

## Topic 12: Implied Political Freedoms

	Political Communications
Case	<i>Nationwide News Pty Ltd v Wills</i> (1992) 177 CLR 1
Facts	An article was published in a Nationwide News paper which attacked the integrity and independence of the Australian industrial Relations Commission. The company was published under the <i>Industrial Relations Act</i> which prohibited bring the Commission into disrepute.
Issue	Was the act valid under section 51(xxxv) - the power to make laws with respect to conciliation and arbitration for the prevention of industrial disputes?
Judgement	<p>The law was invalid. It imposed an unconstitutional burden on political communication, which is itself a necessary instrument of the people making their direct choice.</p> <p><b>Mason CJ, Dawson &amp; McHugh JJ</b></p> <p>The provision was invalid on the ground that the protection it afforded the Commission was so disproportionate that it stood outside the incidental scope of power in section 51 (xxxv).</p> <p><b>Brennan, Deane, Toohey &amp; Gaudron JJ</b></p> <p>The law may have been within the scope of section 51 (xxxv) but, the law infringed upon the Constitution's implied right to freedom of communication about matters relating to the government of the Commonwealth.</p>

	Political Communications
Case	<i>Australian Capital Television Pty Ltd v Commonwealth (No. 2)</i> (1992) 177 CLR 106
Facts	Statute enacted by the Commonwealth to place limits on electoral advertising.
Issue	Did the law impede upon the freedom of political communication?
Judgement	The law was struck down because it imposed an unconstitutional burden on political communication which is necessary for the people to make their direct choice. The legislation overrode the implied freedom of political communication.

	Political Communications
Case	<i>Lange v ABC</i> (1997) 189 CLR 520
Facts	Lange was a NZ Prime Minister and the ABC broadcast things which he claimed was defamatory.
Issue	
Reasoning	The court said the common law of Australia also must conform with the constitution, the common law and requirements of the constitution cannot be at odds, therefore the HC in declaring the common, has to bring it in line with the constitution.
Test	<ul style="list-style-type: none"> <li>- Does the law in some way burden the direct choice? most obviously by burdening political communications.</li> <li>- If it does, it will go down, or it is common law it will have to change, unless you can articulate some way in which it is defensible in constitutional terms (does it nevertheless fit with the constitutional choice?). Trade off speech against safe political sphere, however you cannot balance the constitution against things outside the constitution (<i>Engineers</i>).</li> </ul>

	Political Communications
Case	<i>Coleman v Power</i> (2004) 220 CLR 1 (also an example of “reading down”)
Facts	Coleman argued that that legislation was unconstitutional because of the burden it placed on political communication.
Issue	Can the criminal law criminalise offensive language in QLD?
Reasoning	The statute was read down to criminalise only offensive language which was apt to produce a violent response.
Judgement	<p><b>Gummow &amp; Hayne JJ (majority)</b></p> <p>Take seriously the point that a multitude of considerations bear upon the way in which the people undertake and participate in the direct choice and sometimes these considerations push in different ways. Some offensive language is apt to trigger a violent response. If</p>

	<p>public spaces are therefore full of violence, this burdens on the direct choice as people will not engage in political discussion in public places</p> <p><b>Gleeson J (dissent)</b></p> <p>Prohibiting offensive language is not per se at odds with the direct choice.</p>
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	Political Communications
Case	<i>Wotton v Queensland</i> (2012) 246 CLR 1
Facts	QLD parole laws prohibits parolees from talking to the press.
Issue	
Judgement	<p>The court said this is not a constitutional complaint, it is an administrative law complaint. Whereas, the law in <i>Coleman</i> creates a general criminal law (a duty on people to refrain from criminal language, and therefore it imposes a duty on them to refrain from offensive criminal law, however the constitution says they do not have to follow this – the law itself purports to create a duty which is inconsistent with the direct choice. However, the law here gives a particular public official a power to create new obligations on parolees.</p>

***	Political Communications
Case	<i>Monis v The Queen</i> (2013) 295 ALR 259, [2013] HCA 4
Facts	The law prohibited sending offensive material through the post. Monis was sending letters to the families of Australian soldiers killed in Afghanistan, he was charged for sending offensive material through the post.
Issue	Is the criminal law invalid because of the burden it places on political communication?
Judgement	<p>The legislation was valid. Implied freedom of political communication does not operate as an individual rights; rather, it is an implied restriction on the legislative competence of Australian parliaments and executives. The Court applied the test expounded in <i>Lange</i> and modified in <i>Coleman</i>:</p> <ol style="list-style-type: none"> <li>1. Does the law effectively burden freedom of communication about government or</li> </ol>

political matters?

2. If so:

- a. Does the law have an object that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? And
- b. Is the law reasonably appropriate and adapted to achieving that legitimate object or end?

**Hayne J**

The law was unconstitutional because it clearly burdened political speech in the sense that some political communications will be offensive in character and he said unlike the law in *Coleman* it could not be read down to find a saving interpretation, because whereas some offensive language in public is apt to produce a violent response and that disturbance of speech is a burden to direct choice, when it comes to things in the post, you may not even know who sent it and even if you do there is no one there to respond to with violence – does place a threat to the direct choice

Concern for the joint judgement is that it prioritises a person's right to feel safe opening the mail over the constitutional mandate that there should be a direct choice

**Crennan, Keifel & Bell JJ**

The purpose of the law was to protect people from “intrusive” seriously offensive communications. The nature of postal communications is that they are delivered into people's homes and workplaces and therefore are unsolicited. The purpose is thus compatible with the maintenance of the constitutionally prescribed system of government. The law is reasonably and appropriately adapted to achieving that legitimate purpose.

**French CJ**

Takes the view that the law is valid. All-politics all the time takes on a gender dimension (men tend to take the view of all-politics).

**French CJ & Heydon JJ**

The purpose of the law was simply to prevent the use of postal services in an offensive way. A law which prohibits offensive language through the post only affects political speech indirectly. They considered that the restrictions imposed on political communications were greater than the other justices. Found that the law was invalid, all-politics takes on a gender dimension.

	Political Communications
Case	<i>Unions NSW v New South Wales</i> [2013] HCA 58
Facts	Legislation that limited electoral donations from trade unions. The Unions - argued that the law was unconstitutional – the law is not a burden on their direct choice (a trade union does not have a vote) but the court accepted that political communications from trade unions matter to the decision making to the people who do have a vote, they contribute to the environment in which the choice is made, by limiting it reduces the presence in the political environment).
Issue	
Judgement	The law was struck down because it did not facilitate the direct choice.

	Political Communications
Case	<i>McCloy v New South Wales</i> [2015] HCA 34
Facts	A new law put extreme limits on property developers making electoral donations.
Issue	Do electoral donations by property developers place a burden on political communications?
Reasoning	The Court agreed that it was a burden on direct choice, but the law was valid because there was a countervailing purpose that it served, mainly an anti-corruption purpose, and the statute referred directly to that (and there was evidence from the ICAT of the corrupt influence the property developers had wielded in NSW politics)
Judgement	<p><b>Gordon J</b></p> <p>Articulates her reasoning, the law “works to ensure that the rights of individuals are secured so that <i>each</i> individual has an <i>equal</i> share, or at least a more equal share than they would otherwise have, in political power.” The legislation does not undermine the direct choice, but facilitates the direct choice by establishing some of equilibrium of power.</p> <p><b>Gageler J</b></p> <p>Agreed with the joint judgment, but held that this was not a special case due to proportionality, but rather because the provisions were no more restrictive than was reasonably necessary to be imposed in the pursuit of compelling statutory objective, namely preventing corruption and undue influence in the government of a State.</p>

	<p><b>Majority: French CJ, Kiefel, Bell &amp; Crennan JJ</b></p> <p>Upheld the validity of the law, there can still be permissible, valid laws which burden communication. Donations themselves are not a means of communication. In Australian corporate donation practice, it is quite common for the same corporate entities to donate to both the Government and the opposition.</p> <p><b>Nettle J (dissent)</b></p> <p>Concerned that the burden on communication is not outweighed by the contribution to the political economy. The silencing on the voice of the property developer's, excessively burdens them and the burden on one political voice is itself undermining the electoral approach.</p>
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	Elections
Case	<i>Roach v Australian Electoral Commissioner</i> (2007) 233 CLR 162
Facts	Prohibited prisoners from voting in any federal election, irrespective of the nature of the offence which they had committed and the duration of the term.
Issue	Is there a constitutionally entrenched right to vote? Is it limited in any way?
Reasoning	There is a constitutionally entrenched right to vote; sources sections 7 and 24 of the Constitution. The court struck down the amendments as everyone has to be enfranchised - if parliament has enfranchised someone they cannot then be kicked out of the franchise.
Judgment	<p><b>Gleeson CJ</b></p> <p>Given the importance of the franchise, the right to vote, there must be a substantial reason for limiting a person's right to vote. He looked at the expansive wording of the section. Since it was framed so broadly it denied all people the right to vote who were imprisoned (even those who were imprisoned for 6 months because they could not pay a fine). Although it may be permissible to restrict the right, to prevent all prisoners from voting went beyond the permissible nature of right. Need a substantial reason to restrict the right.</p> <p><b>Gummow, Kirby &amp; Crennan JJ</b></p> <p>Took a slightly different approach. Drew from the test in <i>Lange</i> and said that in order to determine the constitutionality, it is necessary to ask whether the disqualification [from the right to vote] is for a reason that is reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed</p>

	<p>system of representative government? Like Gleeson CJ these judges found that the expansive nature of the law rendered it disproportionate. Preventing all prisoners from voting was disproportionate.</p> <p><b>Hayne &amp; Heydon JJ (dissenting)</b></p> <p>Dissented on the basis of deference to Parliament. Commonwealth Constitution gives the Parliament, which is directly chosen by the people the power to decide. Therefore gives the Parliament the power to decide who should be able to vote. Refused to locate an implied right. Adopted an originalist approach. For Parliament to decide who had the franchise and who did not.</p>
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	Elections
Case	<i>Rowe v Electoral Commissioner</i> (2010) 243 CLR 1
Facts	<p>Legislation was amended such that the time period during which a person could enrol to vote following the announcement of a pending federal election was significantly shortened → prior to this, voters had 7 days to enrol after the announcement of the election.</p>
Issue	Did the shortened cut-off dates for enrolment effectively disqualify the plaintiffs from their right of direct choice?
Judgements	<p>Legislation was struck down; Parliament cannot change the machinery because they would rather different machinery because it stops the people from their direct choice. The direct choice unfolds over time; even though it reaches its crescendo on polling day it continues to occur when the parliament sets up an electoral machine and people nominate to stand for election etc.</p> <p><b>Crennan J</b></p> <p>Provides 3 reasons for why the law fails the proportionality test:</p> <ol style="list-style-type: none"> <li>1. The system worked fine before there was a 7 day cut-off period, so no reason to further limit the amount of time that people have to enrol to vote</li> <li>2. The right to vote is too important to be limited in this way</li> <li>3. The government claimed that the changes were necessary to prevent electoral fraud. The HCA had no evidence of this proposition.</li> </ol> <p>Did not amount to a substantial reason to limit right to vote for so many electors. The means of setting a certain cut off time was not appropriate to ensuring the integrity of the voting process. Although ensuring the integrity is a legitimate purpose, the means were not.</p>

	Elections
Case	<i>Murphy v Electoral Commissioner</i> [2016] HCA 36 (OL)
Facts	Argued that the machinery was unconstitutional because it is not generous enough in letting people enrol.
Issue	Are sections of the <i>Commonwealth Electoral Act</i> contrary to sections 7 and 24 of the Constitution?
Judgement	Found that the machinery the Parliament was using was okay; it is not the Court's job to tell the Parliament the way the machinery should be set up.