Mulholland v Australian Electoral Commission
(2004) 209 ALR 582

SUPPLEMENT TO CHAPTER 10, §3

Much of the rhetoric of *McKinley* and *McGinty* was repeated in 2004 when the Democratic Labor Party ("the DLP") sought to use the words "chosen by the people" as the basis for an attack on the validity of the party registration provisions in Part XI of the *Commonwealth Electoral Act* 1918 (Cth). The essential features of the registration scheme had been introduced by the *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth), as ancillary to a number of electoral changes made by that legislation. These included arrangements for the public funding of election campaigns by registered political parties; the inclusion on ballot papers of candidates' party identification; and the introduction of the simplified system of voting in Senate elections, which sets out lists of candidates in identified party groups and allows the elector to express a preference simply by giving a single vote to one party "above the line". In order for a political party to be registered for each of these purposes, it must either have current parliamentary representation (under par (a)(i) of the definition of "eligible political party" in s 123(1)), or be able to produce a list of at least 500 members (under par (a)(ii)).

A challenge to the validity of the Senate voting system was rejected by Gibbs CJ, sitting alone, in *McKenzie v Commonwealth* (1984) 57 ALR 747. The challenge depended in part on a claim that explicit reference to party identification infringed s 16 of the Constitution, which does not include party membership among the qualifications for senators. As to that, Gibbs CJ pointed out that it did not follow "**[749]** that the Constitution forbids" the use of party identification; he saw "no reason to imply an inhibition on the use of a method of voting which recognizes political realities". It was also argued that the system "discriminate[s] against candidates who are not members of established parties or groups": this was said to infringe "general principles of justice", and also a requirement of "democratic methods" implied by the words "chosen by the people". Gibbs CJ was "prepared to assume" that such a requirement existed, but concluded (quoting what Stephen J had said in *McKinlay*): " [I]t cannot be said that any disadvantage … to candidates who are not members of parties or groups so offends democratic principles as to render the sections beyond the power of the Parliament to enact".

Before the 2001 federal election, the registration scheme was strengthened. By s 126(2A), introduced by the *Commonwealth Electoral Amendment Act (No 1)* 2000 (Cth), it was not permissible for a political party to claim as a member any person also claimed by another party (the "no overlap" rule); and by s 138A, inserted by the *Electoral and Referendum Amendment Act (No 1)* 2001 (Cth), the Commission was given additional powers of reviewing the register with a view to deregistration.

After the 2001 election, the Commission sought to exercise its new powers by scrutinising the DLP's membership claims. In the 1960s and early 1970s the DLP had held the balance of power in the Senate, with four Senators from 1967 to 1970, and five from 1970 to 1974. But its Senate representation was lost at the 1974 election and was never regained. Thus, under the registration system from 1984 onwards, the party had never been entitled to registration as "a Parliamentary party" under par (a)(i) of the definition in s 123(1), but had been registered under the "500 member rule" in par (a)(ii).

When the DLP refused to supply the names of its members, the Commission gave notice that it was considering the Party's deregistration. Thereupon Mr JV Mulholland, the Party's registered officer and its principal Senate candidate at the 2004 election, sought review of the Commission's decisions and conduct under the *Administrative Decisions (Judicial Review)*

Act 1977 (Cth). He also sought a writ of prohibition on the ground that the provisions purporting to authorise deregistration were invalid.

Marshall J of the Federal Court dismissed these applications. A unanimous Full Bench of the Federal Court then dismissed an appeal (*Mulholland v Australian Electoral Commission* (2003) 198 ALR 278), and so did a unanimous High Court.

In the High Court, the constitutional challenge focused particularly on the requirement for a minimum of 500 members as a condition of registration, and on the exclusion by s 126(2A) of any attempt to count the same members by more than one political party. Gummow and Hayne JJ pointed out with some irony that the precise targets of the constitutional challenge had to be chosen with care: the party needed to strike out those provisions under which it might lose its registration, while leaving intact those provisions which gave it the benefits of registration. "**[620]** Were the appellant to succeed on the case put as to invalidity, a real question would arise as to whether that would be but a pyrrhic victory. It would be a substantial victory only if the application of the principles of severance left standing sufficient of Pt XI of the Act to preserve the registration of the DLP and the advantages it presently obtains by registration."

The result in the High Court was announced on 20 May 2004, but the reasons for judgment were not handed down until 8 September 2004, some 10 days after the federal election of 9 October 2004 had been announced. In those circumstances the Commission proceeded no further with any possible deregistration proceedings. However, at the ensuing election the DLP offered candidates for the Senate only in Victoria (obtaining 0.1356 of a quota), and for the House of Representatives only in the Victorian seats of Ballarat and McMillan (obtaining respectively 1.32% and 0.35% of the primary vote).

The constitutional challenge depended in part on the DLP's attempt to demonstrate a "burden" on its freedom of political communication, within the meaning of the decisions in *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. As to the failure of that attempt, see Chapter 27. The challenge also relied in part on return to the "discrimination" argument in *McKenzie v Commonwealth*, bolstered now by the reference made by Mason CJ in *Australian Capital Television* to the concept of a "level playing field". Finally, the challenge depended in part on implied limitations on the legislative power to regulate federal elections, supposedly to be derived from the words "chosen by the people". This aspect of the challenge was bolstered by reference to the Canadian case of *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912, (2002) 227 DLR(4th) 1, where it was held that provisions in the *Canada Elections Act* 1985 (Can) had infringed the democratic rights implied by s 3 of the Canadian Charter of Rights and Freedoms 1982, by "**[946]** derogating from the capacity of marginal or regional parties to present their ideas and opinions to the general public". There, too, the impugned provisions established a system of party registration, carrying with it the right to list party identification on ballot papers. However, the Canadian requirement for registration was that "the party has officially nominated candidates in fifty electoral districts at the [next] general election". The Australian judges distinguished *Figueroa* on that ground, since a requirement of 50 nominated candidates was far more onerous than a requirement of 500 members; and also because the constitutional principles arising under the Canadian Charter of Rights and Freedoms were very different from those arising under the Australian Constitution. The latter principles were again understood as they had been in *McKinley* and *McGinty*.

> **Gleeson CJ: [585]** A notable feature of our system of representative and responsible government is how little of the detail of that system is to be found in the Constitution, and how much is left to be filled in by Parliament. In *Lange v Australian Broadcasting Corporation* [(1997) 189 CLR 520 at 557], this Court said that … the Constitution provides for "the fundamental features of representative government". In other cases, such as *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* [(1975) 135 CLR 1], and *McGinty v Western Australia* [(1996) 186 CLR 140], it was pointed out that

representative democracy takes many forms, and that the terms of the Constitution are silent on many matters that are important to the form taken by representative democracy in Australia, at a federal or State level, from time to time.

For example, while, in common with most democracies, Australia now has universal adult suffrage, this was not always so. At the time of the Constitution, most women in Australia did not have the right to vote. Aboriginal Australians have only comprehensively had the vote since 1962. Unlike most democracies, Australia now has a system of compulsory voting, but this did not exist at Federation. Members of the House of Representatives are now elected by a system of preferential voting. In the United Kingdom, as in the House of Representatives in the United States, and the House of Commons in Canada, members of the House of Commons are elected on a first-past-the-post system. One of the most striking examples of the power given to Parliament to alter, by legislation, the form of our democracy concerns the composition of the Senate. There was a major change in the method of electing senators in 1948. For many years before then, the political party that dominated the House of Representatives usually controlled the Senate. With the introduction of proportional representation in 1948, there came to be a much larger non-government representation in the Senate. Furthermore, a legislative change in 1984, increasing the number of senators from 10 per State to 12 per State, when combined with the system of proportional representation, produced the result that it is now unusual for a major party to control the Senate. This is of large political and practical significance. It was the result of legislative, not constitutional, change.

He quoted the contrast drawn by Barwick CJ in *McKinlay* between the Constitutions of the United States and Australia – the former according to Barwick CJ drafted in a spirit of "**[23]** revolt against British institutions and methods of government", the latter "developed not in antagonism to British methods of government but **[24]** in co-operation with and, to a great extent, with the encouragement of the British Government". Gleeson CJ observed:

Gleeson CJ: [586] That is a useful reminder of historical facts that explain not only what the Constitution says, but also what it does not say. The silence of the Constitution on many matters affecting our system of representative democracy and responsible government has some positive consequences. For example, if then current ideas as to the electoral franchise had been written into the Constitution in 1901, our system might now be at odds with our notions of democracy. The Constitution is, and was meant to be, difficult to amend. Leaving it to Parliament, subject to certain fundamental requirements, to alter the electoral system in response to changing community standards of democracy is a democratic solution to the problem of reconciling the need for basic values with the requirement of flexibility. As to responsible government, the deliberate lack of specificity on the part of the framers of the Constitution concerning the functioning of the Executive was seen, in *Re Patterson; Ex parte Taylor* [(2001) 207 CLR 391], as an advantage. Constitutional arrangements on such matters need to be capable of development and adaptability.

Concepts such as representative democracy and responsible government no doubt have an irreducible minimum content, but community standards as to their most appropriate forms of expression change over time, and vary from place to place. It is only necessary to consider the differences in the present electoral systems of New South Wales, Tasmania and New Zealand, all of which would be regarded as democratic, to see the point. The system in New South Wales is preferential voting of a kind that is orthodox in Australia. Tasmania has the Hare-Clark electoral system, which is unlike any other State system. New Zealand has changed from a first-past-the-post system to a system under which the Parliament has a number of members elected in single-seat constituencies, and a number elected by proportional representation from the lists of those parties obtaining a sufficient percentage of the national vote.

Federalism itself influenced the form of our government in ways that might be thought by some to depart from "pure democracy", if there is such a **[587]** thing. Equal State representation in the Senate may be thought, and at the time of Federation was thought by some, to be inconsistent with a concept of voting equality throughout the Commonwealth. Voters in the smallest State (in terms of population) elect the same number of senators as voters in the largest State. In this respect, the "value" of votes is unequal. That inequality is one aspect of Australian democracy which, exceptionally, is enshrined in the Constitution. Where the Constitution contains an express provision for one form of inequality in

the value of votes, it dictates at least some caution in formulating a general implication of equality on that subject …

[T]he overriding requirement that senators and members of the House of Representatives are to be "directly chosen by the people" … imposes a basic condition of democratic process, but leaves substantial room for parliamentary choice, and for change from time to time. The methods by which the present senators, and members of the House of Representatives, of the Australian Parliament are chosen are significantly different from the methods by which those in earlier Australian parliaments were chosen. Judicial opinion has been divided on the presently irrelevant question as to whether the Constitution guarantees universal suffrage. No one doubts, however, that Parliament had the power, as it did, to prescribe a minimum voting age, and, later, to reduce that age from 21 to 18. Whether Parliament would have the power to fix a maximum voting age is a question that has not yet arisen …

[588] [T]he respondent, and the Attorney-General of the Commonwealth intervening, accept that the choice required by the Constitution is a true choice with "an opportunity to gain an appreciation of the available alternatives" [*Lange*, 189 CLR at 560, quoting Dawson J in *Australian Capital Television*, 177 CLR at 187]. In the course of argument, examples were given of forms of ballot paper prescribed for use at elections which might not conform to that fundamental requirement. A ballot paper, for example, that had printed on it only one name, being that of the government candidate, requiring the name of any alternative candidate to be written in (a form not unknown in the past in some places), might so distort the process of choice as to fail to satisfy the test. Here, the rules in question preserve a full and free choice between the competing candidates for election. The electors are presented with a true choice. The available alternatives between candidates are set out on the ballot paper. The process of choice by electors is not impeded or impaired …

[590] I accept … that certain kinds or degrees of interference by the Australian Electoral Commission in the political process, including arrangements as to the form of the ballot paper, conceivably could be antithetical to the idea of representative democracy and direct choice. Even so, determining the electoral process in a representative democracy requires regulation of many matters, of major and minor significance, and the Constitution gives Parliament a wide range of choice. In the context of a system of registration of political parties eligible to receive the privileges referred to earlier, the imposition of a requirement of some minimum level of support, the fixing of that level at 500 members, and the avoidance of abuse by the no overlap rule, are consistent with the constitutional concept of direct choice by the people and with representative government.

McHugh J: [600] [T]he Constitution prescribes only the irreducible minimum requirements for representative government, including the requirement that senators and members of the House of Representatives be "directly chosen by the people". The Constitution does not prescribe equality of individual voting power. Nor does it protect the secret ballot … [In *McKinlay*], the Court recognised that the concept of representative government is inherent in the structure of the Constitution, but noted that "the particular quality and character of the content" of representative government was "not fixed and precise" [135 CLR at 56]. Stephen J observed that the concept of representative government is "descriptive of a whole spectrum of political institutions". His Honour said that the Constitution permits "scope for variety" in the details of the electoral system [135 CLR at 56-57].

Hence, the Constitution does not mandate any particular electoral system, and, beyond the limited constitutional requirements outlined above, the form of representative government … is left to the Parliament. This includes "the type of electoral system, the adoption and size of electoral divisions, and the franchise" [Dawson J in *McGinty*, 186 CLR at 183-84]. As a result, the Parliament may establish an electoral system that includes compulsory voting. It may specify a particular voting method – for example, preferential or proportional voting or first past the post voting [*McGinty*, 186 CLR at 244]. It may provide for the election of an unopposed candidate and the election of a candidate on final preferences and may limit voters' ability to cast a formal vote and to vote against a candidate [Toohey and Gaudron JJ in *Langer v Commonwealth* (1996) 186 CLR 302 at 333] …

[601] The provisions of the Act that prescribe the "500 rule" and the "no-overlap rule" and confer power on the Commission to administer those rules are laws "with respect to" elections. A law of the Parliament is made "with respect to" the subject matter of a power when it relates to or affects that subject matter and the connection is not "so insubstantial, tenuous or distant" that it cannot properly be described as a law with respect to that subject matter [*Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 369]. A law that regulates the method of voting in a federal election is a law with respect to elections [*McGinty*, 186 CLR at 244; *Langer*, 186 CLR at 333], as is a law which protects the electoral

or voting system that the Parliament selects. So too is a law that assists in the maintenance of the voting system and protects a particular method of voting. Thus, a law which proscribes conduct that interferes with the electoral system that Parliament has chosen is a law with respect to elections …

[603] The Parliament could reasonably take the view that some – maybe many – voters expect that parties identified on the ballot-paper are real political parties with some degree of public support, a genuine organisational structure and a leader. On that assumption, voters could be misled by a party that is a "front" party or a "decoy" party – that is, a party established only for the purpose of capturing preferences and channelling them to other candidates – or a party that has a very low level of public support. The "500 rule" therefore protects the electoral process by requiring that, before a party name can be placed on the ballot-paper, its sponsors demonstrate a minimum verifiable level of public support. As a result, the "500 rule" minimises voter confusion and prevents voters from being misled by parties with no Parliamentary representation and no substantial membership. Similarly, the object of the "no-overlap rule" is to prevent voters from being misled. It seeks to prevent Parliamentary parties or groups of 500 people from registering multiple parties, each with a "single issue" party name, calculated to catch the eye of voters and to channel preferences to another party (whose policies may be entirely unrelated to the name of the "single issue" party).

Without the challenged provisions, the electoral system is open to manipulation in the manner outlined above, particularly in the context of the Senate list system. The challenged provisions are therefore laws "with respect to" elections for the Senate and the House of Representatives because they have the legitimate objectives of preventing voter confusion or deception and assisting voters to make informed choices as to the person or party for whom they wish to vote …

[604] Representatives must be elected in free elections [*Australian Capital Television*, 177 CLR at 230-32]. While Parliament has power to select particular methods of voting and to enact laws to protect those methods of voting, such methods are valid only if they allow a "free choice" among the candidates for election and an "informed choice" [*Langer*, 186 CLR at 317, 325]. A choice is not an informed choice "if it is made in ignorance of a means of making the choice which is available and which a voter, if he or she knows of it, may wish to use in order to achieve a particular result" [Dawson J in *Langer*, 186 CLR at 325]. The choice "must be a true choice ... a choice made with access to the available alternatives" [Dawson J in *Muldowney v South Australia* (1996) 186 CLR 352 at 370]. Those alternatives include not only knowledge of a *means* of making a choice that is available and that the voter may wish to use in order to achieve a particular result but also *information* about the candidates among whom voters are required to choose …

Party endorsement on a ballot-paper is an important piece of information that many voters use when making a choice between candidates on their ballots. It is one of the "countless number of other circumstances and considerations" upon which the ability to cast a fully informed vote depends. Because this is so, Mr Mulholland contends that the provisions that prescribe the "500 rule" and the "no-overlap rule" do not permit a "free and informed choice" or a "true choice" or a "fully informed" choice as required by ss 7 and 24. He contends that the restrictions deny voters important information by precluding the inclusion of the party name on the ballot-paper next to the name of a candidate endorsed by an unregistered party, that is, a political party which does not meet the "500 rule" and the "no-overlap rule" registration requirements. Consequently, the result of this denial of important information is that the choice made by voters ceases to be a "true choice", that is, a choice made with all the relevant information required for a meaningful exercise of the franchise in an informed manner. Moreover, because the Act provides for the ballot-paper to show the party endorsement of registered parties and prevents candidates of parties that do not meet the "500 rule" and the "no-overlap rule" from doing the same, Mr Mulholland contends that the Act permits voters to be misled.

The comment of Gummow J in *Langer v The Commonwealth* [186 CLR at 347] that "the ballot, being a means of protecting the franchise, should not be made an instrument to defeat it" supports Mr Mulholland's contention. So too does the **[605]** reasoning of the Canadian courts in *Figueroa*. When *Figueroa* was before the Ontario Court of Appeal [(2000) 189 DLR(4th) 577 at 613], Doherty JA said that the identification of party affiliation on the ballot lies at the very core of the information needed to permit electors to vote rationally and in an informed manner …

While *Figueroa* was concerned with the Canadian electoral system in the context of an express "right to vote" in the *Canadian Charter of Rights and Freedoms*, the observations made in that case are broadly applicable in the Australian political context. But do the challenged provisions so operate

that electors do not freely and truly choose their candidates in Senate and House of Representatives elections?

At Federation, the inclusion on ballot-papers of political party endorsement of candidates for the Senate and the House of Representatives was not a requirement of the constitutionally prescribed system of representative government. Although, as long ago as the 18th century, politicians and commentators often referred to "party" in describing factions and adherents of **[606]** particular policies, the modern political party is very much a 20th century development. It was not until 1983 that party endorsement was included on ballot-papers for federal elections. Nevertheless, the Constitution makes allowance for the "evolutionary nature of representative government". It also recognises that "representative government is a dynamic rather than a static institution and one that has developed in the course of [the 20th] century" [Gummow J in *McGinty*, 186 CLR at 279-80]. It may be that the role of organised political parties and their influence on voters' choices within the Australian system of representative government have both developed to such an extent that that system requires that a candidate have the right to have his or her party endorsement noted on the ballot-paper.

However, even if the present conception of representative government requires recognition of the right of the candidates of genuine parties to have the party's name included on the ballot-paper alongside that of the candidate, it does not follow that every candidate of every "party" has that right.

Legislation enacted with the object of ensuring that voters are not misled by political parties is regulation of the electoral process that "is necessary in order that it may operate effectively" [Dawson J in *Levy v Victoria* (1997) 189 CLR 579 at 608]. The free choice of electors is not assisted by persons registering a single group of members multiple times with eye-catching "single issue" party names for the purpose of channelling preferences to other candidates. The Constitution accommodates the dynamic nature of the institution of representative government "by authorising the legislature to make appropriate provision from time to time" [Gummow J in *McGinty*, 186 CLR at 280-81]. This accords Parliament a broad scope to determine what is "appropriate" – within the boundaries of the constitutionally prescribed system of representative government. It is also open to the Parliament to hold the view that, important though party identification may be, the free choice of electors will be impaired and not improved by party identification of those parties which cannot or will not comply with the challenged provisions. Given previous decisions of the Court that the Constitution prescribes only the irreducible minimum requirements for representative government, the "500 rule" and the "no-overlap rule" fall within the scope of the legislative power of the Commonwealth with respect to elections. They do not infringe the true choice or fully informed choice requirements of the Constitution.

Gummow and Hayne JJ: [623] The phrase "directly chosen by the people" as it appears in ss 7 and 24 of the Constitution is to be understood against the background of the differing arrangements made in the Australian colonies for what each would have regarded as their system of representative government. Some colonies imposed property qualifications upon electors for one or both chambers; the minimum ages for candidacy varied; women were enfranchised only in South Australia and Western Australia and were eligible as candidates in the former colony only. Nevertheless, as Barwick CJ pointed out in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* [135 CLR at 21], the members of the more numerous legislative chambers in the Australian colonies, even with these diverse franchise arrangements, could properly have been said to have been directly chosen by the people of the colony in question …

[624] Nevertheless, it should be added that, at the time of federation, in various respects the popular element in representative government was more advanced in the Australian colonies than elsewhere. Before the introduction in many States of the United States in the last part of the nineteenth century of the "Australian ballot system", there was a widespread practice whereby the political parties printed and distributed their own ballot papers containing only the names of that party's candidates; the voter could remain ignorant of the existence of other candidates, having merely to deposit a party ticket in the ballot box without, in some States, even marking it, and the printing of ballot papers in distinctive party colours impaired the secrecy of the ballot. It was only after the 1888 presidential election, "which was widely regarded as having been plagued by fraud", that many States adopted the "Australian ballot system" whereby "an official ballot, containing the names of all the candidates legally nominated by all the parties, was printed at public expense and distributed by public officials at polling places" [*Timmons v Twin Cities Area New Party*, 520 US 351 at 356 (1957).

The inclusion of the expression "directly chosen by the people" in s 7, respecting the Senate, and s 24, respecting the House of Representatives, was emphatic of two propositions in the adaption made in Ch I of the Constitution of the principles of representative government to the new federal structure. First, in the drafting of the Constitution, there had been rejected the idea that the senators would be chosen by the legislatures of the State which they were to represent, as was then the position in the United States … [That] first proposition is essentially negative in character; the second puts it positively that the process of choice of members of the two chambers will be by popular election.

It is settled that the Constitution prescribes and gives effect to a system of representative and responsible government [*Lange*, 189 CLR at 557-59] … In the present case, the Solicitor-General of the Commonwealth accepted that representative government requires "an opportunity to gain an appreciation of the available alternatives", as it was put in *Lange* [189 CLR at 560] … **[625]** However, what also is apparent is that room was left by the Constitution for further development by legislation of the system of responsible government, particularly with respect to the franchise and the conduct of elections. (The same is true of the treatment in the Constitution of the system of representative government [*Re Patterson; Ex parte Taylor* (2001) 207 CLR 391].) The limited and temporal operation of s 41 of the Constitution underlines the absence of provisions entrenching universal adult franchise, the secret ballot, compulsory voting, or the preferential or proportional or the Hare-Clark or any other voting system.

The recurrent phrase in the Constitution "until the Parliament otherwise provides" accommodates the notion that representative government is not a static institution and allows for its development by changes such as those with respect to the involvement of political parties, electoral funding and "voting above the line". Some of these changes would not have been foreseen at the time of federation or, if foreseen by some, would not have been generally accepted for constitutional entrenchment.

Thus, care is called for in elevating a "direct choice" principle to a broad restraint upon legislative development of the federal system of responsible government. Undoubtedly examples may be given of extreme situations. [They noted the example given by Gaudron J in *McGinty*, 186 CLR at 220, of a law "to make membership of a particular political party the qualification for election to the House of Representatives"] …

[626] In *Langer* [186 CLR at 332-33], Toohey and Gaudron JJ pointed out that, however broad a construction might be given to the phrase "chosen by the people" in s 7 and s 24 of the Constitution, it had to allow for various special cases. One was the possibility, since provision made in 1977 for the filling of casual Senate vacancies, that at any time the Senate as a whole might not be directly chosen by the people of the States. Secondly, to that may be added the presence of senators elected by the people of the Northern Territory and the Australian Capital Territory. Other special cases include that of the member of the House who is **[627]** returned unopposed and that of the member or senator returned at an election but incapable of sitting by reason of disqualification under s 44 of the Constitution. In the first and third of these special cases, there has been no opportunity for election by an "informed choice" on the part of electors. In the fourth case, the choice is ineffective …

[The requirement of "direct choice" is not impaired] where the receipt by an officer of a political party of public moneys as electoral funding of endorsed candidates is conditioned upon continuing party registration and subjection to investigative powers of the Commission. One of the apparent benefits from public funding under Pt XX of the Act … may be the minimisation of reliance by parties on campaign contributions. It may encourage candidates from new parties and groups. But, on the other hand, that benefit will not be secured by the funding of "front" or "shell" parties with no substantial membership to which officers of the party are accountable. It is entirely consistent with the objectives of a system of representative government that the Act requires a significant or substantial body of members, and without "overlapping" with the membership of other parties, before there is an entitlement to receive public funding by a non-Parliamentary party.

There must be allowable a measure of legislative choice as to the minimum number of party members … There is no occasion for this Court to "second guess" the legislative choice made 20 years ago with the 1983 Act. There can be even less ground for impugning as inconsistent with a system of representative government the added investigative powers given the Commission more recently by such provisions as s 138A, the exercise of which precipitated this litigation.

Kirby J: [639] No written constitution can provide for the detail essential to the conduct of a modern election that carries into effect all of the requirements of a representative democracy such as the Constitution establishes. The power to regulate elections by more detailed federal law is therefore

essential. It exists in substantial measure. Inherent in the task of electing a Parliament, as the Constitution envisages, from electors resident in all parts of a continental country (and absentee electors all over the world), is the necessity to provide a comprehensive law governing the myriad circumstances that arise in translating the sparse constitutional text into detailed machinery. Given the several express heads of power (and the necessary implied powers) it would be inappropriate in the extreme to adopt a narrow view concerning the Federal Parliament's powers to enact laws considered necessary from time to time for the conduct of federal elections. In the history of this Court's decisions on the subject, no narrow view has been taken.

Representative government is also an evolving concept, as indicated by the expansion of female suffrage in Australia (as contemplated by the Constitution and soon fulfilled); the elimination of racial disqualifications from voting and property qualifications for voting; the introduction of compulsory voting and variations upon different forms of election (especially in regard to the Senate); and the signification of preferences in voting designed to maximise the reflection of electors' views and to minimise invalid or wasted votes. The Constitution does not impose rigid limitations on the power of the Federal Parliament … to respond to changing attitudes concerning the conduct of elections. The future will doubtless be no less adaptive in this respect than the past. Successive Parliaments will continue to search for new and improved ways to reflect the representative character of the Parliament and of the senators and members of the House of Representatives who are elected …

[640] In the course of this Court's consideration of the phrase "directly chosen by the people", the suggestion has been made that the purpose of the expression was merely to underline the requirement of *direct* election as contrasted to election by *indirect* means, as by an electoral college. The United States model, with several provisions for the election of the President by an electoral college and the choice of Senators, originally by the legislatures of the States, was regarded by the founders of the Australian Commonwealth as so unsatisfactory as to require explicit provision in the Constitution to ensure a different system. The provision for direct choice by the people was obviously addressed to this problem. However, it is now generally accepted that the constitutional phrase goes beyond this negative stipulation. It has a high constitutional purpose. This Court must give effect to that purpose …

[641] Numerous judicial observations have recognised the significance of the requirement of direct choice by the people for the constraints that may be imposed through electoral law on the fulfilment of the constitutional idea of representative democracy. Clearly, that idea lies at the heart of the democratic character of the Constitution, by which the sovereign people of Australia control their destiny in the deployment of governmental power within the Commonwealth. They do this by reserving to themselves, as electors, approval of alterations to the Constitution; by the institution of the system of responsible government that renders the Executive answerable to the Parliament; and by the requirement that each House of Parliament must be "directly chosen by the people".

Because it has such an important influence, direct and indirect, upon the character of the Parliament, and the laws thereafter made by the Parliament, the requirement that senators and members must be "directly chosen by the people" should not be given a narrow meaning. It must be capable of adapting to changing circumstances.

A large constitutional purpose: An indication that the phrase "directly chosen by the people" has a large constitutional purpose is found in the use of the word "people", rather than "electors" (a word used elsewhere in the Constitution). This exceptional word enshrines the democratic ideal to which Ch I of the Constitution gives expression.

The precise details for the election of senators and members to the Parliament may not be spelt out in the constitutional text. But the critical phrase, and the overall purpose of Ch I, indicate that any attempt to introduce methods of election that are undemocratic, or liable to frustrate an exercise of real choice on the part of "the people", will be examined most carefully because they may put at risk the achievement of the overall constitutional requirements. **[642]** As in all matters of interpretation of the Constitution, the focus of attention is on considerations of substance rather than form …

[643] *Large ambit of the lawmaking power.* As against these considerations …, the decisions of this Court give little support to attempts to translate the phrase "directly chosen by the people" into a large guarantee of substantial equality in the achievement of the democratic ideal reflected in Ch I of the Constitution. Thus, an appeal to implications said to be inherent in the phrase fell, for the most part, on deaf ears in a series of decisions where it was invoked before this **[644]** Court. Notwithstanding occasional references by the Court to the democratic character of the Parliament, and the representative democracy provided for in Ch I, attempts to turn the phrase "directly chosen by the

people" into an effective instrument for the protection of concepts of democracy in the conduct of federal elections, when endangered by electoral law, have so far not proved fruitful.

Why has this been so? In part, the Court has founded its approach in textual provisions that clearly contemplate a substantial power in the Federal Parliament to provide, in considerable detail, for the conduct of elections, as indeed the Parliament has done from the earliest days of the Commonwealth. In part, the Court's approach reflects a recognition of the variety of electoral systems that exist in the world today and the undesirability of restricting the power of the Australian Parliament to experiment amongst electoral systems in the detail of the enacted electoral law. In part, the necessity to permit qualifications on "directly chosen by the people" to exclude babies and young children, to allow for uncontested elections and to provide for casual vacancies in the Senate requires acceptance of some limitations upon the amplitude of the constitutional phrase.

These considerations have led this Court to acknowledge the ample scope of the Parliament's power to enact electoral laws. It may do so as long as it conforms to the Constitution. In the result, *incidental* limitations upon the process of free choice by the people tend to be tolerated although discriminatory limitations upon choice and on the flow of political information to the people may not be.

Over the course of a century, the requirements for election to the Federal Parliament have changed as the Parliament and this Court have given new meaning to the nominated constitutional expressions. This Court has said that it would not be acceptable today to deny a vote for the Federal Parliament to an adult citizen [Gummow J in *McGinty*, 186 CLR at 286-87] or to female citizens [McHugh J in *Langer*, 186 CLR at 342] or to citizens disqualified on the ground of race. I disagree with judicial *obiter dicta* to the effect that it might be open for the Parliament today to abolish secret ballot. The phrase "directly chosen by the people" does not have a meaning fixed as those words were understood in 1901, or in colonial times. The words take their meaning from **[645]** contemporary perceptions of their connotation and how they are intended to operate today. Illustrations of this interpretative process abound. They are too numerous to be denied.

What might in 1901 have been regarded as acceptable for a Parliament "directly chosen by the people" might not pass muster today. In particular circumstances, if a majority in the Parliament endeavoured to disqualify women voters or citizens of Asian ethnicity or to entrench its power in a disproportionate way, to the electoral disadvantage of candidates of other political parties, the requirement of direct election by the people might well afford protection against the offending electoral law.

Heydon J: [675] It cannot be said that elections conducted under the 500 rule and the no-overlap rule do not result in legislators being "directly chosen by the people". The "choice" must involve "an opportunity to gain an appreciation of the available alternatives" [*Lange*, 189 CLR at 560, citing Dawson J in *Australian Capital Television*, 177 CLR at 187]. Regulation of the electoral process is necessary for its effective operation. Sections 7 and 24 forbid the interposition of an electoral college between the electors and those they elect, but otherwise permit the legislature a wide range of choice as to how to ensure that the elected are directly chosen by the electors. The 500 rule and the no-overlap rule do not prevent communication of party endorsement of **[676]** candidates in any respect save one, and hence do not prevent steps being taken to ensure that electors realise that a candidate might be affiliated with a party not noted on the ballot. The goals of the legislation establishing these rules, so far as they seek to prevent electors from being misled, are substantially achieved. Hence, far from being injurious to informed choice, the 500 rule and the no-overlap rule foster it.

The Court was equally unanimous in rejecting the suggestion that the provisions were invalid by reason of a "discriminatory" operation against the DLP.

Gleeson CJ: [588] Plainly, the reason for the 500 rule, in the wider context of a system of registered political parties for various purposes relating to the Act (a system which itself is not challenged by the appellant), is the view … that to qualify as a registered political party a group must have a certain minimum level of public support, and that an appropriate minimum level is established by a membership of 500. As to the first part of that, it is reasonably open to Parliament to consider that, bearing in mind the practical significance of political parties in the operation of the democratic process, it would deprive the concept of "party" of any real meaning if any two or more people, who happened to agree on even one issue, could demand recognition as a "party". It may be added, as was pointed out in

argument, that in Australia there is a long history of electoral systems which discourage multiplicity of candidates by requiring candidates to deposit a sum of money which will be forfeited if they do not achieve a minimum number of votes. Similarly, there are long-standing requirements for nominations of candidates to be supported by a minimum number of people. Those are well-known forms of regulating candidature at elections which have never been regarded as infringing the electors' right of choice, or as involving unreasonable discrimination. A requirement that, to be eligible to be treated as a political party for the purposes of the Act, a group must have some minimum level of public support, is not **[589]** materially different. As to the figure of 500, it is, no doubt, to an extent arbitrary, and there is no logical process by which it can be demonstrated that it should be more than, say 100, or less than (as is the case in New South Wales) 750. Even so, the number 500 is not so large as to be outside the range of choice reasonably available to Parliament if a number is to be chosen at all.

Mc Hugh J referred to what Gibbs CJ had said in *McKenzie v Commonwealth* and added:

McHugh J: [608] *Langer*, *Muldowney v South Australia*, *McGinty*, *McKenzie* and the cases which follow it show that the Court will not – indeed cannot – substitute its determination for that of Parliament as to the form of electoral system, as long as that system complies with the requirements of representative government as provided for in the Constitution. No doubt a point could be reached where the electoral system is so discriminatory that the requirements of ss 7 and 24 are contravened. The challenged provisions cannot be so characterised.

On one view, the Act creates two classes of candidates for Senate elections by offering a voting method to one class (registered political parties, groups of candidates and incumbent senators) that is approximately 20 times more popular than that offered to the other (individuals and groups of candidates which do not lodge group voting tickets). Yet the constitutionality of this voting method has **[609]** been consistently upheld since *McKenzie*. Since its introduction the number of informal Senate ballot-papers has declined by more than half, from 9.9% of the total number of ballots, to around 4%.

Gummow and Hayne JJ: [622] [T]he invocation by the appellant of unreasonable discrimination between candidates does not advance the argument. Certainly one meaning of the legal notion of "discrimination" is the unequal treatment of equals, but differential treatment and unequal outcomes may be the product of a legislative distinction which is appropriate and adapted to the attainment of a proper objective [*Cameron v The Queen* (2002) 209 CLR 339 at 343-44]. So it is that the Supreme Court of the United States has held that federal laws providing for the public funding of those parties which attract more than a specified minimum percentage of the vote do not invidiously discriminate between candidates in violation of the Fifth Amendment jurisprudence; the laws further "sufficiently **[623]** important governmental interests" [*Buckley v Valeo*, 424 US 1 at 95 (1976)].

Callinan J: [672] In my opinion the challenged provisions cannot be said to involve any *unreasonable* discrimination. The Constitution itself contemplates discrimination. Some might say that the election of an equal number of senators by each State discriminates against the more populous States. So too, a legislative entitlement to vote at age 18 years, may be thought by some to discriminate against people of 17 years. Lines must be drawn somewhere. The presence in the Constitution of ss 7, 8, 9, 24, 29, 30 and 34 provides a clear indication of the very broad power of the Parliament to make laws drawing those lines. Implicit in the challenged provisions are these propositions: political parties are comprised of people having a common political philosophy; political parties endorse and support candidates subscribing to that philosophy; endorsement by a political party may be a relevant matter for electors to know; and, to be a real political party of relevance, entitling it to various privileges, it should have no fewer than 500 members who are not members of other parties. Provisions containing, or **[673]** based upon those propositions do not discriminate in any unreasonable way against either a party or a candidate for election.

As I have pointed out, [in *Australian Capital Television*] only Mason CJ used the expression "level playing field" [177 CLR at 131]. The legislated rules apply to all in exactly the same way. Any discrimination that may occur, by denying candidates of unregistered parties of 2 to 499 members the same sort of notation on a ballot paper as a candidate endorsed by a registered party of, say 501 members, is to do no more than to draw the sort of line that the Constitution empowers the Parliament to draw, and that line has not been shown to have been unreasonably drawn here. Even if I were to

accept that a political surface as true and level as a well-calibrated bowling green was required by the Constitution, I would hold that the Act here substantially provides for it.

Heydon J: [677] Even if there is a "necessary implication from the text of sections 7 and 24" forbidding unreasonable discrimination, it is not infringed here. In the context of s 92 of the Constitution, discrimination has been said to lie in the unequal treatment of equals and in the equal treatment of unequals [*Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 480]. Here, there is no equality between parties that have some real level of community support and parties that do not, and the requirement of a minimum of 500 members is not an irrational way of distinguishing between those two classes. In the context of s 117 of the Constitution, discrimination has been said to signify the process by which different treatment is accorded to persons or things "by reference to considerations which are irrelevant to the object to be attained", and the question therefore is whether the different treatment is reasonably capable of being seen **[678]** as appropriate and adapted to a relevant difference [Gaudron J in *Street v Queensland Bar Association* (1989) 168 CLR 461 at 570-72]. Here, the difference exists in order to fulfil the objective of the 500 rule by informing voters about whether a particular candidate is endorsed by a "party" commanding some community support, and in order to fulfil the objective of the no-overlap rule by preventing "front" parties which might otherwise mislead voters. The 500 rule and the no-overlap rule assist an informed choice by electors. The difference in treatment that they effect is rationally based and is not unreasonable.

The plaintiff had raised these issues as part of a larger argument that the challenged provisions were not within power. The relevant legislative powers were those relating to the election and of the two Houses of the federal Parliament, and using the formulae "the Parliament may make laws" (ss 9 and 27) or "until the Parliament otherwise provides" (notably ss 10, 24, 29, 30 and 31). The latter set of provisions were picked up by the general grant of power in s 51(xxxvi) ("Matters in respect of which this Constitution makes provision until the Parliament otherwise provides"). McHugh J outlined the framework for the plaintiff's arguments as follows.

McHugh J: [599] [Sections 7 and 24 of the Constitution] are fundamental in ensuring that the parliamentary system for the Parliament of the Commonwealth is a system of representative government. Sections 9, 10, 31, 34 and 51(xxxvi) of the Constitution facilitate the carrying out of these requirements of representative government by conferring legislative power on the Federal Parliament with respect to elections for the Senate and the House of Representatives. However, although these grants of legislative power with respect to elections have been described as plenary and as purposive in nature, they are subject to certain express and implied constitutional limitations.

The express limitations include, for example, that the method of choosing senators must be uniform for all the States (s 9) and that the electoral system must **[600]** be such that both senators and members of the House of Representatives are "directly chosen by the people" (ss 7 and 24). The implied limitation is that the electoral system must satisfy the requirements of the constitutionally prescribed system of representative government. A corollary of this requirement is that elections must result in a direct, free, informed and genuine choice by the people. Another corollary … is that legislation must not infringe the implied constitutional freedom of political communication between the people.

In response to this structuring of the plaintiff's argument, Kirby J applied a proportionality test. He preferred the language of "proportionality" to the language of "appropriate and adapted" (see Chapter 15, §7). Subject to that terminological choice, he apparently proceeded on the basis that the express and implied limitations on electoral legislation should be subject to the same judicial criteria as those developed for other constitutional limitations on power, whether express (such as s 92) or implied (such as the freedom of political communication.)

Kirby J: [651] [The impugned provisions] are within the powers accorded by the Constitution to the Federal Parliament to enact laws with respect to elections to the Parliament. Measured against the express provisions granting or affecting such powers, the "500 rule" and the "no overlap rule" are, it is true, a burden on the DLP and its candidates. However, in my view, the rules represent a proportionate exercise by the Parliament of its legitimate powers. To that extent they are valid.

How does the introduction into the Act of the "500 rule" and the "no overlap rule" burden the political activities of the DLP? It does so most obviously by imposing a price, that would not otherwise exist, for a benefit that is enjoyed by other (larger and better organised) political parties to have the party affiliation of their candidates signified above the line on the Senate ballot paper in accordance with the choice of those individual candidates. Given the very high proportion of Australian electors who vote for senators in this way, the practical burden that is introduced by the challenged laws cannot be treated as insignificant or trivial. Communicating political allegiance in such a manner would sometimes, perhaps usually, represent a valuable political advantage. This would be especially so in the case of a political party, such as the DLP, which continues to enjoy, to some extent, name recognition, as I would readily infer to be the case.

I also accept the appellant's argument that the machinery of investigation and scrutiny of DLP membership and the obligation cast upon those members to reveal their political allegiances to government officials and to choose amongst several allegiances might, in individual cases, also constitute a burden on the DLP and its members. There were times in the past, and they may return, when public signification to government officials of political allegiances could carry risks of present or future disadvantage. [He referred to *Australian Communist Party v Commonwealth* (*Communist Party Case*) (1951) 83 CLR 1.]

Even if such risks were put to one side, there are many in Australian society who cherish the privacy of their political opinions. For personal reasons, such citizens might not be willing to reveal their party affiliations to government officials. The mere fact that their names might not be available for later public or special interest disclosure would be no comfort to such people. The advantage **[652]** of secret voting … is that it permits privacy in matters of political affiliation in federal elections. To impose on the DLP and its officers a requirement to disclose to the AEC the names of 500 members, and to alert those members to the necessity of such disclosure and about their inability to remain members of other political parties if they are to be counted in the 500, also constitutes a burden on the party and its members. It is particularly so in the case of a party of smaller membership.

All political parties in Australia, past and present, when first formed, had few members – many fewer than 500. For example, the establishment of the "Australian Labour Party" and a "Federal Labour Platform" was approved by a meeting held in Sydney on 24 January 1900. There were 27 persons present, comprising 19 members of colonial legislatures and eight "laymen" … The Liberal Party of Australia was formed by 82 delegates who responded to Mr Robert Menzies's invitation to attend a conference in Canberra in October 1944. Thus the two major political parties in Australia over the past half-century were created by relatively small numbers of persons committed to a common political cause. The Australian Communist Party was formed at Darling Harbour in Sydney in October 1920 by 26 delegates. For many years it exerted an influence disproportionate to its membership. It played a significant role in the events leading to the formation of the DLP. All of the foregoing parties had numerically low founding memberships. Political movements and parties commonly originate from the initiatives of a small band of activists …

I therefore accept that the provisions of the Act introducing the "500 rule" and the "no overlap rule" amount to real and practical burdens on the freedom of the DLP and its members to participate in elections to the Federal Parliament and to offer candidates who freely align with it, by reference to such affiliation. But are the provisions disproportionate to the power that the Parliament enjoys, having regard to the express provisions in the Constitution, so that the impugned laws should be declared invalid by that measure? I think not …

In my opinion, the two rules, and the provisions of the Act for their enforcement, give effect to legislative objects that are not wholly, or even mainly, designed to disadvantage small-party competitors of the incumbents. Whilst some of the arguments advanced to **[653]** explain the impugned provisions do not bear close scrutiny, others were convincing. It was open to the Parliament, in exercising its powers, to accept the latter arguments in adopting both the "500 rule" and the "no overlap rule" and the provisions for their enforcement.

It has been a feature of parliamentary elections in Australia in recent years, federal and State, for large numbers of political parties to field many candidates, producing extremely unwieldy ballot papers. A notable illustration of this phenomenon was the "tablecloth ballot paper" printed for the 1999 State election in New South Wales. The consequence of that development was substantial added cost in printing and handling ballot papers. Such cost might perhaps be diminished by the introduction

… of systems of electronic voting. More important were the consequences of the proliferation of candidates and their nominated political parties described in the materials in this case.

Amongst the problems identified in this material, as affecting the conduct of a general election, were the following: (1) The use by candidates of party names having no apparent connection with any serious or systematic policies or objectives; (2) The creation of "interlocking" political parties with exchanges of preferences unknown, or little known, to those voting for the candidates of such parties but rendered electorally significant because of the very large field of candidates; (3) The creation of political parties allegedly basing their main electoral strategy on the exchange of preferences potentially critical in resolving the return of those candidates last elected by the ultimate distribution of preferences; (4) The pretence that an individual or a very small group of candidates represents a genuine political "party", accountable to members, with party rules and audited accounts, when this is not the case; (5) The reported presentation of "party" membership forms to citizens ostensibly as petitions to Parliament, resulting in undesired affiliation of signatories with a political "party", effectively secured by trickery; and (6) The presentation of apparent political "parties" in a context of known public funding of registered parties, which may convey to voters a false impression that the "party" appearing on the ballot paper is of a size and organisation to be taken into serious account … Upon the later revelation of the true character of such pretended "parties", as no more than an individual or a minuscule rump of supporters, voters could become disillusioned **[654]** and cynical, thereby undermining public trust in the system of parliamentary democracy in Australia, highly reliant as it is on political parties deserving that description in such a context.

Views may differ about the merits of some of these arguments advanced in the parliamentary and committee deliberations that preceded the enactment of the provisions of the Act about which the appellant complains. The effectiveness of all of the impugned provisions of the Act to correct such suggested problems might also be questioned. The protections available to ensure against excessive application of the impugned laws and certain undesirable consequences of them might likewise be debated. However, it is clear that the provisions introducing the "500 rule" and the "no overlap rule", and providing for their enforcement by the AEC, are not based only, mainly or even significantly on purely partisan or self-serving electoral grounds. It would not be accurate to treat them as measures protecting incumbent political parties, to which courts such as this Court must be alert in considering statutory amendments to electoral law.

There are, therefore, reasons of principle and electoral policy that it was open to the Parliament to accept in enacting the impugned laws. Especially after the system of public funding for political parties was instituted, it was incontestably necessary to define the "eligible political party" that could qualify for such funding and for other statutory advantages enacted for that purpose. Fixing the number of members for such reasons is partly (although not wholly) an arbitrary task. One could imagine the legislative assignment of a number that would be so excessive as to risk invalidation of the law as disproportionate in the constitutional sense. Also disproportionate would be any attempt to confine the "choice" reserved in the Constitution to the "people" … [to candidates] belonging to an "eligible political party" defined restrictively to favour incumbents …

Within the scheme, and for the limited purposes of the Act, the "500 rule" and the "no overlap rule", and laws for their enforcement, are proportionate to the **[655]** power conferred on the Parliament by the Constitution to enact laws with respect to, or relating to, federal elections. Specifically, the provisions are not disproportionate to the express requirement that senators and members of the House of Representatives must be "directly chosen by the people" …

The impugned provisions are within the relevant express lawmaking powers of the Parliament referred to in the Constitution. They are proportionate to the *express* terms of the relevant sections of Ch I by which the Parliament is accorded power to enact electoral laws governing the election of senators and members of the House of Representatives. The first part of the appellant's challenge therefore fails.

SUPPLEMENT TO CHAPTER 27, §6

In *Mulholland v Australian Electoral Commission* (2004) 209 ALR 582, the challenge by the Democratic Labor Party ("the DLP") to the party registration provisions in Part XI of the *Commonwealth Electoral Act* 1918 (Cth) was directed particularly to preserving the Party's entitlements to identification of its candidates on federal ballot papers as DLP candidates, and to listing "above the line" on Senate ballot papers for the purpose of the simplified system of voting in Senate elections introduced by the *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth). Accordingly, the Party argued that the party identification of candidates on federal ballot papers was protected by the implied freedom of political communication.

However, this attempt to invoke the implied freedom failed on at least four grounds. The one attracting most judicial support was the idea that the constitutional freedom can only be used as a "shield", not as a "sword": that is, that where pre-existing "rights" are threatened by the operation of legislation (or of the common law), the constitutional implication can be invoked to protect those "rights", but that it cannot be relied upon to generate enforceable "rights" or "freedoms" not already cognisable by law.

One version of this idea had been stated in *Lange*, where the joint judgment explained that ss 7 and 24 of the Constitution "**[560]** do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power". Another version was spelled out by McHugh J in *Levy v Victoria*:

Levy v Victoria
(1997) 189 CLR 579

> **McHugh J: [622]** The freedom protected by the Constitution is not, however, a freedom *to* communicate. It is a freedom *from* laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution. Unlike the Constitution of the United States, our Constitution does not create rights of communication. It gives immunity from the operation of laws that inhibit a right or privilege to communicate political and government matters. But, as *Lange* shows, that right or privilege must exist under the general law …
>
> **[625]** The constitutional implication does not create rights. It merely invalidates laws that improperly impair a person's freedom to **[626]** communicate political and government matters relating to the Commonwealth to other members of the Australian community. It gave the protesters no right to enter the hunting area. That means that, unless the common law or Victorian statute law gave them a right to enter that area, it was the lack of that right, and not the Regulations, that destroyed their opportunity to make their political protest.

The point was taken up by Hayne J, sitting alone, in *McClure v Australian Electoral Commission* (1999) 163 ALR 734. Mr Malcolm McClure, an unsuccessful candidate at the 1998 Senate election, had appeared before Hayne J in person to complain of being disadvantaged – first, by the fact that candidates from registered parties could have their parties identified on the ballot paper and listed "above the line", and, second, by the failure of the mass media to give adequate publicity to his campaign. (He apparently believed "**[738]** that the Court should 'informally instruct' the chiefs of staff of media bodies about how they should act in the future".)

The complaint about the Senate voting system was put simply as one of "unfairness", and Hayne J rejected it by explaining that the reference to "substantial merits and good conscience" in s 364 of the *Commonwealth Electoral Act* 1918 (Cth) "**[742]** does not give the Court some power to rewrite the Act to accord with some abstract standard of fairness". It was only in response to the second complaint, about lack of publicity in the mass media, that Mr McClure invoked the constitutional freedom of political communication, and Hayne J

responded: "**[740]** The short answer … is that the *freedom* of communication implied in the Constitution is not an *obligation* to publicise. The freedom is a freedom from governmental action; it is not a right to require others **[741]** to provide a means of communication. The petitioner's case depends upon him having some right to require others to disseminate his views."

It was this point that was taken up in response to the DLP's claim in *Mulholland*.

Mulholland v Australian Electoral Commission
(2004) 209 ALR 582

Gummow and Hayne JJ: [631] Further attention … is required to the principles which *Lange* expounded and to the nature of the freedom that is protected. The phrase "absolutely free" in the text of s 92 of the Constitution, without more, gave rise to great difficulties in interpretation of the "guarantee" provided by that section. It would have been unfortunate if, by implication, another incompletely stated "freedom" were discerned in the Constitution. However, the case law respecting this freedom of communication has refined the notions involved here.

First, personal "rights" are not bestowed upon individuals by the Constitution in the manner of the *Bivens* action for damages discussed [in *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388 (1971)], in *British American Tobacco Australia Ltd v Western Australia* [(2003) 200 ALR 403], and previously in *Kruger v The Commonwealth* [(1997) 190 CLR 1]. Rather, the freedom creates an immunity or protection which has two aspects: (i) the exercise of legislative or executive power is precluded so that, for example, inconsistent statutory rules are invalid and (ii) the rules of the common law of Australia are required to conform with the Constitution …

[632] To begin consideration of the issue presented on this appeal first by asking whether the laws here in issue, by their terms or operation, effectively burden freedom of communication about government or political matters would be to select a false starting point for legal analysis. Failing to ask and answer the questions "whose freedom?" and "freedom from what?" would entail the error … exposed in *McClure*. To dispose of the case in that way would be to throw the weight of analysis at the wrong stage, namely the destination of a journey undertaken unnecessarily …

[633] 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 to which reference has been made. Whence derives the right of the DLP or its endorsed candidates to have the name of the DLP placed on the "above the line" ballot paper, being the right with which the Act then interferes in a way offending the constitutionally mandated freedom of communication?

No such common law right was identified. Provisions such as ss 168, 169 and 214 of the Act may create certain rights against the Commission respecting the contents of ballot papers. But these are of a nature which the appellant does not regard as satisfactory and it is their very validity which, in part, is attacked by reliance upon a freedom which descends *deus ex machina* …

[634] In the Full Court, their Honours went straight to what they identified as the first *Lange* question, namely, whether the law in question effectively burdened freedom of communication about government or political matters … Having answered that question "Yes", their Honours moved to the second question …

However, there was the threshold issue … respecting the existence and nature of the "freedom" asserted by the appellant. That issue should be resolved as indicated in these reasons, with the result that it is unnecessary to take any further the matters which arise under *Lange*.

Callinan J: [674] The appellant has no constitutional right to have his party affiliation included on the ballot paper. Nor does any other candidate. The rights are entirely statutory. The Act could be repealed or amended so as to allow no right of inclusion of a party on the ballot paper at all. The appellant has no relevant rights other than such rights as may be conferred on him by the Act. In argument, McHugh J drew an analogy: protestors cannot complain about an interference with, or the prevention of their doing what they have no right to do anyway, for example, to communicate a protest on land on which their presence is a trespass. 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. He can communicate his affiliation with the DLP as a candidate in any way and at any time that he wishes.

What he cannot do is compel the respondent to do so in a way which would effectively discriminate in his favour, and would be tantamount to treatment of him as having a relevant *right*.

For Heydon J, the need to point to some previously established "right" or "freedom" was only the first of several obstacles that the appellant's argument failed to surmount.

Heydon J: [678] First, there is no interference with any implied freedom of political communication … because it is necessary that there be some relevant "right or privilege ... under the general law" to be interfered with [McHugh J in *Levy v Victoria* (1997) 189 CLR 579 at 622]. In the absence of legislation permitting it, there is no right in any political party or candidate to have party affiliation indicated on the ballot paper. Indeed, the appellant conceded that a legislative prohibition on the appearance of any party affiliation on the ballot paper would not contravene the implied freedom. It 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. The Full Federal Court saw the challenged statutory provisions as conferring "a limited privilege on registered political parties in relation to their communication with the voters", which was "a burden on all those seeking election that do not enjoy it" [198 ALR at 286]. It would be paradoxical, however, if a complete prohibition was incontestably valid while a partial prohibition was not. It would also be paradoxical if an implied freedom created a right in individuals to have their party affiliation identified in the ballot paper, and created a correlative obligation on the Commission to include it there. Indeed, it would be contrary to principle, for "the *freedom* of **[679]** communication implied in the Constitution is not an *obligation* to publicise ... [I]t is not a right to require others to provide a means of communication" [Hayne J in *McClure*, 163 ALR at 740-41]. The Full Federal Court [in finding that the grant of a privilege to registered parties was a "burden" on those not registered] relied on passages that predate *Lange v Australian Broadcasting Corporation*, were enunciated in a case [*Australian Capital Television*] in which a prior freedom to communicate by radio and television broadcasts was found to exist at common law, and were directed to the inadequacy of the regime which was introduced in substitution for that prior freedom.

Secondly, what appears on the ballot paper is not political communication in the sense used in *Lange v Australian Broadcasting Corporation*, namely communications between the electors and the elected representatives, the electors and the candidates, and the electors themselves – that is, between the people. What is on the ballot paper is a communication only between the executive government and the electors. The ballot paper is the medium by which a vote is cast. It is integral to the election machinery. It is not part of the process of communicating information with a view to influencing electors to vote for one candidate or another. "It is for the electors and the candidates to choose which forms of otherwise lawful communication they prefer to use to disseminate political information, ideas and argument. Their choices are a matter of private, not public, interest. Their choices are outside the zone of governmental control" [McHugh J in *Australian Capital Television*, 177 CLR at 236]. But the conduct of the election itself is a matter of public interest and is within the zone of governmental control. That is particularly true of the form of the ballot paper.

Thirdly, the 500 rule and the no-overlap rule do not create a burden on the implied freedom of political communication in that there is no restraint on any activity which candidates or parties may engage in apart from the legislative system of registration. All opportunities for communication that existed before the impugned provisions were enacted continue to exist.

Fourthly, even if there were a relevant right to communicate party affiliation, even if the ballot paper is a form of exercising it, and even if there were a burden on the implied freedom of political communication, the requirements of the legislation are reasonably appropriate and adapted to serve legitimate ends, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government …

[680] Much of the appellant's argument analysed the structure and history of the legislation to support numerous detailed criticisms of its merits and … suggestions as to how the ends of the legislation could have been more effectively achieved by other means. However, the question is not whether the impugned provisions have established the most desirable or least burdensome regime to carry out the legitimate ends. The question is only whether the legislation is reasonably appropriate and adapted to the achievement of the legislative purpose, and weight is to be given to the legislative judgment.

The appellant's argument depended to some extent on an analogy with *Australian Capital Television Pty Ltd v The Commonwealth*. There is no analogy between the legislation struck down in that case and the legislation challenged in this case. The legislation in that case was characterised as constituting 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, at issue in this case.

The impugned legislation provides a system of funding to groups of politicians attracting sufficient community support to be capable of description and registration as "parties". The scheme of the legislation … is a reasonable technique for achieving its goals. While many numbers other than 500 could have been selected, it provides a reasonable guide to an appropriate level of community support. And the other legislative technique, treating as a party one which counts among its members a member of the legislature, is not arbitrary since to be a member is usually to have received a significant measure of community support, namely enough votes to be elected. The no-overlap rule is a means of ensuring the effective operation of the 500 rule by preventing its evasion.

The second point made by Heydon J – that the case could not be said to involve "political communication" at all – was rejected by Gleeson CJ, and also by McHugh and Kirby JJ.

Gleeson CJ: [591] [T]he argument for the respondent depends upon too narrow a view of what is involved in communication about government and political matters. Communication about elections takes place in a context which includes private or personal initiative, organised party activity, and public regulation. Candidates supply, and voters receive, information in a variety of ways right up to the time the ballot paper is marked. Candidates nominated by registered political parties know that information as to their party affiliation will appear on the ballot paper. At least by implication, they approve that communication of information and, in a substantial, practical sense, it is a communication for their benefit.

In a system of compulsory voting, party affiliation is of particular importance. Relatively few voters may know much about the individual candidates between whom they are invited to choose, and most voters are unlikely to be widely informed about all, or even most, of the issues that divide the candidates. When people are compelled to vote, many of them depend heavily on the guidance of others; and the party political system is the main practical source of such guidance. The so-called conservatism of the Australian people when voting in the referendum process for proposed constitutional change sometimes may be related to the system of compulsory voting, and to an absence of what voters may regard as satisfactory explanation of the proposed change. The party system provides much less guidance on such occasions … At general elections, the influence of party leaders is important. The Prime Minister is not directly chosen by the people of Australia; he or she is not "popularly elected". The Prime Minister, in a formal sense, is chosen by the Governor-General, and, in a practical sense, is chosen by the parliamentarians whose party, or coalition of parties, controls the House of Representatives. The Prime Minister, at any given time, may or may not have been a party leader at the last election. Nevertheless, many people, at a federal election, regard themselves as voting "for" or "against" a party leader, or **[592]** for or against the policies of a party, rather than as choosing between the particular candidates named on the ballot paper they receive.

Party affiliation is included on a ballot paper only at the registered party's request, a request which, in a practical sense, is made in the interests of the party's candidates. It is proper, and realistic, to regard the information conveyed to electors by the 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. The first question identified in *Lange* should be answered "yes".

McHugh J: [610] In my opinion, the Full Court correctly held that the ballot-paper is a communication on political and government matters. For the purposes of the Constitution, communications on political and government matters include communications between the executive government and the people. Representative government and responsible government are the pillars upon which the constitutional implication of freedom of communication rests. Communications between the executive government and public servants and the people are as necessary to the effective working of those institutions as communications between the people and their elected representatives.

As Deane J pointed out in *Cunliffe v The Commonwealth* [(1994) 182 CLR 272 at 336], freedom of communication on political and government matters "extends to the broad national environment in which the individual citizen exists and in which representative government must operate."

Admittedly, in so far as a ballot-paper is a communication on political and government matters for the purpose of the constitutional freedom, it is a communication of a special kind. Freedom of communication on political and government matters is a necessary implication of the Constitution because "the business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box" [*Australian Capital Television*, 177 CLR at 231]. The electors must be able to ascertain and examine the performance of their elected representatives and the capabilities and policies of candidates for election. For that purpose, the electors **[611]** must have access to all the information, ideas, opinions and arguments that may enable them "to make an informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation" [177 CLR at 231].

The primary purpose of a ballot-paper, however, is to record the voter's preferences among the candidates standing for election to Parliament in the voter's electorate. It is part of a process for the casting, counting and recording of votes to elect Parliamentary representatives which is the end to which the Constitution's implication of freedom of communication is directed. It does not convey information, ideas, opinions and arguments that may enable *other voters* to make an informed judgment as to how they should vote. Nor does it seek to persuade *candidates* in the election to modify or adjust their policies. The delivery of a ballot-paper to an elector is primarily a communication by the Commission to that elector that informs the elector what candidates are standing for election and what parties, if any, they represent. It also informs the elector of the manner in which an elector may record a valid vote. In so far as the elector makes a communication by marking the ballot-paper and lodging it in the ballot-box, the elector's primary purpose is to inform the Commission – the body charged with conducting the election – which candidate or candidates the elector wishes to have elected.

But, although the ballot-paper has little resemblance to traditional communications on political and government matters, it is still properly characterised as a communication on those matters. Although the ballot-paper is printed and distributed by the Executive (the Commission), party endorsement of candidates is included only at the request of the party (see ss 169, 210A and 214 of the Act). The Commission determines the form and format of the ballot-paper, but the candidates and parties essentially provide the "content". The ballot-paper is thus the record of the communication. Accordingly, the endorsement details on ballot-papers constitute a communication on political and government matters between candidates and electors. In *Figueroa* [[2003] 1 SCR at 947-48; (2002) 227 DLR(4th) at 31-32], the Supreme Court of Canada pointed out that the inclusion of such endorsement details on the ballot-paper is an important way in which parties and endorsed candidates communicate to voters. Implicit in the Court's reasoning … was that the ballot-paper is a medium of communication between parties and voters. In addition, the marked ballot-paper, when lodged in the ballot-box, is also a communication on such matters. That is because the marked ballot-paper contains a statement – anonymous though it is – that this candidate or these candidates should be elected to Parliament. In that respect, such a statement is no different from a statement made by an elector in the course of an election meeting claiming that X is the person who should represent the electorate.

Accordingly, a ballot-paper is a communication on political and government matters …

Kirby J: [657] [T]he AEC argued that the communication effected by the ballot paper was one not between citizens as to the issues in the election. It was, instead, one between a government agency and citizens and thus outside the ambit of protection by the constitutional "freedom".

Only the most artificial interpretation of the scope of constitutionally protected political communication could sustain such a submission. By agreeing to identify themselves with named political parties, candidates communicate with the electors. They do so at the critical moment of electoral "choice". They thereby signify the alignment of their views … As such, the ballot paper represents a communication with the people, not by officials of the AEC as such but by the candidates themselves. The communication may be highly abbreviated. In some cases it may be uncommunicative. However, in most instances it is vitally important because of the incapacity or unwillingness of most electors to research all of the issues **[658]** canvassed in an election. Many electors in Australia vote for particular political parties because of what they believe, or hope, will be the policies and programmes of such parties which their candidates, if elected, will pursue.

It follows that the Full Court was correct to find a burden on free political communication.

However, in a variant of the point relied on in other judgments, McHugh J held that because there was no pre-existing "right" to party identification on the ballot paper, the only such "right" was created by the very provisions under challenge, which could therefore hardly be said to "burden" the very rights that they created.

McHugh J: [613] The short answer to the claim that the challenged provisions burden political communications by the DLP to electors is that the restrictions are the conditions of the entitlement to have a party's name placed on the ballot-paper. The restrictions do not burden rights of communication on political and government matters that exist independently of the entitlement. Any political communication that is involved in the delivery and lodging of a ballot-paper results solely from the Commission's statutory obligation to hold elections and deliver ballot-papers in the prescribed form, and from the rights of parties and candidates to have their identities marked on the ballot-paper. However, the right of a registered political party to make, or have the Commission make on its behalf, a political communication on the ballot-paper is subject to the conditions imposed by the Act.

Only registered political parties may request the Commission to include endorsement details on ballot-papers. Registration requires the party to meet other statutory requirements, such as appointing officers, having a constitution and complying with reporting obligations. Unregistered political parties do not have a statutory entitlement under the Act to request the Commission to include the party's name or abbreviation next to the names of the candidates whom the party has endorsed. Nor do they have an entitlement to request the Commission to include the party's name or abbreviation next to the "above the line" box on Senate ballot-papers, in circumstances where the party has lodged a group voting ticket with the Commission. Thus, the content of the freedom in respect of any political communication by means of a ballot-paper is commensurate with the scope of the entitlements granted by the provisions of the Act which regulate the making of the communication.

[614] Because the DLP has no right to make communications on political matters by means of the ballot-paper other than what the Act gives, Mr Mulholland's claim that the Act burdens the DLP's freedom of political communication fails. Proof of a burden on the implied constitutional freedom requires proof that the challenged law burdens a freedom that exists independently of that law.

After quoting what he said in *Levy* and what Hayne J said in *McClure*, McHugh J concluded:

McHugh J: [614] No political party or its candidates have any right under the common law or the statute law of the Commonwealth or the States other than the Act to have the party's name printed above the line or on the ballot-paper. The only rights concerning ballot-papers which political parties and their candidates have are those rights that the Act confers on them.

The insistence on a need for pre-existing "rights" was rejected most firmly by Kirby J:

Kirby J: [650] There is one characterisation of the impugned provisions of the Act, presented as an answer to the appellant's complaints, that, with respect, I would firmly reject. It was expressed in *McClure v Australian Electoral Commission* [(1999) 163 ALR 734] and invoked by the AEC in this appeal. It was stated in the form of an aphorism: "the *freedom* of communication implied in the Constitution is not an *obligation* to publicise" [163 ALR at 740-41].

Without casting doubt on the correctness of the decision in *McClure*, I question the accuracy of the propounded dichotomy, at least if it is presented as one of general application. The appellant's attack in this case was on the "500 rule" and the "no overlap rule", and the particular provisions of the Act permitting their enforcement by the AEC. He sought to show that those provisions were invalid by reference both to express and implied constitutional requirements. If he could establish his contentions, and support severance of the offending provisions (as the AEC and the appellant both urged would occur if constitutional invalidity of the provisions were shown), those provisions would be excised. That would leave the Act in the position it was before the provisions were inserted.

Such severance would leave standing provisions for registered political parties and for "above the line" voting with identification of the affiliation of those belonging to any such "eligible political party". Doing this would not cast on the AEC any duty that could fairly be characterised as an "obligation to publicise". It would simply restore the position of allowing candidates who are members

of political parties, without *discriminatory* preconditions, to nominate such parties for inclusion in the Senate ballot paper absent the requirements which the appellant claimed discriminated against the DLP and in favour of incumbent parties.

According to the appellant, the DLP was not seeking the conferral of any special rights of publicity. It was simply claiming protection from this Court to delete from the Act amendments that were inconsistent with the constitutional **[651]** prescription. I agree with the appellant's argument to this extent. It follows that, in this respect, I disagree with the analysis on this point contained in the reasons of Gummow and Hayne JJ.

This passage might appear to suggest that, for Kirby J, the pre-existing "rights" were those created by the original registration scheme introduced in 1984. The issue would then be whether those rights were "burdened" by the new conditions introduced before the 2001 election. That analysis might be persuasive in relation to the "no overlap" rule, introduced in the year 2000; but not for the "500 rule", which dated from 1984. Be that as it may, a later passage made it clear that Kirby J flatly rejected the idea "**[657]** that the 'freedom of communication' that the Constitution protects is limited to 'rights' sustained by the common law or statutory provisions existing outside the Constitution itself". He protested that: "This approach, pushed to extremes, could effectively neuter the implied freedom of communication." Far from allowing existing common law rights to limit the operation of the Constitution, he pointed out that, under *Lange*, the common law "adapts to the Constitution". If the common law did not already embody adequate protections for the implied freedom, it would have to develop them.

In the end, only Gleeson CJ and Kirby J accepted that the case involved a "burden".

Kirby J: [655] The first question is whether the provisions of the Act introducing the "500 rule" and the "no overlap rule" and the sections providing for their enforcement burden the freedom of communication **[656]** about government or political matters implied from ss 7, 24, 64 and 128 of the Constitution. If the provisions do effectively burden that freedom, a second question arises as to whether the burden in question is constitutionally permissible, in the sense of proportionate to the achievement of all of the purposes of the Constitution …

The existence of a burden on political communication could only be denied by the adoption of self-fulfilling criteria as to what constitutes a "burden" or by the application of a constitutional sleight of hand. The provisions enforcing the "500 rule" place a restriction on the highly valuable ballot identification of the association of certain candidates with a named political party. They do so by reference to requirements that may tend to favour larger, incumbent political parties and to disadvantage smaller, less well-organised ones which nonetheless exist and are entitled to compete for political support.

The enforcement against the DLP of laws restricting inclusion on the ballot paper of the party's name in conjunction with party candidates would inferentially have negative consequences for those candidates. Under the Act, they could still appear as a group "above the line". However, they would be politically anonymous. They would be denied ballot association with the DLP party name. For those electors who did not know the candidates personally, but knew and supported the perceived objectives of the DLP, the absence of that name from the ballot paper would frequently prove decisive. Unless electors had some other means of knowing the identity of any DLP candidates, they would effectively be deprived of the opportunity of voting for candidates of that political persuasion. It would take a great deal of political naivety to fail to see the electoral disadvantage to the DLP and its candidates of the omission of its name from the Senate ballot paper in conjunction with the candidates whom it supported and who wished to be so identified.

Proof of this particular pudding may be found in the strenuous efforts of the DLP in these proceedings to win that right without having to comply with the requirements that the Act now extracts. Whatever might be the position in respect of other, new, imaginary or unknown political parties, I consider it unarguable that the name recognition of the DLP with electors has a practical value that would be measured in votes.

Even so, both Gleeson CJ and Kirby J joined in the unanimous result, since each of them held that the appellant had failed to show that the "burden" was unacceptable in terms of the

second test in *Lange*. Kirby J had already applied a "proportionality" test (see Chapter 15, §7) to conclude that the challenged provisions were not incompatible with implied limitations on legislative power arising from the words "chosen by the people" in ss 7 and 24 of the Constitution (see Chapter 13, §5). It followed that he made a similar finding of "proportionality" for purposes of the implied freedom of political communication. So, in substance, did Gleeson CJ.

> **Gleeson CJ: [595]** The circumstance that the appellant's challenge is not to the entire registration system for political parties, but to two particular aspects of that system, should not divert attention from the legislative context, which is in furtherance of, not derogation from, political communication. The idea behind the printing of party affiliations on ballot papers, as appears from the September 1983 report of the Joint Select Committee on Electoral Reform, was to "assist voters in casting their vote in accordance with their intentions." Public funding of political parties for election campaigns, and the adoption of the list system for Senate elections, were also measures in aid of political communication and the political process. Parliament took the view that those measures necessitated provision for the registration of political parties. That view was clearly open and reasonable. Parliament then took the view that some minimum level of public support was required for registration as a party and that 500 members was a reasonable figure for that purpose. It also, later, took the view that, to guard against obvious possibilities for abuse of the registration system, the no overlap rule should be introduced. Bearing in mind the context in which the two rules operate there is justification for them which this Court ought to accept as compelling. There is no reasonable basis on which this Court could legitimately form and substitute a different opinion. Furthermore, bearing in mind that the two rules under challenge are in furtherance and support of a system that facilitates, rather than impedes, political communication and the democratic process, there is no warrant for denying their reasonable necessity.

SUPPLEMENT TO CHAPTER 27, §4

A claim to a constitutionally protected "freedom of association" (at least for political purposes) was also raised in *Mulholland v Australian Electoral Commission* (2004) 209 ALR 582, where the Democratic Labor Party ("the DLP") challenged the statutory provisions under which the Australian Electoral Commission could demand to scrutinise its membership lists. Such a scrutiny, it was said, would impermissibly burden the freedom of association in its most directly relevant form – namely, the freedom of individuals to form or join a political party. In particular, it would intrude unacceptably on the privacy both of the Party and of its individual members. That privacy was seen as an essential element in the freedom of association, itself seen as a necessary corollary of the implied constitutional freedom of political communication.

As to this last-mentioned freedom, however, the Court was unanimous in holding either that it was not "burdened" by the impugned statutory provisions, or that the burden was justified. It followed that any argument based on the freedom or privacy of association would necessarily meet a similar fate.

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(2004) 209 ALR 582

Gleeson CJ: [595] It is unnecessary to deal separately with what were said to be cognate implied freedoms of association and privacy of political association. Since the burden on freedom of political communication has been justified, the same would apply if and to the extent to which such other or different freedoms existed.

McHugh J: [615] [In *Australian Capital Television*, 177 CLR at 232], I said that the Constitution contains "rights of participation, association and communication" in relation to federal elections but that these rights extend only in so far as they are "identifiable in ss 7 and 24" of the Constitution. In *Kruger v The Commonwealth* [(1997) 190 CLR 1], Toohey and Gaudron JJ and I each recognised an implied constitutional freedom of association. Toohey J regarded the freedom of association as "an essential ingredient of political communication" [190 CLR at 91]. Gaudron J said that freedom of association was an aspect of the freedom of political communication that is protected to the extent "necessary for the maintenance of the system of government for which the Constitution provides" [190 CLR at 116]. I said that the Constitution recognises a freedom of association at least for the purposes of the constitutionally prescribed system of government and the referendum procedure [190 CLR at 142].

However, disclosure to the Commission of the names of the members of political parties – either as part of the party's initial application for registration or in answer to a statutory request of the Commission – does not breach the implied freedom of association. Disclosure of the names of members is simply a condition of entitlement to registration and continued registration as a political party for the purposes of the Act. It is up to the political party which seeks to obtain or maintain registration to decide whether or not to disclose the names of its members. If, for privacy reasons, it does not wish to do so, the party is not entitled to the benefits of registration. A political party is not compelled to disclose to the Commission the names and addresses of its members. Accordingly, disclosure of the names of the members of a political party which seeks to obtain or maintain registration under the Act is not a breach of the constitutionally implied freedom of association.

In any event, upon the facts of this case, there appears to be no prospect that the names of members would become available to the general public. **[616]** Although the Register is open to public inspection under s 139 of the Act, the Register does not disclose the names or other identifying characteristics of members of registered political parties. The Act requires public disclosure of the name and address of the person who is nominated as the registered officer of the party (s 126(2)). It does not require public disclosure of the personal details of other members of that party. Nor is the supply to the Commission of the details of membership of the DLP likely to breach the implied freedom of association of those members. The *Privacy Act 1988* (Cth) imposes restraints on the Commission such that the prospect of public disclosure is slight. Furthermore, in so far as the Commission obtains information concerning

membership under its statutory powers, the information is of a confidential nature. Equity would restrain any attempt to disclose it.

The claim based on the implied constitutional freedom of political association therefore fails.

Gummow and Hayne JJ agreed. As to the freedom of association, they said:

Gummow and Hayne JJ: [623] There is no such "free-standing" right to be implied from the Constitution. A freedom of association to some degree may be a corollary of the freedom of communication formulated in *Lange v Australian Broadcasting Corporation* and considered in subsequent cases. But that gives the principle contended for by the appellant no additional life to that which it may have from a consideration … of *Lange* and its application to the present case.

As to the right to privacy, they said:

Gummow and Hayne JJ: [630] The appellant said that, while "freedom of privacy" was not put "generally", it was a very important consideration, presumably going to bolster the arguments for invalidity otherwise presented. Counsel developed the point by submitting that the provisions establishing the 500 rule and the enforcement of that rule would entail the disclosure of the personal identity of members.

However, counsel for the Commission emphasised that, whilst the Register is open for public inspection pursuant to s 139 of the Act, the Register does not contain the names of the members of registered political parties. The initial contents of the Register to be entered by the Commission as required by s 133(1) include the name and address of the person who has been nominated as the registered officer of the party for the purposes of the Act (par (a)(iii)), but not any particulars of the identity of members. Provision is made by s 134 for the entry of changes to the Register but, again, these do not include the names or other details of members.

The supply to the Commission of details of membership in compliance with the exercise by the Commission of its investigative powers springing from s 138A would not leave the Commission at liberty to disclose generally what it had learned. The Attorney-General for New South Wales … pointed, in that regard, to … s 41(1) of the *Freedom of Information Act 1982* (Cth) … Counsel for the Commission also referred to the constraints imposed on the Commission as an "agency" and "record-keeper" within the meaning respectively of s 6(1) and s 10 of the *Privacy Act 1988* (Cth).

In these circumstances it is sufficient to say that the apprehensions of the appellant respecting the disclosure to the Commission of the membership of the DLP do not provide any additional support to the submissions asserting the invalidity of the provisions for the 500 rule and the no-overlap rule.

Kirby J: [658] [I am] prepared to accept … that there is implied in ss 7 and 24 of the Constitution a freedom of association and a freedom to participate in federal elections extending to the formation of political parties, community debate about their policies and programmes, the selection of party candidates and the substantially uncontrolled right of association enjoyed by electors to associate with political parties and to communicate about such matters with other electors.

Especially given the express recognition in the amended terms of s 15 of the Constitution of the existence of "particular political part[ies]" in the context of filling casual vacancies in the Senate, it is impossible to deny an implication of free association to some degree. At the very least, such a freedom exists in this context to the extent that it is essential to make such "political part[ies]" in s 15 a practical reality.

In so far as the Full Court expressed doubts about the existence of a freedom of association for such purposes, implied in the text of the Constitution, I consider that their Honours were unduly cautious. The logic of this Court's decision upholding freedom of political communication obliges acceptance of protected political association, at least to some extent, so that the constitutional system of representative democracy will be attained as envisaged by Ch I.

Less certain is the scope of any implication of a zone of constitutionally protected privacy in the fulfilment of popular participation in the form of representative government established by the Constitution. Opinions suggesting that the secrecy of the ballot in Australia is not protected by a constitutional implication should not, in my view, be accepted. Given the history of voting privacy in this country, reaching back to colonial times, it is unthinkable that a federal electoral law could now introduce provisions obliging electors to reveal their voting preferences. The experience of other

countries where this has occurred suggests that it would constitute a most serious impediment to "direct choice" by the people of their parliamentary representatives.

Voting privacy and privacy in membership of a political party are, however, different in kind. To the extent that an elector takes part, as a member, in the organisation of a "particular political party" of the kind mentioned in the Constitution he or she, to some degree, steps outside the anonymity of citizenship into a more active involvement in the organised electoral system of the nation …

[O]ne can accept the existence of an implied freedom of political association. Even a measure of implied political privacy, essential to fulfil the constitutional design in voting in federal elections, may be accepted. However, such implications would not necessitate treating those requirements as absolutes, as the submissions of the appellant came close to suggesting. In each case where a court faces a challenge to infringements of implied constitutional "freedoms", it remains for that court to evaluate whether the burdens imposed by the impugned laws upon the achievement of those freedoms are disproportionate to the attainment of legitimate ends of electoral law, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative government …

Accepting, as I would, that the provisions of the Act challenged by the appellant burden, to some degree, the implied freedom of political communication and the implied freedom of political association essential for the fulfilment of the constitutional system of representative government, I am unconvinced that such burdens are constitutionally impermissible. They are not disproportionate to the attainment of all of the constitutional objectives operating in this context.

Similarly, to the extent to which there is inherent in the necessity of political association within "particular political part[ies]", as envisaged by the Constitution, any implied constitutional guarantee of privacy (the existence of which I would not finally decide), I reach the same conclusion. The requirements, restrictions and disadvantages imposed on the DLP by the impugned provisions of the Act are real but proportionate to the attainment of legitimate ends chosen by the Parliament. Those ends are compatible with the Constitution.

Callinan J: [673] The appellant put a submission that there were other constitutional implications upon which he could rely, of freedom of association in relation to federal elections "and an associated freedom of political privacy relating thereto". These too were said to be derivable from ss 7 and 24 of the Constitution, or from the implied constitutional freedom of communication itself, in short, … that there should be drawn an implication on and from another implication. The appellant argued that these were necessary precursors to, and inextricably linked with direct choice. Disclosure, it was argued, of the names of members of the party, unreasonably interfered with or burdened these freedoms.

I would reject this submission also. It was not suggested by the appellant that the secret ballot was constitutionally protected, but yet he would have it that secrecy of affiliation with a party should be, even in circumstances in which disclosure is only required in order to verify a qualification applicable to all parties and people for inclusion of a notation on a ballot paper, and other privileges, including a public subsidy. Implications of the type suggested fall far short of being necessary. And even if they were, the Act, and the challenged provisions of it, having as they do, the purposes to which I just referred, are not disproportionate or inappropriate, or ill-adapted to the direct election of members and senators mandated by the Australian Constitution.

SUPPLEMENT TO CHAPTER 15, §7

Amidst the continuing uncertainty surrounding the proper occasions for the "proportionality" test, its precise operation when those occasions arise, and its difference (if any) from the test of "appropriate and adapted", the distinction drawn by Mason CJ and Gaudron J in *Cunliffe v Commonwealth* (1994) 182 CLR 272 continues to offer useful guidance. As Gaudron J put it, when "proportionality" is invoked as an aid to characterisation (that is, as a test of whether an impugned law has a sufficient purposive connection with the positive grant of legislative power relied on), the test is "**[388]** whether the law *is reasonably capable of being viewed as* appropriate and adapted to achieving the purpose in question" (emphasis added). By contrast, when the Court is policing an express or implied constitutional limitation on the exercise of legislative power, the test of validity for a law encroaching on the constitutionally protected area is "whether the law *is* reasonably appropriate and adapted to the relevant purpose" (emphasis in original). The former test, conformably to the High Court's general approach to questions of characterisation, allows for deference to the legislative judgment so long as that judgment "is reasonably capable of being viewed as appropriate". The latter test asserts that the Court itself must be satisfied that the test of "reasonably appropriate and adapted" has been met.

One virtue of this distinction is its clear differentiation between the use of such tests as an aid to characterisation, and their use in the context of judicial protection for express or implied constitutional freedoms. In practice, however, this differentiation is repeatedly blurred. For example, in several cases on the freedom of political communication, Commonwealth and State Solicitors-General have attempted to persuade the Court that the test should be framed in the more permissive terms used by Gaudron J in the context of characterisation. In *Coleman v Power* (2004) 209 ALR 182, Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ all rejected this attempt, though Heydon J, in a footnote to his judgment (at 266n), left the issue open. When the argument was advanced again in *Mulholland v Australian Electoral Commission* (2004) 209 ALR 582, Heydon J again asserted in a footnote that the relevance of this and other proposed formulations did not need to be determined, "**[680n]** since, on any available construction of the test, and on any available way of applying it, the appellant must fail". (He noted, however, that in *Street v Queensland Bar Association* (1989) 168 CLR 461 at 570-72, in the context of identifying the "discrimination" forbidden by s 117 of the Constitution, Gaudron J had suggested that the test was, as Heydon J put it, "**[677]** whether the different treatment is reasonably capable of being seen **[678]** as appropriate and adapted to a relevant difference".)

On the other hand Kirby J, while renewing his attack on the expression "appropriate and adapted", spoke of "reasonably capable of being regarded by the Parliament as appropriate and adapted" as an "**[636]** even more ungainly phrase" and added:

> **Kirby J: [637]** [As] McHugh J recently pointed out in *Coleman v Power* [(2004) 209 ALR 582 at 205], that criterion has never been adopted by a majority of this Court. We should not do so now. It involves an impermissible transference to legislatures of the power, in effect, to define the limits of legislative powers. This is contrary to the basic design of the Australian Constitution, which reserves such questions, ultimately, to this Court. It is also disharmonious with the rule of law implicit in the Constitution. [He referred to the *Communist Party Case*.]

One possible differentiation between issues of purposive characterisation, and issues involving limitations on legislative power, was proposed by Toohey J in *Cunliffe v Commonwealth* (1994) 182 CLR 272, when he suggested that the competing criteria, "proportionate" and "appropriate and adapted", be assigned distributively: "appropriate and adapted" to issues

of purposive characterisation, "proportionate" to issues involving limitations on power. (This would not necessarily be inconsistent with the idea that the level of judicial scrutiny should be more rigorous in the latter context.) In *Mulholland*, however, issues of both these kinds were involved: the appellant had argued both that the impugned provisions of the *Commonwealth Electoral Act* 1918 (Cth) were not within power, and that they impermissibly impaired the implied constitutional freedom of political communication.

On one reading of his judgment, Kirby J rejected all of the distinctions suggested above, by applying the same test of "proportionality" to both of these issues. His actual use of the test might still be compatible with such distinctions, since on careful analysis it is clear that the first part of his judgment used "proportionality" to determine not the sufficiency of connection with a purposive head of power, but only the acceptability of a perceived infringement of express or implied limitations on power supposedly derived from the words "chosen by the people" in ss 7 and 24 of the Constitution. However, his references in the first two paragraphs below to "an essential connection between a constitutional source of power and the law propounded under it", or to "the essential link between an impugned law and its constitutional source of power", make it clear that he envisages "proportionality" as a single all-purpose test.

Kirby J: [636] The Full Court confined itself to the cumbrous obscurity of verbal variations on the theme of "appropriate and adapted". Unpleasant and formulaic as it may be for judges subject to this Court's authority to have to use such expressions to explain the existence of an essential connection between a constitutional source of power and the law propounded under it, it is understandable that they invoke that formula. For ourselves, we should strive to do better: adopting an explanation of constitutional connection that is clearer and more informative …

[648] The ungainly and unedifying phrase "appropriate and adapted", used to explain the essential link between an impugned law and its constitutional source of power, appears to have had its origin in the reasons of Marshall CJ in *McCulloch v Maryland* [17 US (4 Wheat) 316 at 421 (1819)] It is a phrase inappropriate and ill-adapted to perform the constitutional function repeatedly assigned to it by members of this Court.

The word "appropriate" is inapt because, within a given constitutional remit, it is for the Parliament (and not a court) to say whether a law is "appropriate" or "inappropriate". Appropriateness, of its nature, imports notions **[649]** of political degree and judgment which normally belong to legislators, not to judges. Similarly, "adapted" is a verb signifying modification and adjustment in detail: also usually the business of legislators. In so far as the composite phrase is made still further obscure by prefacing it with a description of the law as one "capable of being reasonably considered to be" appropriate and adapted, it is subject to added objections. That phrase risks diverting judgment from the particular law and surrendering the constitutional mandate with which the courts are charged to the assessment of the Parliament or the Executive. I will continue to protest against the continued use by this Court of such an unsatisfactory and ugly expression to explain what it is doing in the cases where the issue of constitutional power is invoked.

A more accurate explanation of the constitutional connection in such cases is found in the word "proportionality". That word has long been used by individual judges. Some have used it as an explanation of the limits of the "appropriate and adapted" test. For example, in *McKinlay* [135 CLR at 61] Mason J was prepared to accept that it was "perhaps conceivable that variations in the numbers of electors or people in single member electorates could become so grossly *disproportionate* as to raise a question whether an election held on boundaries so drawn would produce a House of Representatives composed of members directly chosen by the people of the Commonwealth" as the Constitution requires. The word was there used in a context that acknowledged the limits of the constitutional phrase in imposing a requirement of practical equality of electors in federal electorates. Mason J was addressing the extreme perimeter of constitutional power. "Disproportionate" was taken as a description of a law that exceeded the permissible boundary …

Mason J and Deane J were the progenitors in this Court of the more general use of "proportionality" in constitutional discourse [*Davis v Commonwealth* (1988) 166 CLR 79 at 100; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 30-31]. Following their lead, other judges have treated the notion as equivalent to the "appropriate and adapted" test, at least in certain circumstances.

I mentioned these developments in *Levy v Victoria* [189 CLR at 645], suggesting that proportionality represented a useful description of the actual process of constitutional reasoning. I remain of that view.

In its unanimous decision in *Lange* this Court noted [189 CLR at 567n] that, in the context there considered, "there is little difference between the test of 'reasonably **[650]** appropriate and adapted' and the test of proportionality". No word or phrase exists that fully explains the evaluative function of judgment involved in constitutional characterisation where a court is deciding the limits of constitutional power having regard to the competing considerations of the text and implications that lend scope to, or impose restrictions on the ambit of the power in question. Nevertheless, the notion of proportionality has important advantages over other formulae. This is especially so where (as here) the constitutional powers in issue are of a purposive character, namely powers afforded for the purpose of providing for the conduct of elections to the Federal Parliament …

It followed that Kirby J was also sceptical of the assistance to be gained from notions of "judicial deference" or a "margin of appreciation":

Kirby J: [646] In the past, I have reserved the question whether it is useful, in our constitutional discourse, to refer to "a margin of appreciation". The European courts, which invented that notion, are obliged to accommodate the substantially differing approaches of the many legal systems within the European Union and the Council of Europe. Moreover, notions of "deference" to Parliament (at least outside matters affecting its own internal regulation) accord more closely to the historical approach of courts to an "uncontrolled" legislature than they do to courts in Australia, bound to give effect to the requirements of written constitutions imposing limits on the exercise of legislative power. When those limits are exceeded, it is the duty of Australian courts to say so. They must then do so firmly and without "deference".

Even in England in recent times, there has been criticism of the notion of judicial "deference". Judges have recognised the potential of "deference" to distract courts from their duty to uphold the law [*R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 240]. I do not find either of the concepts ("margin of appreciation" or "deference") helpful in the present appeal. By the same token, I do not regard the mention of them in this case by the primary judge or the Full Court as casting the slightest doubt on their Honours' reasoning.

The judges below were reaching for a phrase to explain a consideration familiar and inescapable in this context. Sometimes an impugned law will clearly be valid and within constitutional power. The appellant, for example, accepted that the provisions of the Act for the registration of political parties, as such, were of that kind. Sometimes provisions of a law will clearly be invalid as exceeding the express conferral of lawmaking power or the limiting implications otherwise drawn from the constitutional text. The former provisions in Pt IIID of the Act, involving prohibitions on political advertisements and broadcasts in federal elections, were held to be in this latter class. But between clearly *valid* and clearly *invalid* provisions of an Act may be other provisions that require **[647]** characterisation. Such characterisation measures those laws against the constitutional text to which the courts must give meaning.

On the other hand, he thought that the distinctions drawn in the United States Supreme Court between different levels of "strict" and "intermediate scrutiny" were also of little assistance:

Kirby J: [647] It is doubtful that expressions such as "strict scrutiny" or "intermediate scrutiny" throw much light on the way in which a court evaluates the validity of a law said to exceed constitutional power. Such expressions amount to attempts to explain the psychology of differing judicial approaches to particular cases. Distinguishing between "strict", "intermediate" and "ordinary" scrutiny seems artificial when describing a common interpretative function.

This notwithstanding, it is probably true to say that, in certain circumstances, courts have a heightened vigilance towards the potential abuse of the lawmaking power inimical to the rule of law. Such vigilance may be specially needed when the power is directed against unpopular minorities. In those cases, or in circumstances where current lawmakers pursue their own partisan advantage, courts may subject the legislative vehicles of such advantage to close attention.

On all of these terminological issues Gleeson CJ was more permissive.

Gleeson CJ: [592] Whichever expression is used, what is important is the substance of the idea it is intended to convey. Judicial review of legislative action, for the purpose of deciding whether it conforms to the limitations on power imposed by the Constitution, does not involve the substitution of the opinions of judges for those of legislators upon contestable issues of policy. When this Court declares legislation to be beyond power, or to infringe some freedom required by the Constitution to be respected, it applies an external standard. Individual judgments as to the application of that standard may differ, but differences of judicial opinion about the application of a constitutional standard do not imply that the Constitution means what judges want it to mean, or that the Constitution says what judges would prefer it to say.

There are criticisms that can be made of both expressions, "reasonably appropriate and adapted", and "proportionality". It is to be noted, however, that … the test stated [in *Lange*] included the question whether the impugned law served "a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government". Identification of the end served by a law, and deciding its compatibility with a system of representative government, is a familiar kind of judicial function. To the extent to which the word "legitimate" means more than "lawful" or "within the scope of the powers of the Parliament" it may not add anything to the requirement of compatibility. For a court to describe a law as reasonably appropriate and adapted to a legitimate end is to use a formula which is intended, among other things, to express the limits between legitimate judicial scrutiny, and illegitimate judicial encroachment upon an area of legislative power.

[593] The concept of proportionality has both the advantage that it is commonly used in other jurisdictions in similar fields of discourse, and the disadvantage that, in the course of such use, it has taken on elaborations that vary in content, and that may be imported *sub silentio* into a different context without explanation …

Human rights legislation, which declares fundamental rights or freedoms but, recognising that they are rarely absolute, permits limits or restrictions provided they can be "demonstrably justified in a free and democratic society", is the context in which current jurisprudence on proportionality is most likely to be seen at work. In *R (Daly) v Secretary of State for the Home Department* [[2001] 2 AC 532 at 547, Lord Steyn said that "[t]he contours of the principle of proportionality are familiar", and … applied a three-stage test, by which the court should ask itself:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective." …

[594] If the use, in the present context, of a test of "proportionality" were intended to pick up all that content, then it would be important to remember, and allow for the fact, that it has been developed and applied in a significantly different constitutional context.

Gleeson CJ also took the opportunity to comment on dicta suggesting a more rigorous level of scrutiny for laws whose impact on political communication is direct, rather than incidental (that is, laws "directed to" political communications, or open to characterisation as laws "with respect to" such communications). See, for example, in *Australian Capital Television*, Deane and Toohey JJ at 169 and Mason CJ at 143 – the latter suggesting that in such a case what the government needs to establish is that the burden is "**[143]** no more than is reasonably necessary to achieve the protection of the competing public interest which is invoked". As to this, Gleeson CJ observed: "**[595]** I do not take the phrase 'reasonably necessary' to mean unavoidable or essential, but to involve close scrutiny, congruent with a search for 'compelling justification'. That is the standard to be applied here."

Gleeson CJ: [594] It should also be said that the word "necessary" has different shades of meaning. It does not always mean "essential" or "unavoidable", especially in a context where a court is evaluating a decision made by someone else who has the primary responsibility for setting policy. In *Ronpibon Tin NL and Tongkah Compound NL v Federal Commissioner of Taxation* [(1949) 78 CLR 47], a case concerning s 51 of the *Income Tax Assessment Act 1936* (Cth), Latham CJ, Rich, Dixon, McTiernan and Webb JJ said that the word "necessarily", in the context of the allowability of deductions for expenditure necessarily incurred in carrying on a business, meant "clearly appropriate or adapted for",

not "unavoidably" [78 CLR at 56]. Under the *Income Tax Assessment Act*, it was not for the Commissioner to tell a taxpayer how to run its business. The primary judgment was left to the taxpayer, and the concept of "necessarily incurred" was intended to impose a limit, enforced by the courts, but allowing due regard for the consideration that it was for the taxpayer to make the business judgment in deciding what to spend. The Commissioner could not disallow a deduction on the ground that the expenditure was not unavoidable. The reference given in *Ronpibon Tin* in support of the Court's view of the meaning of "necessarily" was to a judgment of Higgins J in 1910, in a case concerning the validity of delegated legislation, *The Commonwealth and the Postmaster-General v The Progress Advertising and Press Agency Co Pty Ltd* [(1910) 10 CLR 457 at 469]. The primary Act conferred power to make regulations for matters "necessary" for carrying out the Act. Higgins J said that, in such a context, the word "necessary" may be construed, not as meaning absolutely or essentially necessary, but as meaning "appropriate, plainly adapted to the needs of the Department". He cited *McCulloch v Maryland* [17 US (4 Wheat) 316 (1819)]. This seems almost to bring us round in a full circle. There is, in Australia, a long history of judicial and legislative use of the term "necessary", not as meaning essential or indispensable, but as meaning reasonably appropriate and adapted. The High Court originally took that from *McCulloch v Maryland*. There is, therefore, also a long history of judicial application of the phrase "reasonably appropriate and adapted". It follows that, when the concept of necessity is invoked in this area of discourse, it may be important to make clear the sense in which it is used, especially if that sense is thought to differ from reasonably appropriate and adapted. Different degrees of scrutiny may be implied by the term "necessary". I have no objection to the use of the term proportionality, provided its meaning is sufficiently explained, and provided such use does not bring with it considerations relevant only to a different constitutional context. Equally, I have no objection to the expression "reasonably appropriate and adapted", which has a long history of application in many aspects of Australian jurisprudence.