

TOPIC H: IMPLIED FREEDOM OF POLITICAL COMMUNICATION

PROCESS

- (1) Construe the law to determine whether it is supported by a head of power;
- (2) Apply the *Lange* test

KEY PRINCIPLES

The current test: *Brown v Tasmania*

Does the law infringe the implied freedom of communication on governmental and political matters?

- (1) Does the law **effectively burden** the freedom of communication about government or political matters in its *terms, operation or effect*? [**characterise the law**]
- (2) If “yes” to question (1), is the **purpose of the law legitimate**, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative government? [**“compatibility testing”**]
 - Answer will be affirmative if the purpose of the law identified is compatible with the constitutionally prescribed system in the sense that it does not adversely impinge upon the functioning of the system of representative government
- (3) If “yes” to question (2), is the law **reasonably appropriate and adapted to advance that legitimate object** in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? [**“proportionality testing”**]
 - This question involves “proportionality testing” to determine whether the restriction which the provision imposes on the freedom is justified as:
 - (i) **Suitable** - as having a rational connection to the purpose of the provision;
 - (ii) **Necessary** - in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
 - *McCloy*: laws held to be necessary as plaintiffs did not identify any equally practicable alternatives
 - *Unions of NSW (No 2)*: did not adduce evidence as to why the law was necessary for its purpose
 - (iii) **Adequate in its balance** - a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom

Definitions

- (1) **Freedom**: this means freedom **from governmental action**; not a right to require others to provide means of communication (*Gummow & Hayne JJ in Mulholland*)
- (2) **Communication**: receipt or dissemination of information (*Lange*)
- (3) **Government and political matters**: it appears that there is judicial acceptance of the implied freedom **applying to the judiciary**. However, this is not an established principle and its application will depend upon the circumstances of each case: *Gillard AJA in Popovic*

Purposes held to be valid

- ⇒ The maintenance of **public safety**: *Levy v Victoria*
- ⇒ Keeping public places free from violence/preventing or sanctioning public violence and provocation to such conduct: *Coleman v Power* (Gummow, Hayne & Kirby JJ)
 - **Maintaining public order**: Gleeson CJ
 - Preserving the peace in public places / regulating the interests of an ordered society: Callinan & Heydon JJ
- ⇒ Legislative packages to assist voters in casting their vote: Gleeson & Heydon JJ in *Mulholland*
- ⇒ Kirby J in *Mulholland*:
 - (1) To reduce confusion in the size and form of ballot papers;
 - (2) To diminish the risk and actuality of deception of electors;
 - (3) To discourage the creation of phony political parties;
 - (4) To protect voters against the disillusionment of the system of parliamentary democracy
- ⇒ **Protecting** people from intrusion of **seriously offensive material** into their personal domain: Crennan, Kiefel & Bell JJ in *Monis*
- ⇒ Preventing postal or similar services from offensive uses: French CJ (Heydon J agreeing) in *Monis*
- ⇒ Regulating political donations in order to address the possibility or **undue or corrupt conduct** being exerted: *Unions of NSW v NSW (No 1)*
- ⇒ To **prevent the drowning out of voices** by the distorting influence of money: *Unions of NSW v NSW (No 2)*
- ⇒ To level the playing field to ensure that all voices could be heard: *McCloy*
- ⇒ Protecting corruption and undue influence in the government: *McCloy*
 - Includes preventing perceptions of corruption and undue influence which might undermine public confidence in the government

Key principles

From *Lange*:

- (1) **Basis of the implication**: implication is based on the express **text and structure** of the constitution
 - No longer regarded as deriving from a broad overarching principle of “representative democracy”
 - Rather, the Constitution sets up a precise form of representative and responsible government
 - **ss 7 & 24 set up a system of representative government**. These sections require that there must be a true choice of representative – therefore, it is implied that communication on such matters is required for “the opportunity to gain appreciation of alternatives”
 - s 7: “*The Senate shall be composed of senator for each State, directly chosen by the people of the State*”
 - s 24: “*The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth*”
- (2) **Nature/operation of the implication**: operates as a **constitutional prohibition** on laws which burden speech, NOT as a constitutional immunity from the operation of such laws
 - Moreover, the implied freedom “**does not confer personal rights on individuals, rather precludes curtailment of the protected freedom by the exercise of legislative or executive power**”
 - Result: any law that breaches the implied freedom will be invalid to the extent that it does so
- (3) **Not limited to federal laws/issues**, but also **covers State, local and international** laws/issues relating to public matters
 - Freedom not limited to a discussion of Australian affairs, but all international matters as long as there is some relevance to Australia
 - The implied freedom can thus preclude the exercise of state, territory and local legislative power

- Increasing integration of social, economic and political matters in Australia and the existence of national political parties operating at all levels has meant that discussion of lower level politics may bear on choice in federal elections
- Statements about state police officers captured: *Coleman v Power*

(4) **No temporal limits** on the implication: **applies at all times**, not just during election periods

(5) **Very liberal and broad definition** of what constitutes “political communication”: any matter whatsoever which may be of relevance in electors in deciding how they are going to act

- Only thing that would not constitute PC would be speech regarded as entirely private

(6) Freedom is **not absolute**: **laws which burden political communication may still be valid** if it is otherwise reasonably appropriate and adopted to achieve a legitimate end consistent with representative and responsible government

From *Levy v Victoria*:

(7) Right **includes symbolic speech and non-verbal communication**, so long as it is ‘*calculated to express, and capable of expressing*’ a political message

- Examples of non-verbal communication:
 - ‘Signs, symbols, gestures and images’: *McHugh J* in *Levy*
 - (i) lifting a flag in battle; (ii) raising a hand against advancing tanks; (iii) wearing symbols of dissent; (iv) participating in a silent vigil; (v) public prayer and meditation; (vi) turning away from a speaker; (vii) boycotting a big public event: *Kirby J* in *Levy*
 - Donations to political parties: *McCloy*
 - Ballot paper: *Gleeson, McHugh and Kirby* in *Mulholland*
 - Communications on pamphlets: *Coleman v Power*

PRE-LANGE CASES

Original basis of implication

Originally, representative *democracy* was the source of the freedom. Moreover, a representative democracy requires freedom of political communication: *Nationwide News; ACT v Cth*

⇒ This was overturned in *Lange*

Nationwide News Pty Ltd v Wills (1992)

FACTS	An amendment to the <i>Industrial Relations Act</i> provided that it was an offence for a person to use words in writing or speech calculated to bring the Industrial Relations Commission into disrepute
HELD	Law held to be <u>invalid</u> as the phrase was not detailed enough i.e. did not exclude speech which was a critical evaluation of a particular decision of the IRC <ul style="list-style-type: none"> - The burdening of speech was burdening people from saying anything about the IRC → too broad
PRINCIPLES	Majority found that the Australian constitution created a system of representative democracy <ul style="list-style-type: none"> - This was somehow taken outside of the Constitution as a principle from which you could derive certain implications – here they implied a freedom of political communication - Idea was that democracy requires the freedom of speech

LAWS2011 SUMMARY

EXTERNAL AFFAIRS POWER

s 51(xxix)

s 51(xxix) *Constitution* gives Parliament the power to make laws with respect to external affairs

- ⇒ Note, however, that the external affairs power is granted “*subject to this Constitution*” and is thus subject to express and implied Constitutional limitations: *Starke J* in *Burgess*; *Stephen J* in *Koowarta*; *Gibbs CJ* in *Tasmanian Dam*
 - Express limitation of freedom of interstate trade (s 92)
 - Implied limitation of political communication: *Nationwide News*
- ⇒ But the external affairs power is not subject to international law: *Horta*

GEOGRAPHICAL EXTERNALITY

Is the law legislating on a matter geographically external to Australia?

→ Not applicable if the law applies to Australians in Australia

- ⇒ **The Sharkey principle:** the external affairs power enables legislation with respect to Australia’s relations with all countries outside Australia. Specifically, s 51(xxix) was interpreted *War Crimes* as allowing Parliament to make laws with respect to “*places, persons, matters or things physically external to Australia*” (*Dawson J*)
 - Moreover, the power was characterised in *Industrial Relations* (confirmed in *Horta*) in such a way that **mere geographical externality is enough** (adopting the broader comments of *Dawson J* in *Polyukhovich*)
 - This appeared to reject previous comments by the high court that there must be “some nexus, not necessarily substantial” (*Brennan J* in *Polyukhovich*), such that the law “touches or concerns” Australia (*Toohy J* in *Polyukhovich*)
 - However note that doubt regarding mere geographical externality was entertained by *Kirby J* and *Callinan and Heydon JJ* rejected the principle altogether in *XYZ*, but note that no further cases have challenged the principle and in any case this is not a majority position (although it may suggest that there is some movement away from the principle)
 - Moreover, this is the case irrespective of the existence of any treaty: *Horta*
 - Law need not be consistent with the requirements of international law
- ⇒ The power has been interpreted to **include**:
 - Regulating/prohibiting conduct in Australia which affects Australia’s relations with other nations: *Sharkey*
 - Laws dealing with the movement of persons between Australia and places physically external to Australia, independently of the implementation of any treaty imposing obligations upon Australia w.r.t. non-citizens: *Plaintiff M47/2012* per *Gummow J*
 - Includes movements of children between Australia and places physically external to Australia: *De L v Director General, NSW Department of Community Services*
 - Removing people from Australia to other countries: *Plaintiff M68*
 - Detaining non-citizens that do not possess a visa in Australia, pending the issue of a visa or their removal from Australia: *Gummow J* in *Plaintiff 147*; *Plaintiff M68*
 - Laws regulating the placing by Australian investors of money in overseas countries: *R v Hughes*
 - Laws regulating transactions between Australia and other countries: *Gibbs CJ* in *Koowarta*
 - *Brennan J* in *Koowarta* endorsed an extension of the principle to include “relations with international persons” such as the United Nations and other international governmental organisations
 - *Murphy J* in *Tasmanian Dam* also thought that the power goes beyond nation states: “*there are circumstances where Australia’s relationships with persons or groups who are not nation States, is part of external affairs*” e.g. powerful transnational companies, international trade unions and other groups

Laws held valid under the *Sharkey* principle

- ⇒ **War Crimes:** trial and punishment of Australian citizens and residents who might have committed war crimes in Europe during WWII (even if not a resident/citizen at the time of the commission of the alleged crime)
- ⇒ **Horta:** treaty invalid under international law held to be within power as there was sufficient extraterritoriality given that the seabed over which the agreement was made was geographically external to Australia
- ⇒ **XYZ:** laws criminalising sexual offences towards minors on Australian citizens residing outside of Australia
- ⇒ **Plaintiff M68:** laws empowering the Cth government to take action or to cause action to be taken outside Australia in relation to an arrangement entered into by the Executive government and the government of a foreign country (**Gageler J**)
- ⇒ **Thomas v Mowbray:** provisions for the making by a federal court of interim control orders for the purpose of protecting the public from a terrorist attack (but terrorist attack defined to include the intimidation of a foreign government or the public of a country other than Australia)
- ⇒ **PAG:** extradition laws, or laws regarding the judicial notice taken of foreign judgments of foreign evidence.

IMPLEMENTATION OF TREATIES/CONVENTIONS

- ⇒ **Transformation principle:** the provisions of an international **treaty** to which Australia is a party **do not form part of Australian law** and cannot operate as a direct source of individual rights and obligations **unless** those provisions have been **validly incorporated into Australian municipal law by statute**: **Mason CJ and Deane** in *Teoh*
 - This is because “*in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall with the province of Parliament, not the Executive*”
 - Executive action of **ratifying a treaty** commits Australia as a nation **only externally**, and does not have any legal consequences on the rights and duties of the subjects of the Crown, citizens of Australia: *Dietrich v Queen* per **Mason CJ and McHugh J**

Is the law seeking to implement a treaty obligation?

- ⇒ **Starting point:** Parliament can enact laws that would otherwise be beyond its legislative competence, so long as the subject matter is of international significance (s 51(xxix) power is plenary)
 - Specifically, Parliament has legislative competence to make laws implementing a treaty obligation: *Tasmanian Dam*

(1) Does a bona fide international treaty exist? *Tasmanian Dam*

- *Tasmanian Dam* adopted the Evatt-McTiernan view in *Burgess* which interpreted the head of power such that the only requirement is that an international treaty exist, since the existence of such a treaty itself satisfies the requirement that the subject matter be of international concern (i.e. this is the connection to bring it within the head of power)
 - This supports the practical consideration that Parliament must be allowed plenary power to implement its treaty obligations, lest Australia's assumption and implementation of its international obligations be fragmented: per **Mason J** in *Koowarta*
 - Such an expansive doctrine conforms with the rejection of the “reserved state powers” doctrine in *Engineers*
 - Also consistent with a formalistic methodology, since the Constitution envisages no division of external affairs b/n the Parliament and the State Parliaments: **Murphy J** in *Koowarta*
 - Moreover, the Constitution does not indicate that particular subjects of power should remain within the exclusive legislative authority of the States

Does the law only implement some of the obligations in the treaty?

Industrial Relations case

Partial conformity principle: deficiency in implementing a treaty is not fatal unless it is:

1. “*so substantial as to deny the law the character of a measure implementing the Convention*”; or
2. a deficiency “*which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention*”

- (a) **Quantitative partial implementation:** the Act **implements only some**, but not other/all provisions of the treaty

 - The law will **generally be valid** (meet the margin of appreciation test), w/ **exceptions:**
 - The treaty itself requires the implementation of all of its provisions; or
 - The law implements only some, but not all interdependent treaty obligations

(b) **Qualitative partial implementation:** the law implements particular provisions **selectively** e.g. a provision provides for a benefit or a right, together with a burden, or obligation, and only the benefit or right is legislated for or vice versa

 - The validity of the law depends ultimately on whether it meets the partial conformity principle
 - E.g. if there is a conditional right and the Cth only legislates for the right without the conditions attached to it, this will breach the conformity principle

Does the law seek to implement provisions which are not express treaty obligations?

- ⇒ **Principle:** an **express obligation under a treaty is not necessary** to rely on the external affairs power: *Richardson* (Mason, Murphy, Deane & Brennan JJ)
- ⇒ **Inquiry:** *Richardson*
- (1) Is the obligation “**reasonably apprehended**”? (Mason CJ and Brennan J)
 - Provision “*may reasonably be regarded as appropriate for implementation of treaty provisions*”: Murphy J in *Tasmanian Dam*
 - (2) Does the provision concern a **subject matter** which is **reasonably incidental to the treaty obligation**?

Case examples

- ⇒ Provisions preventing the destruction of an area pending the determination of its status as a world heritage area considered reasonably apprehended to the obligation to protect heritage areas: *Richardson S*

- ⇒ **Margin of appreciation test:** Deane and Gaudron J in *Richardson*
- (1) Is the purpose of the provisions to carry a treaty into effect or secure performance of an international obligation?
 - (2) Are the provisions capable of being reasonably considered to be appropriate and adapted to achieve that purpose?
 - However, not necessary that the Court be persuaded that the particular provisions are, in fact, appropriate and adapted to the designated purpose or object

Does the law seek to implement recommendations connected to a treaty?

- ⇒ **Principle:** **recommendations by an international organisation connected to a treaty (or interpreting treaty articles)** **can be implemented** so long as the conformity principle is met (i.e. the recommendations conform with the treaty): *Industrial Relations* (adopting the Evatt/McTiernan view in *Burgess*) (*even though some may not actually have been precisely mentioned in the treaty*)
- Note that this is especially applicable where the treaty itself does not indicate sufficiently specific measures for its implementation, thereby requiring the recommendation to establish clear steps for implementation

E.g. conventions in *Industrial Relations* related to various matters going to employment conditions, termination of employment etc. However they were