

TOPIC EIGHT (8): THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION (IFOPC)

. **A constitutional implication drawn by the High Court from the text and structure of the *Commonwealth Constitution***

TEST: to apply in these cases is the case *Lange v Aus broadcasting corporation*- modified in *Coleman v Power*

Implied freedom is also a restriction, like chpt III courts

The test for the implied freedom of political communication in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, as modified by *Coleman v Power* (2004) 220 CLR 1:

When the law of a State or Federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined

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

Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end **the fulfilment of [in a manner]** which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s.128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively “the system of government prescribed by the Constitution”). If the first question is answered “yes” and the second is answered “no”, the law is invalid

. **What are Constitutional Implications?**

- Language in constitution sparse and economical
- HCA has the role to interpret the constitution and its underlying principles and to reveal and articulate those implications
- Judges will take into account these unstated assumptions in the text and structure of constitution
- Since s.51 powers are ‘subject to the constitution’ - they are subject to the implications (including an implication of freedom of political communication) drawn from the constitution that judges make (s51 refers to the legislative power of the parliament)

. **The Process of Constitutional Implication**

- C.I seen as a normal process of constitutional interpretation e.g. Mason CJ in ACT TV case ‘court has drawn implications from federal structure of constitution’
- Brennan: ‘said it was consistent and that these limitations can be applied’ - seen as a normal judicial process

. **The High Court’s finding of constitutional implications throughout its history**

- Most recent implication
- Not explicitly stated in constitution

- R v Smithers- leading case outlining these implications
- Certain state functions that states should be preserved in the notion of exercising power- non-discrimination principles applied
- No written protective power- yet implied by HCA's interpretation of constitution
- Implication of freedom of political communication was unlocked in 1992 in case ACT tv case- represented a shift in HC to make implications in regards to the demographic nature of the constitution:

. Contrast Implied Freedom of Political Communication with Express Rights in the Commonwealth Constitution: (and the distinguishing characteristics of the implied freedom)

- Implied freedom is not a right, but a freedom
- Right to trial by jury (s80), right to freedom of religion (s.116) right to freedom from discrimination on the basis of state residence (s.117), acquisition of property on just terms (s.51 (xxxii)), and right to freedom of interstate trade (s.92)
- Above are the five express rights
- Implied freedom is different to a right

Where does Implied freedom sit : interaction

- Identify powers, identify scope of power
- Characterise law as within scope of identified power OR within incidental range of power
- Express Constitutional restriction OR implied constitutional restriction interacting with the power: implied freedom is an e.g.- law may appear valid, yet given an intersection of its infringement of implied freedom of political communication, it is invalid

Source:

- Comes from idea of represented or responsible government: power to communicate with representatives (politicians)- should be able to engage in dialogue with those who elected them
- Ultimate sovereignty rests with the people- change constitution under s.128
- S.7: senators for each state directly chosen by the people of the state
- S.24: HOR composed of members directly chosen by the people of the cth
- Interactive relationship on principles of representative government
- Text and structure of constitution are seen as underpinning implied freedom of political communication (FOPC)

. Note CONSTITUTIONAL STEPS:

1. Identify powers, identify scope of powers

2. Law with respect to subject matter of identified power OR within the incidental range of the power

3. Express Constitutional Restriction\Limitation and\or Implied Constitutional Restriction\Limitation?

The Implied Freedom of Political Communication (Cases)

Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106 **BW 1264**

- Idea was to stop campaigning on basis of money and how much airtime could be bought on tv and radio
- Broadcasting ACT: prohibited political advertising during election and had periods of free airtime
- P's ran tv and contended that the prohibitions and not buying airtime, there was an implied guarantee of IFOPC
- Court found that political advertising ban offended the IFOPC, McHugh said it offended the time between election called and polls being declared- majority found it infringed on the IFOPC
- Brennan dissented: legislation within margin of appreciation allowable to parliament
- Dawson: no general implied freedom of political communication

Nationwide News v Wills (1992) 177 CLR 1 **BW 1262**

- Industrial relations act – alleged that a journalist was guilty of an offence under the IR act in that the article 'did by writing use words calculated to bring the AUS IR commission into disrepute
- Raises issue of IFOPC
- Mason, Dawson, McHugh: invalid- took a strict characterisation approach- law made amending IR act did not fall within the scope of conciliation and arbitration- didn't fall within s51 (xxxix) powers- thus went beyond what it was incidental to
- Dawson J saw lack of sufficient connection with main head of power
- Brennan, Deane, Toohey and Gaudron: invalid as it infringed the implied freedom of political communication

Theophanous v Herald and Weekly Times Ltd (1994) 182 CLR 104 **BW 1274**

- Herald and Weekly Times published letter in 1992 which related to views of Theophanous and questioned his fitness to hold office
- P brought defamation proceedings
- Newspaper was sued stood their ground and said they were acting within the IFOPC
- The common law of defamation intersects this case and interacts with IFOPC
- Held (majority) Mason, Toohey, Gaudron, Deane: IFOPC infringed by existing state defamation laws
- Implied freedom could affect state matters as well as cth
- new test (with which Deane J disagreed but supported for clarity): defendant liable to damages unless est (1) unaware of falsity of claims (2) did not publish recklessly ie not caring whether matter was true or false (3) that publication was reasonable in the circumstances
- Brennan, McHugh, Dawson dissented: law of defamation not inconsistent with any implication drawn from test or structure of constitution: common law rules govern rights inter se, whereas constitution deals with structure and powers of organs of government

Stephens v West Australian Newspapers (1994) 182 CLR 211 **BW 1282**

- Articles in newspaper concerned overseas trip by 22 WA members of parliament and questioned their fitness to hold office

- Defence was that articles were published in relation to the IFOPC under the constitution
- Held (majority) Mason, Toohey, Gaudron and Deane: said defence was bad in law as it did not conform with Theophanous requirements; freedom of communication implied in cth constitution extended to state matters, also similar implication from s.73 of constitution WA- implied freedom affords a defence if conforms with Theophanous requirements
- Deane J said that the IFOPC extends to State laws and legislative powers by reason of s.106 cth constitution
- Brennan J dissented: similar implication in state constitution WAS as in cth constitution, but neither of these implications could affect the common law and defamation as per Theophanous
- Dawson J and McHugh J no applicable IOFPC from either constitution

Major issues:

Description of IFOPC:

- Mason ACTTV:
- Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision.
- Only by exercising that freedom can the citizen criticize government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives
- Idea of communication between electorates and the public
- In Nationwide News case: court talks about representative democracy – circumscribes the powers on constitution with respect to IFOPC- first level of communication is between people of cth and the cth: second level of implied freedom of political communication is communication between people of cth
- Theophanous: talks about different scopes of other judges and expressions on what this implied freedom is

SOURCES AND BASES OF IFOPC

- Textual, structural basis distinguished from unexpressed assumptions
- S7, 24, 128 of constitution
- Difference between implication(judges can unlock) and unexpressed assumption (political theories)
- Reading in light of the whole law (i.e. not just powers under s.51), also affects the general law e.g. common law, and equity
- Underlying doctrines implemented by provisions of constitution- form scope of IFOPC
- Concept of IFOPC is constantly evolving and a state of influx and uncertainty

IFOPC is not a positive constitutional right- but an immunity upon power:

- Implied freedom of political communication cannot be considered as a positive constitutional right available to persons, from which exceptions to the right are judicially created
- Instead, it is perceived as an immunity on power, marking out in appropriate circumstances an area protected from encroachment of the law

Major issues continued: IFOPC is not an absolute or unregulated freedom:

- Is subject to an existing system of law
- Freedom will vary with the subject matter of the law and the boundaries of the freedom cannot be pre-determined- the limits of the freedom need to be worked out by the decision in particular cases

Doctrines of proportionality

- Legislative power is limited by the IFOPC
- Although there may be an impact on political communication, there may be a reason as to why this impact is valid and still necessary under constitutional powers and if it passes a proportionality test

Langer v Commonwealth (1996) 186 CLR 302 **BW 1311**

- Pg 1311 BW book
- Seeking a further implication that text s.24 of cth constitution included a right not to choose
- Electoral Act: offence to print, publish or distribute any matter or thing with the intention of encouraging persons to fill in a ballot paper otherwise than in accordance with s.240
- Langer charged and convicted under electoral act- breached s.329A 'not prohibit discussion about operation, desirability of s.240 method of voting, nor advocacy of its amendment or repeal' according to Brennan
- Langer: advocacy of particular system of voting- identically numbered last square, major parties placed equal last
- Held no infringement of implied freedom of political communication by s.329A: says Brenna, McHugh and Gummow
- HCA declined to draw a further implication from s.24- here, no right to omit choice- HCA would not extend implied freedom to this political advocacy- undesirable
- Toohey and Gaudron: said it infringed implied freedom, but that infringement was legitimate as it was proportionate to constitutional objectives
- Dawson J Dissented: inhibits freedom of political discussion, not appropriate to an end that lies within the ambit of relevant legislative power- finds in favour of Langer- Langer is simply attempting to communicate in a public space about political issues

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 **BW 1284**

- Test in *Lange v Aus broadcasting corporation* 1997- as modified by *Coleman v power*
- When a law of a state or federal parliament of territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7,24, 64 or 128 of constitution, 2 questions must be answered before the validity of the law can be determined

- First: does law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
- Second: if law effectively burdens that freedom, is the law reasonable appropriate and adapted to serve a legitimate end in the fulfilment of a manner which is compatible to the maintenance of the constitutional system of representative and responsible government
- If first Q is answered yes, and 2nd question is answered no, the law is invalid
- Test modified by Coleman case- in topics outline I think?!?!
- Find document on moodle about issues after Lange
- Case was a series of compromises
- 2 questions must be determined before the validity of the law can be determined
- First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
- Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of [in a manner] which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s.128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively “the system of government prescribed by the Constitution”). If the first question is answered “yes” and the second is answered “no”, the law is invalid
- **OVERVIEW: Lange v Australian Broadcasting Corporation – TEN MAJOR POINTS**

UNANIMOUS JUDGMENT- Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ:

- (1) court not bound by previous decisions- neither case contains a binding constitutional principle
- (2) consistent in determination that if implication is to be have, it must come from a system of representative and responsible government- not from external matters, thus look to principles through ss7, 24 and 128
- (3) affirmation and reinstatement of the scope and operation of the implied freedom of political communication as freedom of communication on matters of government and politics- immunise reach of legislative and judiciary power
- (4) reject idea that political communication is restricted to election periods- all year round- there was an attempt to limit it, but this was rejected completely- look at structure of constitution and the relationship between it and society- people have ultimate sovereign
- (5) implied freedom through a proportionality test/reasonable appropriate and adapted test
- Though the freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions
- 1) that the object of law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or procedure for

submitting a proposed amendment to the constitution to the informed decision of the people

- li) law must be reasonably appropriate and adapted to achieving that legitimate object or end (second limb of test re-cast in *Coleman v Power*)
- Different formulae have been used by members of this Court in other cases to express the test whether the freedom provided by the Constitution has been infringed. Some judges have expressed the test as whether the law is reasonably appropriate and adapted to the fulfillment of a legitimate purpose. Others have favored different expressions. There is no need to distinguish these concepts and for ease of expression, throughout these reasons, we have used the formulation of reasonably appropriate and adapted
- When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined.
- First, does the law effectively burden freedom of communication about government and political matters either in its terms, operation or effect?
- Secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfillment of [IN A MANNER] which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s.128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively "the system of government prescribed by the Constitution")?
- If the first question is answered "yes" and the second is answered "no", the law is invalid." [SECOND LIMB OF TEST re-cast in *Coleman v Power* (2004) 220 CLR 1]
- (6) examination of the relationship between the cth constitution and the common law, brought about by the need to accommodate the defence of qualified privilege with the constitutional implication- idea of one common law operating in a federal system established by the constitution
- (7) statement of the instant constitutional issue in defamation action is whether the immunity conferred by traditional common law or by statute conform with the freedom of communication on government and political matters required by the constitution: statement made in a way that is in relation to the IFOPC
- (8) discussion of the proper methods for drawing constitutional implications- concerned that more progressive judges in HCA shifted into political theory that was not grounded in the historical drafting of constitution- need to draw things only from the text and structure of constitution
- (9) an assessment of the common law and statutory defences of qualified privilege for conformity with the constitutional implication and extension of categories of qualified privilege
- (10) 10) Conditions upon which the extended category of common law privilege should be developed (BW)= how to make statement conform to the IFOPC
- Whether the making of a publication was reasonable must depend upon "all the circumstances of the case"; general rule that defendant's conduct in publishing material giving rise to a defamatory implication will not be reasonable unless:

- the defendant had reasonable grounds for believing the imputation was untrue,
- took proper steps (so far as they were reasonably open) to verify the accuracy of the material,
- did not believe the imputation to be untrue,
- sought a response from person defamed,
- published the response except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.
- CONSEQUENCE – Constitutional defence not available, as the implied freedom cannot operate to directly to alter private rights and immunities – but that the common law defence of qualified privilege broadly developed in conformity with the constitutional implication of freedom of communication about matters of government and politics