Chapter Two

Flights of Fancy: The Implied Freedom of Political Communication 20 Years On

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The implied freedom of political communication is something of a case study for the discovery and development of implied rights under the Constitution. Following its imaginary origins, twenty years ago, it has had an erratic but steadily upward trajectory in the courts, and most particularly in the High Court. The difficulties in applying this principle in practice reflect the absence of any anchor in the text of the Constitution.

The other striking characteristic of this implied right is the deeply subjective nature of the tests that have been formulated by the High Court to assess whether a particular legislative provision contravenes the implied freedom. First, however, we should look at where all this started.

Australian Capital Television v Commonwealth

This case concerned a challenge by a number of television broadcasters to amendments to the then *Broadcasting Act* 1942 (Cth) introduced by the *Political Broadcasts and Political Disclosures Act* 1991 (Cth). The chief aspects of the legislation under challenge were:

- prohibition – except for the broadcasting of news and current affairs items and talk back radio programs – on the broadcasting during an election campaign period of political advertisements relating to a federal, State, territory or local government election.
- an obligation on broadcasters to make available free of charge periods for election broadcasts to political parties and certain other persons and groups.
- allowing the broadcast of policy launches by political parties in certain circumstances.

The obvious intention of the legislation was to reduce significantly the need for political parties to raise large sums of money from corporate and individual donors in order to fund political advertisements on television and radio during the course of an election campaign, the rationale being that such a process exposes the parties in question to real or perceived obligations to the donors in return for their donations. At this time political advertisements on television and radio were not permitted in a range of countries including Britain, France, Holland, Austria and the Scandinavian nations.

A majority of the Court struck down the legislation on the ground that it contravened an implied freedom of communication under the Constitution "in relation to public affairs and political discussion," to use the words of the Chief Justice, Sir Anthony Mason.[1] Mason CJ further said that this concept of freedom was not an absolute but that restrictions on communication that targeted ideas or information would need a compelling justification to be upheld. In the case, however, of restrictions on an activity or mode of communication by which ideas or information are transmitted, these required "a balancing of the public interest in free communication against the <u>competing public interest</u> which the restriction is designed

to serve, and for a determination whether the restriction is reasonably necessary to achieve the competing public interest" [emphasis added].[2] It is obvious that there is considerable scope for judicial discretion in making this kind of judgment. Mason CJ considered that the legislation before the Court fell into the second of these categories but took the view that it failed the test put forward by him.

Deane, Toohey, Gaudron and McHugh JJ delivered judgments to similar effect. Dawson J dissented on the ground that there was no warrant in the Constitution for the implication of any guarantee of freedom of communication that operated to limit the legislative power of the Commonwealth.[3] Brennan J also largely dissented but on the basis that the prohibition on political advertisements did not contravene any implied freedom of communication so that the legislation was valid, except insofar as it contravened the *Melbourne Corporation* principle by applying this prohibition to elections for State legislatures and for State local government bodies.[4]

One of the curiosities of the case is that only two of the States intervened. The Attorney-General for South Australia intervened to support the legislation. The Attorney-General for New South Wales appeared to argue that the legislation was invalid. This last intervention is something of an irony, given that the implied freedom of communication was destined to produce many more challenges to State than federal legislation.

The case of *Nationwide News Pty Limited v Wills*[5] was handed down at the same time as *Australian Capital Television*. This decision arose out of a prosecution of a journalist in relation to an article criticising the federal Industrial Relations Commission. The relevant provision of the *Industrial Relations Act* 1988 (Cth) made it an offence to use words "calculated … to bring a member of the Commission or the Commission into disrepute."[6]

All members of the Court held that the provision was invalid. Three members – Brennan, Deane and Toohey JJ – considered that this provision contravened an implied freedom of communication under the Constitution in relation to government and political matters. A majority of the Court – Mason CJ together with Dawson, Gaudron and McHugh JJ – took the view that the provision in question was not authorised by the relevant head of power in section 51 of the Constitution, that is, "conciliation and arbitration for the prevention and settlement of industrial disputes stemming beyond the limits of any one State."

From *Theophanous* to *Lange*

Two years after *Australian Capital Television* the High Court revisited the implied freedom in *Theophanous v Herald & Weekly Times Limited*.[7] Mr Theophanous was a member of the House of Representatives who had sued the defendant newspaper in defamation in relation to an article that was critical of his views on immigration. One of the defences relied on by the newspaper was that the article was protected by the implied freedom.

Although the publication in this case constituted discussion of Commonwealth Government and political matters, Mason CJ together with Toohey and Gaudron JJ quoted (at 124) Barendt's view that "political speech" refers to "all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about". They went on to apparently establish a new defence of

qualified privilege to cover publications on government and political matters to the world at large in circumstances where the publication was reasonable.[8] Deane J joined in this view, although he also went further by making no requirement of reasonability in relation to a publication. Brennan, Dawson and McHugh JJ dissented, broadly on the basis that the Victorian law of defamation was not inconsistent with any implied freedom of communication.

The case of *Stephens v West Australian Newspapers Limited*[9] was handed down at the same time as *Theophanous*. The plaintiffs were members of the Western Australian Legislative Council who had sued the defendant newspaper in defamation in relation to an article concerning their conduct as members of parliament. All members of the Court adhered to their views in *Theophanous* on the implied freedom of communication. Also handed down at the same time was the decision in *Cunliffe v Commonwealth*[10] where provisions of the *Migration Act* 1958 (Cth) were challenged on the basis that, by placing restrictions on the services that could be provided by lawyers – for a fee – to aliens, they contravene the implied freedom of communication. Brennan, Dawson, Toohey and McHugh JJ rejected the challenge. Mason CJ, Deane and Gaudron JJ considered that a number of provisions were invalid.

The next and most unusual episode in this saga came in 1997 with the Court's decision in *Lange v Australian Broadcasting Corporation*.[11] Mr David Lange, a former Prime Minister of New Zealand, had sued the ABC in defamation over the broadcast in Australia of a Television New Zealand program concerning the conduct of his administration. The defence – drafted by myself in this instance – contained a paragraph that reflected the Court's judgment in *Theophanous*. Despite the disparate views expressed by five members of the Court in previous decisions on this issue, a joint judgment of all seven members emerged, this being perhaps a tribute to the political skills of Brennan CJ. The judgment noted the source of the implied freedom:

> The freedom of communication required by ss 7 and 24 [dealing respectively with the creation of the Senate and the House of Representatives] and reinforced by the sections concerning responsible government and the amendment of the Constitution operates as a restriction on legislative power.[12]

The Court then set out a two stage test to be used in determining whether a federal or State law contravened the implied freedom:

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law <u>reasonably appropriate and adapted</u> to serve a legitimate end the fulfillment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively 'the system of government prescribed by the Constitution'). If the first question is answered 'yes' and the second is answered 'no', the law is invalid.[13] [Emphasis added].

Again, the scope for judicial discretion, particularly in the second limb of the test, is obvious.

The Court considered that the NSW law of defamation did not contravene the implied freedom but struck out the paragraph of the defence based on the judgment in

Theophanous, seemingly on the ground that it referred to publication pursuant to the implied freedom rather than relying on the common law defence of qualified privilege which the Court found had developed in accordance with the implied freedom. This might seem a rather fine point of distinction after a week of argument before the Court.

As to how the subject matter of the program related to representative and responsible government under the Constitution, the Court simply noted in one sentence:[14]

> By reason of matters of geography, history, and constitutional and trading arrangements, however, the discussion of matters concerning New Zealand may often affect or throw light on government or political matters in Australia.

The shift from defamation to issues of public order

In the wake of *Lange* there were a number of libel cases where the question was whether the publication in question constituted a discussion of government and political matters as those terms were used in *Lange* and so allowed the pleading of the expanded defence of qualified privilege at common law.[15] But the real difficulties in the application of the tests set out in *Lange* were to emerge some years later in a case concerning legislation dealing with public order. This was presaged in a case heard at the same time as *Lange* and handed down shortly afterwards. This was *Levy v State of Victoria*[16] where the plaintiff had been charged with entering an area reserved for duck hunting without the requisite authority. The plaintiff argued that the purpose of entering the hunting area was to protest against the shooting of the ducks and the relevant Victorian laws, including by way of statements to the media. All members of the Court, albeit in slightly different terms, appeared to consider that the second question posed in *Lange* could be answered "yes" with the result that the validity of the challenged law was upheld. The connection between the plaintiff's conduct and the notion of representative and responsible government under the Constitution might appear to be tenuous but was only addressed by two members of the court – Brennan CJ and McHugh J who left this question open.[17]

In *Coleman v Power*[18] the High Court had to consider Queensland legislation that made it an offence to use any "threatening, abusive or insulting words".[19] Mr Coleman called a police officer corrupt to his face and was charged under this provision with using insulting words. The Attorney-General of Queensland conceded that this might constitute political comment, although this hardly seems obvious. Some members of the Court – Gummow, Hayne and Kirby JJ – construed the term "insulting" as a referring to words that were either intended or reasonably likely to provoke unlawful physical retaliation. They then considered that it met the test in the second limb of the *Lange* principle, slightly reformulated from the original decision to ask whether the law in question is reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the system of representative government enshrined in the Constitution. Other members of the Court – Gleeson CJ, Callinan and Heydon JJ – rejected the limited construction of the provision but effectively took the view that it met the requirements of the second limb in any event. McHugh J rejected the limited construction and found the reference to insulting words invalid insofar as it applied to political and government discussion. One reason *Coleman v Power* illustrates the real difficulties with applying the second limb of the *Lange* test is that their Honours'

conclusions as to what limits could be placed on insulting words without offending the implied freedom arose, at least in part, from their very different individual notions of the character of Australian public debate.[20]

In 2011 a somewhat similar issue came before the NSW Court of Criminal Appeal in *Monis v The Queen*.[21] Mr Monis was charged with several counts of abusing the postal service in a way that "reasonable persons would regard as being, in all the circumstances … offensive".[22] The charges related to letters sent by Mr Monis to the families of Australian soldiers killed serving in Afghanistan. The charges were challenged on the basis that the provision quoted was invalid as a contravention of the implied freedom of political communication.

Bathurst CJ noted that the word "offensive" was used in the relevant provision in conjunction with the words "menacing" and "harassing." He went on to say:

> In these circumstances, in my opinion, for the use of a postal service to be offensive within the meaning of s 471.12 it is necessary that the use be calculated or likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances. However, it is not sufficient if the use would only hurt or wound the feelings of the recipient, in the mind of a reasonable person.[23]

Bathurst CJ held that such a law met the requirements of the second limb, adding that words of this kind had the potential to provoke physical retaliation and, at the very least, cause an emotional reaction.[24] Allsop P substantially agreed with Bathurst CJ, noting that an important feature of the post is that it enters into the home or place of work or business of the recipient as an addressee.[25] McClellan CJ at Common Law agreed with these conclusions and said:

> The section will only be breached if reasonable persons, being persons who are mindful of the robust nature of political debate in Australia and who have considered the accepted boundaries of that debate, would conclude that the particular use of the postal service is offensive.[26]

The judgments in this case tend to underline the absence of objective criteria in the application of the second limb of the test. What is the "legitimate end" served by the law in question? How is it to be determined whether the law is "reasonably appropriate and adapted" to serve that end? And how is it to be determined whether this is being done "in a manner that is consistent with the system of representative government enshrined in the Constitution"? As Heydon J noted in *Wotton v Queensland*,[27] the constant reliance on the second limb of the test:

> … is to bring into play indeterminate considerations and render them crucial in every or almost every case. Those considerations are capable of being applied by each particular judge in a different way. Considerations which tend to lead to sharp divisions of judicial opinion …

Two members of the Bench in *Monis* sat on the NSW Court of Appeal, with Basten JA, when the second limb of the test was again considered in *Sunol v Collier (No. 2)*.[28] This was a challenge to a provision of the *Anti-Discrimination Act* 1997 (NSW) that made it unlawful – subject to some qualifications – for a person by a public act "to incite hatred towards, serious contempt for, or serious ridicule of, a

person or group of persons on the ground of the homosexuality of the person or members of the group."[29] All members of the Court considered that the second limb of the test was satisfied, although some of the problems associated with the *Lange* principle illustrated by the following passage from the judgment of Basten J (who dissented as to the application of the first limb of the test):

> It should be accepted that discussion regarding sexual preference may legitimately arise in the course of political discourse, whether it be concerned with the character, status or conduct of individuals or of groups. It may also be accepted that insult and invective are a legitimate part of political debate … However, to concede that protected political speech may permit hostility, abuse and invective does not require a constitutionally demanded tolerance of speech capable of inciting hatred, serious contempt or severe ridicule.[30]

A similar result, though on a somewhat different basis, was reached by the Queensland Court of Appeal in *Owen v Menzies*, decided in late June 2012.[31] The provision of the *Anti-Discrimination Act* 1991 (Qld) in issue was nearly identically worded to the section in dispute in *Sunol v Collier (No. 2)*. A majority of the Court of Appeal held that the law satisfied the second limb of the Lange test, so did not find it necessary to consider the first limb.[32] McMurdo P preferred Basten JA's view in *Sunol v Collier (No. 2)* and held that the section did not effectively burden freedom of communication.[33]

Yet another application of the *Lange* principle in the context of public order legislation occurred in *Corporation of the City of Adelaide v Corneloup*.[34] The relevant by-law provided that no person was to without permission on any road "preach, canvass [or] harangue" or "give out or distribute to any by-stander or pass-by any handbill, book, notice, or other printed matter" (except for electoral material).[35] The defendants had been charged with preaching and canvassing in a city mall, although the content of their addressees did not seem to figure at all in the proceedings. Nor had they seemingly been charged with haranguing or with distributing printed material. Nevertheless, the Full Court of the Supreme Court of South Australia held both the by-laws quoted above to be invalid on the basis that they failed the second limb of the test.[36] The High Court has granted special leave in this case, which should be heard later this year.

Proceedings have also been commenced in the Federal Court by two members of the Occupy Sydney group who were charged with contravening a notice in Martin Place prohibiting camping or staying overnight in that area. Such notices are authorised by the *Local Government Act* 1993 (NSW). This case has not yet been heard but presumably that will occur before the end of this year. A similar case involving the Occupy Melbourne movement is before the Federal Court in Melbourne.

Is there any scope for reducing value judgments under the *Lange* test?

It has already been suggested there is considerable scope for value judgments under the second limb of the test and that is unlikely to change. It is tempting to imagine that there could be less reliance on the second limb if greater emphasis were given to the first limb – in other words, if there was more focus on the question of whether the law in question burdened the implied freedom at all. This would, however, depend, at least in part, on whether the relevant communication be categorised as political or

government discussion. Yet this question itself requires an obvious value judgment. At one level, the number of actual or potential issues in a federal election might seem to be a relatively well-defined group of subjects. But the authorities indicate that it is possible to make an argument that almost any publication relates in some way to an area of federal legislation or to a real or desired role for government at the Commonwealth or State level. It will be recalled that in *Theophanous*, Mason CJ, Toohey and Gaudron JJ quoted Barendt to say that political speech "refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about".

One decision in which the first limb of the test proved decisive was *Brown v Classification Review Board*[37] where Heerey and Sundberg JJ considered that an article in a student newspaper that amounted to instruction in shoplifting did not constitute political or government discussion.[38] It had been, however, argued to the contrary with reference to various anarchist writings and even to Oscar Wilde's, *The Soul of Man under Socialism*! The challenged law was the source of the respondent's decision to deny classification to the edition of the newspaper that contained the article in question. There was a similar result in *NSW Council for Civil Liberties Inc v Classification Review Board (No. 2)*[39] where the publications in question – which the Board considered advocated acts of terrorism – were refused classification on the ground that they promoted criminal conduct or violence.

It can hardly be right that every law dealing with some form of communication fails the first limb of the test because there could conceivably be a communication with some element of political content. Otherwise this would be true of the offence of, for example, blackmail under the criminal law or the regulation of copyright and trademarks.[40] Heydon J's call for further consideration of whether the burden to which the first limb refers is "meaningful"[41] – that is, not insubstantial or de minimus – is apposite in this context.

In many of the cases concerning the application of the *Lange* principle the character of the communication in question as political and government discussions has been either assumed or conceded and so has the question of whether the relevant law places a burden on the implied freedom. Even if this trend were to change, however, it would, of course, result in a new series of value judgments as to the character of the communication and the weight of the burden, perhaps followed in any event by the old series of value judgments already observed in relation to the second limb of the test. At least, however, a focus on these two earlier questions might allow a greater connection with the "text and structure of the Constitution" than has occurred in most of the cases to date.

Endnotes

1. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 per Mason CJ at 138.

2. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 per Mason CJ at 142-143.

3. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 per Dawson J at 184.

4. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 per Brennan J at 162-164. See also *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

5. *Nationwide News Pty Limited v Wills* (1992) 177 CLR 1.

6. Section 299(1)(d)(ii) *Industrial Relations Act* 1988 (Cth).

7. *Theophanous v Herald & Weekly Times Limited* (1994) 182 CLR 104.

8. *Theophanous v Herald & Weekly Times Limited* (1994) 182 CLR 104 at 137 and 140.

9. *Stephens v West Australian Newspapers Limited* (1994) 182 CLR 211.

10. *Cunliffe v Commonwealth* (1994) 182 CLR 272.

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

12. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561.

13. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568.

14. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-576.

15. See, for example, *Herald and Weekly Times Ltd v Popovic* (2003) 9 VR 1; *Amalgamated Television Services Pty Ltd v Marsden* (2002) NSW CA 419; *John Fairfax Publications Pty Limited v O'Shane* [2005] NSWCA 164; *Peek v Channel Seven Adelaide Pty Ltd* [2006] SASC 63.

16. *Levy v State of Victoria* (1997) 189 CLR 579.

17. *Levy v State of Victoria* (1997) 189 CLR 596 and 626.

18. *Coleman v Power* (2004) 220 CLR 1.

19. Section 7(1)(d) *Vagrants, Gaming and Other Offences Act* 1931 (Qld).

20. For a further discussion, see Adrienne Stone, "The Limits of Constitutional Text and Structure Revisited" (2005) 28(3) *University of New South Wales Law Journal* 842.

21. *Monis v The Queen* [2011] NSWCA 231.

22. See s 471.12 Criminal Code 1995 (Cth).

23. *Monis v The Queen* [2011] NSWCA 231 at [44].

24. *Monis v The Queen* [2011] NSWCA 231 at [67].

25. *Monis v The Queen* [2011] NSWCA 231 at [87] and [91].

26. *Monis v The Queen* [2011] NSWCA 231 at [118].

27. *Wotton v Queensland* (2012) 285 ALR 1 at [53].

28. *Sunol v Collier (No. 2)* [2012] NSWCA 44. See also *Jones v Scully* (2002) 120 FCR 243 for a similar approach by Hely J to provisions of the *Racial Discrimination Act* 1975 (Cth).

29. Section 49ZT *Anti-Discrimination Act* 1977 (NSW).

30. *Sunol v Collier (No. 2)* [2012] NSWCA 44 at [87].

31. *Owen v Menzies* [2012] QCA 170.

32. *Owen v Menzies* [2012] QCA 170 at [156] per Muir J, de Jersey CJ agreeing.

33. *Owen v Menzies* [2012] QCA 170 at [76].

34. *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334.

35. The relevant by-laws were made under s 667 of the *Local Government Act* 1934 (SA).

36. *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at [157]-[161] and [173].

37. *Brown v Classification Review Board* (1998) 82 FCR 225.

38. *Brown v Classification Review Board* (1998) 82 FCR 225 at 246 and 258.

39. *NSW Council for Civil Liberties Inc v Classification Review Board (No. 2)* (2008) 241 ALR 564.

40. *Wotton v Queensland* (2012) 285 ALR 1 at [51].

41. *Wotton v Queensland* (2012) 285 ALR 1 at [54].