

# DISHONOURING THE AUSTRALIAN FLAG

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*Dishonouring a nation's flag, usually by way of burning, is a form of protest with provocative symbolism. The selective policing of flag use in Australia reveals much about the culture of flag veneration inculcated in Australian society during and since the Howard era. Flag burners have been arrested and prosecuted for the offences of disorderly and offensive behaviour, but those who have employed the flag in support of nationalistic or anti-immigration causes have not attracted such opprobrium. Yet, successive attempts to criminalise flag burning have never resulted in the enactment of flag protection legislation — in part on account of a desire on the part of conservative politicians not to martyrise flag burners, but also due to the vulnerability of such legislation to legal challenge for incompatibility with the implied freedom of political communication protected by the Constitution. High Court authority suggests that it would be difficult for such legislation to survive constitutional scrutiny unless the relevant provisions were narrowly tailored to welfare concerns such as public safety or public order, and that an objective of preventing offence cannot be a legitimate reason to suppress political communication.*

## I INTRODUCTION

Dishonouring a nation's flag, usually by way of burning, is a form of protest with provocative symbolism. The Australian flag has regularly been burned in protest against issues such as colonisation, militarism, immigration policy and Islamophobia, attracting the attention of media and politicians. Although one might have the impression that the Australian flag does not attract the same degree of reverence as the United States flag,<sup>1</sup> it is fair to say that the significance of the Australian flag underwent something of a transformation since the Howard era, from a benign symbol of patriotism into a venerated object.<sup>2</sup> Consider John Howard's announcement on Anzac Day in 1996 that he

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1 *Texas v Johnson*, 491 US 397, 429 (Rehnquist CJ) (1989): 'The American flag ... throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. ... Millions and millions of Americans regard it with an almost mystical reverence'. Flag burning has also caught the attention of the United States President, who called for a 'loss of citizenship or [a] year in jail' for those who burn the American flag: @realDonaldTrump (Donald J Trump) (Twitter, 29 November 2016, 3:55am) <<https://twitter.com/realdonaldtrump/status/803567993036754944?lang=en>>. See also Michael Welch, 'The Flag-Burning Controversy: Protection of a Venerated Object as Social Control' (1992) 17(1) *American Journal of Criminal Justice* 1.

2 See Graeme Orr, 'A Fetishised Gift: The Legal Status of Flags' (2010) 19 *Griffith Law Review* 504, 510–11, 516–17.

would entrench the flag design in statute,<sup>3</sup> the 1996 proclamation of the annual Australian National Flag Day,<sup>4</sup> Pauline Hanson launching the One Nation party in 1997 draped in an Australian flag, the 2004 regime that made federal funding for schools contingent upon each school having a ‘functioning flag pole and fly[ing] the Australian flag’,<sup>5</sup> and the steadily growing panoply of flags displayed behind former Prime Minister Tony Abbott as he delivered speeches on national security, counterterrorism and the deployment of troops.<sup>6</sup> The frequent references in the media and scholarly literature to flag burning and related actions as *desecration* highlight what Welch describes as the sanctification of the flag as a symbol of civil religion.<sup>7</sup>

This article assesses the role that the flag plays in our legal discourse, how flag use is policed and has been treated by the courts, and the relationship between proposed flag protection legislation and the implied freedom of political communication (‘implied freedom’). As I will demonstrate, flag use in Australia is selectively policed, where those who employ the flag as a symbol of aggressive nationalism are not (unlike their political opponents) subject to media opprobrium or prosecution. It is also clear that the higher courts have taken into account the implied freedom in flag burning cases, and the failure of successive attempts to enact flag protection legislation is, in part, indicative of some awareness of constitutional considerations among legislators. Although the High Court has held the implied freedom extends to protect ‘uncivilised’ and perhaps ‘offensive’ forms of political communication, it has also indicated that legislation targeted at public safety and public order would justify interference with the implied freedom, which suggests that carefully drafted legislation in this area might survive constitutional scrutiny.<sup>8</sup>

3 The *Flags Amendment Act 1998* (Cth) amended s 3 of the *Flags Act 1953* (Cth) to provide that the flag could only be replaced if a majority of state and territory electors qualified to vote for the House of Representatives agree. This amendment has no legal force: either the provision is in breach of s 1 of the *Constitution*, which vests the legislative power of the Commonwealth in the Parliament, or it is ineffective as it can be expressly or impliedly repealed by subsequent legislation.

4 See Commonwealth, *Gazette: Special*, No S 321, 3 September 1996. See also Australian National Flag Association, *National Flag Day: History of National Flag Day* <<https://www.anfa-national.org.au/history-of-our-flag/national-flag-day/>>.

5 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 June 2004, 31 208 (Brendan Nelson). See, eg, Anna Clark, ‘Flying the Flag for Mainstream Australia’ (2006) 11 *Griffith Review* 53.

6 Nick Evershed, ‘Surge in Poles: Tony Abbott’s Flag Count Hits a New High’, *The Guardian* (online), 3 March 2015 <<https://www.theguardian.com/australia-news/australia-news-blog/2015/mar/03/surge-in-poles-tony-abbotts-flag-count-hits-a-new-high>>; Nick Evershed, ‘10-Flag Announcement Brings Government Flag Count to All-Time High’, *The Guardian* (online), 24 June 2015 <<https://www.theguardian.com/news/datablog/2015/jun/24/10-flag-announcement-brings-government-flag-count-to-all-time-high>>.

7 See Michael Welch, *Flag Burning: Moral Panic and the Criminalization of Protest* (Aldine de Gruyter, 2000) ch 3; Orr, above n 2, 507–8.

8 See below Part IV.

## II LEGISLATIVE INTERVENTIONS

Rituals prescribed by the government for the Australian flag emphasise its hallowed status. A protocol issued by the Howard government exhorts us to treat the flag ‘with the respect and dignity it deserves’: the flag must be folded in a particular way, ‘should not be allowed to fall or lie on the ground’, ‘should be raised briskly and lowered with dignity’; whenever it is ‘raised or lowered, or when it is carried in a parade or review, all present should face the flag and remain silent’ and ‘[t]hose in uniform should salute’.<sup>9</sup> The Liberal-National Coalition government continued to reify the flag, conducting a public consultation on ‘changes to flag protocols to include guidance on conducting a retirement ceremony’ for dilapidated Australian flags,<sup>10</sup> and subsequently promulgating instructions for an ‘Optional Flag Retirement Ceremony’.<sup>11</sup>

However, the *Flags Act 1953* (Cth), which regulates the use of the Australian flag, says nothing about flag burning and related forms of flag use. Eight Bills that would criminalise flag burning have been introduced to federal and state parliaments over the years.<sup>12</sup> Parliamentarians have frequently relied on moralistic justifications in support of flag protection legislation, romanticising war and Australia’s colonial heritage and portraying those who do not venerate the flag as threatening the moral fabric of society.

Introducing the Crimes (Protection of Australian Flags) Bill 1989 (Cth) to the House of Representatives following the burning of an Australian flag by Indigenous activists at Parliament House in Canberra,<sup>13</sup> National Party Member of Parliament (‘MP’) Michael Cobb described the burning of the flag as ‘a treasonable insult’ that ‘mock[s] every decent tradition and foundation in Australia’, continuing that ‘soldiers fought under our flag in two world wars so that we might all live in freedom in this lucky country’.<sup>14</sup> Liberal MP Trish Draper, sponsoring the Protection of Australian Flags (Desecration of the Flag) Bill 2003 (Cth), described the flag as attracting ‘almost sacred respect’,<sup>15</sup> and Liberal MP Bronwyn Bishop remarked that her Protection of the Australian National Flag (Desecration of the Flag) Bill 2006 (Cth) was needed because ‘[t]housands of

9 Department of the Prime Minister and Cabinet, *Australian Flags* (2006) 5, 22–3.

10 James McGrath, ‘Flagging Retirement Options’ (Media Release, 8 December 2016) <<https://ministers.pmc.gov.au/mcgrath/2016/flagging-retirement-options>>.

11 See Department of the Prime Minister and Cabinet, *Australian National Flag Protocols* <<https://www.pmc.gov.au/government/australian-national-flag/australian-national-flag-protocols>>.

12 Crimes (Protection of Australian Flags) Bill 1989 (Cth); Protection of Australian Flags (Desecration of the Flag) Bill 2003 (Cth); Protection of the Australian National Flag (Desecration of the Flag) Bill 2006 (Cth); Flags (Protection of Australian Flags) Amendment Bill 2008 (Cth); Flags Amendment (Protecting Australian Flags) Bill 2016 (Cth); Vagrants, Gaming and Other Offences (Flag Protection) Amendment Bill 2003 (Qld); Flags Protection Bill 2003 (WA); Upholding Australian Values (Protecting Our Flags) Bill 2015 (Vic).

13 See Katharine Gelber, *Speech Matters: Getting Free Speech Right* (University of Queensland Press, 2011) 44.

14 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 May 1989, 1922 (Michael Cobb).

15 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2003, 17 380 (Trish Draper).

Australian men and women have fought and died under this Flag in the defence of the nation' and that 'Parliament [must] defend the Flag for which they have fought'.<sup>16</sup> Liberal Senator Guy Barnett, in his second reading speech on the Flags (Protection of Australian Flags) Amendment Bill 2008 (Cth), opined that '[f]or our flag to be desecrated is an insult to our national pride and heritage, and in particular, our veterans who fought and died under our flag'.<sup>17</sup>

In 2017, National MP George Christensen announced his intention to reintroduce his private member's Bill,<sup>18</sup> the Flags Amendment (Protecting Australian Flags) Bill 2016 (Cth). In his second reading speech, Christensen ventured that the Bill 'responds to flag-burning cases that any red-blooded Australian should (and probably does) find disgusting and offensive', referring to sacrifices made by members of the armed services.<sup>19</sup> In 2018, Independent Senator Fraser Anning moved a motion calling on the government to criminalise flag desecration:<sup>20</sup> 'our flag represents our nation and our values and is bound with our history and heritage', that 'in the lead-up to ANZAC Day, it is important that we seek to protect and defend the Australian flag against the actions of those that attack our history and tradition', and that 'radical actions ... at past Australia Day and ANZAC Day ceremonies ... are completely disrespectful and un-Australian'.<sup>21</sup>

Similar appeals to the need for flag protection legislation have been made periodically in state parliaments. Speaking in support of her proposed Vagrants, Gaming and Other Offences (Flag Protection) Amendment Bill 2003 (Qld), Independent Queensland Member of the Legislative Assembly ('MLA') Liz Cunningham rehearsed familiar justifications: that flag burning caused distress for returned service personnel and 'disrespect[ed] the memory of those who have died for our nation'.<sup>22</sup> Other members went further, stating that the flag was 'inviolable and sacred' and ought to be 'revere[d]',<sup>23</sup> comparing those who engage in flag burning to those who 'deface or attack a church'<sup>24</sup> and claiming that '[n]othing is more sacred than the Australian flag', and nothing is 'more abhorrent' than burning it.<sup>25</sup> In his second reading speech for the Flags Protection Bill 2003 (WA), Liberal Western Australian MLA Colin Barnett emphasised the role of the

16 Explanatory Memorandum, Protection of the Australian National Flag (Desecration of the Flag) Bill 2006 (Cth) 3.

17 Commonwealth, *Parliamentary Debates*, Senate, 3 September 2008, 4445 (Guy Barnett).

18 See Rachel Baxendale, 'Greens Pressured over Australia Day Protests', *The Australian* (online), 19 January 2017 <<https://www.theaustralian.com.au/national-affairs/greens-pressured-over-australia-day-protests/news-story/96878725967efa1cbcd8d80306edc4fd>>.

19 Commonwealth, *Parliamentary Debates*, House of Representatives, 29 February 2016, 2364 (George Christensen); Explanatory Memorandum, Flags Amendment (Protecting Australian Flags) Bill 2016 (Cth) 2. The Bill lapsed when Parliament was prorogued prior to the 2016 election and has not at this time been reintroduced.

20 Commonwealth, *Parliamentary Debates*, Senate, 27 March 2018, 2276 (Fraser Anning). The motion 'call[ed] on the Government to legislate to create a criminal offence for a person to maliciously and intentionally burn, deface, destroy or trample the Australian flag': at 2277.

21 Ibid 2276.

22 Queensland, *Parliamentary Debates*, Legislative Assembly, 4 June 2003, 2519 (Liz Cunningham).

23 Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 2003, 3843–4 (Elisa Roberts).

24 Ibid 3846 (Peter Wellington).

25 Ibid 3850 (Mike Horan).

flag for returned service personnel and those who died in conflict,<sup>26</sup> as did Shooters and Fishers Victorian Member of the Legislative Council (“MLC”) Daniel Young, speaking in support of his Upholding Australian Values (Protecting Our Flags) Bill 2015 (Vic) in 2015.<sup>27</sup>

Debates about the flag are evocative of Australia’s culture wars more generally, exemplifying societal conflict between conservative and progressive social values: here, in relation to history and the teaching of history.<sup>28</sup> The Howard-era revival of Anzac Day relied on nostalgic valorisations of the Australian digger as a means of creating a militaristic national identity, in order to reject those who would oppose military funding and deployment as ‘un-Australian’.<sup>29</sup> To connect flag protection to the Anzac legend is to reinscribe the Howard-era transformation of a commemorative ceremony into the festival of compulsory nationalism that Australia now celebrates.<sup>30</sup> Linking respect for the flag with Australia Day serves to further increase the opprobrium levelled at those who challenge the orthodoxy of unconditionally celebrating the arrival of British colonisers.<sup>31</sup>

On one level, the regularity of parliamentarians proposing to criminalise flag desecration operates to detract from the actual political reality of Australia’s contested history and contemporary race relations. The very act of introducing legislation is symbolic; it serves to bespeak of certain behaviour as acceptable or unacceptable. The introduction of proposed legislation of this nature is primarily concerned not with whether such legislation is ever enacted, but rather with conveying a particular political message to a specific audience.<sup>32</sup> That is to say, the hermeneutic effect of repeated references to flag desecration and what it stands for may matter more than whether these attempts ultimately result in legislation.

26 Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 April 2003, 6825 (Colin Barnett). See also Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 June 2003, 8206 (Cheryl Edwardes): to burn the flag is to ‘inflict emotional pain and suffering on so many returned service men and women as well as on all other Australians’.

27 Victoria, *Parliamentary Debates*, Legislative Council, 24 February 2016, 771 (Daniel Young).

28 See, eg, Inga Clendinnen, ‘The History Question: Who Owns the Past?’ (2006) 23 *Quarterly Essay* 1; Marilyn Lake, ‘How Do Schoolchildren Learn about the Spirit of Anzac?’ in Marilyn Lake et al (eds), *What’s Wrong with Anzac?: The Militarisation of Australian History* (University of New South Wales Press, 2010) 135. See the Anzac Day educational resources issued by the Department of Veterans’ Affairs: Department of Veterans’ Affairs, Australian Government, *Education: Resources* <<https://anzacportal.dva.gov.au/education/resources>>.

29 See the contributions in Marilyn Lake et al (eds), *What’s Wrong with Anzac?: The Militarisation of Australian History* (University of New South Wales Press, 2010); Matt McDonald, ‘“Lest We Forget”: The Politics of Memory and Australian Military Intervention’ (2010) 4 *International Political Sociology* 287, 295–6.

30 See Jeff Sparrow, ‘Memory and the Anti-Politics of Anzac’, *Overland* (online), 24 April 2012 <<https://overland.org.au/2012/04/anzac-day-celebrates-forgetting/>>. See also K S Inglis, *Sacred Places: War Memorials in the Australian Landscape* (Melbourne University Press, 3<sup>rd</sup> ed, 2008) 572 (referring to the revival of Anzac Day in the late 1980s and early 1990s as the development of a civil religion).

31 See Patrick A McAllister, *National Days and the Politics of Indigenous and Local Identities in Australia and New Zealand* (Carolina Academic Press, 2012) chs 5–6; Amelia Johns, *Battle for the Flag* (Melbourne University Press, 2015) ch 5; Farida Fozdar, Brian Spittles and Lisa K Hartley, ‘Australia Day, Flags on Cars and Australian Nationalism’ (2015) 51 *Journal of Sociology* 317.

32 See Robert T Schatz and Howard Lavine, ‘Waving the Flag: National Symbolism, Social Identity, and Political Engagement’ (2007) 28 *Political Psychology* 329. See also Eric A Posner, ‘Symbols, Signals and Social Norms in Politics and the Law’ (1998) 27 *Journal of Legal Studies* 765.

Still, the failure of these Bills to progress demonstrates that there has been no real appetite for flag protection legislation from parliamentarians. The Bills referred to above lapsed, were voted down, or were withdrawn from consideration. One explanation for this reluctance is a desire on the part of those who would otherwise support criminalisation not to, as Howard put it, ‘turn yahoo behaviour into martyrdom’.<sup>33</sup> That is, the criminalising of flag burning risks encouraging people to engage in such conduct as a deliberately transgressive act.<sup>34</sup>

### III FLAG BURNING, POLICE AND COURTS

Suppose I was to see a person in the street wearing an Australian flag fashioned as a cape. I might well find this offensive or even intimidating, based on my knowledge of the events at Cronulla in 2004, where white Australians wore flag capes while attacking Lebanese Australians, and the exclusionary nationalistic politics I associate with using the flag in this way. In early 2017, I set an exam that asked first-year students to interpret mock legislation that criminalised dishonouring the flag (where the person was ‘reckless as to whether her or his conduct would offend, insult or humiliate a person’), and consider a hypothetical situation involving various characters burning the flag, wearing it as a cape, and so on. No student suggested that the wearing of the flag as a cape might ‘offend’ a person within the meaning of the provision; on the contrary, some suggested that such a display ought to be encouraged. Later that year, I asked another group of students, this time in the context of teaching the implied freedom, whether they viewed the wearing of flag capes or garments emblazoned with the Australian flag (T-shirts, swimwear and so on) as a form of political communication. Most did not.<sup>35</sup> For younger people perhaps, the spectre of people wearing the Australian flag is simply an expression of banal nationalism and nothing more — the flag is simply taken for granted, appearing almost unnoticed in daily life.<sup>36</sup>

My (admittedly unscientific) survey sets the scene for examining the selective criminalisation of flag use in Australia. To prohibit flag burning and related conduct but not to regulate other uses of the flag would be, in effect, to suppress anti-nationalistic or unpatriotic (‘un-Australian’?)<sup>37</sup> dissent by deeming

33 ‘Flag Burning Not Criminal, Says PM’, *The Age* (online), 27 January 2006 <<https://www.theage.com.au/national/flag-burning-not-criminal-says-pm-20060127-ge1nb7.html>>. See also, responding to Senator Anning’s plea for flag desecration legislation, Senator McGrath (Liberal) noting that criminalisation ‘would only create an incentive for protesters to martyr themselves by inviting prosecution, giving them the attention they seek and legitimising their vile acts as a form of political protest’: Commonwealth, *Parliamentary Debates*, Senate, 27 March 2018, 2277 (James McGrath).

34 Orr, above n 2, 519–20.

35 This may well be due to their age; most would have been aged about 8 at the time of the Cronulla events.

36 See Michael Billig, *Banal Nationalism* (Sage Publications, 1995) chs 3, 5; Orr, above n 2, 508.

37 At a Melbourne demonstration involving nationalists and counter-demonstrators, a police superintendent opined that police could not arrest flag burners: ‘[w]hilst it is not a very good look, and might be viewed as un-Australian, it’s not an offence’: Rania Spooner, Darren Gray and Marika Dobbin, ‘Far Left, Right-Wing Groups Rally: Anti-Islam, Anti-Racism Groups Protest in Melbourne’, *The Age* (online) 26 June 2016 <<https://www.theage.com.au/national/victoria/far-left-right-wing-groups-rally-antiislam-antiracism-groups-protest-in-melbourne-20160626-gps0p6.html>>.



such communication so dangerous to the social order as to be deserving of a criminal sanction. The event involving flag use that attracted a far greater share of media coverage at Cronulla was the actions of two protesters taking a flag from a flagpole outside a Returned and Services League ('RSL') and burning it.<sup>38</sup> Organisers of the Big Day Out music festival, held some six weeks after Cronulla, expressed concern about the intimidating behaviour of attendees draped in Australian flags.<sup>39</sup> Their request the following year for attendees not to bring flags to the event received widespread condemnation from many, not least Howard (describing the request as 'offensive') and the leader of the opposition Kevin Rudd ('political correctness gone mad').<sup>40</sup> Some legislators have pointed to this apparent dichotomy: speaking in opposition to the Queensland legislation, one parliamentarian observed that the legislation sought 'to appropriate our flag to a particular cause and ... delegitimise those who do not feel represented by the current flag',<sup>41</sup> and a Victorian legislator suggested that the phenomenon of those who wear the flag as a cape to verbally abuse or assault others should, likewise, be conduct that falls within the offence provision.<sup>42</sup> But such statements are few and far between.

Existing public order offence provisions in the various Australian jurisdictions can and have operated to address situations where, for example, an act of flag burning results in threatening or violent conduct or damage to the property of another.<sup>43</sup> Since at least 2016, anti-Islam protests organised by nationalist groups in Melbourne and regional Victoria have involved protesters displaying or adorning themselves with flag capes and flag face masks (curiously, while calling for a 'Burqa ban'), seeking to contrast 'true blue Australian'<sup>44</sup> values with those of Muslim Australians.<sup>45</sup> At some of these events, counter-demonstrators have burned Australian flags to convey their distaste for the rally's message. Both groups' protests involved the use of the flag, but only the actions of the counter-demonstrators are known to have resulted in arrests.<sup>46</sup>

Reported arrests for flag burning indicate that the reason for arrest is usually offensive behaviour, disorderly behaviour, or a related public order offence. These offences, frequently the basis of arrests in protest situations, are notable for their imprecision, giving police broad discretion to determine when conduct transgresses norms of acceptable behaviour.<sup>47</sup> As there are few reports of court

38 See Gelber, *Speech Matters: Getting Free Speech Right*, above n 13, 51.

39 See *ibid* 52.

40 See *ibid* 52–3.

41 Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 2003, 3856 (Rachel Nolan).

42 Victoria, *Parliamentary Debates*, Legislative Council, 9 March 2016, 1065 (Jaclyn Symes).

43 Dan Meagher, 'The Status of Flag Desecration in Australian Law' (2008) 34 *University of Western Australia Law Review* 73, 95.

44 See Vashti Kenway, 'No Pasarán! Fighting Australia's Far Right Then and Now' [2016] (225) *Overland* 9.

45 See also Orr, above n 2, 510–11.

46 See, eg, 'Melbourne Racism Protests Turn Violent', *The Australian* (online), 26 June 2016 <<https://www.theaustralian.com.au/news/nation/melbourne-racism-protests-turn-violent/news-story/2b5e8f96ac28e8ec1e183362db3338f8>>.

47 See Meagher, above n 43, 88.

proceedings involving flag burning in Australia, despite many arrests reported in the media over the years, it is difficult to tell whether charges have proceeded and, if so, how the courts have dealt with these matters. One may surmise that arrests are made in order to control protest situations. This is an observable phenomenon in relation to the policing of protests generally, where arrestees are frequently removed from the scene but ultimately not charged, where police are trying to regain control over the situation or are unsure whether an offence has been committed.<sup>48</sup> Another tactic is to withdraw charges at a later date. Still, police prosecutors' willingness to withdraw charges may well depend on defence lawyers' knowledge of potential defences.

Another approach police have taken is the use of infringement notices: in 2015, a woman was reportedly issued with infringement notices for 'behaving in a riotous manner' and for 'depositing burning litter' in relation to conduct that took place at a counter-demonstration against a protest against a planned mosque in Bendigo, Victoria.<sup>49</sup> Dealing with a matter in this way avoids prosecutorial scrutiny unless the person served with the infringement notice is able to access legal representation or is otherwise capable of challenging it.

The flag's venerated status seems to have influenced some magistrates. The Cronulla flag burner was sentenced to three months' imprisonment at a consolidated plea hearing in the context of other offences (entering a building with the intent of committing an indictable offence and malicious damage by fire). During the sentencing hearing, the magistrate remarked that the burning of the flag, which had been taken from the local RSL club, was an act of 'extreme vandalism' of an item that 'was of significance to the majority of people who were in this country'.<sup>50</sup> In a Queensland case, the magistrate, while suggesting that the defendant had an 'unquestionable right ... to make a peaceful protest', also took account of 'the rights of other persons to enjoy a festive, family occasion, in a public park, free from disturbance, or concerns as to health and safety', concluding that the defendant's 'provocative, disruptive and disturbing' conduct was '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' with one witness feeling 'frightened and angry'.<sup>51</sup> In 2015, media reported on the successful appeal of another Queensland protester, who was granted a retrial on account of the magistrate's failure to afford

48 Fitzroy Legal Service, *Activist Rights: Release without Charge* <[https://www.activistrights.org.au/release\\_without\\_charge](https://www.activistrights.org.au/release_without_charge)>; Alejandra Seguel González, Rhys Aconley-Jones and David Adam, 'Occupy Policing: A Report into the Effects and Legality of the Eviction of Occupy Melbourne from City Square on 21 October 2011' (Report, Occupy Legal Support Team, 2012) 44–53.

49 'Flag Burning Woman Fined after Rally', *Bendigo Advertiser* (online), 3 September 2015 <<https://www.bendigoadvertiser.com.au/story/3324537/woman-fined-after-flag-burning/>>.

50 'Accused Apologises for Post-Riot Incident but ... Jailed for Burning Flag', *Herald Sun* (Melbourne), 13 January 2006, 9.

51 As recounted in *Coleman v Kinbacher* [2003] QCA 575 (24 December 2003) [4]–[5], [19] (Chesterman J). This appeal is discussed further below.



natural justice in relation to a conviction of public nuisance for burning a flag at Brisbane's Shrine of Remembrance the day before Anzac Day.<sup>52</sup>

However, it is clear that at least the higher courts have relied on a highly context-specific analysis of the impact of the defendant's conduct on the physical safety of those present, and have made their decisions with some awareness of the implied freedom. Moreover, prosecutors have in some cases apparently taken heed of constitutional concerns when determining whether to continue prosecutions. In 2003, charges of disorderly behaviour were reportedly dismissed against a 17-year-old protester who burned the Australian flag outside the US embassy in Perth on the basis of the Crown Solicitor's advice that flag burning was protected by the implied freedom.<sup>53</sup>

In 1998, the Northern Territory Court of Appeal found that protesters who burned Indonesian flags outside the Indonesian consulate in protest of Indonesia's occupation of East Timor were not guilty of disorderly behaviour due to the orderly way that they went about their protest.<sup>54</sup> According to Angel J, the protesters' conduct was not 'a gross breach of decorum',<sup>55</sup> the conduct did not cause a 'disturbance', and it was relevant that the conduct was regarded 'as a piece of theatre ... by the media and others present'.<sup>56</sup> Mildren J, noting that 'there was no evidence that anyone was alarmed ... seriously inconvenienced or had their comfort seriously threatened' and that 'there was no tendency to disturb the peace', found that '[t]he supposed danger' described by police witnesses was 'trifling and insubstantial'.<sup>57</sup> The judge also adverted to the implied freedom obliquely:

Whatever we may think of this type of political protest, or the message it conveys, is not to the point. Nor are we in the least concerned by any clamour by politicians or the popular press that people who do these things should be prosecuted. ... [T]he courts must be careful to decide cases such as this according to principles of strict legalism.<sup>58</sup>

- 52 Greg Stolz, 'Australian Flag Burning: Peter Di Iorio Granted Retrial on Public Nuisance Charge', *The Courier Mail* (online), 13 November 2015 <<https://www.couriermail.com.au/news/australian-flag-burning-peter-di-iorio-granted-retrial-on-public-nuisance-charge/news-story/ee33250d6767c7d8fc0b03933d4ff4ac>>. While on bail, Di Iorio was prevented from attending Anzac Day events. Public nuisance is defined in s 6 of the *Summary Offences Act 2005* (Qld) to include disorderly and offensive behaviour that 'interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public'. I was unable to locate the judgment.
- 53 Editorial, 'Flag Flies for All Our Freedoms', *The West Australian* (Perth), 11 June 2003; 'Boy Not Guilty of Burning Flag', *The Sydney Morning Herald* (online), 10 June 2003 <<https://www.smh.com.au/national/boy-not-guilty-of-burning-flag-20030610-gdgv11.html>>.
- 54 *Watson v Trenerry* (1998) 122 NTR 1.
- 55 *Ibid* 8, citing *Summary Offences Act 1923* (NT) s 47(a).
- 56 *Watson v Trenerry* (1998) 122 NTR 1, 8 (Angel J).
- 57 *Ibid* 14–15 (Mildren J). The dissenting judge, Gray AJ, finding the behaviour disorderly, went on to analogise the case with *Levy v Victoria* (1997) 189 CLR 579 (regulations restricting entry to duck hunting areas for the purpose of public safety): 'the provision is reasonably appropriate and adapted to the purpose of maintaining order in public places ... [i]t is not aimed at political expression and only impinges upon it obliquely ... [it] does not prohibit political expression or significantly inhibit it. The section merely prohibits disorderly behaviour in a public place': *ibid* 20–21.
- 58 *Watson v Trenerry* (1998) 122 NTR 1, 10 (Mildren J).

The same result was not achieved for Patrick Coleman (of *Coleman v Power* fame),<sup>59</sup> whose 2002 conviction for disorderly behaviour in burning an Australian flag in a public park on Australia Day in protest against the government's immigration policy was upheld by the Queensland Court of Appeal.<sup>60</sup> Coleman, representing himself, eschewed reliance on the implied freedom and relied instead on an inchoate theory of political protest exempting conduct from the offence of disorderly behaviour.<sup>61</sup> Yet, Coleman's political motivations played a peripheral role only in the Court of Appeal decision. In refusing leave to appeal, the Court took into account the District Court judge's finding that Coleman had poured accelerant on a large flag and burned it in close proximity to other people, including children, holding that '[t]he objectionable feature of the conduct had very little to do with its political significance'.<sup>62</sup> The inference is that had Coleman held public safety in greater regard in undertaking his protest, his conviction would not have been upheld.

#### IV THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

The obvious legal question that arises in relation to specific attempts to ban flag desecration in Australia (apart from the issue of the head of power that would support such legislation)<sup>63</sup> is the question of the compatibility of such provisions with the implied freedom. Implied from the text and structure of the *Constitution*, the implied freedom protects political communications (including non-verbal forms of symbolic protest)<sup>64</sup> that are necessary for the effective operation of Australia's constitutionally-protected system of representative and responsible government.<sup>65</sup>

The language that parliamentarians have employed in support of flag protection legislation demonstrates a misunderstanding of the implied freedom and the broader concept of freedom of expression.<sup>66</sup> Speaking in support of her 2003 federal Bill, Trish Draper stated: 'The freedoms of speech, assembly and association are in no way diminished by this bill ... you can protest without burning our flag,

59 (2004) 220 CLR 1. This case is discussed further below.

60 *Coleman v Kinbacher* [2003] QCA 575 (24 December 2003).

61 *Ibid* [18] (Chesterman J).

62 *Ibid* [24] (Chesterman J).

63 See Meagher, above n 43, 78–80, arguing that the implied nationhood power (s 61 of the *Constitution*, together with the incidental legislative power in s 51(xxxix)) might not support a law criminalising flag desecration, potentially on the basis that such a law would lack proportionality.

64 See *Levy v Victoria* (1997) 189 CLR 579; *O'Flaherty v City of Sydney Council* (2014) 221 FCR 382, 387 [17].

65 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557–62.

66 See, eg, Katharine Gelber, 'Political Culture, Flag Use and Freedom of Speech' (2012) 60 *Political Studies* 163, 173.

you can speak your mind without desecrating our national symbol and you can criticise the system without humiliating the people.<sup>67</sup>

In his Statement of Compatibility for the 2015 Victorian Bill, Daniel Young asserted that the provisions did not limit the freedom of expression as protected by the Victorian *Charter of Human Rights*,<sup>68</sup> but rather sought ‘only to outlaw conduct which sections of the community would find offensive’, further commenting that ‘[y]ou can protest without burning an Australian flag and you can speak your mind without desecrating a national symbol’.<sup>69</sup> Liberal MLC Inga Peulich asserted that ‘burning a flag is not about exercising free speech; it is an act designed to offend, insult, humiliate and intimidate and is done so because of national origin’.<sup>70</sup> Christensen suggested that ‘burning a flag is not speaking’<sup>71</sup> and his Statement of Compatibility for the Bill asserted that no applicable rights or freedoms were engaged.<sup>72</sup>

Yet despite these misconceptions, the implied freedom has undoubtedly played a role, as have underlying concerns about the concept of free speech.<sup>73</sup> Legal advice received by governments in relation to the Western Australian<sup>74</sup> and Queensland<sup>75</sup> Bills that suggested incompatibility with the implied freedom apparently prompted the failure of both Bills to pass. The Victorian legislation did not proceed following a critical report from the Scrutiny of Acts and Regulations Committee<sup>76</sup> and submissions concerning the impact of the provisions on both the implied freedom and the freedom of expression.<sup>77</sup> If he reintroduces his lapsed 2016 Bill, Christensen will have to contend with the report of the Parliamentary Joint Committee on Human Rights, which suggested that the Bill limits the freedom of expression and sought further information as to the importance of the Bill’s objective and the proportionality of the limitation on the right.<sup>78</sup>

67 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 August 2003, 18 671 (Trish Draper).

68 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15.

69 Victoria, *Parliamentary Debates*, Legislative Council, 24 February 2016, 769–70 (Daniel Young).

70 Victoria, *Parliamentary Debates*, Legislative Council, 9 March 2016, 1068 (Inga Peulich).

71 Commonwealth, *Parliamentary Debates*, House of Representatives, 29 February 2016, 2367 (George Christensen).

72 Explanatory Memorandum, *Flags Amendment (Protecting Australian Flags) Bill 2016* (Cth).

73 Gelber, ‘Political Culture, Flag Use and Freedom of Speech’, above n 66, 173; Gelber, *Speech Matters: Getting Free Speech Right*, above n 13, 47.

74 Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 June 2003, 8209 (Jim McGinty): ‘I have grave doubts about whether preventing people from being offended by a political matter is a legitimate aim when the source of the offence is a means of expressing political views. I am sure that aim would be struck down by the court as an inappropriate end to be achieved by the legislation.’

75 Queensland, *Parliamentary Debates*, Legislative Assembly, 8 October 2003, 3841–2 (Tony McGrady).

76 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest*, No 3 of 2016, 8 March 2016, 18–20.

77 See, eg, Liberty Victoria, Submission to Parliament of Victoria <<https://libertyvictoria.org.au/sites/default/files/Liberty-Victoria-2016-comment-Upholding-Australian-Values-Protecting-Our-Flags-Bill-2015.pdf>>.

78 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (2016) 4–7.

Since *Lange v Australian Broadcasting Corporation* ('*Lange*')<sup>79</sup> as reformulated in *Coleman v Power*<sup>80</sup> and developed further in *McCloy v New South Wales* ('*McCloy*')<sup>81</sup> and *Brown v Tasmania* ('*Brown*'),<sup>82</sup> a valid law burdening the implied freedom must (1) have an objective that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, and (2) be reasonably appropriate and adapted to achieving that objective in a manner that is itself compatible with the maintenance of the system of representative and responsible government.<sup>83</sup> In a series of cases<sup>84</sup> culminating in *McCloy* and then in *Brown*, this somewhat vague inquiry has transmogrified into what is known as a test of structured proportionality.<sup>85</sup> A majority of the High Court now favours an approach whereby a law burdening the implied freedom must be rationally connected to an objective that is compatible with the system of representative and responsible government provided by the *Constitution*; there must be 'no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom'; and the law must be 'adequate in its balance ... between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom'.<sup>86</sup>

Reasonable minds may differ as to whether a burden on the implied freedom is permissible. The nature of these value judgments was made more explicit in *McCloy*.<sup>87</sup> Value judgments primarily arise from, firstly, determining whether a law has a legitimate end that is compatible with the constitutionally prescribed system of representative and responsible government, and secondly, whether the marginal social benefit of avoiding the burden on the implied freedom exceeds the marginal social benefit arising from achieving the law's objective.<sup>88</sup>

79 (1997) 189 CLR 520 ('*Lange*').

80 (2004) 220 CLR 1.

81 (2015) 257 CLR 178.

82 (2017) 261 CLR 328.

83 *Lange* (1997) 189 CLR 520, 561–2; *Coleman v Power* (2004) 220 CLR 1, 50–1 [92]–[96] (McHugh J), 77–8 [196] (Gummow and Hayne JJ), 82 [211] (Kirby J); *McCloy* (2015) 257 CLR 178, 193–5 [2], 217–19 [79]–[87] (French CJ, Kiefel, Bell and Keane JJ); *ibid* 363–4 [102]–[104] (Kiefel CJ, Bell and Keane JJ), 375 [155] (Gageler J).

84 *Monis v The Queen* (2013) 249 CLR 92 ('*Monis*'); *Unions NSW v New South Wales* (2013) 252 CLR 530; *Tajjour v New South Wales* (2014) 254 CLR 508.

85 See Caroline Henckels, 'Proportionality and the Separation of Powers in Constitutional Review: Examining the Role of Judicial Deference' (2017) 45 *Federal Law Review* 181, 182–5.

86 *McCloy* (2015) 257 CLR 178, 195 [2] (French CJ, Kiefel, Bell and Keane JJ) (emphasis altered). See also *Brown* (2017) 261 CLR 328, 368–73 [123]–[146] (Kiefel CJ, Bell and Keane JJ), 416–25 [278]–[295] (Nettle J). Gordon J views the proportionality test as 'a tool of analysis, not a constitutional doctrine ... not a "precedent-mandated analysis"'. And, if only for that reason, it is not necessary or appropriate to apply all aspects of that approach in every case': at 476–7 [473] (emphasis in original) (citations omitted). In *McCloy* and in *Brown*, Gageler J has advocated for an approach based on United States constitutional law that would vary the legal test depending on the extent and nature of the burden on the implied freedom: *McCloy* (2015) 257 CLR 178, 238–9 [150]–[152]; *Brown* (2017) 261 CLR 328, 377–8 [162]–[163]. In *Brown*, Edelman J found that the provisions did not engage the implied freedom and as such did not discuss methodology: at 502–7 [556]–[566].

87 (2015) 257 CLR 178, 195 [2], 216–20 [75]–[92] (French CJ, Kiefel, Bell and Keane JJ).

88 See Henckels, above n 85, 188. See, eg, Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 349–51, 357.

Flag burning or other forms of dishonouring might be regarded as a particularly crude form of political speech. The case of *Coleman v Power*<sup>89</sup> establishes that a legislative objective of promoting civil discourse is not compatible with the system of representative and responsible government protected by the *Constitution*. Four members of the Court held that political communication effected by insulting speech should be as equally protected by the implied freedom as ‘uncivilised’ speech,<sup>90</sup> with Kirby J memorably observing that that ‘the *Constitution* ... does not protect only the whispered civilities of intellectual discourse’,<sup>91</sup> and that the implied freedom belonged equally ‘to the obsessive, the emotional and the inarticulate as it does to the logical, the cerebral and the restrained’.<sup>92</sup>

However, the Court also held that the prevention of violence can be a legitimate reason to burden the implied freedom:<sup>93</sup> prohibiting ‘insulting words in a public place’ so as to prevent unlawful physical retaliation by persons provoked by the statements was ‘reasonably appropriate and adapted to serve the legitimate public end of keeping public places free from violence’.<sup>94</sup> Nevertheless, an unqualified prohibition could not be justified to the extent that the communication was political in nature (in that case, vulgar accusations that a police officer was corrupt).<sup>95</sup> *Coleman v Power* therefore stands for the proposition that public order offences may only permissibly limit the implied freedom to the extent that a violent reaction is the intended or reasonably likely outcome of the conduct.

The position taken in *Coleman v Power* was subsequently weakened somewhat in *Monis v The Queen* (*‘Monis’*), where the justices were divided as to the validity of a provision that criminalised using a postal service ‘in a way ... that reasonable persons would regard as being, in all the circumstances ... offensive’.<sup>96</sup> Crennan, Kiefel and Bell JJ, construing the purpose of the provision as seeking to protect people from the intrusion of seriously offensive material into their personal

89 (2004) 220 CLR 1.

90 Ibid 33 [36], 54 [105] (McHugh J), 78 [197] (Gummow and Hayne JJ), 91 [239] 99–100 [260] (Kirby J).

91 Ibid 91 [239].

92 Ibid 100 [260]. To restrict political expression to only those voices capable of a certain level of political discourse not only strongly suggests authoritarianism, but also risks excluding less privileged members of society and those with radical political perspectives: Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton University Press, 1995) 33, 59.

93 *Coleman v Power* (2004) 220 CLR 1, 26 [14]–[15], 32 [32]–[34] (Gleeson CJ), 78 [198] (Gummow and Hayne JJ), 98–9 [254]–[256] (Kirby J), 121–2 [322]–[324] (Heydon J).

94 Ibid 78 [198] (Gummow and Hayne JJ).

95 Ibid 51–2 [96]–[98] (McHugh J), 91 [237]–[239] (Kirby J). Gummow and Hayne JJ, reviewing the legislative history and context of the provision, noted that the insulting words must be addressed to a person and be uttered in, ‘or within the hearing of, a public place’: at 74 [183]. Whether the words would be regarded as insulting ‘would turn on the assessment of whether, in the circumstances in which they were used, they were either intended to provoke unlawful physical retaliation, or were reasonably likely to do so’.

96 (2013) 249 CLR 92, considering *Criminal Code 1995* (Cth) s 471.12. The High Court accepted the New South Wales Criminal Court of Appeal’s interpretation of the provision, which required ‘the use be calculated or likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances’: at 127 [59] (French CJ), 138 [91], 158 [161]–[162] (Hayne J), 210–12 [333]–[339] (Crennan, Kiefel and Bell JJ), quoting *Monis v The Queen* (2011) 256 FLR 28, 39 [44] (Bathurst CJ), 48 [83] (Allsop P).

domain, determined that the objective was permissible,<sup>97</sup> while French CJ, Hayne and Heydon JJ held that the provision did not serve a legitimate end.<sup>98</sup> Unlike the legislation at issue in *Coleman v Power*, there was no indication that the objective of the provision was to prevent violent retaliation.<sup>99</sup> But to the extent that *Monis* weakens the position in *Coleman v Power*, it may be noted that of concern to some members of the Court in *Monis* was intrusion of offensive personal communications into the private sphere;<sup>100</sup> one would imagine that most instances of flag desecration would take place as a form of public spectacle. More generally, in *Wotton v Queensland*,<sup>101</sup> *Levy v Victoria*<sup>102</sup> and *Attorney-General (SA) v Corporation of the City of Adelaide*,<sup>103</sup> the High Court found that the impugned laws permissibly limited the implied freedom as they were reasonably appropriate and adapted to considerations pertaining to public safety.

There is nothing to suggest that a statutory objective of protecting the flag as a symbol of nationhood would itself be incompatible with the constitutionally prescribed system of representative and responsible government. However, the above cases suggest that flag protection legislation that is directed at civilising public discourse by preventing offence caused by acts that are disrespectful of the flag might not be regarded as pursuing a legitimate objective. Moreover, one could argue that the true objective of criminalising certain uses of the flag but not others is, in effect, an attempt to suppress certain types of political communication (say, anti-nationalistic, anti-militaristic or hostile to the colonisation of Australia) over others. That is to say, it is directed at the content of political communication itself. As Greenawalt argues, laws directed at the suppression of violence may in effect be laws that are directed at the suppression of unpalatable views.<sup>104</sup> The same is true for laws directed at preventing offensive behaviour.

Although United States flag burning cases arise in a different constitutional context and must be treated with caution, some aspects of these cases are instructive. Following some 20 years of prosecutions for flag desecration rising largely from Vietnam War-era protests, the Supreme Court of the United States in the case of *Texas v Johnson*<sup>105</sup> invalidated a law that criminalised the desecration of venerated objects ‘in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action’,<sup>106</sup> following Johnson’s appeal against conviction for burning the US flag during an anti-Reagan demonstration. The Court viewed the objective of the law — to preserve the flag ‘as a symbol of nationhood and national unity’ — as directly targeting forms of expression such as flag burning. To the extent that the legislation aimed at preventing breaches of

97 *Monis* (2013) 249 CLR 92, 205 [320], 206–7 [324] (Crennan, Kiefel and Bell JJ).

98 *Ibid* 133–134 [73]–[74] (French CJ), 139–40 [97] (Hayne J), 178–9 [236] (Heydon J).

99 *Ibid* 163 [182], 167–9 [196]–[202] (Hayne J).

100 *Ibid* 114–17 [26]–[29] (French CJ), 169 [199]–[202] (Hayne J).

101 (2012) 246 CLR 1, 16 [31] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

102 (1997) 189 CLR 579, 609 (Dawson J), 614 (Toohey and Gummow JJ), 619 (Gaudron J), 627 (McHugh J), 647–8 (Kirby J).

103 (2013) 249 CLR 1, 42 [64] (French CJ), 63 [136] (Hayne J), 89 [218] (Crennan and Kiefel JJ).

104 Greenawalt, above n 92, 33.

105 491 US 397 (1989).

106 *Ibid* 400 n 1.



the peace, the government could not forbid expressive conduct on the basis that ‘an audience that takes serious offense to the expression may disturb the peace, since the government cannot assume that every expression of a provocative idea will incite a riot but must look to the actual circumstances surrounding the expression’.<sup>107</sup> The United States federal legislature subsequently enacted a law that prohibited, inter alia, knowingly mutilating, defacing, physically defiling or burning the United States flag, but without regard to the intended or likely effects of the conduct. However, the Supreme Court invalidated the legislation, holding that the law was ‘related to the suppression, and concerned with the content, of free expression’ and concluding that the government could not prohibit speech solely on the basis that society finds the idea offensive or disagreeable.<sup>108</sup>

Assuming that the objective of flag protection legislation was not regarded as inimical to the maintenance of Australia’s constitutionally prescribed system of government, the question that would then arise would be the proportionality of the provision itself. In the past, the High Court has held that laws that directly burden the implied freedom (that have political communication as their object) will be more difficult to justify than those that incidentally burden it.<sup>109</sup> In *Australian Capital Television Pty Ltd v Commonwealth*, Mason CJ drew a distinction between those laws that targeted ideas and those that restricted the mode of communication by which ideas are transmitted.<sup>110</sup> He observed that it would, in general, be ‘extremely difficult’ to justify restrictions imposed on the ‘character of the ideas or information’ but that restrictions on an ‘activity or mode of communication by which ideas ... are transmitted’ would be more readily justifiable.<sup>111</sup> Although some members of the Court in more recent cases have held that the *Lange* test does not involve different levels of scrutiny, others have nevertheless drawn a distinction between direct and incidental burdens, indicating that laws that directly burden the implied freedom or that pertain to the content of communication will be more difficult to justify than laws that incidentally burden the implied freedom or do so in a content-neutral manner.<sup>112</sup> A prohibition on acts

107 Ibid 397–8. As to the generally applicable limits on free speech in this area see *Chaplinsky v New Hampshire*, 315 US 568, 571–2 (Murphy J) (1942) (emphasis added) (citations omitted):

it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. ... [I]nsulting or ‘fighting’ words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace ... are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

108 *United States v Eichman*, 496 US 310, 310–11 (1990).

109 See, eg, *Hogan v Hinch* (2011) 243 CLR 506, 555–6 [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

110 (1992) 177 CLR 106, 143.

111 Ibid; see also at 169 (Deane and Toohey JJ), 235 (McHugh J).

112 See *Hogan v Hinch* (2011) 243 CLR 506, 555–6 [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 200 [40] (Gleeson CJ); *Wotton v Queensland* (2012) 246 CLR 1, 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Monis* (2013) 249 CLR 92, 130 [64] (French CJ); 212 [342] (Crennan, Kiefel and Bell JJ); *Tajjour v New South Wales* (2014) 254 CLR 508, 550–1 [37] (French CJ), 575 [132] (Crennan, Kiefel and Bell JJ), 580–1 [151] (Gageler J); *McCloy* (2015) 257 CLR 178, 238–9 [150]–[152] (Gageler J), 268–9 [253] (Nettle J); *Brown* (2017) 261 CLR 328, 361 [94], 367 [118] (Kiefel CJ, Bell and Keane JJ), 383 [182], 389 [199], 397 [232] (Gageler J), 464 [426], 477–8 [478] (Gordon J).

disrespectful of the flag might be regarded, on its face, as restricting the mode of political communication. However, one could also argue — as noted above — that such a law is, in effect, directed at the *content* of the communication, given that only certain political uses of the flag would be likely to be captured by the law.<sup>113</sup> In other words, not only would legislation directed at dishonouring the flag be a direct burden on political communication, but it would also be a restriction on the content (political viewpoint) of that communication.

Regardless of whether members of the Court decide to calibrate the applicable standard of review to whether a burden on the implied freedom is direct or incidental, it must consider the connection between the law's objective and the challenged measure. To pass muster, flag protection legislation should be tailored to public safety concerns arising from flag burning or related acts in public — whether the danger of fire<sup>114</sup> or other threats to physical safety, including danger arising from retaliatory violence. Unlike some previous flag protection bills,<sup>115</sup> George Christensen's Bill tries to address these eventualities: to come within the ambit of the offence provision, a person must be reckless<sup>116</sup> as to whether their conduct will cause, in a public place, (i) death, injury or violence, (ii) damage or destruction to property other than the flag, (iii) a public disorder or a public disturbance, or (iv) offence, insult, humiliation or intimidation.<sup>117</sup> It seems clear that some of these provisions (such as those pertaining to violence) will be easier to justify than others (the causing of offence). The Bill also provides that the offence provision 'does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication'<sup>118</sup> — which in turn suggests that Christensen's Bill serves only a symbolic purpose, given that presumably many if not all uses of the flag that 'a red-blooded Australian should ... find disgusting and offensive'<sup>119</sup> would involve political communication.<sup>120</sup>

In the cases of *Monis*, *Tajjour v New South Wales*, *McCloy* and *Brown*, members of the High Court have noted that the question whether a law is reasonably appropriate and adapted to serve its objective may involve consideration of alternative measures that a legislature could have adopted that impair the implied freedom to a lesser degree, at least where an alternative is 'obvious and

113 However, a law prohibiting reckless dishonouring of the flag arguably might extend to penalise non-political misuses of flags.

114 See *Levy v Victoria* (1997) 189 CLR 579, 594–5 (Brennan CJ). 'Bonfires may have to be banned to prevent the outbreak of bushfires, and the lighting of a bonfire does not escape such a ban by the hoisting of a political effigy as its centrepiece': at 594.

115 See, eg, Upholding Australian Values (Protecting Our Flags) Bill 2015 (Vic), which criminalised simply those who 'intentionally or recklessly dishonour' the flag: at cl 4.

116 A person will be reckless if they are at least 'aware of a substantial risk' that the result will occur, and 'having regard to the circumstances known to him or her, it is unjustifiable to take the risk': *Criminal Code Act 1995* (Cth) s 5.4(2).

117 Flags Amendment (Protecting Australian Flags) Bill 2016 (Cth) sch 1 item 1.

118 Ibid.

119 Commonwealth, *Parliamentary Debates*, House of Representatives, 29 February 2016, 2364 (George Christensen).

120 Explanatory Memorandum, Flags Amendment (Protecting Australian Flags) Bill 2016 (Cth) states that '[t]o avoid any uncertainty ... an offence does not occur in the exercise of constitutional rights'.

compelling'.<sup>121</sup> It is not difficult to imagine alternative ways of promoting and preserving the Australian flag, or protecting public safety, than banning certain uses of the flag.<sup>122</sup> Still, judges have emphasised that this aspect of the *Lange* test does not permit judges to step into the shoes of legislators in terms of devising new policies, but rather to determine 'whether there are alternative, reasonably practicable, means of achieving the same object but which have a less restrictive effect on the freedom'.<sup>123</sup> This is a difficult question to determine in the abstract and in some respects might well rely on the parties' submissions as to potential alternative measures.<sup>124</sup> The final aspect of the *Lange* test involves determining whether a law is 'adequate in its balance ... between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom'.<sup>125</sup> As noted above, this plainly involves value judgment in terms of the relative importance ascribed to achieving the legislative objective compared to the importance of avoiding the burden of the implied freedom occasioned by the law in question.<sup>126</sup> As certain members of the Court observed in *Brown*, this aspect of the test is somewhat controversial<sup>127</sup> and the method of analysis and threshold for invalidity<sup>128</sup> have not yet been 'fully resolved'.<sup>129</sup>

## V CONCLUSION

Debates concerning the desirability of flag protection legislation are at their heart debates concerning the appropriate limits of freedom of expression — superficially the medium of expression, but fundamentally the content of that expression itself. The reported policing of protest activity involving flag use

121 *Monis* (2013) 249 CLR 92, 214 [347] (Crennan, Kiefel and Bell JJ). See also *Tajjour v New South Wales* (2014) 254 CLR 508, 550 [36] (French CJ), 570 [110], 571–2 [114]–[115] (Crennan, Kiefel and Bell JJ); *McCloy* (2015) 257 CLR 178, 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2016) 261 CLR 328, 371–2 [139] (Kiefel CJ, Bell and Keane JJ), 464–5 [282]–[283], 418–19 [289] (Nettle J), 464 [427] (Gordon J).

122 Meagher suggests, for example, that a government 'could promote a National Flag Day and fund school education programs that teach its historical significance and potent symbolism': Meagher, above n 43, 85.

123 *Brown* (2017) 261 CLR 328, 371–2 [139] (Kiefel CJ, Bell and Keane JJ).

124 Bearing in mind the capacity of the High Court to hear evidence: see Gabrielle Appleby, 'Functionalism in Constitutional Interpretation: Factual and Participatory Challenges: Commentary on Dixon' (2015) 43 *Federal Law Review* 493, 494.

125 *McCloy* (2015) 257 CLR 178, 195 [2] (French CJ, Kiefel, Bell and Keane JJ).

126 See Sir Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2016) 27 *Public Law Review* 109, 121. The *McCloy* plurality acknowledged that proportionality testing involves value judgment: *McCloy* (2015) 257 CLR 178, 193–5 [2], 216–17 [76]–[78], 219–20 [89] (French CJ, Kiefel, Bell and Keane JJ); *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 60 [61], 61 [64] (Kiefel J); but see *McCloy* (2015) 257 CLR 178, 287 [336] (Gordon J) (emphasis in original): 'the question is not one of balance or value judgment but rather whether the impugned law impermissibly impairs or tends to impair the maintenance of the constitutionally prescribed system of representative and responsible government'.

127 *Brown* (2017) 261 CLR 328, 464–5 [430] (Gordon J).

128 Nettle J in *Brown* refers to the applicable threshold as 'manifestly excessive': *ibid* 422–3 [290] and 'grossly disproportionate': at 425 [295].

129 *Ibid* 422–3 [290] (Nettle J).

illustrates this phenomenon. High Court jurisprudence demonstrates that laws burdening the implied freedom of political communication that have the objective of ensuring public safety or public order may survive constitutional scrutiny, but much will turn on the scope and wording of the provision at issue. Despite the veneration of the flag in Australian society and its continued reification as a symbol of respect for the sacrifices of Australian armed forces, to date, no flag protection legislation has been enacted despite repeated attempts. The opinion of Howard himself is illustrative of why these attempts have failed: in 2006, Howard remarked that although he ‘despise[d]’ flag burning, ‘I see that kind of thing as just as expression, however offensive to the majority of the Australian community, an expression of political opinion’.<sup>130</sup>

130 See above n 33.