Case Notes

Langer v The Commonwealth and Ors
(1996) 70 ALJR 176[1]

'What is this leading to, Mr Langer?'[2]

Coming before the court on a question stated by Deane J, Langer (the applicant) contended that s 329A of the *Commonwealth Electoral Act* 1918 (the Act) was invalid. The detail of s 329A is explained below, but the general effect of the section is to prohibit the publication of material with an intention to encourage a voter to fill a House of Representatives ballot paper otherwise than as is prescribed in s 240 of the Act. Insofar as the net effect of s 329A read with s 240 is to restrict the manner in which a citizen may attempt to influence how others may cast their vote in a Federal ballot, that effect was, on the argument put by Langer, in fatal conflict with s 24 of the Commonwealth Constitution. Furthermore, as s 329A restricts the right of a citizen to communicate information about the electoral processes of the Commonwealth, it may also have infringed the implied right to free speech. The Court rejected the application by a majority of five to one.[3]

Compulsory Preferential Voting, s 240

As the reasoning of the Court is closely linked to the legislative context in which s 329A was introduced into the Act, it will be useful to begin with some comments on the voting system used for House of Representatives

[1] High Court, 20 February 1996 (Brennan, CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

[2] Brennan CJ, Transcript of proceedings before the High Court: 4/10/95, at p 40. The applicant appeared in person.

[3] Dawson J dissenting.

elections. It is generally true to say that where preferential voting is used to select a single candidate from a field of several, the method of counting the vote has a fragile logic. Put simply, the probability that preferential voting will produce absolute majority results (ie, 50% plus one other vote) in single-member constituencies will decrease when:

i) of the total number of votes which are declared to be valid;

ii) there is an increase in the proportion of ballot papers which fail to record full preferences.[4]

To guard against the chance that polls may deadlock because of a drop in compliance with the requirement that preferences should be listed on the ballot-paper, s 240 of the Act mandates full preferential voting. This brings us to an administrative tension which is central to the case.

As a means of safeguarding the House of Representatives vote against the problem of deadlock, (ie, a ballot which produces no result), the remedy afforded by s 240 brings its own problems. The Act establishes full preferential voting through s 268(1)(c) which excludes from the count all those ballot-papers which fail to comply with s 240. On the face of it this is reasonable; wasted votes are written down as one of the costs of achieving secure majorities in elections for the national parliament. But it is also open to say that, as with all cost-benefit analysis, the sparse logic of s 240 loses its appeal as the 'costs' side of the balance mount. Put differently, if compulsory full preferential voting comes at the expense of disenfranchising large numbers of voters, changes and compromises are called for. And the case for compromise is stronger where there are obvious trends in the informal vote which point to large numbers of voters who had made honest and reasonable mistakes.[5] Consider the following assumption and related scenarios:

i) Assume the only relevant instruction on the House of Representatives ballot-paper reads: *'...number every box to make your vote count'*[6]

ii) The completed ballot-paper appears as:

ALP	LIB
1	

[4] This is a result of the 'exhaustion of votes', ie, the retirement of ballot papers from the count as preference distribution occurs.

[5] As distinct from that percentage of electors who cast deliberately informal votes and who, effectively, choose to disenfranchise themselves.

[6] House of Representatives ballot-papers for the 1990 federal election; see Joint Standing Committee on Electoral Matters, *1990 Federal Election Report*, December 1990, Schedule 1, Form F.

This contravenes s 240, but clearly expresses a full set of preferences; ie, as there are only two candidates, the blank return on LIB can be fairly read as the numeral 2 and the vote should therefore not be ruled out as informal. Such a vote would in fact be saved by s 268(1)(c) of the Act.

iii) The completed ballot-paper appears as:

LIB	National	Shooters
3	4	4
Democrat	Green	Wilderness
1	2	2
ALP	Religious	Natural Law
3	5	5

This contravenes s 240 as numerals 2,3,4 and 5 are repeated. However, this also may be seen as an honest and fair interpretation of the instruction on the ballot-paper; ie, all the squares are numbered and the elector has ranked the candidates by first placing them into politically relevant categories. Furthermore, as the number 1 appears once only, a clear first preference is indicated. The paper would be exhausted after first preferences as it is ambiguous thereafter, but the first preference should be saved and would in fact be saved by ss 270(2) and 270(3) of the Act.

iv) The completed ballot-paper appears as:

LIB	National	Shooters
2	2	2
Democrat	Green	Wilderness
2	2	2
ALP	Religious	Maoist
2	2	1

This contravenes s 240 as the numeral 2 repeats. However, this may again be seen as an honest and fair interpretation of the instruction on the ballot-paper; all the squares are numbered and the elector has ranked all candidates equally second, other than Maoist, where a first preference is indicated. Again the paper would be exhausted after first preferences, and is saved by ss 270(2) and 270(3) of the Act.

So it is that compromise appears in the Act in the form of remedial provisions (ss 268 and 270) which identify common types of innocent and reasonable mistake and save otherwise invalid ballot-papers. Clearly, the purpose of the saving provisions is to ensure that the quest to safeguard full preferential voting (s 240) does not deny the franchise to voters who make honest and reasonable mistakes; such ballot-papers will be counted until ambiguity sets them aside. But consider this. What would be the result if, on reading ss 268 and 270, a political activist discovered the unintended effect of the saving provisions, ie, that 'optional' and 'selective' preferential voting are available, albeit in a de-facto way? It is just that point which attracted the attentions of the applicant in *Langer*.

Hypothetical ballot-paper (iv) above is an example of the voting method which Langer sought to advocate. The effect of following the 'Langer method' is obvious; by placing the numeral 1 against the candidate of first choice and the numeral 2 against all other candidates, the ballot-paper would be saved by s 270 of the Act but would always 'exhaust' after first preferences. In Langer's view, as the Act saved such a vote from the effect of s 240, both optional and selective preferential voting were legally permitted and thus were matters on which he should be allowed to publicly advocate and encourage others to adopt.

As public discussion of the Langer voting method increased during the late 1980s, the Australian Electoral Commission became concerned that widespread and deliberate use of the saving provisions could reach a level which would undermine the voting system. The Australian Electoral Commission cited a ninefold increase in 'exhausted votes' during the 1990 election as a measure of the extent to which voters had begun to deliberately use the saving provisions as a route around s 240 (*1990 Federal Election Report*). Not wanting to lose the benefit of the 'safety net' which ss 268 and 270 created for genuinely mistaken voters, the Australian Electoral Commission instead advocated a new penalty section for the Act. The outcome was s 329A:

> "A person must not, during the relevant period in relation to a House of Representatives election under this Act, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with section 240."

Introduced by s 27 of the *Electoral and Referendum Amendment Act* 1992 (Cth), the stated objective of s 329A was to deter public advocacy of voting styles which contravene s 240 but would be saved by ss 268 and 270. It was against s 329A that Langer made his application.

Reasons of the Majority

> "I would be the last person to be encouraging you to take litigation but this case does not seem to raise the issues that you wish to raise." McHugh J to Mr Langer (Transcript:89)

Just as we have taken some time to consider the background to the underlying issue, so did the Court. Much of the text of each of the five judgments is devoted to an analysis of aspects of the Commonwealth electoral system and those provisions of the Act which we have discussed above. Materially, the question reserved was: *'Is section 329A...a valid enactment.'* However, as s 329A is in aid of s 240, it was relevant for the court to examine the validity of s 240. Of the substantial legal reasoning in the four majority judgements,[7] the general sense of what was said fits under two headings; validity of ss 240 and 329A and, 'Free Speech'.

Authority to enact s 240 was found in ss 51(xxxvi) and 31 of the constitution, a combined legislative grant which Brennan CJ[8] characterised as a plenary power that gave clear support to the enactment of compulsory preferential voting for commonwealth elections[9]. Having located power to enact s 240 of the Act, the court addressed the major part of the argument advanced by Langer, ie, whether the grant of power from ss 51(xxxvi) and 31 was controlled or cut down by the words of s 24 of the constitution, the relevant part of which reads:

> "The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth..."

From the phrase 'chosen by the people' the applicant sought to draw implications from the fact that, as s 240 required preferences be marked for all candidates, many voters would contribute to the election of candidates to whom they were opposed. With this in mind, the majority considered and adopted various interpretations of s 24 before rejecting the argument that *chosen by the people* carries an implication that voters may not be compelled to list preferences for candidates to whom they may be opposed. The common ground to be taken from the collected opinions of the majority is straightforward: the constitutional principle which is spoken for in s 24 requires just that citizens of the Commonwealth should be free to make a choice between candidates presented at democratic elections. Consistent with that view it was also said that s 24 creates no personal rights. As put by McHugh J:

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7 Brennan CJ, McHugh and Gummow JJ; Toohey and Gaudron JJ in a joint judgment.
8 70 ALJR 176 at 180.
9 *Judd v McKeon* (1926) 38 CLR 380, confirmed the power to establish compulsory preferential voting for the Australian Senate.

"The words *chosen by the people*... do not confer individual rights on electors."[10]

Once the majority had decided that s 240 was valid, they had little difficulty accepting the validity of s 329A. In the words of Brennan CJ,[11] s 329A was '...appropriate and adapted to the protection of...' s 240. Accepting the lead of the Chief Justice, other members of the majority pointed to aspects of s 329A which supported the view that the section was drafted to limit the 'dampening effect' it may have on communications about House of Representatives elections. First, and perhaps the factor which most influenced the court, was the specific nature of the offence created. As the section requires proof of an intention to encourage non-compliance with s 240 before an offence is committed, it was acknowledged that a wide range of communications would be unaffected by it. For example, it was accepted that s 329A would restrain nothing within that range of communication which might be imagined to stretch from the mere provision of information[12] to strong criticism of the system. Nor would s 329A restrain advocacy of the repeal of ss 329A and 240[13]. Nor would it be an offence to encourage people to not vote at all.[14]

Second, it was said that the dampening effect likely to arise from the prohibition in s 329A was further limited by a rider that the offence could be committed only during an election period. Third, in addition to taking account of the limits drafted into s 329A, the purpose served by the section was considered. As we said earlier, s 329A was introduced to curb the increase in numbers of electors using ss 268 and 270 as a path around the stipulation of full preferential voting in s 240. Seen in that light, s 329A served a dual purpose; it proscribed conduct which might deadlock seats in House of Representatives elections and allowed for the retention of ss 268 and 270 so as to preserve the franchise for electors who made honest mistakes filling the ballot-paper. No member of the majority had difficulty with the proposition that s 329A was reasonable in the context of those objectives.

There is much irony in *Langer*. For a case which attracted wide attention as one in which issues of free speech were said to be at stake, the belief that s 329A infringed the implied right of free communication did not commend itself highly to the applicant, who raised the point but did not press it in argument. The reluctance of the applicant notwithstanding, each of the majority judges expressed an opinion on the issue and each rejected the proposition. As most of the points we have already discussed in support of the contention that s 329A was 'appropriate and

[10] 70 ALJR 176 at 194.
[11] 70 ALJR 176 at 180.
[12] 70 ALJR 176 at 187.
[13] 'Nothing in s 329A prevents the plaintiff or anybody else from arguing that the system set up by Pt XVIII is unfair, undemocratic, an attack on conscience, or riddled with inconsistencies and absurdities.' McHugh J at 193.
[14] 70 ALJR 176 at 197.

adapted' reappear as elements that count against the submission on the freedom of communication, they need not be repeated. At the risk of oversimplification, the bare logic of the majority view was that as the restrictions in s 329A protect a component part of 'representative government' and are appropriately limited in scope and effect, there was no infringement of the right to free communication.

The Dissent

> "Dawson J: '...your argument is not based upon any implied freedom of speech...?'Mr Langer: 'Yes, I have a similar attitude to the vagueness of implications to some that I have seen in your judgments...'" (Transcript:28)

Notwithstanding the advice of the applicant on the uncertainties of implied constitutional freedoms, the dissenting opinion of Justice Dawson turns on a straight application of what his Honour sees as the correct principle to be taken from the 'free speech' cases:[15]

> "The freedom of communication which I thought to be required by the Constitution was confined to what is necessary for the conduct of elections by direct popular vote as required by ss 7 and 24 and related sections. Nevertheless, in my view, that requirement is sufficient to invalidate s 329A of the Act."[16]

How did Dawson J reason to this position? Inter alia, his Honour made the following points. First, and contrary to the view of Brennan CJ noted above, the relevant legislative power [ss 31 and 51(xxxvi)] is not '...a power which is at large...[but]...a power to make laws for the purpose of implementing s 24'.[17] Second, as s 24 requires that the people remain free to make informed choices at elections, '...access on the part of the voter to the available alternatives in the making of the choice...'[18] must not be restricted. Third, as the literal import of ss 268 and 270 is such that an elector may vote otherwise than as prescribed by s 240, the practical effect of s 329A is to penalise communications relevant to the exercise of lawful voting alternatives. As a result, s 329A was in direct conflict with s 24; ie, it was not 'reasonably and appropriately adapted to the achievement of an end which lies within the ambit of the relevant legislative power'.[19] Dawson J was unimpressed by the rider on s 329A which requires proof

[15] In which, ironically, Dawson J consistently challenged the majority of the Mason court. See especially *Theophanous v Herald and Weekly Times* (1994) 182 CLR 104.
[16] 70 ALJR 176 at 184.
[17] 70 ALJR 176 at 184.
[18] 70 ALJR 176 at 183.
[19] 70 ALJR 176 at 185.

of intention to encourage others to ignore the stipulations in s 240:

> "I must confess that I am unable to see how political discussion can be confined to the mere imparting of information and why it should not extend to the furnishing of information with the intention that it should be used. Indeed, exhortation or encouragement of electors to adopt a particular course in an election is of the very essence of political discussion and it would seem to me that upon the view adopted by the majority in the earlier cases, s 329A must infringe the guarantee which they discern."[20]

Comment

There is much to be said for the dissenting opinion of Dawson J, his final view resonates correctness. But what of the view taken by the majority in *Langer*? A point which stands out is the treatment of s 24 of the constitution. Think of s 24 as one part of the general discourse which defines the notion of 'democracy' as it applies to the federal government. Seen in this way s 24 can be described, after *Langer*, as a minimalist text with few active political implications. Put differently, as s 24 establishes nothing beyond a (very) general requirement that democratic elections must occur, the grounds upon which a challenge to the constitutionality of federal electoral laws may be based are very narrow. For instance, while s 24 ensures a right of choice at free elections, it does not give electors a right to choose the method by which their vote will be cast (Brennan CJ[21]). Nor does s 24 establish grounds to object against listing preferences where an elector either holds no personal preferences[22] or is opposed particular candidates. On this last matter, McHugh J was determined to leave no room for doubt and opened his remarks in typically robust fashion; 'Members of Parliament may be *chosen by the people* even though the people dislike voting for them'.[23] His Honour underscored the point two pages later and illustrated a key aspect of his approach to constitutional doctrine when he said:

> "Whether or not a Member has been chosen by the people depends on a judgment, based on the common understanding of the time, as to whether the people as a class (emphasis added) have elected the Member. It does not depend on the concrete wishes or desires of individual electors."[24]

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[20] 70 ALJR 176 at 185.
[21] 70 ALJR 176 at 179.
[22] Brennan CJ, (70 ALJR 176 at 179) citing *Faderson v Bridger* (1971) 126 CLR 271
[23] 70 ALJR 176 at 193.
[24] 70 ALJR 176 at 195.

This interpretation of s 24, incorporating the people as a 'class' and excluding 'the concrete wishes and desires of individual electors' from what is relevant, is an expression of McHugh J's preference for institutionalist reasoning. Put differently, 'the people' enter his constitutional frame as any other institution might. This aspect of his reasoning goes some way to explaining McHugh J's continuing opposition to the implied rights jurisprudence of the Mason Court. It is also an approach which, although I take sympathy with it, is flawed. When applied to populations or to any lesser sized group of people, notions such as 'class' and 'institution' must be formulated in a manner which confirms that the reference is to some human phenomena. But what is the ongoing relevance of this point? So long as 'the people of the Commonwealth' is held to denote something in the nature of a generalised, abstract 'personality', it is difficult to see how 'the people' can refer to an external reality which is not stripped of relevant human content. In other words, as expressed by McHugh J the 'people' described can never be a reference to 'actual' human kinds; it is a reference is some human-analogue, or to an ideal type in the manner of Weber's approach to social theory.[25]

If the approach taken by Justice McHugh to the constitutional definition of 'the people' is accepted by other members of the Court, there can be little to encourage belief in the prospect that the scheme of citizen-rights favoured by the Mason court will be extended to the current High Court. The reason for drawing this conclusion is quite basic. Thought of as an objective class and no more, the constitutional status of 'the people' is (mainly) that of a passive 'object'. When a question arises which requires the court to assess the validity of the conduct of the three active constitutional 'subjects', (the parliament, the executive, the judiciary), account may have to taken only of 'interests' which arise in 'right of the people as a whole.' Of this approach to the constitutional role of the people I detect a radical downgrade from what might have been assumed, for example, from referring to 'the people' as a 'living force'.[26]

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[25] The primary source is H Gerth & C Mills (eds) *From Max Weber*, London: Routledge, 1948; for a thorough discussion of applications to politics and the law see R Dowse and J Hughes *Political Sociology*, Chichester: Wiley, 1983.

[26] See Deane J in *Theophanous* (1994) 182 CLR 104.