The APLA constitutional challenge to restrictions on the advertising of legal services

By Keven Booker

The High Court heard *APLA Ltd and Others v Legal Services Commissioner of NSW and Another* on 5 and 6 October 2004,[1] with the court reserving its decision.

In this case, APLA Ltd, Maurice Blackburn Cashman Pty Ltd and Robert Leslie Whyburn challenged the constitutional validity of NSW regulations that restrict the advertising of legal services in relation to a personal injury. Restrictions on advertising by lawyers perhaps do not immediately strike the mind as being vulnerable to constitutional challenge, but the case has raised interesting arguments about freedom of political communication, the implications of Chapter III of the Constitution, inconsistency, freedom of interstate intercourse and the scope for a state law to operate extra-territorially.

The defendants in the case are the Legal Services Commissioner of NSW and the state of NSW. The Commonwealth, Victoria, Queensland, South Australia and Western Australia intervened. The Combined Community Legal Centres' Group and the Redfern Legal Centre made submissions as amici curiae in support of the plaintiffs.

RESTRICTIONS ON ADVERTISING

The law under challenge is Part 14 of the *Legal Profession Regulation* 2002 (NSW) made under the *Legal Profession Act* 1987 (NSW). Part 14 of the Regulation makes it an offence for a NSW legal practitioner to publish an advertisement containing any reference to personal injury, circumstances in which personal injury might occur or any personal injury legal service. 'Advertisement' is defined to mean 'any communication of information (whether by means of writing, or any still or moving visual image or message or audible message, or any combination of them) that advertises or otherwise promotes the availability or use of a barrister or solicitor to provide legal services, whether or not that is its purpose or only purpose and whether or not that is its only effect'. The definition of 'publish' includes publication in newspapers, magazines and journals; dissemination by exhibition; broadcast through electronic media; and display on an internet website. If the consequences of the provisions were not so serious (advertising in breach of these laws is a criminal offence and is declared to be professional misconduct) some of the details and distinctions made would be comical: even publication by way of a 'display on any document (including a business card or letterhead) gratuitously sent or gratuitously delivered to any person or thrown or left on any premises or on any vehicle' is covered. There are tightly defined exceptions, including advertising by a lawyer as a specialist in a professional directory, by a sign displayed at a place of business, and publication to a person who is already a client.

General restrictions on lawyers' advertising have historically been imposed for reasons of professional ethics. The lifting of these restrictions in the latter part of the 20th century was driven by paradigms about market forces, competitiveness and the deregulation of professions. Section 38J(1) of the *Legal Profession Act* provides that '[a] barrister or solicitor may advertise in any way the barrister or solicitor thinks fit, subject to any regulations under section 38JA'. This general rule is qualified by s38J(2) which provides that an

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advertisement 'must not be of a kind that is or that might reasonably be regarded' as 'false, misleading or deceptive' or in contravention of the *Trade Practices Act* 1974 (Cth) or the *Fair Trading Act* 1987 (NSW). Section 38JA provides that the regulations may make provision 'for or with respect to regulating or prohibiting conduct by any person that relates to the marketing of legal services', including advertising by a barrister or solicitor.

The provisions of Part 14 of the Regulation are plainly not driven by concern about professional ethics and are not an extension of the prohibition in s38J(2). That they are not devised to deal with the undesirable activities of sharks, touts and fools (the restrictions apply even if the advertising is sensible, balanced and helpful) is reinforced by the absence of similar restrictions for other areas of legal practice. Far from being about ethics, the measures are intended to reduce personal injury litigation. The ban on a category of lawyers' advertising is part of a package of measures that is designed to reduce the amount of personal injury litigation in the hope that reduced litigation will lower insurance premiums. Even if one accepts the premise that lawyers' advertising increases personal injury litigation, and that it is desirable to curtail at least some categories of claims, the NSW law is plainly an 'extraordinarily crude instrument'[2] for the pursuit of this end.

THE SPECIAL CASE

The grounds of challenge in the original Statement of Claim evolved into a Special Case on which the parties agreed. This process was assisted by directions hearings before Gummow J. The Special Case raised for the opinion of the Full Court two questions of law: first, whether Part 14 of the Regulation is invalid in whole or in part by reason that it:

- impermissibly infringes the freedom of communication on political and governmental matters guaranteed by the Constitution;
- 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;
- impermissibly infringes the freedom of interstate intercourse or alternatively trade and commerce guaranteed by s92 of the Constitution;
- exceeds the legislative powers of the state of NSW by virtue of the nature of its extra-territorial operation; and
- exceeds any powers to make regulations under the *Legal Profession Act*, by virtue of the nature of its extra-territorial operation.

Secondly, the Special Case asked whether, if there is invalidity on any of the above grounds, Part 14 validly prohibits the plaintiffs from publishing particular examples of advertisements as detailed in Annexures. Other background information is appended to the Special Case. As no particular advertisement had been the subject of any prosecution or finding of professional misconduct, factual material had to be put before the court to indicate that there was a justiciable issue involving the plaintiffs. The factual material also served to inform the court on the purposes of the law under challenge and the context in which it operates. However, the status and value of some of the appended material is far from clear.

FREEDOM OF POLITICAL COMMUNICATION

The starting point here is the two-part test in *Lange v Australian Broadcasting Corporation:*

> *'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 the fulfilment of 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…'*[3]

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If Part 14 of the Regulation relevantly burdens freedom of communication about government or political matters, then interesting questions arise about its purpose and whether it is reasonably appropriate and adapted to that purpose in a manner that is compatible with the maintenance of the system of government established by the Constitution.[4]

However, the major stumbling block here is the meaning of 'government or political matters'. The impression created by the factual material presented with the Special Case tends to work against this ground of challenge.

The ban on lawyers' advertising has been and remains politically controversial, and there are many ways in which personal injury litigation concerns matters of public interest. But, in general, the content of such advertising could not be said to be about 'government or political matters' without defining such matters in a way that would extend the constitutional freedom well beyond the existing cases. Finding minor or adventitious political content here and there in what lawyers say when advertising their services does little to advance the argument. And it is difficult to disagree with the Commonwealth's submission that '[a] commercial advertisement does not assume the character of a protected political communication by the mere injection of a few catch-phrases or current political references'.[5]

On a very broad definition of political communication, the freedom implied in the Constitution would begin to approach a general freedom of communication. This would challenge the very legitimacy of the doctrine. Notions of politics and government can be defined in different ways for different discourses. For this constitutional doctrine, the definition must make sense in terms of the end that the doctrine serves: the maintenance of the system of government created by the Constitution. That permits considerable flexibility, but caution is required once the identification of government and political matters moves beyond the kind of core examples that have thus far been contemplated in the precedents.

CHAPTER III

Chapter III is not just a set of technical rules about courts and jurisdiction. Its subject matter, by necessary implication, also speaks to vital elements of legal equality, due process and the rule of law. The powers Chapter III accords and the powers that it contemplates will or may be exercised, are subject to restraints, including implied restraints: restraints on statute and common law; restraints on Commonwealth, state and territory laws; restraints on the courts themselves. There are deep constitutional connections between federal jurisdiction, judicial power and fundamental precepts of Australian justice.

The precise constitutional submission about Chapter III evolved during the course of the argument before the High Court. At the outset, the line between this ground of challenge and submissions about *Lange* and freedom of political communication was somewhat unclear. The amicus brief filed in the proceedings demonstrates the potency in focusing on clients' rights – the effective enjoyment and exercise of those rights. If ultimately some categories of rights are to be enforced by federal jurisdiction, then Chapter III becomes relevant. Legal rights will not be exercised if people do not know what those rights are. Knowledge about and assertion of legal rights necessitate various forms of communication and the way that people engage with legal issues concerning rights may require professional legal assistance, not merely in relation to proceedings before courts, but at earlier stages in that process of engagement. The constitutional potential of this line of thought is obscured by conflation with rationales about how political communication serves to effectuate representative and responsible government. The clue is to look to Chapter III for a new kind of implied freedom, one that may have more immediate relevance for a ban on lawyers' advertising, because such advertising will typically be about offering to assist people with their legal claims. The weakness in the political communication argument (the general lack of political content in the advertisements) becomes the strength of the Chapter III argument (the advertisements are communications concerning legal rights). With hindsight, what may prove to be the most important submission about Chapter III was made by Gageler SC, exercising a right of reply, towards the end of the second day of the proceedings. Chief Justice Gleeson had asked for the formulation of a general principle.[6] Gageler's response[7] was to submit that:

> *'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.*
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> *The prohibition, in our submission, 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 – and here we adopt the formulation of Justice Deane in a section 92 context adopted by three members of this court in AMS v AIF – 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.'

This brings the Chapter III argument down from the level of vague generalities to a statement of *textual foundation, core content, logical consequences and a basic criterion for identifying necessary exceptions to accommodate competing interests*. The *Lange* case is a guide to the process of reasoning, but otherwise there is no attempt to analogise with or extrapolate from any notion of freedom of political communication, however broadly defined. Of course, as with any test or touchstone of validity, the complexities cannot readily be captured in short form.

The orthodox interpretive approach is to start with the text of the Constitution and work out from there. Without some implications ss71, 73, 75, 76 and 77 would be unworkable, not merely ineffective. But, if effective operation is the measure, then the extent of implication, including implications on implications, will be contentious. If the right of 'correlative communication' extends to communication from lawyers through the advertising of their services to potential clients, then appropriate controls over fraud or deception would be readily justifiable. A ban on advertisements adopting irrational criteria or capricious mechanisms would not. There is undoubtedly much to be worked through here if this doctrinal door is opened. The submission made by Gageler has consequences well beyond the facts about Part 14 of the NSW Regulation.

Suppose, for the moment, that Chapter III limits controls over legal advertising and other forms of communication in relation to legal rights. What follows in terms of potential legislative response? It is not always easy to isolate federal and non-federal matters in the course of litigation, let alone at the level of providing potential clients with information about possible legal claims. In practical terms, the postulated freedom or freedoms, though sourced in Chapter III, could effectively apply across the Australian legal landscape.

SECTION 92

Section 92 of the Constitution guarantees freedom of interstate trade, commerce and intercourse. *Cole v Whitfield*[8] decided that freedom of interstate trade and commerce and freedom of interstate intercourse are distinct freedoms. The freedom for trade and commerce is freedom from discriminatory burdens of a protectionist character. It seems there is no discrimination requirement for the intercourse part of the guarantee and, in broad terms, interstate intercourse can be subject to reasonable regulation – aspects of the 'old' law of s92 lives on in this corner of the section. The facts at issue involve some communications crossing state boundaries where, for example, information on a website in Victoria is accessed in NSW. The tricky point is whether communication engaged in as part of trade or for the purposes of trade attracts s92 only under the first limb (freedom from discriminatory burdens of a protectionist character), or whether it qualifies for protection as intercourse. Does interstate intercourse mean just non-business activities like a person walking across a state border? It surely cannot include all categories of trade and commerce, for then the *Cole v Whitfield* revolution would have been pointless – something akin to the old individual right theory would reclaim all of s92. Abstract conceptualism is out of fashion in s92 jurisprudence, but some arbitrary line-drawing may be necessary to divide up the areas to which the two limbs of s92 apply.

SECTION 109

Early in the course of the plaintiffs' submissions a question arose about the possibility that Part 14 of the Regulation may be invalid for inconsistency with rights accorded under Commonwealth statutes. After some exchange between bench and counsel on this point, leave was granted to amend the Statement of Claim and the grounds in the Special Case to add this possible s109 point. Written arguments about inconsistency will be submitted after new s78B notices have been issued under the *Judiciary Act* 1903 (Cth). It is not likely that a major inconsistency problem is lurking in the facts. However, the point needs to be resolved and, at the very least, analysis of it has value at the level of distinguishing between a clash between specific rights accorded by Commonwealth statutes, as compared with the more >>

fundamental issue of a possible Chapter III implication that operates to protect rights, including rights created by Commonwealth statute.

EXTRA-TERRITORIALITY

This appears to be a minor line of argument and the plaintiffs were content to let it go forward on the basis of their written submissions. The key issue is whether Part 14 of the Regulation as a matter of construction applies only to advertisements promoting the provision of legal services in NSW. If it extends beyond that to include, for example, material on a website in Victoria about rights in Victoria arising under Victorian law, then the plaintiffs argued the law lacks a sufficient nexus with NSW. Courts tend to lean against constructions that suggest invalidity on the basis of extra-territorial operation. Moreover, the nexus requirement is easily satisfied – even a 'remote or general connexion' will suffice.[9] Any problem about extra-territorial operation could be readily corrected.

CONCLUSION

The Statement of Claim, the Special Case, the written submissions of the parties and the early stages of oral argument in *APLA Ltd v Legal Services Commissioner* were heavily weighted towards the issue of freedom of political communication, and focused on the impact of the particularly draconian NSW law on NSW lawyers. Over the course of the hearing, the emphasis shifted towards the issue of the implications of Chapter III of the Constitution and the impact that various laws, including this particular NSW law, may have on the exercise of legal rights by all Australians. The proceedings are a tribute to the value of dynamic oral argument both building on and moving away from written submissions, with the assistance of questions from the judges. The case also demonstrates how a broader perspective on issues of public import may be enhanced by written and oral argument put by interveners, including here the submissions of the community legal centres.

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Whatever the result on the immediate facts, *APLA Ltd v Legal Services Commissioner* seems destined to be an important constitutional reference point for reasons that go well beyond the immediate controversy that prompted the challenge by the plaintiffs. ■

Postscript: The parties have been instructed to present further argument before the court on 7 December 2004. *Precedent* will follow up this article with a further report on the decision once it has been handed down.

Notes: **1** Transcript [2004] HCA Trans 373 and [2004] HCA Trans 375. Hearing before Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ. **2** Plaintiffs' Written Submissions at [48]. **3** (1997) 189 CLR 520, 567. **4** On the 'manner' in which a law seeks to achieve an end see *Coleman v Power* [2004] HCA 39 at [96] (McHugh J). **5** Commonwealth's Written Submissions at [23]. **6** Transcript [2004] HCA Trans 375 at [7055]. **7** Transcript [2004] HCA Trans 375 at [7185]. **8** (1988) 165 CLR 360. **9** *Mobil Oil of Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at [48] in accord with a long line of authority.

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