

## Topic I. Implied Freedom of Political Communication

### SUMMARY:

#### IMPLIED FREEDOM AS A CONSTITUTIONAL PROHIBITION:

- The freedom of political communication is **implied** from the text and structure of the Constitution, especially ss 7, 24, 64 and 128 (which establishes the system of representative and responsible government) (**Lange**).

### PRINCIPLES:

- The implied freedom operates as a constitutional prohibition – it invalidates a law that breaches the freedom (**Lange**)
  - It does not operate as a constitutional immunity to provide a defence to the operation of laws (**Lange**)
  - It does not confer an absolute right of political communication (**Lange**)
- The implied freedom applies to Federal & State/Territory laws (**Lange**), State election (**Unions NSW**), State police (**Coleman**)
- The implied freedom applies at all times, not just at election time – there is no temporal limit (**Lange**)
- The implied freedom requires that:
  - All statutes must provide a qualified privilege for political communication (**Lange**)
  - The common law must develop consistently with the implied freedom (**Lange**)
  - The law of defamation, whether in statute or common law, must provide for a defence of qualified privilege for political communication (**Lange**)

### SCAFFOLD:

- **0. HEAD OF POWER:** Is the law within power?
- **1. CHARACTERISATION:**
  - **[1] INTERPRETATION:** How will the ambiguous words be interpreted under broad and narrow approach?
  - **[2]** Does the law apply to the person in question?
- **2. MCLOY/BROWN TEST**
  - **[A] BURDEN:** Does the law effectively burden the freedom of political communication in its terms, operation or effect?
    - **[1] Political Communication:** Is the law concerned with political communication?
    - **[2] Threshold:** Is the law or the conduct sufficiently connected to the federal politics and government?
    - **[3] Extent and Nature:** Characterise the extent and nature of the burden
  - **[B] LEGITIMATE PURPOSE:** Is the purpose of the law legitimate?
  - **[C] PROPORTIONATE:** Is the manner (or means adopted) reasonably appropriate and adapted to achieving that legitimate purpose? → **STRUCTURED PROPORTIONALITY TEST**
    - [1] Suitable: Does the law has a rational connection to its purpose?
    - [2] Necessary: Is there
    - [3] Adequate in its balance
    - [4] Cases Applying Lange Test
- **3. READ DOWN/SEVERANCE:** If the law breaches the implied freedom of political communication, can it be read down or severed?

**NOTE:** If the question asks about the alleged offence by a person, the person would not be convicted guilty if:

- (1) The law does not apply to the person → usually argued under the narrow construction of ambiguous words, but still need to discuss the validity
- (2) The law is invalid → argue for both narrow and broad constructions

## 0. Is the law within power?

- **CTH LAW** – needs to fall within a s 51 head of power to be within power
- **STATE LAW** – State parliaments have plenary legislative power, so prima facie, the law is within power

## 1. CHARACTERISATION: interpret any ambiguous words

**RULE:** Where a provision's validity is challenged on the ground that it was contrary to the implied freedom of political communication, the result depends a lot on how judges will interpret the ambiguous words in the provision (like in *Coleman*).

- **NOTE:** No settled position on which approach of construction should be taken. Trial judges always diverged in all different cases.

**STEP 1:** What will be the meaning of the ambiguous words under broad and narrow constructions?

- **APPROACHES:** There are two possible approaches that might be taken by trial judges: (*Coleman; Monis*)
  - **[1] Broad Construction:** where the principle of legality does not apply
    - **Ordinary Meaning:** Construct ambiguous word based on its ordinary meaning to find that the law prohibits a very extensive range of speech, including political speech
    - **Adopted by:** Minority judges in *Coleman* [Gleeson CJ, Callinan J, Heydon J, McHugh J]; and *Monis* [French CJ, Hayne J, Heydon J]
    - **NOTE:** Broad construction of provision can still be read down in some cases so that it does not apply to political communication (like in *Coleman* by McHugh J). SEE [ ]
  - **[2] Narrow Construction:** where the principle of legality applies
    - Narrow construction pursuant to the principle of legality, whereby the ambiguous term is read down so that it infringes less upon common law rights and freedoms
    - **Adopted by:** Majority judges in *Coleman* [Gummow and Hayne JJ, Kirby J] and *Monis* [Crennan, Kiefel and Bell JJ]
- **“Offensive”**
  - *Monis* – Cth law made it an offence to use postal services in a way that is ‘menacing, harassing or offensive’
    - “Offensive” is an ambiguous term – it can refer to a ranging degree / spectrum of offensiveness
    - **Narrow construction** [Crennan, Kiefel and Bell JJ] → “offensive” means a very high degree of offense → the law only applies to communication that is “very”, “seriously” or “significantly” offensive
    - **Broad construction** [French CJ, Hayne J, Heydon J] → “offensive” cannot be read down and was broadly interpreted as communication that is “calculated or likely to arouse significant anger, resentment, outrage, disgust or hatred” → so, the law was so broad as to prohibit political communications
- **“Insulting words”**
  - *Coleman* – State law prohibited use of ‘threatening, abusive or insulting words’ to other persons in or near a public place (whether or not any person could view or hear)
    - “Insulting words” is an ambiguous term – it can refer to a ranging degree of insult
    - **Narrow construction** [Gummow and Hayne JJ, Kirby J] → “insulting words” is confined to words that are “directed to hurting an identified person” and are **“provocative”** – reasonably likely to provoke unlawful physical retaliation or violence
    - **Broad construction** [Gleeson CJ, Callinan J, Heydon J, McHugh J] → “insulting words” takes its ordinary meaning and cannot be read down – it applies to communications that are ‘insulting’, without requiring the language to be provocative or likely to cause a breach of public peace
- **Defamation laws**

- **Lange** – defamation law, in statute and common law, must be interpreted consistently with the implied freedom, and hence, must provide for a defence of qualified privilege for political communication

## **STEP 2:** Does the interpreted provision apply to the person's conducts?

- **RULE:** If, by the construction of the ambiguous words of the law, the scope of the law does not cover the conducts of alleged person, the person would not be convicted regardless of the validity of the law. (as in **Coleman** by Gummow and Hayne JJ, Kirby J)
- **Monis – Offensive speech – both broad and narrow construction apply**
  - **FACTS:** Monis sent letters to the families of Australian soldiers who had been killed while serving in Afghanistan – he was charged under Cth law (prohibited use of postal services in a way that is “offensive”)
  - **Narrow construction** – “offensive” refers to a high degree of offense → Monis’ letters were offensive
  - **Broad construction** – “offensive” refers to speech that is “likely to arouse significant anger, resentment, outrage, disgust or hatred” → Monis’ letters were offensive
- **Coleman – Insulting words – narrow construction has no application**
  - **FACTS:** Coleman’s pamphlet said that a QLD police officer was “corrupt” and included a message “Kiss my ass you slimy lying bastards” – he was charged under a QLD law (prohibited use of “insulting words”)
  - **Narrow construction** – “insulting words” must be directed to hurting a person and is provocative → so, Coleman’s words is not ‘insulting’ since it is not provocative (would not provoke violent reaction)
  - **Broad construction** – “insulting words” has its ordinary meaning, which does not require the language to be provocative → so, Coleman’s words were ‘insulting’ and the law applied to his conduct (Gleeson CJ, Callinan J, Heydon J)
    - BUT – McHugh J read down so that it does not apply to political communication → so, the law did not apply to Coleman – although his statement was ‘insulting’, it concerned the State police force (which is a form of political communication)

## **2. MCCLOY / BROWN TEST: apply the McCloy/Brown Test**

### **CURRENT TEST:**

- The current test to determine whether a law breaches the implied freedom of political communication was initially formulated in **Lange**, modified in **Coleman** and further modified for ‘structured proportionality’ (**McCloy; Brown**).

### **SUMMARY OF THE MCCLOY / BROWN TEST:**

- **(A) BURDEN:** Does the law effectively burden the freedom (of communication about government or political matters) in its terms, operation or effect?
  - **IF NO** – the law does not breach the implied freedom – the law is valid
  - **TERMS** = words are directed at political communication
  - **EFFECT** = the law is broader than political communication, but applies to political communication
- **(2) [If YES to (A)] – PURPOSE:** 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
  - **IF NO** – the law does not breach the implied freedom – the law is valid
- **(3) [If YES to (B)] – PROPORTIONATE MANNER:** Is the law reasonably appropriate and adapted to advance that legitimate objective in a manner that is compatible with the constitutionally prescribed system of representative and responsible government? → STRUCTURED PROPORTIONALITY TEST
  - Is the law **SUITABLE**?
    - Does the law have a rational connection to the purpose of the provision?
  - Is the law **NECESSARY**?
    - Is there no obvious and compelling alternative, reasonably practicable means of achieving the

same purpose

- Is the law **ADEQUATE IN ITS BALANCE** – which requires a value judgement between the importance of the purpose served by the restrictive measure and the extent of the burden it imposes on the freedom?
  - The law is not adequate in its balance if – the burden on the implied freedom “manifestly outweighs” or is grossly disproportionate to the importance of the legitimate purpose (*Clubb v Edwards* [70])

#### (A) BURDEN:

Does the law effectively burden the freedom of political communication in its terms, operation or effect?

**[1] POLITICAL COMMUNICATION:** Does the law prohibit conducts concerned with political communication?

- **RULE:** “Political communication” has been very broadly interpreted as including any communication that concerns “governmental or political matters” which influences an elector’s ability to exercise a “free and informed choice” at elections (*Lange*, 559).
  - It would likely only exclude communications about purely personal matters.
- **NOTE:** The law itself does not need to be about “political communication” → the essential question is whether the law “burden” political communication, so it will be sufficient so long as a person’s conducts concern with political communication, and that conduct is prohibited by an Act → **BURDEN BY EFFECT**
- **NO** – not political communication
  - Laws regulating pornography → but laws regulating advocacy around law reform on pornography is political speech
  - **Private Matters:** Laws regulating speech on purely personal matters – e.g., laws limited to protecting people against personal attack
    - **Nationwide News** – if the law had been confined to personal attacks on members of the Commission (c.f. the law prohibited the use of words calculated to bring the Industrial Relations Commission into disrepute – including Commission’s criticisms on integrity and independence)
  - **Private Conversation:** Communication that is merely private discussion about moral or ethical choices is not political speech (*Clubb; Preston*)
    - *Clubb* and *Preston* – a combined hearing of two appeals on TAS and VIC laws making it an offence to protest or to make certain communication within 150m of a clinic that provided pregnancy termination services. Both laws were held to be valid, but regarding subject matter:
      - *Clubb* [**NOT Political Communication**] → The Vic law prohibited communication about abortions, conditional on that communication “being with a person accessing an abortion provider within a safe access zone” and “likely to cause distress or anxiety” → The legislation seems to regulate the persuasion of individuals to not have abortions – this is not political communication → there is no connection to the electoral choices of the Australian people – it did not concern policy on abortion [**Communication Directing at Individuals**]
      - *Preston* [**Political Communication**] → TAS law prohibited “protests” in relation to abortions within safe access zone → it prohibited the dissemination of a message in relation to terminations that concerns governmental or political matters [**Protests – Directing at Public**]
  - **Donation:** the act of giving donations is not political communication – but the spending of that money on political advertising is political communication (*Unions NSW* and *McCloy*)
  - **READING DOWN** – McHugh J (*Coleman*) and Gageler J (*Farm Transparency*) read down the provision so that it did not apply to political communication.
- **YES** – political communication
  - **DEFAMATION LAW** (*Theophanous* and *Lange*)
    - Defamatory information about a politician or governmental officer is likely to concern political communication. (member of House in *Theophanous*; NZ’s PM in *Lange*)