

TOPIC I: IMPLIED FREEDOM OF POLITICAL COMMUNICATION

[1] Introduction

- **IF Commonwealth law:** Is it within a head of power? [Refer to prior scaffold].
 - o Then: The Cth's power to legislate is subject to express or implied limitations under the Constitution. The constitutional validity of **Section X** of the Act can be challenged on the basis that it contravenes the implied freedom of political communication ('IFPC').
- **IF State Law:** In addressing whether section X is invalid, it is important to note that because it is a provision in a State act, NSW parliament has plenary legislative power subject to the Constitution. Therefore, the question arises as to whether it has an impact on freedom of political communication in such a way as to impede representative government as prescribed by the Constitution (*ACTV*).

[2] Preliminary Points

- **[Purpose]:** 'The implied freedom protects the exercise by the people of the Commonwealth of a free and informed choice as electors.' (Kiefel CJ, Bell and Keane JJ in *Clubb*, 191 [29]). For the implied freedom to be enlivened, the legislation must relate to political communication.
 - o **X Legislation** may be said to be political communication as it relates to **X apply the facts**, where the concept of political matters is quite liberal and broad.
- **[Additional analysis]** Therefore, Section X should be assessed in light of the prohibition (not immunity, per *Lange* at 566) of implied freedom of political communication (set up by ss 7, 24, 64, 128 *Constitution*), originally established in *ACT*. This prohibition has been subject to controversy, with Dawson J arguing that there is no warrant in the constitution for the implication of any guarantee of freedom of communication (*ACTV*, in dissent at 184). While the Constitution clearly provides for representative and responsible government, Dawson J posited that 'much is left to the Parliament concerning the details of the electoral system to be employed in achieving representative democracy' (at 185). Nevertheless, it was settled in its current formulation in the cases of *Lange* (at 557-62), *Coleman*, *McCloy* and *Brown*. If the provision satisfies the test, it will be invalid.

[3] Test

- The formulation in *Brown* (363-364) remains the **current test** which reformulated the *Lange* test and revised the *McCloy* test (862-863, Kiefel CJ, Bell and Keane JJ), and has been illustrated in its application in *Unions NSW (No 2) (2019)*. In summary, it asks whether the law burdens the freedom of political communication in its terms, operation or effect, whether its purpose is legitimate, and whether it is reasonably appropriate and adapted to achieve that purpose.

[3.1] does the law effectively burden the freedom of political communication in its terms, operation or effect?

- Following *Brown*, it must first be determined whether provision X effectively burdens the implied freedom communication in its **terms, operation or effect** (*Lange*; *Brown*; *McCloy*).
 - o **[Broadly construed]:** Political communication has been broadly construed by the case law. It has included speech (*Coleman v Power*), writing (*Nationwide News; Monis v The Queen*), advertising on radio and tv (*ACTV*), television programs (*Lange v ABC*), video recordings (*Farm Transparency*) and protests, including non-verbal communication (*Levy v Victoria; Brown v Tasmania*).
 - o **[Must be on the subject of politics or government]:** Whatever medium it comes in, it must affect communication on the subjects of politics and government (*Brown*). To varying degrees, the case law emphasizes the need for some connection to electoral choice and the making and changes of law or policy.

- **DISSENT: French J:** However, dissenting in *Brown*, French J posited that this definition of political communication should not be so limited, stating that ‘political matters are not limited to matters concerning the functioning of government. They may include broad discussion about the social and economic organisation of society as well as about its laws and proposals for their change’ (*Brown*). Nevertheless, this is not supported by the weight of authority.
- **[Some exceptions]:** Public debate about environmental issues generally constitutes political opinion (*Brown*). May include broad discussion about the social and economic organisation of society as well as about its laws and proposals for their change (i.e. criticising law of theft calling for change)
- **[State Political Matters], X Legislation concerns X** (e.g. state political matters). It is important to note that:
 - the freedom is not limited to federal issues, but includes State, local and international issues relating to public matters. *Lange* made it clear that State legislation must be consistent with the implied freedom and, specifically, must not be so onerous as to burden speech on political matters by creating a serious risk of civil action for such speech.
 - **[More detail]:** The discussion of government or politics at State or Territory level and even at local government level is amenable to protection by the extended category of qualified privilege, whether or not it bears on matters at the federal level. Existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia support this (per *Lange* at 571-72).
 - **[State election has impact on federal]:** the implied freedom applies to restrictions on political communication arising in the course of *State* elections as they *might bear upon* the choice that the people have to make in federal elections and in voting to amend the Constitution, and upon their evaluation of the performance of federal Ministers and departments’ (see [25] French CJ, Hayne, Crennan, Kiefel and Bell JJ; see also [151]-[155], [159] Keane J in *Union NSW v NSW* (2013))
 - **[State police have impact on federal politics]:** In *Coleman* (2004), the appellant’s statements were sufficiently connected with *federal* politics and government to be covered by an implication drawn from the *Commonwealth* Constitution. Despite the State act this is due to the integrated nature of police enforcement in Australia (see [80] McHugh J; [197] Gummow and Hayne JJ; [229] Kirby J in *Coleman Power* (2004)).
- **[Per the facts], X Legislation** may be said to be political communication as it [X]. This shares similarities with [X CASE, choose from below], whereby:
 - **Examples of burdening political communication**
 - **PROHIBITING OFFENSIVE WORDS:** In *Nationwide News v Wills* (1992), the Industrial Relations Act 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. Where a newspaper questioned the integrity and independence of the IRC using the word ‘corrupt’ and ‘compliant’, the Court held that the provision burdened legitimate discussion about the workings of the Commission and its decisions and hence enlivened the prohibition.

- **PROHIBITING PROTESTS IN A ZONE:** In *Clubb v Edwards; Preston v Avery (2019)*, laws made it an offence to “engage in prohibited behaviour within an access zone”, where access zones were a 150m radius around certain premises, and “prohibited behaviour” included protests. This was held to be a burden on political communication as it prohibited the dissemination of a message in relation to matters that concerned government and politics (at [119] in *Clubb v Edwards; Preston v Avery (2019)* per Kiefel CJ, Bell and Keane JJ).
- **RESTRICTION OF FUNDS AND POLITICAL DONATIONS:** In *McCloy v NSW (2015)*, legislation imposed a cap on the political donations that could be made per person per financial year to or for the benefit of a party, candidate, group or campaigner. Legislation also made it unlawful for donations to be made or received by “prohibited donors”, including property developers. Donations were deemed political communication as they are a way of gaining access to politicians and influencing them. Furthermore, caps on donations burdened political parties and candidates in their ability to communicate political messages in their campaigns and advertising (*McCloy v NSW (2015)*).
 - In *Union NSW v NSW (2013)*, s 96D of the *EFED Act* that prohibited political donations from anyone other than an individual enrolled on an electoral roll. This was held to effectively burden the freedom because by restricting who is allowed to give money to political parties and candidates, it restricts the funds to meet the cost of political communications.
- **PROHIBITING POSTAL SERVICE BEING USED TO DELIVER OFFENSIVE THINGS:** In *Monis v The Queen (2013)* (per Crennan, Kiefel and Brennan JJ), it was an offence subject to s 471.12 Commonwealth Criminal Code for a person to use a postal or similar service and do so in a way... that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive. This was held to effectively burden political communications because political communications that are offensive within the meaning of the section will be penalised and therefore be deterred.
- **Examples that ARE NOT political communication**
 - **BREAKING THE LAW:** In *Michael Brown v Classification Review Board (1998)*, a student newspaper containing a story on ‘the art of shoplifting’, commenting on inequality under capitalism, was refused classification. In the Federal Court, the article was not considered political communication because:
 - Heerey J: the Constitutional freedom of political communication exists to “support, foster and protect representative democracy and the rule of law. The advocacy of law-breaking falls outside this protection and is antithetical to it.”
 - **BUT:** But, seemed to imply that the freedom might have more room to apply if the article concerned ‘political or government matters’ by criticizing the laws of theft or calling for legal change.
 - Sundberg J: ‘it is not a communication concerning a political or government matter ... its true character is not political

because it is overwhelmingly a manual about how successfully to steal.’

- **DISSENT:** French J: ‘Political matters are not limited to matters concerning the functioning of government. They may include broad discussion about the social and economic organisation of society as well as about its laws and proposals for their change.’
- **MORAL OR ETHICAL CHOICES:** In *Clubb v Edwards*, Kiefel CJ, Bell and Keane JJ (at 191 [29]) stated that ‘A discussion between individuals of the moral or ethical choices to be made by a particular individual is not to be equated with discussion of the political choices to be made by the people of the Commonwealth [...] That is so even where the choice to be made may be political controversial.’
 - **[Compare]** This contradicts the dissent of French J in *Michael Brown*, confirming that ‘broad’ discussions about ‘social and economic’ matters do not fall within meaning of political communication.
- **VOTING THRESHOLD:** In *Mulholland v Australian Electoral Commission* (2004), in order to be registered under the *Commonwealth Electoral Act 1918* (Cth), a political party must have at least 500 members (“the 500 rule”). A party can only rely on a member for the purpose of this rule, if another party has not relied on the same person to reach 500 members (“the no overlap rule”). 6 judges held that this was not a burden on freedom in its terms, operation or effect.

[3.2] 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? (This is known as “compatibility testing”).

- **[NOTE]:** Define the purpose of the law in practice, which will not necessarily match its stated purpose.
- Proceeding on the basis that **Section X** does burden political communication, the second question is whether the purpose of the law is legitimate in that it is compatible with the constitutionally prescribed system of representative government (*McCloy; Brown*). This requires that the law adversely impinges upon the functioning of the system of representative government (Lange). When assessing the ‘legal effect, operation and purpose of the impugned provision’ (French CJ in *Monis* at 344), Section X clearly outlines that the purpose is to XXX
- "the manner of achieving the statute's purpose, as well as the purpose itself, must be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government" (Brown at 363).
- **EXAMPLES:**
 - **Prohibiting Protests in a Zone** in *Clubb v Edwards*; *Preston v Avery* (2019)
 - Legitimate Purpose — Yes: “to protect the safety and wellbeing, physical and emotional of persons accessing and leaving abortion clinics and to ensure that women may have unimpeded access to, and doctors may provide terminations” (at [122] in *Clubb v Edwards*; *Preston v Avery* (2019)). This was especially legitimate given that protesters had created "an environment of 'conflict, fear and intimidation' outside abortion clinics" which was "harmful to both patients and staff" (at 195). There was no suggestion in the judgment that the purpose of the prohibition was anything but legitimate.
 - Compatible — Yes: the prohibition was “viewpoint neutral” (at [123] in *Clubb v Edwards*; *Preston v Avery* (2019)), making it compatible with the maintenance of the constitutionally prescribed system of representative government. The Court found that forcing political messages upon others is "inconsistent with the human dignity of that person" and that protecting

dignity of Commonwealth citizens, "whose political sovereignty is the basis of the implied freedom," is a purpose "readily seen to be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government" (at 198).

- **[COMPARE]** The Court distinguished this case from *Brown v Tasmania* (2017), noting that the protest prohibition in *Brown* "did not involve an attack upon the privacy and dignity of other people as part of the sending of the activists' message" (at 204). The safe access zones were justified as protecting vulnerable individuals in private health contexts rather than suppressing general political debate.
- **Restricting funds and political donations in *McCloy v NSW* (2015)**
 - **Legitimate Purpose — Yes:** The court found that it was a legitimate purpose to prevent "corruption and undue influence in the government of the State" ([33] in *McCloy v NSW* (2015)), to overcome "perceptions of corruption and undue influence" ([34] in *McCloy v NSW* (2015)); and "to level the playing field to ensure all voices may be heard" ([41] in *McCloy v NSW* (2015)). The Court found that Division 2A's purpose of preventing corruption was legitimate, stating that "The purpose of Div 2A and the means employed to achieve that purpose are not only compatible with the system of representative government; they preserve and enhance it" (at 926).
 - **Compatible — Yes:** The purpose of the law and the means employed to achieve that purpose were deemed compatible with the maintenance of the prescribed system of representative government ([47] in *McCloy v NSW* (2015)).
 - **[quid pro quo corruption]:** The Court recognized various forms of corruption including "quid pro quo" corruption and "clientelism," noting that "the power of money may also pose a threat to the electoral process itself" through what has been termed "war-chest corruption" (at 869, citing US authorities).
 - **[dependence on government decisions]:** The Court accepted NSW's submission that property developers warranted specific regulation due to their "degree of dependence... on decisions of government about matters such as the zoning of land and development approvals" (at 871). The Court found this created heightened corruption risks, supported by eight adverse ICAC reports since 1990 regarding land development applications.
 - It was held that "[p]roperty developers are sufficiently distinct to warrant specific regulation in light of the nature of their business activities and the nature of the public powers which they might seek to influence in their self-interest" ([49], see also [50] in *McCloy v NSW* (2015))
- **Restricting political donations except individuals + reduced amount political party could spend to include organisations treated as affiliated in *Union NSW v NSW* (2013)**
 - **Legitimate Purpose — Yes:** s 96D of the EFED Act that prohibited political donations from anyone other than an individual enrolled on an electoral roll was "to regulate the acceptance and use of political donations in order to address the possibility of undue or corrupt influence being exerted" and was legitimate (see [51] French CJ, Hayne, Crennan, Kiefel and Bell JJ; [140] Keane J in *Union NSW v NSW* (2013))
 - **Compatible — No:** s 96D of the EFED Act did nothing to promote that purpose and had no purpose other than to prohibit certain donations (see [51] per French CJ, Hayne, Crennan). Issue is that it is selective in what it prohibits — that is it prohibits non-electors from being able to give money to

political candidates. However, the basis for the selection of non-electors is not identified and not apparent.

- **Legitimate Purpose — No:** Court also found that s 95G(6) which reduced the amount of political party could spend on a State election campaign by the amount spent by organisations treated as affiliated with the party, burdened the implied freedom but found no legitimate purpose was identifiable.
- **Protecting people from intrusion of offensive material in their personal domain:** In *Monis v The Queen* (2013), the High Court invalidated s 471.12 of the Criminal Code (Cth), which criminalized using postal services for "offensive" communications. The court was evenly divided, so the appealed decision stood (s 23 Judiciary Act 1903 (Cth)) and the section was valid.
 - Majority: Purpose of protecting people from intrusion of seriously offensive material into their personal domain. The purpose was not merely to ensure the civility of discourse of users of the postal service. The purpose was legitimate
 - Crennan, Kiefel and Bell JJ defined the purpose of the provision as 'directed to the misuse of postal services to effect an intrusion of seriously offensive material into a person's home or workplace. ... A purpose of protecting citizens from such intrusion is not incompatible with the maintenance of' r&r govt: 213. It recognises 'a citizen's desire to be free, if not the expectation that they will be free, from the intrusion into their personal domain of unsolicited material which is seriously offensive'. The threshold set by the section was high, excluding reasonable political communications and, properly construed, it only burdens communications which are seriously offensive.
 - **In dissent**, Hayne J found that the purpose of the provision was 'the prevention of "serious" offence. It pursues no wider object or end.': [205]. To this point, he emphasized that "**abuse and invective are an inevitable part of political discourse**" designed to "**drive a point home by inflicting the pain of humiliation and insult**" (at 137). He noted that seriously offensive communication was often "**the plain political purpose of the communication**" (at 138) and stated that 'the elimination of communications giving offence, even serious offence, without more, is not a legitimate object or end.': [220]. He found the law invalid.

END OF SAMPLE