

The Status of Flag Desecration in Australian Law

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The Australian flag may not engender the same kind of mystical reverence that its American counterpart evokes. Nevertheless it remains a potent, evocative and enduring symbol of Australian nationhood. It should come as no surprise that the public desecration of the Australian flag provokes strong and visceral reactions.

I INTRODUCTION

The Australian flag is declared to be the National Flag by the Flags Act 1953 (Cth).¹ In this article the legality of desecrating it in a public place will be considered. My aim in doing so is to provide a roadmap to those persons – legislators, judges, lawyers and other interested citizens – who have a professional or personal interest in the status of flag desecration in Australian law.

First, after outlining in Part II why the Australian flag will continue to exert a considerable if not growing influence on our cultural and political discourse, I want to address the issue of whether flag desecration is constitutionally protected political communication in Australia. This is done in Part III and my analysis demonstrates that flag desecration is a form of symbolic expression that lies at the core of the zone of political communication protected by the Australian Constitution.

Second, I want to explore the consequences of my Part III conclusion. I will do so by considering whether the Flags (Protection of Australian Flags) Amendment Bill 2008 (Cth) – which seeks to make flag desecration a crime – would be constitutionally suspect. I will then address the likely impact of the constitutional status of flag desecration upon the interpretation and possibly even the validity of more general (public order) laws that may already proscribe flag desecration. This

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1. See s 3 and Schs 1–2.

analysis will be undertaken in Part IV. Finally, in Part V, I will consider whether the treatment of flag desecration under Australian law is likely to change under statutory bills of rights of the kind now operating in the ACT and Victoria.

II THE CULTURAL AND POLITICAL SIGNIFICANCE OF THE AUSTRALIAN FLAG: THE CONTEMPORARY CONTEXT

There have been many instances in recent times where the Australian flag has assumed a central importance in a public setting for a person or institution to make what is essentially a political statement.

Consider the following:

- In December 2005 a large gathering of intoxicated Anglo-Australians – many draped in the Australian flag – violently attacked a small group of Lebanese-Australians at Cronulla Beach.²
- In 2005 Brendan Nelson – then federal Minister for Education – made all public schools fly the Australian flag as a condition of them receiving additional government funding.³
- In the sentencing of a man to three months imprisonment for a revenge attack after the Cronulla Beach riots, the Magistrate said that a harsher penalty was warranted because burning the Australian flag – part of the criminal act – was ‘of great significance’.⁴
- In August 2006, a Sydney teenager ‘was sentenced to a period of probation and ordered to take part in a youth conference for setting fire to a flag at an RSL club during the Cronulla riots’.⁵ It re-ignited calls for burning of the Australian flag to be criminalised.
- In 2006 a federal Liberal MP – Bronwyn Bishop – called for the Commonwealth Criminal Code to be amended to make it a criminal offence to desecrate or burn the Australian flag.⁶
- In 2006 Victoria Police seized an artwork called ‘Proudly UnAustralian’ – a burnt and defaced Australian flag – that was hanging in a display outside the Trocadero Art Space in the Melbourne suburb of Footscray.⁷

2. See D Marr, ‘Alan Jones: I’m the Person That’s Led This Charge’, *The Age* (Melbourne), 13 Dec 2005, 7.

3. See I Clendinnen, ‘The History Question: Who Owns the Past?’ (2006) 23 Quarterly Essay 1.

4. See N Wallace, ‘I Should Have Thought First: Flag Burner Sentenced to Jail’, *Sydney Morning Herald* (Sydney), 13 Jan 2006.

5. See H Irving, ‘Flames of Protest Should be Seen From More Than One Viewpoint’, *Online Opinion*, 4 Sep 2006, <<http://www.onlineopinion.com.au/print.asp?article=4869>>.

6. See J Koutsoukis, ‘At \$9000 a Member, An Idea is Run Up the Flagpole’, *The Age* (Melbourne), 7 Mar 2006, 3.

7. See D Marr, ‘Seizure of Art Exhibition Leaves Democracy Flagging, Says Gallery’, *Sydney Morning Herald* (Sydney), 30 January 2006, 3.

- In 2006 the Australian government said it would pay for the installation of a seven-metre flag-pole outside the electorate office of any federal member of parliament for the purpose of flying the Australian flag.⁸
- In January 2007 our political leaders – including the Prime Minister John Howard, federal Labor leader Kevin Rudd and New South Wales Premier Morris Iemma – fell over themselves to condemn the organisers of the Big Day Out music event for asking punters to leave their Australian flags at home for fear that it would be used to make an essentially racist statement as had happened the previous year at the Sydney leg of the tour.⁹ It reached the rather absurd and politically cynical point where Peter Debnam – then opposition leader in New South Wales – proposed that if his party were to win government it would legislate to ‘outlaw banning the display of the flag, require it to be flown on all New South Wales public buildings and provide RSL clubs with the same protections as war memorials.’¹⁰
- In March 2007 the Victorian Premier Steve Bracks announced that his government was to spend \$500,000 on two Australian flags to be placed on and flown from the top of the West Gate Bridge.¹¹
- In January 2008 – indeed on Australia Day – an Aboriginal man burned the Australian flag in Launceston City Park in front of approximately 200 Aborigines ‘to mark what he called invasion day’.¹² In response, Tasmanian Liberal Senator Guy Barnett introduced into the Commonwealth Parliament the Flags (Protection of Australian Flags) Amendment Bill 2008 (Cth). It is a private member’s bill that seeks ‘to outlaw the burning or desecration of official flags, including the national, state and territory and Aboriginal flags’.¹³

These events should leave us in no doubt as to the symbolic, cultural and (increasing) political significance of the Australian flag in our contemporary public discourse. And though the very different contexts outlined above may communicate – or at least imply – divergent messages, the underlying thread is that relevant ‘flag-bearers’ seek to make a claim upon or statement regarding *what they consider* to be the values and ideals that lie at the core of our national identity and made incarnate by the Australian flag.

Moreover, the increased prominence of flag desecration in Australia has followed the now established pattern of being a local adaptation of a hot-button social issue that played out at some earlier point in the political discourse of the United

8. See Koutsoukis, above n 6.

9. See L McIlveen, ‘Fly Your Aussie Flag’, *The Daily Telegraph* (Sydney), 22 Jan 2007.

10. ‘NSW Opposition’s flag plan “unnecessary”’, *The Age* (Melbourne), 23 Jan 2007.

11. S Bracks, *Flags To Fly on West Gate Bridge*, Media Release, 13 Mar 2007.

12. P Duncan, ‘Anger at Flag Burning’, *The Mercury* (Hobart), 29 Jan 2008.

13. ‘Senator Urges Rudd to Outlaw Flag Burning’, *ABC News Online*, 29 Jan 2008, <http://www.abc.net.au/news/stories/2008/01/29/2149307.htm>.

States.¹⁴ Other examples include the parliamentary and public debates on same-sex marriage, stem-cell research, judicial activism and abortion. These issues form part of the broader culture and values wars that have raged both in Australia and the United States as long-term conservative administrations in both nations strived to rectify the damage they consider was done to the social, political, moral and legal fabric by past left-leaning governments.¹⁵

These ongoing legal battles in the United States to some extent reflects the fact that due to the American bill of rights most controversial social and moral issues are ultimately determined – though not necessarily resolved¹⁶ – in the courts. However, independent of this American constitutional context, to achieve victory in the courts or the legislature on the issue of flag desecration – in whatever jurisdiction – is to have the ‘values’ asserted by the victor given *legal* imprimatur. It probably accounts for the spasmodic though continuing interest amongst Australian political elites in exploring the possibility of making flag desecration a crime.¹⁷

It is no surprise then that when the cultural stakes are considered to be this high that ‘victory’ is pursued, achieved and then secured in law. For a final legal judgment on flag desecration would be a moral, cultural, political and historical moment of wider import, capable of seeping into the national consciousness and assuming the status of orthodoxy for the foreseeable future. And as the series of events detailed above demonstrate, flag desecration will continue to be employed as a form of symbolic political protest in Australia and calls for its criminal proscription will inevitably be made in response.

14. For example, in *Texas v Johnson* 491 US 397 (1989) (*‘Johnson’*) the US Supreme Court in 5/4 decision invalidated on First Amendment grounds a Texas statute that made it a crime to desecrate a venerated object, namely the American flag. It invalidated as a consequence similar prohibitions that existed in the laws of 48 of the 50 American States. In response, the US Congress enacted the Flag Protection Act. This law was more narrowly drawn than the invalidated Texas statute but had the same animating purpose: to protect the authority and dignity of the American flag; not surprisingly, it too was struck down by the same Supreme Court in *United States v Eichman* 496 US 310 (1990). Most recently, a proposed constitutional amendment in 2006 – to permit Congress to prohibit flag desecration – failed by a single vote in the Senate to send it the States for ratification, an almost assured outcome considering the past legislative treatment of flag desecration by most American States: see generally PE Quint, ‘The Comparative Law of Flag Desecration: The United States and the Federal Republic of Germany’ (1992) 15 *Hastings Int’l and Comparative L Rev* 613.
15. See generally JD Hunter, *Culture Wars: The Struggle to Define America* (New York: Basic Books, 1991); S MacIntyre & A Clark, *The History Wars* (Melbourne: MUP, 2004).
16. See J Waldron, ‘The Core of the Case Against Judicial Review’ (2006) *Yale Law J* 1348, 1369 where the author correctly notes that ‘[m]ost issues of rights are in need of settlement. We need settlement not so much to dispose of the issue – *nothing can do that* – but to provide a basis for common action when action is necessary’ (footnote omitted; emphasis added). For example, a judicial decision that a right to free speech protects hate speech does not make that decision correct or unimpeachable in some objective sense. That is, the rights disagreement on this free speech issue will persist long after a court has made *its* determination.
17. On these legislative attempts, see Commonwealth, *Protection of Australian Flags (Desecration of the Flag) Bill 2003*, Bills Digest No. 42 (2003–04), <<http://www.aph.gov.au/library/pubs/bd/2003-04/04bd042.htm>>. See also N Stobbs, ‘I Love a Sunburnt Country, But I Prefer “My” Flag Intact: Is Burning the Australian Flag Illegal, Can They Make it Illegal?’ (2006) 6 *ILB* 20.

In the next part of the article I consider whether flag desecration is constitutionally protected political communication. If so, it may present a serious constitutional obstacle to any legislative attempt to expressly prohibit the desecration of the Australian flag.

III IS FLAG DESECRATION CONSTITUTIONALLY PROTECTED IN AUSTRALIA?

In the aftermath of the burning of the Australian flag in Launceston City Park on Australia Day 2008, Senator Guy Barnett, as noted, introduced into the Parliament the Flags (Protection of Australian Flags) Amendment Bill 2008 (Cth) ('FAB'). The object of the FAB is 'to amend the Flags Act 1953 to protect the Australian National Flag or any other flag proclaimed by the Governor-General in accordance with section 5 of the Flags Act 1953 from desecration or wilful destruction'.¹⁸ Its key provisions read as follows:

- (1) It is an offence for a person, without reasonable excuse, to wilfully damage or destroy in any manner, burn or deface, defile, mutilate or trample upon or otherwise desecrate:
 - (a) the Australian National Flag; or
 - (b) any other flag proclaimed by the Governor-General in accordance with section 5.
 Penalty: 10 penalty units or 100 hours of community service.
- (2) In proceedings for an offence against subsection (1), it is a defence if the person has destroyed, burnt or otherwise dealt with the Australian National Flag or a proclaimed flag in accordance with subsection (1) because it has become worn, soiled or damaged in normal usage.¹⁹

This offence closely approximates the kind of flag desecration laws invalidated by the United States Supreme Court in *Johnson*, introduced into the Commonwealth and Western Australian parliaments in 2003 and currently on the statute book in Hong Kong, India and New Zealand.²⁰ Their underlying purpose is to outlaw the desecration of the flag to protect – not its physical integrity so much – but the values and ideals of the nation which it is said to symbolise. In the context of the FAB, '[i]t is designed to demonstrate dignity and respect for the flag ... and to honour our veterans who fought and died under the flag'.²¹ Moreover, it 'has an educative role and by passing [the FAB] sends a message to all Australians that the flag is an important national symbol worthy of protection'.²² Similarly, the

18. G Barnett, Commonwealth of Australia, 'Flags (Protection of Australian Flags) Amendment Bill', Briefing Note, February 2008.

19. Flags (Protection of Australian Flags) Amendment Bill 2008, sch 1, s 7A.

20. See Commonwealth, Bills Digest No. 42 (2003-2004), Appendix: Overseas Flag Desecration Laws. See further K Duggal & S Sridhar, 'Reconciling Freedom of Expression and Flag Desecration: A Comparative Study' (2006) 2 *Hanse L Rev* 141.

21. Barnett, above n 18.

22. *Ibid.*

special resolution agreed to by the Australian Parliament on 30 August 2001 to commemorate the centenary of the Australian flag said it –

[H]onours the ideals for which our national flag stands including our history, geography and unity as a federated nation; notes that this is the world's only national flag ever to fly over one entire continent; acknowledges that our flag has been Australia's pre-eminent national symbol in times of adversity and war, peacetime and prosperity; recognises that our flag now belongs to the Australian people and has been an integral part of the expression of our national pride; and expresses its respect for the Australian National Flag as a symbol of our profound achievements as a federation; our independence and freedom as a people; and our optimism for a common future together.²³

In any event, the question I now wish to address is whether the FAB would pass constitutional muster? In order to do so it must first be sourced to a legislative head of power in the Australian Constitution.²⁴ As part of the executive power vested in it by section 61 of the Constitution, the Commonwealth has an implied nationhood power that permits it – in conjunction with section 51(xxxix), the incidental legislative power – to enact legislation that facilitates its engagement ‘in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation’.²⁵ Importantly, in *Davis v Commonwealth* Brennan J said that this included ‘symbols of nationhood’ and gave as examples a national flag or anthem.²⁶ In *Davis* the High Court said that a law incorporating a company to commemorate the celebration of the Bicentenary was valid on these grounds.²⁷ However, the Court invalidated provisions that proscribed the use of a range of expressions in conjunction with ‘1788’, ‘1988’ or ‘88’ without the consent of the ‘bicentenary company’. Three of the majority judges did so on the ground that a law sourced to the incidental legislative power – section 51(xxxix) – must be *proportionate* to its purpose:

In arming the Authority with this extraordinary power the Act provides for a regime of protection which is grossly disproportionate to the need to protect the commemoration and the Authority...Here the framework of regulation... reaches far beyond the legitimate objects sought to be achieved and *impinges on freedom of expression by enabling the Authority to regulate the use of common expressions and by making unauthorized use a criminal offence...* This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power.²⁸

23. Commonwealth, *Parliamentary Debates* (HR), 30 Aug 2001, 30708 (J Anderson, Minister for Transport and Regional Services).

24. For the remainder of the article referred to as ‘the Constitution’.

25. *Victoria v Commonwealth* (1975) 134 CLR 338, 397 (Mason J) (‘AAP case’).

26. *Davis v Commonwealth* (1988) 166 CLR 79, 111 (‘Davis’).

27. *Ibid* 94 (Mason CJ, Deane & Gaudron JJ), 101 (Wilson & Dawson JJ), 119 (Toohey J).

28. *Ibid* 99 (Mason CJ, Deane & Gaudron JJ) (emphasis added).

If, as seems likely, the FAB relies upon the incidental legislative power for its validity then on this line of reasoning in *Davis* there is certainly an argument that the flag desecration offence may suffer the same constitutional fate. That is, to make peaceful flag desecration a crime is a serious intrusion into freedom of (political) expression and goes far beyond what is reasonable or necessary to preserve the values and ideals which the Australian flag is said to symbolise.

However, since *Davis* the High Court has sought to downplay the role of proportionality in the characterisation of laws that rely on 'the incidental power which is to be implied as an aspect of each of the substantive heads of power in section 51'.²⁹ The following (obiter) comments in *Leask v Commonwealth* are significant in this respect:

In this context it is important to appreciate that, whilst it is correct to speak of implied incidental powers, each head of power is but one grant of power. As Brennan J said in *Cunliffe*: 'the core and incidental aspects of a power are not separated; the power is an entirety'. No doubt as one moves closer to the outer limits of a power, the purpose of a law which lies at 'the circumference of the subject [matter of the power] or can at best be only incidental to it' ... becomes important, because 'by divining the purpose of a law from its effect and operation, its connection with the subject matter of the power may appear more clearly'. 'Purpose' in that connection is merely an aspect of what the law does in fact and the test remains one of sufficient connection. If that connection is established, it matters not how ill-adapted, inappropriate or disproportionate a law is or may be thought to be.³⁰

It might, therefore, be argued that if the constitutional authority for a national flag is provided by the nationhood aspect of section 61 – as Brennan J stated in *Davis* – then a law proscribing its desecration has a sufficient connection with that power and is valid as a consequence. Moreover, it is an orthodox principle of characterisation that once a subject matter – in this instance flag desecration – falls within power then the options available to the Commonwealth include its regulation and, importantly for present purposes, its conditional or absolute prohibition.³¹ If so, this serves to buttress the argument that a flag desecration law is supported by section 61 and the express incidental power.

However, in *Davis*, Brennan J also invalidated those provisions that proscribed the range of 'bicentennial expressions' and did so *without* recourse to notions of purpose and proportionality. In doing so he made important observations about the scope of the legislative power conferred by section 51(xxxix) in conjunction with section 61:

29. *Leask v Commonwealth* (1996) 187 CLR 579, 602 (Dawson J); this view of the (ir)relevance of proportionality to the characterisation process for incidental legislative powers was endorsed by Brennan CJ (593–5), Toohey J (612–16), Gaudron J (616) & McHugh J (616–17) ('*Leask*').

30. *Ibid* 602–3 (Dawson J).

31. See *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1, 11–12 (Stephen J), 18–23 (Mason J).

Section 51(xxxix) confers a power to make a law not with respect to the subject matter of an executive power of the Commonwealth, nor even with respect to a matter incidental to that subject matter; it confers a power to make a law only with respect to a matter ‘incidental to the execution’ of an executive power of the Commonwealth.... [I]t is one thing to create offences to supplement what the Executive Government has done or proposes to do. Where the Executive Government engages in activity in order to advance the nation – an essentially facultative function – the execution of executive power is not the occasion for a wide impairment of individual freedom.... In my opinion, the legislative power with respect to matters incidental to the execution of the executive power does not extend to the creation of offences except in so far as is necessary to protect the efficacy of the execution by the Executive Government of its powers and capacities.³²

Importantly, this led Brennan J to conclude:

It is of the essence of a free and mature nation that minorities are entitled to equality in the enjoyment of human rights. Minorities are thus entitled to freedom in the peaceful expression of dissident views.... By prohibiting the use of symbols and expressions apt to express such opinions, sections 22 and 23 forfeit any support which section 51(xxxix) might otherwise afford.³³

So on this line of reasoning it maybe that a flag desecration law like the FAB is not supported by section 61 in conjunction with section 51(xxxix) *even if proportionality has no role to play in this characterisation process*. Flag desecration may be considered ‘the peaceful expression of dissident views’ and its proscription would not appear necessary ‘to protect the efficacy of the execution by the Executive Government of its powers and capacities’.

However, there is as noted a respectable argument since *Leask* that the *FAB* is a law with respect to a legislative head of power. If so, it then falls to assess its compatibility with the implied freedom of political communication recognised by the Constitution.³⁴ The implied freedom will invalidate federal, state or territory legislative and executive action that interferes with or impairs political communication that ‘is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution’.³⁵ In order to assess the compatibility of a law with the implied freedom, the following two-limbed test is applied:

- First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation of effect?³⁶

32. *Davis*, above n 26, 112–13 (Brennan J).

33. *Ibid* 116–17.

34. For the remainder of the article referred to as ‘the implied freedom’.

35. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561 (per curiam) (*‘Lange’*).

36. *Ibid* 567.

- Second, if it does, is the law nevertheless ‘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’?³⁷

1. The first limb

It must first be determined whether flag desecration as defined in the FAB constitutes ‘political communication’ for purposes of the implied freedom. It seems clear from *Levy v Victoria* that the scope of the implied freedom is broad enough to cover symbolic expression:

For the purpose of the Constitution, freedom of communication is not limited to verbal utterances. Signs, symbols, gestures and images are perceived by all and used by many to communicate information, ideas and opinions. Indeed, in an appropriate context any form of expressive conduct is capable of communicating a political or government message to those who witness it.³⁸

The closest Australian authorities on point are *Watson v Trenerry*³⁹ and *Coleman v Kinbacher*.⁴⁰ In *Watson* the Northern Territory Court of Appeal had to consider whether burning the Indonesian Flag at a protest about the political situation in East Timor outside the Indonesian Consulate in Darwin was ‘political communication’. Gray AJ said that ‘[i]t was common ground that the appellant’s conduct was an expression of political opinion’⁴¹ and that the High Court’s decision in *Levy* made it clear that symbolic expression of this kind was ‘political communication’.

On the one hand it might be queried whether burning the Indonesian Flag in this context may be relevant to the voting choices of electors at a federal election or referendum, which is the essence of ‘political communication’ for purposes of the implied freedom.⁴² However, for the most part the High Court’s conception of ‘political communication’ is not crabbed, inflexible or unduly restrictive. It covers communications between the people on political matters – including the conduct of the entire executive – between the people and their elected representatives and is not limited to election periods.⁴³ It also, as noted, extends protection to political expression that is made without words. The characterisation of burning the Indonesian flag in *Watson* as ‘political communication’ is, then, a perfectly sound judgment. This is especially so considering the intersection between the Australian government and Indonesian politics at the time and the pivotal role the former played in the events leading up to the 1999 independence referendum in

37. *Coleman v Power* (2004) 220 CLR 1, 51 (McHugh J) (‘*Coleman*’).

38. *Levy v Victoria* (1997) 189 CLR 579, 622 (McHugh J) (‘*Levy*’).

39. (1998) FLR 159 (‘*Watson*’).

40. *Coleman v Kinbacher* [2003] QCA 575 (‘*Kinbacher*’).

41. *Watson* above n 39, 179.

42. *Lange*, above n 35, 560, 571 (per curium).

43. *Ibid* 561 (per curium).

East Timor. It was in this respect – and at that time – an important subject matter in Australian political discourse.

Moreover, if we swap the Indonesian for an Australian flag and make the protest about the treatment of asylum seekers by the Australian government, then the same conclusion would seem to logically follow. These were the facts in *Kinbacher* where the appellant challenged his disorderly conduct conviction for setting fire to an Australian flag in a public park on Australia Day in 2002 to protest against the government's migration policy. Oddly enough, the appellant did not argue that the relevant statutory provision was invalid for offending the implied freedom but 'that because he was engaged in what he regarded as a political protest his right to communicate his criticisms of Government migration policy were protected by the Constitution and his conduct could not therefore be disorderly'.⁴⁴ The Queensland Court of Appeal quite rightly rejected this argument:

The applicant's contention that his conduct could not have been disorderly because it was an expression of political opinion or participation in a criticism of Government debate cannot be accepted. His motive for his conduct and the characterisation of it as 'political' are both irrelevant. Acts which the law makes criminal do not cease to have that character by reason that they are the expression of political opinion. The point is too obvious to need explanation. Were it otherwise the murder of a Prime Minister whose policies one despised would be a constitutionally protected act of political debate.⁴⁵

However, as the High Court demonstrated in *Nationwide News* it is possible for the Constitution to render lawful otherwise criminal acts that fall within the zone of constitutionally protected political communication.⁴⁶ But it is also true that political communication is not afforded *absolute* legal protection by the Constitution as the 'murder of the Prime Minister example' clearly illustrates. At any rate, what is important for present purposes is that to peacefully burn or deface, defile, mutilate or trample upon the Australian flag to express disgust with or opposition to an Australian government policy or decision is a form of 'non-verbal conduct which is capable of communicating an idea about the government or politics of the Commonwealth and which is intended to do so'.⁴⁷ If so, the FAB – which seeks to criminalise such behaviour – would effectively burden freedom of communication about government or political matters in its terms, operation *and* effect.

44. *Kinbacher*, above n 40, [18] (Chesterman J).

45. *Ibid* [23].

46. See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 52–52 (Brennan J), 78–80 (Deane and Toohey JJ), 94–5 (Gaudron J) ('*Nationwide News*') where they held that a provision which made it an offence for an person to use words calculated to bring a member of the Industrial Relations Commission into disrepute was invalid for offending the implied freedom.

47. *Levy*, above n 38, 595 (Brennan CJ).

2. The second limb

The application of the second limb of the test to the *FAB* is not so straightforward. This is not surprising for reasonable judicial minds will differ as to whether a legislative measure is *reasonably appropriate and adapted* to serve a constitutional end.⁴⁸ As Gleeson CJ and Kirby J noted in *Mulholland v Australian Electoral Commission*, this test involves a proportionality-style inquiry.⁴⁹ This is generally understood to involve a judicial assessment as to whether a law is ‘suitable’ (a rational means of achieving its objective), ‘necessary’ (impose as little as possible the relevant right or freedom) and ‘balanced’ (the importance of its objective outweighs its restriction on the relevant right or freedom). Other judges use not the language of ‘proportionality’ but consider that ‘[i]f the *direct* purpose of the law is to restrict political communication, it is valid only if *necessary* for the attainment of some overriding public purpose’.⁵⁰ That is, they apply stricter judicial scrutiny to laws whose purpose is to *target* – rather than incidentally effect or burden – political communication.⁵¹ Either way, the essence of the inquiry is the same. It boils down to the State having a much tougher job convincing a court that a law is valid when it *direct targets or restricts constitutionally protected political communication*.

It is clear enough that the *FAB* directly targets – by criminal prohibition – a constitutionally protected form of political communication, flag desecration. This translates to a more rigorous application of the proportionality test as the means by which heightened judicial scrutiny of the *FAB* is affected. In *Coleman*, for example, McHugh J wrote:

[T]he reasonably appropriate and adapted test gives legislatures within the federation a margin of choice as to how a legitimate end may be achieved at all events in cases where there is not a total ban on such communications. The constitutional test does not call for nice judgments as to whether one course is slightly preferable to another.⁵²

In a similar vein, Gleeson CJ said that *Coleman*:

[did] not raise an issue as to the method and standard of scrutiny to be applied in judicial review of a law ‘whose character is that of a law with respect to the prohibition or restriction of [political] communications’. *If it did, the law would be ‘valid only if necessary for the attainment of some overriding public purpose’*.⁵³

48. See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 197 (Gleeson CJ) (*‘Mulholland’*).

49. *Ibid* 199–200 (Gleeson CJ), 266–7 (Kirby J).

50. *Levy*, above n 38, 619 (Gaudron J).

51. See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ).

52. *Coleman*, above n 37, 52–3 (emphasis added).

53. *Ibid* 31–2 (emphasis added).

Consequently, there is broad judicial agreement on the High Court that heightened scrutiny must attend a law like the *FAB* which directly targets political communication. But as I will seek to demonstrate in the following analysis, the manner in which that heightened scrutiny is affected – and therefore the final assessment as to the proportionality of the *FAB* – may well differ depending on the reviewing judge. This is because judges reasonably differ as to the nature of the system of representative and responsible government that the Constitution established.

(a) A robust conception of the implied freedom and the proportionality of the *FAB*

In *Coleman*, McHugh, Gummow, Hayne and Kirby JJ endorsed a conception of the implied freedom that was informed by a robust, emotive and sometimes intemperate political discourse.⁵⁴ In this regard Kirby J observed that:

One might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion... This is the way present and potential elected representatives have long campaigned in Australia for the votes of constituents and the support of their policies. By protecting from legislative burdens governmental and political communications in Australia, the Constitution addresses the nation's representative government as it is practised. It does not protect only the whispered civilities of intellectual discourse.⁵⁵

Importantly, on this conception of the implied freedom the only coherent purpose of the *FAB* is to honour and protect 'the ideals for which our national flag stands including our history, geography and unity as a federated nation.'⁵⁶ This is clearly a purpose that is compatible with the system of representative and responsible government prescribed by the Constitution.⁵⁷ But the critical proportionality issue is whether it's an 'overriding public purpose' and making flag desecration a crime is 'necessary' for its attainment? It is also important to keep in mind that 'necessary' in the context of stricter judicial scrutiny entails the *FAB* being tailored to secure that purpose in a manner that minimally impairs the right to engage in the peaceful

54. Ibid 45 (McHugh J), 78 (Gummow & Hayne JJ), 91 (Kirby J).

55. Ibid 91 (Kirby J).

56. Commonwealth, *Parliamentary Debates* (HR), 30 Aug 2001, 30708 (John Anderson, Minister for Transport and Regional Services); see generally E Barendt, *Freedom of Speech* (Oxford: OUP, 2nd edn, 2005) 84.

57. See eg *Johnson* 491 US 397 (1989) 410, 418 where Brennan J for the Court said, 'It is not that State's ends, but its means, to which we object. It cannot be gainsaid that there is a special place reserved for the flag in this Nation, and thus we do not doubt that the government has a legitimate interest in making efforts "to preserv[e] the national flag as an unalloyed symbol of our country".'

desecration of the Australian flag, the constitutionally protected form of political communication.⁵⁸

In any event, it is reasonable to assume that most Australians may consider protecting the symbolic importance and value of the Australian flag to be an important if not overriding public purpose. But is making its desecration a crime ‘necessary’ to secure this purpose? In other words, is it possible to preserve the Australian flag as a symbol of our nationhood and national unity without making its desecration a crime? The answer must surely be yes. The Australian Government already fosters national unity and our sense of nationhood through its coordination of events such as Australia Day and Anzac Day. More specifically, it could promote a National Flag Day and fund school education programs that teach its historical significance and potent symbolism. Indeed, a conscious decision by the State to tolerate this form of symbolic political protest may even serve to strengthen rather dilute national unity and pride as Scalia J suggested during argument in *Johnson*, the most important flag desecration decision of the United States Supreme Court:

[W]hy did the defendant’s actions destroy the symbol? ... His actions would have been useless unless the flag was a very good symbol for what he intended to show contempt for. His action does not make the flag any less a symbol.... I think when somebody does that to the flag, the flag becomes even more a symbol of the country.⁵⁹

This analysis suggests that on a robust conception of the implied freedom the FAB is disproportionate (in the relevant legal sense) for making the desecration of the Australian flag a crime is not ‘necessary’ to protect and honour its symbolic value.

(b) A pro-civility conception of the implied freedom and the proportionality of the FAB⁶⁰

In *Coleman*, Gleeson CJ, Callinan and Heydon JJ articulated a very different vision of the implied freedom and political discourse more generally. They considered civility – indeed security – in public discourse a fundamental value that was not only essential to public order *but to the proper functioning of the implied freedom*.⁶¹

58. See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ), 235 (McHugh J); *Levy*, above n 38, 619 (Gaudron J), 614–15 (Toohey & Gummow JJ).

59. RA Smolla, *Free Speech in an Open Society* (New York: Knopf, 1992) 83.

60. I acknowledge here that my characterisation of the conception of the implied freedom in terms of (anti/pro) civility is taken from A Stone & S Evans, ‘Developments: Freedom of Speech and Insult in the High Court of Australia’ (2006) 4 *Int’l J Constitutional Law* 677. This article contains an excellent analysis of the majority (anti-civility) and minority (pro-civility) judgments in *Coleman* from this theoretical perspective.

61. *Coleman* above n 37, 32 (Gleeson CJ), 113–14 (Callinan J), 124–6 (Heydon J).

In assessing the validity of a public order offence, Heydon J made the following observations:⁶²

A legislative attempt to increase the standards of civilisation to which citizens must conform in public is legitimate. In promoting civilised standards, section 7(1)(d) not only improves the quality of communication on government and political matters by those who might otherwise descend to insults, but it also increases the chance that those who might otherwise have been insulted, and those who might otherwise have heard the insults, will respond to the communications that they have heard in a like manner and thereby enhance the quantity and quality of the debate.⁶³

On this pro-civility conception of the implied freedom the FAB has another purpose other than to protect the symbolic importance of the Australian Flag. It is to maintain public order by prohibiting a form of behaviour that has the capacity to provoke a breach of the peace. And as Heydon J noted above, this additional public order purpose is not only compatible with the system of representative and responsible government established by the Constitution it is essential to its proper functioning. However a law that directly targets political communication (like the FAB) must still survive heightened judicial scrutiny, as Gleeson CJ⁶⁴ and Heydon J made clear in *Coleman*.

[A] law that incidentally restricts or burdens the constitutional freedom as a consequence of regulating another subject matter is easier to justify as being consistent with the constitutional freedom than a law that directly restricts or burdens a characteristic of the constitutional freedom.⁶⁵

Therefore, on this conception of the implied freedom the critical proportionality question for the FAB is as follows: Is it tailored to secure these constitutional purposes in a manner that minimally impairs the right to engage in the peaceful desecration of the Australian flag? The answer to this question will ultimately turn on whether the FAB secures its public order purpose in a proportionate manner. If it does, then it is difficult to conceive of another legislative option that can achieve *both* purposes with a lesser burden on the implied freedom.

From a proportionality perspective, the main problem with the FAB is that it criminally proscribes every instance of flag desecration irrespective of its capacity (or otherwise) to provoke public disorder. It is possible to engage in the desecration of the Australian flag *in circumstances* where there is no likelihood that public order will be threatened or disturbed and still commit a criminal offence. On the other hand, a flag desecration law that made it an offence to ‘burn or deface,

62. This public order offence – Vagrants, Gaming and Other Offences Act 1931 (Qld) s 7 – in the context of flag desecration is considered in some detail in Part IV below.

63. *Coleman* above n 37, 122.

64. *Ibid* 31 (Gleeson CJ).

65. *Ibid* 123 (Heydon J) (footnotes omitted).

defile, mutilate or trample upon or otherwise desecrate' the Australian flag where it was intended or likely in the circumstances to occasion a breach of the peace is tailored to attain the twin legislative purposes (protecting the flag's symbolic value and preserve public order) in a manner that seeks to minimise the burden on the constitutional freedom. Such a law may well pass constitutional muster on a pro-civility conception of the implied freedom.

But the FAB makes no attempt to limit its coverage to such circumstances. It does not discriminate between those instances of flag desecration which constitute peaceful and, therefore, legitimate political communication and those which in the circumstances pose a real threat to the public order that is necessary for 'individuals to live peacefully and with dignity' and for the implied freedom to properly function. Its direct targeting of a species of political communication and its unqualified criminal prohibition in this regard make the FAB constitutionally suspect. As McHugh J rightly observed in *Coleman*, though it is appropriate for legislatures to have a margin of choice 'in cases where there is not a total ban on such communications':

[T]he Constitution's tolerance of the legislative judgment ends once it is apparent that the selected course unreasonably burdens the communication given the availability of other alternatives. The communication will not remain free in the relevant sense if the burden is unreasonably greater than is achievable by other means.⁶⁶

There is therefore a strong argument that even on a pro-civility conception of the implied freedom the FAB cannot be considered a law that is 'necessary' to attain these legislative purposes and lacks the required proportionality as a consequence.

IV FLAG DESECRATION, THE IMPLIED FREEDOM AND PUBLIC ORDER OFFENCES

As the decision in *Kinbacher* makes clear, it is already possible to commit a crime by desecrating the Australian flag in a public place. The conviction in *Kinbacher* was for disorderly conduct under section 7(1) of the Vagrants, Gaming and Other Offences Act 1931 (Qld). It reads:

Any person who, in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear

- (a) sings any obscene song or ballad;
- (b) writes or draws any indecent or obscene word, figure, or representation;
- (c) uses any profane, indecent, or obscene language;
- (d) uses any threatening, abusive, or insulting words to any person;

66. Ibid 53.

- (e) behaves in a riotous, violent, disorderly, indecent, offensive, threatening, or insulting manner;

shall be liable to a penalty of \$100 or to imprisonment for 6 months.

There are similar public order offences on the statute book of every State and Territory.⁶⁷ They commonly proscribe behaviour undertaken in a public place that is offensive, disorderly, insulting, threatening, abusive or riotous. The breadth and imprecision of these key terms means public order offences of this kind potentially cast a very wide net. The spectrum of behaviour that may fall between ‘insulting’ and ‘riotous’ is great indeed. And on a plain and ordinary construction of those terms, the desecration of the Australian flag in a public place may clearly be considered ‘offensive’, ‘insulting’ or ‘disorderly’ as *Kinbacher* demonstrated.

In any event, the High Court in *Coleman* considered the scope of sub-section (d) – ‘threatening, abusive, or insulting words’ – of section 7. The case involved prominent Townsville activist Patrick Coleman, the same person, incidentally, convicted for disorderly conduct for burning the Australian flag in *Kinbacher*. Coleman was prosecuted for his conduct whilst protesting in a Townsville shopping mall against members of the local police force whom he considered corrupt. To this end, he was ‘distributing pamphlets which contained charges of corruption against several police officers’⁶⁸ and when the respondent asked to see a pamphlet Coleman pushed him and ‘said loudly: “This is Constable Brendan Power, a corrupt police officer”’.⁶⁹

Interestingly in *Coleman* there were three quite different approaches to the construction of a public order offence like section 7 when the impugned behaviour was considered political communication. First, it may be incompatible with the implied freedom and invalid as a consequence if it disproportionately proscribes political communication. Second, the principle of legality that says ‘[f]undamental common law rights are not to be eroded or curtailed save by clear words’⁷⁰ may significantly narrow the scope of expressive conduct caught by section 7. This approach was ‘reinforced’⁷¹ by the principles of the implied freedom.⁷² And third, one may consider that section 7 is compatible with the implied freedom – as it secures the conditions that promote the uninhibited flow of political communication necessary to ensure free and informed federal election voting choices – and so should be given its ordinary and natural construction.

67. See eg Crimes Act 1900 (ACT) s 392; Summary Offences Act 1988 (NSW) ss 4 & 4A; Summary Offences Act 1988 (NT) s 47; Summary Offences Act 1953 (SA) s 7; Summary Offences Act 1966 (Vic) s 17; Criminal Code Act Compilation Act 1913 (WA) s 74A. For a detailed discussion on the content and scope of public order offences in Australia, see S Bronitt & B McSherry, *Principles of Criminal Law* (Sydney: Law Book Co, 2nd edn, 2005) ch 13.

68. *Coleman*, above n 37, 184 (Gleeson CJ).

69. *Ibid*.

70. *Ibid* 75 (Gummow & Hayne JJ).

71. *Ibid* 77 (Gummow & Hayne JJ).

72. See *ibid* 77–9 (Gummow & Hayne JJ), 87–91 (Kirby J).

In the specific context of flag desecration and public order offences, whether a judge takes the first or third interpretive approach will, again, turn on their conception of the system of representative and responsible government established by the Constitution. And whilst the second approach is distinct from and independent of the implied freedom, I would argue that judges who favour it have a (robust) conception of political discourse that is very similar to the one that underpins the first approach. But it should first be noted that as the restriction of political communication is *not* the direct purpose of public order offences like section 7 this makes them less vulnerable to invalidation than flag desecration laws like the FAB. As noted in Part III, in the application of the implied freedom courts are generally prepared to give legislatures more leeway when reviewing laws that have another constitutional purpose and only incidentally burden political communication.

1. Flag desecration and the interpretation of public order offences from a robust conception of the implied freedom

In *Coleman*, McHugh J found that the words used ‘were a communication on political or government matters’ and said that it was ‘beside the point that those words were insulting to Constable Power. Insults are as much a part of communications concerning political and government matters as is irony, humour or acerbic criticism’.⁷³ Similarly, Gummow and Hayne JJ noted that ‘[i]nsult and invective have been employed in political communication at least since the time of Demosthenes’.⁷⁴ As noted above,⁷⁵ these judges along with Kirby J endorsed a conception of the implied freedom that is informed by a robust, emotive and sometimes intemperate political discourse.⁷⁶ It necessarily extends constitutional protection to a broad range of communications.

However, Gummow, Hayne and Kirby JJ employed the principle of legality (the second interpretive approach) to give section 7 a narrow construction. For these judges, words (or conduct) are ‘insulting’ only if ‘they are intended to, or they are reasonably likely to provoke unlawful physical retaliation.’⁷⁷

The Act, so interpreted, is confined to preventing and sanctioning public violence and provocation to such conduct. As such, it deals with extreme conduct or ‘fighting’ words. It has always been a legitimate function of government to prevent and punish behaviour of such kind.⁷⁸

On this common law interpretive approach section 7 was valid.⁷⁹ The constitutional issue was therefore avoided. However, Gummow, Hayne and Kirby JJ made clear that if a public order offence like section 7 was not (narrowly) construed in this

73. Ibid 45.

74. Ibid 78.

75.. See above pp 84–5.

76. *Coleman*, above n 37, 91.

77. Ibid 77 (Gummow & Hayne JJ), 98–9 (Kirby J).

78. Ibid.

79. Ibid 74–9 (Gummow & Hayne JJ), 98–9 (Kirby J).

way then it would be incompatible with their robust conception of the implied freedom.⁸⁰ It is in this regard that their common law interpretive approach was ‘reinforced’ by principles of the implied freedom.

Importantly for present purposes, these judges are unlikely to consider flag desecration to be the sort of extreme conduct that is caught by section 7. If ‘insulting’ – the least serious of its harm thresholds – is equated with words or conduct whose *likely* consequence is to provoke an immediate and unlawful physical retaliation then flag desecration *per se* is unlikely to fall within its purview. There may of course be circumstances where desecrating the Australian flag could breach a public order offence like section 7. Examples might include setting fire to the flag during the Anzac Day ceremonies or during the funeral service for a member of the armed forces. But on the common law interpretive approach the desecration of the Australian flag in a public place will be lawful if done peacefully, safely and in circumstances where immediate physical violence is unlikely.

On the other hand, McHugh J in *Coleman* did not consider the common law interpretive approach available, though he shared their robust conception of the implied freedom. He thought the plain and ordinary meaning of ‘insulting’ was clear enough and extended to a very wide range of words and conduct.⁸¹ This left no scope for the application of the principle of legality employed by Gummow, Hayne and Kirby JJ and translated to a complete prohibition on political communication made with insulting words or conduct. This in McHugh J’s view was constitutionally impermissible:

[I]nsults are a legitimate part of the political discussion protected by the Constitution. An unqualified prohibition on their use cannot be justified as compatible with the constitutional freedom. Such a prohibition goes beyond anything that could be regarded as reasonably appropriate and adapted to maintaining the system of representative government.⁸²

On this approach, McHugh J would likely consider flag desecration – a form of political communication – to be expressive conduct that at that very least had the capacity to insult and offend on an ordinary construction of those terms. Consequently, its ‘unqualified prohibition’ by public order offences like section 7 would also be constitutionally impermissible.

The upshot is that judges with a robust conception of the implied freedom are likely to interpret public order offences like section 7 in a manner that ensures flag desecration *per se* is lawful. And as my analysis of *Coleman* demonstrates, this would be the case whether a judge employed the first (constitutional) or second (common law) interpretive approach. Moreover, a judge with this conception of political discourse would likely reject both the construction of section 7 and the

80. Ibid 77 (Gummow & Hayne JJ), 99 (Kirby J).

81. Ibid 40–1.

82. Ibid 54.

final decision of the Queensland Court of Appeal in *Kinbacher*. For the practical effect – *on either interpretive approach* – is to immunise the constitutionally protected political communication of desecrating the Australian flag in this context from criminal prosecution.

2. Flag desecration and the interpretation of public order offences from a pro-civility conception of the implied freedom

The legality of flag desecration under public order offences like section 7 is another matter altogether on a pro-civility conception of the implied freedom. It was this conception which Gleeson CJ, Callinan and Heydon JJ endorsed in *Coleman*, as noted above.⁸³ It led Heydon J to describe section 7 in the following terms:

The goals of section 7(1)(d) are directed to ‘the preservation of an ordered and democratic society’ and ‘the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity within such a society’. Insulting words are inconsistent with that society and those claims because they are inconsistent with civilised standards. A legislative attempt to increase the standards of civilisation to which citizens must conform in public is legitimate.⁸⁴

On this view a public order offence like section 7 also serves to improve the quality and quantity of political communication by providing an environment where more of the citizenry feel able and secure to participate in civilised political debate.⁸⁵ Even though these judges assumed – without deciding – that *Coleman*’s insulting words were constitutionally-protected political communication, they considered the offence to be reasonably appropriate and adapted to serve the legitimate constitutional purpose of promoting civility and security in public (and political) discourse. In this regard it was easier to justify the proportionality of section 7 as it regulates another subject matter (public order) and only ‘incidentally restricts or burdens the constitutional freedom’.⁸⁶ And as Heydon J explained, *any* political opinion or idea could still be lawfully expressed if done civilly:

[The law] leaves a very wide field for the discussion of government and political matters by non-insulting words, and it leaves a wide field for the use of insulting words (in private, or to persons other than those insulted or persons associated with them). In short, it leaves citizens free to use insults in private, and to debate in public any subject they choose so long as they abstain from insults.⁸⁷

Importantly, these observations suggest three things about flag desecration when evaluated from a pro-civility conception of the implied freedom. The first

83. See above pp 85–7.

84. Ibid 122.

85. Ibid.

86. Ibid 123 (Heydon J).

87. Ibid.

is that it is likely – though by no means certain⁸⁸ – to be considered ‘political communication’. Second, the desecration of the Australian flag in a public place may well, though, constitute the kind of ‘insulting’, ‘offensive’ or even ‘disorderly’ behaviour that is quite properly proscribed by a public order offence like section 7. In *Kinbacher*, for example, the Magistrate in the first instance made the following findings of fact:

- That his actions were responsible for altering the happy festive mood of some of the persons present, and created a significant feeling of ill-will, if not aggression, and disgust, by some members of the public towards the defendant.
- That some persons ... felt some degree of concern, and unease as to precisely what the defendant was going to do after he lit the flag, some of the concern being because of the presence of a small number of children in the park that day; that Mrs Bettenay was frightened and angry by the conduct of the defendant.⁸⁹

So considered, flag desecration in a public place (like the insulting words in *Coleman*) is legitimately outlawed to facilitate ‘the preservation of order in public places in the interests of the amenity and security of citizens, and so that they may exercise, without undue disturbance, the rights and freedoms involved in the use and enjoyment of such places’.⁹⁰ And third, that public order offences like section 7 still leave available to a citizen a variety of other means to publicly express the *same* dissenting political message or viewpoint that attends flag desecration without the need for such insulting, offensive or disorderly behaviour.⁹¹

88. I say that this characterisation is by no means certain because Gleeson CJ and Heydon JJ *assumed* without deciding that the insulting words in *Coleman* were ‘political communication’ for purposes of the implied freedom – see *ibid* 30 and 120 respectively; see also *ibid* 112 where Callinan J said that section 7 placed no burden on freedom of communication about federal political or governmental affairs and rejected the concession made by the parties that the insulting words were ‘political communication’. Moreover, see *ibid* 30 for the comments of Gleeson CJ where he considered that there was a ‘degree of artificiality’ in characterising these words as ‘political communication’ and that ‘[r]econciling freedom of political expression with the reasonable requirements of public order becomes increasingly difficult when one is operating at the margins of the term “political”.’ The tenor of these comments and observations at least raises the possibility that judges with a pro-civility conception of the implied freedom may consider flag desecration to be at or even beyond the margins of ‘political communication’.

89. *Kinbacher*, above n 40, [10]–[11].

90. *Coleman*, above n 37, 32 (Gleeson CJ).

91. *Ibid* 125. A similar point was made in *Johnson* 491 US 397 (1989) 430–2 in the dissenting judgment of Rehnquist CJ (joined by White & O’Connor JJ): ‘[T]he public burning of the American flag by Johnson was no essential part of any exposition of ideas.... Johnson was free to make any verbal denunciation of the flag that he wished; indeed, he was free to burn the flag in private. He could publicly burn other symbols of the Government or effigies of political leaders.... [H]is act ... conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways.... The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest – a form of protest that was profoundly offensive to many – and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy.’

This analysis suggests that on a pro-civility conception of the implied freedom the criminal proscription of flag desecration in a public place is by no means incompatible with the Constitution. On the contrary, such a law operates to protect the civility and security of the public domain. This fosters a more inclusive and informed political discourse and preserves for all citizens the right ‘to a peaceful enjoyment of public space’.⁹²

3. Why public order offences ought to be interpreted from a robust conception of the implied freedom

The analysis in this Part demonstrates that the current legality or otherwise of desecrating the Australian flag under public order offences like section 7 is not clear-cut. It ultimately turns on the conception of the implied freedom that one holds. And though both accounts considered above are defensible and coherent, for the following reasons it is my view that the more robust conception of the implied freedom ought to be the theoretical touchstone from which public order offences (like section 7) are interpreted.⁹³

First, and most importantly, the implied freedom exists to confer constitutional protection on those communications that are ‘necessary for the effective operation of that system of representative and responsible government provided for by the Constitution’.⁹⁴ More particularly, ‘so that the people may exercise a free and informed choice as electors’.⁹⁵ This constitutional imperative, then, requires the courts to identify and confer constitutional protection upon communications that may *in fact* inform the federal voting choices of the people. That is, the *reality* of political communication, not what it might or ought to be in the eyes of the politically enlightened, ‘high-minded parliamentarian’⁹⁶ or even the majority of the citizenry.⁹⁷ In this regard I think Kirby J’s criticism of the pro-civility conception of the implied freedom in *Coleman* was accurate and so too his characterisation of Australian constitutional government:

Reading the description of civilised interchange about governmental and political matters in the reasons of Heydon J, I had difficulty in recognising the Australian political system as I know it. His Honour’s chronicle appears more like a description of an intellectual salon where civility always (or usually) prevails. It

92. *Coleman*, *ibid* 32 (Gleeson CJ).

93. For a strong argument along these lines in the UK context – post-Human Rights Act 1998 (UK), see A Geddis, ‘Free Speech Martyrs or Unreasonable Threats to Social Peace? – “Insulting” Expression and Section 5 of the Public Order Act 1986’ [2004] Public Law 853.

94. *Lange*, above n 35, 561 (per curiam).

95. *Coleman*, above n 37, 120–1 (Heydon J); see also *Lange*, *ibid*.

96. M Chesterman, ‘When is a Communication “Political”?’ (2000) 14(2) *Legislative Studies* 5, 132.

97. Indeed it may be the essence of a constitutional right (to freedom of political communication) that it serves to protect unpopular or dissenting viewpoints. The majority, as is often observed, can and will look after themselves.

is not, with respect, an accurate description of the Australian governmental and political system *in action*.⁹⁸

In Australia, we tolerate robust public expression of opinions because it is part of our freedom and inherent in the constitutional system of representative democracy. That system requires freedom of communication. It belongs to the obsessive, the emotional and the inarticulate as it does the logical, the cerebral and the restrained.⁹⁹

On this view seeking to limit constitutional protection to that which in a judge's estimation is 'civil' runs the risk of political communication being defined in terms of what it ought to be, not what it is.¹⁰⁰ It would betray the constitutional imperative of the implied freedom and its key criterion for determining whether a communication is 'political': its capacity to *in fact* inform federal voting choices. It should also be kept in mind that much political communication emanates from, and is properly the discourse of, the citizenry, whatever form it may take.¹⁰¹

A second and related justification for a robust conception of the implied freedom is that 'procivility laws are dangerous because they risk government misjudgment or misuse; that it is, therefore, better to allow some insults than to risk the possible distortion caused by procivility regulation'.¹⁰² As Simon Evans and Adrienne Stone have suggested:

[This] might reflect an assessment that procivility regulation risks excluding members of marginalized groups from participating in the democratic system of government required by the Constitution. Civility is an inherently conservative standard. It reflects established social practices. It may, as a result, allow for class, gender and race-based discrimination by in-groups in deciding who could appropriately participate in public life and in what ways.¹⁰³

It may be for a marginalised or comparatively powerless person or group that the political message conveyed by the public desecration of the flag and the circumstances in which it is done has the potential to 'cut-through' where other, more 'civilised', forms of communication cannot.

And third, in my view courts have a limited institutional capacity to determine with any certainty what is necessary for the effective operation of our constitutional

98. *Coleman*, above n 37, 91 (emphasis added).

99. *Ibid* 99–100.

100. See Stone & Evans, above n 60, 685–6.

101. For example, the broadcast of a song that crudely lampoons the putative racist views of a federal political candidate on a national youth radio station may well be offensive, uncivil and insulting. But it is simply wrong to conclude that it has no capacity to inform the federal voting choice of a young listener. But see *Australian Broadcasting Corporation v Hanson* (Unreported, Queensland Court of Appeal, de Jersey CJ, McMurdo P & McPherson JA, 28 Sep 1998).

102. Stone & Evans, above n 82, 685.

103. *Ibid*.

system of representative and responsible government. This kind of assessment and analysis has as much to do with politics and sociology as the law.¹⁰⁴ Judges are no better equipped than anyone else – an observation not a criticism – to draw a bright line between political and non-political communication. Yet the application of a pro-civility conception of the implied freedom is predicated on the erroneous assumption that judges not only can draw this line, but also one between civil and non-civil political communication.¹⁰⁵ Moreover, as the judgments of Gummow, Hayne and Kirby JJ demonstrated in *Coleman*, a robust conception of the implied freedom can inform an interpretive approach which honours its constitutional imperative and also upholds the validity of public order offences like section 7. This is important. If for example the peaceful desecration of the Australian flag were to occur at a public protest that suddenly turned nasty, these offences are still fully equipped to catch behaviour that turns threatening, abusive or even violent. It therefore leaves ample scope for the law to operate to preserve public order without diminishing the right of a citizen to engage in this form of symbolic political expression.

V THE STATUS OF FLAG DESECRATION UNDER A STATUTORY BILL OF RIGHTS

Finally, in the analysis to follow I hope to demonstrate that the conclusions made in Parts III and IV regarding the legal treatment of flag desecration under Australian law will not differ under a statutory bill of rights. That is, a statutory rights instrument (of the kind now operating in the ACT and Victoria) will not alter what I have argued above is the legal status of flag desecration under the FAB and existing public order offences.¹⁰⁶ This is due to the analytical overlap between a statutory bill of rights and the implied freedom when they are applied to *a law that implicates a form of political communication or expression*.

1. The nature of the analytical overlap between statutory bills of rights and the implied freedom

In order to explain the nature of the analytical overlap when the law to be assessed implicates a form of political communication or expression it is necessary to briefly outline the core interpretive obligation placed upon courts by a statutory bill of rights. In essence, it is that if possible a court must interpret legislation in a manner that is consistent with its underlying purpose and compatible with human

104. See D Meagher, 'What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28 MULR 438, 457–9.

105. See A Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 MULR 389.

106. See generally C Evans, 'State Charters of Human Rights: The Seven Deadly Sins of Statutory Bills of Rights Opponents' (Paper presented at the Gilbert + Tobin Centre of Public Law Constitutional Law Conference, Sydney, 16 Feb 2007); Consultation Committee for a Proposed WA Human Rights Act, *Report of the Consultation Committee for a Proposed WA Human Rights Act* (Nov 2007).

rights.¹⁰⁷ A law is rights compatible if it respects the protected right *or* the limit it places upon the right is reasonable and can be demonstrably justified in a free and democratic society.¹⁰⁸ If a rights compatible interpretation of a law is not possible, then the court can make a declaration of incompatibility, but this does not affect the validity of the legislation.¹⁰⁹

The upshot is that under a statutory bill of rights there are three interpretive possibilities available to a court when a law (such as the FAB or a public order offence like section 7) is said to implicate a protected right (such as the freedom of expression entailed in flag desecration):

1. The law respects the relevant right so can be interpreted in a rights compatible manner; or
2. The law limits the relevant right but it is a reasonable limitation that can be demonstrably justified in a free and democratic society, so can be interpreted in a rights compatible manner; or
3. The law cannot be interpreted in a rights compatible manner and a declaration of incompatibility will issue.

The critical point for present purposes is the nature of the rights limitation analysis that occurs under the second and third of these interpretive possibilities. In order to make this assessment a court is directed as follows:¹¹⁰

107. Human Rights Act 2004 (ACT) s 30; Charter of Human Rights and Responsibilities Act 2007 (Vic) s 32; see generally S Beckett, 'Interpreting Legislation Consistently with Human Rights', (Paper presented to the 2007 National Administrative Law Forum, 14–15 June 2007).

108. Human Rights Act 2004 (ACT) s 28; Charter of Human Rights and Responsibilities Act 2007 (Vic) s 7.

109. Human Rights Act 2004 (ACT) s 32; Charter of Human Rights and Responsibilities Act 2007 (Vic) s 36.

110. Human Rights Act 2004 (ACT) s 28; Charter of Human Rights and Responsibilities Act 2007 (Vic) s 7. I note here that the right to freedom of expression in the Victoria Charter (s 15) has its own internal limitations clause in sub-s (3). It reads: 'Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary – (a) to respect the rights and reputation of other persons; or (b) for the protection of national security, public order, public health or public morality.' Therefore, the rights (limitation) analysis for laws that implicate freedom of expression will be done *within* section 15 not pursuant to section 7 of the *Charter* as will be the case with most rights. However, the wording of sub-section (3) makes clear that it is properly considered a limitations analysis rather than a component of the right itself. This means that a law that falls within the scope sub-section (3) still infringes the right to freedom of expression but is considered a reasonably necessary lawful restriction for one of the purposes outlined in parts (a) and (b). Moreover, I would argue that the right to freedom of expression can *only* be limited for the reasons listed in parts (a) and (b). It would make little drafting sense to explicitly note these instances in sub-section 3 (a) and (b) if the State could then lawfully restrict freedom of expression for *any* other purpose under the general limitations clause in s 7. Importantly, this has been the construction given to the similarly worded right to freedom of expression in the International Covenant on Civil and Political Rights, Art 19 – see General Comment 10 (UN Human Rights Committee, 19th sess, 27 Jul 1983). What is also clear from the Art 19 jurisprudence is that the internal limitations analysis in the free expression right is essentially the same as that undertaken pursuant to the general

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

This rights limitation analysis framework is taken from the equivalent provision in the South African Bill of Rights¹¹¹ that, in turn, was derived from the seminal rights decision of the Canadian Supreme Court in *R v Oakes*.¹¹² In both instances the Canadian and South African courts have made clear that the application of a proportionality test is involved.¹¹³ Moreover, in those other Commonwealth jurisdictions with statutory bills of rights – New Zealand and the United Kingdom – the courts also apply a proportionality test to determine whether a limit upon a right is ‘necessary’ and ‘can be demonstrably justified’ in a democratic society.¹¹⁴ *Most importantly for present purposes, the proportionality test employed in a statutory bill of rights limitation analysis is the same proportionality test used in the application of the implied freedom.*¹¹⁵

limitations clause: the law must be proportionate in the relevant legal sense: see *Faurisson v France*, Communication No. 550/1993, UN Doc. CCPR/C/58/D/550/1993(1996) (550/93); see generally S Joseph, J Schultz & M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: OUP, 2nd ed, 2005) [18.18]–[18.21].

- 111. Constitution of the Republic of South Africa 1996, s 36(1). The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: (i) the nature of the right; (ii) the importance of the purpose of the limitation; (iii) the nature and extent of the limitation; (iv) the relation between the limitation and its purpose; and (v) less restrictive means to achieve the purpose.
- 112. [1986] 1 SCR 103, 138–139 (*Oakes*); see further PW Hogg, *Constitutional Law of Canada* (Ontario: Carswell, student edn, 2006) 841–2.
- 113. *Oakes*, ibid 138–139 (Dickson CJ). In the context of the South African Bill of Rights, see *S v Makwanyane* 1995 (3) SA 391 (CC) [104].
- 114. See for NZ: *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA); UK: *R v A* [2002] 1 AC 45; ACT: Human Rights Act 2004 (ACT) s 28 – ‘Human Rights May Be Limited’. Explanatory Statement, Human Rights Bill 2003 (ACT) 4 stated ‘Clause 28 requires that the limit must be authorised by a Territory statute or statutory instrument. The limitation must also be reasonable and one that can be demonstrably justified in a free and democratic society. Whether a limit is reasonable depends upon whether it is proportionate to achieve a legitimate aim. Proportionality requires that the limitation be: necessary and rationally connected to the objective; the least restrictive in order to accomplish the object; and not have a disproportionately severe effect on the person to whom it applies.’
- 115. See eg *Coleman* above n 37, n 160 where Gummow and Hayne JJ state, ‘[i]n this [implied freedom] context there is little difference between the test of “reasonably appropriate and adapted” and the test of proportionality’, 32 (Gleeson CJ), 90–1 (Kirby J); see also *Mulholland*, above n 48, 197–200 (Gleeson CJ), 266–267 (Kirby J).

In any event, in the context of the FAB or a public order offence like section 7 the first issue considered in a statutory bill of rights analysis is whether the law implicates a protected right. The right to freedom of expression is clearly implicated by the FAB which directly targets by criminal prohibition a form of symbolic (political) expression. And so too section 7, as the criminal prosecutions in *Kinbacher* (for flag desecration) and *Coleman* (for insulting words) serve to illustrate.¹¹⁶ The free expression right provides in this regard that every person may ‘impart information and ideas of all kinds’ *through any medium they chose*.¹¹⁷ Indeed, it may be that (symbolic) *political* expression – like flag desecration – is not only contemplated by a free expression right but lies at its very core.¹¹⁸

It then falls to consider whether it is possible to interpret these laws in a manner that is consistent with their underlying purpose(s) and is compatible with the right to freedom of expression (in the form of flag desecration), as the statutory bill of rights interpretive obligation mandates.

2. The interpretation of the FAB under a statutory bill of rights

In the case of the FAB the rights limitation analysis is reasonably straightforward. As noted, it involves the application of the proportionality test; the *same* judicial obligation and analysis involved in the application of the implied freedom to the FAB which was undertaken in Part III.¹¹⁹ That analysis suggested that on either conception of the implied freedom the FAB lacked proportionality. To recall, its key defect was the criminal proscription of every instance of flag desecration irrespective of its capacity to provoke or disturb public order. The FAB makes no attempt to discriminate between those instances of flag desecration that constitute peaceful and, therefore, legitimate political expression and those which in the circumstances pose a threat to public order.

116. The right to freedom of expression: Human Rights Act 2004 (ACT) s 16; Charter of Human Rights and Responsibilities Act 2007 (Vic) s 15.

117. See Human Rights Act 2004 (ACT) s 16(2); Charter of Human Rights and Responsibilities Act 2007 (Vic) s 15(2).

118. That this is so becomes clear when one reflects on the arguments for and reasons why freedom of expression attracts some form of legal or constitutional protection within most western legal systems. They typically include the search for truth, the right to self-determination or individual autonomy, distrust or suspicion of government regulation of expression and to facilitate meaningful self-government. The argument from truth may explain why the right to freedom of expression may be limited when ‘reasonably necessary to respect the rights and reputations of other persons’ and the underlying logic of the limitations clauses betrays to some extent a suspicion of government regarding its judgment on rights issues. But the express terms of the free expression rights and the founding principles of these Bills of Rights more generally suggest that the arguments from individual autonomy and self-government are the central reasons why freedom of expression is considered valuable and worthy of special legal protection. And, importantly for present purposes, I think Barendt is right to note that the argument from self-government is the pre-eminent reason why free expression is afforded special legal protection for it draws upon the other three arguments and ‘case-law shows the central importance of ‘political speech’ – Barendt, above n 56, 19–21.

119. See above pp 81–7.

In the language of a statutory bill of rights limitation analysis, there are means reasonably available to the legislature to achieve the purpose(s) of the FAB that are less restrictive on the right to engage flag desecration as a form of symbolic political expression.¹²⁰ As noted in Part III,¹²¹ the FAB could make it an offence to ‘burn or deface, defile, mutilate or trample upon or otherwise desecrate’ the Australian flag but only where it was intended or likely in the circumstances to occasion a breach of the peace. The FAB cannot, therefore, be interpreted in a rights compatible manner and a declaration of incompatibility would issue.¹²²

3. The interpretation of public order offences under a statutory bill of rights

The rights limitation analysis for a public order offence like section 7 poses the same interpretive question and also involves the application of a proportionality test; the same analysis undertaken in Part IV. However, the nature of the analytical overlap requires a little more explanation.

The purpose of public order offences like section 7 is, as noted, to ensure ‘the preservation of order in public places in the interests of the amenity and security of citizens ... so that they may exercise, without undue disturbance, the rights and freedoms involved in the use and enjoyment of such places’.¹²³ It is possible to interpret section 7 in a manner that is consistent with this purpose and compatible with the right to engage in flag desecration as a form of symbolic political expression if one adopts the (common law/principle of legality) interpretive approach employed by Gummow, Hayne and Kirby JJ in *Coleman*. That is, if the relevant harm terms – insulting/offensive/disorderly – are narrowly construed to catch only behaviour that is likely to provoke an immediate and unlawful physical retaliation then flag desecration per se will not fall within its purview for the reasons outlined in Part IV.¹²⁴ In other words, *when a law implicates political expression* the first interpretive possibility under a statutory bill of rights corresponds with the application of the common law interpretive approach.¹²⁵

However, a judge may consider the first interpretive possibility to be unavailable or inappropriate in the interpretation of section 7. There is nothing in its wording

120. But see *Hong Kong SAR v Ng Kung Siu* [2000] 1 HKC 117, where the Hong Kong Court of Final Appeal held that two flag desecration laws (similarly framed to the FAB) infringed freedom of political expression but were a necessary and therefore legally proportionate justification for the protection of public order (*ordre public*). See generally R Wacks, ‘Our Flagging Rights’ (2000) Hong Kong LJ 1.

121. See above pp 85–7.

122. As noted, a declaration of incompatibility under a statutory bill of rights does not invalidate the relevant law. By way of contrast, a law that is incompatible with the implied freedom results in its constitutional invalidity.

123. *Coleman*, above n 37, 32 (Gleeson CJ).

124. See above pp 89–90.

125. This was the interpretive approach of the Northern Territory Court of Appeal in *Watson* (1998) 145 FLR 159, 164–7 (Angel J).

to suggest that the legislature intended that the behaviour had to be ‘likely or intended to provoke a breach of the peace’ to be unlawful. Consequently, there is no reason to give the relevant harm terms anything other than their plain and ordinary meaning.¹²⁶ On this approach it is, therefore, likely that flag desecration may constitute insulting, offensive or disorderly behaviour and fall within the scope of the offence. It then becomes a question of whether that limit (the criminal proscription of flag desecration) of the free expression right is reasonable and can be demonstrably justified in a free and democratic society. As noted, this limitations analysis involves the application of the proportionality test to section 7. There are two possible outcomes in my view.

The first mirrors the interpretive approach and proportionality analysis undertaken by Gleeson CJ, Callinan and Heydon JJ in *Coleman*. That is, the law has an important purpose (the preservation of order in public places) and its limit on free expression is not only incidental but cannot be further minimised and still achieve its (public order) purpose. A person is still free to express *any* political opinion or viewpoint so long as they refrain from behaviour that disturbs the right of others to the peaceful enjoyment of public places. Therefore, section 7 limits the right to freedom of (political) expression but it is a reasonable limit that can be demonstrably justified in a free and democratic society. So, *when a law implicates political expression* the second interpretive possibility under a statutory bill of rights corresponds with the application of an interpretive approach that is informed by a pro-civility conception of the implied freedom.

The second outcome under a rights limitation analysis of section 7 is likely to mirror the interpretive approach of McHugh J in *Coleman*. That is, the law has an important (public order) purpose but its ‘unqualified prohibition’ of flag desecration as a form of symbolic political expression ‘cannot be justified as compatible with [a free expression right]’. Such a prohibition goes beyond anything that could be regarded as [a reasonable limitation that can be justified in a free and democratic society].¹²⁷ This is because section 7 does not *limit* the right to free expression in this context it completely forbids it. And this legislative choice cannot be rights compatible when there are other means reasonably available to achieve the (public order) purpose of section 7 that fall short of criminalizing an important form of protected free expression.¹²⁸ To meet the interpretive obligation on this approach would require, for example, that section 7 be amended to make it an element of the offence that the insulting, offensive or disorderly behaviour is likely or intended to provoke a breach of the peace.¹²⁹ So, *when a law implicates political expression* the third interpretive possibility under a statutory bill of rights corresponds with an interpretive approach that is informed by a robust conception of the implied

126. See *Coleman*, above n 37, 24 (Gleeson CJ), 108 (Callinan J), 116–18 (Heydon J).

127. *Ibid* 53 (McHugh J).

128. *Ibid* 52–3 (McHugh J).

129. *Ibid* 53 (McHugh J).

freedom but when there is no scope for applying the common law principle of legality.

VI CONCLUSION

In this article I have sought to discern the status of desecrating the Australian flag under Australian law. After outlining in Part II its cultural and political significance in our contemporary public discourse, it was demonstrated in Part III that flag desecration is political communication that is, *prima facie*, protected under the *Constitution*. This conclusion presents a significant constitutional obstacle for a law – like the FAB – that seeks to make flag desecration in a public place a criminal offence. But that protection is not absolute: a law may still be compatible with the implied freedom if it is reasonably appropriate and adapted to securing another constitutional purpose. However, my analysis in this Part suggested that the FAB may lack a legislative head of power and is likely to fall foul of the implied freedom in any event.

In Part IV, the legal consequences of flag desecration constituting political communication were explored. This was done by considering the interpretation and even validity of public order offences that may already proscribe the desecration of the Australian flag in a public place. This analysis demonstrated that the legality or otherwise of flag desecration depends on one's conception of the system of representative and responsible government established by the *Constitution*. To this end, I made an argument that a robust conception of political discourse ought to be the theoretical touchstone of the implied freedom and can underpin a common law interpretive approach that leaves ample scope for public order offences to preserve public order without diminishing the right of a citizen to engage in this form of symbolic political expression.

Finally, in Part V, I sought to demonstrate that the conclusions made in Parts III and IV regarding the legal treatment of flag desecration under Australian law will not differ under a statutory bill of rights. This is due to the analytical overlap between a statutory bill of rights and the implied freedom when they are applied to *a law that implicates a form of political communication or expression*. In this regard the statutory right to freedom of expression necessarily encompasses – indeed has at its core – a right to freedom of political communication. And it is the same proportionality test used in the application of the implied freedom that forms the core of a statutory bill of rights analysis.

The Australian flag may not engender the same kind of mystical reverence that its American counterpart is said to evoke.¹³⁰ But it remains a potent, evocative and enduring symbol of Australian nationhood. In particular, it has come to embody the people and events that forged and, in times of crisis, defended the democratic institutions and liberties that are the bedrock of the free, open and tolerant society

130. *Johnson*, above n 57, 429 (Rehnquist CJ).

that Australians enjoy and for which they are justifiably proud. It should come as no surprise then that the public desecration of the Australian flag provokes such strong and visceral reactions.

It is, however, worth keeping in mind that people who desecrate the flag often do so to protest against the conduct of an Australian government of the day which *they* consider is at odds with that free, open and tolerant society which the Australian flag symbolises. In other words, it may be that those who revile and those who engage in flag desecration have a similar underlying interest: to protect and honour the values and ideals embodied in and represented by the Australian flag. And in a society like Australia – which is built upon and governed by the rule of law – it is natural and also welcome that it is to the law that people ultimately turn to vindicate their respective interests in the desecration of the Australian flag.
