THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION: THE STATE OF THE LAW POST *COLEMAN* AND *MULHOLLAND*

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INTRODUCTION

Although Australian law does not have an express guarantee of free speech,[1] the High Court has acknowledged in various decisions[2] that an implied freedom of communication exists under the Constitution in relation to political and government matters.[3] The scope of this freedom and the test to be applied to determine the validity of a law restricting it, however, has been the subject of much debate.[4] This paper will examine the High Court's decisions in *Coleman v Power*[5] and *Mulholland v Australian Electoral Commission*,[6] particularly having regard to the court's application of the principles set out in *Lange v Australian Broadcasting*

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[1] *Coleman v Power* (2004) 209 ALR 182, 232 (Kirby J).

[2] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*'); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*ACTV*'); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 ('*Theophanous*'); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, 112; *Coleman v Power* (2004) 209 ALR 182, 232-3 (Kirby J).

[3] Hereinafter the 'implied freedom' or 'the implied freedom of political communication'.

[4] See, eg, Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668; Diana Sedgwick, 'The Implied Freedom of Political Communication: An Empty Promise?' (2003) 7 *University of Western Sydney Law Review* 35; Elisa Arcioni, 'Before the High Court: Politics, Police and Proportionality – An Opportunity to Explore the Lange Test: *Coleman v Power*' (2003) 25 *Sydney Law Review* 379.

[5] (2004) 209 ALR 182 ('*Coleman*').

[6] (2004) 209 ALR 582 ('*Mulholland*').

Corporation[7] and criticisms raised concerning the court's approach to this issue. However, prior to examining these decisions, it is first necessary to outline how the court has previously interpreted the implied freedom of political communication.

I THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

The implied freedom acts to restrict the powers of the executive and legislature and is not a personal right granted to individuals.[8] It includes not only speech, but also non-verbal communication regarding political and government matters,[9] and its application is not confined to election periods.[10]

The court originally found the implied freedom was derived from the notion of representative democracy,[11] however, in *Lange* the court stated it was the text and structure of the Constitution which gave rise to the implication.[12] The High Court held that the Constitution established systems of representative and responsible government in particular under sections 7, 24, 64 and 128 and that the freedom to discuss political and government matters was indispensable to these systems of government.[13]

The fact that a law infringes upon the freedom does not necessarily mean the law is invalid.[14] In *Lange* the court delivered a unanimous decision wherein it outlined a test to determine the validity of a law:

> First, does the law effectively burden freedom of communication about government or political matters, either in its terms, operation

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[7] (1997) 145 ALR 96 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*').

[8] Ibid 107, 108; Kris Walker, 'It's a Miracle! High Court unanimity on free speech' (1997) 22 *Alternative Law Journal* 179, 180. *Contra Theophanous* (1994) 182 CLR 104.

[9] *Levy v Victoria* (1997) 189 CLR 579, 594-5 (Brennan CJ), 613 (Toohey and Gummow JJ), 622-4 (McHugh J), 638-41 (Kirby J) ('*Levy*'). See also Adrienne Stone, 'Case Note: *Lange, Levy* and the Direction of the Freedom of Political Communication Under the Australian Constitution' (1998) 21 *University of New South Wales Law Journal* 117, 128.

[10] *Lange* (1997) 145 ALR 96, 107; *Coleman* (2004) 209 ALR 182, 264 (Heydon J).

[11] Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 1158; *Nationwide News* (1992) 177 CLR 1, 72-3 (Deane and Toohey JJ); *ACTV* (1992) 177 CLR 106, 168 (Deane and Toohey JJ); *Theophanous* (1994) 182 CLR 104, 123 (Mason CJ, Toohey and Gaudron JJ).

[12] *Lange* (1997) 145 ALR 96, 112 affirming *McGinty v Western Australia* (1996) 186 CLR 140, 168 (Brennan CJ), 181-3 (Dawson J), 284-5 (Gummow J).

[13] *Lange* (1997) 145 ALR 96, 104-6, 112; Walker, above n 8, 179-80.

[14] *Lange* (1997) 145 ALR 96, 108; *Coleman* (2004) 209 ALR 182, 209 (McHugh).

> or effect? Secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people.[15]

Under this test a law is invalid only if the first 'limb' is answered yes and the second is answered no.[16]

Therefore, the implied freedom is not absolute, but is subject to limitations – 'what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution'.[17]

II COLEMAN V POWER

A The Facts

This case involved an incident in the Townsville Mall in March 2000.[18] The appellant was distributing pamphlets alleging police corruption in front of a placard which said '[g]et to know your local corrupt type coppers'.[19] Constable Power, specifically named in the pamphlet, approached the appellant with another officer after becoming aware of its contents.[20] The appellant refused Constable Power's request for a pamphlet and the officer then directed the appellant to cease distributing the pamphlets or face arrest.[21] The appellant responded by pushing the officer and shouting '[t]his is Constable Brendan Power, a corrupt police officer'.[22] The appellant was then arrested.[23] A bystander queried the reason for his arrest, and Constable Power answered 'insulting language'.[24] The appellant forcibly resisted the arrest.[25]

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[15] *Lange* (1997) 145 ALR 96, 112 ('the *Lange* test').
[16] Ibid. See also Belinda Thompson and Jonathan de Ridder, 'Implied freedoms in the Constitution' *Focus: Defamation – September 2004* (2004) <http://www.aar.com.au/pubs/ldr/fodefsep04.htm> at 22 April 2005.
[17] *Lange* (1997) 145 ALR 96, 107-8. See also Max Spry, 'Constitutional Free Speech and Defamation: *Lange v ABC*' (1997) 17(8) *Proctor* 17, 18.
[18] *Coleman* (2004) 209 ALR 182, 195 (McHugh J).
[19] Ibid.
[20] Ibid 195-6 (McHugh J).
[21] Ibid 196 (McHugh J).
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid 250 (Callinan J).

B Previous Proceedings

In the Magistrates Court the appellant was convicted of numerous offences including using insulting words contrary to section 7(1)(d) of the *Vagrant's Gaming and Other Offences Act* 1931 (Qld),[26] an offence under section 7A(1)(c) of the Vagrants Act[27] and four offences relating to his arrest.[28] The appellant pleaded not guilty to all charges and sought, unsuccessfully, to rely on the implied freedom of political communication.[29] He appealed against his convictions and sentence firstly to the District Court of Queensland[30] which dismissed the appeal, and thereafter to the Queensland Court of Appeal.[31]

The Court of Appeal unanimously set aside the appellant's conviction under section 7A(1)(c).[32] However, a divided court upheld the conviction under section 7(1)(d).[33] Their Honours considered that although the section burdened the implied freedom of political communication, the burden was 'not very great' or only 'slight' and satisfied the *Lange* test.[34] The remaining convictions were also upheld.[35] The appellant thereafter appealed to the High Court challenging the validity of section 7 of the Vagrants Act and the convictions relating to his arrest.[36]

C The High Court's Decision

The primary issue in these proceedings was whether section 7(1)(d) of the Vagrants Act was invalid because it infringed the implied freedom of political communication.[37] If the section was invalid, the court was asked

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[26] Hereinafter 'section 7(1)(d)' means section 7(1)(d) of the *Vagrant's Gaming and Other Offences Act* 1931 (Qld) ('the Vagrants Act').
[27] Hereinafter 'section 7A(1)(c)' means section 7A(1)(c) of the Vagrants Act.
[28] *Coleman* (2004) 209 ALR 182, 194 (McHugh J).
[29] Ibid.
[30] *Coleman v Power* [2001] QDC 27.
[31] *Power v Coleman* [2002] 2 Qd R 620; *Coleman* (2004) 209 ALR 182, 194 (McHugh J).
[32] *Power v Coleman* [2002] 2 Qd R 620, 633 (McMurdo P), 635 (Davies JA), 645 (Thomas JA).
[33] Ibid 635 (Davies JA), 645 (Thomas JA); *Coleman* (2004) 209 ALR 182, 195 (McHugh J).
[34] *Power v Coleman* [2002] 2 Qd R 620, 635 (Davies JA), 645 (Thomas JA); *Coleman* (2004) 209 ALR 182, 195 (McHugh J).
[35] *Power v Coleman* [2002] 2 Qd R 620, 634-5 (McMurdo P), 648 (Thomas JA); *Coleman* (2004) 209 ALR 182, 195 (McHugh J).
[36] *Coleman* (2004) 209 ALR 182.
[37] Ibid 193 (McHugh J).

to consider whether the convictions relating to the appellant's arrest should also be set aside.[38]

A narrow majority of judges allowed the appeal insofar as the offence under Section 7(1)(d) was concerned.[39] McHugh J was the only one to do so on the grounds that it restricted the implied freedom.[40] Kirby, Gummow and Hayne JJ, held the section to be valid, but found that the appellant's conduct fell outside the ambit of the section and therefore no offence had been committed.[41] The remaining judges dismissed the appeal entirely.[42] The convictions relating to the appellant's arrest were upheld.[43]

The outcome of this case appeared to hinge significantly on the construction of the Vagrants Act and the interpretation given to 'insulting' words in section 7(1)(d).[44] Although their Honours[45] agreed that the first step to be taken was to construe the law and interpret its correct meaning and effect, their approach to statutory construction and resulting interpretations varied considerably.[46]

1 Statutory Interpretation

Although adopting different interpretative methods, Kirby J concurred with Gummow and Hayne JJ that a more narrow interpretation was to be

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[38] Ibid. The appellant's conviction under section 7A(1)(c) was not challenged: at 219 (Gummow and Hayne JJ).

[39] Ibid 193, 218 (McHugh J), 231-2 (Gummow and Hayne JJ), 248 (Kirby J). See also Thompson and de Ridder, above n 16.

[40] *Coleman* (2004) 209 ALR 182, 193-4, 210-11, 218; Graham Hryce, 'Coleman v Power [2004] HCA 39 Lange Revisited: Deep Divisions Appear in the High Court' *Corrs Media and Defamation Newsletter – September 2004* (2004) <http://www.corrs.com.au/corrs/website/web.nsf/Content/Pub_3335979_Newsletter_MD_270904_Corrs_Media_and_Defamation_Newsletter_September_2004> at 26 April 2005.

[41] *Coleman* (2004) 209 ALR 182, 231 (Gummow and Hayne JJ), 247-8 (Kirby J); Hryce, above n 40.

[42] *Coleman* (2004) 209 ALR 182, 193 (Gleeson CJ), 259-60 (Callinan J), 270 (Heydon J); Hryce, above n 40.

[43] *Coleman* (2004) 209 ALR 182, 193 (Gleeson CJ), 231 (Gummow and Hayne), 250 (Kirby J), 259-60 (Callinan J), 270 (Heydon J).

[44] Clare D'Arcy, 'Law no insult to Constitution Coleman v Power (HC)' (2004) 18 *ALMD Advance* 3; Elisa Arcioni, 'Developments in Free Speech Law in Australia: Coleman and Mulholland' (2005) 33 *Federal Law Review* 333, 339, 354.

[45] *Coleman* (2004) 209 ALR 182, 184 (Gleeson CJ), 222 (Gummow and Hayne JJ), 232 (Kirby J), 260 (Heydon J).

[46] Hryce, above n 40.

preferred.[47] That is, the insulting words were 'intended, or reasonably likely, to provoke unlawful physical retaliation'.[48] Gleeson CJ required the language to be 'contrary to contemporary standards of public good order'.[49] Callinan J interpreted the term to mean words 'so incompatible with civilised discourse and passage that they should be proscribed'.[50] McHugh J applied a broad interpretation merely requiring that words be 'calculated to hurt the personal feelings of a person'.[51] Heydon J applied the ordinary meaning of the word 'insulting'.[52] That the words be used 'to' a person and 'in or near a public place' were also identified as elements of the offence.[53]

After construing the law the court considered the issue of the implied freedom.

2 The Constitutional Issue

To determine the validity of section 7(1)(d) each justice applied, to some degree, the test devised in *Lange*.[54]

(a) The First Limb

It was unnecessary for the Court to decide whether the appellant's words in fact constituted a communication on political and government matters, or whether section 7(1)(d) burdened such communications, as these points were conceded by the respondents.[55] There were differing opinions amongst the Court whether this concession had been correctly made. Kirby J firmly believed it was, as did McHugh J, however, Callinan J disagreed.[56]

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[47] *Coleman* (2004) 209 ALR 182, 227 (Gummow and Hayne JJ), 238 (Kirby). Kirby J considered that in order for the section not to infringe the constitutional freedom as defined in *Lange*, it was necessary to give the word 'insulting' a more restricted meaning: at 241.

[48] Ibid 227 (Gummow and Hayne JJ), 238, 246 (Kirby J).

[49] Ibid 188.

[50] Ibid 255.

[51] Ibid 199.

[52] Ibid 262.

[53] Section 7(1)(d) of the Vagrants Act; *Coleman* (2004) 209 ALR 182, 185 (Gleeson CJ), 261 (Heydon J).

[54] *Coleman* (2004) 209 ALR 182, 191 (Gleeson CJ), 202 (McHugh J), 229, (Gummow and Hayne JJ), 238 (Kirby J), 255 (Callinan J), 264-5 (Heydon J).

[55] Ibid 202-4 (McHugh J).

[56] Ibid 203 (McHugh J), 239 (Kirby J), 257-8 (Callinan J). McHugh J went so far as to indicate that communications on political and government matters extends

The Court then considered the real issue between the parties – whether section 7(1)(d) was 'reasonably appropriate and adapted' as required by the 'second limb' of the *Lange* test.[57]

(b) The Second Limb

The submission that the infringing law only needed to be 'reasonably capable of being seen as appropriate and adapted' was rejected as being deferential to Parliament.[58] However, a slight amendment to the second limb of the *Lange* test was supported in order to clarify that it was both the objective of the law, and the means of achieving that end which must be compatible with the systems of representative and responsible government.[59]

Their Honours differed in their opinion as to the law's purpose. While McHugh J accepted that regulating political speech to prevent breaches of the peace and preventing intimidation of participants in political debates were legitimate ends, his Honour found the means used to achieve those ends were unsatisfactory.[60] Kirby, Gummow and Hayne JJ thought the section was concerned with preventing violence (and provocation of violence in Kirby J's opinion) in public places.[61] Callinan J believed the section sought to further 'peaceable civilised passage through, and assembly and discourse in public places free from threat, abuse or insult'.[62] Gleeson CJ held its aim was to maintain public order.[63] While, Heydon J held the section had a number of legitimate ends.[64]

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to activities of the executive, including 'ministers, public servants and "statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the Legislature"': at 203.

[57] Ibid 204 (McHugh J).

[58] Ibid 205-6 (McHugh), 230 (Gummow and Hayne JJ), 233 (Kirby J).

[59] Ibid 207-8, (McHugh J), 230 (Gummow and Hayne JJ), 233 (Kirby J).

[60] Ibid 210-11.

[61] Ibid 230 (Gummow and Hayne JJ), 246-7 (Kirby J). Kirby J noted that this aim protected the 'social environment in which debate and civil discourse… can take place without threats of actual physical violence': at 247.

[62] Ibid 257.

[63] Ibid 193. Cf *Forsyth County v Nationalist Movement*, 505 US 123, 134-35, 137 (1992) ('*Forsyth'*) where a county ordinance prescribing a fee for public assemblies and parades was held to be invalid, even though its aim was merely estimating the cost of maintaining public order. The majority in *Forsyth* held the ordinance infringed the free speech guarantee contained in the First Amendment to the United States Constitution because the amount of the fee was based upon the content of the speech, the message to be conveyed, and the public's likely response.

[64] *Coleman* (2004) 209 ALR 182, 265-7.

Only McHugh J considered Section 7(1)(d) to be invalid.[65] The remaining judges accepted that the law was reasonably appropriate and adapted to achieving its objective and was thus valid.[66]

As stated above, the decision in *Coleman* seemed to be influenced somewhat by the differing opinions as to the correct interpretation of section 7(1)(d) and the objective of the Vagrants Act, together with an apparent wide degree of deference given to Parliament.[67]

Just seven days after the decision in *Coleman* was delivered, the High Court delivered its judgment in *Mulholland*.[68]

III MULHOLLAND V AUSTRALIAN ELECTORAL COMMISSION

A The Facts

This matter involved a challenge to the validity of certain provisions of the *Commonwealth Electoral Act* 1918 (Cth) which set out particular requirements for registration of political parties.[69] The appellant in this matter was the registered officer of the Democratic Labor Party (the DLP) who sought to invalidate the provisions in order to prevent the deregistration of the DLP by the Australian Electoral Commission.[70] Although registration was not mandatory, there were certain privileges extended to registered political parties under the Act, such as the entitlement to have party affiliation details printed next to a candidate's name on federal ballot papers and to have the registered party's name placed next to a box 'above the line' in Senate elections.[71]

The challenged provisions specified two rules for registration under the Act.[72] Firstly, it was required that non-parliamentary political parties have

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[65] Ibid 193-4, 210-1.

[66] Ibid 193 (Gleeson CJ), 230-1 (Gummow and Hayne JJ), 247-8 (Kirby J), 257-9 (Callinan J), 270 (Heydon J). Callinan J in fact thought section 7(1)(d) advanced the freedom by removing threat, abuse or insult: at 257.

[67] Arcioni, above n 44, 354; Hryce, above n 40. In particular, Gummow and Hayne JJ stated that if section 7(1)(d) had been construed to mean prohibiting words calculated to hurt the personal feelings of a person (as McHugh J had found), the purpose of the section would have been to ensure civility of discourse and as such the section would be invalid having failed the second limb of the *Lange* test: *Coleman* (2004) 209 ALR 182, 230.

[68] (2004) 209 ALR 582.

[69] Ibid 583 (Gleeson CJ).

[70] Ibid 661, 664 (Callinan J).

[71] Ibid 619-20 (Gummow and Hayne JJ).

[72] The challenged provisions are set out in Callinan J's judgment: *Mulholland* (2004) 209 ALR 582, 661-2.

at least 500 members in order to be registered and further, that a list of the 500 members relied upon for registration be provided to the Commission (the 500 rule).[73] Secondly, for the purposes of registration no two parties could rely on the same person (the no-overlap rule).[74]

B Previous Proceedings

Both Mulholland's action in the Federal Court[75] and his appeal to the Full Court[76] failed.

In the Federal Court, Marshall J held that because the communication was one between the executive government and the people, it was not protected by the implied freedom.[77] Nevertheless his Honour applied the *Lange* test and held that although there was a burden on communication, the challenged provisions were reasonably appropriate and adapted because they sought to uphold and protect 'the integrity of the system of registration of political parties' by placing restrictions on parties seeking the benefits of registration under the Act and making the process of registration more effective.[78] In coming to this conclusion, Marshall J referred to the Parliament being owed a 'margin of appreciation'.[79]

The Full Court of the Federal Court of Australia disagreed with Marshall J, finding that communications between the executive government and the people were protected by the implied freedom.[80] However, their Honours agreed with Marshall J's application of the second limb of the *Lange* test and accordingly upheld the validity of the provisions.[81] Mulholland thereafter appealed to the High Court.[82]

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[73] Ibid 597 (McHugh J). The 500 Rule was central to charges raised against Pauline Hanson and David Ettridge for the alleged fraudulent registration of Pauline Hanson's One Nation party under the *Electoral Act* 1992. The Queensland Court of Appeal later allowed an appeal in the matter and quashed the convictions: *R v Hanson; R v Ettridge* [2003] QCA 488.

[74] *Mulholland* (2004) 209 ALR 582, 597 (McHugh J).

[75] *Mulholland v Australian Electoral Commission* (2002) 193 ALR 710.

[76] *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523.

[77] *Mulholland v Australian Electoral Commission* (2002) 193 ALR 710, 725.

[78] Ibid 726, 728-9 [82], [87].

[79] Ibid 728.

[80] *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523, 531-2 (Black CJ, Weinberg and Selway JJ).

[81] Ibid 531-2, 537.

[82] *Mulholland* (2004) 209 ALR 582.

C The High Court's Decision

In the High Court the appellant did not challenge the entire registration scheme.[83] Rather, he sought to have the 500 rule and the no-overlap rule declared invalid and severed from the Act in order to allow the DLP to remain registered and thus entitled to the benefits of registration.[84] The appellant argued that the restrictions imposed on registration by the 500 rule and the no-overlap rule infringed the implied freedom of political communication by impairing the party's statutory right to communicate party affiliation details to voters via the ballot paper.[85] It was also argued that such an impairment was inconsistent with the requirement contained in sections 7 and 24 of the Constitution that senators and members of the House of Representatives be 'directly chosen by the people'.[86]

The appellant also argued that the provisions were beyond the legislative power of the Federal Parliament and that they infringed an implied freedom of association and a related implied freedom of privacy of political association.[87] However, this paper will focus on the argument under the implied freedom of political communication, which was the principal argument relied on by the appellant.[88]

The High Court unanimously upheld the validity of the challenged provisions, rejecting the appellant's arguments on all grounds.[89] However, in relation to the implied freedom, their Honours differed in their approach to the issue.[90]

1 The Need for a Pre-Existing Right

A majority of judges in *Mulholland* held that in order to invoke the implied freedom of political communication in accordance with the test set out in *Lange*, it was first necessary to establish that some *pre-existing* common law or statutory right existed.[91] This was based on the fact that the implied

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[83] Ibid 595 (Gleeson CJ), 620 (Gummow and Hayne JJ).
[84] Ibid 620 (Gummow and Hayne JJ).
[85] Ibid 596 (McHugh J), 670 (Callinan J).
[86] Ibid 604 (McHugh J), 675 (Heydon J).
[87] Ibid 596 (McHugh J).
[88] Ibid 673 (Callinan J).
[89] Ibid 590, 595-6 (Gleeson CJ), 596, 616 (McHugh J) 620, 627, 630, 634 (Gummow and Hayne JJ), 654-5, 659-60 (Kirby J), 671-4 (Callinan J), 676-7, 679, 681 (Heydon J).
[90] Lachlan Cottom, 'High Court votes: electoral rules constitutionally valid Mulholland v Australian Electoral Commission (HC)' (2004) 19 *ALMD Advance* 3, 4.
[91] *Mulholland* (2004) 209 ALR 582, 614-5 (McHugh J), 632, 633-4 (Gummow and Hayne JJ), 674 (Callinan J), 678 (Heydon J).

freedom of political communication does not bestow personal rights on individuals, but rather acts to restrict legislative or executive power to interfere with an *existing* right.[92] Further, their Honours emphasised that the implied freedom was 'a freedom from governmental action… not a right to require others to provide a means of communication'.[93]

Callinan, Heydon, Gummow and Hayne JJ considered that a failure to meet this 'threshold obstacle' meant that it was unnecessary to apply the *Lange* test as the appellant's case had already failed.[94] That is, their Honours held that this threshold test must be satisfied prior to applying the *Lange* test.[95] Gummow and Hayne JJ stated in their joint judgment, it was 'a false starting point for legal analysis' to begin by considering whether a law had burdened the freedom.[96] Rather, questions regarding 'whose freedom?' and 'freedom from what?' should be addressed first.[97] A majority also distinguished the case of *ACTV* as that case concerned an interference with statutory rights previously established under a separate act.[98]

McHugh J, on the other hand, approached the threshold issue somewhat differently.[99] His Honour proceeded to apply the *Lange* test, however, found that the appellant's case failed as the first limb of *Lange* was not

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[92] Ibid 631-3 (Gummow and Hayne JJ). Their Honours cited with approval McHugh J in *Levy* (1997) 189 CLR 579, 622, 625-6: at 632-3.

[93] *Mulholland* (2004) 209 ALR 582, 614 (McHugh J), 632 (Gummow and Hayne JJ), 678-9 (Heydon J) quoting Hayne J in *McClure v Australian Electoral Commission* (1999) 163 ALR 734, 740-1. *Contra* Kirby J, who rejected the distinction between a freedom to communicate and an obligation to publicise: at 650-1, 657. The classification of the implied freedom as a *freedom from* government interference rather than a *right to* free speech may have implications applying Hofeldian analysis, particularly in regards to the 'correlative duty' which may be owed: Walter Wheeler Cook (ed), *Fundamental Legal Conceptions As Applied in Judicial Reasoning* (1978) 38. See also Arcioni, above n 44, 353 discussing Jeremy Waldron, *Theories of Rights* (1984) 6-7.

[94] *Mulholland* (2004) 209 ALR 582, 633-4 (Gummow and Hayne JJ), 674 (Callinan J), 678-9. However, Heydon J went on to apply the *Lange* test in any event: at 679.

[95] Thompson and de Ridder, above n 16.

[96] *Mulholland* (2004) 209 ALR 582, 632.

[97] Ibid.

[98] Ibid 614-5 (McHugh J), 633-4 (Gummow and Hayne JJ), 680 (Heydon J).

[99] Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002 supplement Mulholland v Australian Electoral Commission) 19 <http://www.federationpress.com.au/bookstore/book.asp?isbn=1862874220> at 11 July 2005.

satisfied.[100] Although his Honour accepted that a ballot paper was a communication on governmental and political matters, as there was no right to have party affiliation printed on a ballot paper other than that provided by the Act in question, there was no pre-existing right to be burdened.[101] Accordingly it was not necessary for McHugh J to consider the second limb of the *Lange* test.[102]

While Gleeson CJ failed to mention any threshold issue, Kirby J firmly rejected that the implied freedom was limited to common law or statutory rights as his Honour believed this approach could potentially 'neuter' the implied freedom, despite its previous affirmation by the Court.[103]

2 The First Limb of the Lange Test

In addressing the first limb of the *Lange* test, McHugh J considered there were two separate questions to determine.[104] Firstly, was the ballot paper a 'communication' on political or government matters, and secondly whether the 'challenged provisions' burdened the implied freedom.[105]

There was some disagreement amongst the judges in *Mulholland* as to whether communications between the executive government and the people were protected by the implied freedom of political communication.[106] Heydon J held such communications were not protected by the implied freedom.[107] On the other hand, McHugh J considered they were,[108] while Gleeson CJ found that what was involved was a communication from both the party and the Commission.[109] Although Kirby J considered that the ballot paper was a communication, his Honour held it was a communication with the people by the candidates themselves rather than a communication made by the Commission.[110] As

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[100] *Mulholland* (2004) 209 ALR 582, 614-5 (McHugh J).
[101] Ibid 614 (McHugh J).
[102] Ibid 615.
[103] Ibid 650-1, 657 (Kirby J).
[104] Ibid 609.
[105] Ibid.
[106] Ibid 591-2 (Gleeson CJ), 610 (McHugh J), 657 (Kirby J), 679 (Heydon J).
[107] Ibid 679. Although finding that the appellant's argument failed at the threshold test, Heydon J stated that in any event the appellant's argument would fail under both the first and second limbs of the *Lange* test: at 679.
[108] Ibid 610-11. McHugh J in *Coleman* (2004) 209 ALR 182 indicated that communications on political and government matters extended to activities of the executive, including 'ministers, public servants and "statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the Legislature"': at 203
[109] Ibid 591-2.
[110] Ibid 657.

previously stated, Callinan, Gummow and Hayne did not apply the *Lange* test and accordingly did not comment on this issue.

In any event, Gleeson CJ and Kirby J accepted that a ballot paper was a communication on political and government matters and that a law preventing unregistered candidates from communicating their party affiliation on ballot papers did burden the implied freedom of communication.[111]

3 The Second Limb of the Lange Test

Despite finding that the challenged provisions burdened the implied freedom, Gleeson CJ and Kirby J considered that the appellant's argument failed in relation to the second limb of the *Lange* test.[112] Kirby J considered the rules to be proportionate, stating that it was within the Parliament's power to decide that regulation of political parties was reasonably necessary for a number of legitimate ends.[113] Similarly, Gleeson CJ found the rules to be compellingly justified, as they were 'in furtherance and support of a system that facilitates, rather than impedes, political communication'.[114]

Heydon J, although finding the appellant's action had failed at the threshold issue, considered that in any event the appellant's action would have failed to satisfy the first and second limbs of the *Lange* test.[115] As stated above, the remaining members of the High Court did not address the second limb of the *Lange* test.

IV CRITICISMS OF THE *LANGE* TEST

The *Lange* test and the High Court's differing approaches to its application have been the subject of much criticism.[116] Questions have been raised regarding the correct test to be employed to determine the validity of a law

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[111] Ibid 591-2 (Gleeson CJ) 651-2 (Kirby J).

[112] Ibid 595 (Gleeson CJ), 659-60 (Kirby J).

[113] Ibid 659. In particular the 'ends' referred to were 'to reduce confusion in the size and form of the ballot paper; to diminish the risk and actuality of deception of electors; to discourage the creation of phoney political parties; and to protect voters against disillusionment with the system of parliamentary democracy': at 659-660.

[114] Ibid 595.

[115] Ibid 679-80.

[116] *Coleman* (2004) 209 ALR 182, 204-5 (McHugh). See, eg, Stone, above n 4; Sedgwick, above n 4, 35; Arcioni, above n 4, 379.

restricting the freedom, the 'margin of appreciation'[117] which should be accorded to Parliament, and whether different 'standards of review' should be applied depending on the objective of the law.[118] These issues were evident in *Coleman* and *Mulholland.*

A The 'Reasonably Appropriate and Adapted' Test

The qualification under the second limb of the *Lange* test that a law must be 'reasonably appropriate and adapted' to achieving its 'end' has come under fire from inside and outside the High Court.[119]

Kirby J in particular has repeatedly criticised the phrase 'reasonably appropriate and adapted', describing it as inappropriate, ill-adapted and misleading.[120] In both *Coleman* and *Mulholland* his Honour applied a test of proportionality in determining the second limb of the *Lange* test.[121]

However, despite Kirby J's repeated endorsement of the proportionality test, this approach was not adopted by the remainder of the Court in *Coleman* or *Mulholland*,[122] although in *Mulholland*, Gleeson CJ expressed no objection to either test being adopted.[123] What was important in Gleeson CJ's opinion was not the expression used, but 'the *substance* of the idea it is intended to convey'.[124]

There appears to be some contention as to what is 'the substance' intended by the second limb of the *Lange* test. Some believe it involves a balancing exercise whereby the court subjectively weighs up the purpose of the law against the restriction it imposes on the implied freedom.[125] Heydon J in *Mulholland* expressly referred to weight being given to the legislative

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[117] *ACTV* (1992) 177 CLR 106, 159 (Brennan J) quoting from *The Observer and The Guardian v United Kingdom* (1991) 14 EHRR 153, 178.

[118] See generally Stone, above n 4; Sedgwick, above n 4; Arcioni, above n 4, 379; Timothy H Jones, 'Legislative Discretion and Freedom of Political Communication' (1995) 6 *Public Law Review* 103.

[119] *Coleman* (2004) 209 ALR 182, 240 (Kirby), 256 (Callinan J); See Stone, above n 4, 676-7; Sedgwick, above n 4, 65, 36-7, 43; Arcioni above n 44, 335. Sedgwick argued that a test of third level proportionality would be preferable to the 'reasonably appropriate and adapted test': at 56.

[120] *Coleman* (2004) 209 ALR 182, 240; *Mulholland* (2004) 209 ALR 582, 648-9.

[121] *Coleman* (2004) 209 ALR 182, 240 (Kirby J); *Mulholland* (2004) 209 ALR 582, 649-51 (Kirby J). Kirby J noted that in *Lange* the court had acknowledged there was little difference between the two tests in that context: at 651, footnote 332.

[122] Thompson and de Ridder, above n 16.

[123] *Mulholland* (2004) 209 ALR 582, 592-4.

[124] Ibid 592 (Gleeson CJ).

[125] Arcioni, above n 4, 385-7; Stone, above n 4, 681-3.

judgment when considering if the means used were 'reasonably appropriate and adapted'.[126] However, in *Coleman* McHugh J specifically rejected that any 'ad hoc balancing' was involved.[127] In his Honour's opinion it was not a question of 'balancing a legislative or executive end or purpose against [the implied] freedom' as the freedom of communication always trumps federal, state and territorial powers conflicting with it.[128] McHugh J, however, did consider that *Lange* showed that legislatures were given a 'margin of choice as to how a legitimate end may be achieved'.[129]

B 'Margin of Appreciation'

It has been argued that a wide level of deference given to the executive and legislative arms of government limits the *Lange* test and may influence a court's decision.[130] It is said that although some level of deference may be necessary, it should be minimal as there is 'no point to a constitutional guarantee which does not impose some real limits on the legislative process'.[131]

Several judges have stated that the courts are not concerned with the 'appropriateness' of legislation[132] and that it is not the role of the judiciary to determine whether the means used by the legislature were the best and most appropriate means.[133] This approach is said to be inconsistent with the principles set out in *Lange.*[134]

In the Full Court proceedings in *Mulholland,* the Court rejected the assertion that the trial judge had 'superimpose[d] a "margin of appreciation" test on top of a "reasonably appropriate and adapted test"', describing it as an 'integral aspect of determining what was reasonably appropriate and adapted'.[135]

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[126] *Mulholland* (2004) 209 ALR 582, 680.
[127] *Coleman* (2004) 209 ALR 182, 204-207.
[128] Ibid 207 (McHugh J).
[129] Ibid 209 (McHugh J).
[130] Sedgwick, above n 4, 40, 42, 44; Stone, above n 9, 130-1.
[131] Sedgwick, above n 4, 42.
[132] *Coleman* (2004) 209 ALR 182, 240 (Kirby J); *Mulholland* (2004) 209 ALR 582, 648-9 (Kirby J); *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523, 535 (Black CJ, Weinberg and Selway JJ).
[133] *Levy* (1997) 189 CLR 579, 598 (Brennan CJ); *Rann v Olsen* (2000) 172 ALR 395, 428 (Doyle CJ); *Mulholland* (2004) 209 ALR 582, 648-9 (Kirby J).
[134] Sedgwick, above n 4, 35, 50-1. Sedgwick argues that the use of the word 'reasonably' in the second limb of the *Lange* test 'indicates a degree of deference' which equates to the court according a 'margin of appreciation' to Parliament: at 49.
[135] *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523, 535.

In *Coleman* there was also some evidence of an apparent deference to the legislature.[136] In Heydon J's opinion it was not a question of the court deciding if the means used were the only or the best means of achieving the law's objective, but whether they were '*a reasonably adequate attempt* at solving the problem'.[137] Further, in *Mulholland* his Honour stated that the means used to achieve the legitimate ends did not have to be 'the most desirable or least burdensome regime'.[138]

McHugh J in *Coleman* also held that the court was not concerned with whether one course of achieving the law's objective was slightly preferable to another.[139] However, his Honour went on to say that if the selected course unreasonably burdens the communication, given the available alternatives, the Constitution's tolerance of the legislature's judgment ends.[140]

Despite the above comments, Kirby J in *Mulholland* expressly rejected the notions of 'deference' and 'margin of appreciation'.[141] His Honour stated that Australian courts were required to give effect to the limitations on legislative power contained in the written constitutions and that when these limits were exceeded, 'it was the duty of Australian courts to say so' without any 'deference'.[142]

Assertions that Parliament should be accorded a 'margin of appreciation' and the law restricting the implied freedom need only be 'reasonably capable of being seen as appropriate and adapted' were also rejected by members of the Court in *Coleman* and *Mulholland* on the basis that they were deferential to Parliament.[143]

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[136] *Coleman* (2004) 209 ALR 182, 209 (McHugh), 240 (Kirby J), 267 (Heydon J).

[137] Ibid 267. Heydon J quoted Doyle CJ's comments in *Rann v Olsen* 172 ALR 395, 428 that '[I]t is not for the Court to substitute its judgment for that of Parliament as to the best or most appropriate means of achieving the legitimate end': at 267. However, it has been said this is wrong in light of *Lange*: Sedgwick, above n 4, 54.

[138] *Mulholland* (2004) 209 ALR 582, 680 (Heydon J).

[139] *Coleman* (2004) 209 ALR 182, 209.

[140] Ibid.

[141] *Mulholland* (2004) 209 ALR 582, 637, 646.

[142] Ibid 646 (Kirby J).

[143] *Coleman* (2004) 209 ALR 182, 205-6 (McHugh), 230 (Gummow and Hayne JJ), 233 (Kirby J); *Mulholland* (2004) 209 ALR 582, 636-7 (Kirby J). Kirby J in *Mulholland* reiterated McHugh J's statement in *Coleman* that such an approach had never been adopted by a majority of the High Court: at 637. However, Heydon J in *Mulholland* found it unnecessary to decide this issue given that the appellant's case had already failed: at 679-80 footnote 444.

C The 'Two Tiered' Approach

A 'two tiered' test which distinguishes laws having regard to their purpose has also been applied by members of the Court both prior to and post-*Lange*.[144] Under this test a law with the objective of restricting discussion of government and political matters is given a much higher standard of review than those laws which have an alternative purpose which incidentally restricts political discussions.[145]

In *Coleman*, Gleeson CJ and Heydon J applied this two tier approach, concluding that the purpose of section 7(1)(d) fell under the second category as its effect on communication regarding political and government matters was only incidental.[146] In *Mulholland*, Gleeson CJ again appeared to adopt this 'two tiered' approach, applying a standard of 'compelling justification'.[147]

The author therefore agrees with Hryce that the differing approaches to the implied freedom discussed above have resulted in uncertainty as to how the doctrine will be applied in future cases.[148]

V CONCLUSION

The High Court's decisions in *Coleman* and *Mulholland* illustrate that the divisions evident in previous cases regarding the implied freedom of political communication remain.[149] Although *Lange* still appears authoritative,[150] many questions remain to be answered. Should the

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[144] *ACTV* (1992) 177 CLR 106, 143 (Mason CJ), 169 (Deane and Toohey JJ); *Levy* (1997) 189 CLR 579, 618-9 (Gaudron J) 647 (Kirby J); *Kruger v Commonwealth* (1997) 190 CLR 1, 127-8 (Gaudron J). See also Stone, above n 4, 678-80; Stone, above n 9, 131-4; Arcioni, above n 44, 343.

[145] *ACTV* (1992) 177 CLR 106, 143 (Mason CJ); *Levy* (1997) 189 CLR 579, 618-9 (Gaudron J). In *ACTV* Mason CJ stated that laws directly restricting political discussion needed 'compelling justification' to be valid: at 143. Similarly, Gaudron J said a law directly restricting political discussion was only valid if it was necessary for an 'overriding public purpose': at 618-9. See also Arcioni, above n 4, 386.

[146] *Coleman* (2004) 209 ALR 182, 191-3 (Gleeson CJ), 264, 266-7 (Heydon J).

[147] *Mulholland* (2004) 209 ALR 582, 595.

[148] Hryce, above n 40.

[149] Ibid.

[150] Arcioni, above n 4, 381; Arcioni, above n 44, 333. Although Callinan J has repeatedly questioned the correctness of the decision in *Lange*, in *Coleman* and *Mulholland* his Honour considered himself bound to follow the decision: *Roberts v Bass* (2002) 194 ALR 161, 236-7; *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 185 ALR 1, 97-103; *Coleman* (2004)

reasonably appropriate and adapted test be replaced by a test of proportionality? Does the standard of review differ depending on whether the law directly or incidentally restricts communication on government and political matters? What level of deference, if any, should be given to Parliament?

Questions also remain as to what qualifies as a communication on governmental or political matters for the purposes of the implied freedom.[151] In *Coleman* there was some support for the conclusion that discussion of state police matters were protected, however, it was unnecessary for the court to decide that issue.[152] There is also a suggestion insults may be protected by the freedom, at least in certain circumstances.[153] However, it appears there is some disagreement amongst members of the High Court as to whether the implied freedom covers communications between the executive and the people.

What is clear following *Mulholland* is that in order to invoke the implied freedom of political communication, a *pre-existing* right must be burdened and that right must exist independently of the law in question.[154] Further, this 'threshold test' acts as a precursor to the application of the principles in *Lange* and has been described as a 'third limb' to the *Lange* test.[155]

It also appears that the court is either unwilling, or at the very least wary, of basing its decision on the implied freedom if another avenue is open.[156] In *Coleman* a decision based on the implied freedom of political communication was avoided by the Court's interpretation of the relevant statutory provisions.[157] Likewise, in *Mulholland* the appellant's failure to

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209 ALR 182, 255; *Mulholland* (2004) 209 ALR 582, 670. See also Hryce, above n 40; Thompson and de Ridder, above n 16.

[151] Hryce, above n 40; Roger Douglas, 'The constitutional freedom to insult: The insignificance of Coleman v Power' (2005) 16 *Public Law Review* 23, 34 footnote 69. See also Dan Meagher, 'What is Political Communication? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28 *Melbourne University Law Review* 438, 463.

[152] *Coleman* (2004) 209 ALR 182, 203-4 (McHugh J), 230 (Gummow and Hayne JJ), 239 (Kirby J). See also Thompson and de Ridder, above n 16.

[153] *Coleman* (2004) 209 ALR 182, 204 (McHugh J), 241 (Kirby J). See also Thompson and de Ridder, above n 16. *Contra Coleman* (2004) 209 ALR 182, 268-9 (Heydon J). For a discussion on the impact of *Coleman* on 'broadly framed insulting language laws' see Douglas, above n 151.

[154] *Mulholland* (2004) 209 ALR 582; *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101; Thompson and de Ridder, above n 16.

[155] Thompson and de Ridder, above n 16.

[156] Arcioni, above n 44, 354.

[157] Ibid; Hryce, above n 40.

establish the existence of pre-existing right enabled a majority of the Court to avoid applying the *Lange* test altogether.[158]

While the level of protection the implied freedom provides is yet to be determined, there is merit in the view that the implied freedom is merely an 'empty promise' if inadequate limits are placed on the legislative powers of government.[159]

No doubt the scope of the implied freedom of political communication will be examined by the High Court at some point in the future. Until that time, the law regarding the implied freedom remains unresolved. However given the issues detailed in this paper, and the conflicting opinions expressed by different members of the court, the author agrees that a reformulation of the test *Lange* test may not only be warranted, but may be inevitable.[160]

[158] *Mulholland* (2004) 209 ALR 582, 633-4 (Gummow and Hayne JJ), 674 (Callinan J), 678-9. Arcioni, above n 44, 354.

[159] Sedgwick, above n 4, 37, 42, 56; Stone, above n 4, 699. See also Jones, above n 118, 106.

[160] Hryce, above n 40.