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UNIONS NEW SOUTH WALES v NEW SOUTH WALES (2013) 304 ALR 266

I Introduction

In *Unions New South Wales v New South Wales*,[1] the High Court of Australia considered the constitutional validity of amendments to the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ('*EFED Act*'). The plaintiffs' contention was that provisions restricting political donations and electoral communication expenditure impermissibly burdened the freedom of political communication implied by the *Commonwealth Constitution*.[2] This case note draws comparisons between *Unions* and *Australian Capital Television Pty Ltd v Commonwealth*,[3] a 1992 case that considered legislation remarkably similar to the law in *Unions*. This comparison provides the backdrop for a critical analysis of the provisions challenged in *Unions* and the policies that underpinned the amendments. After exploring the High Court's approach to these issues, this case note concludes with a brief discussion of the implications of *Unions* within the context of electoral system reform.

II Background

A *The Implied Freedom of Political Communication and the* Lange *Test*

The implied freedom of political communication is an integral element of representative and responsible government.[4] It derives chiefly from ss 7 and 24 of the *Constitution*, which dictate that Members of Parliament shall be 'directly chosen by the people'.[5] In electing representatives to govern, communication between voters and current Members of Parliament, running candidates and other voters is essential to ensure that voters can 'exercise a free and informed choice'.[6] This freedom is not a personal right,[7] nor is it absolute. It is a limitation

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1 (2013) 304 ALR 266 ('*Unions*').

2 Ibid 272 [16].

3 (1992) 177 CLR 106 ('*ACTV*').

4 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *ACTV* (1992) 177 CLR 106.

5 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 ('*Lange*'); *Unions* (2013) 304 ALR 266, 272 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

6 *Lange* (1997) 189 CLR 520, 560.

7 Ibid.

on legislative power: a law is invalid if it impermissibly burdens political communication.[8]

The two-limbed test to determine whether a law unjustifiably restricts free political communication was developed in *Lange*.[9] The first limb asks: 'does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?'[10] If it does, the second limb asks: 'is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with … representative and responsible government?'[11] A law is invalid where the first limb is answered affirmatively and the second negatively.[12]

III The Decision in *Unions*

A *The Challenge*

In *Unions*, industrial associations brought proceedings against the State of New South Wales challenging the constitutional validity of two sections recently inserted into the *EFED Act*. Section 96D made it unlawful for 'a party, elected member, group, candidate or third-party campaigner' to accept a political donation unless it was from an individual enrolled to vote.[13] This disallowed political donations from individuals not enrolled, as well as individuals and entities not qualified to enrol, such as corporations.[14] Section 95G(6) extended the *EFED Act*'s existing cap on electoral communication expenditure by including in the calculation of a political party's total the expenditure of 'affiliated organisations'.[15] An 'affiliated organisation' was one authorised 'to appoint delegates to the governing body of that [political] party or to participate in pre-selection of candidates for that party'.[16]

The plaintiffs contended that these two sections impermissibly burdened the implied freedom of political communication derived from the *Constitution*.[17]

B *The Decision*

Both the plurality of French CJ, Hayne, Crennan, Kiefel and Bell JJ, and the separate judgment of Keane J, applied the *Lange* test to determine the validity

8 Ibid. This also applies to the exercise of executive power.

9 (1997) 189 CLR 520.

10 Ibid 567.

11 Ibid; *Coleman v Power* (2004) 220 CLR 1, 50 [92]–[93] (McHugh J).

12 *Lange* (1997) 189 CLR 520, 567–8.

13 *Unions* (2013) 304 ALR 266, 271 [10].

14 Ibid [11].

15 Ibid [12].

16 Ibid [13], quoting the *EFED Act* s 95G(7).

17 Ibid 272 [16].

of the *EFED Act*'s challenged sections. Both sections challenged were held to be invalid. It was unanimously held that s 96D burdened political communication and therefore satisfied the first limb of the *Lange* test.[18] Restricting donations to political parties limited the funds available to parties for campaigning, an integral element of political communication.[19] The Court was also unanimous in its decision that s 96D did not meet the requirements of the second limb,[20] though the judgments differed in their reasoning.

The limitation of electoral communication expenditure under s 95G(6) met the *Lange* test's first limb requirements.[21] It was obvious to the Court that restricting expenditure would in effect restrict electoral (and hence political) communication.[22] Neither judgment could find support for s 95G(6) under the second limb.[23]

C *The Reasoning of French CJ, Hayne, Crennan, Kiefel and Bell JJ*

In applying the second limb of the *Lange* test to s 96D of the *EFED Act*, the plurality could not identify a legitimate end served by the section.[24] Though their Honours acknowledged the broad anti-corruption purposes of the *EFED Act*,[25] they were unable to determine how allowing only those enrolled to vote to make political donations might achieve this purpose.[26]

Similarly, the plurality held that s 95G(6) did not, under the second limb, serve a legitimate end.[27] Their Honours were unable to connect the *EFED Act*'s anti-corruption aims with s 95G(6) as it was not clear how aggregating the electoral communication expenditure of political parties and their affiliated organisations would reduce corruption.[28]

D *Keane J's Rationale*

Keane J took a different approach in applying the second limb of the *Lange* test. His Honour focussed on both sections' compatibility with 'the free flow of political communication'.[29] By allowing donations from some sources but prohibiting

18 Ibid 277 [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 292 [121] (Keane J).

19 Ibid.

20 Ibid 281 [60] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 294–5 [134] (Keane J).

21 Ibid 281 [61] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 300 [163] (Keane J).

22 Ibid.

23 Ibid 282 [65] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 302 [168] (Keane J).

24 Ibid 281 [60].

25 Ibid 279 [49].

26 Ibid 280 [56].

27 Ibid 282 [65].

28 Ibid [64].

29 Ibid 294 [133].

others, s 96D was discriminatory in nature and distorted the free flow of political communication.[30] And by including some electoral communication expenditure in a party's aggregate but excluding other forms of third party expenditure, s 95G(6) was discriminatory in a similar manner.[31] Keane J did not believe either section was 'calibrated' to achieve the government's anti-corruption aims, and so his Honour could not regard the distortion of political communication as 'appropriate and adapted' in the furtherance of free political communication.[32]

IV Discussion

A *The Echoes of* ACTV

What is perhaps most remarkable about *Unions* is its similarity to a case decided over two decades ago.[33] In *ACTV*,[34] the High Court struck down legislation that introduced 'sweeping prohibitions' on political advertising while providing political parties with 'free time' to advertise that varied in length depending on their success at the previous election.[35] While the Court recognised that the provisions served a legitimate purpose — providing free advertising would, ideally, reduce the pressure on political parties to raise money, thereby reducing the risk of corruption[36] — the discriminatory nature of the scheme counteracted rather than enhanced the political process.[37]

The similarity between *ACTV* and *Unions* may be considered from two perspectives. On a favourable (but perhaps naïve) view, the governments involved in each case were seeking to reduce corruption and mitigate the influence of wealth within the political sphere.[38] The law in *ACTV* sought to improve the electoral system by attempting to eliminate the consequences of financial disparities between political parties.[39] In *Unions*, the inserted provisions ostensibly aimed to promote political equality and reduce corruption by restricting the source and amount of funding

30 Ibid 296 [140]–[141].

31 Ibid 301–2 [167]–[168].

32 Ibid.

33 Anne Twomey, '*Unions NSW v State of New South Wales* [2013] HCA 58' (Paper presented at the Gilbert + Tobin Centre of Public Law's Constitutional Law Conference, Sydney, 14 February 2014) 2.

34 (1992) 177 CLR 106.

35 Ibid 124–7.

36 Ibid 144 (Mason CJ).

37 Ibid 145–6 (Mason CJ).

38 See, eg, Tom Campbell and Stephen Crilly, 'The Implied Freedom of Political Communication, Twenty Years On' (2011) 30(1) *University of Queensland Law Journal* 59, 60.

39 *ACTV* (1992) 177 CLR 106, 144–5 (Mason CJ).

available to and used by political parties.[40] As determined in *ACTV*, and upheld in *Unions*, reducing corruption and the undue influence of the wealthy within the electoral system is an entirely legitimate end,[41] not only compatible with the implied freedom of political communication but arguably necessary for that freedom to flourish. It is from this perspective that some have criticised the High Court in its interpretation and application of the implied freedom of political communication.[42] The 'irony of *ACTV*' is echoed in *Unions*.[43] Instead of safeguarding the function and integrity of Australia's democratic system of governance, the implied freedom was used to invalidate legislation sympathetic to its cause.

This perspective, however, considers neither the context nor the political tensions at play. On a critical (or perhaps cynical) view, the respective governments in *ACTV* and *Unions* enacted legislation that 'unduly favoured' those in power and discriminated against their opposition.[44] In *ACTV*, 90 per cent of the free advertising time available was granted to incumbent political parties.[45] The provisions challenged in *Unions* were less overtly discriminatory but more disproportionate as they primarily impacted upon (or targeted) one political party. By preventing all political donations but those of electors, and aggregating the electoral expenditure of parties and their affiliated organisations, the amendments to the *EFED Act* had a significant effect on the Australian Labor Party ('ALP') owing to its extensive union affiliations.[46] While it may be conceded that s 96D impacted upon all political parties (though perhaps not equally), s 95G(6) was quite obviously tailored to damage the ALP's unique relationship with industrial bodies;[47] no other political party allows third party involvement in the appointment of delegates or the pre-selection of candidates. On a critical view of the governments in *ACTV* and *Unions*, anti-corruption legislation was used as a pretext to hamstring the opposition.

B *The Concerns of the High Court*

That there is no mention of these (ulterior) motives in the judgments of *Unions* should not come as a surprise. Keane J provided a timely reminder that it has never

40 *Unions* (2013) 304 ALR 266, 295–6 [136]–[141] (Keane J). See also Anne Twomey, 'The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws' (2012) 35 *University of New South Wales Law Journal* 625, 646–7.

41 *Unions* (2013) 304 ALR 266, 279 [51] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 295 [138] (Keane J).

42 See generally Campbell and Crilly, above n 38.

43 Ibid 62.

44 Twomey, '*Unions NSW v State of New South Wales* [2013] HCA 58', above n 33, 2.

45 *ACTV* (1992) 177 CLR 106, 127.

46 Twomey, '*Unions NSW v State of New South Wales* [2013] HCA 58', above n 33, 2.

47 Legislative Council Select Committee on the Provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011, Parliament of New South Wales, *Inquiry into the Provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011* (2012) 101.

been the role of the judiciary to engage in political disputes or question the reasons and policies that underpin a specific law.[48] The Court is solely concerned with the matters before it; in this case, the constitutional validity of the challenged provisions. Hence, the issue for the plurality was not that they were unable to identify an end or purpose met by the provisions, but that their Honours could not identify a *legitimate* end. The issue was one of incongruence; there was a purpose served that lacked legitimacy, and a legitimate end that was not served.

Similarly, the issue for Keane J was not that the provisions discriminated against the ALP, but that they discriminated against some sources of funding but not others.[49] The political agenda behind the amendments was irrelevant; the distortion of the free flow of political communication brought about by excluding certain sources of funding was fundamental.[50] This is not to suggest that discriminatory provisions will always be invalid; indeed, Keane J implied in his judgment that some discrimination may be permissible or even necessary for political communication to freely flow.[51] But any law that operates in a discriminatory manner must be appropriate and adapted to serve a legitimate end;[52] if there is no proper basis for the discrimination, the law will not satisfy the second limb of the *Lange* test.

C *No Legitimate End?*

Was the High Court correct in its assessment that the provisions of the *EFED Act* challenged in *Unions* did not serve a legitimate end? If the favourable view of *Unions* is conflated with the critical perspective, it is possible to accept that the government's amendments *justifiably* targeted the ALP. After all, the ALP is idiosyncratic in its extensive affiliations with unions. Perhaps the government was merely attempting to eliminate an advantage uniquely enjoyed by the ALP. There is concern that political parties are circumventing the statutory caps on electoral communication expenditure by 'using closely related bodies to campaign on their behalf'.[53] Could targeting a political party that appeared to be exploiting a legal loophole, and thereby providing a 'level playing field' in the electoral process,[54] be considered a legitimate end compatible with the implied freedom of political communication?

The High Court has provided qualified support for governmental attempts to 'level the playing field'.[55] In *ACTV*, it was held that a party would need to present

48 *Unions* (2013) 304 ALR 266, 293–4 [129]–[132].

49 Ibid 297 [146].

50 Ibid.

51 See Keane J's comments at 296 [140]–[141], 297 [146], 301–2 [167]–[168].

52 Ibid 301–2 [167]–[168].

53 Twomey, '*Unions NSW v State of New South Wales* [2013] HCA 58', above n 33, 2.

54 See, eg, Twomey, 'The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws', above n 40, 646.

55 Campbell and Crilly, above n 38, 67.

compelling evidence that 'the ability of the electors to make reasoned and informed choices in electing their parliamentary representatives' was threatened before such interventionist legislation could be upheld.[56] In *Unions*, Keane J endorsed unchallenged provisions of the *EFED Act* that 'enhance[d] the prospects of a level electoral playing field.'[57]

The problem in *Unions* was that the government's amendments were too narrow. By targeting only the ALP and its affiliates, the provisions did not effectively level the playing field because other parties could continue to avoid the statutory caps by, for example, using closely related bodies not deemed 'affiliated organisations'.[58] It seems reasonable to assume, as Anne Twomey does, that general amendments affecting all political parties exploiting the loophole in statutory caps would have been upheld by the Court;[59] they would have served a legitimate end in a discriminatory but justified manner. Or, to use Keane J's turn of phrase, such amendments would have prevented wealthy donors from distorting the free flow of political communication.[60]

D *Forewarned but not Forearmed*

The decision to insert ss 96D and 95G(6) into the *EFED Act* is somewhat baffling. These provisions were remarkably similar to the legislation challenged in *ACTV*. Why the NSW government believed it would succeed where the federal government failed is anyone's guess. Indeed, the constitutional validity of the amendments to the *EFED Act* had been considered in depth on several occasions prior to the *Unions* challenge.[61] Academics were highly critical of the provisions — in particular the disproportionate effect the provisions would have on the ALP — and most concluded that the new sections would not withstand a constitutional challenge.[62] Amendments to resolve the provisions' incompatibility with the implied freedom of political communication were suggested but largely ignored.[63] For all that is said about the

56 *ACTV* (1992) 177 CLR 106, 239 (McHugh J).

57 *Unions* (2013) 304 ALR 266, 295 [136].

58 Twomey, '*Unions NSW v State of New South Wales* [2013] HCA 58', above n 33, 2; *Unions* (2013) 304 ALR 266, 296 [141], 301 [167].

59 Twomey, '*Unions NSW v State of New South Wales* [2013] HCA 58', above n 33, 2.

60 *Unions* (2013) 304 ALR 266, 295 [136].

61 Legislative Council Select Committee on the Provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011, above n 47, 95–105; Twomey, 'The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws', above n 40, 644–7.

62 Legislative Council Select Committee on the Provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011, above n 47, 95–105.

63 Twomey, 'The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws', above n 40, 626.

unpredictability of the High Court generally,[64] and the indefinite and unclear nature of the *Lange* test specifically,[65] in this case the outcome of a constitutional challenge was accurately predicted.

V Implications

The issues raised in *ACTV* and *Unions* — wealth disparities among political parties, expenditure during election periods, and the potential for political donations to corrupt, or at least influence, democratically elected representatives — are as old as democracy itself.[66] The NSW *EFED Act* is one of many state laws that seek to reduce corruption, improve transparency and equalise the electoral system.[67] And the provisions challenged in *Unions* were the latest in a string of substantive amendments, beginning in 2008, that sought to remedy the erosion of public confidence in the government.[68]

In this regard, it is useful to have a recent High Court decision that considers the validity and legitimacy of electoral funding legislation in the context of the implied freedom of political communication, a legislative limitation that has lay dormant for many years.[69] The judgments in *Unions* unanimously endorsed the position taken in *ACTV* that reducing corruption and undue influence in the political sphere is a legitimate end consistent with free political communication.[70] Keane J's decision is of particular value. His Honour lent support to provisions of the *EFED Act* that cap political donations and electoral communication expenditure by explaining the manner in which they might be considered appropriate and adapted.[71] By effectively applying the *Lange* test to unchallenged provisions and finding them entirely valid, Keane J has given hope to those that fear that any attempts to 'counter the corrosive impact of disparate wealth' are doomed to fail.[72] At a time where concerns about corruption are especially prominent, it is vital that governments feel confident that they can pursue aggressive initiatives without those initiatives falling at the final hurdle.

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64 Campbell and Crilly, above n 38; Legislative Council Select Committee on the Provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011, above n 47, 92.

65 See Keane J's discussion in *Unions* (2013) 304 ALR 266, 293–4 [129]–[134].

66 Ian Ramsay, Geof Stapledon and Joel Vernon, 'Political Donations by Australian Companies' (2001) 29 *Federal Law Review* 179, 179.

67 *Unions* (2013) 304 ALR 266, 270 [8]–[9].

68 See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 June 2008, 9323 (Barry O'Farrell, Leader of the Opposition).

69 Campbell and Crilly, above n 38, 66.

70 *Unions* (2013) 304 ALR 266, 279 [51] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 295 [138] (Keane J).

71 Ibid 295 [136], 301 [164].

72 Campbell and Crilly, above n 38, 60.

VI Conclusion

In *Unions*, the High Court struck down amendments to the *EFED Act* because they impermissibly burdened the implied freedom of political communication. *Unions* is a curious case, not least because of the déjà vu experienced by those familiar with the decision in *ACTV*. It is also a useful case, providing insight into the Court's view of anti-corruption legislation and the current application of the *Lange* test. This is particularly pertinent as governments continue to implement measures to counter the effect and influence of wealth in the political sphere.