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The High Court declares invalid NSW laws restricting political donations and electoral expenditure

In [Unions NSW v NSW \[2013\] HCA 58](#) (18 December 2013) the High Court (6:0) declared invalid provisions of a NSW law that (1) prohibited political donations to a political party other than from individuals enrolled on an electoral roll and (2) aggregated expenditure by a political party and its 'affiliated organisations' to determine whether it had exceeded the amount it could lawfully spend for a State election. The main judgment of the Court was delivered by French CJ, Hayne, Crennan, Kiefel and Bell JJ. Justice Keane delivered separate reasons for holding the provisions invalid.

Background

The plaintiff unions challenged the validity of *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (NSW Act) in the original jurisdiction of the High Court. The NSW Act relevantly:

- caps the amount that a political party, candidate for election to the NSW Parliament or anyone else ('third party campaigner') can spend for a NSW election (ss 95F and 95I)
- aggregates expenditure by a political party and its 'affiliated organisations' to determine whether the applicable cap has been exceeded (ss 95G(6) and (7))
- prohibits political donations to political parties, third party campaigners and candidates other than donations from individuals enrolled on a State or federal electoral roll (s 96D).

The plaintiffs sought declarations that ss 95G(6) and 96D of the NSW Act are invalid. They argued, among other things, that those sections impermissibly burden the implied freedom of communication, which is contrary to the Commonwealth Constitution.

The High Court's decision

The High Court unanimously held that ss 95G(6) and 96D of the NSW Act were invalid as contrary to the implied freedom of communication on governmental and political matters in the Commonwealth Constitution.

The *Lange* test is to be applied to determine the validity of the laws

All members of the Court accepted that the test to apply to determine the validity of a law in light of the implied freedom is the 2-step test set out in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (*Lange*) as modified in *Coleman v Power* (2004) 220 CLR 1 ([35], [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [115], but cf [133] (Keane J)). The first *Lange* question asks whether the law effectively burdens the freedom of political communication. If it does, the second *Lange* question must be considered. That question asks whether the law is appropriate and adapted, or proportionate, to serve a legitimate end. If the answer to that question is no, the law will be invalid. The Court held that, contrary to the

defendant's argument, the implied freedom applies to State electoral laws ([25] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [151]–[155], [159] (Keane J)).

Section 96D – prohibiting donations other than by persons on electoral roll

(a) The first Lange question – s 96D burdens political communication

The Court held that s 96D burdens the freedom ([35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [120] (Keane J)). Whether or not the making of a political donation is a form of political communication (which the joint judgment doubted ([37]–[38]), and Keane J rejected ([100], [112])), s 96D restricts the 'funds available to political parties and candidates to meet the costs of political communication by restricting the source of those funds' and so burdens the freedom ([37]–[38]).

(b) The second Lange question – no legitimate purpose identifiable

The Court accepted that the NSW Act overall has a legitimate purpose, being 'to regulate the acceptance and use of political donations in order to address the possibility of undue or corrupt influence being exerted' ([51]; see also [141] (Keane J)). However s 96D was invalid because it does nothing calculated to promote the achievement of that legitimate aim and has no purpose other than to prohibit certain donations ([51]). In particular, s 96D is selective in what it prohibits, but the 'basis for the selection was not identified and is not apparent' ([53], [59]). In light of the conclusion that it was not possible to attribute a purpose to s 96D, the joint judgment found it unnecessary to further apply the second *Lange* question ([60]). Accordingly, it concluded that the *Lange* test was not satisfied and that s 96D was invalid. Justice Keane also held s 96D invalid on the ground that the discrimination effected by s 96D, which there was no evident basis for, 'is apt to distort the flow of political communication within the federation' ([137]).

Section 95G(6) – aggregating expenditure

(a) The first Lange question – s 95G(6) burdens political communication

All members of the Court held that s 95G(6) of the NSW Act burdens the freedom of political communication because it restricted the amount that a political party may spend on electoral communication ([61]; see also [163] (Keane J)).

(b) The second Lange question – no legitimate purpose identifiable

The joint judgment reached the same conclusion on the application of the second *Lange* question to s 95G(6) that it did about s 96D, namely that no legitimate purpose was identifiable. Their Honours concluded that the purpose of s 95G(6) appeared to be 'to reduce the amount which a political party affiliated with industrial organisations may incur by way of electoral communication expenditure and likewise to limit the amount which may be spent by an affiliated industrial organisation' ([64]). It was not clear, however, how that purpose was 'connected to the wider anti-corruption purposes of the [NSW Act], or how those legitimate purposes are furthered by the operation and effect of s 95G(6)' ([64]). In light of that, it was not possible to apply the second *Lange* question to s 95G(6) and the provision was invalid ([65]). Justice Keane also held s 95G(6) invalid because it treated certain sources of political communication differently to others. That differential treatment distorts the free flow of political communication and cannot be regarded as appropriate and adapted to enhance or protect such communication ([167]–[168]).

AGS acted for the Commonwealth Attorney-General, who intervened in the matter pursuant to s 78A of the *Judiciary Act 1903* (Cth) to put submissions on the operation of the implied freedom.

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