THE CONSTITUTION and ADVERTISING LEGAL SERVICES:

APLA LTD v LEGAL SERVICES COMMISSIONER (NSW)

By Keven Booker

In *APLA Ltd v Legal Services Commissioner (NSW)*[1] ('the *APLA* case') the High Court by majority rejected challenges to the validity of NSW regulations restricting the advertising of legal services in relation to personal injury.

Gleeson CJ and Heydon J (in a joint judgment) and Gummow, Hayne and Callinan JJ, found against the plaintiffs on all grounds of challenge. McHugh J, dissenting, held the regulations breached Chapter III of the Commonwealth Constitution. Kirby J, dissenting, considered that the regulations infringed Chapter III, the implied freedom of political communication, and were also invalid for inconsistency with provisions in Commonwealth statutes.

Subject to limited exceptions, s38J of the *Legal Profession Act* 1987 (NSW) permitted barristers and solicitors to advertise as they saw fit. However, Part 14 of the *Legal Profession Regulation* 2002 (made under authority of the Act and as amended in 2003) imposed stringent controls on publishing advertisements for legal services relating to personal injury claims.[2] The relevant clauses in Part 14 ('the regulations') defined advertising and publishing to persons in very broad terms, although communications with the clients of barristers and solicitors were exempt. Publication covered not just standard means like advertisements in newspapers or via radio and television, but extended, for example, to include the display of information on documents 'gratuitously sent or gratuitously delivered to any person or thrown or left on any premises or on any vehicle'.[3] Breach of the regulations was a criminal offence and constituted professional misconduct.

CHALLENGE AND HEARING

The challenge was brought by APLA Ltd,[4] Maurice Blackburn Cashman Pty Ltd (an incorporated legal practitioner) and Robert Leslie Whyburn (a sole practitioner). Their challenge

was assisted by arguments put by the Combined Community Legal Centres' Group NSW Inc and Redfern Legal Centre Ltd appearing as amici curiae. The defendants were the Legal Services Commissioner (NSW) and the State of New South Wales. Attorneys-General for the Commonwealth, Western Australia, South Australia, Victoria and Queensland intervened.

The special case stated for the High Court asked whether the regulations were invalid by reason of:

- infringement of the implied freedom of political communication;
- infringement of Chapter III of the Constitution and the rule of law;
- infringement of s92 of the Constitution;
- exceeding NSW legislative power because the regulations had an extra-territorial operation;
- exceeding the regulation making power under the *Legal Profession Act*; and
- inconsistency with provisions in Commonwealth statutes.

The inconsistency ground was added as a result of points raised in exchanges between counsel and judges during the first two days of hearing on 5 and 6 October 2004. Argument on that further ground was heard on 7 December 2004.

FREEDOM OF POLITICAL COMMUNICATION

Possible infringement of the implied freedom of political communication is determined by a two-part test established by *Lange v Australian Broadcasting Corporation*,[5] as modified by *Coleman v Power*:[6]

> 'First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s128 for submitting a proposed amendment of the Constitution to the informed decision of the people. If the first question is answered "yes" and the second is answered "no", the law is invalid.'[7]

In the *APLA* case, Kirby J was alone in answering 'yes' to the first question in this test. The other judges held that the communications were not about government or political matters in the relevant sense and tended to treat the point as being fairly obvious. As Gleeson CJ and Heydon J explained:

> 'The possibility that an advertisement of the kind prohibited by the regulations might mention some political or governmental issue, or might name some politician, does not mean that the regulations infringe the constitutional requirement. The regulations do not, in their terms, prohibit communications about government or political matters. They prohibit communication between lawyers and people who, by hypothesis, are not their clients, aimed at encouraging the recipients of the communications to engage the services of lawyers. Such communications are an essentially commercial activity [cf *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 124-125]. The regulations are not aimed at preventing discussion of, say, "tort law reform", or some other such issue of public policy. They restrict the marketing of professional services.'[8]

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Likewise, Callinan J held that there was no burden 'upon communications of the kind which the implication seeks to protect',[9] characterising the NSW provisions as 'laws to restrict lawyers from soliciting clients, by communications to the public, inviting or encouraging them to sue in the courts'.[10] His Honour observed that '[i]t is not irrelevant that the targeted publications here are not exclusively but substantially commercially motivated'.[11] Emphasising the constitutional foundations of the freedom, McHugh J illustrated the relevant meaning of communications for the purpose of the *Lange* doctrine by way of examples of 'communications about the desirability of regulations prohibiting or curtailing the ability of lawyers to advertise their services' and 'communications that inform the public about government policies affecting the capacity and opportunity of individuals to enforce their legal rights'.[12] On the scope of 'government' (as compared with 'political') matters, McHugh J adopted a broad institutional and functional approach that relates the meaning to the executive and the legislature because '[c]ourts and judges and the exercise of judicial power are not themselves subjects that are involved in representative or responsible government in the constitutional sense'.[13] Depending on what is meant by 'involved in' in this passage, the constitutional work of the High Court may need to be distinguished from the mainstream of judicial tasks. The extent to which the judiciary, judicial power and the courts are outside the constitutional freedom, and the utility in distinguishing between 'government' as compared with 'political' communications, are issues needing further judicial consideration.

In sharp contrast to the reasoning of the other judges, Kirby J considered '[c]ommunication about access to courts is communication about governmental and political matters. The courts are part of government. They resolve issues that are, in the broad sense, political as this case clearly demonstrates'.[14] As explained below, Kirby J's reasoning on political communication for the purposes of the *Lange* test was to some extent integrated with his views about the infringement of Chapter III of the Constitution.

If the answer to the first question in the *Lange* test is 'no', >>

McHugh J considered the law to be invalid because 'its object and its effect, as evinced by its terms and setting, is to reduce litigation in respect of personal injury in the courts including courts exercising federal jurisdiction'.

the second question does not arise. Callinan J, however, said the NSW regulations were 'reasonably appropriate and adapted to the legitimate end of stemming what the Parliament of New South Wales considers to be an unacceptable tide of litigation of a particular kind in that state'.[15] Also, Gleeson CJ and Heydon J indicated their view on the second question in saying that '[r]estrictions on the marketing of legal services are not incompatible with a system of representative and responsible government, or with the requirements of ss7, 24, 64 and 128 of the Constitution'.[16] With respect, this assertion goes well beyond the issues before the court and is difficult to accept without facts and analysis about particular laws. And while, as their Honours observed, any such incompatibility 'has passed unnoticed for most of the time since Federation',[17] that is barely surprising since no one would have had any reason to consider the issue in a focused constitutional sense before the late 20th century rulings in *Nationwide News Pty Ltd v Wills*[18] and *Australian Capital Television Pty Ltd v Commonwealth*.[19] The joint judgment tends to consider the NSW regulations in the context of an era in which tough controls on lawyers' advertising were the norm. That history has value, but so does a good understanding of the anomalous and disproportionate character of the regulations in the contemporary Australian legal context.

CHAPTER III

In the special case submitted to the High Court, question (1)(b) asked whether the NSW law 'impermissibly infringes the requirements of Chapter III of the Constitution and of the principle of the rule of law as given effect by the Constitution'. This general language prompts the query of what requirements of Chapter III are in question and what, if anything, the reference to the rule of law adds. The main Chapter III argument ultimately put by the plaintiffs took the following form:

> 'Chapter III, in particular sections 71, 73, 75, 76 and 77, requires for its effective operation that the people of the Commonwealth have the capacity, ability or freedom to ascertain their legal rights and to assert those legal rights before the courts there mentioned. The effective operation of that capacity, ability or freedom requires that they have the capacity or ability or freedom to communicate and particularly to receive such information or assistance as they may reasonably require for that to occur.
>
> The prohibition ... is one that extends to any law of the Commonwealth or of a State that burdens the assertion of legal rights before the courts, including the correlative communication to which we have referred, and does not ... go beyond what is necessary or appropriate and adapted for the preservation of an ordered society or the protection or vindication of legitimate claims of individuals in an ordered society.'[20]

It was a brilliant idea to argue that Chapter III by implication guarantees a freedom of communication about legal rights. However, at the level of detailed submissions the idea proved problematical – the model and motivation provided by the established doctrine of freedom of political communication was more hazard than help, and the move from general idea to precise rule was hard to formulate. The great strength of the reasoning in *Lange v Australian Broadcasting Corporation*[21] is the explanation of how freedom of political communication is textually anchored, particularly in Constitution ss7 and 24. But it is far from clear that ss71, 73, 75, 76 and 77 can be built on in an analogous way. The text of those sections, the structure they create and the character of the judicial power they involve, may support an implication or implications about the freedom to communicate legal information, including information about rights. It is not difficult to imagine laws burdening communications in ways that would impair federal judicial processes or frustrate the assertion of rights in federal jurisdiction. But how compelling is the argument that the particular implication as quoted above can be drawn in its own right, or as part of a broader implication?

The test from the authorities is whether a constitutional implication is necessary, not merely desirable. Necessity, of course, comes in different forms and the line between what is necessary and that which is desirable (or simply not necessary) is not readily discerned. The reasoning in the *APLA* case relies heavily on emphasising what the NSW regulations did *not* do and the difference between those regulations and other laws that might arguably contravene Chapter III. Gleeson CJ and Heydon J noted that the NSW law was directed to people who are not clients, did not impede communications with clients and did not 'restrain or inhibit the provision of legal services, or require lawyers to conceal their existence or their identities'.[22] Hayne J pointed out that the NSW regulations 'do not preclude the seeking of advice or information about whether to invoke the judicial power of the Commonwealth'.[23] Callinan J noted that all that was banned was a particular kind of advertising by barristers and solicitors.[24] Gummow J said the NSW law did not fall into the category of invalid laws that might require Commonwealth judicial power to be exercised 'in a manner which is inconsistent with the essential character of a court or with the nature of judicial power'.[25] He illustrated the possible invalidating effect of Chapter III by giving the example of a law denying or forbidding legal representation before a court exercising Chapter III judicial power.[26]

The plaintiffs also argued for a narrower Chapter III point in asking whether the 'state law alters, detracts from or impairs the effective exercise of rights in federal jurisdiction or the effective exercise of federal jurisdiction'.[27] In essence, this argument failed because either it is referring to forms of interference that could not be regarded as flowing from the state law, or it is flawed for the reasons that the broader implication discussed above is flawed. The majority judgments in the *APLA* case tend to lump the two submissions together. There is also some crossover here between arguing how rights and jurisdiction might or might not be impaired in the context of considering what Chapter III protects, and the lines of argument about invalidity resulting from inconsistency with particular statutory rights (that is, the Constitution s109 point).

What then was it that persuaded two judges to find that the NSW law breached Chapter III? McHugh J considered the law to be invalid because 'its object and its effect, as evinced by its terms and setting, is to reduce litigation in respect of personal injury in the courts including courts exercising federal jurisdiction'[28] and also on the ground that 'it impairs the capacity of persons with federal rights in respect of certain matters to obtain legal advice and representation in respect of those rights'.[29] The difference between this dissent and the majority view mainly comes down to matters of fact and degree about the NSW law, rather than any fundamental disagreement about constitutional implications. The NSW law would appear to have more than one purpose and the consequence McHugh J ascribes to a *general* purpose would seem to raise some interesting consequences about state legislative power in contexts well beyond the facts of this case or anything considered in it. The operation of many factors, including other statutes and developments in judicial rulings in personal injury cases, made the effect of the NSW law on litigation hard to gauge. Isolating the effect on federal litigation is particularly difficult. Likewise, the extent to which the NSW law impaired the capacity of persons to obtain legal advice and representation is far from obvious.

The main line of reasoning in Kirby J's dissent on the Chapter III ground involves an unorthodox view of the foundation and character of the implied freedom of political communication. As described by his Honour, the freedom is one that is 'defensive of communications essential to give reality and effectiveness to the legislatures and the executive mentioned in the Constitution'.[30] In his Honour's view a similar implication 'must arise defensive of the reality and effectiveness of the judicature there provided for.'[31] And the two part *Lange* test is to be applied to this new implication (or, alternatively, there is just one implication that embraces the judicial branch of 'government'). Kirby J refers to his extension of the *Lange* test as 'one inherent in the principle that *Lange* expresses'.[32] With respect, this follows only after first re-conceptualising the principle *Lange* expresses as required by and as it applies to the institutions created by Chapters I and II of the Constitution. If the *Lange* principle is open to re-conceptualisation, then there may be other versions, including narrower versions.

SECTION 92

A Constitution s92 point arose on the facts because some of the communications crossed state lines. Whether the facts about the plaintiffs raised a discrete issue about intercourse that does not comprise or is not engaged in for trade or commerce is debatable. For interstate trade and commerce, the *Cole v Whitfield*[33] test asks whether a law discriminates against such trade and commerce in a protectionist sense. The NSW law was not relevantly discriminatory. However, for interstate intercourse the s92 guarantee is not confined to discriminatory laws. The generally accepted view is that laws that are not aimed at interstate intercourse are valid if they constitute reasonable regulation. The judges who dealt with the s92 ground held that the NSW law clearly fell within the category of valid regulation.

It would be helpful if the High Court could consolidate the various dicta about the intercourse limb of s92 in one authoritative statement. In that process, the stimulating analysis by Hayne J in the *APLA* case concerning legislative purposes[34] would merit attention.

INCONSISTENCY

With hindsight, a Constitution s109 ground of challenge was worth canvassing, but perhaps it did not merit the amount of time spent on it. The arguments addressed provisions on substantive rights and legal representation as found in a range of federal statutes, including the *Trade Practices Act* 1974 (Cth), the *Judiciary Act* 1903 (Cth) and the *Federal Court of Australia Act* 1976 (Cth). The relevant test was perceived to be whether the provisions of the state law would (in terms that derive from Dixon J's judgment in *Victoria v Commonwealth*[35]) 'alter, impair or detract' from the operation of the Commonwealth law concerned, rather than the more general covering the field test. As explained by Mason J in *New South Wales v Commonwealth and Carlton*,[36] this test may be applied at the level of the effect on Commonwealth provisions in detail or at the level of a collision with the purpose of the Commonwealth law.

While the words 'alter, impair or detract' improve on the deep ambiguity of 'inconsistent', there is much room to move in their factual application. The ways in which these words can be interpreted as justifying a conclusion of inconsistency on the facts in the *APLA* case are explored in detail in the dissenting judgment of Kirby J. The opposing, majority view is well set out by Gummow J. The guidance accorded by the authorities favours the majority view, but does not unarguably compel it – a common situation in s109 cases.

OTHER POINTS

The NSW law in some circumstances applied to communications originating outside the state. Challenging a state law for lack of requisite extra-territorial power would have looked promising when there were serious doubts about the extra-territorial legislative power of British colonies. But Australian states may legislate beyond their borders where there is a nexus with the state concerned. As explained by Gleeson CJ and Heydon J, 'even a remote or general connection will suffice [*Mobil Oil Australia Pty Ltd v Victoria* >>

The likely constitutional legacy of the APLA case, of course, transcends its immediate result.

(2002) 211 CLR 1 at 22-26 [7]-[16]]. Here the connection is direct and substantial.'[37]

The challenge for statutory ultra vires was that the *Legal Profession Act* 1987 (NSW) did not authorise the extra-territorial operation of the regulations. This ground was not really pressed and was dismissed in short terms.

OVERVIEW

It seems that all tenable constitutional points about NSW regulations controlling the advertising of legal services in relation to personal injury have been fully dealt with in this High Court decision. The complex issues about the effect of those laws (in their current form) and their wisdom and future are left for political resolution. The likely constitutional legacy of the *APLA* case, of course, transcends its immediate result. The case joins a number of other recent decisions indicating that freedom of political communication has stabilised around the *Lange* test. On s92, *Cole v Whitfield* remains the interpretive anchor, although there are aspects of the guarantee about interstate intercourse that need clarification. Section 109 is always at the level of the details – the tests of invalidity have been defined to the extent to which experience indicates they need to be defined. In relation to Chapter III, some of the dicta in the *APLA* case about the kind of laws that would breach that Chapter merit careful study.

In the course of the hearing of the *APLA* case, the focus of the submissions about Chapter III moved from what the NSW law prevented lawyers from doing to emphasising what that law arguably denied to people seeking or potentially seeking to enforce their rights. The shift was tactically wise, but it perhaps left the arguments about the role of the legal profession in relation to the work of Chapter III courts and the exercise of federal judicial power less than fully developed. In this respect, there is an interesting passage at the start of the part of the reasoning of Gleeson CJ and Heydon J dealing with Chapter III and the rule of law:

> 'The rule of law is one of the assumptions upon which the Constitution is based [*Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J]. It is an assumption upon which the Constitution depends for its efficacy. Chapter III of the Constitution, which confers and denies judicial power, in accordance with its express terms and its necessary implications, gives practical effect to that assumption [*In re Judiciary and Navigation Acts* (1921) 29 CLR 257]. The effective exercise of judicial power, and the maintenance of the rule of law, depend upon the providing of professional legal services so that citizens may know their rights and obligations, and have the capacity to invoke judicial power.'[38]

This passage has the potential to be as constitutionally bold as anything the plaintiffs in the *APLA* case put forward about Chapter III of the Constitution. Indeed, it reads more like a statement one might expect to find in reasoning favourable to the plaintiffs, but their Honours jumped quickly from it to very grounded and fact-specific reasons explaining why the NSW law did not infringe Chapter III. The passage traverses an intriguing set of connected ideas: the work of the courts, the rights of citizens and the role of the profession all within the overarching framework of the elusive notion of the rule of law. Chapter III does not contain anything like what might fairly be described as an implied Bill of Rights, but it is an important constraint on power and much about it remains unexplained, unexplored or at least under-explored. Chapter III has centre stage here because as Gummow J once said in the course of argument in a constitutional case, '[t]he rule of law is bound up with parties, not philosopher kings'.[39] ■

Notes: **1** (2005) 219 ALR 403; [2005] HCA 44. See Booker, 'The APLA constitutional challenge to restrictions on the advertising of legal services', (2004) # 65 *Precedent* 40 for a summary of the background and argument. **2** As amended by the *Legal Profession Regulation* 2003. For the current law see the *Legal Profession Act* 2004 (NSW) and the *Legal Profession Regulation* 2005. **3** *Legal Profession Regulation* 2002, Part 14, cl 138. **4** 'APLA' is an acronym for Australian Plaintiff Lawyers Association, now called the Australian Lawyers Alliance. **5** (1997) 189 CLR 520. **6** (2004) 209 ALR 182. **7** (1997) 189 CLR 520, 567-8 with the words 'in a manner' substituted for the words 'the fulfilment of': see McHugh J in *APLA* (2005) 219 ALR 403, 420 [58]. **8** (2005) 219 ALR 403, 413 [28]. **9** (2005) 219 ALR 403, 521 [457]. **10** (2005) 219 ALR 403, 522 [459]. **11** (2005) 219 ALR 403, 522 [460]. **12** (2005) 219 ALR 403, 422 [70]. **13** (2005) 219 ALR 403, 422 [66]. **14** (2005) 219 ALR 403, 488 [347]. **15** (2005) 219 ALR 403, 521 [457]. **16** (2005) 219 ALR 403, 413 [29]. **17** (2005) 219 ALR 403, 413 [29]. **18** (1992) 177 CLR 1. **19** (1992) 177 CLR 106. **20** Transcript [2004] HCA Trans 375, [7185]. **21** (1997) 189 CLR 520. **22** (2005) 219 ALR 403, 414 [34]. **23** (2005) 219 ALR 403, 500 [394]. **24** (2005) 219 ALR 403, 526 [473]. **25** (2005) 219 ALR 403, 463 [247]. **26** (2005) 219 ALR 403, 463 [245]. **27** As summarised by Gummow J (2005) 219 ALR 403, 458 [223]. **28** (2005) 219 ALR 403, 418 [52]. **29** (2005) 219 ALR 403, 428 [87]. **30** (2005) 219 ALR 403, 487 [344]. **31** (2005) 219 ALR 403, 487 [344]. **32** (2005) 219 ALR 403, 491 [358]. **33** (1988) 165 CLR 360. **34** See (2005) 219 ALR 403, 506-507 [421]-[425]. **35** (1937) 58 CLR 618, 630. **36** (1983) 151 CLR 302, 330. **37** (2005) 219 ALR 403, 415 [40]. **38** (2005) 219 ALR 403, 413 [30]. **39** *Australian Catholic Bishops Conference, Ex parte – Re Sundberg* (5 September 2001) Transcript, [7575].

Keven Booker *is a lecturer in law at the Faculty of Law, University of New South Wales, who specialises in constitutional law and Australian constitutional history.* **PHONE** *(02) 9385 2230*
EMAIL *K.Booker@unsw.edu.au*