 ALJR 227, 236 [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

33 [2014] HCA 35 (8 October 2014) [146] (Gageler J); cf [105]–[107] (Crennan, Kiefel and Bell JJ).34 *Tajjour v New South Wales* [2014] HCA 35 (8 October 2014) [33] (French CJ); *Monis v The Queen* (2013) 249 CLR 92, 146 [122] (Hayne J); for an interesting comparative approach, see Wendy Wagner et al, 'Brief for Plaintiffs', Submission in *Wagner v Federal Election Commission*, 13/5162, 3 July 2013, 71.

35 Bret Walker, Submission No 24 to New South Wales Department of Premier and Cabinet, *Panel of Experts – Political Donations*, 17 September 2014, 8–9.

36 Joo-Cheong Tham, 'Establishing a Sustainable Framework for Election Funding and Spending Laws in New South Wales' (Report, New South Wales Electoral Commission, November 2012) 153.

37 Joint Standing Committee on Electoral Matters, Parliament of New South Wales, *Public Funding of Election Campaigns* (2010) 7; Select Committee on Electoral and Political Party Funding, Legislative Council, *Electoral and Political Party Funding in New South Wales* (2008) 106; Panel of Experts – Political Donations, New South Wales Department of Premier and Cabinet, *Issues Paper* (2014) 18.

38 (2013) 88 ALJR 227, 248 [129] (Keane J).

39 *Tajjour v New South Wales* [2014] HCA 35 (8 October 2014) [152] (Gageler J).

40 New South Wales Electoral Commission, Submission No 18 to Joint Standing Committee on Electoral Matters, '*Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981'*, 12 June 2013, 95.

by indistinct legislative definitions plagued by over and under inclusiveness — they fail to catch corporations that may donate following a planning application yet are not in the development business[41], while prohibiting donations 'even when no conflict of interest' exists[42]. Moreover, the commercial activities of a donor may not be 'readily apparent to the recipient'[43], particularly given the troublesome definitions, creating a structural flaw which endangers any meaningful attempt at self-compliance[44]. While the role of the High Court is not to reprimand legislatures for poor drafting, the effectiveness of Division 4A nevertheless goes to the question of whether it can be considered reasonably appropriate and adapted.

As Warren CJ of the US Supreme Court has noted, 'every citizen has an *inalienable right to full and effective* participation in the political process.[45] Division 4A degrades the ability of citizens to engage with their parliamentary representatives to a seemingly impermissible degree. It appears not reasonably appropriate and adapted per *Lange*, nor, from a normative perspective, a legitimate balancing of two compelling ends.

Interestingly, an analogous challenge is currently before a US federal court with several government contractors seeking the invalidation of legislation that prevents them from making political contributions.[46] While *Unions NSW* cautioned against reliance on American jurisprudence in this sphere,[47] the eventual outcome will be an intriguing source of comparison.

Finally, the ramifications of *McCloy* could be even greater if the Court accepts the challenge Mr McCloy is reportedly bringing to the broader donation caps scheme. Although this article has drawn predominantly from the plaintiff's statement of claim, recent comments from Mr McCloy's counsel suggest that the action could encompass a wider challenge to the entire donation cap framework.[48] Evidently, if successful, such litigation would have widespread significance beyond the freedom of expression issues discussed here.

Conclusion

The Court in *McCloy* is confronted with legislation that is undoubtedly less politically-motivated than in *Unions NSW* and more targeted at a legitimate end. Notwithstanding its abundant faults, Division 4A does achieve a purpose that the majority of the population likely supports: preventing political corruption. The question, though, from either a *Lange* perspective of whether it is reasonably appropriate and adapted, or from a normative perspective, is not easily answered.

McCloy provides the Court with an opportunity to explore some of the vexing issues that were not addressed in *Unions NSW*. Whether the Court will look to do so is of course another matter entirely. Either way the judgment is likely to have significant consequences. This article has argued that the Court should accept Mr McCloy's challenge (at least in its narrow original form), not because the anti-corruption end is not legitimate, but because Division 4A has significant practical difficulties and imposes an overexpansive limitation on political expression.

The emperor might have a bountiful wardrobe in *McCloy*, but will the clothes fit? Regardless, the guns of war are likely to continue to fire over campaign finance regulation in Australia.

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41 Tham, above n 36, 154.

42 Ibid.

43 Ibid 155.

44 Ibid; New South Wales Electoral Commission, above n 40.

45 *Reynolds v Sims*, 377 US 533, 565 (1964) (emphasis added).

46 Wendy Wagner et al, above n 34.

47 See, eg, (2013) 88 ALJR 227, 245 [102] (Keane J).

48 Panel of Experts – Political Donations, Report of Proceedings: Session Four – Constitutional Issues and reform of Election Funding Laws in the Wake of the *Unions NSW* Case (29 September 2014, Sydney) 12.