

RULE OF LAW
INSTITUTE OF AUSTRALIA

Freedom of Expression & the Rule of Law in Australia

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The Rule of Law Institute of Australia is an independent not-for-profit organisation which promotes discussion of rule of law issues in Australia. It seeks to uphold transparency and accountability in government and strongly supports the presumption of innocence, independence of the judiciary and procedural fairness in the Australian legal system.

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The Rule of Law and Freedom of Speech

The **rule of law** provides the best way for rights and freedoms to be protected. All **rights** come with **responsibilities**, which means following the law.

International agreements such as the **Universal Declaration of Human Rights** (UDHR) promote human rights standards. The UDHR suggests that the rule of law and legal processes are the best way to protect **human rights**.

"Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,"

- UDHR (1948)

Human rights in Australia are protected by formal **legal processes** which allow:

- 1) a legal dispute should be resolved when the law is broken
- 2) the law can be reformed through democratic processes

What is Freedom of Expression

Freedom of expression is a broad category of rights and freedoms which relate to people being able to express their ideas and opinions.

Freedom of Speech

Freedom of speech and the **right to assemble** are central aspects of freedom of expression, and are particularly important in maintaining the rule of law.

Freedom of speech means to be free to speak or write your ideas or opinions, and is often instrumental

in ensuring people can express their opinion about government, and the way the country is governed.

There is the view in the community that we have a legal right to **free speech** in Australia. This is not true from a legal point of view since the law controls different types of speech, and even defines threats of violence or offensive behaviour as criminal offences.

The **High Court of Australia** has found a narrow protection for "free speech" in the Australian Constitution in the form of an **implied freedom of political communication**. This is narrower than what people commonly understand as free speech.

This freedom is not a **express right** in the Australian Constitution that is given to people individually, but a freedom that acts as a break on the government making laws that restrict people's ability to discuss political matters in public.

The Lange Test is a test the High Court has created to decide whether a law is incompatible with the Australian Constitution and the freedom of political communication which it **implies**.

The Right to Assemble

The second section of this book deals with the right to assemble (see page 10), which is an important aspect of people being able to exercise their freedom of political communication.

These rights and freedoms are important in ensuring the rule of law is maintained and that citizens can participate in democracy.

Express and Implied Rights

The law defines people's rights and freedoms and allows them to be protected. This involves courts enforcing rights and deciding to what extent a particular freedom should be protected.

There are two ways in which rights are written into law:

Express rights

Rights which are written into law and are clearly defined as 'right to' or 'freedom of' something, or right not to be treated in a certain way.

Implied rights

Rights which are not defined in law, but exist because they are an assumption on which a law and the legal system are based.

Questions

Label the following statements as express or implied rights. If implied, what right does it imply?

a) Everyone has the right to recognition as a person before the law
(Article 6 - UDHR)

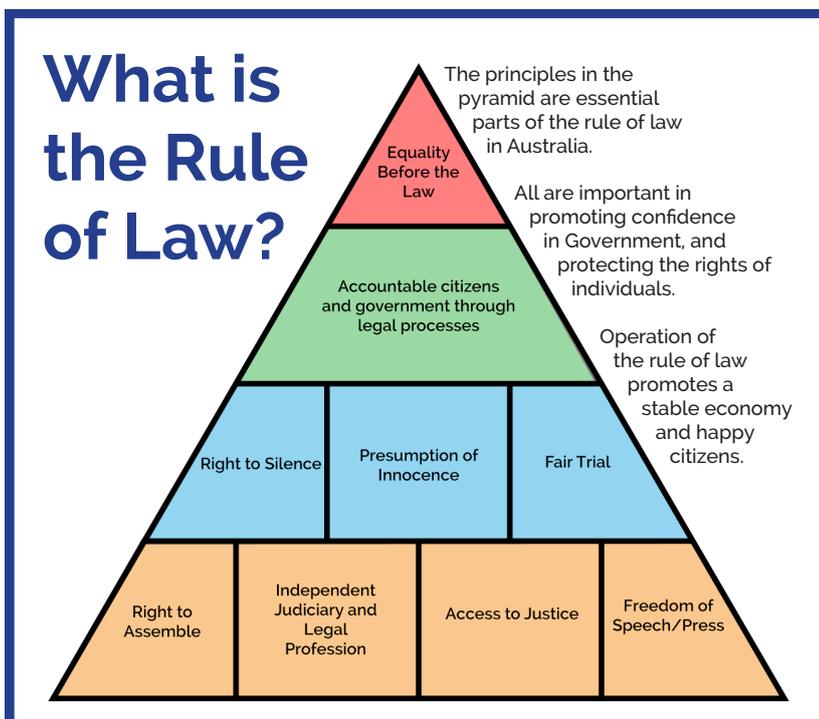
Article 6.1 of the International Covenant on Civil and Political Rights:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his [or her] life.

Section 291 - Killing of a human being unlawful - Criminal Code 1899 (QLD):

It is unlawful to kill any person unless such killing is authorised or justified or excused by law.

Can we assume people have the right to not be killed because the law makes murder a criminal offence?



b) Whosoever commits larceny, or any indictable offence by this Act made punishable like larceny, shall, except in the cases hereinafter otherwise provided for, be liable to imprisonment for five years. (s117 Crimes Act 1900 (NSW))

c) 'The employee may refuse to work additional hours...if they are unreasonable.' (Fair Work Act 2009 (Cth))

The Lange Test

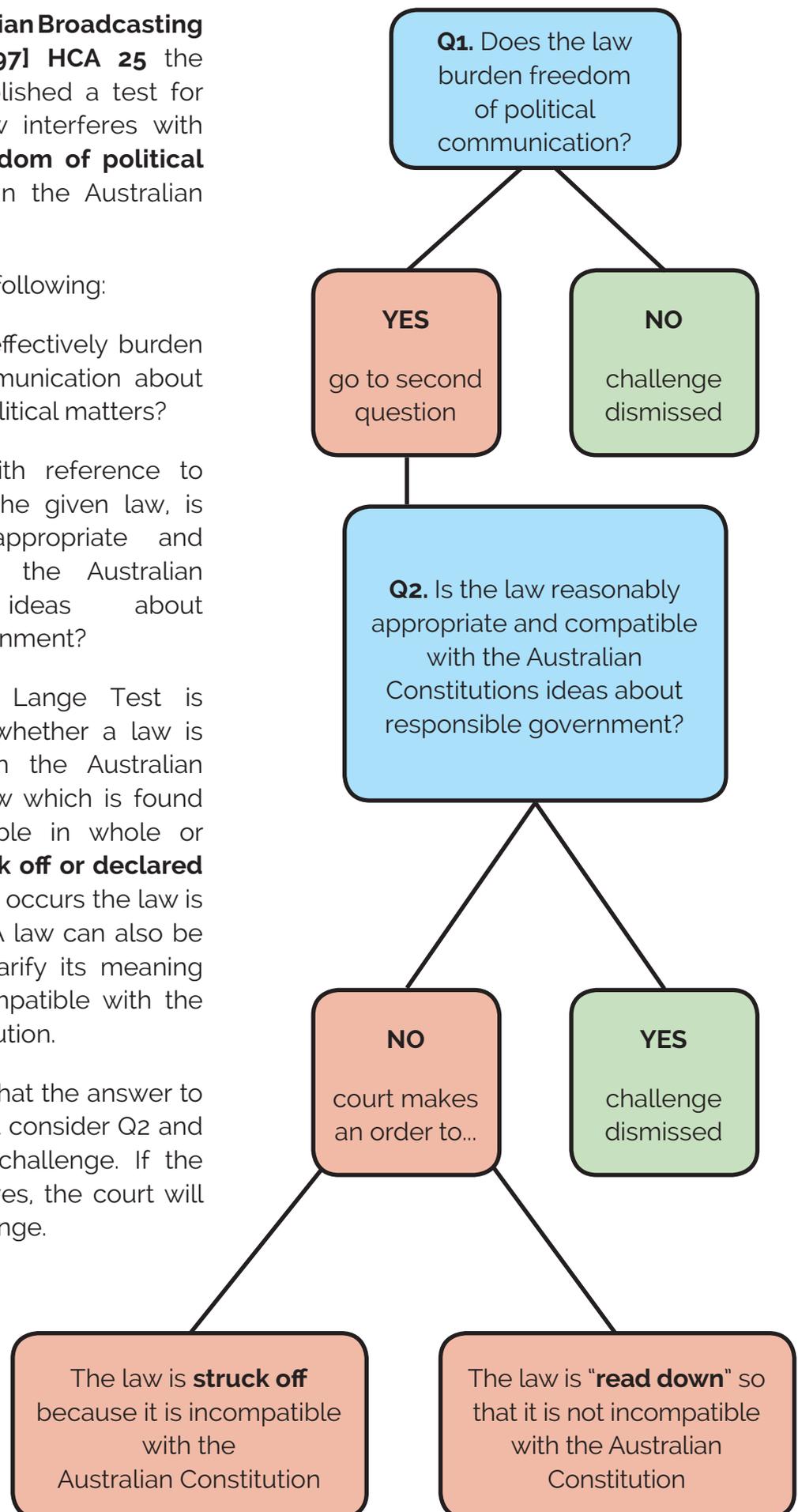
In **Lange v Australian Broadcasting Commission [1997] HCA 25** the High Court established a test for deciding if a law interferes with the **implied freedom of political communication** in the Australian Constitution.

The test asks the following:

- 1) Does the law effectively burden freedom of communication about government or political matters?
- 2) If it does, with reference to the purpose of the given law, is it reasonably appropriate and compatible with the Australian Constitution's ideas about responsible government?

In practice the Lange Test is used to decide whether a law is incompatible with the Australian Constitution. A law which is found to be incompatible in whole or part can be **struck off or declared invalid**. When this occurs the law is no longer a law. A law can also be **read down** to clarify its meaning so it is not incompatible with the Australian Constitution.

If the court finds that the answer to Q1 is no, it will not consider Q2 and will dismiss the challenge. If the answer to Q2 is yes, the court will dismiss the challenge.

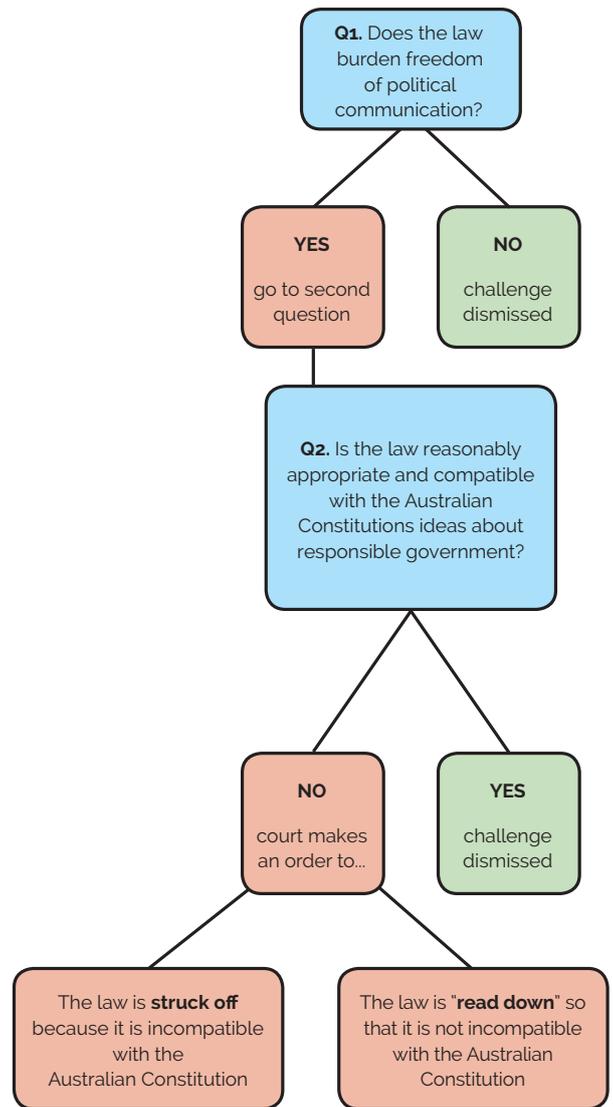


Coleman v Power [2004] HCA 39

Student Patrick Coleman was charged and convicted under the **Vagrants Gaming and Other Offences Act (Qld)** for handing out leaflets in Townsville Mall stating "Get to know your corrupt type coppers" and identifying local police officer Constable Brendan Power as one of the "slimy lying bastards". He was also convicted of assaulting and obstructing a police officer after a scuffle between him and Constable Power.

The High Court found that criticising police is a valid use of the freedom of political communication and dismissed the charge. Given the wide power of police over citizens, the High Court **read down** the Vagrants Act so that it did not apply to political communication. This meant that Section 7 remained law, and the case established a precedent which all lower courts in Queensland would be required to follow in cases similar to Coleman v Power.

The High Court did not interfere with Mr Coleman's conviction for assault and obstructing police.



Vagrants Gaming and Other Offences Act 1931 (QLD) - s7

(1) Any person who, in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear-

(a) sings any obscene song or ballad;

(b) writes or draws any indecent or obscene word, figure, or representation;

(c) uses any profane, indecent, or obscene language;

(d) uses any threatening, abusive, or insulting words to any person;

(e) behaves in a riotous, violent, disorderly, indecent, offensive, threatening, or insulting manner;

shall be liable to a penalty of \$100 or to imprisonment for 6 months.

This Act was repealed in 2004. The **Summary Offences Act 2005 (QLD)** now contains a similar offence.

Offensive Language and Freedom of Speech

R v Grech [2010]
NSW Local Court - 3 May 2010

This case dealt with whether the language used by the accused, Mr Grech, when fined by a police officer for public transport fare evasion was 'offensive language' under the **Summary Offences Act 1988 (NSW) s4A**.

Using offensive language in a public place such as a train station is breaking the law and carries a criminal penalty.

In R v Grech [2010] the Magistrate made the decision that the word used by the accused was not offensive language, and dismissed the charge.

Under the **Summary Offences Act 1988 (NSW)** offensive language is a criminal offence which carries a fine of up to \$660 or up to 100 hours of community service (as of 2010, the maximum fine was increased in 2014).

The accused, Mr Grech was arrested at a train station in Sydney's Eastern Suburbs for fare evasion where upon he called a police officer a 'pr**k'.

The Magistrate was not satisfied that the word was offensive for the following reasons:

- a 'reasonable person' would not be offended by the word pr**k in general conversation
- the word is considered to be of a 'less derogatory nature than other words and...is in common usage in this country.'
- that the police officer would hear offensive language as part of their work and that they would be accustomed to bad language

The offensive language charge was dismissed by the Magistrate.

In the case of offensive language the court can use the 'reasonable person test' to decide whether something is offensive language. A 'reasonable person' is a legal fiction to allow the conduct in question to be compared with how a 'reasonable person' might behave in a given situation. The question to ask is "would a reasonable person behave in the same way as the accused in the same situation?"

R v Kaitira [2010]
QLD Magistrates Court

This case dealt with whether offensive language was used by the accused, Mr Kaitira, during a heated exchange with police at a night club in Townsville.

Using offensive language in a public place is an offence under the **Summary Offences Act (QLD) 2005 s6(3)** and carries a criminal penalty of up to 6 months in prison and/or a fine.

In August 2010 Townsville Magistrates Court found that swearing at police was not a public nuisance.

A 28 year old Mundingburra man, Bardon Kaitira, swore at a police officer outside a Townsville night club.

The police officer gave evidence that Mr Kaitira swore at her twice after a group of police officers who were patrolling the area poured out his girlfriend's drink. He was told that swearing at police was an offence and he was arrested.

Mr Kaitira's barrister convinced the magistrate that Mr Kaitira was not

a nuisance to the public under the **Summary Offences Act (QLD)** and the case against him was dismissed.

The police were concerned about the precedent set by this case and that people in the community would see using offensive language against police as acceptable behaviour.

Offensive Language and Community Expectations

Community opinion varies greatly about which words are offensive, and how offensive particular words are considered to be.

Case law on offensive language suggests that words such as pr**k, and others words usually considered by most people in the community more offensive, are not usually found to be unlawful for the purposes of an offensive language.

This does not mean that words which may be considered offensive by people are allowed to be used in places like a school or workplace, but that use of such words may not be considered as offensive language if a charge is brought to a court.

To be clear: the rules of conduct in schools or workplaces with regard to appropriate use of language apply regardless of whether the law finds a word as being offensive language or not!

Summary Offences Act 1988 (NSW) -

Section 4a - Offensive Language
(as it was in 2010):

'(1) A person must not use offensive language in or near, or within hearing from, a public place or a school.

Maximum penalty: 6 penalty units.

(2) It is a sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence.'

Summary Offences Act 2005 (QLD) -

Section 6(3)- Offensive Language

6 Public nuisance

(1) A person must not commit a public nuisance offence.

Maximum penalty—10 penalty units or 6 months

imprisonment.

...

(3) (a) a person behaves in an offensive way if the person uses offensive, obscene, indecent or abusive language;

Monis v the Queen [2013] HCA 4

Full Citation: Monis v the Queen & Anor; Droudís v the Queen & Anor [2013] HCA 4

This case dealt with whether the criminal offence, under s471.12 of the **Criminal Code Act (Cth)** Using a postal or similar service to menace, harass or cause offence (see below), was consistent with the implied constitutional freedom of political communication in the Constitution.

The appellants Monis and Droudís were placed on trial for the offence after sending offensive letters to the relatives of Australian soldiers killed in Afghanistan. They appealed the offence on the basis that it interfered with the freedom of political communication in the Australian Constitution.

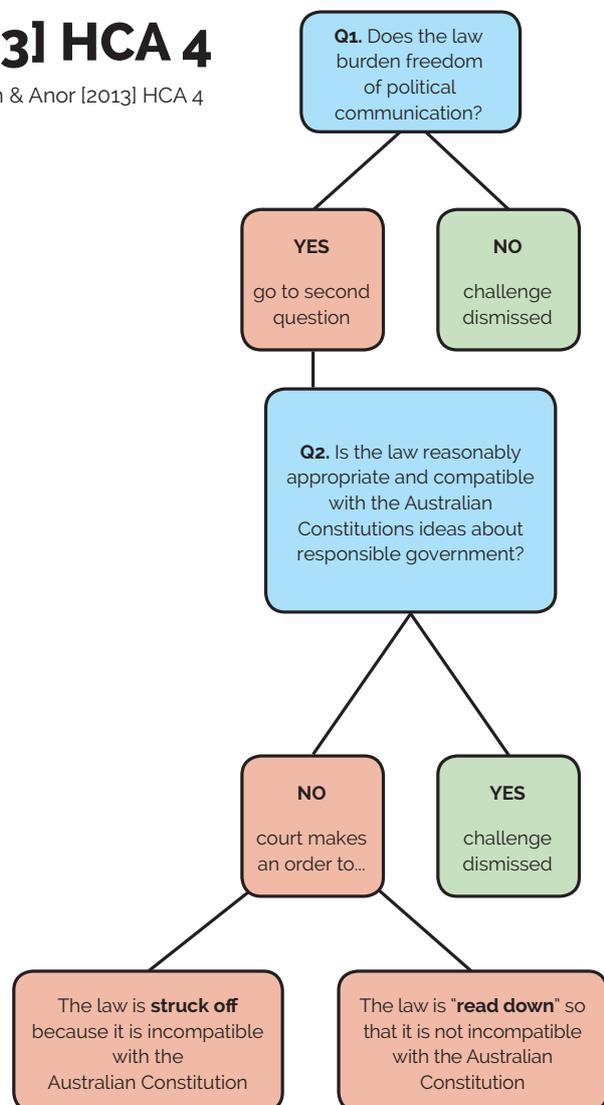
The court applied the Lange Test and did not come to an agreement about Question 2. Three justices found that the offence was compatible with the Constitution, three found that it was not. A critical issue was the extent to which freedom of political communication protects offensive communication.

When the High Court is divided in opinion the decision of the lower court stands. The decision of the NSW Criminal Court of Appeal to reject their appeal stood and the District Court heard the case. Monis and Droudís plead guilty and were each sentenced to 300 hours community service each in September 2013.

What if the High Court came to a majority decision?

This case looked at whether a criminal offence was compatible with the Australian Constitution. The court's opinion was equally divided so the decision of the lower court was upheld.

If a majority of justices had found this offence was not compatible with the Constitution it would have been declared invalid and could have been struck off the statute books.



Using a postal or similar service to menace, harass or cause offence

Criminal Code Act (Cth) s471.12:

'A person is guilty of an offence if:

- (a) the person uses a postal or similar service; and
- (b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.'

Penalty: Imprisonment for 2 years.

Adelaide Street Preachers

Full Citation: Attorney-General for the State of South Australia v Corporation of the City of Adelaide [2013] HCA 3

This case concerned two brothers who are preachers of the "Street Church", Caleb and Samuel Corneloup, who preached in the middle of Rundle Mall in the heart of Adelaide.

They were convicted and fined for breaching a by-law of Adelaide City Council which prohibited people from haranguing, canvassing or preaching on a road without a permit or distributing printed matter on any road to passers-by. The same by-law also prohibited using roads to repair vehicles, collect donations, leading or driving livestock and erecting structures such as fences, hoardings, ladders and trestles.

A challenge to their conviction reached the High Court. Applying the Lange Test, the majority of the Court found that while the by-law did burden the freedom of communication, its object was to prevent the obstruction of roads to ensure safety. This, according to the majority of the court, was a legitimate purpose for the law and was compatible with the Australian Constitution.

The critical point about this case and the Lange Test is that the by-law in question was not intended to interfere with political communication. The court found its purpose was quite different and in this case it meant that the conviction against the Corneloup brothers was upheld.

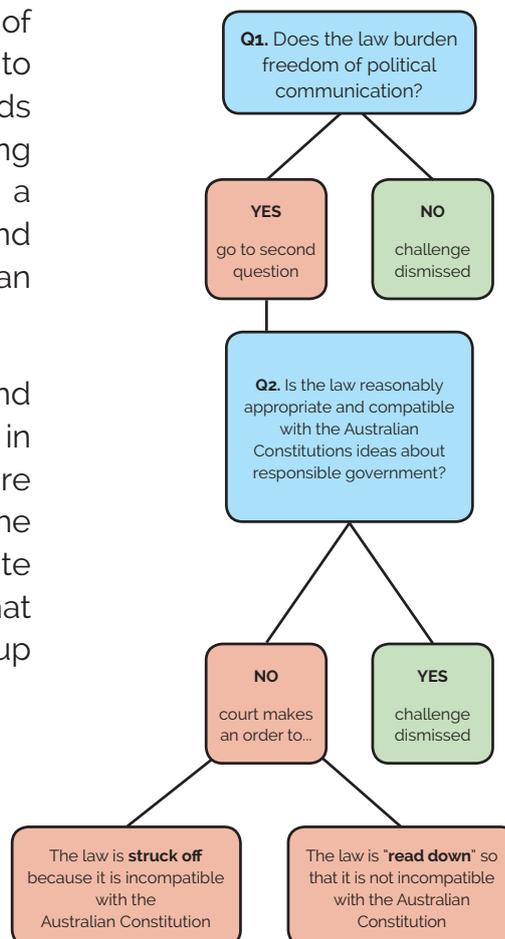
City of Adelaide Council by-law:

2. No person shall without permission on any road:-

2.3 preach, canvass, harangue, tout for business or conduct any survey or opinion poll provided that this restriction shall not apply to a designated area as resolved by the Council known as a "Speakers Corner" and any survey or opinion poll conducted by or with the authority of a candidate during the course of a Federal, State or Local Government Election or during the course and for the purpose of a Referendum;

...

2.8 give out or distribute to any bystander or passer-by any handbill, book, notice, or other printed matter, provided that this restriction shall not apply to any handbill or leaflet given out or distributed by or with the authority of a candidate during the course of a Federal, State or Local Government Election or to a handbill or leaflet given out or distributed during the course and for the purpose of a Referendum.



The Right to Assemble

The right to assemble highlights the relationship between rights and responsibilities under the law.

One of the Rule of Law Institute of Australia's principles states that people should be able to 'assemble without fear for the purpose of criticising the administration of the law'.

Free and open criticism of the law is an essential aspect of upholding accountability in government under the rule of law, democratic life, and influencing the direction of law reform.

The right to assemble is important because it allows people to gather in public and express their opinion about an issue. However, the rule of law requires that those who assemble accept the responsibility to comply with the law.

What is a Public Assembly?

A public assembly is a group of people who gather in a public place for a common purpose. The purpose of an assembly could be to celebrate or commemorate an event, to protest, or for a variety of other reasons.

The Australian States and Territories each have different laws relating to public assembly. In NSW the **Summary Offences Act 1988 (NSW)** provides a legal process to seek legal protection to hold an assembly, and the **Peaceful Assembly Act 1992 (QLD)** also provides a legal process for applying to hold an authorised public assembly.

These legal processes grant legal protections to participants in assemblies which prevent them from being prosecuted for obstructing traffic and people.

Queensland and New South Wales Compared

The right to peaceful assembly is an **implied right** in NSW. People have the **right to apply** for legal protections to hold an assembly under the **Summary Offences Act 1988 (NSW)** but have no express right to assemble.

Queensland has a similar legal process to seek protections, however the **Peaceful Assembly Act 1992 (QLD)** provides an **express right** which directly states that people in Queensland have the right to peaceful public assembly.

When Assemblies Go Bad

Some assemblies turn violent, unlawfully obstruct people or vehicles, and create public safety issues.

When people participating in an assembly fail to uphold their responsibilities under the law the police can use powers or charge them with public order offences.

The behaviour of individual members of an assembly are judged according to whether they have committed an offence.

Regardless of the purpose of the assembly, or how well meaning the participants are, certain types of conduct are punishable with criminal offences, some include:

Summary Offences Act 1988 (NSW) - s11A

Violent disorder

(1) If 3 or more persons who are present together use or threaten unlawful violence and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety, each of the persons using or threatening unlawful violence is guilty of an offence.

Maximum penalty: 10 penalty units or imprisonment for 6 months.

...

(7) In this section:

"violence" means any violent conduct, so that:

(a) it includes violent conduct towards property as well as violent conduct towards persons, and

(b) it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short).

Summary Offences Act 2005 (QLD) - s10A

Unlawful assembly

(1) If—

(a) 3 or more persons are present together for a common purpose; and

(b) the conduct of them taken together would cause a person in the vicinity to reasonably fear that unlawful violence will be used to a person or property;

each of the persons commits an offence.

Maximum penalty—

(a) if—

(i) the offender continues to participate in the unlawful assembly after anyone in the assembly has used unlawful violence to a person or property; and

(ii) the offender knows of, or ought reasonably to know of, the violence—2 years imprisonment; or

(b) otherwise—1 year's imprisonment.

Public Assemblies in NSW

The right to peaceful assembly is not an express right in the law of NSW. Legal protections exist for groups who apply to have their public assembly authorised by the Commissioner of Police or a Court.

A person must fill out a form called a '**Notice of Intention to Hold a Public Assembly**' (see next page) and submit it to the NSW Commissioner of Police. If the Police Commissioner does not oppose the assembly those participating cannot be found guilty of offences relating to obstructing people or vehicles in public spaces, provided they act in accordance with the Notice of Intention.

Legal processes that exist to allow for a peaceful assembly **imply** there is a right to peaceful assembly - this **implied right** is strictly defined and subject to the approval of the Police Commissioner and the Courts.

What if the Police oppose an assembly?

If the Police Commissioner opposes the assembly a meeting between the organiser and the Police must be arranged. If the Commissioner still opposes the assembly, the Police can apply to a Court to have the assembly 'prohibited.'

If the court orders the assembly to be prohibited there is no right to appeal this decision.

The assembly could still go ahead but it would receive no legal protections.

Rights and Protections	Responsibilities
<ul style="list-style-type: none"> the right to apply to hold a public assembly under the Summary Offences Act 1988 (NSW) protection from prosecution for offences relating to obstruction of people or vehicles provided the NSW Police approve and the assembly complies with the Notice of Intention. 	<ul style="list-style-type: none"> the organiser of the assembly under the Summary Offences Act (1988) is responsible for ensuring the assembly takes place in the way described on the Notice of Intention (see next page). If the assembly does not take place according to the Notice of Intention those involved in the assembly loses its legal protections



NOTICE OF INTENTION TO HOLD A PUBLIC ASSEMBLY

Summary Offences Act 1988

To the Commissioner of Police

I,
Name
of
Address
on behalf of
Organisation

notify the Commissioner of Police that on the
of
Month/Year

it is intended to hold:

either:

(a) a public assembly, not being a procession, of approximately
..... persons which will assemble

Number

at

Place

at approximately

Time

.....am/pm

and disperse at approximately

Time

.....am/pm

or

(b) a public assembly, being a procession of approximately

..... Number

This document is a
Notice of Intention which is
completed by the organiser
of a public assembly and
sent to the NSW Police
Commissioner. It becomes
an agreement between the
police and the organiser
that the assembly will be
conducted in a certain way.

The purpose of the proposed assembly is.....
.....
.....

the purpose

..... following special characteristics associated with the assembly would be
..... useful for the Commissioner of Police to be aware of in regulating the flow of
..... traffic or in regulating the assembly:

* (i) There will be(number) of vehicles and/or* floats
involved and their type and dimensions are as follows:
.....
.....

* (ii) There will be(number) of bands, musicians,
entertainers etc entertaining or addressing the assembly
.....
.....

* (iii) The following number and type of animals will be involved
in the assembly
.....
.....

* (iv) Other special characteristics of the proposed assembly are as
follows:
.....
.....

I take responsibility for organising and conducting the proposed public assembly.

Notices for the purposes of the *Summary Offences Act 1988* may be served on
me at the following:
.....

Public Assemblies in QLD

The right to peaceful assembly is an **express right** under Queensland law.

While a legal process exists for groups to apply for legal protections for their assembly, this is not compulsory for an assembly to be lawful.

If a person, 'the organiser' would like to apply for legal protections for their assembly they must submit a '**Notice of Intention to Hold a Public Assembly**' letter or form (see example next page) to the relevant local authority and/or the Police Commissioner of Queensland.

If an assembly is approved, the people in the assembly behave lawfully and meet the conditions of the authorisation they cannot be charged with obstruction in a public place.

What if the Police or local authorities oppose an assembly?

If the authorities oppose a proposed assembly then the Police or local authority can apply to a magistrate for the assembly to not be authorised, but only if the notice of intention is given less than 5 days before the proposed assembly.

The **Peaceful Assembly Act (QLD) 1992** requires a process of mediation to occur between the organisers, the general public and the authorities.

If a Magistrate refuses authorisation an organiser cannot reapply but they can ask for a review of the decision. **However, the assembly can still go ahead and be lawful it will not have the protection provided by the notice of authorisation.**

Rights and Protections	Responsibilities
<ul style="list-style-type: none"> • an express right to hold a public assembly under the Peaceful Assembly Act 1992 (QLD). • protection from prosecution for offences relating to obstruction of people or vehicles provided the assembly complies with the Notice of Intention to Hold of Public Assembly 	<ul style="list-style-type: none"> • the responsibility to obey the law in regard to public order, safety and with regard to the rights and freedoms of other people when holding a public assembly • If the assembly does not take place according to the Notice of Intention to Hold a Public Assembly those involved in the assembly lose their legal protections





NOTICE OF INTENTION TO HOLD A PUBLIC ASSEMBLY

QP 0802

08/11

D2

Privacy Collection Statement

The Queensland Police Service is collecting your information for the purpose of recording your intention to hold a public assembly. The collection of this information is authorised by the Peaceful Assembly Act 1992. The information you provide will not be disclosed without your consent unless such disclosure is authorised by law, including the Police Service Administration Act 1990, the Police Powers and Responsibilities Act 2000 and the Information Privacy Act 2009. You have a right to access personal information that the Queensland Police Service holds about you, subject to any exceptions in relevant legislation. If you wish to seek access to your personal information or inquire about the handling of your personal information, please contact the Queensland Police Service Right to Information and Privacy Unit by email at e-RTI@police.qld.gov.au, by telephone 07 3364 4666 or by facsimile 07 3364 4675.

Email:

ASSEMBLY DETAILS

Day: Date:

Place:

Time participants assemble: am / pm Time assembly to commence: am / pm

Time assembly to conclude: am / pm Expected number of participants:

Purpose of assembly:

Description of any sound amplification equipment to be used:

IF ASSEMBLY IS TO INCLUDE A PROCESSION

Do you propose to use? Roads Footpaths / bikepaths

Time procession concludes: am / pm

What is a 'Notice of Intention to Hold a Public Assembly?' a document filled out by the organiser of a public assembly which is sent to the police commissioner. It becomes an agreement between the police and the organiser that the assembly will be conducted in a certain way.

To: Commissioner of the Queensland Police Service

Relevant local authority

Name of organisation:

Name of organiser:

Address of organiser:

Contact details—Telephone no.: Mobile no.: Fax:

Email:

Name of person giving notice:

Address of person giving notice:

Contact details—Telephone no.: Mobile no.: Fax no.:

Details of any vehicles involved:

How many marshals are available to manage the movement of the procession?

How will marshals be identified?

banners? Yes No



Greenpeace Coal Loader Protests

Legislation

Peaceful Assembly Act (QLD) 1992

Summary Offences Act (QLD) 2005

Police Powers and Responsibilities Act (QLD) 2000

Although peaceful assembly is lawful in Queensland sometimes assemblies which are protests are found to be unlawful because they obstruct people or vehicles, are dangerous for the protesters and those around them, or trespass on private property.

In August 2009 protesters from the environmental organisation Greenpeace spent 36 hours chained and dangling from the top of a Hay Point coal terminal in Mackay to highlight environmental issues and to protest against coal exports.

They were charged with engaging in 'unregulated high risk activities'.

The protesters were charged and fined under the **Summary Offences Act 2005 (QLD)**. The majority had no conviction recorded, and fines ranged from \$300 to \$750.

Police 'move on' Powers and Peaceful Assembly

Section 36 of the **Police Powers and Responsibilities Act 2000 (QLD)** gives police powers to 'move on' people when their behaviour may be causing anxiety to others.

Section 6 of **Peaceful Assembly Act (QLD) 1992** states that this does not apply for participants in authorised public assemblies but may be used if the assembly is unauthorised and the assembly is 'causing anxiety' to the public.

Summary Offences Act (QLD) 2005 s14

Unregulated high-risk activities

(1) A person must not unlawfully do any of the following—

(a) parachute or hang-glide onto a building or structure;

(b) BASE-jump or hang-glide from a building or structure;

(c) climb up or down the outside of a building or a

structure;

(d) abseil from a building or structure.

Maximum penalty—20 penalty units or 1 year's imprisonment

Occupy Martin Place

Legislation

Local Government Act 1993 (NSW)

22 October 2011

Police Remove an Illegal Occupy Sydney Campout

Occupy Sydney Tents and camping equipment removed by police from Martin Place at 5am in the morning. Some participants charged with an offence under the **s632.1 of the Local Government Act 1993 (NSW)**

5 November 2011

Police Allow Occupy Sydney to Hold a Public Assembly

Occupy Sydney protesters march from Town Hall to Martin Place in the Sydney CBD after negotiating a compromise with the NSW Police.

The police used their **discretion** and allowed the march to occur legally as a public assembly.

The organisers of Occupy Sydney challenged the Local Government Act 1993 in the Federal Court of Australia in 2014.

The Court found, per the Lange Test, that the law did effectively burden the freedom of political communication in the Australian Constitution. However, it found the law was reasonably appropriate and adapted to serve the purpose of promoting public health, safety, and use of a public place, and that the protesters were otherwise free to communicate their views.

While the protesters could face penalties for camping overnight in Martin Place, there was no prohibition on them arriving each morning and assembling, provided they did not break any other laws in doing so.

Full case citation:

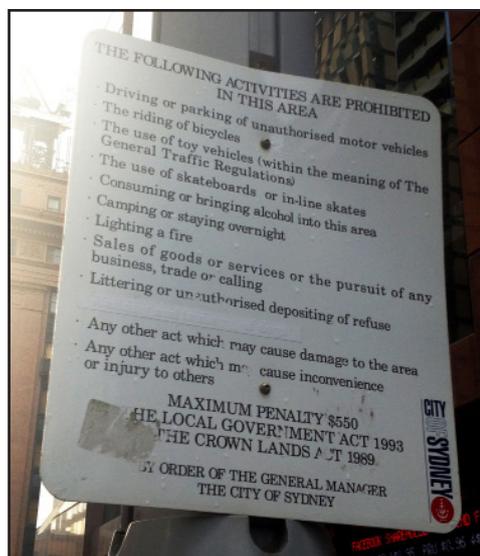
O'Flaherty v City of Sydney Council [2014] FCAFC 56

Signage in Martin Place, Sydney CBD

The **Local Government Act 1993 (NSW)** makes it an offence to disobey a notice such as a sign in a public place, see below:

Section 632.1

"1) A person who, in a public place within the area of a council, fails to comply with the terms of a notice erected by the council is guilty of an offence."



NSW Police Powers: 'Move on' Directions

The NSW Police have the power to issue 'move on' directions under the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW). This is the main law which defines the powers and responsibilities of police in NSW.

Police Discretion and Public Assemblies

LEPRA gives police the power to move on people at their discretion. The reason for this is that it would be impractical and impossible to define and list every situation where a police officer could issue a move on direction.

These laws give police officers general principles they must follow, under the rule of law the use of discretionary power is acceptable provided it is well defined. Section 200 provides limits to this discretionary power, and a process exists for challenging the actions of police in relation to the use of this power.

The limitations to this power recognise that organised assemblies and apparently genuine demonstrations or protests should not be subject to 'move on' directions.

The penalty for disobeying a 'move on' direction is a fine of 2 penalty units

1 penalty unit = \$ _____

Police can give a direction to a person who

Section 197 - Directions generally relating to public places

(1) A police officer may give a direction to a person in a public place if the police officer believes on reasonable grounds that the person's behaviour or presence in the place (referred to in this Part as "relevant conduct"):

- a) is obstructing another person or persons or traffic, or
- b) constitutes harassment or intimidation of another person or persons, or
- c) is causing or likely to cause fear to another person or persons, so long as the relevant conduct would be such as to cause fear to person of reasonable firmness, or
- d) is for the purpose of obtaining, procuring or purchasing any prohibited drug that it would be unlawful for the person to possess.

Guidelines for what are reasonable grounds for giving a direction

(2) A direction given by a police officer under this section must be reasonable in the circumstances for the purpose of:

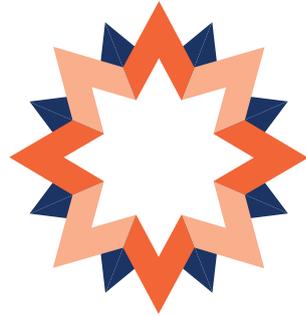
- a) reducing or eliminating the obstruction, harassment, intimidation, or fear, or
- b) stopping the supply, or soliciting to supply, of the prohibited drug, or
- c) stopping the obtaining, procuring, or purchasing of the prohibited drug

Section 200 - Limitation on exercise of police powers

This Part does not authorise a police officer to give directions in relation to:

- (a) an industrial dispute, or
- (b) an apparently genuine demonstration or protest, or
- (c) a procession, or
- (d) an organised assembly.





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