Keeping it in Proportion: Recent Cases on the Implied Freedom of Speech

The implied constitutional freedom of political communication has been continually considered in a range of Australian courts, shifting the consideration of the test established in Lange. Sophie Dawson and Rose Sanderson provide an overview of these developments through an analysis of recent case law.

Introduction

The implied constitutional freedom of speech is alive and well, and is continuing to play an important part in shaping Australian laws. There have been more than 15 significant cases involving the implied freedom in the last 4 years. 2013 was a bumper year, with 7 significant cases.

These cases have all affirmed key principles at the core of the implied freedom. Unlike the Constitution of the United States, the Commonwealth of Australia's Constitution does not expressly protect 'freedom of speech'.[1]

Rather, the courts have recognised an implied freedom of communication, specific to political and government issues.[2] The implied freedom of communication extends to communication relating to government and political matters. Unlike the freedom of speech in the United States[3] (and indeed that in Canada), the implied freedom does not confer any individual right. Rather, it is 'a freedom from laws that effectively prevent members of the Australian community from communicating with each other about political and government matters.'[4]

The 'reasonably appropriate and adapted' aspect of the second limb of the Lange test is commensurate with, and can be expressed as, a judgement as to 'proportionality'

Recent cases have confirmed that the implied freedom extends to state and local political and government matters.[5] They have also confirmed that a law which directly imposes a burden on communication about government or political matters is more likely to be invalid than those which do so incidentally.[6]

The key development is confirmation that the 'reasonably appropriate and adapted' aspect of the second limb of the Lange test is commensurate with, and can be expressed as, a judgement as to 'proportionality'.

This article first considers the two High Court decisions concerning the implied freedom which were delivered together on 27 February 2013, and a further High Court decision delivered on 18 December 2013. It then considers some decisions in other Australian courts which further illustrate the approach taken by the High Court in the last couple of years.

The Lange Test

Before embarking on a review of some recent cases, it is useful to revisit the core principles. The High Court of Australia in *Lange v Australian Broadcasting Corporation* upheld the view that the Constitution gives rise to an implied freedom of political communication to protect the discussion of 'government and political matters.'[7]

To determine whether legislation is inconsistent with the implied freedom of political communication in the Constitution, the *Lange* test, as modified by *Coleman v Power*[8] has traditionally been applied. The test has two limbs and asks the following questions:

- Does the law effectively burden the freedom of political communication about government or political matters, either in its terms, operation or effect?
- If the answer is yes, is the law reasonably appropriate and adapted to serve a legitimate end, in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

Some recent cases

High Court: Ban on preaching on roads

In *Attorney-General for the State of South Australia v Adelaide City Corporation and Others*,[9] the High Court considered Adelaide's preaching ban. Council By-Law No 4 provides that no person shall, without permission, on any road:

- preach, canvass, harangue, tout for business or conduct any survey or opinion poll; or
- give out or distribute to any bystander or passer-by any handbill, book, notice or other printed matter.

The first limb was decided without issue.

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1 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563.

2 *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579; *Hogan v Hinch* (2011) 243 CLR 506; *Wotton v Queensland* (2012) 246 CLR 1.

3 *United States Constitution* amend I.

4 *Levy v Victoria* (1997) 189 CLR 579, 622 (McHugh J).

5 *Unions New South Wales & Ors v New South Wales* (2013) 304 ALR 266.

6 *Hogan v Hinch* (2011) 243 CLR 506.

7 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

8 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.

9 (2013) 249 CLR 1.

There were 6 judges sitting and 5 separate judgments, with each taking a slightly different approach to the second limb. All but one of the judges (Heydon J) found that the laws under consideration were valid, and each took into account practical considerations as to ensuring roads and other areas the subject of the challenged law were free of obstruction.

A key issue which arises from the judgments in this matter and in Monis v The Queen[10] is whether the second limb of the Lange test includes a proportionality test. In *Lange* the idea of proportionality was mentioned as follows:

> Others have favoured different expressions, including proportionality. In the context of the questions raised by the case stated, there is no need to distinguish these concepts.[11]

In *Coleman v Power* Kirby J preferred the 'proportionality' approach to the 'reasonably appropriate and adapted' test on the basis that the latter incorrectly suggests that the Court is concerned with the 'appropriateness' of legislation.[12] However, prior to this case, a 'proportionality' test had not been adopted by a majority of the High Court.

It is important to note that if any concept of proportionality applies, then it is not necessarily the same as the proportionality test applying in other jurisdictions. In *Becker v City of Onkaparinga*[13] in 2010, the Full Court of the South Australian Supreme Court rejected the notion that the Canadian concept of 'proportionality' might apply, and emphasised the differences between the implied freedom and the relevant principles in Canada, finding that the Canadian law developed 'in a fundamentally different context'.[14]

In *Attorney-General for the State of South Australia v Adelaide City Corporation and Others*,[15] Crennan and Kiefel JJ considered the question in the second limb of the *Lange* test as one of proportionality and treated this as having two distinct parts:

- *Is the law proportionate to its object?* This, of course, requires a consideration of the object of the law. Their Honours asked the question of whether there were other, less drastic means available.
- *Is the law proportionate in its effects on the system of representative government, which is the objective of the implied freedom?* Their Honours referred to *Monis v The Queen*,[16] where the court explained that this question involves an assessment of the extent to which the law is likely to restrict political communication.

Their honours answered each of these questions in the affirmative.

French CJ also considered and applied a proportionality test. Hayne, Heydon and Bell JJ did not discuss any proportionality test in their judgements in this case. However, Hayne J did comment on this issue in the *Monis* case, discussed below, which was delivered on the same day. In particular, Hayne J said that when answering the second *Lange* question, the court must make a judgment which '… may be assisted by adopting the distinctive tripartite analysis that has found favour in other legal systems. On this analysis, separate consideration is given to questions of suitability, necessity and strict proportionality. But whatever structure is used for the analysis, it is necessary to consider the legal and practical effect of the impugned law.'[17]

Likewise, Bell J expressed support for a proportionality test in her joint judgment with Crennan and Kiefel JJ in *Monis*.[18] Thus, the judgements together made it clear that a 'proportionality' approach had the support of a majority of the Court. The court considered that 'proportionate' had the same effect in this context as 'reasonably appropriate and adapted.'[19] Crennan, Kiefel and Bell JJ considered whether the *Lange* test should now be changed to replace 'reasonably appropriate and adapted' with the proportionality test, and expressed the view that the concept of 'proportionality' is clearer.[20]

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In his dissenting judgement, Heydon J pointed out the importance of freedom of speech, quoting Lord Steyn in *R v Secretary for Home Department; Ex parte Simms*[21] at 126:

> Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'.[22] Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.[23]

However, in *Monis*, discussed below, Heydon J doubted whether the implied constitutional freedom should continue at all.[24]

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10 [2013] 249 CLR 92.

11 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562.

12 *Coleman v Power* (2004) 220 CLR 1, [235].

13 *Becker and Another v City of Onkaparinkga and Another* (2010) 108 SASR 163.

14 *Becker and Another v City of Onkaparinkga and Another* (2010) 108 SASR 163.

15 (2013) 249 CLR 1.

16 (2013) 249 CLR 92.

17 *Monis v The Queen* (2013) 249 CLR 92, [144] to [145].

18 *Monis v The Queen* (2013) 249 CLR 92, [278] to [283].

19 *Monis v The Queen* (2013) 249 CLR 92, [283].

20 *Monis v The Queen* (2013) 249 CLR 92, [344] to [346].

21 [2000] 2 AC 115.

22 Abrams v United States [1919] USSC 206; 250 US 616 at 630 (1919) (Holmes J dissenting).

23 *Attorney-General for the State of South Australia v Adelaide City Corporation and Others* (2013) 249 CLR 1, [151].

24 *Monis v The Queen* (2013) 249 CLR 92, [251].

High Court: Prohibition on offensive communications

In *Monis v The Queen*,[25] the High Court considered whether a provision in the Criminal Code which prohibits using a postal or similar service in a way that 'reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive' is consistent with the implied freedom of political communication. A Sydney man had been found guilty of the offence for having sent letters to relatives of people who had died in Afghanistan which were highly critical of Australia's involvement in the region and which the Courts below had found made derogatory statements about the relatives who had died.

All six judges held unanimously that the provision in question burdened political communication.[26] Hayne J found that 'effectively burden' means no more than 'prohibit, or put some limitation on, the making or the content of political communications'.[27] Crennan, Kiefel and Bell JJ noted, however, that an 'effect upon political communication which is so slight as to be inconsequential may not require an affirmative answer to the first limb enquiry'.[28]

The recent decisions made in 2013 support a broad approach to the first limb of the Lange test

However, the Court was split evenly on the second limb of the *Lange* test. As a result, the finding of the Court of Appeal that the provision was valid was affirmed. Crennan, Kiefel and Bell JJ construed the provision narrowly so that it only applied to 'seriously' offensive communications and found that, so construed, it was valid. French CJ, Heydon J and Hayne J held that the purpose of s 417.12 is simply to prevent the use of postal services in a way which is capable of being offensive. For slightly different reasons, they held that this is not a legitimate purpose with respect to the *Lange* test. Hayne J described it as an attempt to 'regulate the civility of discourse'. French CJ and Heydon J found that it was appropriate to find the law invalid rather than reading it down because there were multiple ways in which it could have been limited and there is no reason based on the law to choose one over another.

High Court: Political donations

The High Court again considered the implied freedom in its December 2013 judgment in *Unions New South Wales & Ors v New South Wales*.[29] The High Court confirmed that political communication at a state level is included in the protection of the implied freedom, and that political communication at a state level may have a federal dimension. The majority also confirmed that it is appropriate to take a 'proportionality' approach, though they did not abandon the 'reasonably appropriate and adapted' test. In a joint judgment, French CJ, Hayne, Crennan, Kiefel and Bell JJ found that:

> Where a statutory provision effectively burdens the freedom, the second limb of the *Lange* test, upon which the validity of s 96D may be seen to depend, asks whether the provision is reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government.[30]

The High Court had to consider whether a law restricting political donations imposed a burden on political communication.[31] The majority applied *Levy v Victoria*,[32] and found that the restriction does impose such a burden.[33]

The court reiterated that the implied freedom is not a personal right, but rather, a protection from interference.[34] As a result, non-electors as well as electors are entitled to the protection.[35]

The *Unions New South Wales & Ors v New South Wales* case is one of the few in which the law in question failed to meet the requirements of the second limb of the *Lange* test.

Under the provision in question, certain sources of political donations were treated differently from others. The majority found that it was not evident, 'even by a process approaching speculation', what the provision in question sought to achieve by 'effectively preventing all persons not enrolled as electors, and all corporations and other entities, from making political donations' and found that in those circumstances, the provision failed the second limb of the *Lange* test.[36] Keane J in a separate judgment similarly found that the effect of the differential treatment in the law was to 'distort the free flow of political communication' by favouring particular categories of entities, and agreed that the law was invalid.[37]

Federal Court: Restriction activities affecting protests

Protests in 2013 in Sydney and Melbourne led to two Federal Court judgments dealing with the validity of laws which, like the law considered in the *Adelaide City Corporation* case above, had the effect of restricting activities in certain public places. Consistently with *Adelaide City Corporation*, the Federal Court found in each case that the law in question did impose a burden on political communication as it affected the ability of protesters to put their message forward in the way that they considered most effective, and also found that it was reasonably appropriate and adapted to a legitimate end. Both of the relevant laws were therefore found to be valid.

The first of these decisions related to the 'Occupy Sydney' protests. The City of Sydney erected signs prohibiting staying overnight in Martin Place pursuant the *Local Government Act 1993* (NSW).[38] Mr O'Flaherty, a protestor, sought a declaration that the prohibition be struck down as unconstitutional in light of the implied freedom. In

25 (2013) 249 CLR 92.

26 *Criminal Code 1995* (Cth) s 471.12.

27 *Monis v The Queen* (2013) 249 CLR 92, [108].

28 *Monis v The Queen* (2013) 249 CLR 92, [343].

29 (2013) 304 ALR 266.

30 *Unions New South Wales & Ors v New South Wales* 304 ALR 266, [44].

31 *Unions New South Wales & Ors v New South Wales* 304 ALR 266, [51] to [60].

32 (1997) 189 CLR 579.

33 *Unions New South Wales & Ors v New South Wales* 304 ALR 266, [97].

34 *Unions New South Wales & Ors v New South Wales* 304 ALR 266, [109] to [119].

35 *Unions New South Wales & Ors v New South Wales* 304 ALR 266.

36 *Unions New South Wales & Ors v New South Wales* 304 ALR 266, [32].

37 *Unions New South Wales & Ors v New South Wales* 304 ALR 266, [164] to [168].

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

the primary decision, which was affirmed on appeal, Katzmann J found that the non-verbal act of staying overnight constituted political communication.[39]

In a judgement delivered on 15 April 2013, Katzman J in the Federal Court found that the relevant law was valid as it was reasonably appropriate and adapted to its legitimate aim of protecting public health, safety and amenity in a busy public place where members of the public accessed the railway station.

The 'Occupy Melbourne' protests similarly triggered litigation which considered the implied freedom. In *Muldoon and Another v Melbourne City Council and Others*,[40] North J considered whether the implied freedom of political communication was infringed when protestors were served with notices to comply with by-laws which prohibited camping in a temporary structure, such as a tent, and erecting signage in a public place without a permit. In a judgement delivered on 1 October 2013, North J held that the by-laws did burden the implied freedom of political communication, as the tents and signs were essential in expressing the protestors' views on democracy and government in Australia. North J found that the term 'effective' burden operates as a low-level filter so that plainly inconsequential impediments will not needlessly require an examination of the more complex inquiries involved in answering the second *Lange* question.[41] In relation to the second element of the *Lange* test, North J found that the by-laws were valid, as they were reasonably appropriate and adapted to the legitimate end of preserving the public space and allowing access to public transport and amenities.

Victorian Supreme Court: Family Court intervention orders

In the 2013 case of *AA v BB*,[42] Bell J in the Victorian Supreme Court considered whether an intervention order made under the *Family Violence Protection Act 2008* (Vic) and the Act itself were invalid by reason of the implied freedom of political communication. The protected person was a candidate for federal parliament in an upcoming election. The intervention order prohibited the person's former spouse from publishing statements about the personal, family or professional life of the candidate.

When considering whether personal, family and professional suitability matters of a candidate running for election as a member of federal parliament is a matter concerning government and politics, Bell J cited *Theophanous v Herald & Weekly Times Ltd*,[43] before finding that these matters do concern government and politics:

> Criticism of the views, performance and capacity of a member of Parliament and of the member's fitness for public office, particularly when an election is in the offing, is at the very centre of the freedom of political discussion.[44]

In finding that the answer to the first limb of the *Lange* test was yes, Bell J found that the provisions of the Act which were at issue did not directly authorise the imposition of burdens on the implied freedom of communication about government or political matters. However, the provisions indirectly imposed a burden as they had the capacity to authorise the making of intervention orders which would, if authorised, impose such a burden.[45]

Bell J found that the law and the orders made under it were valid. Her honour stated that significant factors in the decision included that the orders did not preclude any comment on the candidate's policies and the history of the particular matters.

Conclusion

The implied freedom of government and political speech is an important check on the power of Australian legislators. The recent decisions made in 2013 support a broad approach to the first limb of the Lange test. A variety of laws were found to impose a direct or indirect burden on political speech.

The decisions of the High Court discussed in this paper also make it clear that a proportionality approach should now be applied to the second limb of the *Lange* test. Thus, following these cases, the test is properly expressed as follows:

- Does the law effectively burden the freedom of political communication about government or political matters, either in its terms, operation or effect?
- If the answer is yes, is the law reasonably appropriate and adapted, or proportionate, to serve a legitimate end, in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

It is clear from the number of cases and from their subject matter than the implied freedom still has an important role in determining the extent to which legislatures can restrict freedom of communication in Australia. It is likely to continue to do so in future.

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39 *O'Flaherty v City of Sydney Council* [2014] FCAFC 56. 40 (2013) 217 FCR 450.

41 (2013) 217 FCR 450, [369].

42 [2013] VSC 120.

43 (1994) 182 CLR 104.

44 *AA v BB* (2013) 296 ALR 353, [115].

45 *AA v BB* (2013) 296 ALR 353, [121], [122].