

## Freedom of Political Communication

### Background, Breakthrough and Expansion

Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be '*directly chosen by the people*

*Lange v Australian Broadcasting Corporation*

Implied in sections 7 and 24 in the Constitution, which provide that...

### *Kruger v Commonwealth per Dawson J*

Constitution does not seek to establish personal liberty by placing restrictions upon exercise of power. It deals with structure/relationship of government rather than individual rights. There is no bill of rights (one was actually rejected in 1898). Framers placed faith in democratic process.

**The High Court has recognised that the system of representative government gives rise to an implied freedom of political communication. Key features include:**

- a) it is an implication derived from the text and structure of Constitution - implied from representative and responsible government.
- b) it relates to communication on government and political matters.
- c) it protects political discussion in relation to all levels of government.
- d) it limits Commonwealth and States.
- e) it is not absolute.

### BREAKTHROUGH

The Court announced that the Constitution contained an implied guarantee of freedom of communication on political matters.

### *Australian Capital Television v Commonwealth*

- **FACTS:** Part IIID, which was inserted into the *Broadcasting Act 1942* (Cth), introduced a ban on electronic broadcasting of political advertising during election periods and required broadcasters to make available free time for election advertising by political parties, as allocated by Australian Broadcasting Tribunal.
- **HELD:** by a majority of six judges (with Dawson J dissenting), that the Constitution contained an implied guarantee of freedom of communication on political matters, which is required by the system of representative democracy for which the Constitution. Majority invalidated provision— it was not that parliament could not regulate electoral advertising at all, but that the free time provisions were heavily weighted in favour of currently represented parties (Brennan, Dawson JJ dissenting held restrictions were justified and did not have a serious effect on voter's right to make real choice)
- **REASONS:** Mason CJ: representative government would fail absent such freedom of communication. McHugh J: ss 7, 24 give the people of Australia the constitutional rights "of freedom of participation, association and communication in relation to federal elections". Brennan J: recognised implied freedom but held it was proportionate to legitimate aim of reducing corruption in political process

### *Nationwide News Pty Ltd v Wills*

- **FACTS:** Section 299(1)(d)(ii) of the *Industrial Relations Act 1988* (Cth) made it an offence for any person to use words calculated to bring a member of the Industrial Relations Commission, or the Commission, into disrepute. The defences which were ordinary available to persons charged with such an offence, defences such as “fair comment” or “honest and reasonable mistake of fact”, had been removed.
- **HELD:** the prohibition was unconstitutional. Brennan, Deane, Toohey and Gaurdon JJ relied on the implied freedom of political communication to strike down the provision. Mason CJ, Dawson and McHugh JJ struck down the law on other grounds.
- **REASONS:** Brennan J: freedom of discussion is an essential part of representative government. Deane and Toohey JJ: representative government presupposes people can communicate information and opinions regarding the discharge of governmental powers and functions; thus, implication of freedom of communication of information relating to government matters is incorporated in Const.

## EXPANSION

Implied freedom of political communication could be pleaded as a defence in defamation to actions brought by politicians and others engaged in public debate.

### *Theophanous v Herald and Weekly Times*

- **FACTS:** D wrote letter that P was biased towards Greek immigrants and “idiotic”. Theophanous brought proceedings against the defendant for defamation. The defendant argued, amongst other things, that the implied freedom of political communication had an impact on the law of defamation which effectively immunised them against suits by politicians.
- **HELD:** the implied freedom of political communication could be pleaded as a defence in defamation to actions brought by politicians and others engaged in public debate. Mason CJ, Deane, Toohey and Guadron JJ held that:
  1. There is implied in the Commonwealth Constitution a freedom to publish material: (a) discussing government and political matters; (b) of and concerning members of the Parliament of the Commonwealth of Australia which relates to the performance by such members of their duties as members of the Parliament or parliamentary committees; (c) in relation to the suitability of persons for office as members of the Parliament.
  2. In the light of the freedom implied in the Commonwealth Constitution, the publication will not be actionable under the law relating to defamation if the defendant establishes that: (a) it was unaware of the falsity of the material published; (b) it did not publish the material recklessly, that is, not caring whether the material was true or false; and (c) the publication was reasonable in the circumstances.
  3. A publication that attracts the freedom implied in the Commonwealth Constitution can also be described as a publication on an occasion of qualified privilege. Whether a federal election is about to be called is not a relevant consideration.

Significantly, the implied freedom extended to political discussion at the **state level** and held that the extended defence therefore applied to an alleged defamation of a state politician.

### *Stephens v West Australian Newspapers*

- **FACTS:** The plaintiffs had undertaken an overseas study trip at taxpayers’ expense and were the subject of criticism in a number of articles in the *West Australian* newspaper that said that the politicians had gone overseas without the knowledge of the parliament and had undertaken “a junket of mammoth proportions”. The plaintiffs sued for defamation.

- **HELD:** the implied freedom of political communication (which they found existed in the Commonwealth Constitution and the *Constitution Act 1899* (WA)) extended to “criticism of the conduct, performance and fitness for office of a member of Parliament”.
- **REASONS:** McHugh J dissented based on strict construction of the words in ss 7, 24—rejected any attempt to draw implications from a more general concepts of representative government

### Reconciliation

In both *Theophanous* and *Stephens* the following division emerged:

- a) Dissents from Brennan, Dawson & McHugh JJ as to the nature and extent of the implied freedom; and
- b) Deane J in the majority had a wider view of the scope of the freedom in regard to defamation than Mason CJ, Toohey and Gaudron JJ.
- c) Although *Theophanous* and *Stephens* mark the zenith of the implied freedom of political communication, in both cases the following division emerged:
  - dissents from Brennan, Dawson & McHugh JJ as to the nature and extent of the implied freedom; and
  - Deane J in the majority had a wider view of the scope of the freedom in regard to defamation than Mason CJ, Toohey and Gaudron JJ.
- d) In *Lange*, in a rare unanimous joint judgment, the High Court clarified the scope of the implied freedom of political communication.

### CURRENT FORMULATION

#### *Lange v Australian Broadcasting Corporation*

- **FACTS:** The plaintiff, a member of the New Zealand Parliament and former Prime Minister, brought a defamation action against the ABC alleging that he had been defamed during a *Four Corners* program.
- **HELD:** The Constitution conferred no private right of defence but instead created an immunity against legislative incursion into free communication in respect of political matters.
  - The Court expanded the common law defence of qualified privilege to provide a protection for criticism of politicians.
  - The Court took the opportunity to settle several of the disputed questions arising from their earlier decisions.

#### General principles from *Lange* (at 559-562):

- Freedom of communication on matters of government and politics is an indispensable incident of the system of representative government which the Constitution creates.
- Sections 7, 24 and related provisions necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.
- The freedom is not confined to an election period.
- The freedom is not absolute: it is limited to what is necessary for the effective operation of the system of representative and responsible government.

The High Court in *Lange* said that in order to determine whether a State, Federal or Territorial Law is valid, two questions must be answered:

1. does the law effectively burden freedom of communication about government or political matters either in its terms, or its effect?
2. 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.

This test was altered slightly by the Court in *Coleman v Power*, before a more structured proportionality test was adopted by a majority of the Court in *McCloy v NSW*.

### Application After Lange - *Levy v Victoria*

- **FACTS:** Levy, an animal rights activist, was charged with summary offences under Victorian hunting season regulations which made it an offence for people who did not hold a valid game licence to enter into or upon any permitted hunting area during a specified period of time. During this period, licensed hunters were allowed to shoot and kill ducks. The plaintiff, (did not hold a license), challenged the constitutional validity of the regulations on the basis that, among other things, the regulations were unconstitutional by reason of the implied freedom of political communication.
- **HELD:** , that the first limb of the *Lange* test had been breached - the plaintiff should be free to protest in non-verbal way and wherever it would have most effect - but that that law was an appropriate regulation of public safety.

### *Mulholland v AEC*

- **FACTS:** An officer of the Democratic Labor Party challenged the rule that a party prove that it has at least 500 members, not being members of another party, to be registered. Registration gave the benefit that the party's name would appear on the ballot paper next to that of the candidates.
- **HELD:** The law was valid. The ballot paper not a communication from party to voters, but a communication between voters and AEC, and was reasonable regulation.

### The two-step test in *Lange* was slightly modified by the majority in *Coleman v Power* -

- **FACTS:** Coleman was protesting, distributing pamphlets which contained charges of corruption against several police...Coleman pushed Power: "This is Constable Brendan Power, a corrupt police officer". The magistrate said that the appellant was not protesting against any laws or government policies, but was conducting a "personal campaign related to particular officers of the Townsville Police. Coleman was convicted of using insulting words in a public place, contrary to the *Vagrants, Gaming and Other Offences Act 1931* (Qld).
- **HELD:** That Coleman's conviction for using insulting words to a police officer should be set aside.
- The majority (Gummow, Hayne, McHugh and Kirby JJ) held that the impugned provisions were either constitutionally invalid under *Lange* or should be interpreted in a manner that did not capture Coleman's conduct. McHugh and Kirby JJ held that the implied freedom affected the outcome of this case - s7(1)(d) needed to be interpreted so that it did not capture insults made during communication about government or political matters. Gummow and Hayne JJ held that Coleman's words were not 'insulting words', and so did not need to apply the *Lange* test.