The rule of law requires that power is used according to law, and that those who have power are accountable for how they use it. The freedom to speak out publicly about the use of power, or the law, and the freedom of the media are essential principles that support the rule of law in Australia.

**The Separation of Powers**

The separation of powers in Australia can be seen in action when the courts decide cases about the freedom of political communication. In these cases, the courts are interpreting the Constitution and considering whether the Parliament and Executive are acting in line with the Australian Constitution. Importantly, the freedom of political communication also provides an argument to protect public assemblies, but a recent case which argued this, O’Flaherty v City of Sydney Council [2014] FCAC 56, was not successful in doing so.

**People Should Not Fear their Government**

The rule of law is strong in a country where people can criticise the law and those in power openly, and in public. People should not be afraid of the government and its officials: judges, politicians, police, and other government officers.

Appropriate checks and balances on the power of officials ensure that an individual does not feel fearful of being persecuted if they criticise someone who has power.

**The Importance of Journalists**

Australian society often relies on journalists to investigate the actions of those in power. Freedom of the media is an essential part of maintaining the rule of law. While many journalists are fearless in trying to expose issues where abuse of power occurs, this can raise difficult legal questions about where journalists get their information.

If a whistleblower gives confidential government information to a journalist, they may be guilty of a criminal offence, and the journalist may be guilty of an offence if they publish that information publicly.

Many journalists feel that increased surveillance and coercive powers of police and law enforcement, as well as a lack of legal protections for journalists and their sources have a ‘chilling effect’ on the freedom of the media in Australia. See our resource on [Metadata & the Rule of Law](https://www.ruleoflaw.org.au/education/metadata/) for more information.

**Free Speech and Accountability**

Free speech allows an individual to express their opinion publicly without being punished for it. It is one of the most important, and most debated, freedoms in many societies. People have been debating freedom of speech, and what, if any, limits should be placed on it, for thousands of years. Over time, different approaches have come about. One of the most famous laws which protects free speech is the First Amendment to the United States Constitution. However, this law has no effect outside the borders of the United States of America.

A number of international agreements such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights provide protections for freedom of expression. The ICCPR contains a broad definition of freedom of expression, but also places some restrictions on it, such as:

"a. Any propaganda for war shall be prohibited by law.

b. Advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

**Freedom of Speech in Australia**

Freedom of speech or expression is not mentioned in the Australian Constitution. However, beginning in the early 1990s, the High Court developed the idea of the ‘implied freedom of political communication,’ which they said was a constitutional right that limited the power of government and protected political communications. The freedom of political communication is narrower than the freedom of expression described by the ICCPR, and relates to the requirement in the Australian Constitution that the Federal Parliament be elected.

"To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential."


The freedom of political communication is one of the few constitutional rights found in the Australian Constitution. A legal test called the Lange Test has been developed to make decisions about whether a law or decision of government is incompatible with the Australian Constitution because it burdens political communication. This resource examines some of the most recent and important cases about the freedom of political communication that have reached the High Court of Australia (HCA) and the Federal Court of Australia (FCA).

**Freedom of Political Communication**

The Lange Test was defined in [Street Preachers](https://www.hchu.gov.au/judgments/1997/HCA130) (1997) HCA 25, a case that dealt with freedom of political communication and defamation laws. It set out the way in which the Lange Test means and how it has been applied using case law.

What does it look like?

What does compatible with the Australian Constitution mean? The answer can be found in the Lange Test. To determine whether a law is compatible with the Australian Constitution, the High Court decided that a law is necessary if it is necessary to achieve a legitimate end. If a law is unnecessary, it can no longer be a law. Therefore, a law is necessary if it is necessary to achieve a legitimate end. "It's become a sadly familiar story by journalists that governments have often been referred to the courts to open and free criticism about political issues. The Australian Constitution suggests it exists because it requires a system of representative democracy.

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What is the Rule of Law?

Preamble of the Universal Declaration of Human Rights (1948):

‘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.

‘Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

‘To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential

Brennan J in Nationwide News Pty Ltd v Wills [1992] HCA 46

‘One might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find its earliest heartland in the writings of the enlightenment and the American pioneers of democracy, but the unclarity of the implied freedom gives the courts virtually untrammeled power to make of it what each judge wills.

Heydon J at 244 in Monis v the Queen [2013] HCA 4

‘The implied freedom of political communication has never been clear. If there were a federal bill of rights, the implied freedom of communication about political and government matters would be listed. “Bills of rights are not moral or even political philosophies. They are, at best, bullet points from such philosophies.”[222] Like other philosophical bullet points, the unclarity of the implied freedom gives the courts virtually untrammeled power to make of it what each judge wills.

Heydon J at 244 in Monis v the Queen [2013] HCA 4

Cases About the Freedom of Political Communication

Coleman v Power [2004] HCA 39
Patrick Coleman was charged and convicted for using insulting words under the Vagrants Gaming and Other Offences Act 1931 (Qld) for handing out leaflets in Townsville Mall stating “Get to know your corrupt type coppers” and identifying local police officer Constable Frenneman Power as one of the “slimy lying bastards”. He was also convicted of assaulting his choice of obstructing a police officer after a scuffle between him and Constable Power.

The High Court applied the Lange Test and found that criticising police was protected by the freedom of political communication and dismissed the charge. The High Court read down the Vagrants Act so that it did not apply to political communication. This meant that the “insulting words” offence remained law, but in a context which allowed complaints from all local councils.

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

Attorney-General for the State of South Australia v Corporation of the City of Adelaide [2013] HCA 3
“The Street Preachers Case”

The Unions Case was the first time the High Court was divided in opinion the decision of the lower courts would be reversed. The Full Bench found that the laws about donating money to political parties, and those which specifically prevented non-electors (people or organisations not on the electoral roll) from donating money to political parties.

Monis v the Queen [2013] HCA 4
The Monis case dealt with whether a criminal offence, under s471.12 of the Criminal Code Act 1995 (Cth) Using a postal or similar service to menace, harass or cause offence, was invalid under the Australian Constitution.

The appellants Monis and Droudis were placed on trial in the NSW District Court for the offence for sending offensive letters to the relatives of Australian soldiers killed in Afghanistan. They argued in the High Court that the offence itself was invalid because 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 whether the law had a legitimate purpose. 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 communications.

When the High Court is divided in opinion the stage proportionality test which asked if the law was proportionate to the purpose was not considered.

McCloy v NSW [2015] HCA 34
Jeff McCloy, a property developer, challenged the law of NSW as burdening the freedom of political communication because it prevented property developers from donating money to political parties.

McCloy’s case was unsuccessful, the High Court finding that the laws which placed a cap on political donations, and those which specifically prevented non-electors from donating money to political parties.

The implied freedom of political communication protects offensive communications. The Lange Test was refined in McCloy and a three stage proportionality test which asked if the law was justified was applied in this case. The court found that the laws about political parties were necessary and adequate in balance.

Chief of Defence Force v Gaynor (2017) FCAFC 42
Bernard Gaynor was dismissed from his position in the Army Reserve for publicly expressing his opinion via social media and on his website about Australian Defence Force (ADF) Members who participated in the Sydney Gay and Lesbian Mardi Gras. Gaynor also made comments objecting to ADF policies supporting transgender people. Gaynor’s comments were found to be against ADF policies and after a process of review he was dismissed.

Gaynor in Gaynor v Chief of the Defence Force (No 3) [2017] FCAFC 42 challenged the ADF regulations that gave the Chief the power to dismiss him. He argued that the decision to dismiss him was contrary to the implied freedom of political communication in the Australian Constitution.

Justice Buchanan of the Federal Court considered the ADF regulations according to the Lange Test, and whether Gaynor’s dismissal had a legitimate purpose.

Buchanan J ordered that Gaynor should be reinstated. The Chief of the Defence Force appealed this decision to the Full Bench of the Federal Court. Justices Perram, Mörzer and Gleeson disagreed with Buchanan J and held that Gaynor’s dismissal was lawful.

The implied freedom is concerned with law and not rights, any assessment of whether the implied freedom is limited by the law not someone’s personal rights have been effected. The Full Bench found that the law does not involve, nor does it recognise or confer, any personal rights on individuals...

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