Victorian Government Solicitor's Office

Client Newsletter

Occupy Melbourne, Street Preachers and Hate Mail

December 2013

Core concepts

The implied freedom of political communication

The implied freedom of political communication is a limit on the legislative power of the Commonwealth and the States which derives from the system of responsible and representative government established by the Australian Constitution. The High Court has based the implied freedom of political communication on the structural necessity to preserve the Constitution's integrity - if political communication is routinely limited either **(a)** for illegitimate purposes; or **(b)** in a disproportionate manner, then the system of government envisaged by the Constitution would, over time, break down. Accordingly, the High Court has adopted an approach that results in legislation that infringes this freedom being found invalid or, if possible, read down.

In *Lange v Australian Broadcasting Corporation*[1] and a series of subsequent decisions,[2] the High Court established a two-stage test for determining whether a law infringes the implied freedom:

1. The first stage of the test asks whether, in its terms, operation or effect, the law burdens the freedom of communication about government or political matters.

2. If so, the second stage asks whether the law is reasonably appropriate and adapted to serve a legitimate end, in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. The second stage of the test focuses on whether the degree of restriction imposed on political communication is reasonable and proportionate when measured against the importance of the law's object and the legislative means chosen to achieve the object.

Summary

The recent High Court decisions in *Attorney-General for South Australia v Corporation of the City of Adelaide* [2013] HCA 3 (***Corneloup***) and *Monis v The Queen; Droudis v The Queen* [2013] HCA 4 (***Monis***), and Federal Court decision in *Muldoon v Melbourne City Council* [2013] FCA 994 (***Muldoon***),[3] together clarify the scope of the implied freedom of political communication in relation to State laws, delegated legislation (eg council by-laws) and administrative decisions. The process of assessing whether a law impermissibly restricts communication about government or political matters is now much clearer. This newsletter discusses these decisions and implications for lawmakers and decision-makers. We also briefly consider the overlap with the freedom of expression protected under the Victorian Charter Act.

The application of this test raises a number of issues that were discussed at the recent seminar and clarified in these three cases, including:

How does a court decide what the purpose or end pursued by a law is? Does the court merely defer to the regulator or executive government or does the court decide this question for itself?

- How does the implied freedom operate when a law enables an administrative-decision maker to effectively prevent or limit political communication?

The Charter Act freedom of expression

In addition to the implied freedom, s 15 of the *Charter of Human Rights and Responsibilities Act 2006* (**Charter Act**) states that 'every person has the right to freedom of expression'. The scope of Charter Act right it is not limited to political communication; it applies to any statement or act capable of conveying some kind of meaning. Like the constitutional implied freedom, freedom of expression under the Charter Act is not absolute. It is subject to the 'internal limitation' in s 15(3) of the Charter Act, which provides that expression may be subject to lawful restrictions reasonably necessary to respect the rights and reputations of other persons, or for the protection of national security, public order, public health or morality. It is also subject to such reasonable limits as can be demonstrably justified in a free and democratic society, pursuant to the general limitations provision in s 7(2) of the Charter Act.

Corneloup

Brothers Caleb and Samuel Corneloup were members of an evangelical group that preached on the streets of Adelaide, including on the city's main shopping thoroughfare, Rundle Mall. The Corneloup brothers challenged a Adelaide City Council by-law that made it an offence to 'preach, canvass [or] harangue', and to 'distribute' printed material, without a permit. The by-law contained exceptions for federal, state and municipal elections, and provided for a designated Speakers Corner, where permits were not required.

The Corneloups were successful in the Full Court of the Supreme Court of South Australia, but the Attorney-General for South Australia (an intervener in the Supreme Court proceeding), appealed to the High Court. The High Court considered first whether the by-law was valid on ordinary statutory interpretation principles, and determined by majority that it was.[4]

Each of the majority justices then turned to the implied freedom and accepted that the by-law burdened communication about government and political matters (as was conceded by the SA Attorney-General and the Council). On the second stage of the *Lange* test, the majority agreed that the by-law was directed to legitimate ends compatible with our system of representative and responsible government. They variously characterised the purpose of the by-law as protecting the 'safety, comfort and convenience of road users', 'keeping of the peace', or preventing the obstruction of roads.

The High Court, by majority, upheld the by-law as being reasonably appropriate and adapted to serve its legitimate ends. In addition to exceptions for a 'Speaker's Corner' and activity related to elections and referenda, the by-law was confined to particular places, and directed to unsolicited communications. Justices Crennan and Kiefel also noted that the permit system implemented by the by-law was the most practical means of securing the safe and convenient use of the roads. Furthermore, French CJ, Hayne J, Crennan and Kiefel JJ noted that the granting or withholding of a permit to engage in activities otherwise prohibited by the by-law could not be validly based upon the decision-maker's approval or disapproval of their content or nature (i.e an administrative power cannot be exercised for an improper purpose and judicial review is readily and swiftly available to scrutinise such decisions).

Monis

In *Monis*, the High Court split 3:3 on whether s 471.12 of the *Criminal Code* (Cth), which makes it an offence to use a postal service in an offensive manner, impermissibly burdens the implied freedom. Mr Monis was charged under the offence provision for sending letters to parents and relatives of soldiers killed in Afghanistan. The letters were critical of Australia's involvement and the part played by the deceased soldiers. Ms Droudis was charged with aiding and abetting some of the offences. Mr Monis and Ms Droudis challenged their indictments on the ground that the offence provision infringed the implied freedom. Following

unsuccessful appeals to the NSW District Court and Court of Criminal Appeal, they were granted special leave to appeal to the High Court.

All six Justices agreed that the offence provision burdened communication on government and political matters. In doing so, their Honours rejected the Commonwealth's submission that the offence provision was valid because it only restricted political communication in a manner that was 'insubstantial' or 'slight'. The reasons of French CJ (with whom Heydon J broadly agreed) and Hayne J make clear that the extent to which a law restricts political communication is irrelevant to the first stage of the *Lange* test. On the other hand, Crennan, Kiefel and Bell JJ accepted that a restriction on political communication which was so slight 'as to be inconsequential' may result in a negative answer to the first stage of the *Lange* test, but nevertheless held that the offence provision did not fall within this category.

The court was equally divided on the second stage of the *Lange* test and the ultimate validity of the offence provision. Because they were evenly split, the Court of Appeal decision (upholding the law) stands. The three Justices who found the offence provision to be invalid (French CJ, Hayne and Heydon JJ) did so on the basis that it did not pursue a legitimate aim compatible with the constitutional system of representative and responsible government. Having regard to the scope of the term 'offensive' and the range of postal and similar services to which the offence provision applies, French CJ defined that the purpose of the offence provision as the prevention of the conduct it prohibits (use of postal or similar services in a manner which reasonable persons would regard as offensive). That, the Chief Justice held, should not be regarded as a legitimate end because its breadth is incompatible with its implementation in a manner consistent with the implied freedom.

Justice Hayne concluded that the only purpose of the offence provision was to penalise, and thereby prevent, the use of postal or similar service in a way that would cause offence. His Honour rejected the other purposes contended for by the Commonwealth: the offence provision offence provision did not protect recipients of postal communications from harm because it did not require proof of any such harm nor did it deal with the safety, efficiency or reliability of postal services. For Hayne J, because the purpose of the offence provision was not a legitimate end, there was no need to consider whether the means adopted were reasonably appropriate and adapted.

Justices Crennan, Kiefel and Bell construed the word 'offensive', in the context of the offence provision, to mean *'seriously* offensive' communication likely to provoke a significant emotional reaction or psychological response. In light of this narrow construction, their Honours determined that the offence provision pursued the legitimate end of protecting people from the 'intrusion of offensive material into their personal domain'. Justices Crennan, Kiefel and Bell JJ held that the offence provision is reasonably appropriate and adapted, because it only applied to 'seriously offensive' communications, provided an objective standard that is familiar in the law, and was further limited by its fault element requiring deliberation or recklessness.

Muldoon

The *Muldoon* decision concerned the 2011 'Occupy Melbourne' protests held in the City of Melbourne's public gardens. Protesters were served with notices to comply with by-laws which prohibited camping in a tent or temporary structure, and erecting signage, in a public place without a permit. Two protesters issued proceedings in the Federal Court seeking to stop the Council and police from enforcing the notices to comply.[5] They argued that the by-laws impermissibly burdened the implied freedom, and that the Council had breached its obligations under s 38 of the Charter Act by making by-laws which were incompatible with Charter rights to free expression and association.

Justice North found that the by-laws did burden the implied freedom, because the tents and signs were symbols that expressed the concept of the Occupy protest about democracy and government in Australia. As to the second stage of the *Lange* test, North J held that the by-laws were valid as they were reasonably appropriate and adapted to the legitimate end of providing for the preservation, care, and equitable use of public space. The following matters were relevant to his Honour's conclusions:

- The extent of the restriction on political communication was not absolute. In particular, the by-laws did not prohibit the protesters from remaining in the gardens, and left open a wide range of other forms of political protest.

- The protesters could apply to the Council for a permit to camp or erect signage in the gardens, and could seek judicial review of a permit decision. Like French CJ, Hayne J and Crennan and Kiefel JJ in *Corneloup*, North J noted that the Council's discretion to grant a permit must be exercised in accordance with the purpose of the by-laws, and cannot have regard to the content or nature of a protest.

- The applicants failed to demonstrate how the Council could have protected the public gardens through means which were less restrictive on political communication. Justice North rejected as impractical the proposition that the by-laws could be drafted so as to not apply to political communication.

On the protesters' Charter Act claims, North J held that the s 7(2) general limitations clause permits restrictions on the Charter right which are 'not relevantly different' from the permitted limitations on the implied freedom. Accordingly, his Honour considered that his conclusions as to the second stage of the *Lange* test equally applied to characterise the by-laws as a justified limitation of the Charter Act rights to freedom of expression, peaceful assembly and freedom of association.

Lessons for drafters and decision-makers

Courts often find that laws burden the implied freedom of communication

In all three cases, the fact that the relevant law was found to burden the implied freedom is not a surprising result. When applying the implied freedom courts almost always reach this outcome. Indeed, this led Heydon J to observe in early 2012 that:

> [t]his common practice of concession or assumption that the first [implied freedom of communication] limb is met tends to generate an insidious belief that it will always be met.[6]

As the three cases demonstrate, laws which regulate non-verbal methods of communication, and laws which are not intended to regulate communication, may nevertheless constitute an effective burden on the implied freedom.

The real focus is therefore on the balancing exercise established by the second stage of the *Lange* test:

- What is the purpose or legitimate end of the law?

- Is the purpose compatible with representative and responsible government?

- Is the law a reasonable means of achieving that legitimate end?

Determining the legitimate end or purpose served by a law is a question of statutory construction

The importance of clear legal drafting is critical, as courts decide the question of what is the purpose or 'legitimate end' pursued by a law by applying the ordinary principles of statutory interpretation. That is, in deciding what is the legitimate end or purpose served by a law, a court does not merely defer to the political or policy object articulated by the regulator or executive government.

It is therefore important to ensure that the end or purpose served by a law is clear 'as drafted' without having to resort to secondary and preparatory materials. The principal reason for this approach is clear - the Court will tend to prefer the end or purpose that can be derived objectively from the logic of the statutory provision or scheme being considered rather than merely referring to statements in preparatory materials.

Administrative decisions must always be made for a proper purpose

The decisions of French CJ, Hayne J and Crennan and Kiefel JJ in *Corneloup*, and the decision of North J in *Muldoon*, also demonstrate how the implied freedom reinforces the requirement that administrative powers be exercised for a proper purpose. In applying the implied freedom of political communication in the context of administrative decisions, courts will assume that the administrative decision-makers will exercise their powers according to their proper purpose (Note: the Charter imposes similar limits on administrative decision-making). Accordingly, the failure to exercise administrative powers for a proper purpose leaves a decision vulnerable to judicial review. Lawmakers and decision-makers need to ensure that:

- Administrative decision-makers exercise powers in accordance with the proper purposes for which they were conferred.
- Evidence exists in each case as to why an administrative power was exercised in a particular manner. Note: evidence can be established in a variety of ways, including policies or guidelines, staff training, written reasons, and oral testimony in court.

A useful tip for drafters to help ensure that a law is reasonably appropriate and adapted to serve a legitimate end

One way in which courts consider if a law is reasonably appropriate and adapted to serve a legitimate end is to consider if there an equally practicable, obvious and compelling alternative options to achieve this end that are less restrictive on political communication. The implied freedom prevents the legislature from using an overly restrictive legislative regime to solve a problem when a less restrictive regime would achieve the same outcome or, put simply, the parliament cannot 'use a sledgehammer to crack a nut'.

While the courts give a high degree of latitude to lawmakers on this point, recognising that they are not best-placed to weigh up policy options. Justice Hayne in *Monis* gave a useful tip to lawmakers and drafters on this point, when drafting a provision consider:

1. whether there is an exception to any general law principles that serve similar purposes to the law being drafted; and
2. if so, consider whether a similar exception should apply to the provision being drafted.

Ensuring consistency between a statutory provision being drafted and the general law will result in a greater likelihood of the court upholding the validity of the statutory provision.

Parallels between the Charter Act and the implied freedom

Finally, although North J's judgment in *Muldoon* did not consider the Charter Act in any detail, it does indicate that, with respect to laws which restrict the Charter Act freedom of expression with respect to communication about government and political matters, the process of determining the question of compatibility with the implied freedom will involve the consideration of matters similar to those relevant to the determination of compatibility with the Charter Act. It follows that a law that is held not to infringe the implied freedom because it is appropriate and adapted to a legitimate end will often also constitute a justifiable limitations on rights under the Charter Act (and vice versa). We note that the correctness of this finding is likely to be challenged in the appeal to the Full Federal Court.

VGSO can advise you on the effect of implied constitutional limits on the proper construction of laws; drafting techniques that may minimise the likelihood of challenge; and decision-making in accordance with implied limits. We can also help with staff training and developing policies or guidelines for good decision-making. If your decision is nonetheless challenged, our experienced litigators can assist in any court or tribunal proceedings.

For further information

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[1] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[2] *Levy v Victoria* (1997) 189 CLR 579, 646; *Coleman v Power* (2004) 220 CLR 1, 51 [95], 78 [196], 82 [211]; *Hogan v Hinch* (2011) 243 CLR 506, 542 [47]; *Wotton v Queensland* (2012) 246 CLR 1, [41].

[3] **NOTE**: Muldoon and Kerrison have appealed to the Full Federal Court - we expect the appeal to be heard around the middle of next year.

[4] Justice Heydon held that that by-law was invalid because it fell outside the by-law making powers conferred on the Council.

[5] At the same time, they applied to the Council for a permit to camp in the gardens indefinitely. The Council denied the application in writing, expressly referring to the implied freedom of political communication and the Charter Act rights to free expression and peaceful assembly.

[6] *Wotton v Queensland* (2012) 246 CLR 1, [41].