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NEW DEVELOPMENTS IN POLITICAL SPEECH CASE LAW

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Today I will discuss the two free speech cases handed down by the High Court of Australia in 2013: *City of Adelaide*¹ and *Monis*.² These cases, both handed down on the same day (23 Feb 2013), recognised and reasserted the constitutionally implied freedom of political communication,³ which has been a feature of Australian constitutional law since 1992. However, the judgments themselves relied also on the common law freedom of speech and the principle of legality to interpret permissible limits on statutory powers, with reasoning often focussing only in the latter part of the judgment on the implied freedom once those issues had been dealt with. Also, in both judgments limits – which could justifiably be seen as reaching far into the freedom as exercised in a modern democracy – were upheld. This demonstrated a reluctance on the part of the High Court to posit freedom of speech as sufficiently powerful to rein in statutory restrictions on it.⁴ The effect of these two decisions has been to confirm the limited capacity of the implied freedom to extend freedom of speech protections in Australia very far, in spite of the hopes, or alternately fears, some might have had when it was first developed that it might do otherwise.⁵ After summarising the judgments, I will turn briefly to consider some of the broader implications for freedom of speech that arise from them.

1. City of Adelaide

Caleb and Samuel Corneloup, members of the ‘Street Church’ were convicted in the Magistrates Court of South Australia for violating the City of Adelaide’s by-law no. 4 (‘Roads’), that *inter alia* requires a person to obtain permission to ‘preach, canvass, harangue, tout for business or conduct any survey or opinion poll’ or to distribute printed matter on a road.⁶ In this case, the activities were conducted in the Rundle Mall. There are exceptions in relation to the designated speakers’ corner, and for conducting opinion polls authorised by a

¹ Attorney-General for the State of SA v Corporation of the City of Adelaide (2013) 295 ALR 197.

² *Monis v The Queen; Droudis v The Queen* (2013) 295 ALR 259.

³ Developed in a unanimous judgment in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567, and updated in *Coleman v Power* (2004) 220 CLR 1 at 30.

⁴ I will not speculate here on the likely reasons for these decisions.

⁵ eg Margo Kingston, ‘Free Speech Ruling Raises Excitement and Hopes’, *The Age* (Melbourne), 1 October 1992, 10.

⁶ By-law No. 4 ‘Roads’, Paras 2.3 (prohibiting ‘haranguing, canvassing or preaching’ and 2.8 (prohibiting the distribution of printed matter, which was revoked in 2010) without a permit.

candidate in an election, or distributing printed matter authorised by a candidate during an election or referendum.⁷ The District Court of South Australia (SA) had found the provisions beyond the by-law making power conferred on councils. Because they were beyond the law-making power, they held that there was no need to rule on the constitutionality question that had been raised.⁸ The Full Court of the Supreme Court of SA dismissed an appeal of that finding, finding that although the by-law did *not* go beyond the council's law making power, nevertheless the specific provisions were inconsistent with the implied constitutional freedom of political communication, and therefore the terms 'preach, canvass and harangue' in the provision were to be struck out. The matter was then appealed to the High Court, a majority of which overturned the Supreme Court's decision.

The High Court dealt with two questions: the first was the power of the council to make the by-law itself, and the second was the question of whether the by-law exceeded the statutory power. In relation to the first question, the High Court found that the by-law was within the power of the council to enact. Hayne, Crennan and Keifel JJ found that the statutes provide a relevant power to make by-laws for the general purpose of good governance, public safety and public convenience.⁹ Once having decided that the council had the statutory power to enact by-laws in relation to roads, the Court considered the subsequent question of whether the exercise of powers in the manner under question was valid. French CJ affirmed that the conferred statutory power was 'sufficient to support the impugned by-law',¹⁰ and further that the provisions were reasonably proportionate because the regulation of roads was 'necessary to optimise their benefit', and the conduct in question could 'have potentially significant effects upon the ability of people using the roads and public places to go about their business unimpeded and undistracted by preaching, haranguing and canvassing and the unsolicited tender of literature from strangers'.¹¹ This idea that the provisions were not an excessive restriction on political communication was supported by most of the other justices. Illustrative is the view of Hayne, J who held that the impugned provisions did not fundamentally ban most communications, but only served to prevent conduct that might obstruct roads, and were therefore directed to the object of the relevant statutory head of law-

⁷ *Attorney-General for the State of SA v Corporation of the City of Adelaide* (2013) 295 ALR 197 at 256.

⁸ *Attorney-General for the State of SA v Corporation of the City of Adelaide* (2013) 295 ALR 197 at 200, per French CJ.

⁹ *Attorney-General for the State of SA v Corporation of the City of Adelaide* (2013) 295 ALR 197 at 222, 251.

¹⁰ *Attorney-General for the State of SA v Corporation of the City of Adelaide* (2013) 295 ALR 197 at 213.

¹¹ *Attorney-General for the State of SA v Corporation of the City of Adelaide* (2013) 295 ALR 197 at 220-1.

making power to ensure good governance and convenience. In sole dissent, Heydon J held that the by-laws were too ‘general, ambiguous and uncertain’ to grant a power that could have such an adverse effect on freedom of speech and concluded that the provisions were invalid.¹²

Given the wide-ranging and highly speech-limiting local by-laws that exist around Australia, this decision is concerning for free speech. The City of Adelaide by-laws that were at issue in this case are not at all unusual in Australia. In 2004 I conducted a national audit of 105 pedestrian malls.¹³ That research showed that by-laws restricting political speech within pedestrian malls, including some that are far more restrictive than those at issue in *City of Adelaide*, are commonplace amongst local governments in Australia.¹⁴ It is to be noted that an important factor rendering the provisions reasonably appropriate and adapted to their purpose was the inclusion of express exceptions in the by-law for conduct authorised by candidates in elections and referendums. My earlier study showed that some other Councils also have exemptions for elections and referenda but at that time this was the case in only about 10% of the by-laws studied. The earlier research concluded that local governments are reluctant to confront the scope of their own regulatory capacities in the context of the protection of freedom of speech, and when they are forced to by public events (such as protests or political artworks), they tend to choose to close down debate rather than to facilitate it. Often, this happens in the context of a desire by local governments to facilitate economic interchange above other forms of social interaction or community self-governance.

2. *Monis*¹⁵

In 2007-09 Mr Monis, aided and abetted by Mr Droudis, wrote letters to parents and relatives of soldiers killed in Afghanistan and an Austrade official killed in Indonesia, critical of Australia’s military presence there and also using ‘intemperate and extravagant language’ to criticise Australia’s presence and to insult the soldiers. The letters accused the soldiers of

¹² *Attorney-General for the State of SA v Corporation of the City of Adelaide* (2013) 295 ALR 197 at 242-3.

¹³ Katharine Gelber, ‘Political Speech Practice in Australia: a study in local government powers’, *Australian Journal of Human Rights*, 41(1) (2005): 203-231; see also Katharine Gelber, ‘Distracting the Masses: Art, local government and freedom of political speech in Australia’, *Law Text Culture* 10 (2006): 194-219; Katharine Gelber, *Speech Matters: Getting Free Speech Right*, University of Queensland Press, St Lucia, 2011: 116-120.

¹⁴ Katharine Gelber, ‘Political Speech Practice in Australia: a study in local government powers’, *Australian Journal of Human Rights*, 41(1) (2005): 203-231; Katharine Gelber, ‘Distracting the Masses: Art, local government and freedom of political speech in Australia’, *Law Text Culture* 10 (2006): 194-219; Katharine Gelber, *Speech Matters: Getting Free Speech Right*, University of Queensland Press, St Lucia, 2011: 116-120.

¹⁵ *Monis v R & Anor* (2013) 295 ALR 259.

being murderers of innocent civilians and children, and compared them to Hitler. Monis and Droudis were held to have committed an offence under s 471.12 of the Criminal Code, which states that it is an offence to use a ‘postal or similar service’ ... ‘in a way ... that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive’. Although the term ‘harassing’ had been considered in the District Court, in the Court of Criminal Appeal and in the High Court the appeal rested only on challenges to the communications as ‘offensive’.

The focus of decision-making was not whether the material in question *was* ‘offensive’, but rather whether it was within statutory power to create an offence under the *Criminal Code* for using a postal service in a way that is ‘offensive’.¹⁶ The judgment – unusually – was split 3/3 (and split along gender lines¹⁷), which meant that the Court of Appeal’s decision that the section was valid was affirmed. The three female justices (Crennan, Kiefel and Bell JJ) read the provision down to apply narrowly and concluded it was a permissible restriction. By contrast, French CJ found the provision impermissibly burdened freedom of political communication and was invalid, and Hayne and Heydon JJ found the provision could be read down, but that even if it were read down the protection of people from ‘offence’ is not a legitimate government end.¹⁸ Following the High Court’s judgment, Mr Monis then pleaded guilty to 12 counts of breaching the Code.¹⁹

Again, the High Court addressed two distinct questions. The first was what the term ‘offensive’ in the impugned provision meant, and the second was the question of whether the law was proportionate to the end being sought. I acknowledge, of course, an overlap between the answers to these two questions. In relation to the first question, French CJ found that the legislation suggested that the term ‘offensive’ was not intended to cover ‘insults or slights or ... hurt feelings’, nor to impose civility. The meaning of offensive was in the ‘higher ranges of seriousness’. The fact of both the criminal sanction and the principle of legality indicated a ‘requirement for a high threshold to be surmounted’, and therefore the Court of Criminal

¹⁶ *Criminal Code*, s471.12.

¹⁷ This ought not to create an expectation that gender lines will be determinative in other cases, see eg *PGA v R* (2012) 245 CLR 355, in which a Supreme Court of SA Court of Criminal Appeal judgment finding that a man was liable at law for the rape of his wife which occurred after they were married and in 1963 was upheld by a majority of 5 (including Crennan and Keifel JJ), with 2 in dissent (Bell and Heydon JJ).

¹⁸ *Monis v R & Anor* (2013) 295 ALR 259 at 261, 283.

¹⁹ Editor, *The Australian*, 6 August 2013, p. 8.

Appeal's approach to the construction of offensive had been 'orthodox'.²⁰ Hayne J, by contrast, found that the law was beyond legislative power, because 'history ... teaches that abuse and invective are an inevitable part of political discourse' and serious offence is a way of driving home a point.²¹ This conclusion, he found, was required in order for the Court's finding to be consistent with *Lange*²² and *Coleman*. Crennan, Kiefel and Bell JJ regarded 'offensive' as 'more than the mere causing of offence to a recipient'.²³ They said the term 'offensive' is limited by the objective standard of a reasonable person, and that, consistently with *Coleman*, the offence could be read down, not so far as to apply only to words that are likely to produce violence, but to include words 'capable of creating a stronger emotional reaction than mere hurt feelings'. They found that the provision relates to 'a degree of offensiveness at the higher end of the spectrum'.²⁴

French CJ then considered whether the provision survived the two-step validity test elucidated in *Coleman*.²⁵ After affirming the first step of the test,²⁶ French CJ concluded that the law was indistinguishable from one that made it an offence to deliver offensive communications at all, and the provision was overbroad.²⁷ Hayne J, with Heydon J agreeing, similarly found that the provision burdens freedom of political communication, and further that the protection of mail recipients from 'offence' (as he construed the provision) was 'not a legitimate object or end', nor was it 'compatible with the maintenance of the constitutionally prescribed system of government'.²⁸ In contrast, Crennan, Kiefel and Bell JJ also found the first limb of the *Lange* test satisfied.²⁹ However, in considering the second limb they found that the provision 'goes no further than is reasonably necessary to achieve its protective purpose' (346), and that since the prohibited conduct must be of a serious nature, and the accused must use the postal service in a way that a reasonable person would regard as offensive, and the accused must also be aware of the substantial risk that they would regard it

²⁰ *Monis v R & Anor* (2013) 295 ALR 259 at 267, 274, 278.

²¹ *Monis v R & Anor* (2013) 295 ALR 259 at 285.

²² *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

²³ *Monis v R & Anor* (2013) 295 ALR 259 at 324.

²⁴ *Monis v R & Anor* (2013) 295 ALR 259 at 341-3.

²⁵ *Monis v R & Anor* (2013) 295 ALR 259 at 279, citing *Coleman v Power* (2004) 220 CLR 1. The test is firstly whether the impugned provision effectively burdens freedom of communication about government or political matters in its terms, operation and effect; and if it does, then secondly whether the law 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 representative and responsible government.

²⁶ *Monis v R & Anor* (2013) 295 ALR 259 at 281-2.

²⁷ *Monis v R & Anor* (2013) 295 ALR 259 at 283.

²⁸ *Monis v R & Anor* (2013) 295 ALR 259 at 287-8.

²⁹ *Monis v R & Anor* (2013) 295 ALR 259 at 329, 344.

as offensive, the effect on the freedom was not unduly burdensome and the section was valid.³⁰

There are two key implications of the *Monis* judgment. The first is its resonance for the likely validity of other statutes – of which there are many – that rely on offensiveness to create an offence. The key finding is that offence is to be construed differently depending on the relevant statute and its purpose. Secondly and relatedly, *Monis* acknowledged that the family home is an environment within which one ought normally to possess greater freedom from intrusion than in public life. Crennan, Kiefel and Bell JJ stated that the fact that the communication was ‘unsolicited’ was a relevant consideration, and that the provision in question recognises ‘a citizen’s desire to be free, if not the expectation that they will be free, from the intrusion into their personal domain of unsolicited material which is seriously offensive’.³¹ They found that one ought not to be ‘captive’ inside one’s home to unwanted intrusions.

3. Conclusion

The 2013 cases were somewhat unsurprising, to the extent that they upheld as valid significant intrusions into freedom of political communication. Both *City of Adelaide* and *Monis* reasserted that freedom of speech in Australia, even given the extant implied constitutional freedom of political communication, is relatively precarious. In the first case wide-ranging Council by-laws were upheld both as within the Council’s by-law making power, and in terms of the breadth of their imposition on freedom of speech. In the second case, the term ‘offence’ was successfully upheld as a valid restriction on the use of the mail system. Given the broader debates in Australia in recent months about the appropriateness or otherwise of ‘offence’ as a standard for law making (case law notwithstanding), what is surprising is that these judgments received so little public commentary. What they do show is that the implied freedom of political communication is possibly weaker in its operation now than at any time since its introduction in 1992.

³⁰ *Monis v R & Anor* (2013) 295 ALR 259 at 346-7.

³¹ *Monis v R & Anor* (2013) 295 ALR 259, at 339.