

Freedom of political communication and local laws

By Elisabeth Stevenson

Introduction

Freedom of political communication is often raised in the context of local laws controlling activities in public places.

The High Court of Australia has recognised since 1992, that the Australian Constitution embodies an implied freedom of political discussion. The nature of the freedom is often misunderstood. In essence it is about laws not about individual rights.

Nature of the implied freedom

The nature of the implied freedom of political communication is best summarised in the following two quotes from High Court decisions.

If a local law can be formulated in a manner that a court is likely to accept is appropriate and adapted to serve a legitimate end in the relevant manner, the local law is likely to survive a challenge...

In *Levy v The State of Victoria*, McHugh J said –

Constitution is not a freedom *to* communicate. It is a freedom *from* laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided by the Constitution.’

The test used for determining whether a law prevents communication in the relevant sense originates from *Lange v Australian Broadcasting Corporation*. The test was expressed relevantly recently in *Wotton v Queensland* as –

‘two questions (‘the *Lange* questions’) arise ... the first question asks whether, in its terms, operation or effect, the law effectively burdens freedom of communication about government or political matters. If this is answered affirmatively, the second question asks whether the law nevertheless is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government’.

The second question is the key to formulating a local law that might, in some circumstances, have the effect of burdening freedom of communication about government or political matters. If the local law can be formulated in a manner that a court is likely to accept is appropriate and adapted to serve a legitimate end in the relevant manner, the local law is likely to survive a challenge that the local law infringes the implied freedom of political communication.

This is illustrated by the most recent decision of the High Court on this issue in *Attorney-General (SA) v Corporation of the City of Adelaide & Ors (Corneloup)*.

Corneloup

The case was about two brothers who regularly preached and distributed leaflets in the streets of Adelaide.

The City of Adelaide had a by-law dealing generally with the management of roads. The by-law prohibited certain activities on roads without the City's permission, including preaching (and other similar activities) and distributing printed material.

There were exemptions making allowance for a 'speakers corner' and election campaigning.

The High Court concluded that the by-law did burden the freedom of political communication but in a way that was reasonably appropriate and adapted to serve a legitimate end compatible with the maintenance of the system of government.

A local law may burden freedom of political communication if it is reasonably appropriate and adapted to serve a legitimate end compatible with the constitutionally prescribed system of government.

The reasoning of the High Court can be summarised as –

- (a) the by-law served the legitimate purpose of controlling activities on roads and was confined to activities on roads;
- (b) the relevant provisions only addressed unsolicited communication;
- (c) the power behind the requirement for permission to engage in the activities in question had to be exercised in the context of the legitimate purpose (and could not be used to control the content of communication) and
- (d) there were appropriate exemptions to the application of the by-law.

O'Flaherty

The Federal Court recently dealt with a similar case, *O'Flaherty v City of Sydney Council* 2013 FCA 344.

O'Flaherty was arrested after staying overnight in Martin Place as part of a protest against social inequality. He was charged with camping or staying overnight contrary to a notice made under the *Local Government Act 1993* (NSW).

O'Flaherty argued that the notice infringed the freedom of political communication.

The Federal Court concluded that O'Flaherty was engaged in political discourse by staying overnight but the notice was reasonably appropriate and adapted to serve a legitimate end in the manner identified in the second test.

Conclusion

Both cases demonstrate that local laws controlling almost anything in a public place could burden the freedom of political communication. Busking, street cafés, trading in public places and any form of advertising are all examples of activities that

could be used for political communication.

Consequently, local governments need to keep this in mind when making any public place local law. The High Court reasoning in *Corneloup* can be used as a guideline to how local laws that may, in some situations, burden freedom of political communication, can be structured so that it is strongly arguable that any such burden is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of government.

The reasoning in *Corneloup* indicates that when making any public place local law, local governments should give consideration to –

- (a) ensuring the local law has a legitimate purpose within the context of the local government’s responsibilities;
- (b) whether it is necessary and appropriate to make some allowance for communication that is clearly political communication (eg particular election campaigning activities); and
- (c) tailoring controls to address the specific purpose of the local law without going beyond what is necessary to do that.

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The information contained in this update should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.