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Developments in Free Speech Law in Australia: Coleman and Mulholland

Abstract
This article provides an overview of the developments in 2004 regarding the constitutional freedom of political communication. This will be done through a discussion of the cases of Coleman v Power and Mulholland v Australian Electoral Commission. These two cases have confirmed the validity of the general propositions in Lange v Australian Broadcasting Corporation, regarding the existence of a freedom of political communication implied from the Australian Constitution, and provide the basis for some observations with respect to that implication. In this article an overview is given of the basic principles in Lange, followed by a detailed discussion of relevant parts of the judgments in Coleman and Mulholland. This article ends with analysis of some of the issues raised by the cases.

Keywords
freedom of speech, implied freedom of political communication, Coleman v Power, Mulholland v Australian Electoral Commission

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DEVELOPMENTS IN FREE SPEECH LAW IN AUSTRALIA: *COLEMAN* AND *MULHOLLAND*‡

Elisa Arcioni*

This article provides an overview of the developments in 2004 regarding the constitutional freedom of political communication.[1] This will be done through a discussion of the cases of *Coleman v Power*[2] and *Mulholland v Australian Electoral Commission*.[3] These two cases have confirmed the validity of the general propositions in *Lange v Australian Broadcasting Corporation*,[4] regarding the existence of a freedom of political communication implied from the *Australian Constitution*, and provide the basis for some observations with respect to that implication. In this article an overview is given of the basic principles in *Lange*, followed by a detailed discussion of relevant

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1 It should be noted that there are a number of potential sources of free speech protection in the *Australian Constitution*, in addition to the implication from representative and responsible government. These include s 92, s 116 and Chapter III of the *Constitution*. The potential for ss 92 and 116 to provide protection can be seen from the text of those sections. The potential for Chapter III to do so is the subject of *APLA Ltd v Legal Services Commissioner of NSW*, heard by the High Court on 5, 6 October and 7 December 2004, judgment reserved. On the basis of the submissions made to the Court in that case, it is predicted that an implication regarding freedom of communication may emerge from Chapter III of the *Constitution*. In brief, Chapter III may protect some speech by requiring 'that the people of the Commonwealth have the capacity, the ability, if you like the freedom, to ascertain their legal rights and to assert their legal rights to approach the courts … the freedom to communicate, that is fundamentally to receive such information and assistance as may be practically necessary for that to occur': Transcript of Proceedings, *APLA Ltd v Legal Services Commissioner of NSW* (High Court of Australia, Mr Gageler SC, 5 October 2004).

2 (2004) 209 ALR 182 ('*Coleman*').

3 (2004) 209 ALR 582 ('*Mulholland*').

4 (1997) 189 CLR 520 ('*Lange*').

parts of the judgments in *Coleman* and *Mulholland*.[5] This article ends with analysis of some of the issues raised by the cases.

I *LANGE* AND SOME BASIC PRINCIPLES

The orthodox starting point for a discussion of the protection of free speech in the *Constitution* seems to be *Lange*.[6] *Lange* followed the decisions of *Australian Capital Television Pty Ltd v The Commonwealth*[7] and *Nationwide News Pty Ltd v Wills*,[8] in which a majority of the High Court recognised an implied freedom of political communication in the *Constitution*. Unlike the earlier cases, *Lange* was a unanimous decision of the High Court. It arose in the circumstances of alleged defamation through the broadcast of a 'Four Corners' television programme by the Australian Broadcasting Corporation. Lange, the then New Zealand Prime Minister, alleged that the broadcast conveyed imputations that, inter alia, he was unfit to hold public office. The High Court responded by applying the implied freedom, which had been accepted in *ACTV* and *Nationwide News*, to the facts and extended the defamation defence of qualified privilege to be consistent with that constitutional imperative. The matter was remitted to the Supreme Court of NSW. Decided in 1997, *Lange* confirmed that the *Constitution*, through its text and structure, established a system of representative and responsible government.[9] Due to the constitutional nature of that system, the *Constitution* therefore also requires that there be freedom of some types of communication, as necessary to maintain that system. That is, the system of government prescribed by the *Constitution* cannot exist without people having the freedom to communicate on matters governmental and political, or else the people could not inform themselves and each other about potential and actual representatives, nor could the representatives be 'responsible' to the people.

The validity of the restriction placed on the freedom, namely the law of defamation, was determined by the often-quoted test adopted in the case:

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation 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 [of the *Constitution*] for submitting a proposed amendment of the Constitution to the informed decision of the people … If the first question is answered 'yes' and the second is answered 'no', the law is invalid.[10]

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5 This article focuses only on the free speech aspect of the judgments. It does not address all the legal issues arising from the cases.

6 This article does not address the history of the development of the ideas in *Lange*. For cases preceding *Lange* see: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 ('*Theophanous*'); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

7 (1992) 177 CLR 106 ('*ACTV*').

8 (1992) 177 CLR 1 ('*Nationwide News*').

9 Sections 1, 7, 8, 13, 24, 25, 28 and 30 were referred to as the font of this constitutionally-prescribed system of government: *Lange* (1997) 189 CLR 520, 557. See also ss 6, 49, 62, 64, 83, 128: *Lange* (1997) 189 CLR 520, 557–9.

10 *Lange* (1997) 189 CLR 520, 567–8 (footnotes omitted).

Further basic principles were consolidated in *Lange*. The freedom of communication is negative, in the sense that it is an immunity from government action (including legislative and executive actions and the common law). It is not positive in the sense of a right enforceable directly against people or institutions which burden the freedom. The remedy for any infringement of the freedom is a challenge to the validity of legislation, executive action, or a challenge to the interpretation of the common law. The freedom is not absolute, as it does not protect all forms of communication at all times and in all circumstances.

Although there have been consistent critics of *Lange* (both judicial[11] and academic[12]), the Court has not disturbed its basic principles, outlined above, although it has given more consideration to what speech falls within the area of protection, what constitutes a 'burden' on that speech and how the standard of review is to be considered and applied. That exploration will be considered in the context of the *Coleman* and *Mulholland* cases.[13]

II *COLEMAN*

Background

Coleman arises from a somewhat more earthy set of facts than *Lange*. Patrick Coleman has a history of protesting in Townsville, Queensland, with numerous charges against him. On the occasion related to this case he was in Townsville Mall, railing against allegedly corrupt policemen. Coleman was distributing pamphlets with the following words on them:

> Ah ha! Constable Brendan Power and his mates, this one was a beauty - sitting outside the mall police beat in protest at an unlawful arrest - with simple placards saying TOWNSVILLE COPS - A GOOD ARGUMENT FOR A BILL OF RIGHTS - AND DEAR MAYOR - BITE ME - AND TOWNSVILLE CITY COUNCIL THE ENEMY OF FREE SPEECH - the person was saying nothing just sitting there talking to an old lady then BAMMM arrested dragged inside and detained. Of course not happy with the kill, the cops - in eloquent prose having sung in unison in their statements that the person was running through the mall like a madman belting people over the head with a flag pole before the dirty hippie bastard assaulted and [sic] old lady and tried to trip her up with the flag while ... while ... he was having a conversation with her before the cops scared

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11 Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 47 *Quadrant* 9, 17. After delivery of the speech reprinted in the above article, Heydon J was appointed to the High Court. He is a member of the Court which decided the cases discussed in this article. Callinan J has similarly been critical of the *Lange* decision — see *Roberts v Bass* (2002) 212 CLR 1, 101–2 [285], where he refers to his earlier reasons in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 330–2 [338].

12 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.

13 I will not be addressing other relevant High Court cases decided since *Lange*, such as *Levy v Victoria* (1997) 189 CLR 579 ('*Levy*'), *Kruger v Commonwealth* (1997) 190 CLR 1 ('*Kruger*'), *Roberts v Bass* (2002) 212 CLR 1, or cases in lower courts such as *Jones v Scully* (2002) 120 FCR 243.

her off ... boys boys boys, I got witnesses so KISS MY ARSE YOU SLIMY LYING BASTARDS.[14]

When two police officers (including Constable Power) approached Coleman to arrest him, he said, amongst other things, '[t]his is Constable Brendan Power a corrupt police officer'.[15] As a result of his communications outlined above, Coleman was charged with offences under the *Vagrants, Gaming and Other Offences Act 1931* (Qld) ('*Vagrants Act*')[16] of distributing material with insulting words (s 7A(1)(c)) and using insulting words in public (s 7(1)(d)). Due to the violent circumstances surrounding Coleman's arrest, he was also charged with obstructing police, serious assault against police and wilful damage.

At trial, Coleman was found guilty of all charges except that of wilful damage. Coleman unsuccessfully appealed to the District Court. In the Queensland Court of Appeal, Coleman was successful only in relation to the charge arising from the distribution of printed material containing insulting words, through a decision that s7A(1)(c) was invalid as it infringed the implied freedom of political communication established in *Lange*.[17] Coleman, self-represented, was then granted special leave to appeal the remaining charges of using insulting words, obstructing police and assaulting police, in the High Court. A majority (McHugh, Gummow, Hayne and Kirby JJ) allowed the appeal in relation to the charge of using insulting words. All of the Court except McHugh J dismissed the appeal regarding the remaining charges that arose from the circumstances of Coleman's arrest.

Therefore, although in the end Coleman was not guilty of either of the charges relating to his communications made in the Townsville Mall (including the one being challenged before the High Court), he was penalised for the way he reacted to his arrest made as a result of those communications. The decision with respect to the consequential charges will be outlined before returning to focus on the primary issue for the purpose of this article — the application of the *Lange* test to the insulting words legislation.

The appellant had argued that the arrest was unlawful because the insulting words charge (which prompted the purported arrest) was based on invalid legislation. Therefore, the appellant's actions in resisting the police attempts to restrain and arrest him (which actions constituted the basis for the remaining charges) were justified, so the charges of obstructing police and assaulting police should also be dismissed. The relevant law at the focus of this argument was with respect to police powers of arrest, namely, s 35(1) of the *Police Powers and Responsibilities Act 1997* (Qld). It relevantly provided: 'It is lawful for a police officer … to arrest a person the police officer reasonably suspects has committed or is committing an offence'. McHugh J concluded

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14 Reproduced in *Coleman* (2004) 209 ALR 182, 195 [42] (McHugh J).

15 Ibid 195 [37] (McHugh J).

16 This Act was repealed by the *Summary Offences Act 2005* (Qld), the operative provisions of which commenced on 21 March 2005. The Explanatory Notes to the Summary Offences Bill 2004 (Qld) state: 'Many of the provisions of the *Vagrants Gaming and Other Offences Act 1931* were so outdated that they were no longer suitable for enforcement in today's society': at 1. No specific mention is made with respect to the insulting language provisions of the *Vagrants Act*. However, similar offences are retained in the guise of prohibitions on public nuisance: see *Summary Offences Act 2005* (Qld) s 6.

17 See *Coleman v P* [2002] 2 Qd R 620.

that s 7(1)(d) of the *Vagrants Act* was invalid, that therefore the police could not have had 'a *reasonable* suspicion that an offence has been committed'[18] so the arrest was unlawful and the remaining charges had to be dismissed. In contrast, a majority of the Court concluded that the *Vagrants Act* was valid (albeit more limited in operation than the police had assumed, to the extent that Coleman's activities did not fall within it) and therefore the issue of the powers of arrest did not arise,[19] and the other charges remained.

Prohibition on using insulting words in public

The focus of this analysis of *Coleman* is the application of the *Lange* test to the primary legislation in the case — s 7(1)(d) of the *Vagrants Act*. However, a significant caveat in this discussion is that concessions were made by the parties to the effect that *Lange* was valid, that it applied to the case and that the first limb of the *Lange* test (that the law burdened the freedom) was satisfied on the facts.[20] The Court accepted these concessions and made it clear that they did not *decide* the issues conceded,[21] although some of the judges agreed with the concessions.[22] There was a diversity of views as to the legitimacy of making such concessions. McHugh J stated that parties *can* legitimately concede issues before the Court,[23] while Kirby J disagreed, but noted that the concessions made no difference to his conclusion as he found them to be correct.[24] Despite the position of the parties, all the justices addressed the *Lange* issue. Although some of that discussion may be obiter, it nevertheless provides an indication of the thinking of the current Court.

McHugh, Gummow, Kirby and Hayne JJ all read down the legislation to such an extent that it did not apply to Coleman's activities. Gummow, Kirby and Hayne JJ restricted its application to circumstances where the words were 'either intended to provoke unlawful physical retaliation, or were reasonably likely to do so'.[25] The justices applied a process of statutory interpretation informed by the *Constitution*. McHugh J came to the same ultimate conclusion that the legislation did not apply to Coleman, but by a different route. McHugh J found the legislation was invalid by virtue of the application of the *Lange* test, that the end to be achieved by the legislation was legitimate but that the means by which it was to be achieved were not. That is, that an unqualified prohibition against insulting language was not justified.[26] His Honour found the legislation invalid 'to the extent that it penalised insulting words uttered in discussing or raising matters concerning politics and government in or near public

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18 *Coleman* (2004) 209 ALR 182, 217 [140] (emphasis in original).

19 Ibid 193 [34] (Gleeson CJ), 231 [204] (Gummow and Hayne JJ), 249 [266] (Kirby J), 260 [303] (Callinan J), 270 [337] (Heydon J).

20 Heydon J noted that 'the Attorney-General for New South Wales disputed [the concession], but "operated on the basis" of it': ibid 264 [317], fn 325.

21 Ibid 191 [26], 193 [33] (Gleeson CJ), 203–4 [80]–[81] (McHugh J), 230 [197] (Gummow and Hayne JJ), 239 [232] (Kirby J), 255 [289] (Callinan J), 264 [318] (Heydon J).

22 Ibid 202 [74] (McHugh J), 234 [214] (Kirby J).

23 Ibid 203 [79].

24 Ibid 239 [231]–[232].

25 Ibid 227 [183] (Gummow and Hayne JJ), with Kirby J agreeing: at 238 [226].

26 Ibid 210 [105].

places.'[27] He therefore read down the legislation so that it did not cover such communication, with the consequence that Coleman's activities did not fall within its scope. The other justices (Gleeson CJ, Callinan and Heydon JJ) disagreed with the interpretations of the legislation given by the majority justices[28] and held the legislation valid and applicable to Coleman's activities.

In the process of interpreting the legislation, all of the Court (except for Callinan J[29]) recognised a freedom or right of speech at common law and a principle of interpretation protective of fundamental rights and freedoms. 'Except by necessary implication, courts should not extend the natural and ordinary meaning of words that create an offence, especially when the statute is regarding such a fundamental right as that of free speech.'[30] Kirby J also proposed what seem to be two related principles.[31]

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27 Ibid 212 [110]. Considering the lack of guidance provided by the courts in relation to what such communication includes, the enforcement of such an interpretation would be difficult.

28 Gleeson CJ (ibid 188 [14]) limited the legislation to include 'insulting words intended or likely to provoke a forceful response', with the qualification that:

> the language in question must be not merely derogatory of the person to whom it is addressed; it must be of such a nature that … [it] is contrary to contemporary standards of public good order, and goes beyond what, by those standards, is simply an exercise of freedom to express opinions on controversial issues.

Callinan J considered the touchstone of the legislation to be the avoidance of the '*risk* of provocation': at 255 [287] (emphasis in original); Heydon J adopted the 'ordinary' meaning of the word 'insulting': at 261 [309].

29 Callinan J did not recognise a common law right or freedom as identified by the other members of the Court but did refer to another 'valuable freedom' of peaceful passage in another context: ibid 257 [297]. It is worth noting that the provision of the *Summary Offences Act 2005* (Qld), which is to replace the legislation at issue in *Coleman*, also has 'peaceful passage' at its heart: see s 6(2)(b).

30 *Coleman* (2004) 209 ALR 182, 199 [65] (McHugh J). Gummow and Hayne JJ described as 'well-established principles of statutory construction' that '[o]nce it is recognised that fundamental rights are not to be cut down save by clear words, it follows that the curtailment of free speech by legislation directed to proscribing particular kinds of utterances will often be read as "narrowly limited"': at 228 [188] (drawing on the US notion that some kinds of speech fall outside the notion of free speech, but that those categories are 'narrowly limited': at 228 [187]). See also at 227 [185] (footnotes omitted): 'The offence which it creates restricts freedom of speech. That freedom is not, and never has been, absolute. But in confining the limits of the freedom, a legislature must mark the boundary it sets with clarity. Fundamental common law rights are not to be eroded or curtailed save by clear words.' Seemingly as a separate argument, Kirby J also considered a separate notion of 'ordinary civil rights to free expression': at 237–8 [225], 245 [250]. He outlined the rule as follows: 'In order to be effective, a statutory provision diminishing ordinary civil rights to free expression, otherwise recognised by the common law, must be stated clearly. … General words … will not normally suffice' (footnote omitted). Kirby J also stated: 'Because of the common law rule that "everybody is free to do anything, subject only to the provisions of the law", there is a general freedom of speech under the common law in so far as it has not been lawfully restricted': at 246 [253] (footnote omitted). He added force to this argument as follows: 'Even more clearly will this approach govern the interpretation where the common law right in question is protected by an implied constitutional freedom, such as that expressed in *Lange*': at 246 [251]. Heydon J also accepted the principle of interpretation, but on the facts found that the word 'insulting' is not unclear: at 262 [313]. The Chief Justice took a slightly different but related approach: at 185–8 [7]–[14].

The justices wavered between the terms 'right' and 'freedom'. Nevertheless, this discussion of the common law's protection of speech suggests that there may be a common law 'right' to free speech, distinct from the notion of a general 'freedom' of speech derived from 'the common law rule that "everybody is free to do anything, subject only to the provisions of the law"'.[32]

This focus on interpretation does not preclude the case being seen as a significant one with respect to free speech in the *Constitution*. All the justices address the *Lange* test in some form, either as a reason to affirm their interpretation of the meaning of the legislation,[33] in the context of a principle of interpretation where 'in the event of ambiguity, a construction of legislation should be preferred which avoids incompatibility with the Constitution',[34] or in order to address the validity of the legislation. However, it remains significant that statutory interpretation was at the core of the judgments. This is consistent with the trend of the Court to avoid directly addressing constitutional issues if an alternative resolution can be found, while at the same time acknowledging the 'single system of jurisprudence'[35] in Australia, whereby the *Constitution* has an affect on legislation and the common law. These cases provide yet another example of the symbiotic relationship between the *Constitution* and other forms of law in Australia.[36] What follows is an outline of how the Court addressed aspects of the implied freedom in *Coleman*, namely, the scope of the freedom, its application to State legislation and the standard of review to be applied.

Scope of the freedom — insults and police officers

The insulting nature of Coleman's communications and their subject matter (State police officers) led to a discussion of whether such communication could be covered by the freedom.

A majority[37] concluded that insults could constitute political communication. McHugh J stated that '[t]he concession that the words used by the appellant were a communication on political or government matters was also correctly made. … Insults are as much a part of communications concerning political and government matters as

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31 The first is that 'a construction that would arguably diminish fundamental human rights (including as such rights are expressed in international law) should not normally be preferred if an alternative construction is equally available that involves no such diminution': ibid 237-8 [225]. The second is by incorporating international law or principles in the discussion. See ibid 241–2 [240], 242 [242]; cf at 189–91 [17]–[24] (Gleeson CJ).

32 Ibid 246 [253] (Kirby J); see also *Lange* (1997) 189 CLR 520, 560.

33 See, eg, *Coleman* (2004) 209 ALR 182, 227 [184], 229–30 [195]–[199] (Gummow and Hayne JJ); cf at 235–6 [219]–[221] (Kirby J).

34 Ibid 237 [225] (Kirby J).

35 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 534 [66] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), quoting *Lange* (1997) 189 CLR 520, 564.

36 Tony Blackshield and George Williams, *Australian Constitutional Law & Theory: Commentary & Materials* (3rd ed, 2002) 1249.

37 The Chief Justice (in the minority in relation to the primary charge) did not explicitly address the issue but stated: 'Let it be accepted that his conduct was, in the broadest sense, "political"', going on to note the problem of delimiting the scope of 'political' communication: *Coleman* (2004) 209 ALR 182, 191 [28]. This problem has been noted previously: see *Theophanous* (1993) 182 CLR 104, 123 (Mason CJ, Toohey and Gaudron JJ); *Levy* (1997) 189 CLR 579, 638 (Kirby J).

is irony, humour or acerbic criticism.'[38] He later stated that 'insults are a legitimate part of the political discussion protected by the Constitution.'[39] Gummow and Hayne JJ seem to have agreed with this: 'Insult and invective have been employed in political communication at least since the time of Demosthenes.'[40] Kirby J also agreed, emphasising how politics is practised in Australia.[41] This should not be a surprising conclusion by the majority, considering the relatively recent discussion by the High Court in *Roberts v Bass*,[42] where the Court found that it was legitimate to target an electoral candidate's reputation in a political campaign, and in light of the Court's previous statements regarding the combative nature of politics.[43]

In contrast, Callinan J rejected this argument and Heydon J seems to have hinted against it, while not going so far as to state that insulting language and political communication are mutually exclusive. Callinan J considered the words of *Lange* and argued that 'to attract the application of the implication it is necessary that the spoken or written communication be capable of throwing light on government or political matters.'[44] He concluded that in this situation, they did not, characterising them as '[i]nsulting or abusive words' which may 'generate heat' but not throw *light* on political issues.[45] This conclusion is consistent with the emphasis in his judgment regarding 'civilized' community, suggesting that insulting language plays no part in civilised political discourse.[46] Callinan J seems to have restricted what he considers is protected communication by stating: 'it is only reasonable conduct that the implication protects. Threatening, insulting, or abusive language to a person in a public place is unreasonable conduct. The implication should not extend to protect that.'[47] While some of Callinan J's discussion may be more directed to the second stage of the *Lange* test (whether a law which burdens the freedom is nevertheless legitimate) and dependent on the particular facts of the case, his position appears to be that insulting language does not constitute relevant political communication. He disagreed with the concession that the legislation prohibiting insulting words burdens the freedom,[48] and regarded 'the notion that [the provisions of the Act] burden the freedom of communication on political matters in any way as far fetched.'[49]

Heydon J appears to have adopted a position between the majority mentioned above and Callinan J. Heydon J stated that it was 'unsatisfactory' for the case to be

38 *Coleman* (2004) 209 ALR 182, 204 [81].
39 Ibid 210 [105].
40 Ibid 230 [197].
41 Ibid 241 [238]–[239].
42 (2002) 212 CLR 1, 20–1 [39]-[42] (Gleeson CJ), 42–3 [107] (Gaudron, McHugh and Gummow JJ), 66 [184] (Kirby J).
43 See the brief discussion and references in Elisa Arcioni, 'Politics, Police and Proportionality – an Opportunity to Explore the *Lange* test: *Coleman v Power*' (2003) 25 *Sydney Law Review* 379, 382–5.
44 *Coleman* (2004) 209 ALR 182, 256 [291].
45 Ibid 259 [299]; cf at 230 [199] (Gummow and Hayne JJ).
46 Ibid 255 [287], 257 [295], 257 [297]; cf at 186 [9], 188 [14] (Gleeson J).
47 Ibid 259 [300].
48 Ibid 257-8 [298], where he states that the legislation 'offers no realistic threat to any freedom of communication about federal political, or governmental affairs. It is no burden upon it. I would hold this to be so regardless of the guarded concession made by the respondents and which I would reject in any event' (footnote omitted).
49 Ibid 259 [299].

determined on the basis of the concession that the legislation burdened the freedom but that this issue returned, albeit 'in another guise' when addressing the second stage of the *Lange* test.[50] At first Heydon J seemed to accept that 'some communications on government and political matters are insulting'[51] and that the legislation may burden the freedom, although any such burden would be 'very slight'.[52] However, he went on to suggest that insulting words are detrimental 'to the exchange of useful communications',[53] characterised such words as neither information, opinions nor argument relevant to political communication and concluded that '[t]o address insulting words to persons in a public place is conduct sufficiently alien to the virtues of free and informed debate on which the constitutional freedom rests that it falls outside of it.'[54]

The subject of Coleman's insulting words was the activities of certain Queensland police officers. A majority concluded that discussion of the behaviour of such officers could constitute relevant communication for the purpose of the implied freedom. McHugh J stated that the freedom includes discussion regarding the Executive, in this case including the State police force.[55] Gummow and Hayne JJ stated that:

> Given the extent to which law enforcement and policing in Australia depends both practically, and structurally … upon close cooperation of federal, state and territory police forces, there is evident strength in the proposition that an allegation that a state police officer is corrupt might concern a government or political matter that affects the people of Australia.[56]

Kirby J took a similar approach, considering that financial dependence and integration as mentioned in *Lange*, 'even communications that principally, or substantially, concern state governmental or political issues (such as the alleged corruption of state police)' could constitute relevant communications.[57] The Chief Justice, Callinan J and Heydon J[58] did not address this issue.

The freedom affecting State legislation

A threshold issue of whether State legislation is subject to the implied freedom was conceded by the parties. McHugh J supported that concession[59] on the basis that the States' powers had been withdrawn by ss 106 and 107 of the *Constitution*, not only with respect to powers explicitly given to the Commonwealth as exclusive powers, but also in relation to:

> powers which would entrench on the zone of immunity conferred by … the implied freedom of communication on political and governmental matters. … The constitutional immunity is the leading provision; the sections conferring powers on the federal, state and territory legislatures are subordinate provisions that must give way to the constitutional immunity. To the extent that the exercise of legislative or executive powers,

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50 Ibid 264 [319].
51 Ibid 268 [330].
52 Ibid.
53 Ibid.
54 Ibid 269 [332].
55 Ibid 203 [80].
56 Ibid 230 [197], referring to *Lange* (1997) 189 CLR 520, 571.
57 *Coleman* (2004) 209 ALR 182, 239 [229].
58 Ibid 264 [319] (Heydon J). See also at 264 [317], fn 324 (Heydon J).
59 Ibid 202 [76].

> conferred or saved by the Constitution, interferes with the effective operation of the freedom, the exercise of those powers is invalid.[60]

Gummow and Hayne JJ agreed[61] and Kirby J seems implicitly to have accepted that State legislation is vulnerable to the *Lange* implication.[62] The Chief Justice and Heydon J took a more neutral approach.[63] Callinan J did not address this issue. Instead he seems to have focused on a requirement that a burden on the freedom must be in relation to 'federal institutions, elections or referenda',[64] which he stated was not satisfied on the facts.

The standard of review

In *Coleman*, there was a great deal of discussion with respect to the standard of review to be applied in determining when a law infringed the freedom. In general, the *Lange* test seems to have survived, but with a slight textual amendment. The debate between whether to adopt the phrase 'reasonably appropriate and adapted' or a test of 'proportionality' continued and the two-tiered test from earlier cases was adopted by some members of the Court.

A majority showed support for a slight rewording of the second stage of the *Lange* test. That rewording is to the effect that it becomes:

> is the law reasonably appropriate and adapted to serve a legitimate end *in a manner* which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[65]

This change from 'the fulfilment of which' to 'in a manner which' seems merely to confirm that the test includes a consideration of the means by which a legislative policy is put into effect, which could be found in the previous incarnation in any event. Perhaps more telling is the rejection, by the same majority, of the submission of the Attorneys-General of the Commonwealth and New South Wales that the second stage of the *Lange* test 'should be weakened by requiring only that the law in question be "reasonably capable of being seen as appropriate and adapted."'[66] This suggests that the Court is asserting its supervisory role over governmental action which may infringe the freedom.

In addition to the slight rewording of the *Lange* test, Gleeson CJ and Heydon J (both in the minority) seem to have supported a standard of review that requires different levels of scrutiny of the law in question, depending on whether the restriction of relevant communication is merely an incidental effect of the law or the purpose of the law. This two-tiered approach harks back to the earlier free speech cases such as

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60 Ibid 206 [90].
61 Ibid 229 [195].
62 Ibid 246–7 [254]–[255].
63 Ibid 191 [26] (Gleeson CJ), 264 [318] (Heydon J).
64 Ibid 256 [293].
65 This rewording was suggested by McHugh J: ibid 207 [93] (emphasis added), ostensibly in line with Kirby J's discussion in *Levy* (1997) 189 CLR 579, 646: see *Coleman* (2004) 209 ALR 182, 208 [95]-[96]. This formulation was agreed to by Gummow and Hayne JJ: at 229 [196], and Kirby J: at 233 [211].
66 *Coleman* (2004) 209 ALR 182, 230 [196] (Gummow and Hayne JJ), 205 [87] (McHugh J), 233 [212] (Kirby J).

Nationwide News.[67] Even after the unanimous decision in *Lange*, Gaudron J maintained the distinction between the two types of laws in *Kruger*[68] and *Levy*.[69]

Gleeson CJ agreed with that approach, to the extent that he agreed with the standard of scrutiny as it applies to laws which only incidentally restrict political communication.[70] Heydon J agreed that where the impugned law is related to a subject other than the restriction of political communication and its effect on such communication 'is unrelated to their nature as political communications',[71] it is easier to justify than 'a law that directly restricts or burdens a characteristic of the constitutional freedom.'[72] In adding to this distinction between content-specific prohibitions and incidental prohibitions, Heydon J supported statements in earlier cases that 'a law curtailing political discussion may be valid if it operates in an area in which discussion has traditionally been curtailed in the public interest, or as part of the general law.'[73]

In contrast to the preference of other justices, McHugh J rejected the need to give the freedom special weight in certain circumstances, focusing instead on the general notion of compatibility:

> The question is … whether the federal, state or territory power is so framed that it impairs or tends to impair the effective operation of the constitutional system ... by impermissibly burdening communications on political or governmental matters. In all but exceptional cases, a law will not burden such communications unless, by its operation or practical effect, it directly and not remotely restricts or limits the content of those communications or the time, place, manner or conditions of their occurrence. And a law will not impermissibly burden those communications unless its object and the manner of achieving it is incompatible with the maintenance of the system of representative and responsible government established by the Constitution.[74]

The notion of compatibility is a convenient link to the broader issue of the formula to be adopted with respect to the standard of review — whether 'reasonably appropriate and adapted' or 'proportionality'[74] is to be preferred. In *Coleman* the parties conceded that *Lange* is the applicable law, and the 'argument … proceeded upon the common assumption that … a test of "reasonably appropriate and adapted"

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67 (1992) 177 CLR 1. See at 76–7 (Deane and Toohey JJ); *Cunliffe v Commonwealth* (1993) 182 CLR 272 ('*Cunliffe*'), 299–300 (Mason CJ).

68 (1997) 190 CLR 1, 126–8.

69 (1997) 189 CLR 579, 619.

70 *Coleman* (2004) 209 ALR 182, 191 [27], 192 [30]–[31].

71 Ibid 266 [326], quoting from *ACTV* (1992) 177 CLR 106, 169.

72 *Coleman* (2004) 209 ALR 182, 267 [326], referring to *Cunliffe* (1993) 182 CLR 272, 396.

73 *Coleman* (2004) 209 ALR 182, 267 [327] (footnotes omitted).

74 Ibid 207 [91]–[92]. It is interesting to note that Gleeson CJ referred to this general notion: *Mulholland* (2004) 209 ALR 582, 593 [33] but supported the different standards of scrutiny to achieve such compatibility.

74 See Brian Fitzgerald, 'Proportionality and Australian Constitutionalism' (1993) 12 *University of Tasmania Law Review* 263; Jeremy Kirk, 'Constitutional Guarantees, Characterisation and Proportionality' (1997) 21 *Melbourne University Law Review* 1; Bradley Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law' (1996) 7 *Public Law Review* 212; Stone, above n 12.

was to be applied.'[75] However, this common assumption did not prevent lengthy passages in the judgments with respect to it.

McHugh J engaged in a sustained discussion of the standard of review to be applied in relation to the implied freedom but seems to have concluded that the *Lange* test stands.[76] This seems to have occurred in the context of McHugh J confirming his general views with respect to the nature of the freedom and in response to Stone's criticisms.[77] Gummow, Hayne and Heydon JJ seem to have impliedly accepted the 'reasonably appropriate and adapted' standard,[78] Heydon J adding that this does not call for a conclusion that 'the law is the sole or best means of achieving that end.'[79] Callinan J proposed an alternative phrase: 'is the law a reasonable implementation of a legitimate object',[80] although this does not seem different in substance. In contrast, Kirby J was very critical of the phrase 'reasonably appropriate and adapted', preferring the notion of 'proportionality'.[81] The main reason for this seems to be an aversion to the term 'appropriate', which may suggest that the Court is imposing its view of the merits of the impugned legislation beyond the more limited exercise of determining the validity of the law.[82]

All the justices analysed some kind of 'fit' between the impugned law and the maintenance of the constitutional system at issue. However, the formulation of that test is no longer unanimous. In the end, perhaps this is inconsequential, as the decision will always be a matter of judgment, regardless of how the test of compatibility is framed.

Coleman provided the Court with an opportunity to delve into the *Lange* test. Unfortunately, the concession made by the parties and the statutory interpretation route taken by some of the members of the Court prevented authoritative development of the *Lange* principles. Nevertheless, the case gives rise to some interesting discussion with respect to the scope of the freedom.

III *MULHOLLAND*

Background

The case of *Mulholland* concerned the validity of Commonwealth electoral legislation. It is a case where the Court was unanimous in the ultimate conclusion but six separate judgments were published. Mulholland, the registered officer of the Democratic Labor Party ('DLP'), challenged the validity of aspects of Part XI of the *Commonwealth Electoral Act 1918* (Cth).[83] The relevant sections create a system of registration of political parties, with consequential benefits including having the party name placed 'above the line' on Senate ballot papers, advantages with respect to electoral funding and access to

75 *Coleman* (2004) 209 ALR 182, 193 [33] (Gleeson CJ).
76 Ibid 204–10 [83]–[100].
77 See Stone, above n 12.
78 *Coleman* (2004) 209 ALR 182, 230 [197]–[198] (Gummow and Hayne JJ), 265 [321], 266–8 [326]–[329] (Heydon J).
79 Ibid 267 [328].
80 Ibid 256 [292].
81 Ibid 240 [234]–[235]; cf at 240 [236].
82 See ibid 240 [235] (Kirby J); cf *Mulholland* (2004) 209 ALR 582, 648 [248] (Kirby J).
83 Specifically, ss 123(1), 126(2A), 136(1)(b)(ii), 137(1)(b), 137(1)(cb), 137(5) and 138A.

relevant electronic electoral rolls.[84] The legislation also creates limitations on that registration. There were two specific limitations at the heart of Mulholland's challenge — the '500 rule' and the 'no-overlap' rule. The 500 rule requires a political party to have a minimum of 500 members in order to be a registered party, if the party does not have a representative in Parliament. Parties could be required to provide that list of members to the Australian Electoral Commission. The no-overlap rule was a requirement that no member could be a concurrent member of any other registered political party.

The Australian Electoral Commission had requested the list of members from the DLP, which Mulholland, as the registered officer, refused to provide (presumably because the DLP did not have sufficient members to satisfy the registration requirements). In circumstances where a federal election was imminent, Mulholland challenged the legislation, presumably to protect the DLP's place on ballot papers. Parts of the Act were challenged on a number of grounds, including that: the legislation was not supported by a legislative head of power; the legislation contravened ss 7 and 24 of the *Constitution* by imposing unreasonable discrimination on some political parties and not allowing a 'direct' choice by the people; and the legislation infringed a purported constitutional freedom of association for political purposes and a right of privacy in relation to such an association. *Mulholland* is therefore a case that touches on many areas of constitutional law. However, this article addresses only the remaining issue — the implied freedom of political communication argument.

Mulholland argued that the restrictions imposed by the 500 rule and the no-overlap rule burdened the constitutional freedom of communication by restricting which parties could be registered and therefore be able to have their candidates' party affiliation appear 'above the line' on Senate ballot papers. Mulholland's application failed in the Federal Court, before the Full Court of that Court, and in the High Court. Unlike *Coleman*, no broad concession was made in *Mulholland* with respect to the operation of the *Lange* test to the facts. In addressing the implied freedom argument, the Court's discussion is relevant to the scope of the freedom, the standard of review and the notion of burden.

Scope of the freedom — the ballot paper

In *Mulholland*, the communication at issue was the identification of a candidate with their political party 'above the line' on Senate ballot papers. The Chief Justice concluded that such party affiliation is, in a 'substantial, practical sense' a communication for the benefit of candidates.[85] He looked to the importance of political parties in the practice of government in Australia and concluded that:

> It is proper, and realistic, to regard the information conveyed to electors by the [Australian Electoral] commission as involving a communication by the party and its candidates, as well as a communication by the commission. It is a communication about a matter that is central to the competitive process involved in an election and therefore falls within the first limb of *Lange*.[86]

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84 See, eg, ss 91(1), 91(7), 91AA.
85 *Mulholland* (2004) 209 ALR 582, 591 [28].
86 Ibid 592 [30].

McHugh J regarded it as a relevant communication, that is, 'political' in a constitutional sense, but for slightly different reasons. He considered that the scope of relevant communications includes 'communications between the executive government and the people', as these are 'as necessary to the effective working of [representative and responsible government] as communications between the people and their elected representatives.'[87] In this case, the 'executive' was the Australian Electoral Commission. McHugh J also looked to the importance of political parties,[88] seeming to characterise the communication in two ways: 'The primary purpose of a ballot-paper … is to record the voter's preferences … It is part of a process … which is the end to which the Constitution's implication … is directed.'[89] In addition, the ballot-paper is the record of communications between candidates and the Commission, regarding party affiliation, and is therefore (albeit indirectly) a 'communication on political and government matters between candidates and electors.'[90] Kirby J agreed with McHugh J's analysis.[91]

Heydon J disagreed, adopting a more limited definition of what constitutes relevant communication. He relied on a phrase in *Lange*, identifying relevant communication as 'communications between the electors and the elected representatives, the electors and the candidates, and the electors themselves'.[92] This may be common ground between the justices. However, Heydon J then continued: 'What is on the ballot paper is a communication only between the executive government and the electors'[93] and a *relevant* communication must be of a nature that is 'part of the process of communicating information with a view to influencing electors to vote for one candidate or another',[94] which he concluded was not the case on the facts. Gummow, Hayne and Callinan JJ did not address this issue, as they concluded that the 'threshold' question of establishing a burden on the freedom (the first limb of the *Lange* test) was not satisfied.[95]

The standard of review — **Coleman** *confirmed*

In *Mulholland*, most of the justices found that the legislation did not relevantly burden the freedom and therefore they did not address the second step in the *Lange* test.[96] Nevertheless, the Chief Justice and Kirby J referred to the standard of review and generally confirmed their comments made in *Coleman*. Kirby J reaffirmed his

87 Ibid 610 [94].
88 Ibid 604–5 [75].
89 Ibid 611 [96].
90 Ibid 611 [97].
91 Ibid 657 [282], 658 [283].
92 Ibid 679 [355], referring to *Lange* (1997) 189 CLR 520, 560.
93 *Mulholland* (2004) 209 ALR 582, 679 [355].
94 Ibid.
95 Ibid 634 [192] (Gummow and Hayne JJ), 674 [337]–[338] (Callinan J). However, Gummow and Hayne JJ did state in another context that the ballot paper 'is the medium by which, in accordance with the Act, a vote is cast. The communication thereon is that required by the statute of the commission in discharge of its functions to administer the Australian ballot system': at 633 [186].
96 Ibid 615 [112] (McHugh J), 634 [192] (Gummow and Hayne JJ), 674 [337]–[338] (Callinan J), 679 [357] (Heydon J), although there Heydon J notes in fn 444 that it was not necessary to deal with the alternative formulation rejected by Kirby J as he found that on any formulation of the standard of review the legislation is valid.

opposition to the phrase 'reasonably capable of being regarded by the Parliament as appropriate and adapted', which was urged by the respondents.[97] The idea of a two-tiered standard of review, whereby a different degree of scrutiny is applied depending on the purpose of the law in question, was approved of by the Chief Justice.[98] Kirby J questioned whether such a distinction is helpful, but stated:

> it is probably true to say that, in certain circumstances [including when the power is directed against unpopular minorities or where lawmakers pursue their own partisan advantage], courts have a heightened vigilance towards the potential abuse of the lawmaking power inimical to the rule of law. … This is the result of applying a constitutional standard that assumes no preference for incumbents or any other particular political interest and postulates (at least in general terms) a 'level playing field' for competing candidates and political parties offering their ideas, policies and programmes to the electors.[99]

The Chief Justice discussed the meanings of 'proportionality' and 'reasonably appropriate and adapted', concluding that he had 'no objection' to the use of either term,[100] while Kirby J maintained his criticism of the latter phrase.[101] Kirby J continued his search for 'an explanation of constitutional connection that is clearer and more informative' than the variations of 'reasonably appropriate and adapted',[102] focusing on 'considerations of substance rather than form' and stating that he is influenced by 'universal human rights as they express democratic ideals'.[103] Kirby J reiterated his preference for a test of 'proportionality', applying it in the context of both characterisation and limitations on legislative power.[104]

What does it mean to burden the freedom?

A majority[105] concluded that Mulholland had failed the first limb of the *Lange* test by failing to convince the Court that the legislation burdened the freedom. The essence of their reasoning focused on their finding that he had not established a pre-existing right to communicate which was burdened by the impugned legislation.

McHugh J argued that as there is no independent right of communication through a ballot paper, apart from the legislative entitlement under the *Commonwealth Electoral Act 1918* (Cth), which has connected to it the inherent restrictions (namely the 500 rule and no-overlap rule), the legislation does not burden the communication.[106] The crux of this argument seems to be that the restriction must be divorced from the law that creates the right of communication: 'Proof of a burden on the implied constitutional freedom requires proof that the challenged law burdens a freedom that exists independently of that law.'[107] Gummow and Hayne JJ found that no 'common law

97 Ibid 636 [203].
98 Ibid 595 [40].
99 Ibid 647 [241] (footnotes omitted).
100 Ibid 592 [33], 594 [39].
101 Ibid 636 [202], 637 [205], 648 [247].
102 Ibid 637 [205].
103 Ibid 642 [223].
104 Ibid 649-50 [249]-[251].
105 Gleeson CJ (ibid 592 [30]) stated that the first stage in the *Lange* test should be answered 'yes'. However, he did not address the threshold issue dealt with by a majority.
106 Ibid 613 [105].
107 Ibid 614 [107].

right' exists granting the DLP a right to have their name on the ballot paper.[108] Therefore, considering the 'existence and nature of the "freedom" asserted by the appellant … it is unnecessary to take any further the matters which arise under *Lange*.'[109]

Callinan J addressed this issue in a slightly different way. He focused on the specific idea that the appellant had to identify a

> constitutional right to have his party affiliation included on the ballot paper. ... As the appellant has no relevant *right* to the imposition of an obligation upon another, to communicate a particular matter, he has no right which is capable of being burdened. The appellant is seeking a privilege, not to vindicate or avail himself of a right. [110]

Heydon J generally agreed with this analysis. He stated that there is no burden because there is no 'relevant "right or privilege … under the general law" to be interfered with.'[111] The appellant had conceded that a prohibition on any party affiliations being placed on ballot papers would be valid and therefore '[i]t follows that to legislate for a mixture of permissions and prohibitions, so as to permit the party affiliations of some candidates but not others to appear on the ballot paper, cannot interfere with the implied freedom.' Heydon J stated that it would be 'paradoxical' if a complete prohibition were valid but a partial one invalid and if an implied freedom created an obligation to publicise.[112]

This raises the question of what 'rights' will satisfy the requirement. The appellant raised the case of *ACTV* in support of its argument that the freedom was burdened by the *Commonwealth Electoral Act 1918* (Cth). *ACTV* concerned a challenge to the validity of Part IIID of the *Political Broadcasters and Political Disclosures Act 1991* (Cth), which prohibited political advertising during election periods[113] unless regulations were made to allow certain restricted advertising.[114] A majority in that case held that Part IIID of the Act was invalid because it infringed the constitutional freedom of political discussion. The analogy sought to be drawn between *ACTV* and *Mulholland* was rejected by McHugh, Gummow, Hayne and Heydon JJ. Their reasons for doing so shed some light on the pre-existing right argument.

McHugh J found that in *ACTV* the Act burdened prior statutory rights to broadcast which existed under the *Broadcasting Act 1942* (Cth) and *Radiocommunications Act 1983* (Cth), that '[t]he [Act] operated to burden long-existing rights that existed independently of that Act. The case is not a relevant analogue with the present case.'[115] Gummow and Hayne JJ also found the reliance on *ACTV* was 'misplaced' because the Act in that case 'restricted what otherwise was the freedom under the common law to transmit broadcasting and television programmes to the general public and to erect, maintain and use the necessary equipment'.[116] Further, they sought to clarify what was

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108 Ibid 633 [187].
109 Ibid 634 [192].
110 Ibid 674 [336]–[337] (emphasis in original).
111 Ibid 678 [354].
112 Ibid 678 [354].
113 See, eg, s 95B.
114 See Division 3 of Part IIID.
115 *Mulholland* (2004) 209 ALR 582, 615 [111].
116 Ibid 633 [188].

the relevant restriction in *ACTV*, namely, the 'broadcasters' freedom to broadcast',[117] rather than any general freedom 'enjoyed by citizens to discuss public and political affairs and to criticise federal institutions' mentioned by Mason CJ in *ACTV*.[118] Heydon J also found there to be 'no analogy' between the legislation in *ACTV* and that in *Mulholland* because the legislation in *ACTV* was:

> a prohibition on a traditional category of political communications being conducted through ordinarily available media. It thus burdened an ordinary mode of communication in such a way as seriously to impede discussion about elections. This is quite distinct from the enactment of a statutory scheme regulating the content of the official ballot paper. [119]

In contrast to the other justices, Kirby J questioned the dichotomy between the '*freedom* of communication' and an '*obligation* to publicise'.[120] He disagreed with the analysis of Gummow and Hayne JJ regarding the distinction,[121] arguing instead that what was being sought by Mulholland was the invalidation of legislation which contravened the 'constitutional prescription', not the granting of special benefits.[122] With respect to the issue of a pre-existing right, Kirby J stated that the approach of the majority, if taken to extremes, could 'effectively neuter the implied freedom of communication … The common law adapts to the Constitution. Where necessary, the common law would, in my opinion, afford remedies designed to uphold such an important constitutional protection.'[123]

In *Mulholland*, the Court addressed many issues relevant to constitutional law. With respect to the implied freedom of political communication, the Court confirmed the principles in *Lange*. Significantly, it forestalled analysis of the second limb of the *Lange* test through its interpretation of what constitutes a relevant burden.

IV SOME COMMENTARY

This section provides some commentary on the two cases of *Coleman* and *Mulholland*. The issues discussed are the institutional focus of the implication, the way in which the justices have approached the task of determining what is relevant to the operation of the constitutionally-prescribed system of government, and the requirement of a pre-existing right to communicate before a relevant burden on the freedom can exist.

Institutional focus and judicial review

Coleman (albeit through a concession regarding the application of *Lange*) and *Mulholland* have confirmed that the implied freedom of communication has an institutional focus and foundation. By this I mean that the implied freedom exists in order to ensure the effective operation of constitutional structures, rather than because of an explicit concern for individuals' rights or freedoms — these are merely inevitable by-products of the *Lange* implication. In *Coleman*, the institutional focus was described thus by McHugh J:

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117 Ibid 634 [190].
118 Ibid 634 [189], quoting Mason CJ in *ACTV* (1992) 177 CLR 106, 129.
119 *Mulholland* (2004) 209 ALR 582, 680 [361].
120 Ibid 650 [252]–[253] (emphasis in original).
121 Ibid 652 [255], 657 [278].
122 Ibid 650-1 [255].
123 Ibid 657 [279].

> If the system is to operate effectively, however, of necessity it must be free from laws whose burdens interfere or have a tendency to interfere with its effectiveness. Thus, it is a necessary implication of the system that no legislature or government within the federation can act in a way that interferes with the effective operation of that system. But since the implication arises by necessity, it has effect only to the extent that it is necessary to effectively maintain the system of representative and responsible government that gives rise to it.[124]

The questions which will therefore lie underneath any case concerning the implication are: 'what is the system' and what is 'necessary' to ensure the effective maintenance of that system? Further, a significant issue in this area of law is *how* the Court answers those questions. A couple of preliminary observations can be made here with respect to the Court's reasoning in *Coleman* and *Mulholland*. The Court has confirmed that the institution to be protected is the system of representative and responsible government established by the *Constitution*. In *Mulholland*, the Court went into some detail regarding the system of government established by the *Constitution*, due to the other arguments raised in the case.[125] In doing so, the consistent message was that the Parliament has significant power to determine the detail of the political systems and institutions in place as part of representative and responsible government. The phrase 'until the Parliament otherwise provides' throughout the *Constitution* confirms this approach, as well as the lack of specific references to the system of government in the text.

This power of the Parliament affects the role of the Court in adjudicating with respect to the system of government. However, none of the justices challenged the ability of the Court to exercise some kind of supervisory role over governmental action. In *Mulholland* the Court acknowledged that there are 'certain fundamental requirements'[126] or 'an irreducible minimum content'[127] of the system against which they will judge governmental action. These requirements were not fully explained.

In relation to the exercise of the Court's supervisory role, a focus on the text of the *Constitution* has been confirmed, with McHugh J being the most vocal member of the Court in this regard. In both *Coleman* and *Mulholland* McHugh J maintained his position that the text and structure of the *Constitution* is the font of the freedom and that no resort should be made to 'political or other theories external to the Constitution.'[128] It seems almost axiomatic that any act of interpretation must involve some kind of theory, if only a theory of interpretation itself. This is acknowledged by McHugh J.[129] While theories of interpretation may be excluded from this prohibition,

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124 *Coleman* (2004) 209 ALR 182, 206 [89].

125 *Mulholland* (2004) 209 ALR 582, 585–7 [6]–[14] (Gleeson CJ), 599-601 [62]–[66], 604 [73], 605–6 [78] (McHugh J), 623–4 [150]–[152] (Gummow and Hayne JJ), 638–40 [211]–[215] (Kirby J), 675 [344] (Heydon J).

126 Ibid 586 [9] (Gleeson CJ).

127 Ibid 586 [10] (Gleeson CJ), 599 [63] (McHugh J).

128 *Coleman* (2004) 209 ALR 182, 206 [88]. See also *Mulholland* (2004) 209 ALR 582, 609 [88] where McHugh J stated that the system of representative government and the implied freedom are concepts 'confined by reference to what the specific provisions of the Constitution are necessarily thought to require.'

129 In *McGinty v Western Australia* (1996) 186 CLR 140, 230 McHugh J acknowledged that '[a]ny theory of constitutional interpretation must be a matter of conviction based on some theory external to the Constitution itself.' See further at 230-2.

political principles or theories are not. The rejection of any such theoretical influences has been subject to much criticism.[130] One critic goes so far as to argue that reference to material outside the text of the *Constitution* may be 'required by the very nature of the concepts within the Constitution' and that in doing so one may 'claim fidelity to the Constitution.'[131] In *Coleman*, McHugh J outlined some of the criticisms made by Stone, another critic, enticing readers of the judgment to read on to see a resolution of the debate. Unfortunately, he does not counter the criticisms but merely restates his position without explanation, that the 'matters [raised in the criticism] show that … the text and structure of the Constitution enable the court to determine whether the freedom has been infringed without resort to political or other theories external to the Constitution.'[132]

Coverage and protection[133] of political communication

Criticisms of this text-based approach are essentially about the method of judicial review to be adopted with respect to the implied freedom. Here I continue the analysis of that method by considering how the Court addressed the scope of relevant communication for the purpose of the freedom. Perhaps not surprisingly, the Court did not speak with one voice in its approach to what is relevant communication.

Most of the judges seem to have accepted the two-stage approach of the *Lange* test. First, determine whether the law burdens the freedom and in doing so, address what is relevantly 'political' in a constitutional sense to determine the *coverage* of the freedom. Then, address whether the burden is justified by considering what is 'necessary' for the constitutional system of government to determine the amount of *protection* granted by the freedom. However, as noted below,[134] any clear separation between the two may be collapsing in the analysis of some members of the Court.

At both stages of this analysis the justices have revealed what they consider to be important elements of the constitutional system of government. Some members of the Court focused on the reality of politics and others emphasise what they believe the political system *should* look like. In *Mulholland*, Gleeson CJ, McHugh and Kirby JJ referred to the importance of political parties in Australian political practice in order to conclude that party affiliation on ballot papers is relevant communication and

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130 See, eg, Stone, above n 12. 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, 439 where he, like others, maintains that it is 'necessary and desirable to establish a sound theoretical basis for the implied freedom', his favoured conception being that of 'popular sovereignty'.

131 Stephen Donoghue, 'The Clamour of Silent Constitutional Principles' (1996) 24 *Federal Law Review* 133, 149 fn 122. See also at 171–2.

132 *Coleman* (2004) 209 ALR 182, 206 [88].

133 This is Schauer's dichotomy. See Frederick Schauer, *Free Speech: A Philosophical Enquiry* (1982), ch 7, where he distinguishes between 'coverage' of a right or freedom of speech, which sets the outer limits of what speech could fall within the right or freedom, and 'protection', which is the extent to which, and the manner in which, the covered communication is in fact protected in a particular set of circumstances. I am grateful to Dr Adrienne Stone for bringing it to my attention.

134 See text following n 140 below.

therefore covered by the freedom.[135] Considering the rationale of the freedom, these references could be taken to mean that those justices assume the constitutional legitimacy of political parties within that system. The freedom covers communication that is relevantly political in a constitutional sense, that is, connected to the system of representative and responsible government. If political party affiliation is included in its scope, political parties must be a legitimate part of the system. By the members of the Court relying on 'reality' to support this argument, the status quo is seen to be a relevant touchstone of what is constitutional government.

By contrast, in *Coleman*, Callinan and Heydon JJ reached their ultimate conclusion by focusing on the civility of discourse as an important part of political debate. In this instance, these justices painted a picture of the system of government as they believe it should exist, or as they believe it would most effectively operate, and use that ideal as the measure for what communication will be protected by the freedom. Callinan J seems to have argued that insulting language is not relevantly political. Heydon J did not do so explicitly, but hinted in that direction. Whether these justices limit the freedom's operation on the basis of coverage or protection, they both appear to be incorporating an aspiration for reasonable, civil communication within the constitutional system of government.

Critiquing the pre-existing right argument

In my view, the reasoning in *Mulholland* with respect to the need for a pre-existing right to communicate before a law will relevantly burden the freedom of political communication raises the most significant issues with respect to the 'existence and nature of the "freedom"'.[136] In *Mulholland*, a majority avoided addressing the second limb of the *Lange* test by concluding that, as Mulholland did not identify a right for the DLP to have its name above the line on the Senate ballot paper that existed independently of the Act which contained the impugned restrictions on such publication, there was no burden on the freedom.

The consequence of this argument is that Parliament has the power to create limited rights of communication, which, if connected to the restrictions to the extent that the right and the restrictions exist in one piece of legislation, can never be considered as limitations on freedom of political communication. Seemingly, Parliament can avoid the implication by only granting limited rights, because the argument turns on whether the right and the impugned limitations are contained within the same Act.

This approach seems to elevate form over substance rather than assessing the impact of the restriction on the system of constitutional government, which is at the heart of the implication. By forestalling the analysis at this threshold, on the basis that no separate right was identified, it is conceivable that the system may be detrimentally affected without the ability of the courts to protect it. Consider the following extreme hypothetical example. In the future, the predominant form of communication regarding political issues prior to elections becomes internet chat sites. The government somehow controls access to all chat sites. It allows communication through those chat sites by requiring users to obtain a licence under the *Chat Sites Act*

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135 However, it should be remembered that they concluded that it is not protected in the circumstances because the legislation restricting the communication satisfies the second stage of the *Lange* test.

136 *Mulholland* (2004) 209 ALR 582, 634 [192] (Gummow and Hayne JJ).

2030 (Cth). The licence fee is $100,000. As that restriction is established within the Act that provides the right to communicate on the chat sites, the implied freedom is not burdened unless a separate right to communicate is found outside the Act. Following the logic of the reasoning in *Mulholland*, this holds true regardless of the practical detrimental effect on political communication prior to federal elections. This is because the 'threshold' is not passed, so the second limb of the *Lange* test, that of compatibility between the restriction and the system of government, is not reached.

Another issue to explore with respect to this part of the reasoning in *Mulholland* is what kind of legal rule qualifies as a ' pre-existing right'. A variety of terms are used by members of the Court: 'freedom', 'common law right', 'constitutional right or right to the imposition of an obligation upon another', 'right or privilege … under the general law'.[137] It is not clear whether the judges mean different things. It also produces an interesting comparison with *Coleman*, where there appeared to be a consensus as to the existence of a common law right or freedom with respect to free speech. This was not referred to in *Mulholland*, perhaps because the argument took place and orders were made in that case prior to the judgment in *Coleman*.[138] It may be argued that if there is a fundamental right of free speech at common law (as is suggested at least by some of the Court in *Coleman*), this could constitute a relevant 'pre-existing right'. If not, is that because the common law rules are not truly characterised as rights, or because the pre-requisite right must be quite specific, to allow the particular *form* or *content* of communication that is burdened by the challenged law?

The division between Kirby J and most of the other justices on the basis of this pre-existing right argument seems to reflect a broader disagreement with respect to what constitutes a relevant burden and what 'freedom' means in this context. The difference can be characterised as a distinction between a 'pure' burden and a 'relevant' burden. The majority on this point seem to be aligned with McHugh J's analysis, that the 'freedom' at issue does not mean an absolute freedom from all regulation or restraint, but a freedom from a relevant type of burden. This conclusion is reached by defining some regulation as beneficial for the operation of the system of government and therefore not a relevant burden.[139] In contrast, Kirby J took a more absolute view. If communication is burdened in any way, that restriction is a relevant burden, with the legitimacy of that burden being a separate issue.[140] The distinction between the two approaches suggests that the majority have, to some extent, collapsed the two stages in

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137 The combination of these phrases brings to mind Hohfeld's analysis of legal rights as set out by Waldron in Jeremy Waldron (ed), *Theories of Rights* (1984) 6–7. Waldron outlines the way in which Hohfeld characterised legal rights as privileges, claim rights, powers and immunities, with each label bearing a different meaning.

138 The orders in *Mulholland* were delivered on 20 May 2004 but the reasons were not published until 8 September 2004, with the reasons in *Coleman* having been published on 1 September 2004. Nor was the 'pre-existing right' argument raised in *Coleman*, presumably because of the concessions made by the parties.

139 *Coleman* (2004) 209 ALR 182, 208-9 [97] (McHugh J); *Mulholland* (2004) 209 ALR 582, 601 [66], 602–3 [69]–[70], 611 [97]–[98] (McHugh J). See also *Coleman* (2004) 209 ALR 182, 265 [323] (Heydon J) and *Mulholland* (2004) 209 ALR 582, 595 [41] (Gleeson CJ).

140 *Coleman* (2004) 209 ALR 182, 239 [230], 239 [232]. The Chief Justice did not explicitly address the pre-existing right argument. However, his analysis in *Mulholland* suggests that he may be more in line with Kirby J's approach on this issue than the remainder of the Court.

the *Lange* test by incorporating an evaluation of compatibility with the system of government in determining the character of any alleged 'burden', rather than addressing whether the freedom is burdened and the legitimacy of that burden as sequential and separate questions.[141]

V CONCLUSION

Coleman and *Mulholland* are the latest additions to the developing law of implied free speech under the *Constitution*. Perhaps unsurprisingly, they provide neither a unanimous position, nor a clarification of all aspects of this area of law. What they do provide is a glimpse of the attitudes of the Court as at 2004 and confirmation of some of the basics of the *Lange* principles. It remains the case that the implied freedom of political communication is not a free-standing boundless freedom of speech, enforceable by all to protect general speech, but is a limited immunity from some government action. By contrast, in *Coleman*, the Court identified a very broad 'fundamental' common law right or freedom of speech. The constitutional freedom is intrinsically connected only to that which is determined to be necessary for the maintenance of the constitutional institutions known as representative and responsible government. Individual rights are *not* the focus of the implied freedom, yet the Court must consider specific factual circumstances of individuals in order to determine the implied freedom cases brought before the Court.

In determining what is necessary for the maintenance of the constitutional system of government, different methods of analysis and different versions of what that system contains are vying for ascendancy. On the one hand, some justices are concerned with civility and the effective operation of a system that fits an ideal. On the other, some justices seem to be trying to protect what they perceive to be the status quo by emphasising the practice or reality of politics in Australia. Neither approach is without its faults. No clear standard of review emerges other than what could be called a collection of approaches that all look to whether there is a 'fit' between the law and a legitimate objective.

These cases show the Court to be eager to avoid the constitutional issue, or at least avoid a full analysis of the *Lange* test. In *Coleman*, the Court made statutory interpretation the primary legal act, perhaps influenced by the *Constitution*, followed by constitutional analysis only if an answer is not reached by interpretation alone. In *Mulholland*, a majority applied a threshold requirement of a pre-existing right to communicate before a law can burden the freedom. This requirement raises a number of issues, left to be resolved in future cases.

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141 I acknowledge that this conclusion of a collapsing of the two stages of the *Lange* test may appear to sit uneasily with the suggestion above that the pre-existing right requirement forestalls the analysis in the second step of that test. It may be that the majority's view of the *nature* of the implied freedom has led to the requirement of the pre-existing right, which must be satisfied as a step antecedent to the analysis of any impugned restriction in accordance with this notion of being a *relevant* burden rather than being any mere restriction on communication.