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Distracting the masses: Art, local government and freedom of political speech in Australia

Abstract

Visual images in the form of politically explicit street art can evoke passionate responses. In the arena of political culture these responses can be educative or vilificatory, constructive or abusive, and form part of public debate. Where these images are censored, restricted or banned through legal intervention by government, however, the debate takes on a different tone because it interacts with free speech principles. What are the limitations of valid government intervention against controversial political art? Is it justifiable, and if so when and under what circumstances, for government to censor political views with which it disagrees or which it may consider hurtful or offensive to members of the community within which the art is exhibited? What are the limits to legal regulation of politically controversial works of visual culture?

Distracting the masses: Art, local government and freedom of political speech in Australia

Katharine Gelber

Introduction

Visual images in the form of politically explicit street art can evoke passionate responses. In the arena of political culture these responses can be educative or vilificatory, constructive or abusive, and form part of public debate. Where these images are censored, restricted or banned through legal intervention by government, however, the debate takes on a different tone because it interacts with free speech¹ principles. What are the limitations of valid government intervention against controversial political art? Is it justifiable, and if so when and under what circumstances, for government to censor political views with which it disagrees or which it may consider hurtful or offensive to members of the community within which the art is exhibited? What are the limits to legal regulation of politically controversial works of visual culture?

This article deals with some aspects of this debate by considering an incident of censorship of political art that occurred in November 2004 in the western suburbs of Sydney, Australia. A commissioned work by Sydney artist Zanny Begg was removed from public display by a local government. This paper examines this event in four parts. First, it considers debate around whether and how local government might have a particular role to play in the promotion or restriction of

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civil liberties and freedoms. Secondly, the events surrounding the removal of Begg's artworks are outlined. Thirdly, the context within which this event took place, namely mechanisms for the protection of (especially 'political') speech in Australia are outlined, as Australia unusually lacks an explicit constitutional or statutory free speech protection and this arguably renders freedom of speech particularly vulnerable to incursion by local government powers. In the next section of the paper analysis is undertaken regarding the legal and cultural mechanisms utilised in this incident, and what they demonstrate about political culture, free speech and local government powers in Australia. The article concludes that taking both the requirements of contemporary local governance and the importance of freedom of political speech seriously requires that local governments be cognisant of, and exercise, self-restraint in terms of their regulatory capacities. In the incident described here, the opposite occurred.

The role of local government

Referred to as the 'bottom tier' of government (Chapman & Wood 1984: 11), local government in Australia is often regarded as much less important than the State² and federal tiers enshrined in the Australian system of government.³ State governments possess residual constitutional powers over areas as diverse as health, primary and secondary education, roads and economic development. The federal government's specified constitutional powers include taxation, welfare and defence. State and federal governments share concurrent powers in a range of policy areas including health and housing, often linked with funding arrangements.

Local government, by contrast, does not derive its powers from the Australian Constitution but rather is a statutory creation of State governments. Its numerous entities are created (and can be merged or split to create new entities) by State parliaments, which grant them — and thus simultaneously delimit — their powers. Two referenda attempting to give constitutional recognition to local governments failed, one in 1974 in which only one State voted in favour of the proposal (Chapman & Wood 1984: 175), and a second in 1988 in which

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less than one-third of Australians voted in favour of the proposal (Jones 1989: 2, 143).⁴ There are approximately 809 local governments nationally.⁵

Historically, local government in Australia has tended to deal primarily with service provision in areas of local concern including regulating land and housing developments, cleaning streets and maintaining local footpaths, administering household rubbish and recycling, and providing local community services including recreational and child care facilities. However, the last two decades have seen a shift in government practices from 'government' to 'governance'. As part of a general embrace in industrialised societies of neo-liberal principles, local governments have become increasingly committed to partnerships with non-government actors for service provision, policy innovation and community consultation (O'Toole & Burdess 2005: 241).

As part of this shift large-scale amalgamations have occurred both within Australia and internationally, leading some studies of local government to question how local governments can remain, or be perceived to remain, relevant and important in the Australian system of government and not be abolished (Jones 1993: 18). The question has been raised of whether local government provides the best opportunity for grass roots representation and involvement in decision making of all the tiers of government, and therefore that it ought to make the best of its 'closeness with the people' by emphasising participation and thus promoting 'localism', defined as 'the desire for local communities to influence their choices and control as much as possible of their own affairs' (Jones 1993: 18).

This closeness with the people could imply that local government has a particular role to play in promoting democracy at the local level. This can happen via the increased promotion of citizen participation in its decision making processes in order to enhance governments' responsiveness to local needs and issues (Jones 1981: 199, 235). Jones argues local government is in a unique position to 'train' people in forms of democratic participation. In doing so, it has the capacity to promote a version of the 'good life', a 'positive' form of liberty in

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which citizens may be assisted by government to take command of their own lives (1989: 18). This is a kind of citizenship-in-government idea; that through participating in their own governance, citizens enhance their own capacities to govern themselves to a greater degree than otherwise possible.

At the same time, it is argued that local government ought to be mindful of its particular responsibilities regarding what I will call 'citizenship-against-government'. This is the idea that local government has the responsibility to develop and enforce a wide range of regulations governing citizen behaviour, regulations which have a tendency to prioritise bureaucratic control. It thus has the power to limit individual liberty in meaningful, important and wide-ranging ways (Jones 1989: 18). It is responsible for many detailed regulations which 'constrain and inhibit public participation' in political affairs outside of government processes (Jones 1981: 235). Jones argues local government must therefore consciously restrain its own capacity for regulation (1989: 19).

In the past it had been argued that local government's importance does not lie in its closer connection with the grass roots, or its inherent and unique democratic tendencies, and that there was little evidence that local government is inherently more suited to, or active in, promoting citizenship involvement in decision making. For example, a 1967 survey of local government activities in the United Kingdom concluded, 'we have found no evidence to support the common belief that our local government has some uniquely democratic content', expressed either in terms of voter turnout or citizen involvement in decision making (Committee on the Management of Local Government (HMSO) cited in Purdie 1976: 25). A 1976 study of Australian local governments drew similar conclusions, based on a lack of representativeness on Councils, low participation of women and then-existing property qualifications on voting (Purdie 1976: 25–36).

However in the context of contemporary understandings of local governments' role, significant and far-reaching changes to their governance practices have occurred. Local governments are increasingly exploring methods of enhancing community consultation

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and participation in decision making processes (O'Toole & Burdess 2005: 252, Cuthill 2001, Bradshaw 2001, Peel & Pearce 1999, Bishop & Davis 2002, Wallis & Dollery 2002). Broader reforms have resulted in the greater involvement of the private sector, non-government organisations, and community groups and networks in local government decision-making (Geddes 2005: 18). This shift has been embraced both by communitarians who see it as a way of reinvigorating collective policy-making processes, and neo-liberals who see it as a remedy for market failure, drawing on voluntarism to produce better and cheaper outcomes for communities (O'Toole & Burdess 2005: 241).

Greater community involvement has transformed both the citizenship-in-government and the citizenship-against-government conceptions of citizen participation in multifaceted ways. For in becoming actively engaged, although these citizens may draw upon governmental resources, they may simultaneously be working against governmental (local, State and federal) power and decision-making (Kenny 1994: 85). Local governance grapples with the contradictory obligations of representing and giving voice to local constituents' interests, and implementing policies of higher levels of government. This produces an 'irresolvability' in local government power, since local government is required to express both compliance with the central authorities from which its mandate derives and support for its local communities (Woods 1998: 25).

Thus, at the heart of the citizenship-in-government conception is a complex, inherent, irresolvable, but also potentially constructive tension. While citizens' participation may enhance their own ability to self-govern, and empower them to participate in their own governance, this can at the same time lead to increasingly differentiated demands and pressures from those citizens on their local governments. This tension is potentially constructive because it means that local governments possess a flexibility in determining their response to competing demands on them (Woods 1998: 25). This flexibility could potentially enhance their policy outcomes by allowing them scope to develop innovative policy choices and to respond in multifaceted ways to pressure from several directions simultaneously.

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When considered in the context of local governments' role in the protection of, or placing of limitations on, important and fundamental civil liberties this constructive tension is particularly interesting. It means that it becomes possible to make a normative argument that local government ought to take its role as a protector of freedom seriously even though this may require that it see itself as protecting citizenship-against-government at all levels — including against its own powers of regulation. To achieve this would require considerable self-restraint. But such self-restraint becomes possible when the inherent tension within local governments' contemporary role is viewed constructively.

In the realm of civil liberties protection, some evidence exists that local governments are adopting a self-restraining and liberty-enhancing role. A formal example occurred in the introduction in 2001 by the Hume City Council in Victoria of a Social Justice Charter containing Australia's inaugural Bill of Rights.⁶ The current Charter is prefaced by a message from the Mayor of the City of Hume in which he affirms the Council's commitment to social justice 'founded upon human rights' and the 'unique and privileged role' of the Council in promoting citizen participation 'in the life of the City'. The Charter itself aims to 'promote an active citizenry', and recognises that every citizen is 'free and equal in dignity and rights' and 'entitled to aspire to that quality of life that allows them to freely realise their potential'. The Bill of Rights acknowledges that the 'spirit and vigour' of human rights' recognition and reinforcement lie 'deep within' local governments' domain and in 'those who participate in the public life of their community'. It also discusses Council's plans to initiate a 'Community Empowerment Action Plan'.

Other, less formal, examples exist in the increasing citizen participation referred to above, and in the increasing involvement of local governments in community development work in which non-government actors participate in local decision-making and in so doing 'build structures that facilitate democratic participation' (Kenny 1994: 8) and generate active forms of citizenship (Kenny 2004).

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So can local government be a protector of citizens' freedom, even if that means protecting its own constituents against its own powers of regulation, indeed against itself? What kinds of freedoms are envisaged in a claim that they can or should be so? How would a freedom-protecting local government act? It is to these kinds of questions that the rest of this article will be addressed. I turn now to a case study to address these issues.

'Weapons of Mass Distraction'

In 2004 the Blacktown Arts Centre, which is funded by the Blacktown City Council,⁷ and the University of Western Sydney jointly organised an exhibition entitled '[OUT OF GALLERY]: A Series of Guerilla Exhibitions in Western Sydney' (Ihle 2004: 10). Work by Sydney artist Zanny Begg was selected for the exhibition. It consisted of 10 life-size cutouts of soldiers in military fatigues with the slogan 'Checkpoint for Weapons of Mass Distraction'. A contract was drawn up between the Arts Centre and the artist, specifying that her artwork would be placed in 10 outdoor sites across the local government area which were to be 'grey areas' between public and private space: car parks, abandoned buildings and so on. The artworks were to be made out of cardboard and affixed with cable ties so they were removable. The pieces were to be left in place for the public to do with them what they wished, including defacing them or taking them down, and the image to be used was approved (Begg 2005).

On 23 November 2004 Begg had already installed five pieces across the local government area. She was in the car park of the Blacktown Arts Centre installing a sixth when a Community Law Enforcement Officer approached her and told her it was an 'illegal sign'. Begg denied it was illegal and suggested that the Officer speak with the Arts Centre. The Officer went into the Arts Centre, and then returned maintaining that the artwork was 'inappropriate'. He said to her, 'Don't you know there's a war on in Iran?' Begg replied, 'That's Iraq'. The Officer replied, 'It's too political. It's totally inappropriate in the climate of terrorism' (Begg 2005).

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The Officer then told Begg that the Council had informed the curator of the exhibition, Mr Adnan Begic, that her work had been removed from the exhibition and that she had to take her pieces down. The Officer told her if she did not comply, 'I'll take you down to the station and you'll be fined'. Begg subsequently contacted the curator of the exhibition who confirmed that her work had been removed from the exhibition and told her to take down all her pieces immediately. She said she disagreed with Begic's decision and they agreed that they would meet the next day so that she could show him where the pieces were and he would take them down, however by then the pieces had already been removed.

Begg and Begic subsequently held a personal meeting with (initially) two representatives of the Blacktown Arts Centre and the Blacktown City Council, which Begg described as 'hostile' (Begg 2005). At this meeting the representatives suggested that the installation of Begg's work had caused concern because Begg herself had been wearing army fatigues while installing the work (which was untrue, as a photo in the local media testified), and that she had also been using a toy gun (which was also untrue). They said this had led to federal counter-terrorism authorities being called⁸ and members of Council being questioned about her behaviour on the streets of the local government area. During the meeting a third and more senior representative arrived who was less hostile to Begg and Begic. She acknowledged that there had been a misunderstanding on the part of Council regarding Begg's behaviour on the day of the installation.⁹

In a subsequent interview, Blacktown Arts Centre and Council representatives were at pains to state Council's position that the artwork had not been 'censored' or 'cancelled' but rather that a 'temporary pause' had been placed on the exhibition of the works. When asked to clarify the difference, the representatives stated that Begg had placed her artworks in public areas two days before the scheduled installation date and that this had caused problems because final approvals from sites where the artworks were to be placed had not yet been secured. After the artworks were cancelled, however, subsequent approval was

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not sought and no further effort was made to permit installation of the artworks (BAC/BCC 2006). Thus, the 'pause' was never lifted.

Begg subsequently received an email from Council informing her that one of her artworks had been impounded and she was being fined for placement of an 'illegal sign', in the amount of \$410.30. No further detail was provided. She argued in response that the artwork had been installed as a work commissioned by the Blacktown Arts Centre, which is funded by the Council, and that the artwork could therefore not be considered an 'illegal sign'. The fine was rescinded (Ihlein 2004: 11).

Begg made several subsequent attempts to get more detailed information from the Council regarding the grounds on which the decision to cancel her work was made, but consistently received no response. Begg left the Blacktown Arts Centre, citing interference by Council in its curatorial decisions (Begg 2005). It was subsequently reported in a newspaper article in February 2005 that staff had left the Arts Centre due to a pattern of mayoral interference and censorship, although in interview representatives of the Blacktown Arts Centre denied that any such pattern exists (BAC/BCC 2006). It was also reported that Mayor Leo Kelly had said the artwork 'discredited the Council' and that he had refused to explain further the Council's decision regarding Begg's work (*Sun Herald* 6 February 2005: 40). Following publication of this article, minutes of the Ordinary Meeting of Blacktown City Council on 9 February 2005 show under 'Business Without Notice' that 'allegations in a newspaper article' in relation to interference in the direction of the Blacktown Arts Centre were raised. They show that 'following advice from the Mayor' this item was not proceeded with any further.¹⁰

In another media report a Council spokesperson was quoted as saying the artwork had been classed as 'street entertainment' which required a permit to show (*Daily Telegraph* 24 November 2004: 22) however the email sent to Begg, the only written evidence of Council's decision, had cited an 'illegal sign'. The Mayor of Blacktown City Council featured in another media report in which he said, 'This sort of thing in the name of art is not going to go on in our city' (*The Glebe* 9 December 2004: 1, 8).

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In February 2005 Begg held a new exhibition with the support of the Mori Gallery in inner-city Sydney. This exhibition was entitled 'Checkpoint' and displayed 100 pieces which were the same as in the first exhibition — cardboard cutouts dressed in fatigues, carrying rifles and tagged with the text 'Checkpoints for Weapons of Mass Distraction'. They filled the gallery and spilled out onto the sidewalk. The exhibition also featured A3-size political placards produced by other artists (*Sydney Morning Herald* 4 February 2005: 26). The exhibition proceeded without incident, and the exhibition brochure contained articles critical of the controversy authored by academics and other artists, as well as a letter of protest sent at the time of the incident to Blacktown City Council and signed by 102 supporters.

Having established the empirical evidence surrounding the removal of Begg's work, and before drawing analytical conclusions regarding the Council's actions in this incident, it is appropriate now to move to a consideration of the broader frameworks of freedom (or otherwise) of speech in Australia, to locate this incident within a broader free speech perspective.

Freedom of political speech and government self-restraint

Freedom of speech is a fundamental (but not absolute) political liberty recognised in liberal democratic nation-states all over the world and enshrined both in international human rights standards (such as the International Covenant on Civil and Political Rights, Art 19) and domestic constitutional or statutory law in many countries (eg the First Amendment to the USA Constitution, Art 16 of the Constitution of the Republic of South Africa, Art 2 of the Canadian Charter of Rights and Freedoms, and Schedule 1, Art 10 of the *Human Rights Act* 1998 (UK)). It is a freedom widely recognised in scholarly literature as important, an importance which is justified on the basis that it promotes the search for truth, participatory democratic practice, individual self-development, or is a deontologically conceived 'right' (Barendt 1985: 8–23, Schauer 1982).

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Historically, Australia has lacked an explicit constitutional or statutory free speech right,¹¹ and for most of Australia's post settlement history a combination of common law and responsible government have been the methods used to preserve and protect free speech (Williams 2002: 25). Thus, free speech in Australia has been an intrinsic and implicit, but often not very visible, component of political and legal culture. The visibility of free speech protections has been augmented since 1992 by an emerging but limited High Court jurisprudence on freedom of political communication.¹² Michael Chesterman outlines how free speech has been recognised as an important component of Australian law over time and that the High Court has referred to, and relied upon, a common law tradition in outlining the parameters of its emerging constitutional doctrine (2000a: 6–7).

The implied constitutional freedom of political communication is limited in its scope, conception and application in important ways. The freedom is regarded as an implication from the form of representative and responsible government established by the Australian Constitution. It is therefore derived from the text and structure of the Constitution and not extrinsically as an individual 'right', and it operates as a freedom from government restraint rather than a right conferred on individuals (*Lange v Australian Broadcasting Corporation* at 566–7, Gelber 2003: 23–32, Patapan 2000: 51–9, Williams 2002: 165–97, Stone 1998, 2001). It is further limited to 'political communication', usually understood as discussions relating to matters that have a bearing on federal politics (*Lange* at 571–2, see also Chesterman 2000b). This relatively narrow definition of political speech prevailed in 2005 in *APLA v Legal Services Commissioner* in which it was argued that a connection with the activities of the legislature and/or executive was required.¹³ The comment on the war in Iraq made by Begg's artwork ought thus to be able to be considered 'political communication' since Australia's involvement arises from a decision of the executive government.

Importantly non-verbal expression has been included in the conception of political communication, as evidenced in *Levy v Victoria*

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in which protesters entering a duck shooting area were considered to be engaging in political communication. Thus the fact that Begg's artwork constituted non-verbal expression would not remove it from the purview of the implied freedom's protection. That Begg's artwork can be considered political speech under the terms of the doctrine ought not to be taken to imply I am subjecting the Begg incident to a test of whether it ought to be considered protected political communication under the terms of the constitutional doctrine, but only that it does constitute political communication even under the narrow definition of such speech favoured by the High Court of Australia.

Finding that an expression constitutes political expression does not automatically protect it from infringement by government. Even where a communication can be determined to be in principle subject to the protection afforded by the implied freedom of political communication, the High Court has permitted governmental restrictions where they occur as a result of a law that is appropriately adapted to achieving another legitimate government end. In a two-step test first outlined in the *Lange* decision, one first questions whether a law does effectively burden freedom of communication about government or political matters, and secondly, if the answer to that question is yes, one asks whether the law is reasonably appropriate and adapted to serve a legitimate government end, compatible with the maintenance of the constitutionally prescribed system of government.¹⁴ If the law is so appropriate and adapted it may still be held to be a valid exercise of legislative power, even where it infringes upon freedom of political speech. Thus, the freedom is able to be overridden where another legitimate purpose is to be achieved by a speech-restricting government policy. The fragility of freedom of even political speech within this framework has been remarked upon by scholars in the field, with Michael Chesterman describing free speech in Australia as a 'delicate plant' (2000a) and my earlier work describing the freedom as 'partial and unsatisfactory' (Gelber 2003: 44).

Within this general framework it can be argued further that freedom of political speech in Australia is vulnerable in relation specifically to the powers of local government. This is so for two intersecting reasons.

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Firstly, protection of political speech has what might be described as a vulnerable foundation in Australian law. The clearest elucidation that political speech is an important and protected freedom — the implied constitutional doctrine — relies upon a negative enforcement mechanism. That is to say, it is a freedom achieved via restraint on government.¹⁵ It is a freedom reliant for its realisation on legislative and executive non-interference in the political speech activities of individuals. Simultaneously, the lack of clear definition of when a law is reasonably appropriate and adapted to another legitimate government end and thus a valid exercise of governmental power leaves considerable scope for restriction on freedom of political speech to occur. This scope will ultimately rely on the interpretive powers of legislators and regulators in the first instance, and judges in the second, to be defined. It has already been argued that the doctrine is losing its importance as a ‘fetter on legislative and executive actions’ due to restrictive interpretations of its scope (Lee 2005: 80). Thus, the protection of political speech which is reliant on restraint (and this assumes also self-restraint) on the part of government is vulnerable where and when governments at whatever level may choose not to practise such self-restraint.

The second and intersecting reason for the particular vulnerability of freedom of political speech in this context is the manner of operation of local government powers analysed above. I have argued that in the realm of civil liberties protection, local government ought to be particularly mindful that such protection may require it to protect its constituents against its own, and other levels of governments’, regulatory powers.

Some evidence already exists that this vulnerability is of more than theoretical concern. Empirical research of specific case studies has shown that some local governments, both before and after the emergence of the implied constitutional freedom, demonstrated similarities in their preparedness to restrict even the most obviously political forms of speech in rather heavy-handed ways (Gelber 2003). An overview of relevant local government regulations in all pedestrian malls around Australia (defined as former roads that have been

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transformed into open air malls,¹⁶ and arguably therefore exemplary public spaces for such activities) shows that opportunities for exercising political speech in pedestrian malls are at risk from regulatory provisions enforced in the context of often hostile politico-cultural attitudes within local governments. A lack of civic culture within local governments regarding the importance of political deliberation was identified (Gelber 2005). It is important to note that the results of these earlier studies were not uniform, and that some local governments were performing 'well' in the sense of promoting liberty and being mindful of their powers in constraining political speech. Yet a significant proportion, as reported in these studies, was not. The in-depth examination of the Begg incident undertaken in this paper is intended to add further evidence and dimension to these conclusions regarding local government powers.

Having established this context for the kind of role local government ought to play in political speech protection, I turn now to consider the grounds on which the Blacktown City Council acted in the Begg incident.

Text, culture and attitude

The grounds on which the action was taken by the Blacktown City Council to remove Begg's artworks are not entirely clear. Nevertheless, some investigative results are worth reporting. In terms of the legal powers of Council, the Blacktown Local Environmental Plan (LEP) defines some types of signs in its interpretive section.¹⁷ None of these signs adequately conceptualises the artwork that was placed in the local government area by Begg. The closest is a 'temporary sign', but this is defined as one advertising a local event. The term 'sign' on its own does not appear in the interpretive section. The LEP lists specified types of signs as exempt from a requirement for consent from Council, subject to compliance with conditions relating to size, number and placement.¹⁸ Temporary signs are listed as exempt from the requirement for a development application. The spirit, if not the text, of the regulations appears to be that relatively small-scale community signs with minimal or no impact on safety or their environment may be placed without requiring approval from Council at all.

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It was argued by the Blacktown Arts Centre and Council that Begg's installation of the works two days prior to the arranged date meant that final approvals for their placement, which were being negotiated between the BAC and local sites, had not been granted (BAC/BCC 2006). This gave the Council a ground for temporarily halting the installation of the artworks until such approval had been secured. However, three arguments speak against this being the sole reason for the artworks' removal. Firstly, if the Council had only wished to secure final approvals from installation sites, they could have continued to do so and the installation could have easily taken place two days later on the scheduled installation date. This did not occur. Once the artworks had been removed they were not subsequently reinstalled, nor was approval sought to reinstall the works at any future date. The 'pause' in the installation was permanent. Secondly, other comments by Council members as reported in the media concerning the content and meaning of the work would have been irrelevant and need not have featured in the debate at all. Thirdly, the spirit of the regulations as described here is that small-scale signs with minimal or no impact on safety and the environment ought to be permitted. Thus in spirit at least and given the size and positioning of the artworks, the possible removal of the artworks for the regulatory purpose of securing public safety seems spurious.

Looking again at the spirit as well as the letter of the regulations, the only two types of 'signs' defined in the interpretive section which explicitly do not attract exemptions from a requirement to obtain consent from Council to place are illuminated street signs and pole or pylon signs, structures which require considerable effort to place and which have a significant impact on their immediate environment. Furthermore, the Blacktown Development Control Plan 1992 (DCP) which provides further detail for the LEP specifies¹⁹ that the Local Approvals Policy provides a mechanism for applying for approval for the placement of a 'sign'. These procedures derive from the State government's State Environmental Planning Policy No 64: Advertising and Signage,²⁰ and go through the building section of the Council. They refer to signs which have significant implications for traffic flow or visibility or are likely to have some other significant impact on the area in which they

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are placed. These provisions are intended to grant State and local governments control over large-scale signs, and/or signs likely to have a significant environmental or safety impact when they are placed. Clearly, Begg's artwork did not fit within these categories or conceptions.

In the context of its regulatory framework, Blacktown Arts Centre and Council representatives were unable to explain why Begg was not invited two days later to reinstall her artworks under the original terms of the contract. They also suggested that the reason the Council Officer who had initially expressed such hostility to the works acted in the manner he did is that he did not know about the exhibition being installed (BAC/BCC 2006). If this oversight were true, it again could have been easily remedied and Begg could have been invited to reinstall her works on the scheduled day.

This implies that the strictly legal status of the artworks was not the sole or primary issue in their initial and ongoing removal, and that cultural or attitudinal issues came into play in this incident. As already noted, the Mayor indicated publicly that he believed the artwork 'discredited the Council' and the Community Law Enforcement Officer saw the artwork as 'inappropriate', but clarification of both these statements remains elusive. During Begg's meeting with local government representatives, other elements they described as leading to the artwork's cancellation (Begg's clothing and use of a toy gun) were admitted to be untrue. Such a lack of clarity regarding the grounds for the artworks' removal requires one to speculate as to the reasons why the artwork may have caused such discomfort on the part of the Council.

At first glance, two possible reasons arise. The first is that the Community Law Enforcement Officer misread the text accompanying the cutouts. Instead of 'Weapons of Mass Distraction', perhaps they read it as 'Weapons of Mass Destruction'. This interpretation is bolstered by the Officer's comment to Begg during discussions about the war in 'Iran'. Precision of expression did not feature during this emotionally charged exchange. However, even if this were true this does not in and

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of itself explain why the artworks were removed and no effort made to secure their subsequent exhibition. Even had the text read, 'Weapons of Mass Destruction', given that they were placed on cutouts of Western soldiers dressed in fatigues and carrying rifles, this would have implied that Western soldiers were themselves weapons of mass destruction. This could be regarded as a controversial statement at a time when Australian soldiers were engaged in fighting in Iraq. But it does not in and of itself justify removal of the artworks unless we accept that the Council has the power to remove political statements either which it finds controversial or with which it disagrees.

A second possible reason for Council's reaction is that it was expressing concern for its constituents. Blacktown, the most populous City in New South Wales, is culturally diverse. It has residents from over 50 countries who speak 63 different languages and in the period August 1991 to February 1996, 96 per cent of new arrivals were from a non-English speaking background (BCC 2005). Perhaps these demographics made the Council more sensitive to criticisms of war in Iraq. However these issues were not cited by Council representatives when or after they took action to remove the artworks from exhibition. Moreover, one could also argue in the obverse that the demographic profile of the Council's constituents would increase the popularity of and support for public artworks critical of the war in Iraq.

Thus neither of these explanations appears convincing, nor does either of them explain how the artworks could have 'discredited' the Council. This raises the possibility that the Council removed the artworks with the intention of closing down the debate such a political piece of public art could provoke. The local government in question chose to shut down public discussion of a critical contemporary political issue — the war on terrorism. A regulatory environment designed to grant local government the power to control the placement of advertising signs was used to achieve this outcome, which seems an extraordinarily misplaced use of the regulation. The incident displayed an attitude that an appropriate (re)action from Council to a political expression which it did not want to hear was to remove it from public display. More specifically, this incident demonstrated an attitude on the part of this

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local government that political discussion on a controversial issue ought to be shut down, rather than facilitated.

This analysis demonstrates that the fate of political speech can be poor in local government environments, based just as much on politico-cultural attitudes towards political speech as on the textual legal environment. Moreover, the lack of any demonstrable reconsideration on the part of Council indicates that the original decision to remove the artwork was not regarded as important to overturn within Council ranks, and that the poor fate of freedom of political speech in this instance was not regarded problematically.

Local government and citizenship

I argued earlier that citizens' participation in local government activities can both enhance citizens' participation in their own self-governance and at the same time lead to tensions where those participatory practices simultaneously challenge governmental power. I argued further that local governments could and should see this dilemma in constructive terms. That is to say, in being forced to confront the scope of their own regulatory capacities, and in the context of the protection of a fundamental liberty such as freedom of political speech, local governments could use such opportunities to develop innovative governance practices that meet the demands both of governing and of their constituents. If they were to do so they could enhance both the citizenship-in-government and citizenship-against-government capacities inherent in their contemporary role.

The Begg incident demonstrates, firstly, that such constructive tensions do manifest. A member of the community participated in a Council-funded arts initiative and in so doing, she and the Blacktown Arts Centre utilised Council resources. When the exhibition took place some Council authorities including the Mayor expressed disfavour for the work. They then utilised their regulatory powers to remove the artworks in question. Secondly, the Council's oversight of the Arts Centre's activities generally combined with its actions in the Begg incident imply a preparedness on the part of Council to utilise its

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regulatory frameworks despite overt disagreement from affected constituents, a contextual background of the importance of freedom of political communication, and open media criticism.

Thus, thirdly, although the Council was forced to confront the scope of its own regulatory capacities in the context of a freedom of political speech issue, its chosen response was to close down debate rather than to facilitate it, to adopt a censorious rather than a constructive policy, and to obscure rather than to clarify its reasons for doing so. In local governance terms the Begg incident demonstrates the failure of the Blacktown City Council to meet the demands both of governance, to the extent that preservation of the fundamental liberty of freedom of political speech is regarded as a demand of governance, and of (a section of) its active citizens who sought to mount a public exhibition of artwork, some of which deliberately raised controversial political themes.

Fourthly, in a context in which freedom of political speech is reliant on government self-restraint to be realised, the Blacktown City Council demonstrated a failure to be cognisant of what could be regarded as appropriate limits to its own regulatory capacities, given its failure to facilitate reinstatement of the works subsequently to their initial removal if purely administrative issues had been the justification for their removal in the first place. That reinstatement did not occur implies that other, non-administrative, reasons existed for removal of the artworks. This renders Council's reasoning obscure and inappropriate in this instance given the normal requirements of local governance. Of course, this is not the only example of governance practices entered into by the Blacktown City Council and I am not attempting to draw general conclusions about a range of Council practices or attitudes from one incident. Indeed in interview local government representatives stressed that Blacktown City Council sponsors a range of arts and cultural development activities, many of which could be seen as controversial, and that Council is proud of its achievements in that area (BAC/BCC 2006). I am arguing, however, that for the reasons outlined here this incident ought to be regarded seriously in the context of the importance of freedom of political speech and local government powers.

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Alternative governance practices would have been possible in this incident; a freedom-enhancing local government could have taken a different role. It could have left the artworks alone in the first place, for citizens to deal with as they wished individually and in ways the artist had intended and hoped for. It could have arranged reinstallation of the artworks two days after they were first removed and in accordance with the original arrangements. It could have seen the artworks as an opportunity to have an open discussion within the community about the war on terrorism, by holding public events or conducting further community consultation. It could even have seen the event as an opportunity to demonstrate to its constituents its commitment to the very freedoms the war on terror is purporting to preserve — democracy, free speech, and the ability of citizens to engage in political expression simultaneously critical of government and free from government restraint. Instead, it chose to do the opposite.

Notes

I would like to thank Zanny Begg for sharing her story with me for this article, for permission to use this image, and for her artwork from which the title of this article has been drawn. I would also like to thank the journal's anonymous referees and Sarah Maddison for very helpful comments on the draft.

- 1 The terms 'speech' and 'communication' (in the context of 'free speech' and 'freedom of political speech/communication') will be used interchangeably in this article and are intended to include deliberately expressive non-verbal forms of expression, such as visual images and artworks.
- 2 In order to avoid confusion, in this article the term 'State' (with a capital 'S') will be used to denote the sub-national level of government in Australia.
- 3 Most general analyses of Australian politics and federalism either omit local government from consideration (eg Brett et al 1994), or provide only marginal analysis of the range of powers of this level of government (eg Singleton et al 2003 provides two pages at 90–2).
- 4 In Australia the text of the Constitution may only be changed via a national referendum, which requires both a majority of voters and a majority of

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- States to vote in favour in order to pass. Referenda have a high failure rate, with only 8 out of 44 passed since Federation (Vromen & Gelber 2005: 80).
- 5 Precise figures on the numbers of local governments differ according to their inclusion or exclusion of forms of indigenous community representation. In 1978 Power et al cited 866 (1981: 25), in 1992 Jones cited 913 including indigenous community councils (1993: 5), and in 1997 McNeill cited 809 local governments plus a further 112 community governments (1997: 17). See also information on the reductions between 1971 and 1980 in Chapman & Wood (1984: 38). The focus of this article is on mainstream 'local governments' and not indigenous community representative forms.
 - 6 The Charter is regularly updated. See text of the 2004 Charter and Bill of Rights at <www.hume.vic.gov.au/Page/page.asp?Page_Id=298&h=1#BM1109> accessed 15 March 2006, copy on file with author.
 - 7 See general information at <www.blacktown.nsw.gov.au/residents/venues/blacktown-arts-centre.cfm> accessed 15 March 2006.
 - 8 There is no evidence that, even if such a call was made, any action resulted or that counter-terrorism authorities regarded the incident as in any way significant. Begg was not contacted by counter-terrorism authorities, and this claim did not feature in any subsequent negotiations between Begg and the Council.
 - 9 In interview, representatives of the Blacktown Arts Centre clarified that on the morning on which Begg had installed her works, a Council officer had reported a separate incident in which an unidentified member of the public had motioned with their hands in pretence at 'shooting' the Council officer. They argued this contributed to an atmosphere of 'heightened security awareness'. It was clearly understood by the time this meeting with Begg had occurred that Begg had not been the person in question (BAC/BCC 2006).
 - 10 Minutes of the Ordinary Meeting of Blacktown City Council, 9 February 2005: 18. Copy on file with author. Scrutiny of the minutes of other Ordinary Council meetings during the 12-month period following the removal of Begg's artworks shows no other mention of the incident.
 - 11 With the exception of the recently enacted and limited jurisdiction of s16 of the Australian Capital Territory's *Human Rights Act* 2004 and s15 of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) .

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- 12 The two landmark cases that outlined the freedom were *Nationwide News Pty Ltd v Wills* and *Australian Capital Television v Commonwealth*. A unanimous judgment in *Lange v Australian Broadcasting Corporation* clarified the freedom.
- 13 *APLA Ltd v Legal Services Commissioner (NSW)* at 421 (per McHugh J) and 519 (per Callinan J).
- 14 This is known as the ‘Lange test’ and is derived from the unanimous judgment in *Lange v Australian Broadcasting Corporation* at 567–8. This test was reaffirmed in *Coleman v Power* at 207–8, and *APLA Ltd v Legal Services Commissioner (NSW)* at 456.
- 15 ‘Within our legal system, communications are free only to the extent that they are left unburdened by laws that comply with the Constitution’: *Lange* at 567.
- 16 This is contrasted to the private space constituted by ‘shopping malls’ — enclosed buildings erected for the purpose of promoting commercial transactions. Shopping malls were not included in the study.
- 17 Blacktown Local Environmental Plan 1988, Part 1: Preliminary, s6(1) Interpretation, pp 21–36. These are an awning sign, a business identification sign, a fascia sign, a fin sign, a flush wall sign, an illuminated street sign, a painted wall sign, a pole or pylon sign, a projecting wall sign, a real estate sign, a school sign, a temporary sign (defined as one advertising a local event and displayed no more than 14 days before the event is to take place), a top hamper sign, an under awning sign and a window sign.
- 18 Blacktown Local Environmental Plan 1988, Part 3, Schedule 6: Exempt Development, pp 98–9. These are awning and under awning signs, business identification signs, fascia signs, fin or projecting wall signs, flush or painted wall signs, real estate signs, school signs, temporary signs (as defined above), top hamper signs or window signs.
- 19 Blacktown Development Control Plan 1992, Part D: Development in the Business Zones, s4: General Guidelines for Development, subsection 4.9: Signs.
- 20 According to the NSW government web site, ‘State environmental planning policies (SEPPs) deal with issues significant to the state and people of New South Wales’: <www.planning.nsw.gov.au/asp/sepp.asp?where=sepp> accessed 15 March 2006. The assessment criteria to which signs are subjected under these procedures appear in Schedule 1 of the SEPP.

References

- Barendt E 1985 *Freedom of Speech* Clarendon Press Oxford
- Begg Z 2005 Interview conducted by Katharine Gelber Sydney 14 April 2005
- Bishop P and Davis G 2002 'Mapping public participation in policy choices' *Australian Journal of Public Administration* 61/1: 14–29
- Blacktown Arts Centre and Blacktown City Council [BAC/BCC] 2006 Interview conducted by Katharine Gelber with a representative from the Blacktown Arts Centre and a representative of Arts and Cultural Development, Blacktown City Council at Blacktown Sydney 28 March 2006
- Blacktown City Council [BCC] 2005 'Our City – Statistics' *Blacktown City Council* <http://www.blacktown.nsw.gov.au/our-city/statistics/statistics_home.cfm> accessed 15 March 2006
- Bradshaw M 2001 'Combining Social Research with "Community Consultation" for More Inclusive Local Planning Outcomes' *Urban Policy and Research* 19/2: 251–7
- Brett J, Gillespie J and Goot M eds 1994 *Developments in Australian Politics* MacMillan South Melbourne
- Chapman R and Wood M 1984 *Australian Local Government: The Federal Dimension* George, Allen & Unwin Sydney
- Chesterman M 2000a *Freedom of Speech in Australian Law: A Delicate Plant* Ashgate Dartmouth
- 2000b 'When is a communication political?' *Legislative Studies* 14/2: 5–23
- Cuthill M 2001 'Developing local government policy and processes for community consultation and participation' *Urban Policy and Research* 19/2: 183–202
- Dollery B and Marshall N eds 1997 *Australian Local Government: Reform and Renewal* Macmillan South Melbourne
- Geddes M 2005 'International Perspectives and Policy Issues' in Smyth et al 2005: 13–34
- Gelber K 2003 'Pedestrian Malls, Local Government and Free Speech Policy in Australia' *Policy & Society: Journal of Public, Foreign and Global Policy* 22/2: 22–49

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- 2005 'Political Speech Practice in Australia: A Study in Local Government Powers' *Australian Journal of Human Rights* 11/1: 203–31
- Groves M ed 2005 *Law and Government in Australia* Federation Press Sydney
- Ihle L 2004 'Blacktown Art Gallery censorship schermozzle' *Lives of the Artists* #8 December Elizabeth Pulie Sydney
- Jones M 1981 *Local Government and the People: Challenges for the Eighties* Hargreen Publishing Company Melbourne
- 1989 *Managing Local Government: Leadership for the 21st Century* Hargreen Publishing Company Melbourne
- 1993 *Transforming Australian Local Government: Making It Work* Allen & Unwin Sydney
- Kenny S 1994 *Developing Communities for the Future: Community Development in Australia* Thomas Nelson Australia South Melbourne
- 2004 'Non-Government Organisations and Contesting Active Citizenship' in Patmore 2004: 70–85
- Lee H P 2005 'The "Reasonably Appropriate and Adapted" Test and the Implied Freedom of Political Communication' in Groves 2005: 59–81
- McNeill J 1997 'Local Government in the Australian Federal System' in Dollery & Marshall 1997: 17–39
- O'Toole K & Burdess N 2005 'Governance at a Community Level: Small Towns in Rural Victoria' *Australian Journal of Political Science* 40/2: 239–54
- Patapan H 2000 *Judging Democracy: The New Politics of the High Court of Australia* Cambridge University Press Cambridge
- Patmore G ed 2004 *The Vocal Citizen: Labor Essays 2004* Arena Publishing Fitzroy
- Peel P and Pearce P 1981 'Overview of Local Governments in Australia' in Power et al 1981: 1–122
- 1999 'Actively Engaging Citizens' *Canberra Bulletin on Public Administration* 94: 34–9
- Power J, Wettenhall R and Halligan J eds 1981 *Local Government Systems in Australia* Advisory Council for Inter-government Relations Information Paper No 7 AGPS Canberra
- Purdie D M 1976 *Local Government in Australia: Reformation or Regression?* The Law Book Company Limited Sydney

Distracting the masses

- Schauer F 1982 *Free Speech: A Philosophical Enquiry* Cambridge University Press New York
- Singleton G, Aitkin D, Jinks B and Warhurst J 2003 *Australian Political Institutions* 7th ed Longman Sydney
- Smyth P Reddel T and Jones A eds 2005 *Community and Local Governance in Australia* UNSW Press Sydney
- Stone A 1998 'Lange, Levy and the Direction of the Freedom of Political Communication under the Australian Constitution' *University of New South Wales Law Journal* 21/1: 117–34
- 2001 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' *Melbourne University Law Review* 25/2: 374–418
- Vromen A and Gelber K 2005 *Powerscape: Contemporary Australian Political Practice* Allen and Unwin Sydney
- Wallis J and Dollery B 2002 'Social Capital and Local Government Capacity' *Australian Journal of Public Administration* 61/3: 76–85
- Williams G 2002 *Human Rights Under the Australian Constitution* 2nd ed Oxford University Press South Melbourne
- Woods M 1998 'Advocating Rurality? The Repositioning of Rural Local Government' *Journal of Rural Studies* 14/1: 13–26

Cases

- APLA Ltd v Legal Services Commissioner (NSW)* (2005) 219 ALR 403
- Australian Capital Television v Commonwealth* (1992) 177 CLR 106
- Coleman v Power* (2004) 209 ALR 182
- Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520
- Levy v Victoria* (1997) 189 CLR 579.
- Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1

Statutes

- Charter of Human Rights and Responsibilities Act* 2006 (Vic)
- Human Rights Act* 1998 (UK)
- Human Rights Act* 2004 (ACT)