GRAFFITI, REGULATION, FREEDOM

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Abstract

In designing and implementing regulative measures to address graffiti and its perceived consequences, care must be taken to strike an appropriate balance between protecting public order and protecting individual rights and freedoms. This paper discusses the issues of graffiti, regulation and freedom and the way in which those concepts interact. First, the relationship between graffiti and regulation is considered. Regulation is not necessarily the approach that is required or desirable in dealing with graffiti as an issue, but it is one option that can be placed in a broader strategy of management. Secondly, the relationship between regulation and freedom is discussed. The paper ends with some guidance on how to achieve a balance between maintaining public order and protecting freedom of speech.

This paper is not calling for absolute freedom in relation to graffiti, nor is it calling for drastic regulation to remove every piece of graffiti from public and private spaces in Australia. Rather, it is a discussion of what graffiti is, how regulation can be an element in a strategy of managing graffiti and how individual freedoms such as the freedom of political communication should be put into that mix.

Part 1 - Graffiti and Regulation

1.1 Graffiti – What, Where, When, Why, How and By Whom

I take a broad view of what graffiti is. Graffiti is a form of expression which appears on public or private spaces, whether "internal" (eg in toilet blocks, also called "latrinalia") or "external" (trains, walls, buildings). The designs, words, images can be created[1] with temporary (chalk) or permanent or semi-permanent (spray paint, texta, pen) materials. Graffiti can be considered an art form,[2] vandalism, politics[3] or communication, or a combination of those, depending on where it appears (and with or without whose permission), the aesthetic appeal of the particular graffiti and its communicative effect. Graffiti can also therefore have a number of corresponding intentions behind its appearance in public or private space – artistic creation (perhaps following a commission), an act of imitation, protest against a particular political order or policy, expression of rage, boredom or dissatisfaction with life, destruction of others' property, notice of territory.[4] It is also received or perceived differently by different groups in society.

I do not ascribe to a number of stereotypes regarding who produces graffiti and the corresponding criminal implications. In theory, "graffitists"[5] may be of any age, socio-economic background and education. A number of studies have been carried out which suggest that graffitists are predominantly within a young age bracket, some suggesting that they are "largely young people who under-achieve at school".[6] However, there are also well-publicised occasions of graffiti including adult professionals.[7] As described above, the graffitists' intentions are not homogenous.

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[1] For an example of some definitions adopted in legislation, "marking graffiti" includes "writing, painting, spray-painting or drawing … scratching or burning": *Transport Act* 1983 (Vic) s 223A.

[2] See the paper "Graffiti – Expression of Creativity in a Legal Way" by Mick Jones, Youth Centre Wollongong in this 'Graffiti Art" session, as well as sources such as Jeff Ferrell *Crimes of Style* (1993) Garland Publishing New York.

[3] One political element that has emerged in commentary on graffiti has been the identification of graffiti as a subculture, anarchistic - in battle with the dominant ideology (see the discussion of an "anarchist criminology" in Jeff Ferrell *Crimes of Style* (1993) Garland Publishing New York at 159ff. In particular, there is a debate concerning graffiti as a reclaiming of space by citizens from commercial monopolisation of areas that would traditionally be considered "public" spaces: see eg Leonie Sandercock "From Main Street to Fortress: the Future of Malls as Public Spaces – OR – 'Shut Up and Shop'" (1997) 9 *Just Policy* 27; Christine Mendes "Signal Driver: From bus stops to bus shelters – the new art of appropriating space" (1995) 6 *Current Issues in Criminal Justice* 362.

[4] For a discussion of the non-homogenous nature of graffiti see Halsey & Young "Graffiti and Municipal Administration" (2002) 35(2) *The Australian and New Zealand Journal of Criminology* 165.

[5] I have chosen this term to avoid classifications such as "graffiti artists" or "writers", both of which may imply skill, intention and/or legitimacy.

[6] Susan Gearson & Paul Wilson, *Preventing Graffiti & Vandalism* (1990) Australian Institute of Criminology at 8.

[7] For example, the BUGAUP (Billboard Utilising Graffitists Against Unhealthy Promotions) campaign whereby individuals opposing certain kinds of advertising graffiti-ed over billboards. See Margo, "The doctors who fight cancer with spray cans" *Sydney Morning Herald*, 19 Feb 1983 at 32.

In relation to “criminality”, there are a number of points to make. First, it should be clear from the definition of graffiti given above that not all graffiti is illegal. Secondly, I do not agree with the often-made assumption that the existence of graffiti necessarily correlates to a high element of crime in the area, making the area less safe for the public. One piece of research from the Australian Institute of Criminology has suggested that there should in fact be a public *differentiation* between graffiti and “violent crime”.[8] Thirdly, I do not believe that all graffitists are necessarily engaged in serial and serious criminal activity beyond graffiti-ing.[9] As White states: “Graffiti does not necessarily, nor logically, nor automatically, equate with criminality”.[10]

1.2 Management of Graffiti?

Despite my non-acceptance of some stereotypes related to graffiti, I do acknowledge that the existence of graffiti may have *perceived* and *actual* negative effects. The *perceived* effects may be perceptions held by members of the community (excluding perhaps the graffitists themselves[11]) that the mere existence of the graffiti increases the level of crime in the area and makes the area less safe.[12] Perceptions are important because they can lead to *actual* effects such as a fall in the desirability of the area as a place within which to live or conduct business and therefore a fall in property prices, despite a lack of empirical evidence to support those views.

There are also *actual* negative consequences through graffiti constituting a breach of accepted norms in society, especially those related to property, if done without permission of the property-owner upon which the graffiti appears.[13] The consequence is a violation of property rights, perhaps on the basis of a trespass committed in the course of gaining access to property, as well as the more obvious “damage” to the property appearance, with consequent clean-up costs in the graffiti’s removal.[14]

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[8] Wilson & Healy, “Research brief: Graffiti and vandalism on public transport” Australian Institute of Criminology; trends & issues in crime and criminal justice No 6 (July 1987) at 3.

[9] An interesting comparison appears in a research brief produced by the Australian Institute of Criminology, that Sydney graffitists “come from a wide range of social groupings and areas”, that while “some graffitists engage in vandalism most confine their activities to illegal drawings”, “vandals generally originate from poorer geographical areas of the city” see Wilson & Healy, “Research brief: Graffiti and vandalism on public transport” Australian Institute of Criminology; trends & issues in crime and criminal justice No 6 (July 1987).

[10] White, “Graffiti, Crime Prevention & Cultural Space” (2001) 12(3) *Current Issues in Criminal Justice* 253 at 266. See also the interview with Mark Halsey, who was one of the researchers involved in the Graffiti Culture Research Project, prepared for Keep South Australia Beautiful, TransAdelaide, the City of Mitcham, the City of Onkaparinga, the Crime Prevention Committee of the City of Tea Tree Gully, the City of Salisbury, the City of Unley and the Crime Prevention Unity of the SA Attorney-General’s Department, who states that “there is very little evidence to suggest that graffiti causes or leads to more serious offending” – published in Deslandes, A “graffiti, culture & young people; a conversation about law & policy responses” (Sep 2002) *article 13; Law & Policy journal of the National Children and Youth Law Centre* 8 at 8.

[11] Indeed, a number of researchers have found that graffitists often have a different perception of graffiti from the views held by other members of the public. Individual graffitists interviewed by some researchers have stated that they do not consider their work to be vandalism, but art, while others disapprove of “illegal” graffiti as it “disrupts others who wish to engage in legal graffiti”: White, “Graffiti, Crime & Cultural Space” (2001) 12(3) *Current Issues in Criminal Justice* 253 at 259, referring to O’Leary, J (1997) “Making a Mark”, *The Big Issue*, 24 Feb-9 Mar pp 15-17. I agree with people such as White, that graffiti should not necessarily be considered as a “problem” requiring a “solution”, but an issue which can be considered from many viewpoints but which may call for some management in dealing with the differences in perception: Rob White, “Graffiti, Crime Prevention & Cultural Space” (2001) 12(3) *Current Issues in Criminal Justice* 253 at 253.

[12] See eg Frances Gant & Peter Grabosky *The Promise of Crime Prevention* (2000, 2nd ed) Australia Institute of Criminology Research and Public Policy Series No 31 at 24.

[13] There is also an interesting debate concerning the value judgment made of graffiti as “visual pollution” while advertising which may be offensive to others is regarded as “acceptable”: White, “Graffiti, Crime Prevention & Cultural Space”, (2001) 12(3) *Current Issues in Criminal Justice* 253 at 258, Halsey & Young “Graffiti and Municipal Administration” (2002) 35(2) *The Australian and New Zealand Journal of Criminology* 165 at 180-181.

[14] In some of the legislation in place in Australia, the “loss” suffered by a person whose property has been marked with graffiti is taken to be “the market cost of labour and materials required for repairing or making good any property on which graffiti has been marked”: *Transport Act* 1983 (Vic) s 223F.

These effects – perceived and real – lend force to the argument for management of graffiti, as some individuals or groups perceive or actually suffer because of graffiti. By the word "management" I do not necessarily mean legal regulation.[15] Management is a broader term, encompassing any measure taken to address a perceived problem in society. An idea of the breadth of the term can be seen from the varied graffiti management strategies that have been adopted throughout Australia. Many are focused on the local, usually involving local government and community groups[16], although there are some state-wide policies[17]. I do not propose to go through them. However, they can be categorised as a combination of a number of approaches – removal, criminalisation, welfarism, acceptance[18]. Within the strategies there are elements of education, communication, consultation, training, prevention and more.

Whatever strategy is chosen, the causes and effects of graffiti should be critically examined, not assumed. Nor should the views or characteristics of the graffitists be ignored. Any form of management of issues affecting society should consider all the stakeholders, and in the context of graffiti, graffitists have a "stake" in the form and implementation of that management. Further, the development of a management strategy should begin with an exploration of the local area and the local factors that affect graffiti and its effects and then tailor the management strategy around that knowledge.

It can be seen that "management" is not necessarily synonymous with "legal regulation". However, the law can be and is one of the tools available in any management suite. I would argue for a position whereby regulation, if used, is used in conjunction with these other measures. The law is not the only or best problem-solver. In fact, I would agree that law is not "the only civilising cement which holds society together and prevents the anti-social unleashing of egoism and plunder that 'human nature' would otherwise dictate".[19] It is only one form of control, which is adopted as a political choice.

1.3 Regulation – An Option Already Being Used

Although regulation is only one tool among many, it is one which exists in abundance in our society and which will always exist. Regulation is an entrenched part of Australian society and in every State there are already a number of laws which can be imposed on graffitists and their activities. The existing laws regulating activities of citizens fall within a number of categories – protection of property (reflecting both the public and private nature of property), maintenance of public order and specific measures to prevent graffiti.

Before any further regulation is suggested, the scope of the existing system should be examined to determine whether the current system is appropriate and then whether any changes or new laws are necessary. I will not here evaluate the existing regimes, but simply note the variety of laws that currently exist that are relevant to graffiti.[20] However, it is important to consider how the regulation

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[15] By "legal regulation" I am referring to laws enacted by legislatures – be they local, State or federal. Therefore, it is a term used synonymously with "legislation" in this paper. In contrast, "the law" or "law", is used to mean the collection of all legal rules in our society.

[16] A useful list of links to such programs is contained on the Australian Institute of Criminology website, <www.aic.gov.au/research/localgovt/property.html#graffiti>. An account of the Marrickville Council's strategy a decade ago appears in Ackermans M "A Graffiti & Vandalism Strategy" (1991) 27(2) *Australian Parks & Recreation* 11.

[17] For example, in South Australia, a Graffiti Prevention program within the broader SA Crime Prevention Projects; a graffiti removal program within the Victorian Travel Safe Program (introduced in 1990), and the NSW Graffiti Solutions Program. These State-wide programs then feed into the local initiatives and provide resources, funding etc for those local actions.

[18] See Halsey & Young "Graffiti and Municipal Administration" (2002) 35(2) *The Australian and New Zealand Journal of Criminology* 165 at 175ff where these ideas are explored and a number of local government strategies are analysed.

[19] David Brown, David Farrier, Sandra Egger & Luke McNamara, *Criminal Laws: Material and Commentary on Criminal Law and Process in New South Wales* (2001) 3rd ed Federation Press at 21.

[20] There is at least one example of an unsubstantiated claim that it is regulation itself that had led to the decrease in graffiti in certain areas, however there needs to be further research before such a conclusive statement can be made:

is supposed to work as a measure in dealing with graffiti. For example, whether it is to stop or limit graffiti, ie be a preventative measure? Or is it to punish those who graffiti – a retributive measure, perhaps including an element of restoration through an order to clean-up the graffiti created or other graffiti in the area?[21] These considerations assist in determining how the regulation fits within the management strategy for an area.[22] In relation to any regulation – existing or proposed - the enforcement mechanisms should be given a great deal of consideration,[23] including as a first step, raising the awareness of the community (including graffitists) of the existence of the regulation.

So, what laws are currently in place? To begin with, there are already general laws relating to the sanctity of private property – regarding access and use. The general position is that any property owner has exclusive possession over their land and therefore has control over who comes onto the land and who is kept from it and also who does what on the land (and buildings contained thereon). There are moves against this absolute position in other countries, but such a change has not reached Australia's judiciary or legislatures.[24] So, the general rules. The first is the law relating to access, ie trespass laws. These provide a remedy for any property owner whose exclusive possession has been breached through another's entry onto the land without permission.[25] This could cover any graffitist who enters private land to mark graffiti. It also covers some government land to which there is not a general right of access by the public (think rail corridors etc). The next relevant group of laws is that prohibiting destruction of property. There is a range of laws concerning damage generally,[26] or legislation specifically defining "graffiti" as a form of damage to property.[27]

There are also "public order" laws that may apply, depending on the content of the graffiti. These laws usually restrict what can occur on public land or in public space, broadly defined. The relevant laws could include those prohibiting offensive language or conduct, if the content of the graffiti were deemed to be "offensive".[28]

Parliamentary Debates (Hansard), Western Australia, Legislative Assembly, Mr Prince (Minister for Police), 9.10am Thursday 11 May 2000 at p 6881-2.

[21] Consider the laws that have been introduced including the option of community service orders requiring the removal of graffiti as a punishment option available against those guilty of offences relating to graffiti: *Community Service Orders Act* 1979 (NSW) amended in 1994 to include sub-s 4(1A), 14(2), 26A(1AA) and *Children (Community Services Orders) Act* 1987 amended in 1994 to include s 5(1A), 5(1AA), 17(2); *Transport Act* 1983 (Vic) s 223E, other legislation has an automatic default option of removal as punishment: *Graffiti Control Act* 2001 (SA) s 9(3).

[22] For a discussion of the way in which regulation can be a part of a broader strategy, in a very different context, see Elisa Arcioni, "Out Damned Weeds! Weed Management in Australia – Keeping Them at Bay" (2003) 8 *The Australasian Journal of Natural Resources Law and Policy* 75.

[23] In relation to enforcement, it is important to consider the way in which the regulation is to work according to its terms and then the way in which the practical enforcement may go outside that structure. One useful analytical tool in designing and evaluating any regulatory and enforcement structure, is the "enforcement pyramid" developed by Braithwaite in "Convergence in Models of Regulatory Strategy" (1990) 2 *Current Issues in Criminal Justice* 59. For an example of this model as it relates to practical regulatory enforcement in a very different context, see Elisa Arcioni, "Out Damned Weeds! Weed Management in Australia – Keeping Them at Bay" (2003) 8 *The Australasian Journal of Natural Resources Law and Policy* 75 at 110-117.

[24] See for example the following recent decision in Europe: *Appleby v United Kingdom* (Judgment of the European Court of Human Rights, 6 May 2003, Application No 44306/98) para 47; some interesting legislation granting a right of individuals to enter and walk about another's private property without having to gain permission: *Countryside and Rights of Way Act* 2000 (England), *Land Reform (Scotland) Act* 2003. I thank Kevin Gray for collecting these and other materials and for raising this issue in his seminar on "Pedestrian Democracy", given as part of the Legal Intersections Research Committee 2003 Seminar Series, at the University of Wollongong Faculty of Law, 5 June 2003, in which he outlined the tensions between the position of absolute control over private property vesting in the owner and judicial and legislative recognition of exceptions to that position.

[25] The law of trespass has traditionally been considered a "tort" or "private wrong" – see eg Butterworths Concise Australian Legal (1997), which states that trespass is "[o]ne of the earliest forms of tort": at 396. That is still the case, but it has now also been added to the statutebooks in the form of impermitted access to inclosed lands etc: see eg *Inclosed Lands Protection Act* 1901 (NSW) s 4, or statutory trespass laws eg *Trespass Act* 1987 (NT).

[26] eg *Criminal Law Consolidation Act* 1935 (SA) s 85; *Police Act* 1892 (WA) s 80; *Crimes Act* (NSW) s 195; *Summary Offences Act* 1988 (NSW) ss 7, 8.

[27] Eg *Summary Offences Act* 1988 (NSW) amended in 1994 to include s 10A; *Rail Safety Regulation* 1999 (NSW) s 34; *Graffiti Control Act* 2001 (SA) s 9 which interestingly prohibits the marking of graffiti, which is defined to include "deface property in any way" in s 3; *Passenger Transport (Regular Passenger Services; Conduct of Passengers) Regulations* 1994 (SA), cl 35; *Transport Act* 1983 (Vic) s 223B(1)-(2); *Transport Infrastructure (Rail) Regulation* 1996 (Qld) s 10(3), (4); *Metropolitan (Perth) Passenger Transport Trust Regulations* 1977 (WA) s 41;

[28] eg *Vagrants Gaming and Other Offences Act* 1931 (Qld), s 7(1)(d), see the broad definition of "public place" in s2.

The last group of laws concerns graffiti specifically. Recently, laws have been enacted which aim to prevent graffiti by restricting access to the materials used to graffiti. The "implements" have been regulated through restrictions on their sale,[29] and possession of such implements has been limited in a number of ways.[30]

Therefore, a number of regulatory options already exist to deal with graffiti as an issue – whether by restricting access to property, prohibiting damage to property or restricting access to implements used to graffiti.

Part 2 – Regulation and Freedom

Regulation is here to stay as one option in addressing social issues. In analysing the regulation already in place and in drafting new regulations, the functions of the law should be considered. These include, relevantly for the purpose of this paper, the protection of society through the maintenance of order and peace, and the protection of individual rights and freedoms.[31] Government (local, State, federal), in regulating certain activities, is, or should be, engaged in a balancing exercise between these two.

2.1 Balancing Order and Freedom

The federal Parliament's power to make laws for the nation is explicitly on the basis that it be "for the peace, order, and good government of the Commonwealth with respect to" a range of topics.[32] Many of the Australian States have a similar statement in their constitutions.[33] This is a clear indication that at least one of the functions of the law is to provide and maintain order.[34] That means protection of physical order ie physical safety of citizens and their property, as well as the moral order of the society, although the content of this "moral order" is more difficult to define.[35]

However, the regulatory powers of the Parliaments should not be used only to this end. Those powers must also be used to protect individual rights and freedom – whether that entails positive protection through their entrenchment in law or negative protection by restrictions placed on the

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[29] Prohibiting the sale of spray cans to minors: *Summary Offences Act* (NSW) amended in 2002 to include s10C, *Graffiti Control Act* 2001 (SA) s 5, 6; regulating the storage of spray cans in retail premises: *Graffiti Control Act* 2001 (SA), s 4. In addition, there have been moves by the retail industry, such as the "Responsible Retail Strategy" of the Australian Retailers' Association, the Commonwealth Attorney-General producing a "Code of Conduct for Graffiti Prevention".

[30] In some legislation there is reference only to spray cans, while other legislation is of broader scope, including "implements capable of spraying paint or a similar substance" or "implements designed or modified to produce a mark that is not readily removable by wiping or by use of water or detergent and is more than 15 millimetres wide": *Graffiti Control Act* 2001 (SA) s 10(2), cf *Transport Act* 1983 (Vic) s 223A(1). Some of the regulation includes a requirement of *intent* to "deface" property, others do not: *Summary Offences Act* 1988 (NSW) amended in 1994 to include s 10B, *Graffiti Control Act* 2001 (SA) s 10; *Transport Act* 1983 (Vic) s 223B(4), 223C; *Rail Safety Regulation* 1999 (NSW) s 34(2); cf *Transport Act* 1983 (Vic) s 223B(3); *By-law* 23 (WA) s 23 (inserted by Gazette 30 December 1994 p 7332)

[31] I focus only on these two functions of law - protection of order and protection of freedom. As each of those are very broad in scope, I believe that encompasses most functions that have been advanced by others. However, there are different descriptions given by some, extending the functions into six or more categories – see eg JW Harris, *Legal Philosophies* 1980 at 237-240.

[32] Constitution, s 51 (see the chapeaux for this phrase).

[33] *Constitution Act* 1902 (NSW) s 5: "power to make laws for the peace, welfare, and good government of New South Wales"; *Constitution Act* 1867 (Qld) s 2, affirmed by the *Constitution of Queensland Act* 2001 (Qld), s 8: "power … to make laws for the peace welfare and good government of [Queensland]"; *Constitution Act* 1889 (WA); s 2: power to "make laws for the peace, order, and good Government of [Western Australia]"; cf Victoria, which merely states that the Parliament shall have the "power to make laws in and for Victoria": *Constitution Act* 1975 s 16 and South Australia, where the *Constitution Act* 1934 (SA) s 5 merely confirms that "Legislative Councils may be established in … South Australia": *"An Act for the better government of Her Majesty's Australian Colonies"* 13 & 14 Vic c 59 s 7.

[34] However, it should be noted that such a phrase is not one of limitation and the argument that all laws must therefore be for such purposes has been questioned by the High Court: *Kable v The Director of Public Prosecutions for the State of New South Wales* (1995) 189 CLR 51.

[35] Arguably, the Australian system is based upon Judaeo-Christian ideas, embodied in the British legal system enforceable in Australia since approximately 1788 (Britain claimed sovereignty over different parts of Australia at different times after 1788). It is unlikely that Australia's legal independence from the 1980s (with the *Australia Acts* 1986 (Cth)) has affected this underlying proposition. However, this does not assist in resolving the *content* of those principles.

way in which the freedoms can be infringed by the law. The importance of freedom under law has a long history[36] although it has never been without its difficulties. Australia is generally accepted to be a liberal[37] country, based on democratic principles and broad freedoms. Although we do not have a Charter of Rights,[38] Human Rights Act[39] or list of explicitly protected rights in the Constitution,[40] fundamental to our political system is that the government will not arbitrarily infringe upon freedom and that there are some rights deserving protection.[41]

Rights that deserve some level of protection can be found in international instruments to which Australia is a signatory[42] and may arise from the structure of the legal system in Australia[43] – remnants from the unwritten British system that we inherited with colonisation in 1788. There are arguments of "natural" rights[44], "self-evident" principles[45] or rights that arise from the social contract between individuals and government that underlies society.[46] However, the definition of those rights and their legal status is uncertain. Some consider them important, perhaps even fundamental. Although the High Court has adopted a rule of interpretation such that fundamental rights must not be abrogated by legislation unless the legislature expresses an explicit intention to do so,[47] this rule in itself proves that the rights are vulnerable.

The main problem for any government is therefore to make the political choice of how to balance the protection of order with the protection of rights and freedoms.[48] There are a number of theorists that have advanced ideas on how to make the choice,[49] some placing greater weight on communal needs, others on individual freedoms and rights. That choice will always be one determined by electoral expediency and the policy and politics of those in power at any given time. The balance will change depending on the risks perceived and felt by groups within society and pressures from other communities (regional, national, international). However, the need to balance the competing interests of order and freedom is one consideration that should be kept in mind when choosing legal regulation as a tool in addressing any social issue, including graffiti.

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[36] See Denning, *Freedom under the Law* (1949) The First Series of the Hamlyn Lectures.

[37] I use this term very loosely.

[38] cf Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act, 1982 (Can); Charter of Fundamental Rights of the European Union.

[39] cf *Human Rights Act* 1998 (UK).

[40] Cf the well-known position of freedoms under United States law, where the Supreme Court has recently applied the ideas of fundamental freedoms to include the right to privacy and strike down as invalid laws prohibiting same-sex intercourse between consenting adults in Texas: *Lawrence and Garner v Texas*, case no. 02-0102, judgment delivered 26 June 2003.

[41] It is problematic to talk of individual rights versus public order, as a right to such order can be classified as an individual right in itself. Some political philosophers are involved in a current debate concerning whether rights should ever be located in groups, or whether all rights should be attached to individuals: Chandran Kukathas "Are There Any Cultural Rights?" (1992) 20 *Political Theory* 105; Will Kymlicka "The Rights of Minority Cultures: Reply to Kukathas" (1992) 20 *Political Theory* 140; Chandran Kukathas "Cultural Rights Again: A rejoinder to Kymlicka" (1992) 20 *Political Theory* 674. However, it remains a valuable process to consider how the law should balance competing interests, whether characterised as "public" and "private" or simply competing rights.

[42] For example the International Covenant on Civil and Political Rights done at New York on 19 December 1966, ATS 1980 No 23; International Covenant on Economic, Social and Cultural Rights, done at New York on 19 December 1966 ATS 1976 No 5.

[43] For example the right to be considered innocent until proven guilty, the right to privileged communications between solicitors and their clients.

[44] Locke, (1690) *Second Treatis on Government* ie rights pre-existing government or the legal system cf Hobbes (1651) *Leviathan*.

[45] Rawls *A Theory of Justice* (1971).

[46] Itai Sened *The Political Institution of Private Property* (1997) Cambridge University Press esp 29-32, 178-184.

[47] Eg *Coco v R* (1994) 120 ALR 415 at 419 (Mason CJ, Brennan, Gaudron & McHugh JJ) – see D C Pearce & R S Geddes *Statutory Interpretation in Australia* (2001, 5th ed) at 131-132 [5.1].

[48] This is reflective of the general problem of legislatures in a democracy, in drawing a line between groups' and individuals' rights and among a number of individual rights claimed: see Larissa Behrendt *Achieving social justice* (2003) Federation Press at 16-17, referring to J Dewey, *The Public and Its Problems* (1991, orig 1923) Swallow.

[49] For example, Mill's harm principle, which holds that freedom can only be infringed in order to avoid harm to others: J S Mill *On Liberty* (1859), later developed by HLA Hart in *Law, Liberty and Morality* (1963). There is a somewhat connected balancing formula of acknowledging public morality to be a basis for legislation, but excluding from regulation all that is considered to be "private" morality, or those things done in the home – reflected in the Wolfenden Committee (UK), *Report of the Committee on Homosexual Offences and Prostitution* (1957) at 24 [61].

2.2 Freedom of Political Communication

This dual conception of regulation may not be accepted by all. Instead, some may consider the law to have no function apart from reflecting the whims of the voting public and their representatives at any given time. However, even if the general proposition of a need to balance order and freedom is not adopted by legislatures, there is one specific freedom that must be taken into consideration. There is at least one freedom implied in the Constitution – the freedom of political communication. Regardless of whether governments believe that individual freedom has any place in designing laws, this one must be considered in order to avoid legislative invalidity.

The High Court has established a test that must be followed to determine whether regulation, in the form of legislation (federal, State or territory Acts, Ordinances or Regulations or local by-laws) goes too far in restricting that freedom and is therefore invalid. This is relevant for existing legislation – all governments should be wary that existing legislation may fall foul of the Constitutional protection. And if new regulation is being considered, this same consideration should be taken into account. The rest of this paper explains the implied freedom of political communication, how it works and sets out some guidelines on how legislatures can test whether or not the regulation passes the Constitutional test. However, it should be noted that this is an area of the law that has not yet received a great deal of judicial explanation.[50] This article does not form advice that can be relied upon without question; it is intended to give a general understanding only. Legal advice should be sought in relation to the detail of specific legislation.

The Constitution protects political communication by setting up a freedom *from* regulation, not a freedom *to* communicate. The difference between the two is that if the freedom is infringed, regulation doing so will be declared invalid ie not a real law, but an individual cannot take anyone else to court merely because the latter has restricted an individual's freedom. The only recourse is by arguing the regulation itself is invalid. The High Court has set up a test to determine this last point – whether or not legislation is valid. The test asks two questions:[51]

"First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfillment of which is compatible with the maintenance of the constitutionally prescribed system of representative government … If the first question is answered 'yes' and the second is answered 'no' the law is invalid."

The test seems relatively straightforward, but there are a number of issues hidden within it.

[50] The implied freedom was only recognised and accepted by a majority of the High Court of Australia in 1992. Since then there have not been a great number of cases exploring this topic, therefore there are outstanding questions in relation to its application. However, at least from 1997, with the decision in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, there has been a greater amount of certainty at least as to the *test* to be applied in order to determine legislative invalidity where regulation infringes the freedom, although the application of that test is itself in a state of development.

[51] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-68. This case has been accepted in courts around the country: *Roberts v Bass* (2002) 77 ALJR 292 at 304 [66] (Gaudron, McHugh & Gummow JJ), 323 [162] (Kirby J); *Jones v Scully* [2002] FCA 1080 at [236]; *Coleman v P* (2001) 189 ALR 341 at 342 [3] (McMurdo P), 354 [45] (Thomas JA with whom Davies JA agreed at 351 [34]); *Coleman v Power* (Queensland District Court, Pack J, 26 February 2001) at [22]-[23]. Its status as an authoritative rule seems to have been established through acceptance by the High Court, although two members of the current bench have questioned the very existence of the implied freedom: Heydon, "Judicial Activism and the Death of the Rule of Law" (2003) 47(1) *Quadrant* 9 at 17; *Roberts v Bass* (2002) 77 ALJR 292 at 345 [285] (Callinan J) referring to his Honour's earlier reasons in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 330-332 [338].

2.2.1 What is Covered by the Freedom?

A classic definition of "political communication" is given by Barendt : "'political speech' refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about".[52] I would agree with Barendt and argue that the scope of the freedom is incredibly broad. Members of the High Court have questioned whether there is an end to what is 'political'[53] while another has cautioned that the freedom not be 'debased'[54] by giving it too broad a coverage.

To get an idea of the outer reaches of the freedom, we should consider the basis of the implication of the freedom into the Constitution. The freedom was found to be implied in order to ensure the effective operation of the system of governance that exists in this country – representative and responsible government. That system is a two-way system, whereby our government is elected through free and informed elections and that once elected, those representatives are *responsible* ie *accountable* to the Australian people.

The first part means that the freedom covers communication concerning electoral *candidates* during an election period,[55] and includes communication concerning State, Territory and national *issues*, possibly extending to international issues that may have implications in this country[56] and which could be raised in an election. The second aspect of the system – accountability, means that not only is communication concerning the elected representatives' actions (especially those of the Ministers, as the executive arm of government) subject to the freedom, but also communication regarding any part of the entire bureaucracy involved in governing us. That includes the public service,[57] the 'institutions and agencies of government'[58] and those who staff them.[59] And the type of discussion about them would include anything concerning the 'propriety, appropriateness or significance of official conduct'.[60] Therefore, the content of the freedom includes discussion of a broad range of individuals and their conduct, as well as covering a broad range of topics – anything that our governments would ever have to address in governing us.

2.2.2 What Regulation of the Freedom will be ok?

Although the range of communication covered by the freedom is very broad, it is clear that the freedom is not an absolute one. It is possible and legitimate to affect the exercise of that freedom, *but only if the regulation that does so is for a legitimate end and is reasonably appropriate and adapted to that end*. The aims of law mentioned above (public order, peace, security and protection of property) would most probably be legitimate ends. They do not adversely affect the system of government in Australia and arguably help it to function. Therefore, most of the regulation listed above, that regulates graffitists and their activities, would be considered to have legitimate ends. So the real question becomes whether the specific regulation, ie *the method used* to achieve order, is "reasonably appropriate and adapted" to that end.

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[52] Eric Barendt, *Freedom of Speech* (1985) Clarendon Press Oxford at 152, referred to in *Theophanous v The Herald & Weekly Times Ltd* (1993) 182 CLR 104 at 124 (Mason CJ, Toohey & Gaudron JJ).
[53] *Theophanous v The Herald & Weekly Times Ltd* (1993) 182 CLR 104 at 123 (Mason CJ, Toohey & Gaudron JJ).
[54] *Levy v Victoria* (1997) 189 CLR 579 at 638 (Kirby J).
[55] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561.
[56] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 576.
[57] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561. See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 74 (Deane & Toohey JJ).
[58] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 48 (Brennan J); compare at 34 'public institutions' (Mason CJ); *Theophanous v The Herald & Weekly Times Ltd* (1993) 182 CLR 104 at 124 (Mason CJ & Gaudron J),150 (Brennan J); *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 217 (Gaudron J); *Cunliffe v The Commonwealth* (1993) 182 CLR 272 at 329 (Brennan J).
[59] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 79 (Deane & Toohey JJ).
[60] *Theophanous v The Herald & Weekly Times Ltd* (1993) 182 CLR 104 at 180 (Deane J).

For a law to be "reasonably appropriate and adapted" to a legitimate end requires a balancing of the aims of the law and the means adopted in achieving it. That involves a question of "proportionality"[61]. No clear guidance has been provided by the High Court as to how this is to be tested; the only thing that is clear is that it is a question of degree. However, a number of considerations may be relevant:[62]

i. *The legislation's purpose and the freedom – their relative importance*

The balancing act should be done in the context of the impact the provisions have on the freedom of political communication. The conclusion will always be a value judgment, reflecting the way in which the freedom and the legislation's aims are prioritised. The detrimental and beneficial effects of the legislation should be canvassed against each.

ii. *An attempted balance or an absolute ban?*

Has the legislature attempted to achieve a balance? One approach is to consider the regulation as going "too far" if it exhibits no attempt at balancing the legislative aims and the freedom.[63] There is no doubt that legislation can regulate the exercise of the freedom, but a balance is required. The existence or absence of defences, exceptions, exemptions and options for gaining permission are important indicators. Where the regulation is of a severe nature, are there practical alternatives or is the severity necessary to achieve the legislation's purposes?[64]

iii. *Manner of restriction – time, place & form*

Whether the inhibition placed on the freedom is direct or indirect, the nature of the temporal and spatial restrictions as well as the form or forms of communication that are regulated are relevant. Although again a matter of degree, a connection must be shown between the choice of restrictions and the legislative aim. Further, it must be shown that there are ample alternative means of communication so the legislation does not in effect preclude any meaningful exercise of the freedom. The nature and specific subject-matter of the communication and the expected and desired audience are also factors to be taken into account.

iv. *Co-existing alternative regulation*

Whether alternative regulatory regimes are already in place to achieve the purposes of the relevant legislation and if so, whether that legislation adds anything to the regime or merely creates greater restrictions on the exercise of the freedom is significant. As noted above, there are already a number of schemes in place in each State, some overlapping.

Conclusion

Graffiti is something that exists throughout Australia and in many parts of the world. It has been a feature of society throughout history and should not be given a simplistic explanation. Different kinds of people are engaged in graffiti and for a variety of purposes. There are advocates of allowing it to continue and there are advocates of a tough line to eradicate it from our towns and cities. Graffiti undoubtedly has some negative consequences, whether they be actual physical harm

[61] This was noted in a footnote to the High Court's test in *Lange* (set out above), where the High Court stated "In this context, there is little difference between the test of 'reasonably appropriate and adapted' and the test of proportionality", referring to *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 337, 396.
[62] These considerations were first outlined in Elisa Arcioni, "Politics, Police and Proportionality – An Opportunity to Explore the *Lange* Test: *Coleman v Powers*" (2003) 25 *Sydney Law Review* (forthcoming, September).
[63] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 53 (Brennan J).
[64] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 51 (Brennan J).

to individual property or perceived signs of social disorder and dangerous areas. In managing the actual and perceived effects of graffiti, regulation is certainly one option to be put into the mix of tools available. Regulation is in fact one tool already being used in a variety of forms throughout Australia. In analysing its place within a management strategy and in designing further regulative measures to address graffiti as an issue, the dual functions of the law should be kept in mind. The law should exist to protect society generally as well as the rights and freedoms of individuals. This is a general proposition that may not be accepted by all. However, there is one freedom, the freedom of political communication, which is protected by the Constitution and must be considered. The freedom is very broad, covering any communication addressing any *issue* that a government may address or commenting on the activities of any *member* of the government and its apparatus. The focus of the legislature in trying to balance the freedom with graffiti management should be on ensuring that whatever regulation is put in place is reasonably appropriate and adapted to the aims of the law. That is, make sure that the methods adopted are such as to satisfy that aim, without going too far.