Constitutional issues concerning the validity of NSW election funding laws

By Anne Twomey*

Introduction

There are good grounds to argue that recent changes to NSW election funding laws, contained in the *Election Funding, Expenditure and Disclosures Amendment Act* 2012 (NSW) are constitutionally suspect because they breach the implied freedom of political communication. This is because they are arguably not reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the system of representative and responsible government established by the Constitution. These provisions are therefore likely to fail the second limb of the test set out by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

However, there are several difficult constitutional hurdles that these laws would have to overcome before even getting to the second limb of the *Lange* test. This paper addresses them.

1. Does the Commonwealth implied freedom of political communication apply to State laws that do not affect Commonwealth matters?

The implied freedom of political communication is derived from the Commonwealth Constitution. Since the *Lange* case in 1997, this implication has been anchored firmly in the text of the Constitution, rather than a general principle of 'representative government'. In particular, it is derived from ss 7 and 24 of the Constitution which require that Members of Parliament be 'directly chosen by the people' and s 128 of the Constitution which requires a referendum to be held to approve any constitutional amendments. In both cases, federal electors would be unable to make a free and informed choice in exercising their vote if they were not able to communicate and receive communications about political matters. Hence the implied freedom is tied to the notion of allowing federal electors to be 'informed' when exercising their votes in elections and referenda. The implied freedom operates as a limitation on legislative and executive power.

It is clear that State laws have the potential to burden the implied freedom. For example, State laws of defamation could impede criticism of Commonwealth Members of Parliament or candidates in Commonwealth elections and therefore limit the capacity of federal electors to be informed before exercising their votes. In the first cases in which the High Court recognised the implied freedom in 1992, a majority of the High Court argued that political discourse was 'indivisible', meaning that one could not divide it into

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discourse about State political matters and Commonwealth political matters. This was because such a dividing line would be extremely difficult to draw, given that the political responsibilities of the Commonwealth and the States have now significantly merged. For example, traditionally State matters such as education and health are now the subject of Commonwealth funding and are subject to initiatives such as a national curriculum. Commonwealth powers, such as the corporations power and the external affairs power, have been stretched by the High Court to cover a much wider range of issues than initially intended. Further, political parties operate across the levels of government and a scandal affecting a party at one level of government might influence voters with respect to another level of government. Finally, voters have little knowledge of the division of political responsibility and are therefore likely to be influenced by state matters in exercising their federal vote and vice versa.

Hence, in the cases on the implied freedom in 1992 and 1994 (eg *Australian Capital Television v Commonwealth, Nationwide News Pty Ltd v Wills, Theophanous v Herald & Weekly Times Ltd* and *Stephens v West Australian Newspapers*) the High Court did not distinguish whether a political matter was or was not one which was likely to inform a federal elector in exercising his or her vote. The more pragmatic approach of lumping all political communication into the one category of political discourse was taken.

In 1996, however, there was a swing away from the broad interpretation of the implied freedom towards a more refined implication that was attached more closely to the terms and structure of the Commonwealth Constitution. In the case of *Muldowney v South Australia* (1996) 186 CLR 352, a majority of the High Court held that a State law concerning communication about the method of filling out a ballot paper in a State election had nothing to do with Commonwealth matters and was not covered by the Commonwealth implied freedom. In the *Lange* case, in 1997, the Court again stressed that the freedom of political communication implied from the Commonwealth constitution 'is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the [Commonwealth] Constitution' ((1997) 189 CLR 520, 561).

In subsequent cases, the High Court has not clearly identified where the dividing line is placed. If the State law limits communication about issues of general political relevance, such as Aboriginal affairs (see *Wotton v Queensland*), then it will be covered by the implied freedom. If the State law involves political matters where there is inter-governmental cooperation and interaction between the levels of government, such as policing (see *Coleman v Power*), then it will also fall within the implied freedom. However, it is likely that if the law concerns State electoral matters (see *Muldowney v South Australia*) which do not impact at all upon Commonwealth elections (see *Australian Capital Television*), then the law would not be covered by the Commonwealth implied freedom.

Given that the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW), in its provisions concerning political donations and expenditures, is confined in its application so that it does not affect donations to political parties with respect to Commonwealth

electoral campaigns, there is therefore a good argument that the Commonwealth implied freedom will not apply to it.

2. Is there an implied freedom of political communication which can be drawn from the State Constitution?

If a constitutional implication is to bind a State Parliament and affect the validity of its laws, then it must be derived from entrenched constitutional provisions. If the implication is drawn from unentrenched provisions, then these provisions can be impliedly amended or repealed by subsequent ordinary legislation. Hence any implication will be an ineffective restraint upon legislative power.

The *Constitution Act* 1902 (NSW) is largely unentrenched with only particular provisions entrenched by ss 7A and 7B. It is possible, however, if one adds together the entrenched provisions to conclude that the *Constitution Act* 1902 (NSW) establishes a system of representative government in which Members of Parliament are to be elected by voters. It is also possible that an implied freedom of political communication might be drawn from this. The complication, however, is that this would not amount to a limitation on the *power* of the State to enact laws, but rather on the *manner and form* in which laws are enacted.

There is ongoing debate about what sources are available for the entrenchment of State laws. It is likely, however, that the only source which now applies is s 6 of the *Australia Acts* 1986 (Cth) and (UK). If this is so, a State law that unduly limited freedom of political communication would only breach a State implied freedom of political communication if the State law was one respecting the 'constitution, powers or procedure' of the State Parliament. In such a case the State law would not be a valid law unless passed in the required manner and form, including the approval of the people in a referendum. A State electoral funding law would only be characterised as a law with respect to the 'constitution, powers or procedure of the Parliament' if a court took a very broad view of that phrase.

3. Does a campaign donation amount to political communication?

If an implied freedom of political communication of some kind applied to the State law, the next issue is whether the making of political donations for electoral campaigns amounts to a form of political communication. Would the *Election Funding, Expenditure and Disclosures Amendment Act* 2012 (NSW), to the extent that it bans certain persons and bodies from making political donations, amount to a burden on political communication 'in its terms, operation or effect?' This is the first limb of the test set out in the *Lange* case.

This issue has not yet been decided in Australia. In the United States the Supreme Court has held that the making of a donation is a kind of 'speech' because it is an expression of support for the political party. Further, to the extent that political donations fund the capacity of a political party to communicate its policies to the public, there is an indirect

relationship with political communication. Hence a law which bans certain forms of political donations would, in its operation or effect, burden political communication. It is therefore likely that the *Election Funding, Expenditure and Disclosures Amendment Act* 2012 (NSW) would satisfy the first limb of the *Lange* test and be found to burden political communication.

4. Is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of government prescribed by the Constitution?

The second limb of the *Lange* test is whether a law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of government prescribed by the Constitution. This is where the *Election Funding, Expenditure and Disclosures Amendment Act* 2012 (NSW) hits real trouble.

If one goes back to the case of *Australian Capital Television v Commonwealth,* which was the original case in which the High Court identified the implied freedom, there were two aspects of the legislation in that case which led a majority of the Court to hold that the law was invalid. The first was that the law banned third party campaigners (such as environmentalists, charities and the like) from using the electronic media to campaign during an election. The second was that the law was biased towards incumbents because free political advertising was largely allocated to parties by reference to the proportion of votes received at the previous election. These two elements of impeding political advertising by third parties and political bias led a majority to hold that the law was not reasonably appropriate and adapted to achieving a legitimate end (i.e. the reduction of the risk or perception of corruption) and was invalid.

Curiously, the *Election Funding, Expenditure and Disclosures Amendment Act* 2012 (NSW) would appear to provoke the High Court in both of these high-risk categories. Section 95G aggregates the electoral communication expenditure of a political party and any 'affiliated organisation', being one that is authorised to appoint delegates to the governing body of the political party or to participate in the pre-selection of candidates for the party. The problem with this provision is that rather than being directed at a genuine problem of parties establishing separate associated bodies so that separate expenditure limits can be exploited, it is instead narrowly focused upon the structure of one particular political party. This makes it very difficult to argue that the provision is reasonably appropriate and adapted to serving a legitimate end. A more nuanced and defensible way of achieving the same outcome would have been to broaden s 4(8) of the principal Act to deal generally with the problem of associated bodies, rather than focusing on a particular political party.

Section 96D bans political donations from any body or person other than a person on the electoral roll. In itself, this provision might struggle to meet the second limb of the *Lange* test because it is hard to see how this ban is reasonably appropriate and adapted to achieve the legitimate end of reducing the risk or perception of corruption when the law already limits maximum donations to $5000, so that corporate donations or donations

from minors or resident non-citizens cannot be any more influential than those of others. However, the even more provocative aspect of this provision is that it also prohibits political donations to third-party campaigners from anyone other than an individual on the electoral roll. The effect is to prevent peak bodies from receiving donations from their constituent bodies to run political campaigns during elections. Given the administrative and logistical burden of attempting to raise money from individuals and identifying whether or not they are on the electoral roll, most third parties would be unable to do so and could no longer operate political campaigns. This would effectively wipe out third-party campaigns other than those run by big corporations (eg mining companies) or wealthy individuals who could pay for the campaigns without receiving donations from anyone else.

This problem was raised at the parliamentary committee hearings into the Bill. The Government's response was to include a further provision, s 87(4), to clarify the definition of electoral expenditure. It provides:

> (4) Electoral expenditure (and electoral communication expenditure) does not include expenditure incurred by an entity or other person (not being a registered party, elected member, group or candidate) if the expenditure is not incurred for the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election.

The intended effect is to allow third parties to run 'issues' campaigns during an election which express their concern about a particular issue without falling under the regime concerning political donations and electoral expenditure. This is meant to ameliorate the concerns about the application of s 96D. While it is certainly an improvement, it arguably does not go far enough. While an 'issues' campaign during an election period may not endorse or oppose particular candidates or parties, the whole point of the campaign is to influence the way that people vote – otherwise there would be no point in running the campaign. Of necessity, therefore, any 'issues' campaign run by a charity or environmentalists or unions or a business association will have the dominant purpose of 'influencing the voting at an election.' Hence any prudent third-party campaigner, which did not have the infrastructure or administrative capability to raise separate funds from individuals which it could identify as being on the electoral roll, would have to refrain from expending money on advertising about issues of concern to it if these could be regarded as for the dominant purpose of influencing the way people vote. It is very hard to see how this could be regarded as reasonably appropriate and adapted to serving a legitimate end in a manner that is compatible with the system of representative and responsible government.

Conclusion

If the *Lange* test for breach of the implied freedom of political communication is applied to the provisions of the *Election Funding, Expenditure and Disclosures Amendment Act* 2012 (NSW), then those provisions are likely to fail and be held invalid. However, the

more difficult question is whether the law is subject to such an implied freedom. If it is not, then one does not even get to the application of the *Lange* test.

If the High Court were to focus on whether or not an implied freedom actually applied to such a State law, then there are strong arguments why it would not apply. Curiously, the High Court, in other cases, has largely avoided undertaking any such analysis. In many cases this has been because the parties have conceded that the implied freedom does apply (eg *Levy v Victoria, Roberts v Bass* and *Coleman v Power*) and preferred to fight the case upon the second limb of the *Lange* test. In other cases (eg *Stephens v Western Australian Newspapers*) the High Court has just skated superficially over the top of the question of how a State implication of freedom of political communication operates without even considering the relevance of manner and form restrictions. Hence the survival of the provisions of the *Election Funding, Expenditure and Disclosures Amendment Act* 2012 (NSW) might well depend upon how the parties argue the case, what concessions are made and whether the High Court is prepared to go back to first principles and consider more deeply the relationship between the implied freedom of political communication and the Constitution from which it is drawn.

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