THE AMERICAN AND AUSTRALIAN APPROACHES TO ABORTION "BUFFER ZONES": THE SAME BUT DIFFERENT

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ABSTRACT

In Clubb v Edwards *and* Preston v Avery*, the High Court of Australia examined the legality of abortion "buffer zones" in Victoria and Tasmania. In upholding the legality of these zones, the High Court dismissed arguments that such laws infringed the implied right of freedom of political communication in the Commonwealth Constitution. In this paper, the authors argue this decision may well lead to unintended consequences that will discriminate against the full, frank and public exercise of political communication.*

I. INTRODUCTION

This article analyses the decision of the High Court of Australia regarding abortion "buffer zones" in *Clubb v Edwards* and *Preston v Avery*.[1] In particular, the article seeks to draw a comparison between the American Supreme Court applying rights under the First Amendment to the *Constitution of the United States of America* in the case of *McCullen v Coakley*[2] and the Australian High Court applying the implied to freedom of political communication. We will argue that the jurisprudential approaches appear similar but the

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[1] [2019] HCA 11.
[2] 573 US (2014) ('*McCullen*').

outcome in the decision of High Court in *Clubb* and *Preston* are different, with grave implications.

In order to propound this argument, we will first look at the development of the American jurisprudential approach and the interpretation of America's First Amendment in case law.

Second, we will see how this American legal approach was applied in *McCullen v Coakley* to see how "buffer zone" laws in this case were held to be unconstitutional.

Third, we will give an overview of the development of the implied freedom of political communication in the Commonwealth Constitution, and fourth, outline how that was applied in *Clubb* and *Preston* to uphold the impugned laws. Lastly, we will conclude outlining how this decision will have wider implications for political communication than so far realised.

II. THE AMERICAN APPROACH – *MCCULLEN V COAKLEY*

A. The First Amendment

According to commentary in the *Harvard Law Review*, for over forty years the distinction between content-based and content-neutral restrictions on speech has been central to the Supreme Court's First Amendment jurisprudence.[3] Action challenging the legality of "buffer zones" was brought to the Supreme Court of the United States of America on the basis that laws in this regard breach the First Amendment to that country's Constitution. This Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

The U.S. Supreme Court, in a series of 'First Amendment' cases, has held that, pursuant to this Amendment, the Government has no power to restrict expression because of its message, its ideas, its subject matter or its content.

[3] 'Leading Cases' (2014) 128 (1) *Harvard Law Review* 191, 221.

The First Amendment's guarantee of freedom of speech has come to be understood as a personal right extending beyond political communication. '[S]peech which bears, directly or indirectly, upon issues with which voters have to deal' has nevertheless long been understood to have the greatest claim to protection under the First Amendment.[4] This 'First Amendment Principle' was intended to be applied "with full force" to footpaths and public streets, since these are historically important sites for debate, discussion and leafletting.[5]

The *Police Department of Chicago v Mosley* case concerned Earl Mosley, a Federal postal employee, who had been picketing Jones Commercial High School in Chicago by walking along the footpath holding up a sign charging the school with *"black discrimination."* When Mosley heard about a Chicago ordinance preventing all picketing within 150 feet (45.72 metres) of a school, except for peaceful picketing related to a labour dispute, he called the police department to ask how it would affect him. He was informed that his picketing must stop or he would be arrested. Mosely thus brought an action in the Supreme Court arguing that such an ordinance violated his First Amendment rights. In this matter, the Supreme Court held that the Government could not selectively exclude speakers from the public sphere based on the content of their message.[6]

In *United States v Grace*,[7] the challenged law prohibited the 'display [of] any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement' in the vicinity of the Supreme Court. Protestors distributing leaflets outside the Supreme Court sought an injunction to stop the application of the law. In striking down the law, the Court said sidewalks have traditionally been held open for expressive activities and considered to be public forums. As such, the interest in maintaining order or insulating the courts from lobbying was insufficient to sustain a total ban on picketing and demonstrations on the sidewalks outside the court.

White J, in handing down the decision observed that '[t]here is no doubt as a general matter peaceful picketing and leafleting are expressive activities involving 'speech' protected by

[4] A. Meiklejohn, *Political Freedom* (Harper Collins, 1960), 79, quoted in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 124; [1994] HCA 46.
[5] See, in particular, *Police Dept of Chicago v Mosely* 408 US 92 (1972); *United States v Grace* 461 US 171 (1983).
[6] *Police Dept of Chicago v Mosely* 408 US 92, 95 (1972).
[7] *United States v Grace* 461 US 171, 180 (1983) ('*Grace*').

the First Amendment.'[8] White J added that the government may impose reasonable restrictions 'on time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest so long as they leave open ample alternative channels for communication of the information'.[9]

Subsequent Supreme Court decisions have held that such restrictions must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'[10]

Further, in *Ward v Rock Against Racism*[11], it was held that if the restrictions were not content neutral they could only be constitutionally valid if they could withstand "strict scrutiny". As Quinlan[12] notes, this is a much more rigid test and requires such laws to use the 'least restrictive means of achieving a compelling state interest.'[13]

The *Ward* case concerned an effort to control the volume at Naumberg Acoustic Bandshell, an amphitheatre in Central Park, by the City of New York, by way of a regulation that required performers at concerts to use sound amplification equipment and a sound technician provided by the City. The City had passed the regulation after repeated complaints of excessive noise by nearby residents and other users of the park. *Rock against Racism*, a group that regularly performed rock concerts at the shell, challenged the regulation, contending that it constituted an impermissible content-based restriction on speech.

The Supreme Court ruled 6-3 in favour of the City. In the majority judgment, Kennedy J recognized that music is a form of expression protected by the First Amendment. However, he emphasized that the sound amplification requirement was a time, place, and manner restriction on speech, as opposed to a content-control measure. The City's principal purpose

[8] Ibid.
[9] Ibid. This is the approach the Court adopted in *McCullen*.
[10] See, for example, *Erznoznik v City of Jacksonville* 422 US 205 (1975).
[11] 491 US 781 (1989) ('*Ward*').
[12] Michael Quinlan (2015) "The legality of exclusion zones around abortion clinics in the US and Australia", Law and Religion Australia Blog, June 2015, <https://lawandreligionaustralia.blog/category/exclusion-zones-and-abortion-clinics/>
[13] *Ward*, above n 11, 791. See also *United States v Playboy Entertainment Group Inc* 529 US 803, 813 (2000).

was not to censor content but merely to control noise levels. The distinction between laws that were 'content based' as opposed to those that were 'content neutral' was at the heart of the judgment in *McCullen*.

B. McCullen v Coakley

In the matter of *McCullen*, the Supreme Court held that a law establishing a fixed 'buffer zone' outside of Massachusetts abortion clinics was a content-neutral "time, place, or manner" restriction on speech, and that it was unconstitutional because it was not narrowly tailored.

An action was brought by a group of people who engaged in "sidewalk counselling" of women approaching abortion clinics in Massachusetts in 2007, in direct disagreement of the law that made it a crime to 'knowingly stand on a "public way or sidewalk" within 35 feet (10.67 metres) of any place where abortions are performed other than at a hospital.[14]

Unlike protestors who use signs or chants or face-to-face confrontation to express objections to abortion, this was not the approach of the counsellors.[15] They provided women with information alternatives to abortion and assisted the women to take these alternatives if they wished to do so. In order to provide this counselling, the Court heard that the counsellors, who were, in fact, appropriately qualified medical professionals in the business of assisting people with mental health during traumatic times in their lives, considered it essential for them to maintain a caring demeanour, a calm tone and direct eye contact with women entering abortion clinics.[16]

In this matter, the counsellors' counsel claimed that because the exclusion zone included the public footpaths adjacent to the clinics they were not able to approach the clinics' entrances and driveways and this frustrated their counselling efforts, since they could not distinguish patients from other passers-by, making it difficult for them to distribute literature to arriving patients.[17]

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[14] *Reproductive Health Care Facilities Act* s120E1/2(a), (b) *Mass. Gen Laws* ('*Massachusetts law*').
[15] *McCullen*, above n 2.
[16] Ibid.
[17] Ibid.

The counsellors thus challenged the validity of the Massachusetts law on the basis that it violated the First and Fourteenth[18] Amendments to the American Constitution. Interestingly, the uncontradicted evidence of one counsellor was that, prior to 2007, about 100 women had chosen alternatives to abortion as a consequence of her counselling outside Massachusetts abortion clinics, but none since, which coincided with the enactment of the law.

In delivering its judgment, the Supreme Court found unanimously (although via differing views) that the Massachusetts law violated the First Amendment and was therefore unconstitutional. This ruling is relevant for our consideration, since this is America's jurisprudential finding of its "implied freedom of political communication" under the First Amendment.

The plurality of Roberts CJ, Ginsburg, Breyer, Sotomayor and Kagan JJ, in their joint judgment, first considered whether the Massachusetts law was content based and concluded that it was not. The majority noted that the law[19] did not refer to the content of any speech and so was not directed towards the prevention of, or anti-abortion speech. The majority also found that the State had a legitimate interest in ensuring public safety, preventing large crowds gathering, impeding access and obstructing footpaths and that these problems would arise no matter what was said within close proximity to an abortion clinic.[20] The majority rejected the counsellors' arguments that the Massachusetts law discriminated against free speech based on its content by providing for an exception for employees and agents of clinics who were permitted to pass in and out of the exclusion zone. This was because they found that the exception for employees and agents was necessary and there was no evidence that any speech in favour of abortion took place inside the exclusion zones was authorised by clinics.[21] As the majority found that the Massachusetts law was not content based, they concluded that it was not necessary for the law to be the subject of strict scrutiny in line with *Ward v Rock Against Racism*[22] and subsequent decisions.

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[18] U.S. Constitution, 14th Amendment, s 1*:* "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".
[19] *McCullen*, above n 2.
[20] *Ward*, above n 11.
[21] *McCullen*, above n 2.
[22] Ibid and *Grace*, above n 7.

Further, the Court did find that that the law burdened substantially more speech than was necessary to further the government's legitimate interests. The majority accepted that the State had a legitimate interest in attempting to prevent deliberate obstruction of clinic entrances and harassment and intimidation of patients and clinic staff, however, these concerns were addressed in other unchallenged provisions of the law, as well as laws relating to obstructing, blocking or hindering entry to a reproductive health care facility, not to mention the general criminal law (i.e., assault, trespass, breach of peace, and so forth).[23]

The majority judgment in the *McCullen* case thus concluded that the Massachusetts law burdened more speech than was necessary to further government's legitimate interests, since, by excluding all persons (other than clinic workers) from buffer zones, the law '[swept] in innocent individuals and their speech'.[24] The Massachusetts law made it more difficult for those such as counsellors to engage in conversations at normal proximity and volume or to hand out leaflets. In the plurality's view, targeted injunctive relief focussed on precise individuals and precise conduct at a particular clinic was preferable and would not breach the Constitution.[25]

While Scalia and Alito JJ in their separate judgement agreed with the majority that the Massachusetts law violated the First Amendment they criticised its approach, arguing that the law should have been subject to "strict scrutiny", since it targeted abortion and was therefore "content based".[26] As Quinlan[27] outlines, in Justice Scalia's opinion, the Massachusetts law *was* content based because it imposed a blanket prohibition on speech in an area where anti-abortion messages would be most effective. Scalia J rejected the notion that, in these circumstances, the purpose of the legislation could properly be determined by reference to its stated objects. He had no doubt that abortion clinic employees or agents would often speak in favour of abortion and seek to counter the speech of people, like the

[23] *McCullen*, above n 2, referring to ch 266 s120E1/2 (e) *Mass. Gen Laws* which creates a criminal offence for "[a]ny [person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility."
[24] Ibid.
[25] Ibid.
[26] Ibid Scalia J 7, 13 and Alito J 1-3.
[27] Quinlan, above n 12.

counsellors within the exclusion zone and that they would do so within the scope of their employment.[28] He noted, interestingly that:

> Protecting people from speech that they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks.[29]

III. THE AUSTRALIAN APPROACH – IMPLIED FREEDOM TO POLITICAL COMMUNICATION

In Australia, the *Clubb* and *Preston* cases saw action challenging the validity of "buffer zone" laws brought on the basis that they constitute a breach of the implied freedom of political communication as outlined in *Lange v ABC*[30] and *McCloy v New South Wales*.[31]

As noted by Neil Foster, this right is an implication from the democratic structure of the Commonwealth Constitution, that Parliaments (both Commonwealth and State/Territory) should not unduly restrict free speech on political issues.[32] In the *Clubb*[33] matter which we will look at in more detail later on, Mrs Clubb's defence counsel's submissions proceeded from an unstated premise that the implied freedom of political communication operates in similar fashion to the First Amendment right of free speech and that, because United States authorities have suggested that conduct of the kind in which Mrs Clubb engaged would be protected by the First Amendment, it should be concluded that her conduct was protected by the implied freedom of political communication. The High Court rejected this argument, '*stripping it of this misconception.*[34] However, as will be demonstrated in this paper, comment in relation to abortion has to be considered political communication 'about government or political matters' in view of the *Lange* test.

[28] *McCullen* Scalia J 5, 6-7.
[29] Ibid, 9.
[30] (1997) 189 CLR 520 ('*Lange*').
[31] (2015) 527 CLR 178 ('*McCloy*').
[32] Neil Foster,(2019) "High Court upholds abortion buffer laws", Law and Religion Australia blog: https://lawandreligionaustralia.blog/2019/04/10/high-court-upholds-abortion-buffer-zone-laws/ ('Foster').
[33] *Clubb v Edwards* ('*Clubb*')*; Preston v Avery* ('*Preston*') [2019] HCA 11.
[34] *Clubb*, at 248.

Prima facie, Australia's implied freedom of political communication appears to be a right which requires a more subjective interpretation than that of America's explicit rights as laid out in the First Amendment, in the *Constitution of the United States of America*. An analysis of the jurisprudence surrounding the Australian implied freedom is required, since, just like the laws of the United States of America, the laws of this country, within the context of a consideration of relevant international laws, protect religious freedom and the free speech rights of protestors.

As Foster points out, our law places a strong value on the right of people to make public statements about their beliefs, where they are not directly attacking or threatening others.[35]

A. History of the development of the implied freedom to political communication

An implied freedom of political communication in the Australian Constitution was first recognised by the High Court in 1992 in *Australian Capital Television v Commonwealth*[36] and *Nationwide News Ltd v Wills*[37]. With respect to the former, the High Court invalidated the Commonwealth Government's prohibition on electoral advertising during election campaigns on the grounds that it infringed an implied Constitutional right of freedom of communication with respect to the Government of the Commonwealth. In *Nationwide News v Wills*, the majority Justices in Brennan, Deane, Toohey and Gaudron also invalidated a Commonwealth law that prohibited the publication of material calculated to bring the Industrial Relations Commission into disrepute, on the basis that it infringed the established implied freedom of political communication.

In these cases, the High Court drew an implication of freedom of communication relating to Commonwealth Governmental affairs from the system of representative government that the Constitution creates, and the implied rights of its citizens thereof. In particular, sections 7 (Senate) and 24 (House of Representatives) of the Australian Constitution provides that Senators and Members of the House of Representatives shall be *"directly chosen by the*

[35] Ibid.
[36] (1992) 177 CLR 106.
[37] (1992) 177 CLR 1 ('*Wills*').

people".[38] As Moens and Trone discuss at length, the notion of this implied freedom is controversial[39], however, it has now been established as part of Australia's Constitutional landscape as a central right of all citizens without restriction – until recently, it seems. In *Lange v Australian Broadcasting Corporation*[40] the framework for the application of this right was set out, of which a brief analysis is provided below.

B. Lange v ABC

The pertinent facts here concerns the broadcast of a Four Corners program by the Australian Broadcasting Corporation (ABC), in which allegations were made that the incumbent Labour Party in New Zealand had come under the influence of large business interests through substantial donations which were made to the New Zealand Labour Party's 1987 election campaign.

David Lange, the former New Zealand Prime Minister, alleged that he had been defamed by the report due to its allegations of corruption while in political office. In its defence, the ABC argued that the report was protected by the implied freedom of political communication.

In holding unanimously that the report was defamatory, the High Court then proceeded to clarify certain principles regarding this implied right. Most notably, the Court held that the implied freedom was to be a negative right, not a grant of a free-standing positive right, and operated chiefly as a restraint on executive and legislative power to the extent that such power would burden the implied freedom.[41] In adopting this approach, the Court overturned its previous decision in *Theophanous v Herald & Weekly Times Ltd*[42] and *Stephens v West Australian Newspapers*.[43] Thus, the implied freedom, in effect, creates a line that Commonwealth, State and Territory legislative and executive actions cannot cross. Any such action that crosses this line is invalid.[44]

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[38] Gabriël A. Moens and John Trone, 'Is There an Implied Constitutional Right of Freedom of Communication?' (1994) 1 *Agenda* 71-79.
[39] Ibid.
[40] *Lange*, above n 30.
[41] Ibid, 560.
[42] (1994) 182 CLR 104.
[43] (1994) 182 CLR 211.
[44] Joshua Forrester, Lorraine Finlay and Augusto Zimmerman 'Finding the Streams' True Sources: The Implied Freedom of Political Communication and Executive Power' (2018) 43(2) *UWA Law Review* 188, 189.

The High Court in *Lange* developed a two-stage test, which was modified by the High Court in *McCloy v New South Wales* to include a 'proportionality test'. The test, as currently formulated, poses the following three questions.[45]

1. *Does the law effectively burden the implied freedom in its terms, operation or effect?*
2. *If the answer is "yes" to question 1; is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?*
3. *If the answer is "yes" to question 2; is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?*

As outlined by Foster[46], the *"proportionality"* analysis in the third stage asks whether the imposed burden is *'reasonably appropriate and adapted'* to achieving a legitimate end. This will involve a consideration on whether, first, the impugned law is *"suitable",* in the sense that is has a rational connection to the purpose of the provision. Second, is the law *"necessary"* in that there is no obvious and compelling alternative to achieve the same purpose which has a less restrictive effect on the freedom, and third, is the challenged law *"adequate in its balance"?* This will require a judgment as to the balance between the importance of the purpose served by the restriction and the extent such restriction imposes on the implied freedom.

While on the surface the freedom may seem less robust than the American First Amendment, as Forrester et. al., point out, it is a strong and wide-ranging freedom.[47] In support of this argument they cite *Monis v The Queen*,[48] in which Hayne J observed that while implied freedom was not absolute, this did not mean 'it must yield to accommodate the regulation

[45] See, in particular, *McCloy*, above n 31; *Brown v Tasmania* (2017) 349 ALR 422 ('*Brown*').
[46] Foster, above n 32.
[47] Forrester et al., above n 44, 191.
[48] (2013) 249 CLR 92 ('*Monis*').

of conduct which a majority of members of the Australian community may consider to be repugnant.'[49] The authors also cite McHugh J in *Coleman v Power*[50], where he stated:

> In determining whether a law is invalid because it is inconsistent with freedom of political communication, it is not a question of giving special weight in particular circumstances to that freedom. Nor is it a question of balancing a legislative or executive end or purpose against that freedom. Freedom of communication always trumps Federal, State and Territorial powers when they conflict with the freedom.

Further, implied rights derived from our Constitution should not easily be altered, requiring the 'common person' to be an intrinsic part of the process; as Forrester et. al., opined:

> Under the Commonwealth Constitution, the Australian people are sovereign. That is, it is they alone who have the power to change the Commonwealth Constitution. Further, it is the Australian people who elect representatives to the Commonwealth Parliament to legislate in their name. It is also the people of the various Australian States and Territories who elect representatives to their respective Parliaments to legislate in their name.[51]

This representative form of democracy invites its citizens into regular political dialogue, by way of the individual's implied freedom to political communication found in Australia's Constitution, whether the person choses to express his/her political communication through his/her legal representatives, through formal political processes or individual expression of political opinion or speech, without restrictions to whether it takes place in public or private forums, notwithstanding its legality. The question remains then; what appropriate restrictions can the State place upon the implied freedom of political communication in a free democracy, and what roles can citizens play in light of these restrictions?

Commonwealth, State and Territory Parliaments each have plenary powers to make laws, which, broadly speaking, means that the content of laws with respect to matters within the legislative scope of Commonwealth, State or Territory Parliaments may be whatever the respective Parliament desires, by virtue of the will of the people. In executing laws, the Executive in Commonwealth, State or Territory jurisdictions may be given wide-ranging powers,[52] and Members of Parliament have parliamentary privilege to discuss past or

[49] Ibid 141.
[50] (2004) 220 CLR 1, 49 ('*Coleman*').
[51] Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016), 122-3.
[52] Forrester et. al., above n 44, 193-4.

proposed legislative and executive action fully, frankly, and robustly,[53] exercising formal expressions of political communication by elected, political representatives who are also citizens and sovereign as individuals.

It follows that, as sovereign, the Australian people must also be able to discuss government and political matters fully, frankly and robustly. As Forrester et. al., have previously outlined:

> Put another way, it borders on absurdity to say that, under the Commonwealth Constitution, Parliament may pass outrageous laws, the executive may do outrageous things, and members of Parliament may say outrageous things. However, the people from whom Parliament, members of Parliament and the executive derive their authority may not speak outrageously. If anything, in a democracy, a sovereign people must be free to speak even the unspeakable. To be clear, there are limits to freedom of expression. However, these limits are themselves strictly limited.[54]

Put simply, the Australian people may speak about any matter, and any restriction on this freedom must clear a high bar, it must be for a specific purpose, and legitimate insofar as a prohibition.[55]

In addition, Common Law freedom of expression is itself of Constitutional importance.

In *Minister for Immigration and Citizenship v Haneef*[56], the Full Court of the Federal Court endorsed the following statement by Trevor Allan:

> Liberty is not merely what remains when the meaning of statutes and the scope of executive powers have been settled authoritatively by the courts. The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction. The common law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal.[57]

This view was most recently endorsed in *Brown*.[58]

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[53] See, for example, *Commonwealth Constitution* s 49; *Parliamentary Privileges Act 1987* (Cth) s 16; *Parliamentary Privileges Act 1891* (WA) s 1. See also: Forrester et. al., above n 51, 122-3; Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, 'An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania's 'Hate Speech' Laws' (2016) 7 *The Western Australian Jurist* 275, 286-9.

[54] See Forrester et. al., above n 51, 130. See also: Lorraine Finlay, Augusto Zimmermann and Joshua Forrester, '18C is Too Broad And Too Vague, And Should Be Repealed', *The Conversation* (online), 31 August 2016 <https://theconversation.com/section-18c-is-too-broad-and-too-vague-and-should-be-repealed-64482>.

[55] Forrester et. al., above n 44, 194.

[56] (2007) 163 FCR 414.

[57] Ibid 444.

[58] *Brown*, above n 45 (per Edelman J).

In the *Wills* case, Mason CJ held that the extent to which a law infringes common law freedom of expression is a factor relevant when assessing its proportionality.[59]

In view of this jurisprudence, distinct limits to governmental overreach seem to be set on this now entrenched constitutional freedom, that the authors see as similar to the approach of the U.S. Supreme Court, in that governments may impose reasonable restrictions 'on time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest so long as they leave open ample alternative channels for communication of the information.'[60]

In consideration of these case law developments to the jurisprudence of the implied freedom of political communication in Australia which has been consistent with the interpretation of this principle at law in other jurisdictions such as America, the judgment of the High Court in *Clubb and Avery* appears all the more puzzling. We will assess these judgments briefly below.

IV. *CLUB v EDWARDS; PRESTON V AVERY* [2019] HCA 11

A. Clubb v Edwards

The plaintiff in this case, Kathy Clubb, challenged the validity of Section 185D *Public Health and Wellbeing Act* 2008 (Victoria), which provides that a person must not engage in 'prohibited behaviour' within a 'safe access zone' of 150 metres outside an abortion facility. Under section 185B of the same Act, 'prohibited behaviour' includes *'communicating by any means in relation to abortions in a manner that is likely to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety.'* The question here is: is this restrictive law a compelling, legitimate prohibition of the State, and to what extent should this restriction to free speech be applied, and to what extent is abortion, or the lobbying against abortion political communication?

[59] *Wills*, above n 37, 30-1 (Mason CJ), as applied in *Attorney-General (SA) v Corporation of the City of Adelaide* ('*Adelaide Preachers' Case*') (2013) 249 CLR 1, 31-2 [43]-[44] (French CJ)
[60] *Grace*, above n 7, 180 (White J).

Nettle J in this High Court ruling observed that: *'*a woman's decision whether or not to abort her pregnancy is not a political decision. It is an apolitical, personal decision informed by medical considerations, personal circumstances and personal religious and ethical beliefs, qualitatively different from a political decision as to whether abortion law should be amended'. [61] For the same reason, a communication directed to persuading a woman as to whether or not to abort her pregnancy is not a political communication but a communication concerning an entirely personal matter. It stands in contrast to what Hayne J described in *Monis v The Queen* as a single governmental or political communication embodying personal attacks on individuals'.[62]

So, if abortion is not a political decision, is the lobbying, or advocacy of an alternative to abortion a political act, or as Nettle J notes, 'apolitical, as it is informed by personal decisions informed by personal religious and ethical beliefs, qualitatively different from a political decision'? The public interest that this law seeks to protect is the safety of those entering or exiting legal abortion clinics, ensuring that they are not *'caused distress or anxiety'*. The question here is: what did Mrs Clubb do or say that caused said *'distress or anxiety'*?

The relevant facts concerning Kathy Clubb were that she shared a leaflet with a woman and her partner and no more, in that she did not display any placards or signs, nor was she confrontational in any way. Given that the Court could not establish the exact and specific words that passed between the plaintiff[63] and defendant, and the court could not establish a point of distress or anxiety insofar as Mrs Clubb's actions or words were concerned, how can it then, be established that Mrs Clubb's words were of a *'prohibitive nature'*, or that they can, and had *'caused distress or anxiety'*?

Notwithstanding this, Clubb was charged under section 185D[64] and challenged the validity of the law on the basis that the abovementioned sections breached the implied freedom of political communication. The High Court held that Mrs Clubb *was not* engaged in political

[61] *Cattanach v Melchior* (2003) 215 CLR 1 at 80 [221] per Hayne J; [2003] HCA 38.
[62] *Clubb*, above 33, 252.
[63] Ibid, 11: "The evidence did not establish what was said between Mrs Clubb and the young couple, but the pamphlet that Mrs Clubb proffered offered counselling and assistance to enable pregnancy to proceed to birth."
[64] *Public Health and Wellbeing Act 2008* (Vic).

communication in the act of sharing a leaflet with a woman entering the abortion clinic, and her conviction was upheld. Mrs Clubb's communication as political in form needs therefore to be established.

B. Preston v Avery

Graeme Preston had been holding up signs outside a Tasmania abortion clinic speaking about rights of the unborn under international law. He was charged under section 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tasmania), in that he was engaging in *'Prohibited behaviour'* within a 150 metre access zone. *'Prohibited Behaviour'* is defined to cover '*a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided'*.[65] Interestingly, *'protest'* is not defined in this Act, although this word inherently implies the act of political communication, and it is the most likely form a protest will take. In *Preston*, as in *Clubb*, this law was challenged on the basis of a breach of the implied constitutional right to freedom of political communication.

Extrapolating from a statement in *Brown*[66], and marginalising both the reasoning and the outcomes in *Coleman* and in *Monis*, the Attorney-General for Victoria argued that the implied freedom of political communication is a guarantee of freedom to communicate only with willing recipients. According to the High Court, unsolicited, unwelcome, uncivil or offensive political communication is not carved out as an exception from the freedom of political communication impliedly guaranteed by ss 7, 24, 61, 64 and 128 of the *Constitution*.[67] Here, again, we come to the need to define the conduct of Mr Preston, as is required with Mrs Clubb, found on the evidence, according to judicial procedure.

With respect to this principle, although it is not an exception to the implied political communication to offend or become uncivil in the exercise of political free speech, it can be assumed that political debate is not without its controversies and difficulties. Is the solution to public challenges to political communication a gagging clause of all forms of political communication? This would be an outrageous, suppressive and dictatorial breach.

[65] *Reproductive Health (Access to Terminations) Act 2013* (Tas), s 9 (1)
[66] *Brown*, above n 45, 415 [275].
[67] *Clubb*, above n 33, 195.

Australian courts have no constitutional mandate to tinker with legislative design in order to improve on the product of democratic choice[68].

In the words of Gaegler J in *Clubb*,

> If and to the extent necessary to address the question of whether legislation infringes the implied freedom of political communication in order to determine rights or liabilities in issue in properly constituted proceedings, Australian courts do have a duty to ensure that such burden as a particular democratically chosen legislative restriction places on political communication does not undermine the constitutionally prescribed system of government which made that democratic choice possible. That is the structural imperative which underlies the implication of the freedom of political communication and which frames the ultimate issue to which the Lange-Coleman-McCloy-Brown analysis is directed.[69]

The High Court held that Preston *was* engaged in political communication, but, even though the restrictive law was a burden on political speech, it had an acceptable purpose and was therefore appropriate and adapted to the circumstances, hence satisfying the proportionality test in *Lange/McCloy*[70]. The authors argue that this decision is an inconsistent one, given the similarity of the approach to jurisprudence on the American First Amendment and the Australian implied right. This argument will now be explored further.

C. What is Political Communication?

The freedom of political communication that is implied in the Australian Constitution is a constraint upon the exercise of power. The constraint is against the imposition of undue burdens on political communication. In broad terms, the conditions for when a law will impose an undue burden have been accepted for over two decades since the decision of the Court in *Lange v Australian Broadcasting Corporation*[71]. Those broad terms involve twin concerns about (i) the purpose of imposing a burden upon political communication, and (ii) the effect of imposing that burden upon political communication.[72]

In the *Clubb* matter, Nettle J in his judgment observed that,'[a] law is taken to impose an effective burden on the implied freedom of political communication if it at all prohibits

[68] *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 53 [39], 74 [110].
[69] *Clubb*, above n 33, 207, citing *McGinty v Western Australia* (1996) 186 CLR 140 at 286; [1996] HCA 48; *McCloy*, above n 31, 227-228 [114]-[118].
[70] *Lange*, above n 30 and *McCloy*, above n 31.
[71] *Lange*, above n 30.
[72] *Clubb*, above n 33, 453.

political communication unless perhaps the prohibition or limitation is so slight as to have no real effect'.[73]

By proscribing prohibited behaviour within a 150 m radius of premises at which abortions are provided, s 185D prevents persons engaging in political communications about abortion within that area. To that extent, s 185D imposes a restriction on the implied freedom of political communication. But inasmuch as s 185D leaves persons free within the law to say and do whatever they wish about abortion at any point more than 150 m from premises at which abortions are provided, it is not apparent that the proscription of prohibited behaviour within that area has any real effect on the implied freedom.[74]

In Nettle J's judgment, he clearly identifies discussing abortion in public as a form of political communication. With respect to their Honours, a restriction on any form of political communication in public – whether restricting a zone, its content or the timeframe for which it is to be discussed; this form of prohibition on speech is a restriction on a citizen's rights under the Constitution to engage in debate that is political in nature. Political debates will inevitably take the form of public debates in relation to matters concerned with racial, religious, cultural, social, economic matters, which bear weight and significance to a community's way of life, their ideologies and their practices.

The appellant, Mrs Clubb, contends that the communication prohibition section (185D of the *Victorian Act*), infringes the implied freedom of political communication. But Mrs Clubb, her counsel said, was not in a position to mount, and did not mount, a positive case that she was engaged in political communication.[75]

Although the High Court held Mrs Clubb *was not* engaged in political communication, their Honours commented on the validity of the Victorian Act, finding that there was indeed a burden, but there was a legitimate purpose for protecting the *"privacy and dignity"* of women attending abortion clinics, that the law was *"suitable"* to achieve its desired purpose

[73] *Monis*, above n 48 per Hayne J, 212-213; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 555 [40] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, 574 [119] per Keane J ('*Unions NSW*'); *Tajjour v New South Wales* (2014) 254 CLR 508 at 569-570 [105]-[107] per Crennan, Kiefel and Bell JJ; *McCloy*, above n 31, 230-231 [126] per Gageler J.
[74] *Clubb*, above n 33, 250.
[75] Ibid at 328.

since there did not seem to be a less restrictive approach which would achieve the same ends,[76] and it was not *"disproportionate"* in the manner it achieved those ends, and that the law would have restricted activities in relation to public debate about abortions.[77] Gordon J in *Clubb* held that. 'on the assumption that the Communication Prohibition is constitutionally invalid because it impermissibly burdens the implied freedom of political communication, is it severable?'[78]

Adapting and adopting the words of Barwick CJ in *Harper v Victoria*[79]:

> Where [a severance clause] is available, and the statute can be given a distributive operation, its commands or prohibitions will then be held inapplicable to the person whose [communication] would thus be impeded or burdened. Of course, the question of validity or applicability will only be dealt with at the instance of a person with a sufficient interest in the matter; and, in my opinion, in general, need only be dealt with to the extent necessary to dispose of the matter as far as the law affects that person.[80]

The key here is establishing the *"sufficient interest in the matter"* for the plaintiff.

The authors contend that, as argued by Morris and Stone,[81] even by dissuading a couple from proceeding with an abortion and offering alternatives, this has to be considered political communication 'about government or political matters' in view of the *Lange* test.

As Nettle J observed in *Brown*[82], 'the implied freedom of political communication is a freedom to communicate ideas to those who are willing to listen, not a right to force an unwanted message on those who do not wish to hear it[83], and still less to do so by preventing, disrupting or obstructing a listener's lawful business activities. Persons lawfully carrying on their businesses are entitled to be left alone to get on with their businesses and a legislative purpose of securing them that entitlement is, for that reason, a legitimate governmental

[76] Ibid [84].
[77] Ibid at [56]; [86]-[95].
[78] Ibid, at 337.
[79] (1966) 114 CLR 361 at 371; [1966] HCA 26.
[80] *Clubb*, at 337.
[81] Shireen Morris and Adrienne Stone, 'Abortion protests and the limits of freedom of political communication: *Clubb v Edwards*; *Preston v Avery*.' (2018) 40 (3) *Sydney Law Review* 395.
[82] *Brown*, above n 45, 415 [275].
[83] *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086 at 1090 [28]; 163 ALR 734 at 740-741; [1999] HCA 31; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 245-246 [182]; *Adelaide Preachers' Case* n 59 at 37 [54]; [2013] HCA 3; *Monis* n 48 at 206-207 [324]. See and compare *Cox v Louisiana* (1965) 379 US 536 at 553-556; *Frisby v Schultz* (1988) 487 US 474 at 484-488; *Hill v Colorado* (2000) 530 US 703 at 715-718; *McCullen v Coakley* (2014) 134 S Ct 2518 at 2545-2546.

purpose.*'* Thus, the High Court has held continually that on-site protest activities constitute *"political communication"*.[84] By standing near the clinic, Mrs Clubb's actions in counselling women not to proceed with their abortion could be considered a political act of demonstration, specifically aimed at laws regarding abortion, that may influence or affect electoral decision-making.[85]

The High Court's judgment regarding the *"legitimate purpose"* and *"proportionality"* of the Victorian Act, appears similar to the *'content based'* approach in relation to America's First Amendment case law precedent set by the American Supreme Court, as discussed in *McCullen v Coakley*. The question here is: do these buffer zone laws substantially burden and restrict the freedom of speech more than is necessary to further the government's *"legitimate interests*"? In addition, how can the government's interests be classified as legitimate, when the restrictive law is a prohibition of the free speech of citizens speaking out about the government's roles as the legislature?

D. Is the burden "appropriate and adapted"?

The authors argue that the third limb of the *Lange/McCloy* test, namely; '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', similar to the application of the First Amendment approach in America, where it was found that the law cannot impose restrictions on 'the time, place or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, and that they are narrowly tailored to serve a significant government interest and that they leave open ample alternative channels for communication of the information.'[86]

In light of the above pronouncements, therefore, in our view, by finding that the restrictive laws in question in *Clubb* and *Preston* have an acceptable purpose and are therefore appropriate and adapted to the circumstances, the approach of the High Court seems

[84] *Levy v Victoria* (1997) 189 CLR 579; *Brown* above n 45. See in particular Gaegler J (at 409): The communicative power of on-site protests, the special cases emphasises and common experience confirms, lies in the generation of images capable of attracting the attention of the public and of politicians to the particular area of the environment which is claimed to be threatened and sought to be protected.
[85] Morris and Stone, above n 81, 397.
[86] *Ward*, above n 11.

contradictory to recent developments in the application of the implied freedom of political communication by that same Court, not to mention in conflict with the inherent Common Law rights of freedom of expression, as discussed above. We will now elaborate on the reasons for this view.

A great deal of weight could be applied to the view of Parliamentary Supremacy, particularly with regard to State and Territory Parliaments, since State and Territory Constitutions, unlike the Commonwealth Constitution, do not formally split legislative and executive powers. [87] However, Australia's Constitutional arrangements create one system of jurisprudence and one polity.[88] As noted by the High Court in *Lange*:

> Of course, the discussion of matters at State, Territory or local level might bear on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of Federal Ministers and their departments. The existence of national political parties operating at Federal, State, Territory and Local Government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable.[89]

Furthermore, in *Unions NSW*, a majority of the High Court noted:

> The reality is that there is significant interaction between the different levels of government in Australia and this is reflected in communication between the people about them.[90]

The complex interrelationship between levels of government, issues common to State and Federal Government and the levels at which political parties operate necessitate that a wide view be taken of the operation of the freedom of political communication. As was observed in *Lange*, these factors render inevitable the conclusion that the discussion of matters at a State, Territory or local level might bear upon the choice that the people have to make in federal elections and in voting to amend the Constitution, and upon their evaluation of the performance and the representative proficiency of Federal Ministers and Departments.[91]

[87] Forrester et. al., above 44, 205.
[88] Ibid 206.
[89] *Lange*, above n 30, 571-2.
[90] (2013) 252 CLR 530, 549.
[91] Ibid 550.

E. The 'content neutral' dilemma

The notion that a content-based time, place or manner restriction demands closer scrutiny corresponding to a need for greater justification than a content-neutral time, place or manner restriction is consistent with the approach taken to the implied freedom of political communication by Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth*[92] and by Gaudron J in *Levy v Victoria*[93] as subsequently endorsed by Gleeson CJ in *Mulholland v Australian Electoral Commission*[94] and unanimously applied in *Hogan v Hinch*[95].

The time, place and manner restriction on political communication held to withstand implied freedom scrutiny in *Levy* was a content-neutral restriction found to involve *"no greater curtailment of the constitutional freedom than was reasonably necessary to serve the public interest in the personal safety of citizens"*[96]. The time, place and manner restriction on political communication later held to withstand implied freedom scrutiny in *Attorney-General (SA) v Adelaide City Corporation*[97] was similarly content-neutral. Admittedly, it is hard to establish any form of political communication that is neutral in its content and uncontroversial, however, if the principles of implied freedom of communication are upheld to their full measure giving full regard to the principles of freedom of speech in the public domain, controversy will not be regarded as an impediment to the exercise of these rights.

F. The same, but different?

The High Court decision in *Clubb* and *Preston* would also seem inconsistent on the basis of the facts, particularly in relation to *Clubb*, in that they are similar to *McCullen* (counselling, handing out leaflets), not to mention the much smaller exclusion zone, a factor which Gaegler J noted with some concern.

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[92] (1992) 177 CLR 106 at 143-144.
[93] (1997) 189 CLR 579 at 618-619; [1997] HCA 31, referring to *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143, 169, 234-235, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 76-77, *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 299-300, 337-339, 388; [1994] HCA 44 and *Kruger v The Commonwealth* (1997) 190 CLR 1 at 126-128; [1997] HCA 27.
[94] (2004) 220 CLR 181 at 200 [40]; [2004] HCA 41.
[95] *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]-[99]; [2011] HCA 4.
[96] (1997) 189 CLR 579 at 614. See also at 597-598, 619-620, 627-628, 647-648.
[97] *Adelaide Preachers' Case*, above n 59.

Their Honours in *Clubb* concluded that Mrs Clubb's communication was *not* political, but the Court found Preston's communication political. What was the differentiating factor that set these two types of communication apart, qualifying them so distinctly? And, what role did the restrictive laws in their respective States play in the interpretation of this communication as political or otherwise? One key difference is the wording in the Tasmanian legislation that uses the term *'protest'* as describing the prohibited practice.

Further, the US Supreme Court in *McCullen* pointed to alternative prohibitions that would serve the government's legitimate interest, namely, in laws relating to obstructing, blocking or hindering entry to a reproductive health care facility, not to mention the general criminal law (i.e., assault, trespass, breach of peace, and so forth). Similarly, in *Clubb* and *Preston* it was demonstrated that there were already prohibitions in both of the challenged Acts regarding: *"besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding",* not to mention the general law.[98]

This measure would appear to run counter to the *"proportionality"* test as outlined in *McCloy*, in that there is a rational connection to the purpose of the law, and the *"necessary"* element, in the sense that there is no obvious and compelling alternative, reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom. If both these questions are answered in the affirmative, the question is then whether the challenged law is *"adequate in its balance".*

The authors note in particular a similarity in the views of Gaegler J expressed in the judgment of *Clubb*, with those of Scalia J in *McCullen*. As pointed out by Foster,[99] Gaegler J stated that:

> Unsolicited, unwelcome, uncivil or offensive political communication is not carved out as an exception from the freedom of political communication impliedly guaranteed by ss 7, 24, 61, 64 and 128 of the *Constitution.*[100]

Furthermore, just as Scalia J held that *"Protecting people from speech that they do not want to hear is not a function that the First Amendment allows",* the laws in question in Clubb and Preston, as Gaegler J points out, would clearly favour the pro-abortion side of the debate:

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[98] *Victorian Act* s 185B(1), *Tasmanian Act* s 9(1).
[99] Foster, n 32.
[100] *Clubb*; *Preston* n 33 at [195].

> The real-world effect of the prohibition operating only within a radius of 150m around premises which provide abortion services can only be that the prohibition curtails protests by those who seek to express disapproval of the availability of services of the kind provided at the premises to a significantly greater extent than it curtails protests by those who seek to express disapproval.[101]

Gaegler J also holds that 'the burden which the protest prohibition places on political communication is direct, substantial and discriminatory'.[102] On this basis, Justice Gaegler opines that the restrictive law warrants a high level of scrutiny- that for the law to be valid it must be shown to be in pursuit of a *"compelling"* (not just a *"permissible"*) government interest, and the prohibition 'needs to be closely tailored to the achievement of that purpose; it must not burden the freedom of political communication significantly more than is reasonably necessary to do so'.[103] This approach is remarkably similar to that of Scalia J in *McCullen*.

V. CONCLUSION

In our view, it would appear that the decision in *Clubb* and *Preston* could give rise to discrimination, as discussed by Gaegler J. Discrimination that extends to the freedoms of religion, conscience, the freedom of association, as expressed in public, in consideration of international law principles[104] and common law precedents discussed above.

More specifically, laws that inherently discriminate against the full, frank and public exercise of political communication curtail the protests of those who seek to express disapproval of such laws, in direct conflict with the jurisprudence of the implied freedom of political communication in the Commonwealth Constitution. We express this view given that the freedom of political communication, by consequence, must allow full and free discussion of matters at a State, Territory or local level, given that such matters have a direct effect on political elections and therefore policy amendments that affect a citizen's daily life.

[101] Ibid at [170].
[102] Ibid [174].
[103] Ibid [184].
[104] See, in particular, Article18(1), *International Covenant on Civil and Political Rights* (1966) and Article 1(1) 1981 Declaration of the United Nations General Assembly.

Our concern is that, if the approach in *Clubb* and *Preston* is applied consistently, such a limitation on political communication could be extended to other forms of protest, such as picket lines against unjust labour practices, or protests outside churches relating to child abuse accusations. The authors also note their concern, in the current political climate surrounding religious freedom (noting in particular further laws coming into force across Australia restricting discussion on abortion),[105] that the decision in *Clubb* unnecessarily limits Common Law rights of freedom of expression, which necessarily form part of the *McCloy* proportionality test.

The authors would like to note, lastly, that political communication often engages broad matters of public policy, including matters in relation to religious freedom. There is therefore a strong intersect between the right to political communication, the right to freedoms of speech, and the right, in some instances of freedoms of religion, including the right to freedom of belief, conscience, movement and association – associated with these rights. These freedoms and rights have to be delicately held in balance, one with the other. Laws that seek to protect people from speech that they do not want to hear would, as Gaegler J points out, run the risk of "legislative overreach", which would also put in jeopardy the basic rights of all persons, as codified universally under international human rights laws[106], to express their private individual and collective political opinions in public.

[105] As outlined by Foster (n 32), since the passing of the *Victorian Act* and the *Tasmanian Act*, we now have the *Public Health Act* 2010 (NSW) Part 6A (effective 15 June 2018); the *Termination of Pregnancy Act* 2018 (Qld), Part 4 (effective 3 Dec 2018); the *Health* Act 1993 (ACT), Part 6, Div 6.2 (effective 22 March 2016); and the *Termination of Pregnancy Law Reform Act* 2017 (NT) (effective 2 July 2017). The Western Australian Parliament will soon debate similar legislative provisions.

[106] See, in particular, Article18(1), *International Covenant on Civil and Political Rights* (1966) and Article 1(1) 1981 Declaration of the United Nations General Assembly.