Western Australian Local Government Association

Political Signage Guideline

Implied Constitutional Freedom of Political Communication

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1. Introduction

In 1992 the High Court found that there is an implied freedom of political communication within the Australian Constitution.

At election time, political signs are common. These signs are a form of 'political communication'.

Local planning schemes and local planning policies frequently contain provisions relating to signs. As planning schemes have legislative effect, their provisions (including those relating to signs) are subject to the implied freedom of political communication.

The purpose of this guide is to assist Local Governments to avoid overstepping – and breaching the implied freedom – when regulating signs through their planning schemes and policies.

This guide also considers how the implied freedom might constrain other areas of Local Government regulatory control (such as local laws affecting the use of reserves managed by Local Governments).

2013 State election campaign

Regulation of election signage on private property under local planning schemes and local planning policies was tested during the 2013 State Government election, when candidates seeking to advertise their candidacy obtained an injunction from the Western Australian Supreme Court that prevented the City of Armadale from enforcing its planning scheme against electoral signs (see *Liberal Party of Australia (Western Australia Division) Inc v City of Armadale* [2013] WASC 27).

WALGA subsequently obtained legal advice to clarify the ability of Local Governments to regulate election signage on private property under local planning schemes and local planning policies. Based on the advice received, and in consultation with stakeholders, WALGA developed this guideline to assist Local Governments when assessing election signage regulatory arrangements within their districts.

The 'Deemed Provisions'

Some Statewide uniformity of approach was achieved from late 2015 when a limited exemption for political advertising was inserted into all local planning schemes by the 'Deemed Provisions'. The scope of this exemption was enlarged and clarified in 2020 when the current 'Deemed Provisions' exemption relating to political advertising signs was introduced.

The matters detailed in this guide are not exhaustive and there will be cases where limitations sought to be placed on election signage outside of existing legislative parameters (e.g. outside the time periods specified in the 'Deemed Provisions' exemption) may be subject to legal argument. Local Governments must evaluate the legitimacy of the constraints that they seek to place on election signage. WALGA is unable to provide conclusive guidance on some matters due to limited judicial precedent.

2. Implied Constitutional Freedom of Political Communication

Background

In the 1992 case of *Australian Capital Television Pty Ltd v Commonwealth of Australia* the High Court found that there is an implied freedom of political communication within the Australian Constitution ('**the implied freedom**'). In this decision, the majority of the High Court reasoned

that representative democracy is constitutionally entrenched and there is therefore *implied* in the Constitution a guarantee of freedom of communication on all political matters.

However, this implied freedom of political communication is not absolute.

The freedom does *not confer rights on individuals* or organisations (e.g. political candidates and parties) to communicate about political matters. Instead, it operates as *a limitation on legislative (and executive) power* (see *Levy v The State of Victoria* (1997) 189 CLR 579).

The test for determination

The test for determining whether a planning scheme provision relating to signs infringes the implied Constitutional freedom of political communication is that formulated by the High Court of Australia applicable to all legislation.

The three-stage test

The test currently favoured by the courts for determining whether a law violates the implied freedom, is a three-stage test:

(1) First, does the law *effectively burden* freedom of communication about government or political matters either in its terms, operation or effect?

(2) Is the law *legitimate* by reference to its purpose?

(3) Is the law a *proportionate response* to the purpose sought to be achieved?

(See *McCloy v New South Wales* [2015] HCA 34; see also *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18)

If the first stage is answered 'yes' and either (or both) the second or third question are answered 'no', then the law will violate the implied freedom and be invalid.

Local Governments must therefore analyse their local planning scheme provisions in light of the three-stage test to determine their validity.

The first stage of the test

Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

The High Court has said that phrase '*effectively burden'* simply means to '*prohibit, or put some limitation on the making or the content of the political communications'* (*Monis v The Queen* (2013) 249 CLR 92 at [108]). The High Court has also explained that a limitation that is 'so slight as to be inconsequential may not require an affirmative answer to the first limb enquiry' (*Monis v The Queen* at [343]).

It has been said that the first stage '*in many cases can be readily determined in the affirmative'* (see *Van Lieshout v City of Fremantle (No 2)* [2013] WASC 176 at [38]). In other words, in many cases it will be reasonably obvious that the law in question places some burden (or limitation) on the freedom of political communication.

Local planning schemes – regulation of signs

Local planning schemes may include provisions that:

- prohibit signs (generally) without prior approval; or
- prohibit election signs (specifically) as a class; and/or
- impose any restriction affecting signs (all signs, or only election signs) e.g. size restriction, or restriction on the period during which a sign may be in place.

As these limitations would apply to signs containing political communication, they have the effect of burdening freedom of communication about political matters.

Therefore, there is little doubt that scheme provisions adopting these types of provisions would satisfy the first stage of the test.

The second stage of the test

If the law effectively burdens the implied freedom, is the law legitimate by reference to its purpose?

Application of the second stage of the test is more difficult, as it requires analysis of whether a provision (which burdens the implied freedom) has some other, legitimate purpose. The High Court has described the 'legitimate purpose' stage of the test as follows:

> *'That process commences with the identification of the purpose which the statute seeks to achieve. That purpose must be legitimate, which is to say compatible with the constitutionally prescribed system of representative government. If the statute does not have a legitimate purpose no further consideration will be necessary, for invalidity will be made out.' (underlining added)*
>
> (LibertyWorks Inc v Commonwealth at paragraph [45])

Examples of 'legitimate purposes' recognised in decided cases include the prevention of physical injury, the prevention of corruption in elections and planning objectives.

Where a provision fails to pass the second enquiry, the implied freedom will be infringed.

In most cases where the three-stage test has been used, the laws in question have been recognised as having a purpose that is legitimate (in the sense of being compatible with the constitutionally prescribed system of representative government). In such cases the courts have had to consider the third stage of the test.

The third stage of the test

Is the law a proportionate response to the purpose sought to be achieved?

This 'proportionality' analysis has been explained by the High Court as follow:

> *'In addition to having the requisite purpose, the law must be shown to be proportionate to the achievement of that purpose. In order to justify a burdensome effect on the freedom a law must be a proportionate, which is to say a rational, response to a perceived mischief. A law will satisfy the requirements of proportionality if it is suitable, necessary and adequate in its balance' (underlining added).*
>
> (LibertyWorks Inc v Commonwealth at paragraph [46])

Regarding whether the law in question is 'necessary', the court is interested in whether the relevant provision could have achieved the same purpose using a less onerous means (eg. Brown v Tasmania (2017) 261 CLR 328).

2013 WA Supreme Court Decision – Liberal Party v City of Armadale

The decision by the WA Supreme Court in *Liberal Party of Australia (Western Australia Division) Inc v City of Armadale* [2013] WASC 27 caused concern in local government circles when made in 2013, because the Judge relied on the implied freedom to grant an injunction preventing the City of Armadale from enforcing its planning scheme against election signs.

However, the decision should be approached with some caution. First, it was an interim decision (not a final decision following a full hearing of all the facts).

Secondly, the Court relied on the decision of the Full Court of the Supreme Court of South Australia in *The Corporation of the City of Adelaide v Corneloup & Ors* [2011] SASCFC 84, which was subsequently overturned on appeal to the High Court of Australia (*Attorney-General for the State of South Australia and the Corporation of the City of Adelaide & Ors* [2013] HCA 3).

In addition, the decision was made without reference to the *Becker* case (summarised in the Addendum to this Guideline) which specifically related to signs with political content.

3. The Deemed Provisions in local planning schemes

Introduction

Since the implied freedom was first recognised in 1992, the question has arisen as to how to adapt the planning regulation of signs so as not to violate the implied freedom - when such regulation also captures political advertising signs.

The State government in WA has sought to establish a consistent set of provisions in local planning schemes, by including in the 'Deemed Provisions' (explained below) an exemption for political signs that are temporarily erected during election periods.

It seems likely that the exemption for election signs (which was included in the first set of 'Deemed Provisions' in 2015) was a direct response to the issues raised in *Liberal Party v WA* decision of 2013. That is, the electoral signs exemption is an attempt to ensure that local planning schemes do not violate the implied freedom, by unreasonably over-regulating 'political communication'.

Whether the exemption in the Deemed Provisions strikes the correct balance is yet to be tested by the courts in Western Australia.

The 'Deemed Provisions'

Schedule 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015* contains provisions that apply to all local planning schemes in Western Australia (see section 256 of the *Planning and Development Act 2005* (P&D Act)). These Schedule 2 provisions are commonly referred to as the 'Deemed Provisions'.

Deemed Provisions apply in all local planning schemes

These Deemed Provisions include an exemption for temporary electoral signs (explained further, below), and so by the effect of the Deemed Provisions this exemption is deemed to be contained in all WA local planning schemes.

Deemed Provisions cannot be overridden or eroded by local planning schemes

Any provision in a local planning scheme that is inconsistent with a 'Deemed Provision' is invalid, and the 'deemed provision' prevails to the extent of the inconsistency (section 257B(3), P&D Act).

In other words, Local Governments cannot override this 'deemed' exemption for electoral signs in the period around an election or vote. Nor can Local Governments limit the operation of the exemption in any other way - such as by imposing further restrictions on signs during the exemption period (e.g. limits on the size of signs during that period, or nominating a shorter time period for the exemption to apply). Any such attempts would be 'inconsistent' with the Deemed Provisions exemption, and so of no effect.

Importantly though, the automatic 'deemed' exemption only applies:

during periods around elections (as explained below). Outside that period, Local Governments have more leeway to fashion their own planning scheme regimes for signs (including electoral signs) – see section 4 of this Guideline.

where the sign in question complies with each of the five 'conditions' applicable to the exemption (see the table below). If an electoral sign fails to meet one of those conditions, it is not exempt under the Deemed Provisions, and so would be subject to the other provisions of the local planning scheme and planning policies applicable to signs.

The exemption for electoral signs

Clause 61(1) of the Deemed Provisions sets out classes of development work for which development approval is not required, provided the prescribed conditions associated with the class of development work are complied with.

Clause 61(1) Table Item 9 prescribes an exemption for temporary 'advertisements' specific to election signage. The relevant parts of clause 61(1) are extracted below:

> *61. Development for which development approval not required*
>
> *(1) Development approval is not required for works if —*
>
> *(a) the works are of a class specified in Column 1 of an item in the Table; and*
>
> *(b) if conditions are set out in Column 2 of the Table opposite that item - all of those conditions are satisfied in relation to the works.*

	Column 1 *Works*	*Column 2* *Conditions*
9.	*The temporary erection or installation of an advertisement.*	*(a)* *The advertisement is erected or installed in connection with an election, referendum or other poll conducted under the* Commonwealth Electoral Act 1918 *(Commonwealth), the* Referendum (Machinery Provisions) Act 1984 *(Commonwealth), the* Electoral Act 1907, *the* Local Government Act 1995 *or the* Referendums Act 1983. *(b)* *The primary purpose of the advertisement is for political communication in relation to the election, referendum or poll.* *(c)* *The advertisement is not erected or installed until the writ or writs have been issued or, for an election, referendum or poll under the* Local Government Act 1995, *until the 36th day*[1] *before the day on which the election, referendum or poll is to be held.* *(d)* *The advertisement is removed no later than 48 hours after the election, referendum or poll is conducted.* *(e)* *The advertisement is not erected or installed within 1.5 m of any part of a crossover or street truncation.*

[1] Note that the start of the exemption period (the 36th day before the election) no longer aligns with the close of nominations for Local Government elections (now 44 days - *Local Government Act 1995*, section 4.49(a)).

4. Regulation of signs outside the Deemed Provisions exemption

This section 4 of the Guideline looks beyond the Deemed Provisions exemption for election signs, in two ways:

(1) Other Local Government (etc.) regulatory regimes (especially where other land tenures are involved); and

(2) Local Government planning requirements for signs that do not attract the Deemed Provisions exemption.

Implications of the implied freedom for other local government regulatory regimes

Each sign must be considered in context of compliance with the Deemed Provisions clause 61(1) Table Item 9 conditions (the '**Item 9 Conditions**') and *any other requirements for signage* applicable within the Local Government's district.

Election signs which do not comply with the Item 9 Conditions must be considered on their merits in accordance with, as applicable, other planning requirements (such as other Deemed Provisions, the Local Planning Scheme (**LPS**), Local Planning Policies (**LPPs**)), Local Law provisions and the guidance provided in this Guideline.

Requirements for different land tenures

The following table outlines requirements that may apply to different land tenures (these are a guide only and may not be exhaustive in all circumstances):

Land Tenure:	Considerations:
Private land	• Owner consent required. • Complies with Item 9 Conditions. ○ If not, consider development requirements under the Local Government's LPS and LPPs. • If considered a 'building' or 'incidental structure' under the *Building Act 2011*, a building permit may be required.

Local Government Property
Freehold, or Reserve under care, control and management of the Local Government
	• Owner consent required.
	  ○ Owner consent may be in the form of a Local Law Permit - check your Local Government's Local Law provisions. Eg WALGA template *Public Places and Local Government Property Local Law*, Part 3.
	• If LG planning approval is required, sign complies with Item 9 Conditions.
	  ○ If the sign does not comply with the Item 9 Conditions, consider development requirements under the Local Government's LPS and LPPs.
	• If considered a 'building' or 'incidental structure' under the *Building Act 2011*, a building permit may be required.

Land Tenure:	Considerations:

Local Government thoroughfares	• Owner consent required.
	  o Owner consent may be in the form of a Local Law Permit, e.g. WALGA template *Activities on Thoroughfares and Public Trading Local Law*, Part 3.
	  o Local Governments without a local law may be able to rely on obstruction permits issued under regulation 6 of the *Local Government (Uniform Local Provisions) Regulations 1996*.
	• If LG planning approval is required, sign complies with Item 9 Conditions.
	  o If the sign does not comply with the Item 9 Conditions, consider development requirements under the Local Government's LPS and LPPs.
	• If 'construction' is required to instal the sign, a permit may be required under regulation 17 of the *Local Government (Uniform Local Provisions) Regulations 1996*.

Main Roads WA designated State Roads	• Main Roads WA consent required (regulation 5, *Main Roads (Control of Advertisements) Regulations 1996*), and subject to compliance with the MRWA Guideline - Roadside Election Signs, contact MRWA - 138 138 or enquiries@mainroads.wa.gov.au • If LG planning approval is required, sign complies with Item 9 Conditions. o If the sign does not comply with the Item 9 Conditions, consider development requirements under the Local Government's LPS and LPPs.

Handy Hint:

For efficiency and to reduce administrative burden, Local Governments that have Local Law provisions for control of signs on Local Government property and/or thoroughfares may issue permit approvals to a political party or individual candidate, which apply to a range of specified locations, inclusive of conditions relating to signage size, proximity to intersections (sightlines) and period for which signs may be in place.

Any of these Local Law provisions controlling signs (and so applying also to political signs) has the potential to violate the implied freedom of political communication. To reduce this risk, consider alignment of these Local Law conditions with the conditions specified in the election advertising exemption in the Deemed Provisions. Also consider whether the Local Law conditions meet the other guidance set out in these Guidelines (including in the 'Frequently Asked Questions').

Planning requirements for political advertising - beyond the Deemed Provisions

Introduction

The political advertisement exemption in Item 9 of clause 61(1) of the Deemed Provisions is time-bound: the exemption only applies in the weeks before (and 48 hours after) the date of the relevant poll.

Outside the period to which the Deemed Provisions exemption applies, Local Governments have more freedom to regulate political signage – but still must do so without violating the implied freedom of political communication.

Similarly, if a sign does not comply with all five 'conditions' described in the Deemed Provisions exemption, then that exemption does not apply to the sign, and the other provisions of the local planning scheme (and local planning policies) about signs will apply.

Such 'general' signs regulation can still potentially be challenged for violation of the implied freedom of political communication, because the 'general' signs regulation will also affect political signs.

Frequently Asked Questions

The guidance in this section – by way of answers to some FAQs – is intended to assist Local Governments to assess the appropriateness of their local planning schemes and local planning policies. The guidance offered in these responses is based on WALGA's understanding of key issues Local Governments face when contemplating election signage in their districts.

Some key points emerge from the answers to the FAQs below:

(1) First, Local Governments should not single out election signage as a class of signs under a local planning scheme or local planning policies to which specific arbitrary constraints are attached.

(2) Secondly, the regulatory provision or policy should have a 'legitimate' and clear planning purpose.

(3) Thirdly, the attainment of that legitimate planning purpose should be achieved by means that are proportionate to the attainment of the purpose.

What limitations does the implied freedom place on the control of election signage on private land?

The following general observations may be made for the control of election signage on private land:

(1) An *absolute prohibition* on election signage would infringe the implied freedom of political communication.

(2) It is not clear whether a *requirement for approval* of all election signs would infringe the implied freedom, and the answer would depend on all the circumstances. So, for example, if election signs were simply one of numerous categories of signage requiring approval, the requirement might not impinge on the implied freedom, especially where it is clear that the requirement for approval serves a legitimate object or end in terms of orderly and proper planning (depending on the context and the planning scheme as a whole). By contrast however, if the requirement for approval involves a timeframe inconsistent with the short timeframes usually associated with the calling and conduct of elections, then potentially the approval requirement could be found to infringe the implied freedom.

(3) The implied freedom of political communication would be unlikely to be infringed where a scheme contained provisions *regulating signage generally* (and so applied to signage of an electoral or political nature), where the provisions clearly and proportionately serve the objectives and principles of orderly and proper planning (or other recognised planning matters such as amenity and safety).

(4) While planning scheme provisions could specifically address election signage, they could not be discriminatory in the sense of being more onerous than the provisions relating to other types of signage. So, for example, Local Governments could consider including broader exemptions in scheme provisions (or local planning policies) that add to the exemption in the Deemed Provisions (for example, exemptions for political signs that operate outside the time period specified in the Deemed Provisions). Such broader exemptions might, for example, permit some election signage without approval.

Can the control of election signage be based purely on the fact that it is an election sign?

LPS provisions and planning policies may specify multiple categories of sign and contain specific provisions for each category. These categories may relate to the physical form of the sign (e.g. panel, roof, wall and pylon signs) and also the content or purpose of the sign (e.g. real estate, product and vehicle display and community service signs).

The creation of a separate category for election signs would be consistent with this approach and would not itself be guaranteed to infringe the implied freedom of political communication. However, planning provisions directed specifically at election signs would likely attract greater scrutiny under an 'implied freedom' lens, so great care should be taken in framing such provisions.

The critical issue would be whether the content of the provisions specifically relating to election signs was inconsistent with that implied freedom. In particular, care would need to be taken to ensure that election signs were not singled out for harsher regulatory treatment than signs of a comparable type or nature. Local Governments would need to give some thought in defining the election sign category.

Can scheme provisions be used to control the size of an election sign?

Scheme provisions may regulate the size of signs, although scheme provisions also often contain a power of variation which permits approval of signs which are inconsistent with the size requirements.

Any provision limiting the size of election signs could not be more onerous than provisions relating to the size of other comparable signs. For example, if an election sign took the form of a roof sign, the size limitations on that sign could not be more restrictive than for other roof signs. If election signs were required to be smaller than other comparable signs, there would be a strong argument that the more restrictive size limits on election signs did not serve a legitimate planning objective or end.

The other circumstance in which size restrictions on election signs may infringe the implied freedom is if election signs were the only type of signs subject to a size restriction. It is doubtful that any legitimate planning objective or end could be identified for this differential treatment.

Because the Deemed Provision exemption contains no reference to the size of signs (ie. the exemption applies to all sizes of election signs), any attempt to limit election sign size *during the Deemed Provisions exemption period* would be inconsistent with the Deemed Provisions, so invalid.

Can a Local Government control election signage on land it manages?

It is generally established that a Local Government is able to regulate activity on land it owns in freehold or which is under the Local Government's care, control and management. Local Governments can exercise such control in their capacity as *owner* (or manager), so the implications of planning regimes are not the only factor.

At least one court decision in Western Australia has considered the validity of a Local Government's local laws or policies that seek to restrict advertisements on its own property. In

McClure v The Mayor and Councillors of the City of Stirling [No 2] [2008] WASC 286, the WA Supreme Court had to consider whether residents who erected a tent and banners on the Scarborough Beach foreshore without a permit – contrary to the City of Stirling's *General Local Law* – were protected from such enforcement action by the implied freedom. The residents argued that the implied freedom prevented the City from enforcing its own local law on the public reserve managed by the City. The Court noted:

(1) By requiring a permit for the erection of buildings on a public reserve, the local law serves the legitimate end of preserving the use and enjoyment of the public reserve by the public;

(2) the local law is not aimed at political content, but only regulates it incidentally;

(3) a person refused a permit has a right of appeal.

The Court was of the view (but did not have to finally decide) that the local law was 'reasonably appropriate and adapted' to serve legitimate ends.

The issue of land held by a Local Government in freehold would be treated by the Courts as similar to a private landholder and any attempt to place advertising on private land without the consent of the landowner, whether a public body or not, would be seen as a trespass. It would be possible for Local Governments to include scheme provisions which regulate signage on both zoned and reserved land under local planning schemes.

It would be necessary to give separate consideration to the regulation of signs on land the subject of reserves under the *Metropolitan Region Scheme* which are usually excluded from the operation of the provisions of local planning schemes (Deemed Provisions, clause 61(2)(a)).

> Handy Hint:
>
> The *WALGA Template Activities on Thoroughfares and Trading Local Law* includes provisions for the control of advertising signs (includes election signs) and portable direction signs, requiring a permit to be issued before a relevant sign can be erected or placed on a thoroughfare or posted, affixed or placed on a thoroughfare.

Can a Local Government control election signage through the 'amenity' provisions of a scheme?

The control of political signage for the purpose of protecting amenity (visual amenity in particular) was regarded as a legitimate object or end of the planning laws considered in the *Becker v. City of Onkaparinga* case (although in *Becker,* amenity was not the sole planning justification for the approval requirement). Therefore, the application of amenity provisions to election signs would not be inconsistent with the implied freedom. Of course, this assumes that the relevant planning scheme requires the amenity provisions to be considered by Councils when considering applications for approval for signage.

(As noted elsewhere in this Guideline, in the *Liberal Party v City of Armadale* case, the WA Supreme Court did not appear to accept that local amenity (by itself) was a legitimate object or end for the control of election signage. However, that view is inconsistent with the decision in *Becker v City of Onkaparinga*. In the absence of judicial consideration by the Court in Western Australia of that case, the decision in the *Liberal Party* case does not provide a strong basis on which to dismiss amenity as a legitimate object or end in controlling election signage without infringing the implied freedom of political communication. *Becker v City of* Onkaparinga is summarised in the Addendum to this Guideline.)

What about controls of election signage within shop windows?

Scheme provisions may contain provisions controlling window signs. For other forms of signage (ie. non-window signs), considerations of amenity and public safety can readily be identified as legitimate objects or ends justifying control of election signage by schemes.

These objects or ends are less apparent with window signs.

Consequently, there would be an argument that requiring approval for election signs placed in windows would be incompatible with our system of representative government because there is either a weak (or no) planning justification for imposing the control. Therefore, window signs may give rise to greater difficulty in arguing that scheme provisions controlling this form of signage do not infringe the implied freedom of political communication.

To avoid infringing the implied freedom it would be necessary (at the least) for provisions relating to election signs in windows to be no more onerous than those applying to other window signs.

Does a Local Government have the ability to specify the type of materials that an election sign can be made from?

It would be possible for a scheme provision to specify the type of material from which an election sign could be made. However, these provisions could be no more onerous than a comparable sign which did not carry any election content.

For example, if the form of election sign was a wall sign, then any requirements as to the materials of which the sign was to be constructed could be no more onerous than existed for any other type of wall sign. Further, there would need to be a clear planning justification, such as the protection of public safety.

Does a Local Government have the ability to specify that an election sign can only be permitted at a campaign office or at a polling location?

A scheme provision which restricted election signage to campaign offices and polling locations would infringe the implied freedom of political communication. There would be no discernible planning objective or end served by such a restriction. It would be a restriction peculiar to election signage which would not apply to any other form of comparable signage. For these reasons, such a scheme provision would be invalid as an infringement of the implied freedom.

Can restrictions be placed on an election sign in places that would cause sight obstructions?

Considerations of safety have been regarded by the Courts as a legitimate object or end of planning laws which control election signs and would not infringe the implied freedom.

Consequently, scheme provisions that are applied to signage which relate to issues of public safety (such as sight obstructions) would not infringe the implied freedom of political communication, insofar as the determination of the existence of a sight obstruction was fairly and consistently applied to all signs.

5. Conclusion

It should be noted that while the implied Constitutional freedom of political communication may appear to have primacy in relation to election signage, it is not absolute. Considerations of planning impacts and public safety will be taken into account by the Courts and where reasonably and proportionately applied, may well fetter the implied freedom.

The question of whether the implied freedom is infringed by the regulatory control turns on an examination of the terms, operation and effect of specific provisions in the legislative context in which they are found. Ultimately, the question whether any particular provision infringes the implied Constitutional freedom of political communication will depend on the content of that provision and other scheme provisions relating to signage.

The principal point of note that arises from examination of this issue, is for Local Government not to single out election signage as a class of sign under a local planning scheme or local planning policies to which specific arbitrary constraints are attached.

Any such attempt to prohibit (or otherwise heavily regulate) election signage in a district is likely to be deemed an infringement on the implied freedom of political communication and will be considered invalid. Local Governments that have local planning schemes and local planning policies that reflect such a prohibition should amend their schemes.

6. List of Cases

Australian Capital Television Pty Ltd v Commonwealth of Australia (1992) 177 CLR 106

Other Cases

Attorney-General for the State of South Australia and the Corporation of the City of Adelaide & Ors [2013] HCA 3; (2013) 249 CLR 1

Becker v City of Onkaparinga (2010) ALR 390; (2010) 108 SASR 163 (this decision is summarised in the Addendum to this Guideline)

Coleman v Power (2004) 220 CLR 1

Greene v Gold Coast City Council [2008] QSC 25 (25 February 2008)

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

Levy v The State of Victoria (1997) 189 CLR 579

Liberal Party of Australia (Western Australia Division) Inc v City of Armadale [2013] WASC 27

Moule v Cambooya Shire Council and Anor [2004] QSC 50 (19 March 2004)

The Corporation of the City of Adelaide v Corneloup & Ors [2011] SASCFC 84

Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104

McClure v The Mayor and Councillors of the City of Stirling [No 2] [2008] WASC 286

Van Lieshout v City of Fremantle (No 2) [2013] WASC 176

Monis v The Queen (2013) 249 CLR 92

LibertyWorks Inc v Commonwealth of Australia [2021] HCA 18

7. Addendum – Additional case summaries

Introduction to the additional case summaries

The cases summarised below are decisions that have arisen in various legal and factual contexts. Most of them are *not* planning law decisions involving election signage (the exception is the *Becker* decision, which *is* about signs).

However, these case summaries help in proving a broader understanding of the way in which the implied freedom has been interpreted by the courts. The decisions summarised below are appeal decisions (High Court of Australia and other appeal courts).

The earlier two-limb test

Earlier court decisions used a two-limb test (rather than the current three-stage test), where the second limb asked whether the law in question was '*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? This 'second limb' has slowly been overtaken by stages 2 and 3 of the three-stage test. Some of the older cases summarised below refer to the two-limb test.

Becker v City of Onkaparinga (2010) ALR 390

An example of a case where planning laws controlling the display of signs did *not* infringe the second limb (of the earlier two-limb test) is *Becker v City of Onkaparinga* (2010) ALR 390, a decision of the Full Court of the Supreme Court of South Australia.

The case concerned legislation which required development approval for *all* signs. The requirement clearly burdened the freedom to display political signs, so met the first limb of the test. Regarding the second limb, the Full Court made the following conclusions:

(1) The laws were not expressly directed at political communication and did not apply only to election signs, but to all signs and advertisements. (at [63])

(2) The legitimate end for which the provisions were reasonably appropriate and adapted was to ensure that the display of all signs and advertisements, whether or not they were about the government or political matters, complied with the objectives and principles providing for proper, orderly and efficient planning and development in South Australia. This was a process involving consideration of a wide range of matters including visual amenity and public safety. (at [57])

(3) The prohibition on signs under the City's laws was not absolute. Landowners were not precluded from seeking development approval for signs. (at [67])

The Full Court concluded: '*the prohibition in the present case is not a blanket prohibition. The appellants can avail themselves of many other forms of communication in many different forms. Further, the prohibition is limited in that it only applies to signs without development approval. It follows that the appellants are unable to satisfy the second limb of the* Lange *test...*'. (at [71]-[72]).

McCloy v New South Wales [2015] HCA 34

In this case, the High Court upheld the validity of NSW laws capping political donations (and banning some types of donations altogether).

The NSW *Election Funding, Expenditure and Disclosures Act 1981* imposes restrictions on private funding of political candidates and parties in State and local government elections in NSW. The provisions impose a cap on political donations, prohibit property developers from making such donations, and restrict indirect campaign contributions. McCloy, a property developer, challenged the laws, arguing they were invalid for impermissibly infringing the freedom of political communication on governmental and political matters.

The State of NSW accepted that the laws indirectly burdened political communication by restricting the funding available for such communication. The issue was whether the burden was justified.

The enquiry was said to be whether the statutory provisions in question have a rational connection to their purpose. If they do not, it would follow that they are simply a burden on the implied freedom without a justifying purpose.

McCloy's argument was that the provisions restrict political communication by removing the preferential access to candidates and political parties which would otherwise come to those who have the capacity and incentive to make large political donations.

The court rejected this argument, saying that this argument goes to the heart of the mischief to which the provisions are directed. The court found that it is actually *consistent* with the implied freedom of political communication that wealthy donors *not* be permitted to distort the flow of political communication according to the size of their political donations. The court emphasised the importance of establishing a 'level playing field' for those engaged in political communication. The legislated donation caps 'preserve and enhance' the integrity of the system of representative and responsible government established by the constitution.

The Act's provision prohibiting indirect campaign contributions was found to be reasonably appropriate and adapted to serve its legitimate object or end. It seeks to prevent corruption *and* the appearance of corruption by restricting indirect campaign contributions. This does not distort and corrupt the political process, but rather maintains and enhances the implied freedom.

Brown v Tasmania [2017] HCA 43

In this decision the High Court found that some aspects of Tasmania's anti-protest laws were invalid because they violate the implied freedom of political communication.

The *Workplaces (Protection from Protestors) Act 2014* (Tas) (the **Act**) includes provisions that prohibit people from taking part in protest activities in or around business premises, including on forestry land (among other restrictions). Protestors are prohibited from carrying out protests in or near businesses, that would prevent or hinder the carrying out of the business activity.

Former Greens leader Bob Brown and another person were arrested while walking near, and filming, forestry operations.

The court noted that the implied freedom of political communication is a freedom to communicate ideas to those who are willing to listen, not a right to force an unwanted message on those who do not wish to hear it, and still less to do so by preventing, disrupting or obstructing a listener's lawful business activities. Persons lawfully carrying on their businesses are entitled to be left alone to get on with their businesses and a legislative purpose of securing them that entitlement is, for that reason, a legitimate governmental purpose.

However, as the law here is targeted at political communication (that is, protest activity), the Act requires close scrutiny to ensure the law is 'compelling and closely tailored to the achievement of its purpose'.

In this case, the court found there was a lack of rational connection between the purpose of the Act (protecting businesses from damage and disruption) and the wide-ranging police powers bestowed by the Act (including the ability to impose a blanket four-day exclusion for environmental protesters from a business access area – which could cover a large range of people). Accordingly, the court found that the Act impermissibly burdens the implied freedom of political communication. And the resulting burden on political communication goes beyond what is reasonably appropriate and adapted to serve the legitimate object of the Act.

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

This decision arose out of the 'Occupy Sydney' protests in 2013.

Mr O'Flaherty was convicted of the offence of failing to comply with the terms of notice given by the City of Sydney, which prohibited camping or staying overnight in Martin Place. O'Flaherty contended that it was beyond the power of the City of Sydney to issue the notice because it impermissibly infringed freedom of communication about government and political matters and/or his freedom of association.

The primary judge had found that the prohibition against staying overnight is '*reasonably appropriate and adapted to serve the legitimate ends of maintaining public health, safety and amenity and preserving the ability of all members of the public to use the area'*.

The appeal court agreed, noting that while the prohibition on *camping overnight* was 'absolute', the 'protestors retained the freedom to otherwise occupy that site or other public sites ... and thereby communicate their views'. In other words, while the law burdens the implied freedom, it does so in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

Clubb v Edwards [2019] HCA 11

Mrs Clubb challenged a law that prohibited her from communicating her political beliefs within the declared 'safe zone' outside an abortion clinic.

The State of Victoria submitted that the activities of protesters had previously created an environment of 'conflict, fear and intimidation' outside abortion clinics, and that these activities were harmful to both patients and staff. The State argued that it was the effect of these protest activities on women accessing abortion services, and on clinic staff - and not the suppression of anti-abortion views - that led to the enactment of the *Public Health and Wellbeing Act 2008* (Vic).

Mrs Clubb argued that the communication prohibition does not serve a legitimate purpose compatible with the maintenance of the constitutionally prescribed system of representative and responsible government because the prohibition burdens the anti-abortion side of the abortion debate more than the pro-choice side. Mrs Clubb also argued that to prohibit communications on the ground that they are apt to cause discomfort is not compatible with the constitutional system. In this regard, it was said that political speech is inherently apt to cause discomfort, and causing discomfort may be necessary to the efficacy of political speech.

These submissions by Mrs Clubb were not accepted. The High Court found that the protests involved an attack upon the privacy and dignity of other people. Within those zones, the burden on the implied freedom is justified by the very considerations of the dignity of the citizen as a member of the sovereign people that necessitate recognition of the implied freedom. A law calculated to maintain the dignity of members of the sovereign people by ensuring that they are not held captive by an uninvited political message accords with the political sovereignty which underpins the implied freedom.

The protection of the safety, wellbeing, privacy and dignity of the people of Victoria is a legitimate concern of any elected State government. A legislative purpose of securing its people that entitlement is thus consistent with the system of representative and responsible government mandated by the Constitution.

Chief of the Defence Force v Gaynor [2017] FCAFC 41

An army reservist (Mr Gaynor) was sacked after he published comments on his Twitter and Facebook pages, including an exchange between him and a transgender officer, which the primary judge described as 'intemperate, vitriolic and personally offensive...'

Mr Gaynor was sacked for various reasons, including for being critical of Defence Force policy and continuing to make public comments after being instructed not to do so.

He said his termination infringed the implied freedom of political communication. The primary judge had said the sacking did violate the implied freedom: while Mr Gaynor's comments were 'offensive', the judge found they were 'political in nature'.

On appeal, Mr Gaynor's sacking was found to be lawful and not to have violated the implied freedom. The appeal court focussed on the regulation under which the sacking was done, rather than on the actual decision to termination.

The appeal court described Mr Gaynor's published comments and actions as 'extreme, including his refusal to accept and abide by orders and directions given to him'.

The regulation allowing the sacking was (the court found) not intended to control public communication, but instead provided an important disciplinary tool for preserving desirable membership within the ADF.

The court added that any potential harm to the freedom of political communication is outweighed by the need to preserve the ability to terminate the service of individuals whose conduct and behaviour justifies the considerable step of terminating the service of an officer (at paragraph [111]).

Therefore, while the scope of the power in the law was wide, it was sufficiently confined by the objects and purposes of the statutory scheme in which it appears that it can properly be described as suitable, necessary, and adequate in balance with respect to any burden it imposes on the implied freedom (at paragraph [112]).