

A FRAGILE FREEDOM

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Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant*

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[255] Freedoms and rights of the kind which are constitutionally entrenched in many other Western democracies depend largely in Australia on the imperfect genius of the common law, under which ‘everybody is free to do anything, subject only to the provisions of the law’.² Until 1992, the right to freedom of expression in this country rested wholly on this shifting and unsatisfactory foundation. Defamation laws, in particular, have the capacity to chill debate on important matters of public interest. Politicians of all hues are among our most frequent defamation plaintiffs, sometimes suing in the hope of acquiring a ‘Fairfax swimming pool’ or a ‘Murdoch motor launch’. A striking contrast can be drawn with the situation which prevails in the United States, where by reason of the First Amendment, legal restrictions on freedom of speech are judged ‘against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.’³

This fascinating book by Professor Michael Chesterman charts the Australian jurisprudence on freedom of speech from the time a majority of the High Court first recognised a limited, implied Constitutional right to discuss government and political matters in 1992.⁴ Although constitutionally speaking the implied freedom must have been there all along, Chesterman argues that it was in reality ‘delicately planted’ by the High Court.

¹ Dr Matt Collins is a Melbourne barrister. His book, *The Law of Defamation and the Internet in the United Kingdom and Australia* will be published by Oxford University Press in 2001.

² *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283, cited with approval in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564.

³ *New York Times Co v Sullivan*, 376 US 254, 270 (1964).

⁴ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

After a brief introductory chapter, Chapter 2 describes in a thoroughly illuminating way the origins of the implied freedom in 1992, the judicial adventurism of the High Court represented by three split 1994 decisions,⁵ and [256] its conservative retreat in two unanimous 1997 decisions.⁶ Chesterman deconstructs each of the critical judgments in a way which permits the impact the implied freedom has actually had to be intelligently evaluated. He convincingly argues, for example, that the implied freedom increasingly relies for its legitimacy on an 'institutional', rather than a 'participatory' concept of representative democracy, geared more towards ensuring that information on political matters flows to electors than towards protecting the rights of citizens to express their views. Put another way, the implied freedom is not so much a freedom *to* communicate as a freedom *from* laws which prevent political communication.⁷ Chesterman points out that the subjects of communication protected by the implied freedom remain fluid and uncertain, while suggesting that they might be wider than first appears. At the same time, however, he warns that legislatures retain a broad margin of appreciation to circumscribe political communication for 'legitimate purposes'. He presents the 'optimistic' and the 'pessimistic' view of the scope of the implied freedom, ultimately expressing cautious optimism that the implied freedom has taken seed and will grow.

This platform then leads to a discussion in separate chapters of the extent to which freedom of speech is protected and undermined in various legal spheres in Australia, specifically through defamation, anti-vilification, and contempt laws.

Chapter 3 examines the extent to which the defamation law defences of absolute privilege, qualified privilege and fair comment conform with the implied freedom. Chesterman argues, in particular, that the expanded qualified privilege defence articulated in *Lange v Australian Broadcasting Corporation* might need further refinement. He points out that the 'reasonableness' requirement — a defendant's conduct must be 'reasonable' to attract the benefit of a defence of qualified privilege in respect of a publication to the world at large concerning government or political matters — has been rejected in favour of a more restrictive approach in Canada, and

⁵ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Cunliffe v Commonwealth* (1994) 182 CLR 272.

⁶ *Lange* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579.

in favour of a more liberal approach in the United Kingdom and New Zealand. The requirement can be difficult for media defendants to satisfy, particularly in cases where confidential sources have been relied upon. Nonetheless, Chesterman is on the side of those who consider the *Lange* decision to have dramatically liberalised Australian defamation law, converting qualified privilege into a 'freedom which applies relatively indiscriminately within the sphere of debate on government and political matters.'

In Chapter 4, which is less concerned with the implied freedom, Chesterman looks at two areas of perennial discussion in debates about the reform of defamation law in Australia: the merits of adopting the American 'public figure' defence, and the need for more responsive remedies. The shortcomings of the American 'public figure' defence are neatly summarised, and compared with the defence of qualified privilege at common law. Chesterman argues that both defences deny plaintiffs from obtaining a resolution on the issue of the truth or falsity of the publication; a matter which is likely to have motivated the bringing of proceedings in the first place, and which may serve the interests of the public at large. Both defences have the effect in many cases of turning defamation proceedings into an inquiry about the propriety of the publisher's conduct, rather than the content of the publication itself or the damage sustained by the plaintiff. Chesterman's solution is the adoption of alternative remedies in defamation actions, even in cases where the defendant has a defence of qualified privilege. He favours courts being granted the power to make declarations of falsity or to order mandatory correction orders or rights of reply.

In Chapter 5, Chesterman turns his attentions to anti-vilification laws which, depending on one's view, either protect the disadvantaged from speech with no legitimate claim to protection, or unacceptably interfere with freedom of speech and are likely to have all sorts of unintended consequences. The view proffered is that anti-vilification laws are defensible on the grounds that they define and enforce the rules of civility operating within an equality-based communitarian society. Nonetheless, as with defamation [257] law, Australia plainly suffers from a lack of uniformity in its approach to the proscription of vilification. Chesterman compares the

⁷ *Levy* (1997) 189 CLR 579, 622.

various approaches, identifies flaws where they exist and offers some modest solutions.

Chapter 6 begins with a provocative comparison of the media frenzies which surrounded the Lindy Chamberlain case in Australia in the 1980s and the O J Simpson case in the United States in the mid 1990s. Both cases highlighted the tension between the freedom of the media to report on matters of undoubted public interest and the right of defendants to a fair trial. In the United States, media defendants are, for practical purposes, not constrained by contempt laws. In Australia, by contrast, such laws regularly restrict the media, under threat of penal sanction, from publishing material which might prejudice a current or forthcoming criminal trial. As Chesterman concludes, neither country is necessarily 'right'. The American approach means that trials more frequently have to be deferred or relocated, and that jurors are routinely interrogated as to what media reports they have seen or heard. The Australian approach, which involves less disruption to the trial system, may have the effect of restricting the media to a greater extent than is necessary to counter the actual harm likely to result in most cases from pre-trial publicity.

Chesterman begins and ends his book with a look at the various theoretical rationales for freedom of speech. The concluding chapter draws the threads of the book together by looking at those theories and addressing, by reference to American experience and the growing body of Australian case law, the vexing question of who really benefits from freedom of speech: dissenters or conservatives?

This book is a welcome and uniquely Australian contribution to the international literature on the legal protection of freedom of speech. Because it is interwoven with international comparisons and references to the theoretical literature, it will be of interest to a broad audience. Chesterman is at his best when analysing the scope and theoretical underpinning of the implied freedom and when pointing to the areas in which that freedom is vulnerable or susceptible to further development. In these respects he takes the Australian literature to a new level and positions himself alongside the likes of Eric Barendt, Robert Post and Frederick Schauer.

The chapters on defamation and contempt are, in effect, revised and updated versions of journal articles previously published by Chesterman. Although this detracts a little from the coherence of the book as a whole, this material bears repetition and for the most part comfortably finds a place among the new material and the theoretical framework constructed around the jurisprudence of the implied freedom. As the author himself notes, there remains scope for further books or commentaries to explore the various other spheres in which freedom of speech is circumscribed in Australia, and to examine the difficult questions which arise in relation to the regulation of material published globally via the new media.

Chesterman is ultimately optimistic that Australia now has a legitimate seat at the table of countries with a constitutional foundation for the protection of freedom of speech, although he acknowledges that in most cases in which the implied freedom has been invoked since 1992, courts have either rejected its application or reached a decision without reliance upon it.

[258] Therein, of course, lies the risk for the legal protection of freedom of speech in Australia: to continue the horticultural analogy, a delicate plant cannot grow without water or in the dark. Because it is implied, rather than express, we do not know whether the plant, now a mere sapling, will turn out to be a willow or an oak. It is accordingly to be hoped that judges sitting on Australian superior courts will heed Chesterman's warning about the fragility of the implied freedom. Policy makers and legislatures should consider whether more robust and certain solutions are needed to protect this most important of rights.