

Meyerhoff v Darwin City Council [2005] NTCA 8

PARTIES: GARY WILLIAM MEYERHOFF

v

DARWIN CITY COUNCIL

TITLE OF COURT: COURT OF APPEAL OF THE
NORTHERN TERRITORY

JURISDICTION: CIVIL APPEAL FROM THE SUPREME
COURT EXERCISING TERRITORY
JURISDICTION

FILE NO: AP 05 of 2005 (20325359)

DELIVERED: 1 November 2005

HEARING DATES: 1 November 2005

JUDGMENT OF: MILDREN, THOMAS & RILEY JJ

CATCHWORDS:

CRIMINAL LAW – appeal – fixing handbill to fixture in the street without permit – Darwin City Council By-laws – whether by-law impugned against the right to free speech – whether freedom of speech gives unlimited freedom to individuals appeal dismissed

Control of Roads Act, s 7
Darwin City By-law, s 97(1)(b)
Local Government Act, s 131(1), s 131(4)
Planning Act, s 64
Trespass Act, s 5

Referred to

Coleman v Power and Ors (2004) 209 ALR 182
Highway, Meyerhoff & Inder-Smith v Thomas (unreported, Court of Appeal of the Northern Territory, 21/5/2004 AP 25 of 2003)
Highway, Meyerhoff & Inder-Smith v Thomas (unreported, Supreme Court of the Northern Territory, 26/11/2003, JAs 123, 124 & 125 of 2003)

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

Followed

John Fairfax Publications Pty Ltd and Others v Ryde Local Court and Ors
(2005) 152 A Crim R 527

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

REPRESENTATION:

Counsel:

Appellant:	Litigant in person
Respondent:	C. Ford

Solicitors:

Appellant:	Litigant in person
Respondent:	Cridlands

Judgment category classification:	B
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Meyerhoff v Darwin City Council [2005] NTCA 8
No. AP 5 of 2005 (20325359)

BETWEEN:

MEYERHOFF, Gary William
Appellant

AND:

DARWIN CITY COUNCIL
Respondent

CORAM: MILDREN, THOMAS & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 1 November 2005)

Mildren J:

- [1] 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.
- [2] From that decision the appellant appealed to the Supreme Court, the only ground of appeal being that the learned magistrate erred in finding that the relevant Darwin City Council By-law did not breach the implied right to free speech and political communication contained in the Australian Constitution. On appeal to the Supreme Court Southwood J held that the by-

laws were not repugnant to the Australian Constitution and dismissed the appeal.

[3] The relevant By-law, 97(1)(b) provides as follows:

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

(b) to affix or caused to be affixed a handbill to a fixture in a street.”

[4] There are provisions in the By-laws that enable a person to apply to the council for a permit. The evidence was that no such application was made in this case. There was no dispute about any of the elements constituting the offence and there is no appeal against any of the factual findings of the learned magistrate.

[5] The sole matter of appeal for this court is that Southwood J erred in law by finding that "Section (sic) 97 of the Darwin City Council By-laws 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”.

[6] The way the appeal is drafted reflects the decision of the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568, where in a joint judgement of seven Justices of the Court, the Court said this:

“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 s 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 by government prescribed by the Constitution"). If the first question is answered "yes" and the second is answered "no", the law is invalid.”

- [7] Since that decision the second limb of the test has been amended by a majority decision of the High Court in *Coleman v Power and Ors* (2004) 209 ALR 182 in paras [95] to [96] in the judgement of McHugh J (with whom Gummow and Hayne JJ agreed at para [196] as did Kirby J at para [211]).
- [8] There is therefore a slight rewording of the second limb of a *Lange* test by reference to the way in which Kirby J expressed it in *Levy v The State of Victoria and Ors* (1997) 189 CLR 579 at 646. In other words the question is, does the law which is impugned have the effect of preventing or controlling communication upon political and governmental matters in a manner which is inconsistent with the system of representative government for which the Constitution provides?
- [9] The relevant sign was found by the learned magistrate to be a fixture in a street in accordance with By-law 97(1)(b) and there is no appeal either to Southwood J or to this court as to that finding.

[10] Under s 7 of the Control of Roads Act, it is provided that,

“Subject to s 64 of the Planning Act and Division 4 of part 6 of the Local Government Act, all roads... in the Northern Territory, together with the timber growing on those roads are the property of and vested in the Territory and are under the care, control and management of the Minister.”

[11] Section 64 of the Planning Act provides that in certain circumstances, where land shown on a plan of survey as a road is approved under certain other provisions for the subdivision or consolidation of the land then the land is vested in fee simple in the Territory.

[12] There is no evidence to show whether that provision applies to this particular land or not.

[13] Section 131(1) of the Local Government Act provides:

“Notwithstanding any other Act, but subject to this section -

(a) roads vested in a municipal council under s 64 of the Planning Act;

(b) roads in respect of which a municipal council accepts or has accepted responsibility for care, control and management; and

(c) roads within the meaning of paragraphs (a)(v) of the definition of "road" in section 3’,

are, by virtue of this subsection under the care, control and management of council and, in respect of roads referred to in paragraph (b), vested in that council.”

- [14] There are provisions also in s 131(4) for the Minister by notice in the Gazette, after consulting with a municipal council, to declare that a road within a municipality is vested in and is under the care, control and management of the Territory.
- [15] There is simply no evidence as to whom the particular sign which was part of a fixture attached to a road belongs. It could belong under those provisions either to the Northern Territory or it could belong to the Darwin City Council. The evidence does not make it clear who is the owner, but clearly the sign must belong to either the Council or the Territory.
- [16] I think it is important to recall that in *Lange v Australian Broadcasting Corporation*, the court made it plain that the implied constitutional right of freedom of communication between persons concerning political or governmental matters do not confer personal rights on individuals. Their Honours said this at page 560:

“That being so, ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of protected freedom by the exercise of legislative or executive power. As Dean J said in *Theophanous*, they are "a limitation or confinement of laws and powers [which] gives rise to a pro tanto immunity on the part of a citizen from being adversely affected by those laws or by the exercise of those powers rather than to a 'right' in the strict sense". In *Cunliffe v The Commonwealth*, Brennan J pointed out that the freedom confers no rights on individuals and, to the extent that freedom rests upon implication, that implication defines the nature and extent of the freedom. His Honour said:

"The implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control".

[17] It has since been held by this Court that the constitutional immunity does not authorise an individual to trespass upon the property of another.

[18] In the case of *Highway, Meyerhoff & Inder-Smith v Thomas* (unreported, Court of Appeal of the Northern Territory, 21/5/2004 AP 25 of 2003) this Court heard an appeal from Bailey J in circumstances where the appellants have each been found guilty of trespass, contrary to s 5 of the Trespass Act, the particulars of trespass being that the appellants, together with others, trespassed on the premises of the Office of the Chief Health Officer, 4th Floor, Health House, 87 Mitchell Street, Darwin.

[19] On appeal from the Court of Summary Jurisdiction (*Highway, Meyerhoff & Inder-Smith v Thomas* (unreported, Supreme Court of the Northern Territory, 26/11/2003, JAs 123, 124 & 125 of 2003)) Bailey J said (at p 6 of the transcript):

“If the appellants wish to see drug laws changed then there are legitimate ways to go about it. The appellants may seek to use lawful means to persuade members of the executive to change policies and members of the legislature to change laws.”

[20] His Honour went on to say (at p 7 of the transcript):

“I am in no doubt that each of the appellants would be outraged if someone entered their home uninvited with the intention of persuading them to see the error of their ways. The law of trespass makes no distinction between domestic, commercial, industrial or government premises. The appellants have invoked the right to

freedom of speech. In the Northern Territory it has been held that the right of freedom of speech is not an unlimited freedom, see *Watts v Trennery* (1998) 122 NTR 91.”

- [21] On appeal to this Court, although Angel J dealt with whether the particular law offended the constitutional freedom in accordance with the test in *Lange v Australian Broadcasting Corporation*, his Honour said:

“I would only add that a person's right to speak cannot authorise entry upon another's premises without their permission. There is no obligation on a person to hear another speak. Just as one may open one's mouth, another may turn a deaf ear. As Lord Macnaughten said in *Mackill v Wright Brothers* (1888) 14 App Cas 106 at 123, 'advice unsought is not always welcome.' Indeed, the Chief Health Officer not only had the right to evict the appellants from her office, but also the right to tell them to mind their own business.

In *R v Director of Serious Fraud Office* (1993) AC 1 at 31, Lord Mustill spoke of from the common view that one person should, so far as possible, be entitled to tell another person to mind his own business. All civilized States recognise this assertion of personal liability and privacy”.

- [22] His Honour's judgement was agreed to by myself and also by Riley J.

- [23] I think what flows from that decision is that this Court has recognised that the constitutional implied right of free speech arising from the Constitution does not entitle one to trespass upon the property of others, even if the property belongs to the government.

- [24] A similar point has been recently discussed by the New South Wales Court of Appeal in the case of *John Fairfax Publications Pty Ltd and Others v Ryde Local Court and Ors* (2005) 152 A Crim R 527. In that matter Ms Pat O'Shane, the magistrate, was the subject of an interim ADVO, later made

final by consent. The claimants were media organisations which sought access to court papers relating to the application. They sought declarative relief against orders refusing access and the closing of the court where one of the parties was a child. The claimants submitted that refusal to allow access to papers violated the principles of open justice and that there was no power to refuse access to the originating process.

[25] Further, they submitted that the order closing the court during the hearing, where the interim order was made final, erred by failing to otherwise order that the proceedings be in public. It was also submitted that both decisions violated the implied constitutional right of political communication and were incompatible with courts exercising federal jurisdiction.

[26] In respect of the last point, Spigelman CJ said, at p 546 par [96]:

“The claimants invoked the implied constitutional freedom of communication. There are a number of answers to this submission. It is sufficient to state that the freedom was a negative one which creates an immunity rather than any freestanding right. The constitutional immunity does not provide a right of access to legislative or executive documents, let alone to judicial documents. There must be a burden on a freedom that exists independently of the law. There is none here. (See *Lange v Australian Broadcasting Corporation* (1997), 189 CLR 520 at 560, *Mulholland v The Australian Electoral Commission* (2004) 78 ALJR, 1279 at [107] to [109], [180] to [187], [337], [356]. See also *Titelius* at [87].”

[27] Likewise, in my opinion that judgment establishes that the implied constitutional freedom of communication, does not create a right to override private property rights, whether those private property rights are those

which belong to private individuals or whether they are the property rights which are the rights of the Territory.

[28] I therefore conclude that there is no constitutional invalidity in the By-law to the extent that it creates an offence without a permit in or a public place to affix, or cause to be affixed a handbill to a fixture in the street. In my opinion the appeal must be dismissed.

THOMAS J

[29] I agree with reasons expressed by Mildren J. I agree the appeal should be dismissed.

RILEY J:

[30] I agree that the appeal should be dismissed and I have nothing to add.