

Meyerhoff v Darwin City Council [2005] NTSC 19

PARTIES: GARY MEYERHOFF
v
DARWIN CITY COUNCIL

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: JA 92/04 (20325359)

DELIVERED: 6 April 2005

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JUDGMENT OF: SOUTHWOOD J

CATCHWORDS:

JUSTICES APPEAL – APPEAL AGAINST CONVICTION

Affixing handbills to traffic signs; no permit; Darwin City Council By-laws; breach of By-law 97; Australian Constitution; implied freedom of communication about government and political matters.

Coleman v Power (2004) 78 ALJR 1166; *Coleman v Sellars* (2000) 181 ALR 120; *Cunliffe v Commonwealth* (1994) 183 CLR 272; *Kruger v Commonwealth* (1997) 190 CLR 1; *Lange v Australian Broadcasting Corporation* [1997] 189 CLR 520; *Levy v Victoria* [1997] 189 CLR 579; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211

REPRESENTATION:

Counsel:

Appellant: Gary Meyerhoff (litigant in person)
Respondent: Mr J P Tompkins

Solicitors:

Appellant: litigant in person
Respondent: Cridlands

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Gary Meyerhoff v Darwin City Council [2005] NTSC 19
No JA 92/04 (20325359)

BETWEEN:

GARY MEYERHOFF
Appellant

AND:

DARWIN CITY COUNCIL
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 6 April 2005)

Introduction

- [1] The Appellant appeals against his conviction in the Court of Summary Jurisdiction. The appeal was commenced by a Notice of Appeal dated 26 November 2004.
- [2] On 28 October 2004 the appellant was convicted of an offence that contrary to Darwin City By-law 97(1)(b) on 26 August 2003 at the intersection of the Stuart Highway and Goyder Road in Darwin he affixed or caused to be affixed a handbill to a fixture in a street without having a permit to do so.

[3] After he convicted the Appellant, the Magistrate ordered that the Appellant was to be released upon the Appellant giving security in the sum of \$600.00 and promising to comply with the following conditions: (1) to be of good behaviour for a period of 12 months; and, (2) to appear before the Court of Summary Jurisdiction if called upon to do so during the period of the order.

The issue

[4] The only ground of appeal pleaded in the Notice of Appeal is that the learned Magistrate erred in finding that the relevant Darwin City Council By-law did not breach the implied right of free speech and political communication contained in the Australian Constitution.

[5] The issue for determination by the Supreme Court is whether the relevant Darwin City By-law is invalid because it is repugnant to the freedom of communication about government and political matters implied in the Australian Constitution.

The By-laws

[6] The relevant Darwin City By-laws are By-laws 97, 3, 13, 14, 15 and 20. By-law 97 provides as follows:

“97. Handbills

(1) It is an offence committed by a person for that person, without a permit, in or on a public place –

(a) to give out or distribute a handbill; or

(b) to affix or cause to be affixed a handbill to a power pole, signpost or fixture in a street.

(2) It is a condition of a permit to affix a handbill that the holder shall –

(a) ensure that the handbill is preserved in a clean and tidy condition;

(b) remove the handbill if it becomes worn, torn or detached; and

(c) remove any waste or litter from the area.

(3) It is an offence committed by a person for that person, without a permit and the consent of the owner or occupier of land adjoining a public place, to affix or cause to be affixed a handbill to or against a structure on the land.

(4) Where an authorised person is of the opinion that a handbill is dirty, untidy, worn, torn or detached, the authorised person may, whether or not a permit has been granted or the consent of the owner or occupier of the land obtained in relation to affixing the handbill, give notice in accordance with by-law 10 to –

(a) the owner or occupier of the building where the handbill is posted; or

(b) the person responsible for authorising the production of the handbill,

requiring remedial action or the removal of the handbill.”

[7] A handbill includes a poster, placard, notice, ticket, pamphlet and advertisement (By-law 3).

[8] Darwin Council By-law 14 provides as follows:

“14. Applications for licences, &c.

(1) A person may apply to the clerk for the issue of a licence required under these By-laws.

(2) An application shall be –

(a) in accordance with the approved form;

(b) accompanied by the appropriate fee; and

(c) accompanied by any documents, specifications or particulars that the council may require.”

[9] “Licence” includes permit, authority and registration (By-law 13). The Council may grant or refuse to grant a licence (By-law 15(1)) and the licence maybe subject to such conditions as the Council thinks fit (by-law 15(4)).

[10] A person who contravenes or fails to comply with a By-law is guilty of an offence and is liable on conviction to a penalty not exceeding \$3000.00 and in addition, to a penalty not exceeding \$100.00 for each day during which the penalty continues (By-law 20).

[11] The approved form for making an application for a permit to affix a handbill to a fixture in a street requires the applicant to give his name and address and to advise the Darwin City Council of the occasion for the affixing of the handbills to fixtures and the date of the event. It also requires an example of each type of handbill to be submitted to the Darwin City Council. The Director of Community Services has been authorised to waive the appropriate fee and fees are normally waived. Rather than requiring the payment of an appropriate fee the Darwin City Council usually imposes a condition on the permit holder to the effect that if handbills are not removed

within 48 hours of the completion of the notified event then the handbill may be removed by the Council and the costs of doing so recovered from the person described as the principal in the application for the permit.

[12] Mr Tompkins of counsel who appeared for the Darwin City Council stated that the Council did not receive a lot of applications for permits to affix handbills to fixtures in public streets and he agreed with Mr Meyerhoff that Mr Meyerhoff may be the first person to be prosecuted for a breach of By-law 97 of the Darwin City Council By-laws 1994.

Facts

[13] The Appellant is a spokesperson for a group of people who call themselves the Network against Prohibition. The group is made up of approximately 12 core members and approximately 100 to 200 supporters. It was formed in Darwin in 2002 after the enactment of Division 1A of the Misuse of Drugs Act. Division 1A of the Act enables certain residential premises to be declared drug premises.

[14] The objectives of Network against Prohibition are to achieve drug law reform and to have the use of prohibited drugs legalised. The group is comprised of activists who engage in political dissent to this end.

[15] The regulation of drug use and the prohibition of the use of illicit drugs is an important and sometimes controversial issue for the Northern Territory

Government. It is a matter about which there has been significant debate in the community.

[16] At about 1.00am on 26 August 2003 the Appellant and another man were observed by two police officers to be bent over a “keep left” traffic sign that is situated at the intersection of the Stuart Highway and Goyder Road, Darwin. The two men were seen as police drove by inbound on the Stuart Highway. One of the police officers saw the two men rubbing the back of the traffic sign with their hands. The police officers drove past, executed a u-turn and returned to where the Appellant was to be found. One of the police officers then spoke to the Appellant and the other man who was still in the vicinity of the sign. The Appellant was observed by one police officer to be holding a bucket which contained home made glue. The other gentleman was holding a plastic bag containing leaflets. The leaflets were of two different sizes and two different types. The two different sizes were A4 and A3. All but two leaflets had writing on them:

“Make tracks to the Second Darwin Syringe Festival and International Conference on Direct Action. It’s a hit. End the war on Drugs 21 to 28 September www.napnt.org. PH – 0415162525”

[17] The Darwin Syringe Festival is an annual festival that is held in Darwin. Mr Meyerhoff told the Court that the festival promotes the safe use of drugs; provides an opportunity for those who attend the festival to consider the health issues confronting drug users; provides an opportunity to hold training sessions for general medical practitioners who consult patients with

drug problems; and creates an event which can be used to advocate drug law reform.

[18] At the time the leaflet was affixed to the sign the Appellant did not hold a permit issued by a clerk of the Darwin City Council to affix or cause to be affixed a handbill to a fixture in a street.

[19] The leaflet described constituted a notice or advertisement specifying a web address and a mobile phone number from which information could be sought pertaining to the Second Darwin Syringe Festival and International Conference on Direct Action which was to be held in Darwin from 21 to 28 September 2003.

The implied freedom of communication

[20] The By-laws do burden freedom of communication about a government or political matter. However, a mere restriction of the freedom of communication is not sufficient to invalidate the By-laws.

[21] In *Lange v Australian Broadcasting Corporation* [1997] 189 CLR 520 at 566 to 568 the High Court stated that:

“Since McGinty it has been clear, if it was not clear before, that the Constitution gives effect to the institution of “representative government” only to the extent that the text and structure of the Constitution establish it. In other words, to say that the Constitution gives effect to representative government is a shorthand way of saying that the Constitution provides for that form of representative government which is to be found in the relevant sections. Under the Constitution, **the relevant question is not, “What is required by representative and responsible government?” It is, “What do the terms and structure of the Constitution prohibit, authorise or require?”**

Moreover, although it is true that the requirement of freedom of communication is a consequence of the Constitution's system of representative and responsible government, it is the requirement and not a right of communication that is to be found in the Constitution. Unlike the First Amendment to the United States Constitution, which has been interpreted to confer private rights, **our Constitution contains no express right of freedom of communication or expression. Within our legal system, communications are free only to the extent that they are left unburdened by laws that comply with the Constitution.**

To the extent that the requirement of freedom of communication is an implication drawn from ss 7, 24, 64, 128 and related sections of the Constitution, the implication can validly extend only so far as is necessary to give effect to these sections. Although some statements in the earlier cases might be thought to suggest otherwise, when they are properly understood, they should be seen as purporting to give effect only to what is inherent in the text and structure of the Constitution.

When a law of a State or Federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, **two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively "the system of government prescribed by the Constitution").** If the first question is answered "yes" and the second is answered "no", the law is invalid. (Emphasis added)

[22] The freedom of communication which is required by the constitution is not confined to verbal communication, and may extend to conduct where such conduct "... is a means of communicating a message within the scope of the freedom": *Levy v Victoria* [1997] 189 CLR 579 at 613 per Toohey and Gummow JJ. Laws which prohibit or regulate communication by restricting freedom of movement or denying people the opportunity to communicate may contravene the constitutional requirement: *Levy v Victoria* at 617-618 per Gaudron J and at 622-3 per McHugh J.

[23] The purpose, as well as the operation and effect of a law may be taken into account in assessing whether the law curtails freedom of communication in a

manner or to an extent inconsistent with the constitutional implication: *Coleman v Sellars* (2000) 181 ALR 120 at 126 per Muir J; *Cunliffe v Commonwealth* (1994) 183 CLR 272 at 337; *Levy v Victoria* at 611 per Toohey and Gummow JJ.

[24] A law restricting conduct which may incidentally burden freedom of political speech will not be invalid simply because it can be shown that some more limited restriction could suffice to achieve a legitimate purpose. This is consistent with the respective roles of the legislature and the judiciary in a representative democracy: *Coleman v Power* (2004) 78 ALJR 1166 at 1174 per Gleeson CJ; *Levy v Victoria* at 619 per Gaudron J; *Kruger v Commonwealth* (1997) 190 CLR 1 at 126-128 per Gaudron J.

[25] The freedom of communication which the constitution requires is a freedom which is commensurate with reasonable regulation in the interests of an ordered society: *Levy v Victoria* at 608 per Dawson J.

[26] The freedom of communication required by the constitution protects political discussions in relation to all levels of government: *Levy v Victoria* at 596 per Brennan CJ; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 232 per Mason CJ.

The character of By-Law 97

[27] With the above principles in mind, I now turn to consider whether By-law 97 is reasonably appropriate and adapted to serve a legitimate end the

fulfilment of which is compatible with the constitutionally required freedom of communication.

[28] The purpose of the By-law is clearly to regulate the affixing of handbills to fixtures in public streets in an orderly manner so as to maintain the amenity of the environment and the integrity of the fixture. The mandatory conditions stipulated By-law 97(2) makes it clear that both the maintenance of the handbill in a clean and tidy condition and the avoidance of waste and litter are important matters. The purpose of the By-law is also to cover to some degree the cost of the Darwin City Council removing old handbills from such fixtures. The By-law only incidentally burdens the freedom of communication. There is no reason to think that the purpose of the By-law is other than legitimate.

[29] The By-law is of general application. It applies to posters, notices and advertisements containing all kinds of information. It is limited in its operation to fixtures, power poles and signs in public streets in the area regulated by the Darwin City Council. It does not create a complete prohibition to the affixing of handbills to power poles, sign posts or fixtures in a street. The By-law only prohibits such conduct in circumstances where a permit has not been obtained. There are ample alternative means of giving notice of conferences and events.

[30] Mr Meyerhoff argues that the above factors are counteracted by the following features of the permit system. An application for a permit must be

in writing in the prescribed form. It must be lodged with the Council and subject to any waiver must be accompanied by the prescribed fee which is a significant obstacle for small non-profit organisations. An application for a permit must be “accompanied by any documents, specifications or particulars that the council may require”. By-law 15 gives the Council an unqualified right to refuse a permit. A permit may be subject to such conditions as the Council thinks fit. Making an old and conservative argument (see for example F A Hayek, “The Road to Serfdom”) he says in effect, that because there are no criteria fixed and announced by the By-laws beforehand which make it possible to foresee with fair certainty how the Council will exercise its discretion, the By-laws make the relevant freedom of communication illusory. Caprice significantly interferes with freedom.

[31] However, given the legitimate purpose of the By-laws, the limited area subject to regulation and other available means of communication even a By-law that absolutely prohibited the affixing of handbills to fixtures in streets would be commensurate with reasonable regulation in the interests of an ordered society. A law will not be invalidated simply because it can be shown that a more limited restriction could suffice.

[32] The By-law is appropriate and reasonably adapted to the fulfilment of a legitimate purpose which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

[33] For these reasons the By-laws are not repugnant to the Australian Constitution and I dismiss the appeal. I will hear the parties as to costs.