

CONSTITUTIONAL LAW GUIDEBOOK

SECOND EDITION

BEDE HARRIS

CHAPTER 8

Because the topic of Express and Implied Rights is so broad, there are two problems at the end of this chapter. Be careful—you should also look at Chapter 5 when answering Problem 1, and at Chapter 3 when answering Problem 2.

PROBLEM QUESTION 1

In a bid to regulate the broadcasting industry more tightly, Parliament enacts the *Broadcasting Regulation Act 2015* (Cth), relevant sections of which state as follows.

1 Broadcasting Control Commissioner

The Governor-General shall appoint a Broadcasting Control Commissioner to discharge such functions as are conferred the Commissioner by this Act.

2 Declaration of designated broadcasters

The Broadcasting Control Commissioner may declare any broadcaster to be a designated broadcaster under this Act if he forms the subjective opinion that it is in the public interest for such a declaration to be made.

3 Control of broadcasting

The Broadcasting Control Commissioner may, in respect of any broadcaster declared to be a designated broadcaster under this Act, give directions to such a broadcaster in respect of all matters pertaining to its operations including, but not limited to, the following:

- (i) hours of broadcasting
- (ii) program content

- (iii) advertising
- (iv) salaries and other conditions of employment of employees
- (v) financial matters, including the taking of loans and the investment of assets
- (vi) the acquisition, disposal, lease and hire of assets and
- (vii) purchases and sales of programs and broadcasting rights.

4 Review of decisions by the Commissioner

- (1) Any person who is dissatisfied with a decision by the Commissioner may seek review by the Broadcasting Appeal Panel.
- (2) The Broadcasting Appeal Panel shall consist of three persons appointed by the Minister for Telecommunications, who shall serve three-year terms.
- (3) A decision by the Panel shall be registered with the Federal Court of Australia and shall have effect as if it were an order of the Federal Court of Australia unless a party to the appeal lodges an application for review of the Panel's decision within 21 days.

Linda Himmler, leader of the National Socialist Party of Australia (NSAPA), owns a local television station in Sydney. She broadcasts material asserting that members of various ethnic groups are inferior to others and ought not to be allowed the right to vote. The Broadcasting Control Commissioner exercises his powers under s 2 of the Act and declares her television station to be a designated broadcaster. He makes a range of orders under s 3, including an order limiting the station's broadcasting hours to 11pm–5am, prohibiting it from selling advertising time, capping employees' salaries and prohibiting it from selling assets or borrowing money. He also makes an order under s 3(ii) ordering the station 'not to broadcast racially discriminatory views or any other material which is harmful to relations between ethnic, religious or racial groups in Australia'.

Himmler sought review of the Commissioner's decision under s 3 of the Act. Two months ago the Panel gave its decision, upholding the Commissioner's exercise of his various powers. Linda did not have the money to lodge an appeal with the Federal Court and now approaches you for advice.

ISSUES TO CONSIDER

1. Which power do you think would support this law?
2. Looking first at the effect of the law on Linda's capacity to run her business, what has been the effect of the orders made under s 3 of the *Broadcasting Regulation Act 2015* (Cth)? What case does this remind you of? What would Linda argue the law should have contained?

3. If Linda claims that her property rights have been infringed, what two counter-arguments could the Commonwealth make?
4. Turning next to the specific order made under s 3(ii), what freedom would Linda argue that this infringes? What is the purpose of that right?
5. What is the test for determining whether infringement of that freedom is constitutionally valid?
6. What issues does the mechanism for review of the Commissioner's decision raise, given the tenure of the Panel's members and the status of their decisions?

PROBLEM QUESTION 2

Bernstein Woodward is a journalist with the *National Inquirer* and has built up a reputation as a fearless investigative journalist. Much of the success of the *Inquirer* derives from the fact that it manages to print newsworthy items before anyone else, and journalists are under constant pressure to get their stories out first.

Over a period of years, Woodward has written several articles critical of Greg Falwell, an MP. Falwell has recently been appointed Minister of Family Affairs. At 3pm one Thursday, Woodward receives an anonymous call from someone who says: 'You know that sanctimonious jerk Falwell? Well I've just seen him come out of the Alley Katz Escort Agency with a grin on his face.' Woodward realises that this news is political dynamite and, anxious to meet the 5pm deadline for stories to be printed, he writes a piece headlined, 'Falwell Purrs after Alley Katz Rendezvous—Engaging in a Family Affair?' and stating that Falwell was seen coming out of the escort agency and questioning whether someone holding the post of Minister for Family Affairs was a fit person to hold office in light of such behaviour.

The next morning, Woodward is contacted by Madame Sinn, owner of Alley Katz. She complains that business is being driven away by the horde of journalists camped outside her door, and asking why Woodward did not simply telephone her when he got the story, as she could have told him that Falwell had never visited the establishment. Falwell sues Woodward, alleging that he was defamed in the *National Inquirer* article.

A few weeks later, Falwell makes a speech in Parliament in which he says: 'One reporter, who I will not name, takes bribes from the Opposition, and is a corrupt, lying little rat with no principles.' A few weeks after that, Falwell is interviewed on the *Nationwide* television program at its studios in Sydney and, in response to a question as to who he had referred to in his speech in Parliament said: 'It was Bernstein Woodward.' Woodward sues Falwell for defamation.

Assume you are Woodward's solicitor. Prepare an opinion advising him as to the legal position arising out of both legal actions.

ISSUES TO CONSIDER IN ANSWERING THIS PROBLEM

1. Given that what Woodward has written is false, what defence is open to him?
2. What are the requirements of that defence, and is he likely to satisfy them?
3. If one considers Falwell's two statements together, could one say that Woodward has been defamed? What if one considers them separately?
4. If this matter went to court, what defence is Falwell likely to raise? Will he be successful?