Lange in a state context

Rebecca Gall reports on *Unions NSW v New South Wales* [2013] HCA 58

A six-member bench of the High Court unanimously held that certain provisions of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) impermissibly burdened the implied freedom of communication on government and political matters and are therefore invalid. The sections considered related to the identities of donors and caps on the amount that can be donated.

Legislation and parties

In March 2012, the two provisions at issue in this case were inserted into the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (EFED Act).

Those sections were:

- s 96D, which provides that it is unlawful for political donations to be accepted unless the donor is an individual who is on the roll of local, state or federal elections; and
- s 95G(6), which aggregates the amount spent by way of electoral communication expenditure by a party and its affiliates for the purpose of capping provisions.

The plaintiffs to the proceedings were trade unions who intended to make political donations to the Australian Labor Party, its NSW branch or other entities. The defendant was the State of New South Wales and the Commonwealth; State of Queensland, State of Victoria and State of Western Australia all intervened.

The questions as to the validity of the provisions were reserved by French CJ for determination by the full bench of the High Court pursuant to s 18 of the *Judiciary Act 1903* (Cth).

Decision of the High Court

The High Court unanimously[1] held that ss 96D and 95G(6) impermissibly burdened the implied freedom of communication on government and political matters. Accordingly, the sections were held to be invalid.

The applicable test

The High Court confirmed that the test consists of two limbs as set out in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, being:

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1. Whether the provision effectively burdens the freedom of political communication either in its terms, operation or effect. This requires consideration as to how the section affects the freedom generally.[2]
2. Whether the provision is reasonably appropriate and adapted or proportionate to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government. This limb involves consideration of whether there are alternative, reasonably practicable and less restrictive means of achieving this.[3]

However, the High Court also used this case as an opportunity to make a contextual clarification as to when legislation will be held to be invalid on this basis:

> The point sought to be made in Lange and in APLA was that legislation which restricts the freedom is not invalid on that account alone. It will be invalid where it so burdens the freedom that it may be taken to affect the system of government for which the Constitution provides and which depends for its existence upon the freedom. Lange confirmed that if certain conditions concerning the operation and effect of the legislation or the freedom are met, legislation which restricts the freedom may nevertheless be valid.[4]

Justice Keane criticised the 'indefinite and highly abstract language'[5] of the test and suggested that:

> the question for the Court can only be whether the impugned law can reasonably be said to be compatible with the free flow of political communication within the federation.[6]

However, as no party or intervener advanced such an argument, Keane J applied the second limb in its current form.[7]

Application of test in a state context

Prior to considering the application of the test it was necessary for the High Court to determine whether

the implied freedom, confirmed in *Lange*, applied in a state context.

In a joint judgment, French CJ, Hayne, Crennan, Kiefel and Bell JJ held that given the complex interrelationship between levels of government and common issues it was necessary to take a wide view of the operation of the freedom of political communication.[8]

Justice Keane ultimately reached the same conclusion but approached the issue on the basis that:

> Where political and governmental information which flows to and from the electorate in state and local government campaigns (that electorate being part of the people of the Commonwealth) might be pertinent to the political choices required of the people of the Commonwealth, the sources and conduits of that information must be kept open and undistorted.[9]

The nature of the freedom

The High Court made it clear that the freedom of political communication is not a personal right.[10]

The plurality referred to the fact that *Lange* 'implies that a free flow of communication between all interested persons is necessary to the maintenance of representative government'[11] but ultimately did not develop this further.

In contrast, this issue was a particular focus for Keane J. After confirming that the issue is not concerned with the vindication of personal rights his Honour stated that:

> In truth, the issue is whether the provision which restricts the free flow of political communication is justifiable in terms of the indispensable need to maintain the free flow of political communication within the federation.[12]

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Application of the Lange test

Argument focussed on the second limb as the defendant conceded that the first limb was satisfied.[13]

Before consideration could be given to the application of the second limb, that is, whether the prohibition is proportionate, the plurality held that it was necessary to identify the object which the section seeks to achieve.[14]

The plurality found that the application of the second limb was forestalled because it was not possible to attribute a purpose to the provisions that was connected to, or in furtherance of, the anti-corruption purposes of the EFED Act.[15] In relation to s 96D, their Honours stated that:

> It is not evident, even by a process approaching speculation, what s 96D seeks to achieve by effectively preventing all persons not enrolled as electors, and all corporations and other entities, from making political donations.[16]

Similarly, in respect of s 95G(6) the plurality concluded that there was 'nothing in the provision to connect it to the general anti-corruption purposes of the EFED Act'[17] and therefore 'no further consideration can be given as to whether the provision is justified.'[18]

Justice Keane, while ultimately reaching the same conclusion as the plurality, did not conclude that it was not possible to identify the object which the provisions were directed toward. His Honour reached the view that the provisions were invalid as they distorted the flow of political communication within the federation.[19]

His Honour held that the proscriptions in s 96D 'do not reflect a calibrated balancing of legitimate ends as contemplated by the second limb' and are very broad:

> they are not calibrated to give effect to the rationale identified by the defendant by criteria adapted to target the vices said to attend the disfavoured sources of political communication.[20]

In respect of s 95G(6) his Honour also found that it distorted the free flow of political communication and:

> is not calibrated, even in the most general terms, so as to target only sources of political communication affected by factors inimical to the free flow of political communication throughout the Commonwealth.[21]

Accordingly, the High Court unanimously declared that ss 96D and 95G(6) were invalid as those provisions impermissibly burdened the implied freedom of communication on government and political matters.

Endnotes

1. French CJ, Hayne, Crennan, Kiefel and Bell JJ wrote a joint judgment, Keane J wrote a separate judgment. Gageler J did not sit after recusing himself. His Honour stated that he had, as a solicitor-general of the Commonwealth provided signed legal advice to the attorney-general of the Commonwealth in response to a request for advice which touched on the validity of provisions of the EFED Act: [2013] HCATrans 263.
2. At [35] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; at [115] per Keane J.
3. At [44] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; at [115] per Keane J.
4. At [19] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
5. At [129] per Keane J.
6. At [133] per Keane J.
7. At [134] per Keane J.
8. At [25] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
9. At [158] per Keane J.
10. At [30] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; at [109] per Keane J.
11. At [27] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
12. At [166] per Keane J.
13. At [38] and [43] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
14. At [46] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
15. At [60] and [64].
16. At [56] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
17. At [64] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
18. At [65] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.
19. At [137] and [168] per Keane J.
20. At [141] per Keane J.
21. At [168] per Keane J.

Patents for methods of medical treatment

Emma Beechey reports on *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* [2013] HCA 50

The High Court recently ruled that a method of medical treatment of the human body involving the application of a product to produce a therapeutic or prophylactic result is a 'manner of manufacture' for the purposes of s 19(1)(a) of the *Patents Act 1990* (Cth) (the Act). The court also held that a new therapeutic use of a known pharmaceutical substance having prior therapeutic uses can be a 'manner of manufacture'. This is the first occasion on which the High Court has ruled on the patentability of methods of medical treatment of the human body.

The facts and the proceedings

The drug leflunomide is used to treat psoriatic and rheumatoid arthritis. It was patented in 1979 by Hoechst AG.[1] That patent expired in 2004. In 1994, Hoechst AG applied for a patent for a method of preventing psoriasis by application of leflunomide. That patent is the subject of the proceedings and will expire in 2014.

In 2008, Apotex Pty Ltd obtained registration on the Australian Register of Therapeutic Goods of a generic version of leflunomide (Apo-Leflunomide). The product information supplied with Apo-Leflunomide stated that the product was indicated for the treatment of rheumatoid arthritis and psoriatic arthritis. It stated that it was not indicated for the treatment of psoriasis not associated with arthritic disease.

The respondents brought proceedings in the Federal Court alleging that Apotex would infringe the patent under s 117 of the Act by supplying Apo-Leflunomide for the treatment of psoriatic arthritis. Apotex denied that it would infringe the patent and cross-claimed seeking revocation of the patent.

Lower courts

The primary judge (Jagot J) held that the patent was valid[2] and that the supply of Apo-Leflunomide for treatment of psoriatic arthritis would infringe the patent because the effect of such treatment would be the indirect treatment or prevention of psoriasis.[3]

The full court of the Federal Court dismissed the appeal, upholding the primary judge's finding as to validity of the patent and finding that the supply of the Apotex product would infringe the patent, but for different reasons to those set out by the primary judge.[4] The full court found that the construction of the claim preferred by the primary judge was incorrect; the patent claim was not for treatment