CHAPTER 5

Why Australia Is a Great Place to Start: The Implied Freedom of Political Communication and TIPA Laws

Introductory Comments

We now argue that the Australian constitutional and jurisprudential approach to political speech, as embodied in the implied freedom of political communication, makes Australia a uniquely favourable setting for TIPA laws and the type of burden they place on political speech. We do so by laying out precisely how this implied freedom is conceptualised and operationalised in law and track in detail how such laws have resisted constitutional challenge. We conclude the chapter by summarising the arguments for TIPA-type laws as prosecuted in the first 5 chapters of the book.

Australia's Implied Freedom of Political Communication.

We have good reason to believe that properly designed and implemented TIPA laws are appropriate and will work in every Australian jurisdiction, including the Commonwealth. This is not just because the majority of Australians want them, but because they have a very good chance of withstanding constitutional scrutiny, as demonstrated in the South Australian experience, which we discuss in more detail in Chapter 8. This resilience to constitutional challenge is largely a function of the High Court's particular approach to political speech in Australia.

L. Hill et al., *How and Why to Regulate False Political Advertising in Australia*, https://doi.org/10.1007/978-981-19-2123-0_5

According to the Australian High Court, certain speech acts can be justifiably curtailed by the interest of the Australian people in enjoying other democratic 'rights and privileges' (*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 51 (Brennan J)) including their right to have access to accurate information in order to make a reasoned voting decision. Australian courts have said that election speech which is inaccurate or misleading can be justifiably regulated and that electors are entitled to protection 'from being misled and deceived' (*Cameron v Becker* (1995) 64 SASR 238, 252 (Lander J)).

The freedom of political communication implied in the *Australian Constitution* emerged in two cases decided in 1992: *Nationwide News Pty Ltd v Wills* ('*Nationwide*') ((1992) 177 CLR 1) and *Australian Capital Television Pty Ltd v Commonwealth* ('*ACTV*') ((1992) 177 CLR 106). These cases, along with historical Australian jurisprudence and cases decided since then, exemplify that freedom of communication in Australia is to be understood (as per our discussion in Chapter 3) as a social condition, rather than an individualised right. This unique jurisprudential understanding of the role of speech in a democratic society has normative implications for the way in which election campaigns should be understood, managed and most importantly, regulated.

In *Nationwide*, Deane and Toohey JJ found that legislation can be justifiably curtailed by 'what is reasonably necessary for the preservation of an ordered society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity' (*Nationwide*: 77). In the same case, Brennan J considered that the relevant considerations would include 'the extent to which the protection of the other interest itself enhances the ability of the Australian people to enjoy their democratic rights and privileges' (*Nationwide*: 51).

ACTV echoes parallel sentiments about the role of political speech in a free and democratic society and stipulates parameters for when regulation is both necessary and desirable. Contradicting the individualistic, libertarian and almost absolutist conception of 'free speech' that some citizens hold, particularly in settings like the United States, Mason CJ held that the 'freedom of communication is not an absolute [freedom]' and there is no guarantee that 'the freedom must always and necessarily prevail over competing interests of the public' (ACTV: 142). Indeed, *ACTV* suggested that electors' access to the information necessary to express their true preference was not only necessary, but *required* by the *Constitution*, per Dawson J: '[A]n election in which the electors are denied

access to the information necessary for the exercise of a true choice is not the kind of election envisaged by the Constitution' (*ACTV*: 187).

As false information becomes more ubiquitous and the costs associated with seeking credible information grow, the need for laws designed to ensure that electors have sufficient access to 'true' information becomes more urgent. While the suppression of false information may be construed differently to the promotion of 'information necessary', the sheer volume of information currently available to consumers necessitates both the promotion of the 'information necessary' and the mitigation of false information. Justice Gaudron in *ACTV* makes this point by contradicting the belief that there is an unassailable right in Australia to disseminate false political information, and affirming the validity of constraining it:

> [A]s the freedom of political discourse is concerned with the free flow of information and ideas, it neither involves the *right to disseminate false or misleading material nor limits any power that authorizes laws* with respect to material answering that description. (*ACTV*: 217) (emphasis added)

Subsequent case law has been congruent with Gaudron J's opinion that the proscription of false and misleading material is compatible with the implied freedom. For example, in *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* ((1993) 41 FCR 89), considering the restrictions on misleading and deceptive conduct in s 52 of the then-*Trade Practices Act 1974* (Cth), Hill J opined that: 'There is nothing in any of the judgements of their Honours in recent decisions of [*ACTV*] … and [*Nationwide*] … which suggests for a moment that a law prohibiting misleading and deceptive conduct could infringe any constitutional protection of free speech' (*Tobacco Institute v Australian Federation of Consumer Organisations Inc* (1993) 41 FCR 89, 113).

Since *ACTV* and *Nationwide*, the High Court's conceptualisation of speech and its role in an ordered society has given rise to a number of important corollaries regarding the regulation of political speech—particularly as it pertains to free elections. In *Levy v Victoria* ('*Levy*'), Dawson J expressly found that 'free' elections require anything but a '*laissez-faire*' approach to the regulation of speech:

> Free elections do not require the absence of regulation. Indeed, regulation of the electoral process is necessary in order that it may operate effectively or at all. Not only that, but some limitations upon freedom of

> communication are necessary to ensure the proper working of any electoral system. Apart from regulation of the electoral process itself, elections must take place within the framework of an ordered society and regulation which is directed at producing and maintaining such a framework will not be inconsistent with the free elections contemplated by the Constitution, notwithstanding that it may incidentally affect freedom of communication. In other words, the freedom of communication which the Constitution protects against laws which would inhibit it is a freedom which is commensurate with reasonable regulation in the interests of an ordered society. (*Levy*: 608)

In Dawson J's view, there is a need for communications to be regulated for the electoral process to work and that such limitations on speech are, in fact, contemplated by the Constitution. The effective and proper functioning of the electoral system must occur within a regulatory framework that constrains (and thereby paradoxically facilitates) the free flow of political communication in the interests of an *ordered society*. Justice Dawson's understanding is congruent with the nature of 'free speech' as understood in our discussion in Chapter 3 in that political communication should be regulated in pursuit of the 'overall condition' and 'interests of an ordered society'.

While Dawson J's comment was the most explicit opinion regarding the relationship between speech regulation and free elections, cases since have emphasised the desirability of regulating political speech within the context of the implied freedom. In *Coleman v Power* ('*Coleman*') ((2004) 220 CLR 1) the High Court further elucidated its understanding of political speech and its role in Australian society. Following the reasoning of Dawson J, and citing *Lange v Australian Broadcasting Corporation* ('*Lange*') ((1997) 189 CLR 520), Gleeson CJ affirmed that 'freedom [of speech] is not, and never has been, absolute' (*Coleman*: 185).

Justice McHugh concurred. Contradicting the view that any restriction on political speech is a burden on democracy, his Honour commented that in representative democracies such restrictions can positively enhance the overall democratic condition:

> Communications on political and governmental matters are part of the system of representative and responsible government, and they may be regulated in ways that enhance or protect the communication of those matters. Regulations that have that effect do not detract from that freedom. *On the contrary, they enhance it.* (*Coleman*: 52) (emphasis added)

Chief Justice Gleeson stated that '[v]arious constraints upon [free speech] have always been essential for the existence of a peaceable, civilised and democratic community' (*Coleman*: 297). Regulation of political speech, particularly as it relates to free elections as contemplated in the *Constitution*, has become a staple of Australian jurisprudence. The implied freedom of political communication is certainly not absolute and must be guided by an appropriate regulatory apparatus that is consistent with the character of Australian society. The High Court understands this regulation of election communication to be a requirement of (non-exhaustively); a peaceable, civilised, democratic and ordered society that protects individuals' legitimate claims to live with dignity—a society to which Australia does, and ought to, aspire.

This interpretation of free speech as a social condition as opposed to an individualised right is best understood by comparing it with the dominant conception in other mature democracies. TIPA-type provisions have often been tested in these jurisdictions but have encountered fierce cultural and constitutional opposition. While the operability of specific TIPA provisions in other jurisdictions is discussed later in Chapter 6, some comparative jurisprudence on speech liberties is worth foreshadowing here, especially as it applies in the United States where a near-absolutist conception dominates.

The First Amendment of the *United States Constitution* prohibits Congress making any law 'abridging the freedom of speech' (*United States Constitution* amend I). The clause was judicially toothless until the end of the First World War, after which cases in purported violation of the clause began to be heard; most notably, cases relating to the *Espionage Act of 1917* (Pub L No 65, 40 Stat 217 (1917)) and *Sedition Act of 1918* (Pub L 65, 40 Stat 553 (1918)). Since then, a unique speech jurisprudence, very different from the Australian understanding, has emerged. Abetted by the express rather than implied right in the *United States Constitution*, speech, as well as acts of expression, are understood and protected as inviolable individual rights upon which the government cannot, under almost any circumstances, infringe.

Such a conceptualisation of speech is inherently inattentive to the overall 'free speech condition'. We can reasonably assume that many cases in which political speech is protected in the United States would fail to receive the same protection in Australia—and are ostensibly incompatible with, among other things, a peaceable and civilised society. For

example, demonstrable lies with no social value (*United States v Alvarez* (2012) 567 U.S. 709), simulated child pornography (*Ashcroft v Free Speech Coalition* (2002) 535 U.S. 234) or even Ku Klux Klan-style cross-burning intended to intimidate, have all sought and obtained constitutional protection under the First Amendment (*R.A.V. v City of St. Paul, Minnesota* (1992) 505 U.S. 377).

The United States, constitutionally and culturally, has consistently prioritised the individualised right to free speech and held to a faith in the unreconstructed conception of a marketplace of ideas to manage problems around speech. The solution, in that setting, is not regulation but *more* speech to compete with and counteract false, misleading and hateful speech. This notion of 'counter-speech' was expressed by Brandeis J writing in the majority in *Whitney v California* ((1927) 274 U.S. 357), and has since remained influential in US jurisprudence. As Brandeis J opined: 'If there be a time to expose through discussion the falsehood and fallacies, to avert the evil by process of education, *the remedy to be applied is more speech, not enforced silence*' (*Whitney v California* (1927) 274 U.S. 357, 377, emphasis added). On this account, the best antidote to false speech is 'true speech'. Justice Brandeis' opinion, written in 1927, is better understood when read in conjunction with Holmes J's influential dissent in *Abrams v United States* ((1919) 250 U.S. 616) where his Honour upheld the concept of a 'marketplace of ideas' that would allow ideas to compete freely and the best to emerge victorious: '[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out' (*Abrams v United States* (1919) 250 U.S. 616, 630).

The 'marketplace of ideas' doctrine, paired with the 'counter-speech' remedy, continues to culturally and politically reverberate throughout the United States. Indeed, the American Civil Liberties Union ('ACLU') explicitly endorse it as their remedy to hateful speech: '[W]here racist, sexist and homophobic speech is concerned, the ACLU believes that more speech—not less—is the answer most consistent with our constitutional values' (ACLU, 2021). This understanding is consistent with an understanding of free speech as a negative right—that is—freedom from external speech restraints.

This constitutional, cultural and political commitment to the negative liberty conception of free speech has important implications for the way in which electoral 'speech' is regulated in the United States. For example, in

Citizens United v Federal Electoral Commission ((2010) 558 U.S. 310), the US Supreme Court held that restrictions on independent expenditures, from corporations or otherwise, were violations of free speech as protected by the First Amendment. In effect, the entity willing to spend the most money on campaigning is permitted to have the 'loudest' voice. Although, theoretically, this approach is consistent with the multiplicity of voices principle, in practice it means that very few voices can be heard above the din of monied communicators. Freedom is therefore favoured over fairness.

In Australia, things are very different: the Australian High Court's particular understanding of the role of speech in a free and democratic society has important implications for the way in which public debate is managed. There are many restrictions on political speech, including TIPA laws, which the High Court has found to be compatible with the implied freedom. There are numerous examples of laws that, while restricting speech, are not protected by the implied freedom. For example, the High Court has held that laws prohibiting advocacy for voting in ways that are almost certainly legal, but contrary to procedures outlined in the relevant electoral legislation, are constitutional despite their chilling effect on political communication (See *Muldowney v South Australia* (1996) 186 CLR 352 and *Langer v Commonwealth* (1996) 186 CLR 302). Similarly, a law prohibiting entry into a hunting area where animal rights activists sought to gain access in order to stage a protest was also found to be compatible with the implied freedom. In this case, the primary end of the law was to protect public safety, with the burden on communication being merely incidental (*Levy* (1997) 189 CLR 579). In *Coleman v Power* ((2004) 220 CLR 1), where a student handing out flyers alleging police corruption in Queensland was arrested under the *Vagrants, Gaming and Other Offences Act 1931* (Qld), the High Court held that words likely to provoke 'unlawful physical retaliation' could be suitably proscribed. While not adjudicated in the High Court, anti-vilification laws in Australia have been found to be compatible with the implied freedom. In *Islamic Council of Victoria, Inc v Catch the Fire Ministries* (2006) 206 FLR 56), the Supreme Court of Victoria held that the right to engage in robust discussion is not absolute.

The implied freedom of political communication therefore strikes a balance between speech as a 'negative' right and speech as a 'positive right'. The positive/negative liberty distinction, famously elaborated by Isaiah Berlin (Berlin, 2002: 121–122), works like this: negative liberty is

usually conceptualised in individualistic terms as freedom *from* constraints to an individual's freedom, while positive liberty concerns the freedom *to* act so as to realise one's own goals and plan of life. On this understanding, negative liberty can only be infringed by other persons therefore we would not say our liberty is being violated by weather that prevents us from going outside or by tone deafness that prevents us from becoming a celebrated singer. By contrast, the positive liberty to fulfil our potential is usually guaranteed by social arrangements, such as positive attempts to ensure universal access to an education. In Australia, laws must satisfy the former requirement in that they do not have a chilling effect on vigorous and *bona fide* communication on political matters. At the same time, it is possible to frame laws that are at once consistent with the implied freedom yet restrict speech that detracts from the overall free speech condition. Speech that operates as an impediment to the proper functioning of responsible, representative government will not, therefore, receive the same protection as speech that enhances it. In so doing, such laws can also enable previously occluded voices to be better heard thereby serving the following 'two basic principles':

> The first we may call the *noninterference or no censorship principle*: One should not be prevented from thinking, speaking, reading, writing or listening as one sees fit. The other I call *the multiplicity of voices principle*: The purposes of freedom of speech are realised when expression and diversity of expression flourish. (Lichtenberg, 1987: 334)

As the Australian example illustrates, commitments to these basic principles are not mutually exclusive and a healthy democracy must seek to balance them both. TIPA laws, when designed and implemented with care, are merely one of many laws that satisfy these two requirements; they do not detract from genuine communication on political matters and operate to prevent speech that negatively impacts the quality of political discourse and the free speech condition in which, ideally, speech that promotes the condition flows freely. When we speak to each other respectfully and truthfully, we are promoting that condition but when our speech is deceptive we are eroding it. When false speech becomes the norm, speech itself becomes worthless.

Australia's highly nuanced legal, constitutional, cultural and political approach to speech is fertile ground for TIPA laws. Further, Australia has already introduced other innovations of the 'positive liberty' variety

that enhance the free speech condition indirectly; for example, the partial public funding of political parties seeks to create a more 'level playing field' via mitigating the pressure from 'louder' private voices in the political arena. Such an approach ensures that politically viable, yet smaller and less financially resourced parties and candidates are able to campaign without capitulating to private, monied interests on whom they might otherwise rely for survival. Similarly, the presence of compulsory voting in Australia obligates all eligible voters to express their political preference at election time. There is a positive requirement for everyone, regardless of ideological leaning or social location, to express this opinion in order that: the democracy may benefit from hearing every voice, secure the full consent of the governed and serve the democratic values of political equality and representativeness. In order to ensure that this actually happens, the Australian state, through its electoral commissions, operates an elaborate affirmative action programme to facilitate access for every elector, no matter how marginalised, disadvantaged or isolated (see Chapter 3). Both of these policy innovations work to ensure Lichtenberg's 'multiplicity of voices principle'.

Australia, relative to the other anglophone democracies and particularly the United States, is uniquely positioned to appropriately regulate political speech.[1] The implied freedom of political communication adequately balances the competing demands of 'positive' and 'negative' speech liberty. The implied freedom is unique and ever-changing in its application—allowing it to effectively adapt to the changing media and cultural environment of the time. Indeed, this malleability is one of its most effective traits. The High Court's understanding of speech, especially as it relates to electoral regulation, is conducive to TIPA laws which infringe upon the 'negative' dimension of free speech but could be said to serve the positive right to enjoy a healthy free speech condition. South Australia's TIPA laws have withstood a constitutional challenge previously in 1995. It should be noted, however, that the evolving nature of the implied freedom of political communication renders the law vulnerable to challenge in its current form, as we argue in Chapters 7 and 8. Remedies to that vulnerability are also proposed.

Summary of Justifications for Legal Regulation of False Information

- For clarity, and before moving on to the next chapter, we pause to summarise our argument so far. We have argued in the last five chapters that false election campaign statements should be legally regulated because they produce a range of democratic externalities that inflict substantial damage upon the free speech condition that is necessary for any authentic democracy to function properly.

They can:

- Alter the course of elections;
- Raise the cost of voting participation, particularly among minorities and the less educated;
- Lower the standards of public discourse and incentivise defamatory statements;
- Silence minority voices;
- Contribute to voter cynicism;
- Aggravate low turnout among the disadvantaged and promote democratic disengagement more generally;
- Manipulate and mislead voters;
- Polarise the electorate and stoke populist and extremist sentiment;
- Lead to divergent policy outcomes;
- Place authentic electoral outcomes in doubt;
- Undermine the authority of elected representatives leading to problems in governing and social instability;
- Prevent elections from performing their primary functions; and
- Affect the way future elections are regulated and managed and even cause them to be rendered void.

Furthermore, false campaign statements impugn the legitimacy of the election process because:

- They represent deliberate interference with the ability of people to engage in 'effective participation';

- Undermine the equal capacity of citizens to enjoy the 'enlightened understanding' that enables them to know how to vote and participate more generally in democracy. In doing so, they infringe other legitimacy criteria such as 'political equality' and 'inclusiveness';

We have also argued that, because voting is compulsory in Australia, the state has a special duty to ensure that the information environment necessary for informed voting is not polluted. We are not suggesting that only citizens in compulsory voting settings are entitled to this condition because citizens in *all* democracies are entitled to it; but we *are* saying that the obligation on the state is stronger where citizens are required to vote, in the same way that the state is obligated to provide schools where it legally requires parents to ensure that their children are educated.

The fact that markets are ineffective in regulating false information, coupled with the additional fact that there are perverse—probably inevitable—incentives to produce false election information, makes false election communication a collective action problem. In turn, this means that a legal remedy is likely to be the most, and perhaps only, effective one.

Note

1. Some commentators have advised Australian jurists to exercise caution in relation to the free speech jurisprudence of the United States. For example, in 1994 Eric Barendt opined that: 'Australian lawyers should always consider what the Supreme Court says about freedom of speech, but it would also be advisable for them to consider other approaches to an understanding of that freedom' (Barendt, 1994).

Cases

Abrams v United States (1919) 250 U.S. 616.
Ashcroft v Free Speech Coalition (2002) 535 U.S. 234.
Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106.
Cameron v Becker (1995) 64 SASR 238.
Citizens United v Federal Electoral Commission (2010) 558 U.S. 310.
Islamic Council of Victoria, Inc v Catch the Fire Ministries (2006) 206 FLR 56.
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.
Langer v Commonwealth (1996) 186 CLR 302.

Muldowney v South Australia (1996) 186 CLR 352.
Nationwide News Pty Ltd v Wills (1992) 177 CLR 1.
R.A.V. v City of St. Paul (1992) 505 U.S. 377.
Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (1993) 41 FCR 89.
Whitney v California (1927) 274 U.S. 357.

References

American Civil Liberties Union. (2021). *Speech on campus*, viewed 21 November 2021. https://www.aclu.org/other/speech-campus?redirect=cpredirect/12808
Barendt, E. (1994). Free speech in Australia: A comparative perspective. *Sydney Law Review, 16*(1), 149–166.
Berlin, I. (2002). Two concepts of liberty. In I. Berlin (Ed.), *Four essays on liberty*. Oxford University Press.
Espionage Act of 1917 Pub L No 65–24, 40 Stat 217.
Lichtenberg, J. (1987). Foundations and limits of freedom of the press. *Philosophy & Public Affairs, 16*(4), 329–355.
Sedition Act of 1918 Pub L 65-150, 40 Stat 553.
United States v Alvarez (2012) 567 U.S. 709.