

Topic 10: Implied Political Freedoms

Implied Freedom of Political Communication

P ____ will challenge the validity of ____ (section/Act) on the grounds that it breaches the implied freedom of political communication (IFPC).

In the early 1990s there was a spectrum of opinion on the exact source of the freedom (*Nationwide*; *ACTV*). However, in *Lange* the textual approach prevailed as the Court identified the IFPC as ‘an implication drawn from ss 7, 24, 64 and 128 and related sections’. Specifically, ss 7 and 24 require members of parliament to be ‘directly chosen by the people’ and the IFPC is necessary to effectuate this (*Lange*).

1. Does ____ (the law) burden political communication?

- The IFPC is not absolute (*ACTV*; *Nationwide News*) and ____ P must prove that ____ (the law) burdens political communication ‘either in its terms, operation or effect’ (*Lange*).

1.1 Is ____ (the communication) ‘political communication’?

- **Opening line:** The accepted definition of political communication is communication with respect to matters that could affect peoples’ choices at federal elections or constitutional referenda (*Lange*; *c.f. Theophanous*).
- **Is it communication? (only discuss if it is an issue)**
 - Communication = ‘expressive conduct’ that ‘conveys an opinion’ (*Levy*)
 - ‘Verbal utterances’ are clearly communication (*Levy*)
 - In *Levy* non-verbal communication (protests and placards) constituted communication
- Is it likely to affect people’s choices as electors? Is it a hotly debated issue?
- Generally speech about state politics will fall within the ambit of the IFPC (*Theo*; *Unions NSW*) as political parties operate at all tiers of government and ‘social, economic and political matters’ are ‘increasingly integrated’ (*Lange*)
- ‘Insults’ can form part of political communication (*Coleman per McHugh J*; *Monis*)
- In *Levy* Court said ‘false, unreasoned and emotional communication’ can be protected
- **Examples from the cases:**
 - Sending hateful and critical letters to families of dead Australian soldiers was political speech in *Monis*
 - Protesting against duck shooting in Victoria (*Levy*)
 - Insulting language against Qld police officer (*Coleman*)
 - Speech about indigenous people and police (*Wotton*)
 - Unsolicited street preaching (*Adelaide Street Preachers*)
 - Providing immigration advice (*Cunliffe*)
 - Identification of the party affiliation of a candidate on an official voting ballot (*Mulholland*)
 - Discussion of a former NZ PM was political speech in *Lange* because ‘matters of geography, history and constitutional and trading arrangements’ discussion of NZ matters shed light on Australian federal politics

- **Examples of political speech from *Theophanous*** per Mason CJ, Toohey and Gaudron JJ:
 - Discussion of the conduct, policies, fitness for office of government, political parties, public bodies, public officers and those seeking public office;
 - Views and conduct of person engaged in activities that have become the subject of political debate including trade union leaders, Aboriginal political leaders, political and economic commentators.
 - Lifting a flag in battle, raising a hand against advancing tanks, wearing symbols of dissent, participating in a silent vigil, public prayer and meditation, turning away from a speaker, or even boycotting a big public event (per Kirby J).

1.2 Is _____ (the communication) burdened?

- State how it is burdened
- Does not matter if burden is minor or major (*Unions NSW*)

2. Justification?

- The law will not be invalid if the law is ‘reasonably appropriate and adapted’ to fulfilling a ‘legitimate end’ which is ‘compatible’ with representative government (*Lange*)

2.1 Is there a legitimate end?

Cth will argue that _____ (the law) aims to achieve the legitimate end of _____.

Test: Is the object of the law compatible with representative and responsible government?

Legitimate ends from the case law:

- Improving the quality of political debate, reducing costs of electoral campaigning, and reducing the dependency of political parties on fundraising since they won’t need to advertise as much (*ACTV*)
- Protecting the authority of the IR Commission (*Nationwide News*);
- Protection of reputations from false and defamatory statements (*Lange, Theophanous, Stevens*);
- Quality control of migration advice (*Cunliffe*)
- Public safety (*Levy* – didn’t let people without gaming licence inside hunting areas);
- Preventing vigilantism (*Hogan v Hinch*)
- Protection of public order (*Coleman* – prohibiting insults in public area).
- Preventing obstructions of roads (*Adelaide Street Preachers*)

2.2 Are there legitimate means?

- **Test:** Is the law an RAA means of achieving the abovementioned end? (*Lange; Coleman*)
- Is the punishment minor? In *Levy* the restriction was not considered to be disproportionate with the end of protecting public safety because the fine was minor
- In both *Wotton* and *Monis* the Court distinguished between laws that directly burden political communication and those that indirectly/incidentally burden it. A law ‘which only incidentally restricts political communication is more likely to satisfy’ the 2nd limb of the *Lange* test.
- A **blanket ban** is appropriate and adapted to the system of representative government only if it ‘could be demonstrated that at the time such a prohibition was the only way

that the system of representative government could be protected' (**McHugh J in Coleman**).

3. Conclusion

The IFPC is a shield rather than a sword (a freedom not a right) (**Lange**) and operates as a fetter on legislative power (**Coleman**) and the common law (**AID/Watch; Lange**).

Accordingly, _____ (the law) is valid/invalid by reason of the IFPC.

Nationwide News Pty Ltd v Wills (1992) 177 CLR 1

Facts:

- Provisions in the *Industrial Relations Act 1988* (Cth) created offence of bringing the Industrial Relations Commission or one of its members into disrepute
- Newspaper publisher was prosecuted under them and challenged them

Issue: Were the provisions valid?

Judgment:

- **Mason CJ, McHugh and Dawson JJ** held that the provisions were outside the scope of s 51(xxxv)
- **Brennan, Deane, Toohey and Gaudron JJ** held that the provisions were within power but held they breached an IFPC
- **Mason CJ Brennan, Deane, Toohey and Gaudron JJ** were of the view that the freedom was implied through representative government and representative democracy which were implied from the text and structure of the Constitution – NO LONGER GOOD LAW

Principles: 1. Speech about the Industrial Relations Commission was political speech; 2. Source of freedom

ACTV Pty Ltd v Commonwealth (No 2) (1992) 177 CLR 106

Facts:

- Concerned Pt IIID of the *Broadcasting Act*, which banned broadcast political ads during election
- Broadcasters had to provide free time given to established parties and new parties (90% to established parties and 10% to new parties and 0% to non-parties)

Issue: Was this law invalid by reason of IFPC?

Judgment:

- HCA found it invalid for contravening IFPC
- The law burdened political communication for a legitimate end of nullifying the advantage for major political parties by reducing the reliance on money and therefore wealthy donors
- The means of achieving this legitimate end were not reasonable because 90% was going to established parties and therefore doesn't level out the playing field
- **Brennan J** dissented and accepted an alternative objective – that the laws were intended to improve the quality of political debate. His honour stated that broadcast political advertisements were directed more to the emotions than the intellect and contributed little by way of valuable information

Principles: 1. Nullifying advantage of major parties = legitimate end; 2. Example of disproportionate means

Lange v ABC (1997) 189 CLR 520

Facts:

- Concerned the relationship between the IFPC and the common law of defamation
- David Lange was a former PM of NZ and he sued ABC for defamation
- The ABC relied on *Theophanous* and *Stephens* to claim it was protected by IFPC

Issue: Was this law invalid by reason of IFPC?

Judgment:

- Unanimity on source of the IFPC as ‘an implication drawn from ss 7, 24, 64, 128 and related sections of the Constitution’ – specifically in ss 7 and 24 the words ‘directly chosen by the people’
- *Lange* set a two step test:
 1. Does the law ‘effectively burden freedom of communication about government or political matters either in its terms, operation or effect?’
 2. 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’?
- The Court defined political speech as communication ‘with respect to matters that could affect’ peoples’ choices ‘in federal elections or constitutional referenda’
- The Court pulled back from the *Theophanous* position of indivisible speech and said that ‘discussion of matters at State, Territory or local government level *might* bear on the choice that the people have to make in federal elections, or in voting to amend the Constitution’ but it seems this will usually fall within the ambit of the IFPC as political speech because of the ‘existence of national political parties operating at federal, State, Territory and local government levels ... and the increasing integration of social, economic and political matters in Australia’
- On the facts the Court found that by ‘reasons of matters of geography, history and constitutional and trading arrangements’ discussion of NZ matters often affect or shed light on government matters in Australia thereby rendering them protected political communication

Principles: 1. Source = text & structure; 2. Two step test; 3. Discussion of former NZ prime minister = political communication; 4. Discussion of state matters *might* be political communication

Coleman v Power (2004) 220 CLR 1

Facts:

- Relevant ‘communication’ was an insult aimed by Patrick John Coleman at Constable Brendan Power of the Queensland Police in which Coleman loudly labelled him ‘a corrupt police officer’ in public.
- Coleman was arrested and charged by Power with the offence of using insulting words against Power under s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld)

Issue: Was Coleman's speech protected by the IFPC?

Judgment:

- The speech constituted political speech under the *Lange* definition
- Gummow, Hayne and Kirby JJ read down s 7(1)(d) so that only applied where the words are so hurtful that they are either intended to or reasonably likely to provoke unlawful physical retaliation. This interpretation meant the law fell within the accepted limits of constitutionality as it was RAA to preserving the peace and public order.
- **McHugh J** refused to read down the provision and therefore found it invalid as a ban on 'insulting words' was not RAA to preserving peace and public order

Principles: 1. Insults = political communication; 2. Protecting public order = legitimate end

Wotton v Queensland (2012) 246 CLR 1

Facts:

- Plaintiff was a parolee who challenged the *Corrective Services Act 2006* (Qld) to the extent that it authorised certain parole conditions imposed upon him
- Wotton had been convicted of riot offences on Palm Island after an aboriginal man died in custody
- Wotton was restricted from attending public meetings and doing media interviews

Issue: Was this law valid or did it breach IFPC?

Judgment:

- The majority characterised the law as one which restricted political speech as it restricted Wotton's public 'discussion of matters relating to Aboriginal and Indigenous affairs.'
- The law had a legitimate means and ends. The end was to preserve community safety, and to facilitate monitoring, rehabilitation and humane treatment of parolees.
- Court noted the law only incidentally burdened IFPC

Principles: 1. Discussion of aboriginal affairs = political speech; 2. Safety = legitimate end;

Monis v The Queen (2013) 295 ALR 259

Facts:

- Convicted of using the post in an offensive way when he sent hateful letters to the families of recently deceased Australian soldiers
- He appealed against his conviction on IFPC

Issue: Was this law valid or did it breach IFPC?

Judgment:

- The Court held that the law burdened political communication
- Court split 3:3 on justification
- In the statutory minority of **French CJ, Heydon J and Hayne J**, **Hayne J** offered the most detailed analysis
- **Hayne J** noted one objective could be to promote civility but stated this objective could not prevail because of the *Coleman* precedent
- **Hayne J** examined the idea that the law protected the integrity of the post but he said this went to the idea of not sending dangerous items through the post

- **Hayne J** looked to the ends of protecting against the infliction of psychiatric injury but the means by which this was protected was the law of torts and the law in question here was a criminal law and was therefore an excessive means.
- **Heydon J** condemned Monis' conduct as outrageous but constitutionally protected
- **Crennan, Kiefel and Bell JJ** held that the legitimate end was protecting the privacy of the recipient of offensive mail – protecting against intrusion
- In their discussion of means the statutory majority of **Crennan, Kiefel and Bell JJ** noted that the law did not directly burden IFPC but merely 'incidentally burdens them in its operation' Their honours cited *Wotton* as authority for the proposition that 'a law which only incidentally restricts political communication is more likely to satisfy' the 2nd limb of the *Lange* test.
- Ultimately the statutory majority characterised the restriction as minor and incidental and therefore the means by which the end of privacy was protected was acceptable in comparison.

Principles: 1. Hate letters = political communication; 2. Privacy = legitimate end; 3. Incidental vs. direct burden

Unions NSW v NSW [2013] HCA 58

Facts:

- NSW provisions purportedly designed to enhance the integrity of NSW elections and politics
- A provision (s 96D) limited the right of non-voters to donate thereby stopping trade unions and corps from donating
- Another provision, known as the "aggregation" provision, changed the way that the cap on election spending was calculated. S 95G(6) factored into a political party's cap any election spending by organisations affiliated with the party (clearly hit ALP)

Issue: Was this law valid or did it breach IFPC?

Judgment:

- On the issue of whether the donations and expenditure were a form of political communication the HCA sidestepped the issue by focussing on the impact of the restriction on the flow of political communication rather than asking whether the money itself constituted speech.
- S 96D pursued no legitimate end. It was argued that it prevented corruption but it could not be proven that the risk of corruption was greater in relation to political donations from corporations or trade unions than the risk entailed in political donations from individuals.
- In respect of the aggregation provisions the Court noted the party and affiliated organisations are not the same entity and there was no rational reason for treating them as one entity
- It was argued that only people on the electoral role have the ability to vote so only they should have the ability to donate because only they have a legitimate interest. However, the court reasoned that non-voters have a legitimate interest as they are affected by policies of government.

Principles: 1. Reasonable end and means; 2. Non-voters have legitimate interest in elections too