Western Australian Local Government Association

POLITICAL SIGNAGE GUIDELINE

IMPLIED CONSTITUTIONAL FREEDOM OF POLITICAL COMMUNICATION

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Executive Summary

The appropriateness of the regulatory provisions for election signage under local planning schemes and local planning policies became an issue for the sector during the 2013 State Government election. Local Governments found their regulatory schemes to be lacking when the issue was tested by candidates seeking to advertise their message to the community.

In light of the recent Supreme Court case of *Liberal Party of Australia (Western Australia Division) Inc v City of Armadale* [2013] WASC 27, guidance for the sector was requested. WALGA obtained legal advice in order to clarify the issue of the ability of Local Governments to regulate election signage under local planning schemes and local planning policies. On the basis of the advice received, and in consultation with stakeholders, WALGA developed the current guideline for Local Governments to consider when assessing political advertising within their districts.

The matters are not exhaustive and deal primarily with signage of a political nature. There will be cases where limitations sought to be placed on electoral advertising such as time constraints, may be subject to legal argument. It will be for each Local Government to determine the legitimacy of the constraints that it may place on electoral advertising. WALGA is unable to provide conclusive guidance on some issues due to limited judicial precedent. Notwithstanding, it is the intention that the guideline will be updated as and when relevant information comes to hand.

This guideline refers to the approval process required outside of the timeframe stipulated in the Deemed Provision under the *Planning and Development (Local Planning Schemes) Regulations 2015*. Only brief comment has been made as to the operation of the provisions in this guideline.

Background

The High Court in the case of *Australian Capital Television Pty Ltd v Commonwealth of Australia* deemed there is an implied freedom of political communication ('the implied freedom') within the Australian Constitution. In this case, the majority of the High Court reasoned that representative democracy is constitutionally entrenched and there is therefore implied in the Constitution a guarantee of freedom of communication on all political matters.

However, this implied freedom of political communication is not absolute. The freedom does not confer rights on individuals or organisations (e.g. political candidates and parties) to communicate about political matters. It operates as a limitation on legislative (and executive) power (*Levy v Victoria* (1997) 189 CLR 579).

Election Signage – Testing the 'Implied Freedom'

Local planning schemes have 'full force and effect' as if enacted by the *Planning and Development Act 2005* (section 87(4)). Local planning schemes may, and frequently do, contain provisions relating to signs. As schemes have legislative effect, their provisions (including those relating to signs) are subject to the implied freedom.

The Test for Determination

The test for determining whether a scheme provision relating to signs infringes the implied Constitutional freedom of political communication is that formulated by the High Court of Australia for all legislation.

The test has 2 limbs:

(1) Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

(2) If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

(*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1)

In order to apply this test, any scheme provision applying to election signs would require detailed examination. Therefore, each Local Government should analyse the current provisions contained within their local planning schemes to determine their validity.

(1) The First Limb of the Test

Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

The approach taken by many schemes is to prohibit signs without prior approval. As this limitation would apply to signs containing political communication, it would effectively burden freedom of communication about political matters. Therefore, there is little doubt that scheme provisions adopting this approach would satisfy the first limb of the test. Equally, if a scheme provision imposed any restriction affecting election signs (e.g. size restriction) this would also constitute a burden satisfying the first limb of the test.

A scheme provision that prohibited election signs as a class would also come within the terms of the first limb of the test, as would a scheme provision that placed a time constraint on political advertising or the placement of the sign.

(2) The Second Limb of the Test

If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

More difficult issues arise in applying the second limb of the test. It is only where a provision fails to meet the second limb that the implied freedom will be infringed. What must be shown is that the particular provision is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of representative and responsible government.

In the decision of the Full Court of the Supreme Court of South Australia in *Becker v City of Onkaparinga* (2010) ALR 390, a case which concerned legislation controlling signs, the Full Court made the following conclusions:

(1) The laws were not expressly directed at political communication and did not apply only to election signs, but to all signs and advertisements.

(2) The legitimate end for which the provisions were reasonably appropriate and adapted was to ensure that the display of all signs and advertisements, whether or not they were about the government or political matters, was done in the manner which complied with the desired objectives and principles providing for proper, orderly and efficient planning and development in the State of South Australia. This was a process involving consideration of a wide range of matters including visual amenity and public safety.

(3) The prohibition on signs under the City of Onkaparinga laws was not absolute. Landowners were not precluded from seeking development approval for signs.

Most Local Governments are aware that the position in Western Australia was recently the subject of a decision by the Supreme Court in *Liberal Party of Australia (Western Australia Division) Inc v City of Armadale* [2013] WASC 27. However, caution needs to be taken in applying this decision. First, the Court relied on the decision of the Full Court of the Supreme Court of South Australia in *The Corporation of the City of Adelaide v Corneloup & Ors* [2011] SAS CFC 84 which was subsequently overturned on appeal to the

High Court of Australia (*Attorney-General for the State of South Australia and the Corporation of the City of Adelaide & Ors* [2013] HCA 3).

In addition, the decision was made without reference to the *Becker* case referred to above which specifically related to signs with political content. Furthermore, the City of Armadale case did not require the Court to consider the wider issues of the implied freedom of political communication.

Deemed Provisions

The provision contained in Schedule 2, Part 7, clause 61 of the *Planning and Development (Local Planning Schemes) Regulations 2015*, are commonly referred to as the 'Deemed Provisions'. This clause sets out the timeframe for when development approval is not required in relation to temporary election signage.

61. Development for which development approval not required
(1) Development approval of the local government is not required for the following works —
(g) the temporary erection or installation of an advertisement if —
(i) the advertisement is erected or installed in connection with an election, referendum or other poll conducted under the Commonwealth Electoral Act 1918 (Commonwealth), the Electoral Act 1907 or the Local Government Act 1995; and
(ii) the primary purpose of the advertisement is for political communication in relation to the election, referendum or poll; and
(iii) the advertisement is not erected or installed until the election, referendum or other poll is called and is removed no later than 48 hours after the election, referendum or other poll is conducted;

The 'Deemed Provisions' do override all Local Planning Scheme Provisions for the temporary election signage, but only between the time period of 1 February 2017 (when the issue of writs for the State Election will be made) to 48 hours after the election (13 March 2017) – as per the timeframes specified within Schedule 2, Part 7, cl. 61 (g) (iii). The above dates only apply to the 2017 State Election.

It is untested as to whether a Local Government may request the removal or remedy of a sign during this timeframe on the basis of a competing public interest. For example, if a sign is considered structurally unsound a Local Government may well be acting lawfully in requesting the removal or remedy of the sign. It should be noted that the implied constitutional freedom of political communication is not without fetter and that a court may well consider the actions of a Local Government reasonable in the above circumstances.

Outside of the timeframe of the 'Deemed Provisions', all signs need to be considered on their merits, in accordance with Local Planning Scheme, LPP provisions and the advice provided in this Guideline. A Local Government must consider them not as an 'election sign', just as a 'sign', only looking at the structure, size and any specific requirements for signage within the Local Government district.

Frequently Asked Questions

To assist Local Governments assess the appropriateness of their local planning schemes and local planning policies, the following advice is provided. This advice is based on WALGA's understanding of the key issues Local Governments face when contemplating election signage in their districts, excluding the exemption timeframe established under the Deemed Provisions of the *Planning and Development (Local Planning Schemes) Regulations 2015*

What limitations exist for the control of election signage on private land?

The following observations may be made for the control of election signage on private land –

(1) An absolute prohibition on election signage would infringe the implied freedom of political communication.

(2) A requirement for approval of all election signs may not infringe the implied freedom, so long as these signs were simply one of numerous categories of signage requiring approval. While regulation of all election signage would serve a legitimate object or end in terms of orderly and proper planning, it may be seen as incompatible with the maintenance of representative government, as the requirement for approval may involve a timeframe inconsistent with the short timeframes usually associated with the calling and conduct of elections.

To diminish the risk of scheme provisions infringing the implied freedom as a consequence of this incompatibility, it is suggested that there be an exemption included in scheme provisions that permits some election signage without approval. A sample Exemption Clause is provided later in the Guideline.

(3) The implied freedom of political communication would not be infringed where a scheme contained provisions regulating signage generally and which applied to signage of an electoral or political nature, where the provisions serve the objectives and principles of orderly and proper planning. One is not referring to the approval process but a set of regulatory criteria that apply generally to all signs.

(4) While scheme provisions could specifically address election signage, they could not be discriminatory in the sense of being more onerous than the provisions relating to other, comparable types of signage.

Does a Local Government have the ability to specify the timeframes for which election signage can be installed?

Many schemes contain a provision enabling Local Governments to impose conditions limiting the period of time for which an approval remains valid. Such a condition could only be imposed for planning purposes. As election signs relate to a specific event (Federal, State or Local Government elections), a condition linking the time period of an approval to the conclusion of an election would have a legitimate planning basis.

Equally, it may be possible to have a scheme provision which specified a time period for the display of approved signs, regardless of the content and purpose of these signs. Such a provision would serve a legitimate planning objective or end, in a manner compatible with the maintenance of the system of representative government.

The legitimate objective or end would be the minimisation of adverse impacts on visual amenity caused by signs. Specifying a time period which enabled the signage to serve its purpose in relation to the election would ensure there was compatibility with the process of elections which are an element of the system of representative government.

While that may be deemed the case, care would need to be taken in selecting the period specified for the display of election signage. The commencement of a timeframe could, for example, logically coincide with some form of requirement for elections to be called such as the issuing of writs for the election.

The imposition of a time constraint as a regulatory provision on an election sign was not judicially considered by Martin, J in *The City of Armadale Case* as his Honour was not required to rule on the issue.

However, there is a possibility that a reasonable time constraint based on a legitimate objective to minimise adverse impacts on visual amenity caused by election signs may be a regulatory control that, if challenged, a Court might accept.

It should be noted that the 'Deemed Provisions' provide a timeframe that envisages that election signs will be removed within 48 hours after the election. This may provide further support for the above case.

Can the control of election signage be based purely on the fact that it is an election sign?

Frequently, scheme provisions specify multiple categories of sign and contain specific provisions for each category. These categories may relate to the physical form of the sign (e.g. panel, roof, wall and pylon signs) and also the content or purpose of the sign (e.g. real estate, product and vehicle display and community service signs). The creation of a separate category for election signs would be consistent with this approach and would not itself infringe the implied freedom of political communication.

The critical issue would be whether the content of the provisions specifically relating to election signs was inconsistent with that implied freedom. Local Governments would need to give some thought in defining the election sign category.

Can scheme provisions be used to control the size of an election sign?

Scheme provisions may regulate the size of signs, although there is often a power of variation which permits approval of signs which are inconsistent with the size requirements. Any provision limiting the size of election signs could not be more onerous than provisions relating to the size of other comparable signs. For example, if an election sign took the form of a roof sign, the size limitations on that sign could not be more restrictive than for other roof signs. If different size requirements applied, there would be a strong argument that the more restrictive size limits on election signs did not serve a legitimate planning objective or end.

The other circumstance in which size restrictions on election signs may infringe the implied freedom is if election signs were the only form of signs subject to a size restriction. It is doubtful that any legitimate planning objective or end could be identified for this differential treatment.

Can a Local Government control election signage on land that it manages?

Most schemes regulate development on zoned land (which is often in private ownership) and development on reserved land which is often under the care, control and management or ownership of either the Local Government itself or some other public agency. It would be possible for Local Governments to include scheme provisions which regulate signage on zoned and reserved land under schemes. It would be necessary to give separate consideration to the regulation of signs on land the subject of reserves under the *Metropolitan Region Scheme* which are usually excluded from the operation of the provisions of local planning schemes.

It is generally established that Local Governments are able to regulate activity on land that it owns either in freehold or which is under its care, control and management. Courts in Western Australia have not had to determine the validity of a Local Government's local laws or policy that seeks to restrict advertisements on its property.

The issue of land held by a Local Government in freehold would be treated by the Courts as similar to a private landholder and any attempt to place advertising on private land without the consent of the landowner, whether a public body or not would be seen as invalid. On the other hand, the issue of political advertising on land held by a public body under a management order might be contentious. Notwithstanding, it may be that a Court would find such an activity to be similarly invalid, holding that the manner in which the land is held is irrelevant and that the management order would require the consent of the holder of the land, and it is probable that a determination would be consistent with the judicial position as to the regulation of general activity on land the subject of a management order.

Can a Local Government control election signage through the 'amenity' provisions of a scheme?

The control of political signage for the purpose of protecting amenity (visual amenity in particular) was regarded as a legitimate object or end of the planning laws considered in the *Becker* case. Therefore, the application of amenity provisions to election signs would not be inconsistent with the implied freedom. Of course, this assumes that the schemes require the amenity provisions to be considered by Councils when considering applications for approval for signage, including election signage. In the decision in the *City of Armadale* case, the Supreme Court did not appear to accept that local amenity was a legitimate object or end for the control of election signage.

However, that view is inconsistent with the decision in *Becker.* In the absence of judicial consideration by the Court in Western Australia of that case, the decision in the *City of Armadale* case does not provide a strong basis on which to dismiss amenity as a legitimate object or end in controlling election signage without infringing the implied freedom of political communication.

What are the controls of election signage within shop windows and the parameters of that control?

Scheme provisions may contain provisions controlling window signs. With other forms of signage, consideration of amenity and public safety can be readily identified as legitimate objects or ends justifying control of election signage by schemes. These objects or ends are less apparent with window signs. Consequently, there would be an argument that

requiring approval for election signs placed in windows would be incompatible with our system of representative government because there is either a weak or no planning justification for imposing the control. Therefore, window signs may give rise to greater difficulty in arguing that scheme provisions controlling this form of signage do not infringe the implied freedom of political communication.

To avoid infringing the implied freedom it would be necessary for provisions relating to election signs in windows to be no more onerous than those applying to other window signs.

Does a Local Government have the ability to specify the type of materials that an election sign can be made from?

It would be possible for a scheme provision to specify the type of material from which an election sign could be made. However, these provisions could be no more onerous than a comparable sign which did not carry any election content. For example, if the form of election sign was a wall sign, then any requirements as to the materials of which the sign was to be constructed could be no more onerous than existed for any other type of wall sign. Further, there would need to be a clear planning justification, such as the protection of public safety.

Does a Local Government have the ability to specify that an election sign can only be permitted at a campaign office or at a polling location?

A scheme provision which restricted election signage to campaign offices and polling locations would infringe the implied freedom of political communication. There would be no discernible planning objective or end served by such a restriction. It would be a restriction peculiar to election signage which would not apply to any other form of comparable signage. For these reasons, such a scheme provision would be invalid as an infringement of the implied freedom.

Can restrictions be placed on an election sign in places that would cause sight obstructions?

Considerations of safety have been regarded by the Courts as a legitimate object or end of planning laws which control election signs and would not infringe the implied freedom. Consequently, scheme provisions that are applied to signage which relate to issues of public safety (such as sight obstructions) would not infringe the implied freedom of political communication, insofar as the determination of the existence of a sight obstruction was fairly and consistently applied.

Other Relevant Considerations

It would be the preferred option that any scheme provisions include an exemption from the requirement for approval for election signs placed on private property with the consent of the owner. The administrative burden for Local Governments in processing development applications for all election signs would be significant given the number of signs involved, particularly in relation to forthcoming elections.

The precise terms of the exemption would require consideration, but consistency with exemptions for other signage purposes (such as property disposal signs) would be a pre-requisite

Requirements that could apply to a broad signage exemption policy may include such items as -

(1) a limit on the number of exempted signs per privately owned lot (e.g. 2 signs);

(2) a limit on the size of signs;

(3) a limit on the time period for which signs could be displayed;

(4) the absence of any safety risk by reason of the sign's location and construction;

and

(5) the absence of any defamatory or offensive content.

In addition to relieving Local Governments of the burden of processing many development applications, such an exemption would confine the scope of planning disputation over election signs to a relatively small number of instances. Such an exemption would not negate the ability of a Local Government to require approval where issues of public safety are a concern.

Conclusion

It should be noted that while the implied Constitutional freedom of political communication may appear to have primacy in relation to election signage, it is not absolute. Considerations of public safety will be taken into account by the Courts and where reasonably applied, may well fetter the implied freedom. The question of whether the implied freedom is infringed by the regulatory control turns on an examination of the terms, operation and effect of specific provisions in the legislative context in which they are found. Ultimately, the question whether any particular provision infringes the implied Constitutional freedom of political communication will depend on the content of that provision and other scheme provisions relating to signage.

The principal point of note that arises from examination of this issue, is for Local Government not to single out election signage as a class of sign under a local planning scheme or local planning policies to which specific arbitrary constraints are attached.

Such attempt to prohibit election signage in a district is likely to be deemed an infringement on the implied freedom of political communication and will be considered invalid. Local Governments that have local planning schemes and local planning policies that reflect such a prohibition will be required to amend their schemes in light of the *City of Armadale* case and the invalidity of such provisions.

List of Cases

Australian Capital Television Pty Ltd v Commonwealth of Australia (1992) 177 CLR 106

Additional Cases

Attorney-General for the State of South Australia and the Corporation of the City of Adelaide & Ors [2013] HCA 3
Becker v City of Onkaparinga (2010) ALR 390
Coleman v Power (2004) 220 CLR 1
Greene v Gold Coast City Council [2008] QSC 25 (25 February 2008)
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520
Levy v Victoria (1997) 189 CLR 579
Liberal Party of Australia (Western Australia Division) Inc v City of Armadale [2013] WASC 27
Moule v Cambooya Shire Council and Anor [2004] QSC 50 (19 March 2004)
The Corporation of the City of Adelaide v Corneloup & Ors [2011] SAS CFC 84
Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104

Addendum – Recent Developments

***McCloy v New South Wales* [2015] HCA 34**

In this case, the validity of the Election Funding, Expenditure and Disclosures Act 1981 was tested, which imposes restrictions on private funding of political candidates and parties in State and local government elections in NSW. The provisions impose a cap on political donations, prohibit property developers from making such donations, and restrict indirect campaign contributions, are invalid for impermissibly infringing the freedom of political communication on governmental and political matters.

The enquiry was said to be whether the statutory provisions in question have a rational connection to their purpose. If they do not, it would follow that they are simply a burden on the freedom without a justifying purpose.

The plaintiff's argument was that the provisions restrict political communication by removing the preferential access to candidates and political parties which would otherwise come to those who have the capacity and incentive to make large political donations. The court rejected this argument, saying that this argument goes to the heart of the mischief to which the provisions are directed. It is consistent with the implied freedom of political communication that wealthy donors not be permitted to distort the flow of political communication according to the size of their political donations. The idea that unregulated political donations pose a threat to the integrity of the system of representative and responsible government established by the constitution, is logical and of long standing.

The court found that the burden imposed on the freedom is incidental and slight. The provision operates as a partial limit on the ability of parties, members and candidates to raise funds, or equivalent benefits, which might be used by those recipients to engage in political communication.

The section was found to be reasonably appropriate and adapted to serve its legitimate object or end. It seeks to prevent corruption *and* the appearance of corruption by restricting indirect campaign contributions. This may be seen not to distort and corrupt the political process but to maintain and enhance the implied freedom.

The proportionality test involves consideration of the extent of the burden affected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

Suitable – as having a rational connection to the purpose of the provision;

Necessary – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

Adequate in its balance – a criterion requiring a value judgment consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be 'no' and the measure will exceed the implied limitation on legislative power.

***Brown v Tasmania* [2017] HCA 43**

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, 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 purpose.

As the plurality reasoned in *McCloy*, whether such a risk is 'undue' is to be assessed by weighing the consequent effect upon the implied freedom of political communication against the apparent public importance of the purpose sought to be achieved by the provisions.

In this case, where the law concerned a blanket four day exclusion for environmental protesters from a business access area, it impermissibly burdens the implied freedom of political communication, contrary to the Constitution. And the resulting burden on political communication goes beyond what is reasonably appropriate and adapted to serve the legitimate object of the Protesters Act.

***O'Flaherty v City of Sydney Council* [2014] FCAFC 56**

This concerned the offence of failing to comply with the terms of notice given by the City of Sydney, which prohibited camping or staying overnight in Martin Place. O'Flaherty contended that it was beyond the power of the City of Sydney to issue the notice because it impermissibly infringed freedom of communication about government and political

matters and/or his freedom of association. The judge found that the prohibition against staying overnight is reasonably appropriate and adapted to serve the legitimate ends of maintaining public health, safety and amenity in a high use public area and preserving the ability of all members of the public to use the area. Furthermore, it does so in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

Clubb v Edwards **[2019] HCA 11**

Mrs Clubb challenged a law that prohibited her from communicating her political beliefs outside of an abortion clinic. The Solicitor-General for Victoria submitted that the activities of protesters had previously created an environment of 'conflict, fear and intimidation' outside abortion clinics, and that these activities were harmful to both patients and staff in a number of ways. It was said to be the concern about the effect of these activities on women accessing abortion services, and on clinic staff, and not the suppression of anti-abortion views, that led to the enactment of the Safe Access Zones Act. In particular, it was said that existing laws did not adequately protect women and staff against the effects of these activities.

Mrs Clubb submitted that the communication prohibition does not serve a legitimate purpose compatible with the maintenance of the constitutionally prescribed system of representative and responsible government because the object pursued by the prohibition is offensive to that system in that it burdens the anti-abortion side of the abortion debate more than the pro-choice side. Mrs Clubb also argued that to prohibit communicatons on the ground that they are apt to cause discomfort is not compatible with the constitutional system. In this regard, it was said that political speech is inherently apt to cause discomfort, and causing discomfort may be necessary to the efficacy of political speech.

These submissions were not accepted, because these protests involved an attack upon the privacy and dignity of other people. Within those zones, the burden on the implied freedom is justified by the very considerations of the dignity of the citizen as a member of the sovereign people that necessitate recognition of the implied freedom. A law calculated to maintain the dignity of members of the sovereign people by ensuring that they are not held captive by an uninvited political message accords with the political sovereignty which underpins the implied freedom.

Just as persons lawfully going about their commercial business are entitled to get on with it unimpeded by the unwelcome, disruptive antics of insistent protesters, women seeking an abortion and those involved in assisting or supporting them are entitled to do so safely, privately and with dignity, without haranguing or molestation. The protection of the

safety, wellbeing, privacy and dignity of the people of Victoria and so a legitimate concern of any elected State government. A legislative purpose of securing its people that entitlement is thus consistent with the system of representative and responsible government mandated by the Constitution.

***Chief of the Defence Force v Gaynor* [2017] FCAFC 41**

The Respondent published comments on his Twitter and Facebook pages, including an exchange between the Respondent and a transgender officer, which the primary judge described as 'intemperate, vitriolic and personally offensive…'

The circumstances of the Respondent's comments are, in our opinion, aptly described as extreme, including his refusal to accept and abide by orders and directions given to him. Any potential harm to the freedom of political communication is outweighed by the need to reserve to the repository of the power the ability to terminate the service of individuals whose conduct and behaviour places them in a category where their continued presence in the Australian Defence Force is assessed to be sufficiently serious, in the opinion of the repository of the power, to justify the considerable step of terminating the service of an officer.

Therefore, while the scope of the power in the law was wide, it was sufficiently confined by the objects and purposes of the statutory scheme in which it appears that it can properly be described as suitable, necessary, and adequate in balance with respect to any burden it imposes on the implied freedom.

***A v Independent Commission Against Corruption* [2014] NSWCA 414**

The Independent Commission Against Corruption (ICAC) issued a summons to the appellant (A Co) requiring the production of certain documents at a compulsory examination in purported exercise of its power under s 35(1) of the ICAC Act.

The focus of the applicant's challenge to the issue of the Commission's summons was a failure to act within the scope of the authority granted by s 35 of the ICAC Act. However, the summons also challenged the validity of s 35(1) and (2) on the basis that they exceeded the legislative power of the State because they contravened the constitutional freedom of communication on governmental and political matters.