

# Never has the Alliance been so important



By Eva Scheerlinck

**T**hat the Alliance has never been more relevant or more necessary has been made abundantly clear by the High Court decision on the legal advertising ban in NSW.

On 1 September 2005 the High Court decided to uphold the validity of the Legal Profession Regulation 2002 (NSW), which prohibits the advertising of personal injury legal services in that state.<sup>1</sup>

While obviously affecting our members in NSW, and also in WA, NT and QLD where similar restrictions apply, this decision's most significant implications are for legal consumers' rights to information.

We have no equivalent to the First Amendment to the US Constitution, so Australians have no guaranteed freedom of communication. The High Court held that the NSW Regulation did not impermissibly infringe the freedom of communication on political and governmental matters implied in our Constitution.<sup>2</sup> While our Constitution requires a system of responsible and representative government, the implied freedom of speech does not cover information communicated by personal injury lawyers to those whose rights have been infringed, but who are not already the lawyers' clients. The fact that the Regulation makes it a criminal and

professional offence for NSW lawyers to provide this information to potential consumers of legal services, enabling them to access appropriate remedies, was hardly raised in the reasons for the decision.

In a dissenting judgment, Justice Kirby said: "Unless persons affected may be informed about the existence of such rights, and how they may go about enforcing them, the rights will in many cases be entirely theoretical. They will be unknown or, if known, unenforced because of ignorance, uncertainty or fear of the costs and other difficulties of attempting to turn the rights into remedies."<sup>3</sup>

In considering whether the NSW Regulation infringed the requirements of Chapter III of the Constitution (which confers judicial power), the High Court considered the impact of lawyer advertising on the necessity of lawyer/client communication. McHugh J, in a dissenting judgment, talked of the practical nature of lawyer/client relationships. "In practice the formal client-lawyer relationship is frequently created only after the lawyer has had a preliminary consultation with the client. The protection that Chapter III gives to communications between litigants and potential litigants and lawyers does not depend on the existence of retainers but on communications made by lawyers to persons with potential federal rights or obligations."<sup>4</sup>

So while some practicalities and principles were acknowledged, the High Court in a 5:2 majority upheld the validity of the Regulation, dismissing the plaintiffs' arguments on the freedom of communication

guarantee, the Chapter III argument, the s92 argument, the submissions on extra-territorial application and alleged inconsistencies with federal legislation.<sup>5</sup>

Personal injury lawyers can therefore be effectively silenced by government regulation, even when their communication is designed to inform people how to access legal services, or how the law has changed and might affect their legal entitlements.

If one part of a profession can be legally censored in this way, then surely other professions and institutions should be alarmed? Surely this High Court decision makes the need to enshrine proper, democratic safeguards in a federal bill of rights even more imperative? In the meantime, the current vacuum – where principled leadership in our current legislature should be – must be filled by individual lawyers working to protect people's rights. In this context, the importance of the Alliance cannot be overstated. ■

**Notes:** **1** *APLA Limited & Ors v Legal Services Commissioner of NSW & Ors* [2005] HCA 44. [http://www.austlii.edu.au/au/cases/cth/high\\_ct/2005/44.html](http://www.austlii.edu.au/au/cases/cth/high_ct/2005/44.html)  
**2** Kirby J, dissenting. **3** At page 106 of the judgment. **4** At page 33 of the judgment. **5** See 'APLA's High Court challenge to restrictions on the advertising of legal services' by Keven Booker in the November/December 2004 *Precedent*, issue 67.

**Eva Scheerlinck** is the Australian Lawyers Alliance's Chief Executive Officer.  
**PHONE** (02) 9258 7700  
**EMAIL** [eva@lawyersalliance.com.au](mailto:eva@lawyersalliance.com.au)