High Court upholds constitutional validity of political donations legislation

Madeleine Ellicott reports on *McCloy v New South Wales* [2015] HCA 34.

In *McCloy*, the High Court considered whether certain provisions of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW)(EFED Act) that impose a cap on political donations, prohibit property developers from making such donations and restrict indirect campaign contributions impermissibly infringed the implied freedom of political communication.

The majority (French CJ, Kiefel, Bell and Keane JJ in a joint judgment, Gageler J and Gordon J) found that none of the impugned provisions were invalid. Nettle J upheld the challenge to Division 4A of the EFED Act but found that none of the other impugned provisions were invalid. The court diverged on the issue of the appropriate methodology for analysing burdens on the freedom of political communication under the test in *Lange v Australian Broadcasting Corporation*[1].

Background

Mr McCloy, the first plaintiff, was a director of the second and third plaintiffs, McCloy Admin and North Lakes. From about October 2010, Mr McCloy made political donations exceeding the cap imposed in Division 2A of Part 6 of the EFED Act. Further, McCloy Admin made an indirect campaign contribution in full or part payment of the remuneration of a member of the staff of the election campaign of a candidate in the March 2011 New South Wales state elections.[2]

The plaintiffs brought a special case in the High Court challenging the following provisions of the EFED Act:

- The scheme for imposing caps on donations (Division 2A of Part 6);
- The banning of donations from all categories of prohibited donors (Division 4A of Part 6); and
- The banning of indirect donations (s 96E).

The 'Lange' test

It was not in dispute[3] that the test to be applied to determine whether a law infringes the implied freedom is that in *Lange v Australian Broadcasting Corporation,*[4] as restated in *Coleman v Power*.[5] This test involves a two-limb analysis: first, whether the law effectively burdens the freedom and second, if the law effectively burdens that freedom, whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[6]

In *McCloy*, the approach adopted by the plurality and the other three judges as to the formulation of the *Lange* test diverged. At the outset of their judgment, the plurality broke down the *Lange* test into three questions, as follows:[7]

1. Does the law effectively burden the freedom in its terms, operation or effect?
2. If 'yes' to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object?

Their Honours also stated that the 'proportionality' test involved in answering the third question had three stages, being whether the law is justified as suitable, necessary and adequate in its balance.[8] According to the plurality, suitability requires 'a rational connection to the purpose of the provision'. The requirement that it be 'necessary' requires that 'there is no obvious and compelling alternative, reasonably practicable means of achieving the purpose which has a less restrictive effect on the freedom'. Finally, adequacy of balance requires a value judgment describing the balance between the importance of the purpose served by the restrictive measure, and the extent of the restriction it imposes on the freedom.[9] In formulating this test, their Honours had regard to analogous criteria developed in other jurisdictions (particularly in Europe and the United Kingdom).[10]

In contrast, the other three justices eschewed the need for a reformulation of the *Lange* test. In particular, Gageler J was critical of the plurality's approach, stating that:

> This case does not require a choice to be made between the alternative expressions of the 'reasonably appropriate and adapted' formulation. Much less does this case warrant consideration of the benefits and detriments of the wholesale importation into our constitutional jurisprudence, under the rubric of proportionality, of a particular and prescriptive form of proportionality analysis which has come to be applied in relation to the Canadian Charter of Rights and Freedoms and the European Convention on Human Rights'.[11]

Gordon J stated that the questions raised in the special case could be answered 'by reference to the known questions and tools' and noted that no party had contended for a revised test.[12] Similarly, Nettle J endorsed the two-limbed test in *Lange*, noting that 'the standard of appropriateness and adaptedness does vary according to the nature and extent of the burden'. [13]

Was the freedom burdened?

It was not disputed that the provisions of the EFED Act effectively burdened on the freedom, as reflected in the previous judgment of the court in *Unions NSW v New South Wales*,[14] as they restricted the funds available to political parties to meet the costs of political communication. [15] The plaintiffs' submission that the provisions had a further effect on the freedom, namely, on the ability of donors to make substantial political donations in order to gain access and make representations to politicians and political parties, was rejected, the plurality noting that the implied freedom was not an 'individual right'.[16]

Legitimate purpose/reasonably and appropriately adapted

The plurality, applying the three-step test set out above, held that while each of the provisions did burden the implied freedom, they had been enacted for legitimate purposes, advanced those purposes by rational means that 'not only do not impede the system of representative government … but enhance it', were adequate in their balance, and that there are no obvious and compelling alternative and reasonably practicable means for achieving that purpose.[17] In particular, their Honours held that the impugned provisions were clearly directed to the stated object of the EFED Act, being the prevention of 'corruption and undue influence in the government of the state'.[18] They also served an ancillary purpose of 'overcoming perceptions of corruption and undue influence'. Their Honours rejected the plaintiffs' argument, founded in United States jurisprudence such as the decision of Kennedy J in *Citizens United v Federal Election Commission* that 'ingratiation and access … are not corruption',[19] and in so doing, underlined the risk of perceived 'clientelism' to the political process.[20]

Gageler J concluded that the restrictions on political communication imposed by the provisions were no greater than were reasonably necessary to be imposed in pursuit of a compelling statutory object.[21] Gordon J, applying a two-step *Lange* analysis, found that while each provision burdened the implied freedom, they served a legitimate object and were reasonably and appropriately adapted to serving that end.[22]

Nettle J upheld the validity of the political donation caps and restrictions on indirect contributions, however held that the prohibited donor provisions were invalid as they failed the second limb of the *Lange* test; in particular, his Honour noted that 'burdens which discriminate between, or have an unequal effect upon, segments of the community, political parties and candidates or certain political viewpoints require strong justifications'.[23]

The plurality's approach to proportionality testing in this case may have significance, not only for cases considering the implied freedom, but also more broadly.

Conclusion

The plurality's approach to proportionality testing in this case may have significance, not only for cases considering the implied freedom, but also more broadly. In particular, the issue of whether the proposed method of analysis should also be applied in cases involving purposive and incidental powers, as foreshadowed in the joint judgment at [3], is a question for another day.

Endnotes

1. (1997) 189 CLR 520.
2. *McCloy v New South Wales* [2015] HCA 34 at [277] – [279].
3. Ibid at [308].
4. (1997) 189 CLR 520.
5. (2004) 220 CLR 1.
6. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–8; *Coleman v Power* (2004) 220 CLR 1, 50–51 (McHugh J), 77–8 (Gummow and Hayne JJ), 82 (Kirby J).
7. *McCloy v New South Wales* [2015] HCA 34 at [2], [66] – [93].
8. Ibid.
9. Ibid.
10. Ibid at [3].
11. Ibid at [140].
12. Ibid at [308] and [311].
13. Ibid at [220] and [222].
14. [2013] HCA 58.
15. *McCloy v New South Wales* [2015] HCA 34 at [30].
16. Ibid at [25] – [30].
17. Ibid at [5].
18. Ibid at [33].
19. 558 US 310 at 360 (2010).
20. *McCloy v New South Wales* [2015] HCA 34 at [36].
21. Ibid at [98].
22. Ibid at [311].
23. Ibid at [251].