

THE APPLICATION OF THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION TO STATE ELECTORAL FUNDING LAWS

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I INTRODUCTION

Recent controversial amendments to the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) in 2010 and 2012 have led to questions being asked about their compatibility with the implied freedom of political communication. The 2010 amendments imposed caps on political donations and electoral communication expenditure.¹ The 2012 amendments banned political donations to political parties, candidates, members of Parliament and third-party campaigners from any body or person other than a person on the state, Commonwealth or local government electoral rolls.² The Select Committee examining the latter Bill discussed the constitutional validity issue in some detail.³ It concluded that if enacted, there was a significant risk that there would be a constitutional challenge to the Act and that such a challenge would have

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1 *Election Funding and Disclosures Amendment Act 2010* (NSW). Note also the provisions *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ss 96GAA–96GB, which ban donations from property developers and tobacco, liquor and gambling industry entities, including donations from directors, officers and major shareholders of such entities and their spouses. Note that the ban on property developer donations was introduced earlier in the *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009* (NSW).

2 *Election Funding, Expenditure and Disclosures Amendment Act 2012* (NSW). Bans on donations from directors, officers and major shareholders of property developers and tobacco, liquor and gambling industry entities and their spouses remain, even if they are on the electoral roll and would be otherwise qualified to donate.

3 Legislative Council Select Committee on the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011, Parliament of NSW, *Inquiry into the Provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011* (2012) 89–107.

some possibility of success.⁴ It recommended amendments to reduce this risk, but these were not adopted by the Government.⁵

Most of the discussion of this subject has been about whether these electoral funding laws meet the second limb of the *Lange* test – that is, whether they are reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the system of government prescribed by the *Commonwealth Constitution*.⁶ There has so far been inadequate consideration of the equally complex question of the extent to which an implied freedom of political communication might apply to state electoral funding laws. This article picks up that deficit in the current debate and primarily addresses this fundamental issue, before moving on to a brief discussion of the second limb of the *Lange* test.

The connection between the implied freedom of political communication and state laws is not, at first, obvious. The implied freedom, as first identified by the High Court in 1992,⁷ was derived from the *Commonwealth Constitution* on the basis that it was necessary to support the system of representative government established by the *Commonwealth Constitution*. For a short period this implication was broadly based upon the requirements of a system of representative government,⁸ but in 1996–97 the High Court pulled back from this position, firmly grounding the implied freedom in the text of the *Commonwealth Constitution*⁹ and in particular sections 7 and 24 of the *Constitution* which provide that members and senators are to be ‘directly chosen by the people’ and section 128 which provides that voters must approve constitutional amendments by way of referendum before they can be made.

The High Court held that the choice made by electors in Commonwealth elections and referenda must be a free and informed choice, which can only be the case if voters are free to make and receive communications about political matters. In *Lange*, the High Court observed that ‘sections 7 and 24 and the related sections of the *Constitution* necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors’¹⁰ in Commonwealth elections or referenda.

4 Ibid 104–5.

5 Note, however, the Government’s insertion of s 87(4) which was intended to ameliorate a problem identified by the Select Committee concerning the funding of ‘issues campaigns’ by third parties: NSW, *Parliamentary Debates*, Legislative Assembly, 16 February 2012, p 8458 (Mr O’Farrell).

6 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (*‘Lange’*), as altered by *Coleman v Power* (2004) 220 CLR 1, 50 [93] (McHugh J), 78 [196] (Gummow and Hayne JJ), 82 [211] (Kirby J).

7 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (*‘Australian Capital Television’*); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (*‘Nationwide News’*).

8 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 (*‘Theophanous’*); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 (*‘Stephens’*).

9 The herald for this change was *McGinty v Western Australia* (1996) 186 CLR 140 (*‘McGinty’*), even though it concerned a different implication. See also *Muldowney v South Australia* (1996) 186 CLR 352. The High Court’s position was confirmed in a unanimous judgment in *Lange* (1997) 189 CLR 520.

10 *Lange* (1997) 189 CLR 520, 560.

If this is so, then how does this implied freedom extend to limit state laws and does it apply to political communications about purely state matters? This article explores the extent to which the Commonwealth implied freedom of political communication may render state laws invalid and whether it affects state laws concerning state political matters which have little if any bearing on Commonwealth elections or referenda. It considers whether a separate implication might be drawn from the *Commonwealth Constitution* that requires representative government at a state level and gives rise to a state freedom of political communication. It also considers whether the *NSW Constitution* might give rise to an implied freedom of political communication.¹¹

The article then concludes by discussing the particular problems that arise in relation to state constitutional and electoral laws and whether recent changes to NSW electoral campaign funding laws might breach an implied freedom of political communication.

II THE IMPACT OF THE COMMONWEALTH IMPLIED FREEDOM OF POLITICAL COMMUNICATION ON STATE LAWS

To what extent does the Commonwealth implied freedom of political communication limit state legislative power? It is clear that state laws, such as defamation laws, have the potential to limit political communication concerning matters relevant to Commonwealth elections. For example, to the extent that a state law limited the capacity of persons to criticise the policies of Commonwealth ministers or the capacities or integrity of Commonwealth members of Parliament or candidates for election, such a law would potentially breach the implied freedom.¹²

It is important to keep in mind the constitutional basis upon which the state law is affected. This is not an issue of inconsistency under section 109 of the *Constitution* where a state law is rendered inoperative to the extent of its inconsistency with a Commonwealth law. In this case there is no Commonwealth law with which the state law is inconsistent. Instead, it is an inconsistency with the *Commonwealth Constitution*. Covering clause 5 of the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12 provides that the *Constitution* ‘shall be binding on the courts, judges and people of every State ... notwithstanding anything in the laws of any State’. Section 106 of the *Constitution* preserves state constitutions, but this is ‘subject to this Constitution’, including constitutional implications. Section 107 of the *Constitution* preserves the powers of state Parliaments, unless they are exclusively vested in the Commonwealth Parliament or ‘withdrawn from the Parliament of the State’. Arguably, the implied freedom of political communication acts as a limitation on

11 *Constitution Act 1902* (NSW).

12 *Theophanous* (1994) 182 CLR 104; *Lange* (1997) 189 CLR 520.

state legislative power by withdrawing the capacity of a state legislature to make laws that would breach the implied freedom. The crucial difference between the operation of section 109 of the *Constitution* and the operation of covering clause 5 and sections 106–7 of the *Constitution*, is that section 109 does not affect the power of the state to make the law (merely its operative effect)¹³ whereas covering clause 5 and sections 106–7 affect the power of the state Parliament to enact a law,¹⁴ with the consequence that a state law is void *ab initio* if it breaches the *Commonwealth Constitution*.

In determining whether a state law breaches the *Commonwealth Constitution*, the State law must be characterised by reference to what it does – what rights, powers, privileges, immunities or prohibitions it confers or imposes. Hence the primary question for a court should be ‘What does the state law do and does this cause it to be in breach of the *Commonwealth Constitution*?’ While this might seem elementary, it is curious that many of the cases concerning the implied freedom of political communication do not focus upon what the impugned law actually does (that is, whether the provisions of the law breach the implied freedom of political communication by unduly inhibiting political communication about matters that might conceivably inform the vote of an elector in Commonwealth elections or referenda)¹⁵ but rather upon the nature of the communication in the particular case.¹⁶ As Bathurst CJ observed in *Sunol v Collier (No 2)*:

Although the acts complained of may be of assistance in identifying the type of publications or speech which would generally fall within the challenged sections, the question posed must be answered by reference to the legislation itself rather than the acts complained of. This also follows from the fact that the implied freedom is a limitation on legislative power not an individual right.¹⁷

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- 13 *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557, 573 (Latham CJ); *Butler v Attorney-General (Vic)* (1961) 106 CLR 268, 286 (Windeyer J); *Western Australia v Commonwealth* (1995) 183 CLR 373, 464–5 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).
- 14 *Theophanous* (1994) 182 CLR 104, 156 (Brennan J), 165 (Deane J). See also Dawson J: at 190 for various grounds upon which a state law breaching ss 7 and 24 of the *Commonwealth Constitution* might be invalid.
- 15 See *Wotton v Queensland* (2012) 86 ALJR 246, 236 [80] (‘*Wotton*’) where Kiefel J rightly observed: ‘The question is how the legislative provisions, which are sought to be impugned, may affect the freedom generally’, rather than whether the plaintiff is limited in the way he can express himself. See also: *APLA Ltd v Legal Service Commissioner of New South Wales* (2005) 224 CLR 322, 451 [381] (Hayne J).
- 16 See, eg, *Brown v Classification Review Board* (1998) 82 FCR 225, where the Federal Court focused upon whether an article about shop-lifting in a banned issue of the La Trobe University newspaper ‘Rabelais’ amounted to political communication, rather than whether the censorship law under which it was banned burdened political communication in a manner that was in breach of the implied freedom of political communication and could not be read down. 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, 468–9; Adrienne Stone, ‘Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication’ (2001) 25 *Melbourne University Law Review* 374, 381–2. Note, however, that the nature of the communication in question may be relevant if the law is to be read down so that it is constitutionally valid.
- 17 *Sunol v Collier (No 2)* (2012) 260 FLR 414, 421 [24] (Bathurst CJ); see also at 415 [81] (Basten JA); *Monis v The Queen* (2011) 256 FLR 28, 40 [47] (Bathurst CJ); *Owen v Menzies* [2012] QCA 170, [71] (McMurdo P).

What if a state law impinges upon freedom of political communication with respect to state matters rather than Commonwealth matters? From the very start, the High Court has been wary of trying to draw a borderline between political communications on state matters and Commonwealth matters. In the early cases on the implied freedom the Court contended that political communication in this context was indivisible.¹⁸ This was because:

- Commonwealth policies and funding affect state political affairs;
- the same political parties operate across state and federal levels;
- political issues, such as the environment, education, health and industrial relations may be dealt with by more than one level of government;
- political ideas and debate flow across all levels of government; and
- what one learns from political experience with one level of government may affect how one votes with respect to the other level of government.¹⁹

One might well add to this analysis that in practice voters usually do not know which level of government is responsible for a policy area in any event.²⁰ Further, the Commonwealth's legislative powers have been broadened by High Court interpretation to such an extent²¹ that the Commonwealth can now intervene in almost all areas of state political responsibility, rendering any attempt at allocating responsibilities to different levels of government rather pointless.

Accordingly, state laws that burden the freedom to communicate about political matters, even if they be state political matters, may be held to breach the freedom of political communication implied from the *Commonwealth Constitution*,²² at least where there is a connection of some kind with informing federal electors in the exercise of their vote. As Zines has explained the position:

This reasoning (which was not spelt out) does not rely on any constitutional entrenchment of State representative government. It is rather that *Commonwealth* representative government requires free communication of State governmental affairs. A State cannot therefore impair that freedom.²³

18 *Nationwide News* (1992) 177 CLR 1, 75–6 (Deane and Toohey JJ); *Australian Capital Television* (1992) 177 CLR 106, 142 (Mason CJ), 168–9 (Deane and Toohey JJ); 215–17 (Gaudron J); *Theophanous* (1994) 182 CLR 104, 122 (Mason CJ, Toohey and Gaudron JJ); *Stephens* (1994) 182 CLR 211, 232 (Mason CJ, Toohey and Gaudron JJ), 257 (Deane J).

19 See also a more comprehensive list of indivisibility factors in Gerard Carney, 'The Implied Freedom of Political Discussion – Its Impact on State Constitutions' (1995) 23 *Federal Law Review* 180, 183.

20 Query, however, whether the implied freedom should relate to what might *actually* affect the choice of voters, regardless of how misconceived that influence may be, or what is objectively *relevant* to the choice of voters, regardless of whether the voters see it as relevant or not. Note Meagher's discussion of the appropriateness of judges making such a distinction: Meagher, above n 16, 465.

21 See, eg, the expansion of the corporations power in the *Work Choices Case* so that it now potentially gives the Commonwealth control over education and health: *New South Wales v Commonwealth* (2006) 229 CLR 1, 224 [539] (Kirby J), commenting on the effects of the judgment of the majority.

22 *Stephens* (1994) 182 CLR 211, 232 (Mason CJ, Toohey and Gaudron JJ). Cf Brennan J: at 235 who thought that the publication of criticism of members of a state Parliament was 'irrelevant to the government of the Commonwealth and is unaffected by the implication'.

23 Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 545.

III DOES THE COMMONWEALTH IMPLIED FREEDOM AFFECT STATE LAWS THAT HAVE NO BEARING ON COMMONWEALTH POLITICAL MATTERS?

The High Court has held that the implied freedom of political communication, derived from the *Commonwealth Constitution*, is there to support the representative system of government established by the *Commonwealth Constitution*. Could a state law which inhibits political communication about matters intimately related to the state constitution, such as state electoral laws, and which has no bearing on Commonwealth elections or referenda, potentially breach the Commonwealth implied freedom of political communication? The early High Court judgments from 1992–94, in proclaiming the ‘indivisibility’ of political communication, sought to avoid the making of such distinctions. This was an essentially pragmatic approach for the reasons noted above. Yet, it is inevitable that some line must be drawn or otherwise all communications could be regarded as having a potentially ‘political’ element, leading to a general freedom of communication, rather than a freedom of political communication.²⁴

The change in attitude from 1996 onwards,²⁵ which caused the Court to anchor the implication much more firmly in the text of the *Constitution*, adds further support to the need to draw a line. *Muldowney v South Australia* provides a good example.²⁶ Section 126 of the *Electoral Act 1985* (SA) prohibited a person from publicly advocating that a voter should mark a ballot paper otherwise than in the manner prescribed by section 76 of that Act. It was argued in *Muldowney* that both sections 76 and 126 breached an implied freedom of political communication derived either from the *Commonwealth Constitution* or the *South Australian Constitution*.

Chief Justice Brennan concluded that the implication arising from the *Commonwealth Constitution* had no effect upon a state electoral law. He observed:

In so far as the freedom of political discussion implied in the Commonwealth Constitution is invoked to invalidate s 126(1)(b) and (c) [of the *Electoral Act 1985* (SA)], the attack on the validity of the section is misconceived. The freedom of political discussion implied in the Commonwealth Constitution is implied to protect the working of the system of government of the Commonwealth prescribed by the Constitution, but not to protect the working of the system of government prescribed by the Constitution of a State. Although the provisions of the Commonwealth Constitution prevail in the event of any inconsistency with the powers otherwise vested in the Parliament of a State, none of the provisions from which a freedom of political discussion is inferred affects the method of election of the members of a State Parliament. Nor does s 126 affect the government of the Commonwealth. The validity of s 126 is

24 Meagher, above n 16, 465; Tom Campbell and Stephen Crilly, ‘The Implied Freedom of Political Communication, Twenty Years on’ (2011) 30 *University of Queensland Law Journal* 59, 67. For a discussion of line-drawing and various options, see Stone, above n 16, 380–90.

25 See, Michael Chesterman, ‘When is a Communication “Political”?’ (2000) 14(2) *Legislative Studies* 5.

26 *Muldowney v South Australia* (1996) 186 CLR 352 (*‘Muldowney’*).

therefore unqualified by the implied freedom of political discussion to be found in the Commonwealth Constitution.²⁷

Justice Toohey agreed that the Commonwealth implied freedom of political communication did not apply in this case.²⁸ Justice Dawson was also of the same view. He observed:

In *McGinty v Western Australia I* agreed, for the reasons given by the Chief Justice, that the Commonwealth Constitution provides only for Federal elections and its provisions in that regard, including any implications to be drawn from them, do not prescribe the mode of State elections. That does not, of course, mean that the Commonwealth provisions do not extend to the States, but they do so in relation to Federal elections and not State elections.²⁹

Justice Gaudron, however, while accepting that the purpose of the implied freedom of political communication ‘is to maintain the democratic processes of the Commonwealth of Australia, not those of its States’,³⁰ considered that the *Commonwealth Constitution* required the States to maintain a democratic system of government.³¹ Accordingly, the Commonwealth implication would not result in state legislation being held invalid if the state legislation was capable of being viewed as operating to further the democratic processes of the states, provided that the state legislation did not interfere with the democratic processes of the Commonwealth.³² For Gaudron J, the boundaries of the application of the implication were more flexible and the implication was more likely to extend to the states even when the communication in question had no real bearing on Commonwealth political matters. Justice Gummow, with whom McHugh J agreed, found it unnecessary to decide whether or not the Commonwealth implication applied to a State electoral law.³³

The High Court next addressed the issue in *Lange*, which dealt with state defamation laws and the application of the Commonwealth implied freedom of political communication. The High Court’s unanimous judgment stressed that the freedom of political communication which the *Commonwealth Constitution* protected ‘is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the [*Commonwealth*] *Constitution*’.³⁴ Their Honours set out the limits of the implication, noting:

To the extent that the requirement of freedom of communication is an implication drawn from ss 7, 24, 64, 128 and related sections of the *Constitution*, the implication can validly extend only so far as is necessary to give effect to these sections.³⁵

27 Ibid 365–6 (Brennan CJ) .

28 Ibid 373–4 (Toohey J)

29 Ibid 370 (Dawson J). See also *McGinty* (1996) 186 CLR 140, 175–6 (Brennan CJ), 189 (Dawson J), 210 (Toohey J), 250–1 (McHugh J).

30 *Muldowney* (1996) 186 CLR 352, 375 (Gaudron J).

31 This is stated more clearly in *McGinty* (1996) 186 CLR 140, 216 (Gaudron J).

32 *Muldowney* (1996) 186 CLR 352, 376 (Gaudron J).

33 Ibid 387–8 (Gummow J), 381 (McHugh J).

34 *Lange* (1997) 189 CLR 520, 561.

35 Ibid 567.

In setting out its test for the breach of the Commonwealth implied freedom of political communication, the High Court stated that the freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies certain conditions. One condition is that ‘the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government’.³⁶ The ‘constitutionally prescribed system of government’, is that prescribed by the *Commonwealth Constitution*, not the state constitution.

In taking the further step of expanding the common law defence of qualified privilege in *Lange*, the Court included within that privilege the discussion of government and politics at state, territory or local level ‘whether or not it bears on matters at the federal level’. To this extent the qualified privilege extended ‘beyond what is required for the common law of defamation to be compatible with the freedom of communication required by the Constitution’.³⁷ While this shows the Court’s recognition of the distinction between the constitutional implication (which requires a connection to the system of representative government set out in the *Commonwealth Constitution*) and the qualified privilege (which is broader), this quotation has on occasion been misinterpreted as stating that the Commonwealth implication applies to state laws concerning state political matters, regardless of whether or not they bear on matters at the federal level.³⁸

As the implied freedom only serves the purpose of protecting the Commonwealth system of government, a state law which limits political communication but which has no effect at all on the Commonwealth system of representative and responsible government and no bearing on how federal electors would exercise their vote ought not to be held invalid as a result of the Commonwealth implication. Some judges have approached this issue quite strictly. For example, a state law which affected communication about religious matters and ‘church politics’ was held not to breach the constitutional implication because such discussion was not needed to give effect to the system of government established by the *Commonwealth Constitution*.³⁹ Equally, a local government planning decision was held to have no relevance to the Commonwealth system of representative government and the capacity of Commonwealth electors to make an informed choice in Commonwealth elections.⁴⁰ As Sackville J said in *Direct Factory Outlets Homebush Pty Ltd v Property Council of Australia*:

36 Ibid 562, 567.

37 Ibid 571.

38 See, eg, *Sellars v Coleman* [2001] 2 Qd R 565, 571 [26] (Muir J); *Roberts v Bass* (2002) 212 CLR 1, 58 [159] (Kirby J).

39 *Harkianakis v Skalkos* (1999) 47 NSWLR 302, 306–7 [17]–[18] (Dunford J).

40 *Direct Factory Outlets Homebush Pty Ltd v Property Council of Australia Ltd* (2005) 148 FCR 12, 29–30 [70]–[72] (Sackville J) (*‘Direct Factory Outlets’*). See also *Treby v Local Government Standards Panel* [2010] WASAT 81 [53]; *McLure v City of Stirling [No 2]* [2008] WASC 286, [80]–[88] (Beech J).

It is ... clear that if a communication is to come within the first limb of the *Lange* test it must concern the system of representative and responsible government for which the *Constitution* provides. A communication on a matter that bears neither on the choices that people have to make in federal elections or referenda, nor on their evaluation of the performance of the executive branch of the federal Government, is not a communication about government or political matters within the meaning of the *Lange* test.⁴¹

Others have found it easier to draw connections with Commonwealth legislation. Hence, a State anti-discrimination law concerning vilification of homosexuals was regarded as forming ‘part of the fabric of political debate in this country’ and bearing ‘on the choice people have to make at federal elections’.⁴²

In a number of other cases in which the Commonwealth implied freedom of political communication has been raised in order to invalidate state laws, there has been a concession on the part of the state that the Commonwealth implication applies⁴³ or the case has been argued on that basis, even when the connection with the Commonwealth system of representative government seems strained. For example, in *Levy v Victoria*, the impugned State laws concerned access to duck hunting areas at the beginning of duck shooting season. While the connection between duck hunting laws and federal elections seemed to be ‘remote’⁴⁴ at best, the State argued the case on the basis that the Commonwealth implied freedom applied, but that the law was reasonably appropriate and adapted to meet a legitimate end and therefore did not breach the implied freedom. As the Court accepted that the law was reasonably appropriate and adapted, it did not need to decide whether there was a sufficient connection with the *Commonwealth Constitution*.⁴⁵

Similarly, in *Coleman v Power*, the respondents and interveners conceded that the State law, which prohibited the use of insulting language in a public place, did come under the Commonwealth implied freedom. They argued instead that the law met the ‘appropriate and adapted’ test. The majority judges,

41 *Direct Factory Outlets* (2005) 148 FCR 12, 30 [70] (Sackville J). See also *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 151 FLR 81, 97–8 [86]–[89] (Spigelman CJ) (*‘John Fairfax’*); *Brisbane TV Ltd v Criminal Justice Commission* [1996] QCA 295 (McPherson JA) regarding allegations of corruption in the Criminal Justice Commission.

42 *Sunol v Collier (No 2)* (2012) 260 FLR 414, 424 [43] (Bathurst CJ); See also at 428 [65] (Allsop P), 432 [85] (Basten JA).

43 See, eg, *Sellars v Coleman* [2001] 2 Qd R 565, 569–70 [20] (Muir J); *Roberts v Bass* (2002) 212 CLR 1, 58 [159] (Kirby J); *Sunol v Collier (No 2)* (2012) 260 FLR 414, 432 [83] (Basten JA). For discussion of the significance of *Roberts v Bass*, see Geoffrey Lindell, ‘The Constitutional and Other Significance of *Roberts v Bass* – *Stephens v Western Australian Newspapers Ltd Reinstated?*’ (2003) 14 *Public Law Review* 201; Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 200 n 243; Zines, above n 23, 546–7; Helen Chisholm, ‘“The Stuff of Which Political Debate Is Made”: *Roberts v Bass*’ (2003) 31 *Federal Law Review* 225, 240–1.

44 *Levy v Victoria* (1997) 189 CLR 579, 626 (McHugh J). He concluded, however, that he did not need to decide whether there was a federal connection, as the law would pass the ‘appropriate and adapted’ test anyway.

45 Note, however, Justice Brennan’s concern about whether duck-shooting policies could be related to a Commonwealth head of power, such as the external affairs power: *ibid* 596.

however, still sought to find a connection between the offence and federal political affairs, noting that allegations of police corruption at a state level may affect federal political affairs because of the close relationship between federal and state policing.⁴⁶ Their Honours did not suggest that a state law with no connection at all to federal political affairs would still be covered by the Commonwealth implication.⁴⁷

Interestingly, in *Hogan v Hinch*, it was the Commonwealth that argued against a broad application of the Commonwealth implied freedom to State laws concerning State matters. The Commonwealth Solicitor-General contended that:

The implied freedom of political communication protects only communication on a subject that relates expressly or inferentially, structurally or practically, to some action or inaction by the federal legislature or executive for which they are directly or indirectly accountable to the electorate. It should not now be accepted that the implied freedom extends to all communications about politics and government. Increasing integration of social, economic and political matters in Australia means that communications concerning local issues may also constitute communications in relation to federal politics or government. But it must be possible to establish a real even if indirect connection to a federal issue. A law which involves no realistic threat to any freedom of communication about federal political or government affairs will not impinge the freedom.⁴⁸

The Court, however, concluded that it did not need to decide the issue.⁴⁹ Only French CJ commented upon it, observing that while there was a ‘logical attraction’ to limiting the Commonwealth implied freedom to politics or government at the national level, he thought that such a limit was ‘not of great practical assistance’ given the significant interaction between the different levels of government in Australia and the use of cooperative arrangements.⁵⁰

Most recently, in *Wotton v Queensland*,⁵¹ a majority of the Court was quite explicit in drawing the link between national political affairs and the nature of the communications affected by a State law in that case. Their Honours explained:

46 *Coleman v Power* (2004) 220 CLR 1, 44–5 [78]–[80] (McHugh J), 78 [197] (Gummow and Hayne JJ), 88–9 [228]–[232] (Kirby J). Callinan J (dissenting) found no such connection with the implied ‘freedom of communication about federal political, or governmental affairs’, regardless of the concession: at 112 [298]. See also Justice Heydon’s unhappiness with the concession: at 119–120 [317]–[319].

47 Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 128.

48 *Hogan v Hinch* (2011) 243 CLR 506, 520 (S J Gageler SC) (during argument). See also Adrienne Stone, ‘The Freedom of Political Communication since *Lange*’ in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (Federation Press, 2000) 1, 8–10 for a similar view.

49 *Hogan v Hinch* (2011) 243 CLR 506, 547 [65], 556 [99] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). It also avoided the same issue in *Wainohu v New South Wales* (2011) 243 CLR 181, [72] (French CJ and Kiefel J), 231 [114] (Gummow, Hayne, Crennan and Bell JJ). But see Heydon J at 251 [186].

50 *Hogan v Hinch* (2011) 243 CLR 506, 543 [48] (French CJ).

51 *Wotton* (2012) 86 ALJR 246. Note that in this case a concession was made by an intervener to the effect that the first limb of the *Lange* test was satisfied, but not by the defendant: at 256 [41] (Heydon J).

The public discussion of matters relating to Aboriginal and Indigenous affairs, including perceived or alleged injustices, involves communication at a national rather than purely State level about government and political matters, in the sense of the first *Lange* question.⁵²

Their Honours went on also to point out the interaction between State and federal policing and the levels of inter-governmental cooperation involved, which brings it into the field of national affairs.⁵³ Justice Kiefel also noted that ‘[b]ecause of the constitutional context in which the freedom arises, it is necessary that the law affect communications that are of the kind which the freedom protects and that the communications have a Commonwealth dimension’.⁵⁴ There would have been no need to draw out a connection with Commonwealth political matters if the Commonwealth implied freedom applied to *all* political communication about State matters regardless of their relationship with the need for electors to be informed in the exercise of their vote in Commonwealth elections and referenda.

Zines has summarised the position thus:

The position ... seems to be that the simpler proposition expounded in *Stephens v West Australian Newspapers Ltd* that political speech relating to all levels of government in Australia is indivisible has been rejected. However, in line with *Lange* quite a large area of communication about and affecting the State systems has a sufficient connection with the protected federal system to come within the implied freedom. The degree of connection required remains very uncertain, and leaves open the possibility of much further litigation to elucidate the matter. Many matters which constitutionally appear to be within the exclusive power of the States can be of direct concern to the Commonwealth Parliament and government.⁵⁵

Meagher has suggested that the test should not be whether a matter is within the exclusive power of the states, but rather whether the ‘subject matter of the communication is such that it may reasonably be relevant to the federal voting choices of its likely audience’.⁵⁶ This test seems to be consistent with the constitutional basis for the Commonwealth implied freedom.

IV CAN A SEPARATE IMPLICATION OF STATE REPRESENTATIVE GOVERNMENT BE DRAWN FROM THE COMMONWEALTH CONSTITUTION?

If the Commonwealth implied freedom of political communication is drawn from provisions in the *Commonwealth Constitution* which establish a system of

52 Ibid 253 [26] (French CJ, Gummow, Hayne, Crennan, and Bell JJ).

53 Ibid 253 [27] (French CJ, Gummow, Hayne, Crennan, and Bell JJ).

54 Ibid 263 [79] (Kiefel J).

55 Zines, above n 23, 547–8. Note, however, the criticism by Lindell of drawing distinctions between different kinds of political communication and his preference for the ‘indivisible’ approach on pragmatic grounds: Lindell, above n 43, 204.

56 Meagher, above n 16, 467 (emphasis altered). Note, however, Stone’s observation that ‘confining the freedom to matters relevant to federal politics is not a very significant limitation’: Stone, above n 16, 381.

representative government at the Commonwealth level, is it also possible that the provisions of the *Commonwealth Constitution* concerning the states and their electoral systems could be interpreted as requiring that the states have a system of representative government that gives rise to an implied freedom of political communication about state matters?

The *Commonwealth Constitution* contains a number of provisions that refer to state Parliaments and state elections. Section 10 refers to state laws ‘relating to elections for the more numerous House of the Parliament of the State’. Section 25 refers to the disqualification of persons of any race from voting at elections for the more numerous House of the Parliament of a state. Section 30 refers to the qualification of electors for the more numerous House of Parliament of a State and notes that in Commonwealth elections voters may only vote once. Section 31 refers to state electoral laws. Section 41 refers to persons acquiring a right to vote at elections for the more numerous House of the Parliament of a state. Section 123 refers to the approval of the ‘majority of the electors’ of a state voting upon a question. Section 128 also refers to ‘any State in which adult suffrage prevails’.

This would appear to provide a plausible foundation for a Commonwealth constitutional assumption that each State has an electoral system, established by law, according to which electors choose members of their State Parliament. Justices Deane and Toohey in *Nationwide News* observed that ‘the Constitution’s doctrine of representative government is structured upon an assumption of representative government within the States’.⁵⁷ They referred to sections 10, 30 and 31 of the *Commonwealth Constitution* as supporting this ‘assumption’. Justice Gaudron also observed that one reason why the Commonwealth implied freedom must extend to political discourse concerning State affairs

is that the Constitution expressly recognises their Constitutions [section 106], their Parliaments [sections 107, 108, 111, 123, 124] and their electoral processes [sections 9, 10, 15, 25, 29, 30, 31, 41, 123, 128] and, in so doing, necessarily recognizes their democratic nature.⁵⁸

In *ABC v Lenah Game Meats Pty Ltd*, Kirby J commented that the *Commonwealth Constitution* ‘appears to contemplate that State Parliaments, by analogy with the Federal Parliament, will be representative of the people of the State and democratically elected’.⁵⁹

Assumptions, recognition and contemplation, however, do not necessarily give rise to constitutional implications which bind the States.⁶⁰ For example, section 15 of the *Commonwealth Constitution*, as originally enacted, referred to the ‘Houses of Parliament of the State ... voting together’ to fill a casual Senate vacancy. This provision was based upon the assumption that each State

57 (1992) 177 CLR 1, 75 (Deane and Toohey JJ). Compare Justice McHugh’s view that ‘There is not a word in the Constitution that remotely suggests that a State must have a representative or democratic form of government’: *Theophanous* (1994) 182 CLR 104, 201.

58 *Australian Capital Television* (1992) 177 CLR 106, 216 (Gaudron J). See also *McGinty v Western Australia* (1996) 186 CLR 140, 216 (Gaudron J).

59 *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 281–2 [197] (Kirby J).

60 *McGinty* (1996) 186 CLR 140, 184 (Dawson J). See also Carney, above n 19, 192.

Parliament was to be bicameral. The High Court has observed, however, that section 15 of the *Commonwealth Constitution* does not require that a State continue to have two houses in the future.⁶¹ Such assumptions are not binding requirements.

In *McGinty*, Brennan CJ considered that the structure of the *Constitution* was ‘opposed to the notion that the provisions of Ch I [of the *Commonwealth Constitution*] might affect the Constitutions of the States to which Ch V is directed’.⁶² His Honour also rejected an argument that the implication of representative democracy derived from the *Commonwealth Constitution* applied to control state elections because the states formed part of the ‘organic unity’ of the federal system. Chief Justice Brennan concluded that the Commonwealth implication could only have an effect in relation to Commonwealth elections.⁶³

Justice Toohey noted that an implication of equality of voting power at Commonwealth elections did not give rise to an implication of equality of voting power in state elections, as the conduct of state elections would not undermine Commonwealth elections.⁶⁴ Justice Gaudron essentially agreed with the reasoning of Toohey J, even though she retained her view that the *Commonwealth Constitution* requires that the States ‘be and remain essentially democratic’.⁶⁵ Her Honour concluded that this democratic requirement stopped ‘considerably short’ of any proposition that the *Constitution* required that state Parliaments be elected on the basis of ‘one vote, one value’. Justice McHugh also noted that any Commonwealth implication concerning representative government must be based upon the provisions of the *Commonwealth Constitution* concerning Commonwealth elections. Any Commonwealth implication could not shake off its foundations in its application to the states.⁶⁶

Justice Gummow referred to the provisions in the *Commonwealth Constitution* concerning state Parliaments and concluded that the framers of the *Constitution* accepted the structure of government in the colonies as it existed at the time of federation. However, his Honour observed that there was nothing in section 106 or elsewhere in the *Commonwealth Constitution* ‘to bind the States to any particular subsequent stage of evolution in the system of representative government’.⁶⁷

At this stage, it would appear unlikely that the High Court would draw an additional implication from the *Commonwealth Constitution* that the states must have systems of representative government and that there is accordingly an implied freedom of political communication about state matters. However, it

61 *Clayton v Heffron* (1960) 105 CLR 214, 248–9 (Dixon CJ, McTiernan, Taylor and Windeyer JJ). See also *Theophanous* (1994) 182 CLR 104, 201–2 (McHugh J); *McGinty* (1996) 186 CLR 140, 206–7 (Toohey J), 292 (Gummow J).

62 *McGinty* (1996) 186 CLR 140, 175 (Brennan CJ). See also 189 (Dawson J).

63 *Ibid* 175–6 (Brennan CJ). See also 189 (Dawson J).

64 *Ibid* 210 (Toohey J).

65 *Ibid* 216 (Gaudron J).

66 *Ibid* 250–1 (McHugh J). See also *Muldowney* (1996) 186 CLR 352, 365–6 (Brennan CJ); 370 (Dawson J); and 374 (Toohey J).

67 *McGinty* (1996) 186 CLR 140, 293 (Gummow J).

might approach the issue in a different way. In recent times the High Court has shown a propensity to identify ‘constitutional expressions’ in the *Commonwealth Constitution* and then to attribute to them ‘defining’ or ‘essential’ characteristics. This has occurred, in particular, in relation to references to the supreme courts of the states in the *Constitution*.⁶⁸

This approach has been the subject of some criticism. The former Chief Justice of NSW, James Spigelman, noted that:

The concept of a ‘constitutional expression’ provides a textual basis for and, therefore, an aura of orthodoxy to, significant changes in constitutional jurisprudence. That aura dissipates when the court undertakes the unavoidably creative task of instilling substantive content to the constitutional dimension of a constitutional expression by identifying its ‘essential’ features or characteristics.⁶⁹

His criticism of this approach has been joined by Basten JA⁷⁰ and former Justice Sackville.⁷¹ Despite its unsatisfactory basis, it is not inconceivable that the High Court might extend its approach so that it attributes defining or essential characteristics to the ‘constitutional expression’ ‘Parliament of a State’, which include a characteristic that its members be chosen directly by the people in circumstances where there is free political communication. Hence a discrete freedom of political communication at the state level might be identified in the *Commonwealth Constitution*.

V CAN AN IMPLIED FREEDOM OF POLITICAL COMMUNICATION BE DRAWN FROM THE NSW CONSTITUTION?

If the Commonwealth implied freedom of political communication does not affect a state law which burdens political communications about matters only of relevance to the state, then can a freedom of political communication be implied from the state constitution? This is more difficult to ascertain, as most provisions in state constitutions are not entrenched and therefore cannot support overriding implications that limit legislative power. If a provision is not entrenched, any

68 See, eg, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ); *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, 355 [56] (French CJ); *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 580–1 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *South Australia v Totani* (2010) 242 CLR 1, 42–3 [61]–[62] (French CJ), 81 [201], 82 [205], 83–4 [212] (Hayne J), 156–7 [426] (Crennan and Bell JJ); *Hogan v Hinch* (2011) 243 CLR 506, 530 [20], 541–2 [46] (French CJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 210 [47] (French CJ and Kiefel J), 228–9 [105] (Gummow, Hayne, Crennan and Bell JJ); *Crump v New South Wales* (2012) 86 ALJR 623, 632 [31] (French CJ). See also James Stellios, ‘Using Federalism to Protect Political Communication: Implications from Federal Representative Government’ (2007) 31 *Melbourne University Law Review* 239, 259–60.

69 J J Spigelman, ‘The Centrality of Jurisdictional Error’ (2010) 21 *Public Law Review* 77, 80.

70 John Basten, ‘The Supervisory Jurisdiction of the Supreme Courts’ (2011) 85 *Australian Law Journal* 273, 294.

71 Ronald Sackville, ‘Bills of Rights: Chapter III of the Constitution and State Charters’ (2011) 18 *Australian Journal of Administrative Law* 67, 79.

implication drawn from it can simply be overridden by an inconsistent later law, enacted in the ordinary way.⁷²

The *WA Constitution* contains an entrenched provision that requires members of State Parliament to be ‘chosen directly by the people’, imitating sections 7 and 24 of the *Commonwealth Constitution*. It has therefore been held to contain an implied freedom of political communication.⁷³ The SA Government, in *Muldowney*, conceded that the *SA Constitution* also gave rise to such an implied freedom⁷⁴ as entrenched provisions of its *Constitution*, including sections 11 and 27, required that members be elected by the inhabitants of the State. Section 10 of the *Constitution of Queensland 2001* also provides that members of the Queensland Parliament are to be ‘directly elected’ by the eligible electors of the State. However, this provision is not entrenched so it cannot give rise to a binding implication that limits the legislative power of the State.⁷⁵

When it comes to the *NSW Constitution*,⁷⁶ the first question is whether there are sufficient entrenched constitutional provisions to support a constitutional implication of representative government and freedom of political communication.⁷⁷ The *Constitution Act 1902* (NSW) does not contain an express provision, like that in the *Commonwealth Constitution*, which requires that members of Parliament be ‘directly chosen by the people’. Its entrenched provisions are largely directed at preserving the existence and powers of the Legislative Council. The existence or absence of a second house of the Parliament has no real bearing on any implication of representative government or freedom of political communication.

However, it is possible to make a case that some entrenched provisions give rise to an implication of representative government. Section 7A of the *Constitution Act* refers to members of Parliament being ‘elected’ and sections 7B and 11A refer to the holding of a ‘general election’. Section 11B refers to persons who are ‘entitled to vote’ at elections for the Legislative Council and the Legislative Assembly and provides that voting is compulsory. The entitlement to vote, however, is not entrenched, although section 22 provides that persons

72 *McGinty* (1996) 186 CLR 140, 212 (Toohey J); *ICAC v Cornwall* (1993) 38 NSWLR 207, 253 (Abadee J). See also Carney, above n 19, 196–8.

73 *Stephens* (1994) 182 CLR 211, 233–4 (Mason CJ, Toohey and Gaudron JJ), 236 (Brennan J).

74 (1996) 186 CLR 352, 367 (Brennan CJ), 373–4 (Toohey J), 377–8 (Gaudron J), 387–8 (Gummow J). See also *Cameron v Becker* (1995) 64 SASR 238, 247 (Olsson J). For a more detailed analysis of the extent to which a freedom of political communication may be implied from the *SA Constitution*, see Michael Wait, ‘Representative Government under the South Australian Constitution and the Fragile Freedom of Communication of State Political Affairs’ (2008) 29 *Adelaide Law Review* 247, 256–9.

75 See *Brisbane TV Ltd v Criminal Justice Commission* [1996] QCA 295, 21–3 (McPherson JA) regarding the earlier equivalent constitutional provision which was also unentrenched; Gerard Carney, above n 47 *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 133.

76 The following discussion is drawn from Twomey, above n 43, 205–7.

77 Note that Spigelman CJ has observed that the principle of ‘responsible government’ forms part of the *NSW Constitution*, but he did not address the further questions of whether the principle rested on entrenched or unentrenched provisions and whether any other implication may be drawn from it: *Egan v Chadwick* (1999) 46 NSWLR 563, 572 [45] (Spigelman CJ).

entitled to vote at a general election of members of the Legislative Assembly are also entitled to vote at a periodic Council election. Section 17 provides that the Legislative Council shall consist of 42 members ‘elected at periodic Council elections’, and the Sixth Schedule provides that the whole of the State shall be a single electoral district for the return of half the members of the Legislative Council at each periodic Council election. Section 22D provides a method for filling casual vacancies in the Legislative Council, by way of a joint sitting of both Houses. Section 26 provides that members of the Legislative Assembly are elected to represent an electoral district.⁷⁸ Sections 27 and 28 provide for the distribution of electoral districts, and apply the principle of ‘one vote, one value’, with a margin of allowance not exceeding 10 per cent. The Sixth Schedule sets out a proportional voting system for the Legislative Council and the Seventh Schedule sets out an optional preferential voting system for the Legislative Assembly.

These entrenched provisions therefore provide for a system of government where the representatives of the people are elected to a bicameral parliament in periodic elections, according to the principle of ‘one vote, one value’, pursuant to a democratic voting system. On this basis, it is possible that a court could hold that the *Constitution Act* imposes a system of representative government, and that in order for there to be an ‘election’, there must be a true choice.⁷⁹

However, reaching this conclusion is not the end of the process. The method of invalidating a state law on the basis of such an implication is different to that under the *Commonwealth Constitution*. Under the *Commonwealth Constitution*, it is the legislative power of the Parliament which is constrained by the implication. As there is no power to enact provisions which impermissibly breach the implication, the offending provisions are struck down as invalid for lack of legislative power. In NSW the process and the result are different. The issue is not whether the NSW Parliament has the *power* to enact a law, but whether or not it has done so in the required *manner and form*.

This leads to the vexed issue of the basis upon which the NSW Parliament can impose manner and form restrictions upon the exercise of its legislative power. While various sources of potential entrenchment, such as section 106 of the *Constitution*⁸⁰ and the *Ranasinghe* principle⁸¹ have been mooted from time to time, the position has been arguably resolved by the enactment of the *Australia*

78 Note Carney’s view that this might support an implied freedom of political communication: Gerard Carney, above n 47, 133.

79 Justice Dawson noted that the provisions of the *Constitution Act 1934* (SA), while not expressly providing that members be directly chosen by the people as in ss 7 and 24 of the *Commonwealth Constitution*, were in effect the same ‘because they provide for elections by inhabitants eligible to vote and elections necessarily require a choice to be made by voters’: *Muldowney* (1996) 186 CLR 352, 369.

80 See Anne Twomey, above n 43, 293–6.

81 ‘[A] legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law’: *Bribery Commissioner v Ranasinghe* [1965] AC 172, 197 (Lord Pearce), cited in *Victoria v Commonwealth* (1975) 134 CLR 81, 164 (Gibbs J); *Wilmshurst v Western Australia* [1981] WAR 159, 175–6 (Smith J).

Acts 1986.⁸² Section 2 of the *Australia Acts 1986* confers upon State Parliaments plenary legislative power, including the power to amend existing state laws, subject to the application of section 6. Section 6 provides that state laws ‘respecting the constitution, powers or procedure of the Parliament of the state shall be of no force or effect unless ... made in such manner and form as may from time to time be required by a law made by that Parliament’. It has been suggested that section 6 now covers the field of entrenchment, excluding the application of any broader principle.⁸³

Accordingly, if an implication of freedom of political communication is to be drawn from a purportedly entrenched provision of the *NSW Constitution*, but the law that is claimed to breach that implication is not a law respecting the constitution, powers or procedure of the Parliament, then that law is not restricted by a manner and form constraint and may impliedly repeal or amend the purportedly entrenched provision, rendering any implication ineffective.⁸⁴

It is unlikely that a law with respect to political donations, for example, would be regarded as a law respecting the ‘constitution’ of the Parliament. This is because political donations are probably one or two steps too removed from the constitution of the Parliament. Political donations are used by political parties to advertise the party’s message and policies in the hope that its candidates may be elected. The High Court has previously held that a law with respect to the qualifications of members of Parliament is not one with respect to the constitution of the Parliament.⁸⁵ On that basis, it is unlikely that a law concerning political donations, which is even more remote from the determination of how a house is constituted, would be regarded as a law respecting the constitution of the Parliament.

Further, the terms of the entrenching provisions also add complications. In the case of section 7A the law must be enacted for the ‘purpose’ of impliedly repealing or amending those provisions. This may be difficult to establish. For example, could it be argued that a law, which provides that appeals on a point of law in contempt proceedings are to be heard in camera, was enacted for the purpose of impliedly amending the provisions of the *Constitution Act* which set out a system of representative government?⁸⁶

82 See further: Anne Twomey, *The Australia Acts 1986 – Australia’s Statutes of Independence* (Federation Press, 2010) 235–49; Wait, above n 74, 260.

83 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 574 [80] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 616–7 [214]–[215] (Kirby J) (*‘Marquet’*). See also *McGinty* (1996) 186 CLR 140, 297 (Gummow J).

84 See Wait, above n 74, 263–4.

85 *Clydesdale v Hughes* (1934) 51 CLR 518, 528 (Rich, Dixon and McTiernan JJ). Note that while in *Marquet* (2003) 217 CLR 545, 572–3 [75]–[77], Gleeson CJ, Gummow, Hayne and Heydon JJ took quite a wide view of the ‘constitution’ of the Parliament, relating it to the features that give the Parliament and its Houses a representative character, their Honours still appeared to accept the authority of *Clydesdale v Hughes* regarding qualifications.

86 See *John Fairfax* (2000) 151 FLR 81. See also H P Lee, ‘The Implied Freedom of Political Communication’ in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 383, 402–3.

In summary, if one is to seek to invalidate a provision of a state law on the ground that it breaches an implied freedom of political communication in the *NSW Constitution*, one must first characterise the state law as:

- (a) a law respecting the constitution, powers or procedure of the Parliament; and
- (b) a law enacted for the ‘purpose’ of expressly or impliedly amending or repealing one or more of the sections of the *Constitution* entrenched by section 7A or a law that expressly or impliedly repeals or amends provisions entrenched by section 7B of the *Constitution Act 1902* (NSW).

If one succeeds in this task, then the result is that the whole of the Bill in which the offending provision was contained has not been validly passed, and is therefore invalid. No issues of severance arise. This could lead to extremely serious consequences if an incidental provision in a major piece of legislation (for example, the *Supreme Court Act 1970* (NSW)) were, as a result of the application of a constitutional implication, held to be in breach of the manner and form provisions of sections 7A or 7B, rendering the entire Act invalid.

VI THE SPECIAL STATUS OF STATE CONSTITUTIONAL AND ELECTORAL LAWS

State constitutional laws, including their electoral laws, have a special constitutional status because they are fundamental to the continuing existence of the State and its capacity to exercise its constitutional powers. State constitutions are also preserved by section 106 of the *Commonwealth Constitution* as is State legislative power under section 107.⁸⁷

The High Court has derived from the system of federalism imposed by the *Commonwealth Constitution* an implication that the legislature or executive of one polity in the federation may not act to destroy the independent functioning of another polity in the federation. This is known as the *Melbourne Corporation* principle.⁸⁸ The principle, as revised by the High Court in *Austin v Commonwealth* is that a Commonwealth law may not restrict or burden ‘one or more of the States in the exercise of their constitutional powers’.⁸⁹ Any Commonwealth law which interferes with the State’s *Constitution* or matters as essential to the operation of its *Constitution* as its electoral laws, is likely to be

87 Note Justice Kirby’s reliance on ss 106–7 to support the proposition that the Commonwealth Parliament does not have the power to amend the Constitution of a state by limiting or controlling the constituent powers of its legislatures: *Marquet* (2003) 217 CLR 545, 614 [206] (Kirby J).

88 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (*‘Melbourne Corporation’*).

89 *Austin v Commonwealth* (2003) 215 CLR 185, 258 [143] (Gaudron, Gummow and Hayne JJ). Note the attempt by Stellios to ground the implied freedom of political communication in federalism principles: Stellios, above n 68.

found to be in breach of the *Melbourne Corporation* principle. Justice McHugh put the position thus in *Australian Capital Television*:

To be consistent with the constitutional premise of the States continuing as independent bodies politic with their own Constitutions and representative legislatures, a power conferred by s 51 of the Constitution should not be construed as authorizing the Commonwealth to make a law whose immediate object is to interfere with the electoral processes authorized by those Constitutions unless the contrary intention is plainly evident in the section ... It is for the people of the State, and not for the people of the Commonwealth, to determine what modifications, if any, should be made to the Constitution of the State and to the electoral processes which determine what government the State is to have.⁹⁰

Chief Justice French also stated more recently that ‘no law of the Commonwealth could “impair or affect the *Constitution* of a State”’.⁹¹ Hence, regardless of the implied freedom of political communication, a Commonwealth law that limited freedom of political discussion with respect to state elections or otherwise affected the operation of state electoral laws, would be likely to be invalid because it breached the *Melbourne Corporation* principle.⁹²

The reverse side to the *Melbourne Corporation* principle is that state Parliaments do not have the capacity to interfere with the constitutional or electoral systems of the Commonwealth.⁹³ Justice Dawson noted in *Theophanous* that:

If a State legislature were to enact legislation which interfered with the requirements of s 7 or s 24 [of the Commonwealth Constitution], the legislation would be invalid either for simple inconsistency with the Constitution, or as an interference with Commonwealth governmental authority...⁹⁴

The High Court would presumably seek to interpret the implied freedom of political communication in a manner that is consistent with the *Melbourne Corporation* principle, to the extent that both implications are drawn from the

90 *Australian Capital Television* (1992) 177 CLR 106, 242 (McHugh J). See also Brennan CJ in *McGinty* who considered that it was possible that a Commonwealth law could affect a state constitution ‘but not so as to curtail the continued existence of the State or the capacity of the Government of the State to exercise its functions’: *McGinty* (1996) 186 CLR 140, 173 (Brennan CJ).

91 *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, 289 [19] (French CJ), quoting *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 392 (Dixon J) and citing *New South Wales v Commonwealth* (1932) 46 CLR 155, 176 (Rich and Dixon JJ).

92 *Australian Capital Television* (1992) 177 CLR 106, 162–4 (Brennan J), 242–5 (McHugh J). See also Dawson J: at 202 who did not think the laws in question had a sufficiently serious effect to trigger the *Melbourne Corporation* principle. Note Carney’s observation that in the view of Brennan J ‘the *Melbourne Corporation* principle proved a more onerous restriction on the Commonwealth ... than did the implied freedom’: Carney, above n 19, 186.

93 *Melbourne Corporation* (1947) 74 CLR 31, 61 (Latham CJ), 74 (Starke J), 99 (Williams J); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 507–8 (Kirby J) (‘*Re Residential Tenancies*’); *Commonwealth v Western Australia* (1999) 196 CLR 392, 435–6 [122]–[123] (Gummow J). See also A R Blackshield, ‘The Implied Freedom of Communication’ in G Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 232, 265; Carney above n 19, 191. Compare the more limited *Cigamic* principle: *Commonwealth v Cigamic Pty Ltd (in liq)* (1962) 108 CLR 372, 377–8 (Dixon CJ); *Re Residential Tenancies* (1997) 190 CLR 410, 424 (Brennan CJ), 438 (Dawson, Toohey and Gaudron JJ).

94 *Theophanous* (1994) 182 CLR 104, 190 (Dawson J), citing *Melbourne Corporation* (1947) 74 CLR 31, 81.

Commonwealth Constitution. Hence, where state electoral or constitutional laws are concerned, a court is likely to require a more substantial connection with political communication at the Commonwealth level before finding such a state law invalid for breaching an implied freedom of political communication that is derived from the *Commonwealth Constitution*. If, on the other hand, a state electoral law clearly interfered with Commonwealth elections (for example, by banning electoral advertising regarding Commonwealth elections or banning donations to political parties that could be used to fund Commonwealth electoral campaigns) the law would be likely to be held invalid, as it would be likely to breach the *Melbourne Corporation* principle as well as the implied freedom of political communication. For this reason NSW laws that limit or ban certain types of political donations are confined so that they only apply with respect to donations for the purpose of state electoral campaigns and do not affect donations to a political party with respect to Commonwealth electoral campaigns.⁹⁵

VII STATE ELECTION FUNDING LAWS THAT BAN POLITICAL DONATIONS

In NSW, amendments to the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) have been enacted banning political donations to parties, members of Parliament, groups, candidates or third party campaigners in relation to State elections:

- from any body, organisation, corporation or person other than a person enrolled on the Commonwealth, State or local government electoral roll (section 96D);
- that are indirect in form, such as office accommodation, vehicles, equipment, or paid staff provided for no consideration or inadequate consideration (section 96E);
- from unknown sources (where the donation is of a reportable amount) (section 96F); and
- from close associates of property developers, tobacco industry business entities and liquor or gambling industry business entities, including directors, officers, major share-holders and their respective spouses (sections 96GAA–96GE).

Those persons on the electoral roll who are permitted to make political donations with respect to state election campaigns are also limited in the amount of donations that they can make in any financial year, being a maximum of \$5000 for registered parties and groups and \$2000 for candidates, members or third party campaigners, with special aggregation provisions also applying over the financial year (section 95A).

⁹⁵ *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ss 83, 95AA. See also s 96 which requires separate state campaign accounts to be kept.

Whether the Commonwealth implied freedom of political communication would apply to such provisions is doubtful, especially as they are not intended to affect political donations in relation to Commonwealth elections and would seem to have little if any bearing upon Commonwealth political matters. The Commonwealth implied freedom is only likely to apply if:

- (a) the attempt to isolate the limitations on political donations so that they only have an impact on state electoral campaigns has failed and the law is regarded as having an impact upon Commonwealth elections;
- (b) the High Court reverts to its *Stephens* view that all political discourse is ‘indivisible’; or
- (c) the High Court draws a new implication of representative government and freedom of political communication at the state level from provisions in the *Commonwealth Constitution* concerning the states or achieves the same outcome though attributing essential characteristics to a constitutional expression.

Whether an implied freedom of political communication can be drawn from the *NSW Constitution* is also doubtful, as is whether a law concerning political donations would be regarded as one respecting the constitution, powers and procedure of the Parliament and one with the purpose of impliedly amending or repealing entrenched constitutional provisions. Although political donations have a potential impact upon election campaigns and the election of members to Parliament, this connection with the ‘constitution’ of the Parliament is likely to be too remote.

If, however, some form of an implied freedom of political communication applied, whatever its source may be, and if the two-limb test set out in *Lange* applied,⁹⁶ other difficult questions would arise.

The first limb of the *Lange* test asks whether the state law effectively *burdens* freedom of communication about government or political matters either in its terms, operation or effect.⁹⁷ The first task then, is to characterise the law by reference to what it does. It bans some individuals (including a number who are on the electoral roll) and all corporations, associations or other bodies, from making political donations. It also caps the sums of money that may be validly donated by individuals on the electoral roll. It has the effect of limiting the amount received by political parties in donations, which depending upon their other sources of funding, such as public funding, may have the effect of limiting their capacity to campaign in elections. Does such a law effectively burden political communication?

In the United States the view has been taken that the making of a political donation is a form of political communication. Such a donation tends to indicate that the donor supports the political party and wishes to aid it in winning or

96 (1997) 189 CLR 520, 567–8. Note the debate about how the *Lange* test should be applied: see Meagher, above n 16.

97 *Lange* (1997) 189 CLR 520, 567.

retaining government.⁹⁸ In colloquial terms, it is a form of putting one's money where one's mouth is. It is therefore a direct form of political communication.⁹⁹ Secondly, political donations fulfil the role of financially supporting the capacity of a political party to communicate its policies to electors in order to inform their vote. Unreasonable limits on political donations (especially if there is no other source of funding, such as public funding) may chill political communication during election periods because political parties may be unable adequately to communicate with electors.¹⁰⁰

While the High Court might choose not to adopt the American approach, there is at least a plausible argument that the High Court would hold that bans on political donations (and any consequential reduction in political campaign expenditure) *burden* the implied freedom of political communication. It might, on the other hand, take the view that the banning of some political donations actually results in the promotion of political communication, rather than burdening it, because such actions, by removing dominant voices, enhance the opportunity for political communication amongst the voters themselves.¹⁰¹

The second limb is directed at determining three things:

1. whether the law serves a 'legitimate end';
2. whether the law is reasonably appropriate and adapted to serving that legitimate end; and
3. whether the manner in which it does so is compatible with the system of government prescribed by the (relevant) *Constitution*.¹⁰²

The 'legitimate end' in this case is likely to be the avoidance of the risk of corruption and undue influence and the public perception of it.¹⁰³ It is possible that the notion of a 'level playing field', the reduction of the influence of the rich

98 Note, however, that many corporations in the past have given equally to opposing political parties. Such donations are more likely to indicate that the donor wants to obtain influence with whoever wins the election – rather than approval of the party or its policies.

99 See, eg, *Buckley v Valeo*, 424 US 1, 21 (1976) where the US Supreme Court stated that a political donation 'serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.' Note, however, that this view has been the subject of criticism: see J Skelly Wright, 'Politics and the Constitution: Is Money Speech?' (1976) 85 *Yale Law Journal* 1001; S Issacharoff, P Karlan and R Pildes, *The Law of Democracy*, (Foundation Press, 4th ed, 2012) 347–8.

100 See again, *Buckley v Valeo*, 424 US 1, 21 (1976), where the US Supreme Court observed that caps on political donations 'could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy'.

101 For discussion of the argument that some limitations on political discourse do not effectively burden it, but rather promote it, see *Sunol v Collier (No 2)* (2012) 260 FLR 414, 433 [86], 433–4 [89] (Basten JA); *Owen v Menzies* [2012] QCA 170, [72] (McMurdo P).

102 Note that *both* the legitimate end and the manner in which it is fulfilled must be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government: *Coleman v Power* (2004) 220 CLR 1, 50 [92] (McHugh J); *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334.

103 *Australian Capital Television* (1992) 177 CLR 106, 144–5 (Mason CJ), 156 (Brennan J), 175 (Deane and Toohey JJ), 238–9 (McHugh J).

and the ideal of ‘political equality’ would also be considered a legitimate end.¹⁰⁴ In either case, however, the imposition of caps of \$5000 or \$2000 on the aggregate spending of donors has already reduced the risk and perception of corruption and undue influence and levelled the playing field to such a degree that it is difficult to see how the provisions that completely ban capped political donations from anyone not on the electoral roll as well as certain individuals who are on the electoral roll can be regarded as reasonably appropriate and adapted to serving such a legitimate end. It is very difficult to see what legitimate end these laws are directed at and how they are appropriate and adapted to achieve it. Hence recent changes to state electoral funding laws are likely to fall down at the last hurdle and be held constitutionally invalid because they burden political communication and are not reasonably appropriate and adapted to serve a legitimate end, but only if an implied freedom of political communication applies, which as noted above, faces a number of obstacles.

VIII CONCLUSION

The High Court’s reluctance to grapple with the issue of how the implied freedom of political communication applies to state laws that burden communication about state political matters has led to an assumption, at least amongst practitioners, that one way or another the implied freedom will apply. The battleground in most cases has been the second limb of the *Lange* test. If this is the battleground in relation to the recent reforms to NSW electoral funding laws, then those laws are likely to be defeated. However, if the High Court were instead to consider the nature of the constitutional implication and how it applies to state electoral laws that are confined to state political matters, then this shift in the battleground may well result in the validity of such laws being upheld. The outcome to any High Court challenge may therefore depend upon how the case is argued before the High Court, what concessions are made, whether they are accepted by the Court and the extent to which the High Court is prepared to engage in the fundamental constitutional issues concerning the application of the implied freedom.

104 The ‘level playing field’ constraint has been adopted in *Figuroa v Attorney-General (Canada)* [2003] 1 SCR 912, 943–6 [48]–[53] (Iacobucci J) but rejected in the United States: *Davis v Federal Election Commission*, 554 US 724, 742 (2008) (Alito J for the majority) and so far has received little support in the High Court: *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 215 (McHugh J), 296 (Callinan J), 302 (Heydon J).