

IT'S A MIRACLE!

High Court unanimity on free speech

Kris Walker

The High Court responds to conservative attacks on its integrity by entrenching freedom of speech.

On 8 July 1997, the High Court rendered one of its more surprising decisions in recent times, *Lange v Australian Broadcasting Corporation*: a unanimous decision on the application of the previously established constitutional freedom of political expression. David Lange, former Prime Minister of New Zealand, was suing the Australian Broadcasting Commission (ABC) for defamation. The ABC pleaded by way of defence that the program was published 'pursuant to a freedom guaranteed by the Commonwealth Constitution to publish material ... in the course of discussion of government and political matters' and so was not actionable by Lange (the constitutional defence). The ABC also pleaded a common law qualified privilege defence: that the matters published related to subjects of public interest and the ABC had a duty to publish the material to viewers who had a legitimate interest in receiving that information (the common law defence). The matters in question related to political, social and economic matters pertaining to New Zealand.

The case was removed from the Supreme Court of New South Wales into the High Court of Australia because of the constitutional issue and, in particular, the arguments put by Mr Lange's counsel that the High Court should reconsider its decisions in *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104 and *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211. Lange was heard with a Victorian case which also challenged *Theophanous* and *Stephens* — *Levy v Victoria*. The Court has not yet handed down its decision in *Levy*.

Lange and *Levy* were the first serious challenges to the High Court's application of the implied freedom of political discussion. Notably, there was no challenge to the correctness of the decisions which established the freedom, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106. The challenges to *Theophanous* and *Stephens* were expected in some quarters to succeed, given the Court's later pronouncements on the scope of the constitutional freedom in *McGinty v Western Australia* (1996) 186 CLR 302. However, notwithstanding some media reports to the contrary, the Court in its unanimous decision in *Lange* did not overrule *Theophanous* and *Stephens*, although it did modify somewhat the approach to be taken to the application of the implied freedom.

This article will set out the Court's conclusions and analyse the implications of those conclusions.

The Court's decision

The Court began by reaffirming that representative government and responsible government are implied in the Constitution (*Lange* at 14–17). The Court relied on a number of terms for its implication of representative government in the Constitution: ss.1, 7, 8, 13, 24, 25,

Kris Walker teaches law at the University of Melbourne.

28 and 30. Other provisions provided support for the principle of responsible government: ss.6, 49, 62, 64, and 83. Having established these principles, the Court then affirmed that:

freedom of communication on matters of government and politics is an indispensable element of that system of representative government which the Constitution creates by directing that the members of the House of Representatives be 'directly chosen by the people'. [at 17]

Freedom of communication 'between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors' (at 18) is thus protected by the Constitution, and this protection is not confined to election periods (at 19). The Court noted that the presence of s.128 requires that freedom of communication on matters that might be relevant to a vote cast in a referendum would also be protected. Furthermore, the principle of responsible government implied a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch through the life of a federal Parliament (at 19). This latter freedom is not confined to the conduct of the Ministers and public service, but extends to the affairs of statutory authorities and public utilities which are obliged to report to the legislature or a Minister (at 19). Finally, however, the Court affirmed the existing view that the freedom of political communication is not absolute, and will not invalidate a law which has a legitimate object or purpose (that is, one that is compatible with the maintenance of responsible and representative government) and which is reasonably appropriate and adapted to achieving the legitimate end (at 20).

Notwithstanding that it grounded the freedom of political communication in the implied concepts of representative democracy and responsible government, the Court emphasised the importance of the text and structure of the Constitution, so that:

[T]he relevant question is not, 'What is required by representative and responsible government?' It is, 'What do the terms and structure of the Constitution prohibit, authorise or require?'

In its affirmation of the freedom, the Court stressed that this freedom is not an individual right (which it had, on occasion, been called). Rather, it is a limitation on legislative power (both Commonwealth and State) and it affects the content of the common law. What it does not do is give citizens any freestanding constitutional right. Rather, a person who believes her freedom has been infringed must first establish the invalidity of legislation or the content of the relevant common law and then use any statutory or common law remedies or defences available. Whether this makes any substantive difference to the individual concerned, however, is debatable.

The Court, as mentioned, affirmed that the constitutional freedom acts as a limitation on State legislative power and that it operates to determine the content of the common law. These two propositions were established by *Theophanous* and *Stephens* and in that respect, those decisions have been left intact. This is significant, as it means that the scope of the constitutional freedom is confirmed rather than wound back to affect only Commonwealth legislative power. Furthermore, the Court indicated that it must develop the common law in line with the Constitution (including, of course, the implied freedom) and that the common law so developed cannot be restricted or limited by the legislature. Thus, al-

though the pleading of a constitutional defence was bad in law, the ABC could plead the newly developed common law defence. This defence is constitutionally protected because legislative defamation regimes may extend protections available to defendants but not curtail them in a way that conflicts with the constitutional freedom. So although the common law defence is not called a constitutional defence, it operates in a quasi-constitutional way.

Qualified privilege

The Court then turned its attention to the content of the common law of defamation, particularly the defence of qualified privilege. It held that the common law as previously expounded in Australia imposed an unreasonable restraint on freedom of political communication, so that the Court was now required to broaden the scope of the common law defence.¹ It declared that:

[E]ach member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it.

Interestingly, the Court considered that this went beyond what is necessarily required by the constitutional freedom, in so far as it would, in some circumstances protect communications that would not illuminate the choices for voters at federal elections or referenda or throw light on the administration of federal government, for example, speech about the United Nations or other countries (at 33). Similarly, the qualified privilege would protect speech about State and Territory and even local government issues, even where this would not bear on federal political issues (at 33): again, the common law defence is broader than that mandated by the constitutional freedom.

The Court went on to elaborate on the conditions for the application of the expanded qualified privilege. They held that, where a mass audience is involved, the defence can operate (contrary to the previous position), but that it required reasonableness of conduct by the publisher. This, the court held, subsumed the two other requirements that had been enunciated by the majority in *Theophanous* with respect to the then constitutional defence, namely that the publisher had to be unaware of the falsity of the publication and that the publisher was not reckless (at 35-6). Reasonableness, they held, would depend on the circumstances of a given case, but as a general rule would include assessment of whether the defendant had reasonable grounds for believing that the imputation was true, whether it took proper steps to verify the accuracy of the information, whether the defendant believed the imputation to be untrue and whether the defendant sought a response from the person defamed and published the response made (at 37). With respect to these issues, the burden is on the defendant, it seems.

Finally, if the plaintiff can demonstrate that the offending publication was *actuated* by malice or improper motive, then the common law defence will be defeated (at 36-7). Here, the burden is on the plaintiff, but the Court noted that the motive of causing political damage to a person or her party cannot be regarded as improper. Notably, the majority in *Theophanous* had rejected malice as relevant to the constitutional defence, so this is another way in which the common law defence differs from the previous constitutional defence.

Implications

The *Lange* decision is significant in so far as this is the first time the Court has unanimously agreed on the constitutional freedom of political communication. This means that the continued existence of the freedom is virtually unassailable, something of a relief given the impending Liberal Government appointments to the Court. Indeed, one wonders if the belligerent suggestions that the Liberals will appoint 'capital C conservatives' to the bench might have prompted the Court to unite for the sake of its integrity. The basis of the freedom has perhaps been wound back somewhat, in that the Court is emphasising the need to focus on the text and structure of the Constitution, rather than the content of principles such as representative government, although the real significance of this difference remains to be seen.

Perhaps the most interesting feature of the decision is that, notwithstanding its rejection of the constitutional defence as 'bad in law', the Court has in substance left us with a constitutional protection, because the expanded common law qualified privilege defence cannot be reduced so as to violate the freedom. The Court itself was obliged to develop the common law consistently with the Constitution and if the legislature, be it State or Commonwealth, purported to cut back this protection, such legislation would be invalid. So we may not, in the Court's pedantic terminology, have an 'individual right' or a constitutional defence, but at least so far as the law of defamation is concerned, the effect seems to be the same.

Where we do have a departure from the previous constitutional approach is in the Court's approach to political speech concerning State, Territory and local government issues. Previously, a majority of the Court had adopted the view that political speech was indivisible — so although the constitutional protection flowed from the presence of representative government in the Commonwealth Constitution, it was not confined to Commonwealth political speech but included all political speech. This was because it was artificial and not coherent to attempt to divide politics into hermetically sealed spheres of Commonwealth politics and 'other' politics. Although the Court in *Lange* has not expressly rejected that approach, rejection seems to be implicit in the discussion of the relationship between the expanded common law defence and the Constitution. The Court indicates that, while the Constitution will protect speech about State, Territory and local government issues where those issues bear upon federal elections, referenda and federal government administration, the common law defence will go further and protect political speech about State, Territory and local government issues *even where such issues do not bear upon federal political issues* (at 33). The same applies to matters of an international nature. This implies the Constitution does not protect all political speech in Australia, but only that which can be said to be federal in nature.

The Court has also departed from *Theophanous* and *Stephens* in its elaboration of the common law defence: namely its elaboration of reasonableness which was present in *Theophanous*, but has now been more explicitly spelt out; and its addition of malice as a relevant factor which can defeat the defence, although the concept of malice so introduced is a narrow one, requiring: not merely the existence of an improper purpose, but that such a purpose *actuated* the publication.

Ultimately, it is my view that in the compromise and negotiation that must have occurred to produce this decision,

those who championed constitutional free speech in previous cases have consolidated the position of the freedom, while those who deplored the Court's direction in the implied rights cases have gained very little. The previous minority has seen the formal outcome that a defendant should not plead the common law rather than the Constitution; but defendants nonetheless have a defence that is both inspired and protected by the Constitution, thus preserving many of the gains for freedom of political expression made in *Theophanous* and *Stephens*.

Reference

1. Prior to *Lange*, the common law doctrine of qualified privilege provided a defence for a person who published an otherwise defamatory publication in the performance of a duty or to protect an interest, where the person to whom the statement is made has a corresponding interest or duty in receiving the information (there are other forms of qualified privilege but these are not relevant for present purposes). The requirement of reciprocal duty or interest severely limited the operation of this form of qualified privilege, as the interest in the publication on the part of the receiver must amount to an interest 'material to the affairs of the recipient ... such as would ... assist in the making of an important decision or the determining of a particular course of action' (*Austin v Mirror Newspapers Ltd* [1986] 1 AC 299, 311). This had rarely applied to publications made to the public at large, as not every member of the group would have the requisite interest. Essentially, there was no duty-interest relationship between the media and the general public. See Walker, Sally, *The Law of Journalism in Australia*, Law Book Company, 1989, pp.187-89.

Court in the web

Websites which might interest ALJ's

For and about young people and the law: site produced by National Children's and Youth Law Centre

<http://www.lawetuff.org.au>

Fitzroy Legal Service homepage. Access to a wide range of community reports and submissions.

<http://www.fitzroy-legal.org.au>

The 'Bringing them Home' Report

<http://www.austlii.edu.au/au/other/hreoc/stolen/>

Recent High Court cases

http://www.austlii.edu.au/au/cases/cth/high_ct/recent-cases.html

On-line petition to the Senate about the resolution of the Wik case

<http://www.austlii.edu.au/au/other/unsw/centres/ilc/>

Results of above petition can be viewed at

http://www.austlii.edu.au/au/other/unsw/centres/ilc/wik_table.html

Information relevant to refugee law in Australia

http://www.austlii.edu.au/au/other/ahric/refugee_info/