The Rule of Law and the Implied Freedom of Communication in Australia

International Agreements and Australian Law

Freedom of 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 that time, many different approaches have come about.

One of the most well known 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 (ICCPR) provide broad protections for freedom of expression.

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

However, international law does not provide protections for freedom of expression – as we know international law is not enforceable except when a national parliament, such as Australia, passes a law that explicitly protects freedom of expression.

The Implied Freedom of Political Communication in Australia

Freedom of speech or expression is not explicitly 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 implied 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.

1. 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

The freedom of political communication is one of the few constitutional rights found in the Australian Constitution.

A legal test called the McCloy 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. For more on the McCloy test and the case law see over the page.

Glossary

Representative government - that the Australian Constitution requires the people of Australia elect people to the Parliament to represent them.

Responsible government - that members of the executive (who run the country) are held to account by the legislature (who make the laws).

Struck down - where a law is found to be invalid (unconstitutional) and is declared to no longer be a law.

Read down - where the court decides that words in a law have a more specific or narrower meaning.

The Australian Constitution - the supreme law of Australia which outlines the structure and powers of government.

Constitutional right - a right that is found in the Constitution.

Implied right/freedom - a right or freedom found by a judge(s) to exist because the law suggests it does.
The McCloy Test Questions as defined by the High Court

1. Does the law effectively burden the implied freedom in its terms, operation or effect?

2. If ‘yes’ to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

3. If ‘yes’ to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the constitutionally prescribed system of representative and responsible government?

The third step of the McCloy test is assisted by a proportionality analysis which asks whether the imposed law is ‘suitable’, in the sense that it has a rational connection to the purpose of the law, and ‘necessary’, in the sense that there is no obvious and compelling alternative, reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom. If both these criteria are answered in the affirmative, the question is then whether the challenged law is ‘adequate in its balance’. This last criterion requires a judgment, consistently with the limits of the judicial function, as to the balance between the importance of the purpose served by the law and the extent of the restriction it imposes on the implied freedom.


Does this law burden political communication mean?

- What does limiting political communication mean?
  - A law which burdens political communication includes using stop or restrict a person from communicating or publishing comments in politics, and the actions or policies of the government.

- What does it look like?
  - In Coleman v Power the High Court decided that the freedom of political communication included the freedom to criticise the police, and that a law punishing insulting language burdened the freedom of political communication.

- Is the law compatible with the Australian Constitution?
  - If the “purpose” and “means” of a law do not undermine the system of representative and responsible government it is compatible with the Australian Constitution.

- What does it look like?
  - In the Street Preachers case, the High Court decided that a council by-law which burdened political communication had a purpose and means that were compatible with the Constitution because a law to protect public safety throughfuges in public spaces, did not undermine representative and responsible government.

- Is the law “suitable” and “necessary”?
  - Suitable - there is a rational connection between the purpose of the law and the way it achieves that purpose
  - Necessary - there is no alternative way to achieve the purpose of the law in a way that is less of a burden to political communication

Unions NSW v New South Wales [2013] HCA 58

In the Unions case, the High Court determined whether a law of NSW which restricted people or organisations from the electoral roll from donating money to political parties, and limited the amount of money a political party could spend on electioneering was valid.

The Court found that the law limited the flow of money to political parties, and it also limited the amount of money a political party could get and the amount of money a political party could spend on electioneering would not fulfill the purpose of an anti-corruption act.

The court declared the laws were invalid.

Chief of Defence Force v Gaynor [2017] FCAFC 41

Bernard Gaynor was dismissed from his position in the Army Reserve for publicly expressing his opinion via social media and on his website about extramural (ADF) Member who participated in the Sydney, Gay and Lesbian Mardi Gras. Gaynor also made comments objecting to ADF policies supporting trans–gender people. Gaynor’s comments were found to be against ADF policies and after a process of review he was dismissed.

Gaynor in Gaynor in Chief of the Defence Force (No. 3) (2015) challenged the ADF regulations that gave the Chief of the Defence Force 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.

Coleman v Power [2004] HCA 39

Patrick Coleman was charged and convicted for using insulting words under the Vagrants Act (South Australia) (Cth) for leaflets in Townsville Mall stating “Get to know your corrupt type cops” and identifying local police officer Constable Brendan Power as one of the “slimy bullies” and accused of corruptly attacking and obstructing a police officer after a scuffle with 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 noted that the Vagrants Acts Act did not apply to political communication. This meant that the “insulting words” offence remained law, but 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 review 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 Street Preachers case concerned two brothers who were preachers of the Religion of Art.” They were fined for breaching a by-law of the Adelaide City Council which prohibited people from harassing, canvassing or preaching on a road without a permit or distributing printed matter on any road to passers-by.

The by-law also prohibited using vehicles, collecting donations, leading or driving livestock and erecting structures such as fences, hoardings, ladders and trellises.

The by-law was challenged in the High Court as being invalid because it attempted to place a restriction on political communication. The High Court, in the Street Preachers Test, a majority of the Court found that while the by-law did burden the freedom of political communication, its purpose was to prevent roads being obstructed and to ensure safety. This decision meant that the by-law was a legitimate purpose for the by-law and it was therefore compatible with the freedom of political communication found in the Australian Constitution.

Monis v the Queen [2013] HCA 4

The case concerned whether a criminal offence, under s 477.12 of the Criminal Code Act 1910 (Cth), of who was convicted for mailing a parcel or similar material to many people, was harassment or cause of violence, was invalid under the Australian Constitution.

The case was first heard in the NSW District Court and they were tried 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 was valid. Justice Haye and Justice Gordon held 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 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 Droudis pleaded not guilty and were each sentenced to 300 hours community service in September 2013.

McClary v NSW [2015] HCA 34

Jeff McClary, 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.

McClary’s case was unsuccessful, the High Court finding that the laws which placed a cap on political donations, and those which specifically prevented property developers ‘not only do not impose the system of representative government provided for by the Constitution, but enhance it.’

The Large Test was refined in McClary 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 donating money to political parties were suitable, necessary and adequate in balance.

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