

PART VII – LIMITATIONS ON LEGISLATIVE POWER

I *Express Rights and Freedoms*

A *Rights Protection in Australia*

1 *Common law*

The common law offers relatively little protection to human rights and freedoms. Although certain processes and causes of action operate to curtail the extent to which power may be used to deprive an individual of their rights, no guarantees of those rights are provided. Thus, the common law writ of *habeas corpus* can be granted to remedy unlawful imprisonment, but offers no prima facie protection of the right to liberty.

Freedom of religion is not protected at common law (*Grace Bible Church v Reedman*).

2 *Statute*

Several statutes have been enacted which offer some protection to human rights:

- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth)
- *Disability Discrimination Act 1992* (Cth)

However, more commonly legislation will override rights conferred by the common law (as in *Durham Holdings Pty Ltd v New South Wales*).

3 *State constitutions*

The phrase ‘peace, order and good government’ in s 2(1) of the *Australia Act 1986* (Vic) does not constitute any limitation upon state legislative power (*Union Steamship Co of Australia Pty Ltd v King*; *Kable v DPP*). Rather, it is a conferral of plenary power upon the Victorian Parliament. This means that the state parliaments can legislate inconsistently with human rights if they so choose.

The situation is somewhat different in the Australian Capital Territory since the enactment of the *Human Rights Act 2004* (ACT). However, such legislation relies more on political limitations than legislative ones to discourage laws inconsistent with rights protection.

No right to compensation exists for the acquisition of property by a state government: *Durham Holdings Pty Ltd v New South Wales*.

4 *Commonwealth Constitution*

Not incorporating a Bill of Rights, the *Commonwealth Constitution* contains relatively few instances of human rights recognition. Indeed, some provisions were almost certainly intended by the framers to be used to the opposite end (see, eg, s 51(xxvi)). Broadly, the rights protected by the *Constitution* may be grouped into two types: express and implied.

The express rights commonly alleged to be found within the *Constitution* are the following. Where relevant, articulated limits are noted:

Section	Right protected	Directed at	Limits
24	Right to democratic election	Commonwealth Parliament; minimum requirement that members are 'directly chosen by the people'	<i>McGinty</i> : not 'one vote, one value' but may include adult suffrage <i>Mulholland</i> : 'free and informed choice'
41	Right to vote?	This section does not create any such right	
51(xxxi)	Right to just compensation for compulsory deprivation of property	Commonwealth Parliament (but not states)	Scope of parliamentary heads of power
80	Trial by jury	Federal judiciary (courts exercising federal jurisdiction)	Indictable offences only
92	Rights to free carriage and domestic travel	State trade regulation (state Parliament) and Commonwealth Parliament (both)	<i>Coleman v Power</i> : 'absolutely' (which is a limit)
116	Freedom of religion	Federal Parliament	
117	Right to free intercourse	State legislatures	

Of these provisions, those which confer an express right are now considered in turn.

B Democratic Election

Section 24 sets boundaries upon the exercise of the Commonwealth Parliament's power to legislative with respect to electoral matters:

Section 24:

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth...

In essence, this provision defines a spectrum of representativeness setting bounds on the permissible use of the power. For an explanation of the content of this spectrum, and the criteria by which its ends are delimited, see above Part III.

C Compensation on Just Terms

Section 51(xxxi) confers power to legislative with respect to:

Section 51:

(xxxi) ...the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

Unusually, this express right arises within the context of a *grant* of power (and not a limitation upon it). The effect of this context is as follows: for an Act of the Commonwealth Parliament to be supported by s 51(xxxi), it must comply with the conditions it establishes. Thus, it *grants* the Parliament power to acquire property whilst *requiring* that such acquisitions be made 'on just terms'.

In this sense, s 51(xxxi) is not an absolute right to private property. Parliament can still compulsorily deprive individual citizens of their proprietary rights, but for such actions to be supported by this head of power they must be accompanied by compensation in 'just terms'. What constitutes 'just terms' is a matter of fact. Effectively, this makes parliamentary decisions subject to judicial review.

The protection will be enlivened whenever property is acquired by the Commonwealth on the purported authority of s 51(xxxi). However, the fact that acquisition of property forms an incidental part of an Act supported by another head of power does not entail a right to compensation: *Mutual Pools and Staff Ltd v Commonwealth*. What is relevant is whether the law is properly characterised as relating to the acquisition of property. The fact that it involves 'adjusting ... competing claims, obligations or proprietary rights of individuals as an incident of the regulation of their relationship' is irrelevant (Mason J).

Requirements:

- **Acquisition must be compulsory:** *Trade Practices Commission v Tooth & Co Ltd*
Voluntary acquisition, as evidenced by agreement or mere regulation, will not enliven the protection;
- **What is acquired must be 'property':** what constitutes property has been interpreted broadly to include any right or interest recognised by law, and even some others
 - Lessee of a parking lot holds 'property' for purposes of s 51(xxxi): *Minister of State for the Army v Dalziel*
 - Loss of control over directorship of a bank is 'property': *Bank of New South Wales v Commonwealth* ('Bank Nationalisation Case')
 - Chose in action (right to sue in tort) is 'property': *Georgiadis v Australian & Overseas Telecommunications Commission*

These preconditions having been established, the holder of the property is entitled to just terms. This was interpreted by Brennan J in *Georgiadis* as meaning full compensation at market value, having regard to the public interest in acquisition.

D Trial by Jury

Section 80 provides as follows:

Section 80:

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

Section 80 is interpreted narrowly. It may be seen to embody the following values:

- **Respect for the rights** of the accused (right to a trial by jury)
- **Trial by peers** (representatives of the community)
- **Involvement of laypeople** in the criminal process (values/standards of the community)
- **Federalism and the protection of state rights** (criminal trials proceed according to state rules, in state courts and by jurors of that state)

However, there is considerable debate about the scope of protection that was intended by the framers. In particular, two primary issues surround the construction of s 80:

- 1 What offences must be 'tried by jury'?
- 2 What does 'trial by jury' mean or require in a procedural sense?

These issues are now examined in turn.

1 Scope of offences triable by jury

The scope of triable offences is limited by two requirements:

- **Jurisdiction**
Only applies with respect to a 'law of the Commonwealth', which means federal offences: *Bernasconi*; and
- **Indictment**
The offence must be one subject to trial by indictment: *Kingswall v R*.

With regard to the first of these limitations, it is clear that only Commonwealth offences are included within the provision (*The Queen v Bernasconi*). This also excludes the territories.

Of the federal offences, only a certain class is required to be tried by a jury. That class is the indictable offences (*The Queen v Archdall*). As Isaacs J noted in *The Queen v Bernasconi*:

*If a given offence is not made triable on indictment at all, then s 80 does not apply.*¹

The effect of the second restriction has been described as undesirable, since it allows Parliament to effectively narrow the right to a trial by jury to the point of nothingness simply by not creating any indictable offences. However, no workable criterion has been proposed by which to objectively determine the nature of an offence independently from parliamentary declaration. In the absence of a workable alternative, then, the High Court seems content to construe offences on the basis of Parliament's intention.

However, Higgins J noted in *Archdall* that this interpretation of s 80 has an important benefit: summary offences (which are ordinarily less serious) are able to be tried by a Magistrate sitting alone. This provides a simpler and more efficient way to dispose of the many summary charges placed before district trial courts without undue inconvenience to jurors and judges.

Whatever the practical arguments in favour of a narrow construction of s 80, it cannot be said to guarantee a right to trial by jury. The Commonwealth Parliament can clearly decide what is to be indictable, and can thus grow or diminish the 'right' as it sees fit. Thus it was that in *R v Federal Court of Bankruptcy; Ex parte Lowenstein*, Dixon and Evatt JJ argued that s 80, being one of the few express constitutional rights, ought to afford substantive protection for trial by jury. It should be available as of right for all serious offences, determined objectively:

R v Federal Court of Bankruptcy; Ex parte Lowenstein (1938) HCA:

Issue

- What is the proper scope of s 80 of the *Constitution*?

Reasoning (Dixon and Evatt JJ)

- **[582]** There is high authority for the proposition that "the *Constitution* is not to be mocked." A cynic might, perhaps, suggest the possibility that s 80 was drafted in mockery; that is language was carefully chosen so that the guarantee it appeared on the surface to give should be in truth illusory. No court could countenance such a suggestion, and, if this explanation is rejected and an intention to produce some real operative effect is conceded to the section, then to say that its application can always be avoided by authorising the substitution of some other form of charge for an indictment seems but to mock at the provision.'
- Indictment has had various historical meanings the current nature of which are unclear: 'information' and 'presentment' appear to be synonyms
- The 'trial upon indictment' has essential characteristics that arise irrespective of the intention of Parliament:
 - A public authority has charged the accused; and
 - The sentence is 'a term of imprisonment or to some graver form of punishment'
- **[584]** We admit the difficulties which the form of s 80 creates, but to treat such a constitutional provision as producing no substantial effect seems rather to defeat than to ascertain its intention.'

This view has not prevailed (see, eg, *Zarb v R* (7:0) narrow view).

¹ *The Queen v Bernasconi* (1915) 19 CLR 629, 637.

Kingswell v R (1985) HCA:Facts

- The *Customs Act 1901* (Cth) defines by s 233B the offence of ‘attempting’ to import narcotic drugs, and imposes penalties, up to and including life imprisonment, on the basis of findings by a judge rather than a jury: s 235
- The defendants plead guilty to the offence, but later challenge their convictions

Issue

- Is s 235 constitutionally invalid for reason of contravening s 80 of the *Constitution*?

Reasoning

- Gibbs CJ, Wilson and Dawson JJ:
 - The Commonwealth may determine the nature of an offence by legislative instrument
 - **[276]** Section 80 says nothing as to the manner in which an offence is to be defined. Since an offence against the law of the Commonwealth is a creature of that law, it is the law alone which defines the elements of the offence.’
 - Thus, whether or not an offence is indictable is a matter of statutory construction
- Deane J (dissenting):
 - Dixon and Evatt JJ were correct in *Lowenstein*: s 80 applies to all ‘serious offences’ regardless of parliamentary intention
 - However, their Honours’ criterion for what constitutes a serious offence cannot be accepted
 - **[310]** In light of the foregoing, it appears to me that the correct criterion of what constitutes a serious offence is that it not be one which can appropriately be dealt with summarily by justices or magistrates ...’
 - If a charge is made such that ‘the accused will, if found guilty, stand convicted of a “serious offence”’ then s 80 operates to require a jury trial

Whatever the weaknesses of Dixon and Evatt JJ’s criterion in *Lowenstein*, it was at least capable of clear application. Justice Deane’s is difficult to apply and offers little guidance to trial judges.

Cheng v R (2000) HCA:Reasoning

- McHugh J:
 - The text, history and purpose of s 80 all support the traditional view that the text means what it says
 - No reference is made to a class of ‘serious offences’
 - Instead, the scope of offences attracting the protection are described as ‘indictable’; the Convention Debates support this view
 - Even as interpreted, s 80 still has some protective value
 - The alternative view — that all objectively ‘serious’ offences should attract the protection — is riddled with practical problems: what is a ‘serious’ offence?
- Kirby J:
 - If a narrow view is adopted, s 80 might as well not exist
 - The framers’ views cannot be seen as definitive of the provision’s meaning

The practical problems alluded to by McHugh J in *Cheng* are numerous. How long must the term of imprisonment be: 1 year, 5 years? If it is not always required, are large fines sufficient? Further, even if the nature of the offence is determined by reference to the kind of punishment, *this still leaves the ultimate decision to Parliament*. This is because the federal Parliament is just as capable of setting maximum penalties as it is of expressing an offence to be triable summarily or by indictment. In this way, the scope of protection afforded by s 80 can still be varied at will.

However, the problem remains with a deferential view of 'seriousness' that Parliament can create offences having extremely severe sentences but still triable summarily. For example, Parliament could enact terrorism offences triable summarily but carrying life sentences upon conviction.

Having regard to these limitations, it might well be argued that s 80 is obsolete on account of its failure to protect rights. This criticism is otiose. Obsolescence depends on the section's original purpose. If its purpose was simply to entrench federalist principles into the conduct of criminal trials, then it arguably succeeds.

2 The nature of a trial by jury

Although the High Court has construed narrowly the scope of offences triable by jury, it has maintained a strong view of what the conduct of such a trial requires. The common law understanding of a 'trial by jury' (and that which the framers most likely intended) was that twelve people (ie, propertied, Anglo-Saxon men) would decide questions of fact arising throughout the trial.

The states have modified this position somewhat, as a result of practical concerns and the steady lengthening of criminal trials. In particular, some states have provided that:

- Majority verdicts are sufficient to ensure a guilty verdict (10 out of 12); and
- If a juror falls ill or dies during a trial, it is still possible to have a competent jury of 10.

The issue arises of the extent, if any, to which such changes are constitutionally valid. According to *Cheatle v R*, they are completely invalid.

***Cheatle v R* (1993) HCA:**

Facts

- Cheatle is charged under s 86A of the *Crimes Act 1914* (Cth)
- Section 57 of the *Juries Act 1927* (SA) permits the trial judge to accept a majority verdict in respect of such trials (that is, 10 out of 12 concurring jurors)
- Cheatle challenges his conviction on the basis that the *Juries Act* is invalid

Issue

- Is it constitutional for the trial judge to accept a majority verdict?
 - That is: would the resulting trial still constitute a 'trial by jury' according to s 80 upon its proper construction?

Reasoning

- In 1900, unanimity was an essential feature of trial by jury
 - [Surely the fact that the qualifications of jurors have changed so dramatically is inconsistent with maintaining that the features of a trial by jury remain static]
 - [The connotations of both terms have arguably changed, but the Court only

- recognises these changes in relation to jurors, and not the qualities of the trial itself]
- The phrase ‘trial by jury’ and the principle it denotes are viewed at a broader level of abstraction than the notion of a juror
 - The essential requirement in 1900 was the jury represent the people of the states (who in 1900 were only seen to be propertied, white men, but who today are various)
 - Correspondingly, that requirement remains essential today, but the specific connotation has changed to reflect broader notions of representation
 - Unanimity is also essential in principle:
 - The requirement has been instituted with ‘unwavering insistence’ by the common law since the fourteenth century
 - It is ‘one of the hallmarks of the common law institution of criminal trial by jury’
 - The majority should not be able to overrule the minority: unanimity ensures that the ‘[552] representative [553] character and the collective nature of the jury’ are preserved
 - Verdicts must be reached by consensus
 - By contrast, a majority verdict is similar to the electoral process
 - To allow otherwise would result in less deliberation and increase the chance of a false conviction
 - The requirement of unanimity promotes deliberation and reduces the danger of ‘hasty and unjust verdicts’
 - Importantly, if two out of 12 jurors have doubts about the accused’s guilt, then it is highly unlikely that the prosecution has successfully discharged its burden of proving the elements of the offence ‘beyond all reasonable doubt’
 - ‘[559] ...assuming that all jurors are acting reasonably, a verdict returned by a majority of the jurors, over the dissent of others, objectively suggests the existence of reasonable doubt and carries a greater risk of conviction of the innocent than does a unanimous verdict...’
 - Although there were some undesirable aspects of jury trials in 1900, this is not persuasive:
 - Jurors were required to be white men holding property
 - However, unlike unanimity of verdict, the qualifications of jurors were not essential features of the jury process: connotations not denotations
 - Further, liberalising the qualifications is making the interpretation more consistent with the provision’s denotation (representation of the community) by making jurors more representative of the community

Decision

- No, unanimity of verdict is an essential element of the concept of ‘trial by jury’ expressed in s 80 of the *Constitution*
- Section 57 of the *Juries Act* is read down so as not to apply to indictable Commonwealth offences

Section 80 does not allow individuals to waive their right to a trial by jury. Arguably, this makes the provision look even less like it grants a right, since it can’t be waived (then again, many other rights are said to be inalienable, such as the right to be free from slavery). The justification for denying waiver is that it would undermine the benefits conferred upon the criminal justice system (accuracy of conviction; fairness of process; judgment according to community values) by jury trials. It would therefore be inappropriate from a broader perspective of social justice to allow individual accuseds to wave their right to trial by jury.

Finally, it bears mentioning that s 80 applies only to Commonwealth offences. This is why, in *Cheatle*, the Act was able to be read down so as to apply only to state offences (and Commonwealth summary offences).

E Interstate Trade and Commerce

Section 92 provides as follows:

Section 92:

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

It was traditionally understood as creating rights to trade and travel between the states. However, it is no longer understood as such a guarantee. Indeed, the word 'absolute' is now treated as meaning not so much a blanket prohibition on internal tariffs and other barriers to free trade, but rather an invitation for courts to determine the scope of relevant protectionist measures.

The provision was intentionally drafted in an abstract manner to avoid the divisive (and, for federation, potentially fatal) political problem of describing particular measures as either protectionist or conducive to free trade. Unfortunately, this task has proved no less difficult for the High Court (though not for want of trying). The contemporary view of s 92 is that it is a provision for free trade so as to limit the powers of Commonwealth and state parliaments to erect barriers to the intra-national flow of goods and services.

***Cole v Whitfield* (1988) HCA:**

Facts

- The *Sea Fisheries Regulations 1962* (Tas) require, by reg 31(1)(d), crayfish commercial fished to be above a certain size (105mm females, 110mm males)
- Equivalent regulations in South Australia only require crayfish caught to be larger than 98.55mm
- The intention of the regulations is to maintain a breeding stock for a sustainable crayfish population (environmental controls)
- Mr Whitfield imports South Australian crayfish into Tasmania that are > 98.55mm but less than <110mm in size
- He is prosecuted for having undersized crayfish, and argues that reg 31(1)(d) is invalid because it contravenes s 92

Issues

- What is the meaning of s 92?

- Is the regulation such as to render 'trade, commerce, and intercourse among the States' less than 'absolutely free'?

Reasoning

- After a lengthy historical analysis of the convention debates and surrounding circumstances leading up to federation and the drafting of the provision in its final form:
 - **[391]** The purpose of the section is clear enough: to create a free trade area throughout the Commonwealth and to deny to Commonwealth and states alike a power to prevent or obstruct the free movement of people, goods and communications across state boundaries.'
 - 'By refraining from defining any limitation on the freedom guaranteed by s 92, the Conventions and the *Constitution* which they framed passed to the courts the task of defining what aspects of interstate trade, commerce and intercourse were excluded from legislative or executive control or regulation.'
 - The result is an unclear jumble of interpretations, none of them binding
 - 'Sir Robert Garran contemplated that a student of the first fifty years of case law on s 92 might understandably "close his notebook, sell his law books, and resolve to take up some easy study, like nuclear physics or higher mathematics"'
- The meaning of 'free' is 'free trade':
 - 'The expression "free trade" commonly signified in the nineteenth century, as it does today, an absence of protectionism, ie, the **[393]** protection of domestic industries against foreign competition.'
 - The provision intended that 'the Australian states should be a free trade area in which legislative or executive discrimination against interstate trade and commerce should be prohibited. Section 92 precluded the imposition of protectionist burdens: not only interstate border customs duties but also burdens, whether fiscal or non-fiscal, which discriminated against interstate trade or commerce.'
 - **[407]** ...we adopt the interpretation which, as we have shown, is favoured by history and context.'
- The test for infringement of s 92 is whether a law imposes a discriminatory burden of a protectionist kind:
 - The two key elements of s 92 are the words 'intercourse' and 'absolutely free'
 - However, **[394]** there is no reason in logic or commonsense for insisting on a strict correspondence between the freedom guaranteed to interstate trade and commerce and that guaranteed to interstate intercourse.'
 - This leaves open the possibility that freedom of movement may yet be recognised as embodied by s 92
 - The words 'absolutely free' are not necessarily inconsistent with an interpretation that 'concedes to interstate trade no more than a freedom from burdens of a limited kind'
 - The words should *not* be read as a 'guarantee of anarchy' when it comes to trade among the states of the Commonwealth
 - Instead, the Court must 'identify the kinds or classes of legal burdens, restrictions, controls of standards from which the section guarantees the absolute freedom of interstate trade and commerce.'
 - 'the failure of the section to define expressly what interstate trade and commerce was to be immune from is to be explained by reference to the dictates of political expediency, not by reference to a purpose of prohibiting all legal burdens, restrictions, controls or standards. In that context, to construe s 92 as requiring that interstate trade and commerce be immune only from discriminatory burdens of a protectionist kind does not involve inconsistency with the words "absolutely

free”: it is simply to identify the kinds or classes of burdens, restrictions, controls and standards from which the section guarantees absolute freedom...’

- The meaning of discrimination:
 - **[399]** The concept of discrimination in its application to interstate trade and commerce necessarily embraces factual discrimination as well as legal operation. A law will discriminate against interstate trade or commerce if the law on its face subjects that trade or commerce to a disability or disadvantage or if the factual operation of the law produces such a result.’
- Commonwealth laws:
 - A law enacted under s 51 might still offend s 92 ‘if its effect is discriminatory and the discrimination is upon protectionist grounds’
 - Whether the law is discriminatory in effect and whether that discrimination is protectionist in character ‘are questions raising issues of fact and **[408]** degree.’
- State laws:
 - ‘In the case of a state law, the resolution of the case must start with a consideration of the nature of the law impugned. If it applies to all trade and commerce, interstate and intrastate alike, it is less likely to be protectionist than if there is discrimination appearing on the face of the law. But where the law in effect, if not in form, discriminates in favour of intrastate trade, it will nevertheless offend against s 92 if the discrimination is of a protectionist character.’
 - However, ‘if a law, which may be otherwise justified by reference to an object which is not protectionist, discriminates against interstate trade or commerce in pursuit of that object in a way or to an extent which warrants characterisation of the law as protectionist, a court will be justified in concluding that it nonetheless offends s 92’
- Application to the facts:
 - The issues is **[409]** whether the burden which [reg 31(1)(d)] imposes on interstate trade in crayfish goes beyond the prescription of a reasonable standard to be observed in all crayfish trading and, if so, whether the substantial effect of that regulation is to impose a burden which so disadvantages interstate trade in crayfish as to raise a protective barrier around Tasmanian trade in crayfish.’
 - These are ‘questions of fact and degree on which minds might legitimately differ’
 - There is no discrimination on the face of the law
 - ‘The regulation neither operates at the border or frontier nor distinguishes between local and interstate trade or produce.’
 - However, fish caught in South Australian waters and sold in Tasmania are subject to more stringent conditions of importation than were they sold in South Australia
 - Even so, the prohibition applies both to crayfish caught in Tasmanian waters and also those that are imported
 - Therefore, ‘no discriminatory protectionist purpose appears on the face of the law’
 - The object of the law is environmental, not protectionist
 - By prohibiting the catching of undersized crayfish, the regulation assists in protecting and conserving ‘an important and valuable natural resource, the stock of Tasmanian crayfish’
 - Although this will preserve the sustainability of the Tasmanian crayfish industry, ‘it is not a form of protection that gives Tasmanian crayfish production or intrastate trade and commerce a competitive or market

- advantage over imported crayfish or the trade in such crayfish’
- ‘...even if the legislation were to give an advantage to the local trade by improving the competitive qualities of mature Tasmanian crayfish by eliminating undersized imported crayfish from the local market, the agreed facts make it clear that the extension of the prohibitions against sale and possession to imported crayfish is a necessary means of enforcing the prohibition against the catching of undersized crayfish in Tasmanian waters.’
- ‘[410] the legislation and the burden which it imposes on interstate trade and commerce are not properly to be described as relevantly discriminatory and protectionist.’

Decision

- (7:0) No, the regulation does not infringe s 92

1 *Interstate trade and commerce*

Essentially, then, *Cole v Whitfield* envisages a two stage enquiry when determining whether s 92 has been contravened by a law regulating trade and commerce:

- Does the law ‘discriminate’ against interstate trade?
 - If not, the law cannot possibly contravene s 92
- If so, does the discrimination have a ‘protectionist’ purpose or effect?
 - If the law has another, legitimate object, it will not contravene s 92
 - Only if the law’s purpose is protectionist in character will it so contravene s 92

Their Honours note at several stages that whether these questions are answered in the affirmative are questions of fact and degree. However, the Court also suggests that the more heads of powers relied upon by the Commonwealth, the less likely it is that a law will be characterised as discriminatory because it suggests that the Commonwealth is intending to regulate the relevant area of trade and commerce as extensively and uniformly as it has the legislative power to do.

Using history as a guide to constitutional interpretation, *Cole v Whitfield* authoritatively establishes that ‘absolute freedom’ does not entail freedom from *all* measures with the effect of imposing barriers to free trade. Rather, it means *absolute* freedom from *such measures* as may be relevantly characterised as ‘discriminatory’ and ‘protectionist’.

The Court leaves open the question whether ‘absolute freedom’ in relation to intercourse (freedom of personal movement and communication) means something different to the meaning of ‘absolute freedom’ in relation to interstate trade and commerce. According to Blackshield and Williams, the former freedom may truly be absolute.²

Notably, Sir Garfield Barwick was quite unimpressed with the result in *Cole v Whitfield*. He described as ‘laughable’ ‘terrible tosh’ and ‘[v]ery sad’.

These objections notwithstanding, the content of the rule is now indisputable. However, subsequent courts (including the identically constituted High Court) have faced difficulty in applying it to novel situations. *Bath v Alston Holdings* was handed down one month after *Cole v Whitfield*, yet is a (4:3) decision. This illustrates the difficulty of making ‘nice judgements’ about discriminatory effects and protectionist purposes.

² Blackshield and Williams at 1076.

Bath v Alston Holdings (1988) HCA:Facts

- Sections 10(c) and 10(d) of the *Business Franchise (Tobacco) Act 1974* (Vic) required retail tobacconists to pay licences of the following quantum:
 - \$50 (flat rate); plus
 - 25 per cent of the value of the tobacco sold in a given period, 'other than tobacco purchased in Victoria from the holder of a wholesale tobacco merchant's licence...' (*ad valorem* component)
- The exception for Victorian wholesalers was intended to prevent duplication of the licence fee, since such wholesalers had already paid the *ad valorem* component on their own stock
 - Essentially, the exception just ensured that each lot of tobacco incurred a single *ad valorem* charge only

Issue

- Do ss 10(c) and 10(d) of the Act contravene s 92?

Reasoning

- Mascon CJ, Brennan, Deane and Gaudron JJ:
 - The Act '[424] applies indifferently to retailers of both local and interstate products'
 - However, by excluding tobacco purchased from a Victorian wholesaler from the total sale value, which is used to calculate the *ad valorem* licence fee, there is '[425] an element of differentiation and at least *prima facie* discrimination.'
 - If the Act did not exempt Victorian wholesalers from calculation of the fee, there would be no differentiation and the impost would not contravene s 92
 - For example:
 - A tobacco retailer who sells only Victorian tobacco will pay the flat fee only (\$50)
 - However, a retailer who sales only interstate tobacco will pay \$50 *plus* 25 per cent of the value of that tobacco
 - Viewed in isolation, this situation is 'undeniably protectionist both in form and substance' because it discriminates against interstate purchases of tobacco in favour of purchases in Victoria
 - The provisions 'protect local wholesalers and the tobacco products they sell from the competition of an out of state wholesaler whose products might be cheaper'
 - '[426] the practical effects of the discrimination involved in the calculation of the retailer's licence fee would be likely to be that the out of state wholesalers would be excluded from selling into Victoria and that the products which they would otherwise sell in interstate trade would be effectively excluded from the Victorian market.'
 - The effect of ss 10(1)(c) and 10(1)(d) is therefore to discriminate against interstate tobacco products
 - 'The wholesaler's licence fee, imposed on local wholesalers by [427] reference to all their local sales, does not infringe s 92 in that it does not discriminate against goods coming from another state. The *ad valorem* content of the retailer's licence fee does infringe s 92 in that it discriminates against interstate trade and commerce in a protectionist sense by taxing a retailer only because of, and by reference to the value of, his actual or imputed purchases of products in any state other than

Victoria...'

- The idea that the tax is an 'equalising' mechanism is insufficient justification
 - 'The most that such notions of economic equalisation can do ... is to provide some local justification for the imposition of a protectionist tax in respect of interstate goods ... They do not alter the character of the tax as such or remove it from the ambit of s 92.'
- Wilson, Dawson and Toohey JJ:
 - A finding of discrimination has only '[431] a superficial plausibility'
 - This is an 'incomplete picture of the practical operation of the Act'
 - The practical operation is what determines whether there is discrimination: *Cole v Whitfield*
 - The interstate wholesaler is not subject to franchise fees and therefore able to sell tobacco to Victorian retailers at a significantly lower price because of this expense
 - The interstate advantage is therefore balanced by the *ad valorem* fee that the Victorian retailer–importer must pay under the legislation
 - (However, there is discrimination)
 - Further, '[432] the object of the legislation was not to favour Victorian trade at the expense of interstate trade in the product.'
 - Therefore, there was no protectionist purpose

Decision

- (4:3) Yes, it does contravene
- Majority:
 - '[429] A tax upon retailers in respect of their trading in goods may burden their trade in interstate goods consistently with the guarantee of s 92 only if it applies equally to the interstate and local goods which the retailers sell; it cannot lawfully discriminate between them so as to protect the local goods.'
- Minority:
 - There is no discrimination for a protectionist purpose

The judgments in *Bath v Alston Holdings* start by asking whether there is discrimination, then determine whether that discrimination is 'protectionist'. Both the majority and minority agree that the law is discriminatory on its face. Their Honours disagree as to whether that discrimination is of a protectionist character.

In *Castlemaine Tooheys Ltd v South Australia*, the Court unanimously held that a law having in effect a discriminatory effect on interstate manufacturers is in breach of s 92.

***Castlemaine Tooheys Ltd v South Australia* (1990) HCA:**

Facts

- The *Beverage Container Amendment Act 1986* (SA) purports to render the sale of beer in non-refillable bottles commercially disadvantageous
- The major manufacturers of such bottles were interstate breweries in New South Wales, Western Australia and Queensland
- The Bond Brewing Group challenges the legislation for breach of s 92

Issue

- Is the factual disadvantage to which interstate manufacturers are in effect subjected

- sufficient to say that the law is discriminatory?
- If so, is the law 'protectionist' in that it protects South Australian brewers against interstate competition?

Reasoning

- Mason CJ, Brennan, Deane, Dawson and Toohey JJ:
 - There is discrimination
 - '[464] The practical effect of the 1986 Act and regulations ... was to prevent the Bond brewing companies obtaining a market share in packaged beer in excess of 1 per cent whilst their competitors used refillable beer bottles.'
 - A law designed to achieve a non-protectionist objective must be reasonably appropriate and adapted to that objective
 - South Australia argues that, as in *Cole v Whitfield*, the Act was designed to promote litter control and conserve energy and resources (a non-protectionist, environmental purpose)
 - This argument posits that the legislation intended to discourage the use of non-refillable containers by imposing a higher deposit and by requiring acceptance of returns at the point of sale (discouraging retailers from handling them)
 - The legislation, on its face, '[472] appears to be directed to the solution of social and economic problems, not being the uncompetitive quality or character of domestic trade or industry'
 - '...interstate trade, as well as intrastate trade, must submit to such regulation as may be necessary or appropriate and adapted either to the protection of the community from a real danger or threat to its welfare to the enhancement of its welfare.'
 - 'But if the means which the law adopts are disproportionate to the object to be achieved, the law has not been considered to be appropriate to the achievement of the object ... There is a compelling case for taking a similar approach to the problem now under consideration.'
 - The problem here was 'finite energy resources'; legislative measures designed to address this issue which were appropriate and adapted to the resolution of those problems would be consistent with s 92, '**so long as any burden imposed on interstate trade was incidental and not disproportionate to their achievement.**'
 - Although the law was not ostensibly for a protectionist purpose, it was disproportionate to the (environmental) objective sought
 - The Court notes that the '[474] discrepancy between the 15 cents refund amount ... for non-refillable beer bottles and the 4 cents refund amount prescribed ... for refillable bottles goes beyond what is necessary to ensure the return of non-refillable bottles at the same rate as refillable bottles.'
 - 'The magnitude of the discrepancy indicates that the object of fixing the 15 cents refund amount went further than ensuring the same rate of return of non-refillable and refillable bottles and that the object was to disadvantage the sale of beer in non-refillable bottles as against the sale of beer in refillable bottles.'
 - 'If ... the legislature had enacted a law whose object and effect was simply to discourage the sale of beer in such bottles, the fact that the law had a more adverse impact on interstate brewers than domestic brewers because interstate brewers sell beer in such bottles would not make the law a discriminatory or protectionist law, if that impact was incidental and not disproportionate to the resolution of the little problem.'
 - 'In such a case the competitive disadvantage sustained by the interstate

brewer would be merely incidental to and consequential upon a regulatory measure whose object and effect was not discriminatory in a protectionist case.'

- 'The legislative regime is one which has as its immediate purpose the return and collection of containers generally, including refillable and non-refillable bottles.'
 - However, '[477] neither the need to protect the environment ... nor the need to conserve energy resources offers an acceptable explanation ... for the differential treatment given to the products of the Bond brewing companies.'
 - 'Accordingly, in our view, that treatment amounted to discrimination in a protectionist sense in relation to their interstate trade.'
- Gaudron and McHugh JJ:
 - 'A law is discriminatory if'
 - It operates by reference to an irrelevant distinction;
 - Although it operates by reference to a relevant distinction, 'the different treatment thereby assigned is not appropriate and adapted to the ... differences which support that distinction'; or
 - 'Although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, if it treats equally things that are unequal'
 - There must be a 'connexion between the distinction and the objective such that the object is reasonably capable of being seen as likely to be achieved'
 - Here the different treatment of non-refillable and non-refillable must be shown to be supported by the objectives of conserving energy and ameliorating waste
 - The defendant must show that the problems referable to non-refillable bottles are greater than those concerning refillable bottles
 - However, '[480] neither the objective of litter control nor the objective of energy conservation provides an acceptable explanation or justification for the different treatment assigned in the legislative regime for beverage containers.'

Decision

- The regime is discriminatory and disproportionate to its environmental purpose
- It advantages South Australian brewers, which use refillable bottles, and is therefore of a protectionist character and in breach of s 92

2 Summary

- Section 92 binds the Commonwealth and the states, both of which it prevents from enacting laws which impose a discriminatory burden upon trade, being a burden of a protectionist character (*Cole v Whitfield*);
- The purpose of s 92 is to protect free trade by preventing discrimination between interstate and intrastate trade;
- Whether a law is discriminatory depends less so on its form than its practical effect: a law will discriminate either if it does so on its face or if its practical effect is to accord differential treatment to states;
- Whether a law is protectionist depends on whether the effect of the law is to protect or advantage intrastate trade from or over the competition of interstate trade;
 - *Bath v Alson Holdings* majority: protectionist since Victorian wholesalers not subject to the interstate tax; grants a competitive advantage to Victorian wholesalers or removes interstate competitive advantages

- *Bath v Alson Holdings* minority: not protectionist since in practice it imposed the same financial burden on all wholesalers, just at different points (paid upon purchase by the retailer from interstate wholesales, paid by Victorian wholesalers themselves)
- If the Commonwealth creates uniform laws of general application, they will rarely if ever be discriminatory;
- If a law has a non-protectionist purpose, it will not contravene s 92 if the law is appropriate and adapted to that purpose such that any discrimination is purely an incident of meeting that objective;
 - Legislation whose practical effect is to discriminate against interstate trade in a protectionist manner will still be legitimate if
 - It has a legitimate non-protectionist objective (protecting the community from danger or enhancing its welfare); and
 - The legislation is either necessary or appropriate and adapted to the achievement of that objective; and
 - The protectionist effect of the legislation is only incidental to the achievement of the objective and is proportionate to that objective
 - I.e., the burden must be justified given the benefits derived from achieving the objective
 - Examples:
 - Protecting crayfish breeding populations is a non-protectionist purpose such that a discriminatory effect on out-of-state crayfish imports is incidental: *Cole v Whitfield*
 - Litter control and energy conservation are non-protectionist purposes, but they will not justify laws which treat two kinds of bottles (both creating litter) markedly differently; such a differential treatment would be disproportionate to the objective: *Castlemaine Tooheys*
 - If the deposit rates had simply been set at the level needed to achieve the objective, the law would have been valid

3 Intercourse between the states

Intercourse between the states includes movement of people, things and communications. The *Cole v Whitfield* Court left open the question of the extent to which such intercourse must be 'absolutely free'. In *Nationwide News v Willis*, Brennan J summarised the position under s 92 as follows:

***Nationwide News Pty Ltd v Willis* (1992) HCA:**

Reasoning (Brennan J)

- A law enacted with the purpose of interfering with interstate movement will *prima facie* contravene s 92 (*R v Smithers*; *Ex parte Benson*)
- Even if the law does not on its face target interstate movement, a law with the practical effect of impeding such movement will also be invalid;
- However, a law impeding intercourse among the states will not contravene s 92 if:
 - The law is enacted for another purpose (eg, prohibiting the importation of drugs); and
 - The law is appropriate and adapted to fulfil that purpose; and
 - The effect on interstate intercourse is only incidental to the law's operation; the interference must be no greater than is reasonably required to achieve the objective: *Cunliffe v Commonwealth*

F Freedom of Religion

Section 116 provides as follows:

Section 116:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Notably, s 116 has a counterpart in the *United States Constitution* (Amendment I). However, the Australian provision has not been interpreted so as to achieve the extensive effects of its American counterpart. Instead, the High Court has settled on a narrow view that merely prevents the Commonwealth from itself establishing a religion (eg, the Church of England).

It also prevents religious discrimination in Commonwealth employment (but not in the private sector) and invalidates laws compelling observance of a religion. However, it does not invalidate laws prohibiting the expression of religious sentiments (eg, religious vilification).

G Free Intercourse

Section 117 provides as follows:

Section 117:

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

The section prevents discrimination on the basis of state. However, this does not require absolute equality between the states (*Street v Queensland Bar Association*).

***Street v Queensland Bar Association* (1989) HCA:**

Facts

- The *Rules of the Supreme Court* (Qld) prevented barristers from other being admitted while they continued to practice in other states (applicants had to sign an affidavit to that effect)
- They were later amended to require only that applicants 'practice principally in the State of Queensland'; the amendments also imposed a 12 month period of conditional admission during which the principal nature of an applicant's practice would be assessed
- Mr Street is a New South Wales barrister wanting to practice in both Queensland and

New South Wales

- He argues that the practical effect of the admission requirements was to limit admissibility to residents of Queensland, hence infringing s 117 of the *Constitution*

Issue

- Are the amended *Rules* in breach of s 117 of the *Commonwealth Constitution*?

Reasoning

- Purpose of the provision
 - Mason CJ:
 - **[485]** ...designed to enhance national unity and a real sense of national identity by eliminating disability or discrimination on account of residence in another state.'
 - 'a constitutional guarantee of equal rights of all residents in all states.'
- Scope of the provision
 - Mason CJ:
 - **[485]** ...liberal, rather than a narrow, interpretation of "resident" in s 117 ... right to non-discriminatory treatment in relation to all aspects of residence.'
 - **[486]** ...the terms of the section invite a comparison of the actual situation of the out-of-state resident with what it would be if *he* were a resident of the legislative state' (emphasis added)
 - Thus, if V is a Victorian and Q a Queensland, the comparison is not whether V and Q have equal rights but whether V's disability, if one exists, would be present if V lived in Queensland
- Kind of discrimination
 - Mason CJ:
 - **[487]** The section is not concerned with the form in which the law subjects the individual to the disability or discrimination. It is enough that the individual is subject to either of the two detriments, whatever the means by which this is brought about by state law.'
 - Thus, laws with either a discriminatory purpose *or* effect may fall afoul of s 117
 - Gaudron J:
 - **[569]** ...in the interpretation and application of the *Constitution*, particularly its guarantees of freedom and the prohibitions by which those freedoms are secured, regard should be had to substance rather than form...'
 - '...the protection of s 117 extends to indirect discrimination or different treatment which is revealed by the disparate impact of the matter in complaint.'
- Relevant test
 - Mason CJ:
 - **[488]** An examination of the effect of the relevant law is both necessary to avoid depriving s 117 of practical effect and consistent with its emphasis upon the position of the individual.'
 - 'It seems to me that for s 117 to apply it must appear that, were the person a resident of the legislative state, that different circumstance would of itself either effectively remove the disability or discrimination or, for practical purposes in all the circumstances, mitigate its effect to the point where it would be rendered illusory...'

- Limitations and exceptions
 - All judges agreed that the scope of s 117 is limited by several exceptions
 - Eg, non-state residents cannot participate in the electoral processes of a state, such as elections for that state's Parliament or representation in the Senate
 - Brennan J: adopts the broadest view (fewest exceptions)
 - '[512] ...it is clear that there must be some exception to a general application of [s 117's] terms.'
 - It is necessarily inconsistent with s 7 of the *Constitution*, which expressly discriminates against non-state citizens by entitling only citizens of a state to vote in that state's electorate
 - 'In my opinion, the guarantee of equality of treatment is qualified only by necessary implication from the *Constitution* itself.'
 - '[513] The necessity to preserve the institutions of government or their ability to function demands that electoral laws providing for a franchise based on residence in a state be given full effect.'
 - However, this exception is 'narrowly confined'
 - '[521] The law, which today pushes open the doors of the Supreme Court of Queensland for entry by suitably qualified barristers admitted and practising in other states, opens too the doors of state universities, hospitals and other institutions for entry by subjects of the Queen resident in other states in the same terms as residents of the relevant state.'
 - McHugh J:
 - '[583] ...the existence of a federal system of government, composed of a union of independent states each continuing to govern its own people, necessarily requires the conclusion that some subject-matters are the concern only of the people of each state.'
 - Such matters, not within the scope of s 117, '[584] would seem to include the franchise, the qualifications and conditions for holding public office in the state, and conduct which threatens the safety of the state or its people.'
 - Mason J:
 - '[491] To allow the section an unlimited scope would give it a reach extending beyond the object which it was designed to serve by trenching upon the autonomy of the states to a far-reaching degree...'
 - '[492] The preservation of the autonomy of the states demands that the exclusion of out-of-state residents from the enjoyment of rights naturally and exclusively associated with residence in a state must be recognised as standing outside the operation of s 117.'
 - Example: the right to enjoy state welfare benefits
 - 'The exclusion would not seem to detract from the concept of Australian nationhood or national unity which it is the object of the section to ensure, because **it would offend accepted notions of state autonomy and financial independence** and a due sense of a state's responsibility to the people of the state to say that the *Constitution* required the state to extend the range of persons entitled under the scheme to out-of-state residents. The same comment might be made about a requirement that a person is not eligible to be the licensee of an hotel unless he resides on the premises.'
 - 'On the other hand, the same comments could not be made about the exclusion of out-of-state residents from participation in professional activities open to residents of the legislating state ... **unless the exclusion could be justified as a proper and necessary discharge of**

the state's responsibility to the people of that state...'

- Effect of contravention:
 - Mason CJ and Brennan J:
 - The law will not be generally invalid
 - It will only result in the individual being exempt from the law
 - The other justices do not expressly endorse this view, but the Court's order has this effect
 - The order is that the provisions '[592]' are inapplicable to the plaintiff to the extent that they would require him ... to have an intention of practicing principally in Queensland...'

Decision

- Section 117 involves assessment of the *actual effect* of the impugned rule on a non-state resident: if the rule places more onerous obligations on non-state residents, then it is in contravention of s 117
- It is in breach of s 117 to prevent a non-Queensland resident from being a member of the Queensland bar association
- Therefore, the rules do not apply to Mr Street (though they are not invalid)

In order to attract the protection, the discrimination must affect a 'subject of the Queen'. It is unclear whether this simply means 'Australian citizen'. It may go further and encompass other categories of person (eg, corporations).

This provision has also been interpreted narrowly. It reflects federal values, not human rights, and is to that end intended to bring the states together into a single entity rather than guarantee any individual rights like freedom of movement or personal equality.

II *Implied Freedoms*

A *Political Communication*

1 *Introduction*

The decisions in *Nationwide News Pty Ltd v Wills* and *Australian Capital Television Pty Ltd v Commonwealth* recognised that the *Constitution* implies a requirement that citizens be entitled to free political communication. This requirement is said to be a necessary consequence of the system of representative government for which the *Constitution* provides — not in a general, overarching sense, but from the requirements in ss 7 and 24 that members of the Senate and House of Representatives be ‘directly chosen by the people’.

The possibility of such an implication was first raised in the 1970s, but was then dismissed by the Court (with the exception of Murphy J). Justice Mason’s rejection in these early cases was somewhat ironic given his subsequent championing of the implication 20 years later. His Honour appears to have decided that implications need not be *necessary*, just *logical* given the text and structure of the *Constitution*. The making of implications is hardly a new occurrence (see, eg, *Engineers’ Case, Melbourne Corporation*) but it continues to be subject of criticism.³

Early recognition in the freedom construed the implication broadly: that is, as a general freedom of discussion implied by the notion of representative democracy itself (*Nationwide News*).

Nationwide News Pty Ltd v Willis (1992) HCA:

Facts

- Section 299(1)(d)(ii) of the *Industrial Relations Act 1988* (Cth) stated that:
 - ‘A person shall not ... by writing or speech use words calculated ... to bring a member of the Commission or the Commission into disrepute’
 - The objective was that members of the Commission, when exercising the executive function, should be protected from ridicule just like a court, so that if a person makes rude comments they may be punished for contempt
- Newton publishes an article in *The Australian* which includes the following statements:
 - ‘[Industrial relations laws are] enforced by a corrupt and compliance “judiciary” in the official Soviet-style Arbitration Commission’
 - ‘enforced by the corrupt labour “judges”, etc
- The newspaper is prosecuted for breach of s 299(1)(d)(ii)

Issue

- Is s 299(1)(d)(ii) within the scope of the incidental power?
- If so, does it nevertheless infringe upon a freedom of political communication implied by the text of the *Constitution*?

Reasoning

- Brennan J:
 - Limitations on the express powers of the Parliament granted by s 51 of the *Constitution* can be implied from the text of the *Constitution*
 - **[47]** To sustain a representative democracy embodying the principles prescribed by the *Constitution*, freedom of public discussion of political and economic

³ Indeed, implication is neither a controversial nor a novel technique in itself. Most objections are levelled not at the interpretive technique but at the *moral content* or *political significance* of the result.

matters is essential: it would be a parody of democracy to confer on the people a power to choose their parliament but to deny the freedom of public discussion from which the people derive their political judgements.'

- Freedom of public discussion of government is inherent in the idea of a representative democracy
 - '[48] Once it is recognised that a representative democracy is constitutionally prescribed, the freedom of discussion which is essential to sustain it is as firmly entrenched in the *Constitution* as the system of government which the *Constitution* [49] expressly ordains...'
 - '[50] No law of the Commonwealth can restrict the freedom of the Australian people to discuss governments and political matters unless the law is enacted to fulfil a legitimate purpose and the restriction is appropriate and adapted to the fulfilment of that purpose.'
- Deane and Toohey JJ:
 - The *Constitution* embodies at least three 'main general doctrines of government'
 - **Federalism:** dividing legislative, executive and judicial powers among central and regional governments
 - **Separation of powers:** separating legislative, executive and judicial power
 - **Representative government:** 'of government by representatives directly or indirectly elected or appointed by, and ultimately responsible to, the people of the Commonwealth. The rational basis of that doctrine is the thesis that all powers of government ultimately belong to, and are derived from, the governed...'
 - '[72] The people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the *Constitution* reserves to them if each person was an island, unable to communicate with any other person.'
 - 'An ability to vote intelligently can exist only if the identity of the candidates for election or the content of a proposed law submitted for the decision of the people at a referendum can be communication to the voter.'
 - 'The doctrine presupposes an ability of represented and representatives to communicate information, needs, views, explanations and advice. It also presupposes an ability of the people of the Commonwealth as a whole to communicate, among themselves, information and opinions about matters relevant to the exercise and discharge of governmental powers and functions on their behalf.'
 - There are thus two levels at which the freedom of communication operates:
 - Communications and discussions between the represented and their elected representatives
 - Communications between the people of the Commonwealth
 - This second level includes '[74] information, opinions and ideas about all aspects of the government of the Commonwealth, including the qualifications, conduct and performance of those entrusted (or who seek to be entrusted) with the exercise of any part of the legislative, executive or judicial powers of government which are ultimately derived from the people themselves'

Decision

- Mason CJ, Dawson and McHugh JJ: the law is not within the scope of the implied incidental power (unnecessary to decide the political communication issue)
- Brennan, Deane, Toohey and Gaudron JJ: even if s 299(1)(d)(ii) was within power, it would still infringe the implied freedom and so be invalid

The judgment of Mason CJ in *Australian Capital Television* provides another example of a broad formulation of the implied freedom. His Honour distinguishes between restrictions upon the content of a communication (harder to justify) and those merely regulating the mode of communication (easier to justify). The enquiry is seen as a balancing of the burden placed upon free political communication against the public interest served by that burdening.

Australian Capital Television Pty Ltd v Commonwealth (1992) HCA:

Facts

- The *Political Broadcasts and Political Disclosures Act 1991* (Cth) amended the *Broadcasting Act 1942* (Cth) to include a new pt IID
- Section 95B purported to ban political advertisements on radio or television during federal election periods
- Section 95C extended the ban to territory elections, while state and local government elections were included under s 95D
- The only broadcast time permitted to candidates was on the basis of a regulation scheme giving preference to existing Members of Parliament
- The law is clearly within s 51(v) of the *Constitution*

Issue

- Does Pt IID nevertheless infringe a constitutionally guaranteed freedom of political discussion?

Reasoning

- Mason CJ:
 - ‘The very concept of representative government ... signifies government by the people through their representatives’
 - **[138]** ...the representatives who are members of Parliament and Ministers of state are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.’
 - Freedom of political communication is essential to ensure accountability and representation as provided by the *Constitution*
 - **[138]** Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion’
 - Such a freedom is necessary for citizens to communicate their views on political matters, criticise government decisions, and generally influence the conduct of their representatives in the performance of their duties
 - Elected representatives must also have freedom to communicate with the people
 - **[139]** Communication in the exercise of the freedom is by no means a one-way traffic, for the elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform the people so that they may make informed judgements on relevant matters.’
 - The scope of the freedom is wide, but not absolute
 - **[142]** Unlike the legislative powers of the Commonwealth Parliament, there are no limits to the range of matters that may be relevant to debate ... The consequence is that the implied freedom of communication

extends to all matters of public affairs and political discussion, notwithstanding that a particular matter at a given time might appear to have a primary or immediate connection with the affairs of a state, a local authority or a territory and little or no connection with Commonwealth affairs.'

- However, 'the concept of freedom of communication is not an absolute.'
- For example, 'Parliament may regulate the conduct of persons with regard to elections so as to prevent intimidation and undue influence, even though that regulation may fetter what would otherwise be free [143] communication.'
- Draws a distinction between two kinds of restrictions upon political communications:
 - Those which target ideas or information; and
 - Those which target the activity or mode of communication
 - For the first category 'only a compelling justification will warrant the imposition of a burden ... and the restriction must be no more than is reasonably necessary to achieve the protection of the competing public interest which is invoked to justify the burden on communication. Generally speaking, it will be extremely difficult to justify restrictions imposed on freed communication which operate by reference to the character of the ideas or information.'
 - 'So, in the area of public affairs and political discussion, restrictions of the relevant kind will ordinarily amount to an **unacceptable form of political censorship.**'
 - The second category of restrictions is 'more susceptible of justification'
 - This kind of regulation occurs frequently in the broadcasting industry
 - It is in the public interest for some restrictions to be placed on the flow and dissemination of ideas and information
 - 'If the restriction imposes a burden on free communication that is disproportionate to the attainment of the competing public interest, then the existence of [144] the disproportionate burden indicates that the purpose and effect of the restriction is in fact to impair freedom of communication.'
- Application to the facts
 - The restrictions here fall into the second category, being imposed upon television and radio broadcasting
 - The law specifically prohibits broadcasting in connection with the electoral process
 - The law's purpose is '[144] to safeguard the integrity of the political process by reducing pressure on parties and candidates to raise substantial sums of money, thus lessening the risk of corruption and influence.'
 - It also prevents wealthy parties (or those with wealthy supporters) from monopolising the airwaves by providing for quotas
 - It further prevents parties from 'trivialising' political debate by showing political advertisements
 - Given these ends, it may well be possible to justify some of the restrictions
 - '[145] ...a comparison or balancing of the public interest in freedom of communication and the public interest in the integrity of the political

process might well justify some burdens on freedom of communication. But it is essential that the competition between the two interests be seen in perspective.'

- Shows scepticism towards laws which stifle public discussion and criticism of government
 - Pt IIID 'severely restricts freedom of communication in relation to the political process, particularly the electoral process'
 - It discriminates against new candidates and prevents access to an important mode of conveying political information to the electorate
 - The protection given to news, current affairs and other comments are insufficient to preserve free political communication because those media are controlled by powerful interests and may not allow for an opportunity to reply
 - '[146] The consequence is that the severe restriction ... plainly fails to preserve or enhance fair access to the mode of communication which his the subject of the restriction. ... [It] does not introduce a "level playing field". It is discriminatory in the respects already mentioned. In this respect I do not accept that, because absolute equality in the sharing of free time is unattainable, the inequalities inherent in the regime introduced by Pt IIID are justified or legitimate.'
- Dawson J (dissenting):
 - The law is valid
 - However, there is some limit on Parliament's ability to limit access to political information (though that limit is not crossed on the facts)

Decision

- Mason CJ, Deane, Toohey and Gaudron JJ: Pt III is wholly invalid for infringing the implied freedom
- McHugh J: invalid except to the extent that it concerns territory elections
- Brennan J: there is an implication, but the restrictions were a reasonable impingement upon the freedom
- Dawson J: there is no such implication and the restrictions are valid

Importantly, the implied freedom is not a general right to free speech. It protects speech only to the extent that it relates to political and government matters. The Court is essentially saying that it is possible to draw a line between political and non-political expression.

However, the freedom is not limited to just Commonwealth politics. Justice Mason in *ACTV* observed that matters of political speech are not divisible along state and federal boundaries. (Gaudron, Deane and Toohey JJ concurring).

Further, the freedom is not absolute. There *are* qualifications. This is effectively a recognition that some forms of expression don't contribute to political speech, and that other forms of restriction don't detract from it (or else detract from it justifiably).

ACTV embodies a distinction between laws targeting the content of ideas (eg, 'pro-communist advertisements shall be banned') and those targeting the expression of ideas (eg, 'advertisements that take place via loudspeaker shall be banned'). Restrictions on the content of ideas need a compelling justification. They must be no more than is necessary to balance the competing public interests with freedom of communication.

Courts are generally willing to accept Parliament's judgement about an end being legitimate, but carefully scrutinises the *manner* in which such an objective is achieved. In *ACTV*, the means were disproportionate because the scheme disadvantaged new candidates. As a result, the mechanism was not reasonably appropriate and adapted (proportionate) to the ends sought to be achieved.

The nature of a burden may be expressed in form (as in *ACTV*, where political advertisements were restricted whereas advertisements of other kinds were not) or substance (as where a law banning the use of loudspeakers has an adverse effect on public protesters).

Political communication includes non-verbal conduct and other actions which convey political or government messages (*Levy v Victoria*). However, even if such conduct is burdened by a law, it must be weighed against the public interest in any legitimate ends sought to be achieved.

***Levy v Victoria* (1997) HCA:**

Facts

- Upon the commencement of the 1994 duck shooting season, the plaintiff, a Mr Levy, sought to protest against duck shooting
- As an animal rights activist, he wanted to retrieve the bodies of dead and injured birds with the intention of displaying them on television to promote the ban
- The Victorian government enacted the *Wildlife (Game) (Hunting Season) Regulations*, which prohibited, by reg 5, unauthorised entry to a hunting area
- The objectives of the regulations included to 'ensure a greater degree of safety of persons in hunting areas'

Issue

- Can Levy's non-verbal protest attempt be classified as political speech?
- If so, are the regulations in breach of the implied freedom of political communication?

Reasoning

- Brennan CJ:
 - '[594] actions as well as words can communicate ideas'
 - 'The implication denies legislative or executive power to restrict the freedom of communication about the government or politics of the Commonwealth, whatever be the form of communication, unless the restriction is imposed to fulfil a legitimate purpose and the restriction is appropriate and adapted to the fulfilment of that purpose'
 - 'In [595] principle, therefore, non-verbal conduct which is capable of communicating an idea about the government or politics of the Commonwealth and which is intended to do so may be immune from legislative or executive restriction so far as that immunity is needed to preserve the system of representative and responsible government that the *Constitution* prescribes.'
 - 'A law which simply denied an opportunity to make such a protest ... would be as offensive to the constitutionally implied freedom as a law which banned political speech-making on that issue.'
 - There are limits to the protection (legitimate ends)
 - '...non-verbal conduct may, according to its nature and effect, demand legislative or executive prohibition or control even though it conveys a political message. Bonfires may have to be banned to prevent the outbreak of bushfires, and the lighting of a bonfire does not escape such a ban by the hoisting of a political effigy as its centrepiece.'

- McHugh J:
 - '[622] For the purpose of the *Constitution*, freedom of communication is not limited to verbal utterances. Signs, symbols, gestures and images [623] are perceived by all and used by many to communicate information, ideas and opinions.'
 - The constitutional implication protects both 'false, unreasoned and emotional communications' *and* 'true, reasoned and detached communications'
 - The implication 'is not confined to invalidating laws that prohibit or regulate communications'
 - If a law may be said to 'burden communications by denying the members of the Australian community the opportunity to communicate with each other on political and government matters relating to the Commonwealth. Thus, a law that prevents citizens from having access to the media may infringe the constitutional zone of freedom. The use of print and electronic media ... is so widespread ... that today it must be regarded as indispensable to freedom of communication.'
 - Here, '[624] the constitutional implication ... also protects *the opportunity* to make use of the medium of television.'
 - However, the freedom 'is not absolute', but limited to the protection 'necessary to the effective working of the *Constitution's* system of representative and responsible government'
 - 'a law that is reasonably appropriate and adapted to serving an end that is compatible with the maintenance of the constitutionally prescribed system of government will not infringe the constitutional implication.'
- Kirby J:
 - Does the conduct amount to constitutionally protected 'political communication'?
 - Yes, both words and actions are protected: the freedom includes '[637] protest, assembly, demonstration, agitation and the other activities which exclusion from the proclaimed area would totally prevent in the critical first days of the open season for duck shooting.'
 - '[638] A rudimentary knowledge of human behaviour teaches that people communicate ideas and opinions by means other than words spoken or written. ... The constitutionally protected freedom of communication in Australia must therefore go beyond words.'

Decision

- Communication by 'expressive conduct' or 'symbolic speech' can still fall within the protected realm of political communications, including non-verbal demonstration
- However, reg 5 is valid because it is a reasonable restriction upon freedom of political communication
- It is reasonable because it is in the interests of public safety, and was 'proportionate' (or 'appropriate and adapted') to that end

The scope of the implied freedom was at its height with *Theophanous* and *Stevens*:

- *Theophanous*:
 - A Member of Commonwealth Parliament sues a newspaper for defamation
 - A constitutional defence is accepted in relation to communications about a Member of Parliament, though it does have limits (4:3)
- *Stevens*:
 - A Member of a state Parliament sues for defamation

- The issue is whether the protection applies to state Members as well
- The Court extends the protection to state Members of Parliament (4:3)
- *Langer*:
 - The limitations on the power are formalised
 - A law will be valid if it is appropriate and adapted to protecting a legitimate end
 - The law is valid

However, since *Langer*, subsequent treatments narrowed and refined the basis for implication and the scope of the resulting freedom of political communication. For example, in *Lange v Australian Broadcasting Corporation* (plaintiff pronounced 'Long-ie'), the Court confirms that the freedom must be anchored to the text and structure of the *Constitution*. Notably, this was the only unanimous decision of the Brennan Court.

***Lange v Australian Broadcasting Corporation* (1997) HCA:**

Facts

- Mr Lange is a former Prime Minister of New Zealand
- He sues the Australian Broadcasting Corporation in defamation for statements allegedly made on *Four Corners*, a television programme
- Inter alia, ABC asserts a 'constitutional defence' (after *Theophanous*)

Issue

- Is the communication protected by the implied freedom?

Reasoning (the Court)

- Neither *Theophanous* nor *Stephens* have expressed a binding view as to the scope of the implied freedom of political communication
- The matter is to be considered afresh on the basis '[556] of principle and not of authority'
- '[559] Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the *Constitution* creates by directing that the members of the House of Representatives and the Senate shall be "directly chosen by the people" of the Commonwealth and the states, respectively.'
 - The implication does not just arise from ss 7 and 24, but also from s 128 and the vesting of executive power in a parliamentary ministry
 - The implication of a requirement of free political communication '[566] is a consequence of the *Constitution's* system of representative and responsible government', but it is not a consequence of that concept generally
 - Political communications are free from impingement 'only to the extent' it is 'necessary to give effect to [ss 7, 24, 64 and 128 of the *Constitution*]'
- '[560] Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation.'
- 'Furthermore, because the choice given by ss 7 and 24 must be a true choice with "an opportunity to gain an appreciation of the available alternatives", ... legislative power cannot support **an absolute denial of access by the people to relevant information about the functioning of government in Australia** and about the policies of political parties and candidates for election.'
 - This includes the intervals between elections: '[561] If the freedom to receive and disseminate information were confined to election periods, the electors would be deprived of the greater part of the information necessary to make an

effective choice at the election’

- However, ss 7 and 24 ‘do not confer personal rights on individuals’ — they just prevent legislative and executive power being used to curtail the freedom
 - Therefore, no constitutional defence of this kind is not an answer to a private suit
- Other comments about the scope of the implied freedom as it applies to legislative and executive conduct:
 - The freedom is not absolute (at [561])
 - A law burdening political communications will be valid if two conditions are satisfied:
 - The law’s objective is compatible with representative and responsible government; and
 - The law is reasonably appropriate and adapted (proportionate) to achieving that objective
 - The constitutional implication sets a minimum threshold on the scope of political speech; the common law or legislation *may* confer broader privilege than the *Constitution*; however, they cannot set the freedom any narrower
 - Thus, a statute could diminish the rights of the defamed in order to enlarge the freedoms of the people to discuss political matters
- The relevant test:
 - [567] ...two questions must be answered before the validity of the law can be determined.
 - First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
 - Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government ...? ...
 - If the first question is [568] answered “yes” and the second is answered “no” the law is invalid.’
 - Example:
 - If there were ‘less drastic means by which the objectives of the law could be achieved’ (as in *ACTV*)

Decision

- (7:0) No, the defence is not available because the constitutional implication cannot operate to alter private rights and immunities *inter se*
- The Court impliedly overrules *Theophanous*
- The protection given by the common law to a person’s reputation ‘does not unnecessarily or unreasonably impair the freedom of communication about government and political matters which the *Constitution* requires.’

The following sections may be said to support the system of representative and responsible government:

- Representative government: ss 1, 7, 8, 13, 25, 28, 30
- Responsible government: ss 6, 49, 62, 63, 64, 83

Lange confirms that the implied freedom is not a right, but rather a limit on legislative power: Parliament cannot legislate in a manner inconsistent with this system of government. Although *Lange* has been seen by some as a departure from *Theophanous*, it really just marks a return to the *ACTV* and *Nationwide News* basis, albeit in stricter terms.

2 Current test

The *Lange* test was accepted by the High Court in *Coleman v Power*. In that case, McHugh J made a minor restatement of the second limb; however, this serves only to clarify the requirements and not to change the substantive meaning:

(a) Does the law burden political communication?

- (i) Is the communication 'political'?
- (ii) Does the law impose a burden?

(b) If so, is it nonetheless justified as appropriate and adapted to achieving a legitimate end?

The freedom will not invalidate a law enacted to satisfy some other legitimate end if it satisfies two conditions:

- (i) The object or legitimate end of the law is consistent (compatible) with the system of representative and responsible government provided for by the *Constitution*; and
- (ii) The law is reasonably appropriate and adapted to achieving a legitimate end *in a manner that is compatible* with the maintenance of the constitutionally prescribed system of representative and responsible government.

To satisfy the second limb, both the end and the manner in which it is achieved must be consistent with the constitutional system of responsible and representative government.

The first branch is rarely in issue, and is often conceded by the government. Most actions seeking to invalidate a law for breach of the implied freedom are fought most vigorously in relation to the second. The phrase 'in a manner that is compatible' reflects McHugh J's amendment in *Coleman*.

***Coleman v Power* (2004) HCA:**Facts

- Patrick Coleman, a Townsville law student, distributes a pamphlet criticising the conduct of local police, particularly in previous incidents involving the arrest of protesters
- It included a specific allegation referring to Constable Brendan Power, and invited the police to 'kiss my arse you slimy lying bastards'
- Constable Power approached Mr Coleman, whereupon Coleman cried out: 'This is Constable Brendan Power, a corrupt police officer'
- Coleman was charged under s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld), which prohibited 'threatening, abusive or insulting words to any person', being made 'in any public place or so near to any public place'

Issue

- Does s 7(1)(d) infringe the implied freedom of political communication?

Reasoning

- McHugh J:
 - [208] When, then, is a law not reasonably appropriate and adapted to achieving an end in a manner that is compatible with the system of representative government enshrined in the *Constitution*?
 - In my opinion, it will not be reasonably appropriate and adapted to achieving an end in such a manner whenever the burden is such that communication on political or governmental matters is no longer “free”.
 - Freedom of communication under the *Constitution* does not mean free of all restrictions
 - [209] Hence, a law that imposes a burden on the communication of political and governmental matter may yet leave the communication free in the relevant sense. Thus, laws which promote or protect the communications or which protect those who participate in the prescribed system, for example, will often impose burdens on communication yet leave the communications free.
 - On the other hand, laws that burden such a communication by seeking to achieve a social objective unrelated to the system of representative and responsible government will be invalid, *pro tanto*, unless the objective of the law can be restrictively interpreted in a way that is compatible with the constitutional freedom.
 - Thus, a law that sought to ban all political communications in the interest of national security would be invalid unless it could be demonstrated that at the time such a prohibition was the only way that the system of representative government could be protected. In such a case, the issue would not be whether the needs of national security require the prohibition of communication on political and governmental matters. It would be whether, at that time, the system of representative government is so threatened by an external or internal threat that prohibiting all communication on political and governmental matters is a reasonably appropriate and adapted means of maintaining the system. A total prohibition would not be reasonable unless there was no other way in which the system of representative government could be protected. Ordinarily, the complete prohibition on, or serious interference with, political communication would itself point to the inconsistency of the objective of the law with the system of representative government.’
 - ‘As the reasoning in *Lange* shows, the reasonably appropriate and adapted test gives legislatures within the federation a margin of choice as to how a legitimate end may be achieved at all events in cases where there is not a total ban on such communications.’
 - Both the ends and means of a law must be examined for compatibility
 - ‘The constitutional test does not call for nice judgments as to whether one course is slightly preferable to another. But the *Constitution*’s tolerance of the legislative judgment ends once it is apparent that the selected course unreasonably burdens the communication given the availability of other alternatives. The communication will not remain free in the relevant sense if the burden is unreasonably greater than is achievable by other means.’
 - The ends argued to be served by s 7(1)(d):
 - To avoid breaches of the peace
 - This is an end that is compatible with the system of representative government established by the *Constitution*

- **[210]** an unqualified prohibition on [the use of insulting words] cannot be justified as compatible with the constitutional freedom.'
 - 's 7(1)(d) infringed the constitutional freedom by simply making it an offence to utter insulting words in or near a public place whether or not a person hears those words even when they were used in the discussion of political and governmental matters'
 - To protect free political communication by removing threats, abuses and insults from the arena of public discussion, so that persons would not be intimidated into silence
 - This is an end that is compatible with the system of representative government laid down by the *Constitution*
 - 'insults are a legitimate part of the political discussion protected by the *Constitution*. An unqualified prohibition on their use cannot be justified as compatible with the constitutional freedom. Such a prohibition goes beyond anything that could be regarded as reasonably appropriate and adapted to maintaining the system of representative government.'
- Gleeson CJ (dissenting):
 - **[192]** The conduct prohibited by the relevant law in its application to the
 - present case involved what the magistrate was entitled to regard as a serious disturbance of public order with personal acrimony and physical confrontation of a kind that could well have caused alarm and distress to people in a public place ... Almost any conduct of the kind prohibited by s 7, including indecency, obscenity, profanity, threats, abuse, insults, and offensiveness, is capable of occurring in a "political" context ... Reconciling freedom of political expression with the reasonable requirements of public order becomes increasingly difficult when one is operating at the margins of the term "political".'
 - 'the Court will not strike down a law restricting conduct which may incidentally burden freedom of political speech simply because it can be shown that some more limited restriction "could suffice to achieve a legitimate purpose".'
- Heydon J (dissenting):
 - **[266]** *Is s 7(1)(d) reasonably appropriate and adapted to serve its legitimate ends?* Section 7(1)(d) in its relevant operation is limited in three respects.
 - It is limited geographically to conduct in or near public places.
 - It is limited in its application only to "insulting words".
 - And it is limited in its requirement that the words be addressed to a person.
 - Hence it leaves a very wide field for the discussion of government and political matters by non-insulting words, and it leaves a wide field for the use of insulting words (in private, or to persons other than those insulted or persons associated with them)
 - In short, it leaves citizens free to use insults in private, and to debate in public any subject they choose so long as they abstain from insults
 - Even if s 7(1)(d) does create an effective burden on communication on government and political matters, that is not its purpose; it is not directed at political speech as such. Its purpose is to control the various harms which flow from that kind of contemptuous speech which is "insulting". Its impact on communications about government and political matters is therefore incidental only ...'
 - **[269]** The fact is that insulting words are not truly part of "open discussion" or

“the search for truth”. They do not really express “opinions” or enable the strengths and weaknesses of what genuinely are opinions to be identified. They form no part of criticism which rises above abuse. They reflect the vices of intolerance rather than the virtues of tolerance. They can crush individual autonomy rather than vindicating it.’

- Kirby J:
 - ‘[241] Reading the description of civilised interchange about governmental and political matters in the reasons of Heydon J, I had difficulty in recognising the Australian political system as I know it. **His Honour's chronicle appears more like a description of an intellectual salon where civility always (or usually) prevails.** It is not, with respect, an accurate description of the Australian governmental and political system in action.
 - One might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas. Anyone in doubt should listen for an hour or two to the broadcasts that bring debates of the Federal Parliament to the living rooms of the nation.
 - This is the way present and potential elected representatives have long campaigned in Australia for the votes of constituents and the support of their policies. It is unlikely to change ... The *Constitution* addresses the nation's representative government as it is practised. **It does not protect only the whispered civilities of intellectual discourse.**’

Decision

- (4:3) The appeal is allowed
- McHugh J:
 - The conviction under s 7(1)(d) must be quashed
 - The convictions for obstructing and assaulting the police in the performance of their duty must also be quashed, since it is no part of a police officer's duty to enforce a non-existent law
 - The arrest was unlawful, and the appellant was lawfully entitled to resist it
- Gummow, Kirby and Hayne JJ:
 - The offence only applies where ‘[227] they were either intended to provoke unlawful physical retaliation, or were reasonably likely to do so’.
 - Therefore, the use of insulting words to a police officer would not attract the provision, since ‘[231] by their training and temperament police officers must be expected to resist the sting of insults directed to them’
 - In effect, their Honours read down the legislation slightly
- Gleeson CJ, Callinan and Heydon JJ (dissenting):
 - The provision is constitutionally valid and should be interpreted as including conduct likely to result in a breach of the peace
 - It is important to encourage civil and non-insulting public discourse

The test for whether a law encroaching on the constitutionally protected area is nonetheless valid because it serves a legitimate end is ‘whether the law *is* reasonably appropriate and adapted to the relevant purpose’ (*Mulholland*). The approach to applying constitutional limitations may be compared with the Court's treatment of characterisation issues. Characterisation allows for deference to the legislative judgment so that laws need only be ‘reasonably capable of being viewed as appropriate and adapted’. By contrast, when dealing with a limitation, the Court itself must be satisfied that the test of ‘reasonably appropriate and adapted’ has been met.

Mulholland v Australian Electoral Commission (2004) HCA:Issue

- Do the impugned provisions of the *Commonwealth Electoral Act 1918* (Cth) impermissibly impair the implied constitutional freedom of political communication?

Reasoning

- Is there a political communication?
 - Gleeson CJ: Yes
 - **[591]** In a system of compulsory voting, party affiliation is of particular importance. ... 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.'
 - **[592]** 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: Yes
 - **[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.'
 - **[611]** 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.'
 - Heydon J: No
 - Gummow and Hayne JJ: No
 - **[633]** 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.'
 - Their rights were purely statutory ones, and 'it is their very validity which, in part, is attacked by reliance upon a freedom which descends *deus ex machine*...'
 - **[634]** 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*.’

- Is it burdened?
 - McHugh J: No
 - ‘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.’ (Blackshield and Williams)
 - **[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.’
 - Kirby J: Yes
 - Blackshield and Williams: ‘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.’
 - Gleeson CJ: Yes
 - Heydon J: unnecessary to consider
- In determining whether the law is directed at a legitimate end, the ‘reasonably appropriate and adapted’ test should be used
 - Kirby J:
 - **[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, ... is a phrase inappropriate and ill-adapted to perform the constitutional function repeatedly assigned to it by members of this Court.’
 - **[649]** A more accurate explanation of the constitutional connection in such cases is found in the word “proportionality”.’
 - ‘In its unanimous decision in *Lange* this Court noted that, in the context there considered, “there is little difference between the test of ‘reasonably **[650]** appropriate and adapted’ and the test of proportionality”.’
 - ‘Nevertheless, the notion of proportionality has important advantages over other formulae.’
 - 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.’
 - Instead, the Court ‘applies an external standard.’
 - ‘...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”. ... 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.'

- '[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.'
- Is the law nevertheless directed at a legitimate end?
 - Gleeson CJ: Yes
 - The appellant failed to show that the 'burden' was unacceptable in terms of there being an absence of a legitimate end (*Lange*)
 - '[595] 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.'
 - '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.'
 - Kirby J: Yes
 - Applying the proportionality test, the challenged provisions are not incompatible with the system of representative and responsible government established by the *Constitution*

Decision

- (7:0) The law does not burden political communication or, if it does, the burden has not been shown to be anything other than reasonably appropriate and adapted to a legitimate end

3 Summary

(a) Does the law burden political communication?

- (i) Is the communication 'political'?
 - Communication between electors and elected (*Mulholland* per McHugh J and Gleeson CJ)
 - Discussing governments and political matters? (*Nationwide News*: impugning members of an executive body)
 - Identity of candidates for election? (*Nationwide News*)
 - Content of a proposed law? (*Nationwide News*)
 - Explaining and accounting for their decisions and actions in government? (*ACTV* per Mason CJ)
 - Informing electors about public affairs so that they can make informed judgements? (*ACTV* per Mason CJ)
 - 'matters of public affairs and political discussion'
 - Even matters relating primarily to states or territories

- Information conveyed to electors by an executive agency: *Mulholland*
 - Communication among electors
 - 'information, needs, views, explanations and advice' about matters 'relevant to the exercise and discharge of governmental powers and functions': *Nationwide News* per Deane and Toohey JJ
 - Includes non-verbal conduct capable of communicating an idea about the government or politics': *Levy v Victoria*
 - Denying the opportunity to protest
 - Signs, symbols, gestures and images (McHugh J)
 - Protest, assembly, demonstration, agitation (Kirby J)
 - Protects both 'false, unreasoned and emotional communications' and 'true, reasoned and detached communications': *Levy* per McHugh J
 - Does the law deny members of the community the opportunity to communicate with each other on political matters?
 - Does the law prevent citizens from having access to the media (indispensable to freedom of communication)? (*Levy* per McHugh J)
 - Communication must relate to
 - Conduct of government (legislative, executive and judicial branches)
 - Candidates, political parties and their policies
 - At either the federal or state level
 - Barendt suggests: 'all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about' (Mason CJ, Toohey and Gaudron JJ in *ACTV*)
- (ii) Does the law impose a burden?
- Either in its 'terms, operation or effect': *Lange*
 - Preliminary issue: is there a freedom to burden?
 - Is there a pre-existing right?
 - If not, is the right conferred by statute?
 - Is the same statute now impugned?
 - If so, the freedom descends '*deus ex machine*' and there can be no freedom to burden, since the very right pleaded would not exist without the statute creating it: *Lange* per Gummow and Hayne JJ, McHugh J
 - Burdening specific ideas or information
 - Need a 'compelling justification': *ACTV* per Mason CJ
 - Normally 'an unacceptable form of political censorship'
 - Does the law support 'an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election'? (*Lange*)
 - Extends beyond election periods: *Lange*
 - Burdening the activity or mode of communication
 - Easier to justify: weigh up public interest against extent of impairment of freedom: *ACTV* per Mason CJ
 - Regulating television and radio broadcasting in relation to the electoral process: *ACTV*

(b) If so, is it nonetheless justified as appropriate and adapted to achieving a legitimate end?

The freedom will not invalidate a law enacted to satisfy some other legitimate end if it satisfies two conditions:

- (i) The object or legitimate end of the law is consistent (compatible) with the system of representative and responsible government provided for by the *Constitution*; and
- Safeguarding the integrity of the political process by
 - Reducing the need to raise money for political campaigns, thereby diminishing corruption and undue influence: *ACTV*
 - Preventing wealthy parties from monopolising political speech: *ACTV*
 - Preventing the ‘trivialising’ of political debate: *ACTV*
 - Safeguarding the public or a public purpose
 - Banning bonfires to prevent a bushfire: *Levy* per Brennan J
 - Avoiding breaches of the peace: *Coleman* per McHugh J
 - Safeguarding political and other speech itself
 - To protect free political communication by removing threats, abuses and insults from the arena of public discussion: *Coleman* per McHugh J
 - Cf Kirby J: insults are an inherent part of the political process
 - Or is the burden such that communication on political or governmental matters is no longer capable of being termed ‘free’? (*Coleman* per McHugh J)
 - If so, it will be ‘designed to undermine that system’ of government
- (ii) The law is reasonably appropriate and adapted to achieving a legitimate end *in a manner that is compatible* with the maintenance of the constitutionally prescribed system of representative and responsible government.
- **Incompatible effect**
Does the law ‘severely restrict’ communication about the political or electoral processes?
 - Is there a ‘complete prohibition on, or serious interference with, political communication’?
 - If so, this of itself points to incompatibility with the system of representative government: *Coleman* per McHugh J
 - **Alternative means**
Were there ‘less drastic means by which the objectives of the law could be achieved’ (as in *ACTV*)? (*Lange*)
 - **False positives**
Does the law impose a blanket prohibition regardless of whether or not the conduct was engaged in for the discussion of political and governmental matters?
 - If so, likely to infringe the constitutional freedom: *Coleman* per McHugh J

- But does it 'only incidentally burden freedom of political speech'? (*Coleman* per Gleeson CJ)
 - If so, something stronger than the availability of a more limited restriction must be shown
- An unqualified prohibition on the use of insulting words is incompatible with the constitutional freedom: *Coleman*
- **Ulterior purpose**
Difficult to justify 'laws which stifle public discussion and criticism of government' (*ACTV* per Mason CJ)
- **Imperfect implementation**
Are there inequalities inherent in the regime? (*ACTV* per Mason CJ)
- **But: facilitation of communications**
Does the law further or support a system (eg, electoral) that facilitates, rather than impedes, political communication and the democratic process? (*Mulholland* per Gleeson CJ)
- **But: threat to representative government**
'[A] law that sought to ban all political communications in the interest of national security would be invalid unless it could be demonstrated that **at the time** such a prohibition was the **only way** that the **system of representative government** could be **protected**.' (*Coleman* per McHugh J)
 - Not an issue of national security
 - The issue is whether *the system of representative government* was threatened and whether prohibiting all communication on political and governmental matters is a reasonably appropriate and adapted means of maintaining that system
 - A total prohibition would not be reasonable unless there was no other way in which the system of representative government could be protected

To satisfy the second limb, both the end and the manner in which it is achieved must be consistent with the constitutional system of responsible and representative government.

The enquiry is thus:

Does the impugned law serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? (Gleeson CJ in *Mulholland*; *Lange*)

Consistency or compatibility is determined by asking:

Can it be said that (i) the object; and (ii) the manner (or means) of attaining that object are each 'reasonably appropriate and adapted' (or 'proportional') to the system of representative and responsible government established by the Constitution?

General comments:

- The constitutional protection of political communication does not confer personal rights on individuals and cannot be pleaded in defence to an action for defamation: *Lange* (cf *Theophanous*);
- The common law or legislation *may* confer broader privileges than the *Constitution*; however, they cannot set the freedom any narrower: *Lange*;

- Rather, the common law *must be consistent with* the *Constitution* in all respects; therefore, the common law of defamation must incorporate a new defence of ‘qualified privilege’; in this sense, the implication impacts upon the common law.

B Arbitrary Detention

1 Of citizens

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, the High Court held that the power to detain citizens is outside the scope of the executive’s prerogative powers. Even if legislation confers such a power upon a member of the executive, it will not be possible to exercise a power of permanent detention. This is because such a power is judicial in nature and it would breach the separation of powers to confer it upon a body that is not a Ch III Court for constitutional purposes.

However, if the detention is non-judicial power, it will not be constitutionally invalid to confer it. Detention will therefore be permissible so long as a court (judicial body) is the final arbiter of the imprisoned person’s rights. Thus, it would be constitutional to detain a citizen temporarily (pending trial), but impermissible to make such a determination as to rights and freedoms itself. The detention of mentally ill or diseased people might also be justified.

The commonality to these permissible forms of detention is that they are not punitive in character:

Although detention under a law of the Parliament is ordinarily characterised as punitive in character, it cannot be so characterised if the purpose of the imprisonment is to achieve some legitimate non-punitive object. ... But if imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character.

(*Lim* per McHugh J at 71)

2 Of non-citizens

Parliament can confer upon the executive the power to detain unlawful immigrants. However, the executive cannot make a conclusive determination of whether a person so detained is an unlawful immigrant for the purposes of the *Migration Act 1958* (Cth). Such a determination must be made by a Court. Because of this, the impugned provision vested judicial power in a non-judicial body and was incompatible with the separation of powers.

***Al-Kateb v Godwin* (2004) HCA:**

Facts

- Mr Ahmed Al-Kateb arrived in Australia by boat in December 2000 without a passport or visa
- He was detained pursuant to *Migration Act 1958* (Cth) s 189, which requires an officer who knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen to detain the person
- Section 196 provides as follows:
 - (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:

- (a) removed from Australia under section 198 or 199; or
 - (b) deported under section 200; or
 - (c) granted a visa.
- (2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.
- (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.
- In January 2001, Mr Al-Kateb applies for a visa on the basis that he is a refugee
- His application is denied
- Subsequently, in August 2001, Mr Al-Kateb asked to leave the country and be returned to Kuwait or Israel; he asked the Minister 'to remove [him] from Australia as soon as reasonably practicable'
- However, despite being born in Kuwait, he was not eligible for Kuwaiti citizenship; this left him stateless
- The Commonwealth tries unsuccessfully to deport Mr Al-Kateb to Egypt, Jordan, Kuwait, Syria, and the Palestinian territories
- Mr Al-Kateb brings proceedings seeking a declaration that he is being 'unlawfully detained' and an order that he be released

Issue

- Is the detention unlawful?
- Can Mr Al-Kateb be released into the Australian community?

Reasoning

- Hayne J:
 - The purpose for the detention is still in existence even though efforts to comply with s 196(1)(a) have been unsuccessful
 - **[182]** Because there can be no certainty about whether or when the non-citizen will be removed, it cannot be said that the Act proceeds from a premise (that removal will be possible) which can be demonstrated to be false in any particular case. And unless it has been practicable to remove the non-citizen it cannot be said that the time for performance of the duty imposed by s 198 has arrived.
 - All this being so, it cannot be said that the purpose of detention (the purpose of removal) is shown to be spent by showing that efforts made to achieve removal have not so far been successful. And even if, as in this case, it is found that "there is no real likelihood or prospect of [the non-citizen's] removal in the reasonably foreseeable future", that does not mean that continued detention is not for the purpose of subsequent removal.'
 - The provision does not breach Ch III of the *Constitution* because it does not purport to confer judicial power
 - **[187]** The line which was drawn in the joint reasons [in *Lim* at 33] was a line between detention "reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered" and detention not so limited. The former was said not to contravene Ch III; the latter was said to be punitive and contrary to Ch III.'
 - **[188]** the provision is mandatory; the legislature requires that persons of the identified class be detained and kept in detention. No discretion must, or even can, be exercised. No judgment is called for. The only disputable question is whether the person is an unlawful non-citizen. And the courts can readily adjudicate any dispute about that. There is,

therefore, nothing about the decision making that must precede detention which bespeaks an exercise of the judicial power. Nor is there any legislative judgment made against a person otherwise entitled to be at liberty in the Australian community. The premise for the debate is that the non-citizen does not have permission to be at liberty in the community.'

- Although punitive detention will be judicial and therefore in contravention of the separation of powers, it is very difficult to determine when a detention will embody this quality
 - In *Lim*, it was said that 'with certain exceptions, "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".'
 - 'Their Honours described this as "a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth"
 - However, this immunity (if it exists) applies only to citizens
 - '[189] it is plain that unlawful non-citizens have no general immunity from detention otherwise than by judicial process.'
- In any case, detention under s 189 is not punitive
 - 'the consequences which befall an unlawful non-citizen whom the executive cannot quickly remove from Australia are not inflicted on that person as punishment for any actual or assumed wrongdoing. They are consequences which come about as the result of a combination of circumstances. They flow, in part, from the non-citizen entering or remaining in Australia without permission, in part from the unwillingness of the executive to give the non-citizen that permission, and in part from the unwillingness of other nations to receive the person into their community or their unwillingness to permit that person to travel across their territory.'
 - 'But at its root, the answer made to the contention that the laws now in question contravene Ch III is that they are *not* punitive.'
 - 'Punishment exacted in the exercise of judicial power is punishment *for* identified and articulated wrongdoing.
 - "(i) It must involve pain or other consequences normally considered unpleasant.
 - (ii) It must be for an offence against legal rules.
 - (iii) It must be of an actual or supposed offender for his offence.
 - (iv) It must be intentionally administered by human beings other than the offender.
 - (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed."
 - 'First, immigration detention is not detention for an offence. There is now no offence of entering or being found within Australia as a prohibited immigrant.'
 - 'Secondly, where a non-citizen has entered or attempted to enter Australia without a visa, detention of that person excludes that person from the community which he or she sought to enter. Only in the most general sense would it be said that *preventing* a non-citizen making landfall in Australia is punitive. Segregating those who make landfall, without permission to do so, is not readily seen as bearing a substantially different character. Yet the argument alleging invalidity

- would suggest that deprivation of freedom will *after a time* or in some circumstances *become* punitive.’
- Can indefinite detention *become* punitive?
 - ‘It is essential to confront the contention that, because the time at which detention will end cannot be predicted, its indefinite duration (even, so it is said, **[191]** for the life of the detainee) is or will become punitive. The answer to that is simple but must be made.’
 - ‘If the unlawful non-citizen is stateless, as is Mr Al-Kateb, there is no nation state which Australia may ask to receive its citizen. And if Australia is unwilling to extend refuge to those who have no country of nationality to which they may look both for protection and a home, the continued exclusion of such persons from the Australian community in accordance with the regime established by the *Migration Act* does not impinge upon the separation of powers required by the *Constitution*.’
 - How can this possibly be justified?
 - Judge Hand said in *Shaughnessy v Mezei*, 195 F 2d, 971 (1953):
 - ‘Think what one may of a statute ... when passed by a society which professes to put its faith in [freedom], a court has no warrant for refusing to enforce it. If that society chooses to flinch when its principles are put to the test, courts are not set up to give it derring-do.’
 - McHugh J:
 - **[136]** A law requiring the detention of the alien takes its character from the **purpose of the detention**. As long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive.’
 - **[137]** Nothing in ss 189, 196 or 198 purports to prevent courts, exercising federal jurisdiction, from examining any condition precedent to the detention of unlawful non-citizens. Nor is it possible to hold that detention of unlawful non-citizens — even where their deportation is not achievable — cannot be reasonably regarded as effectuating the purpose of preventing them from entering Australia or entering or remaining in the Australian community. Indeed, detention is the surest way of achieving that object.’
 - ‘If the Parliament of the Commonwealth enacts laws that direct the executive government to detain unlawful non-citizens in circumstances that prevent them from having contact with members of or removing them from the Australian community, nothing in the *Constitution* — including Ch III — prevents the Parliament doing so. For such laws, the Parliament and those who introduce them must answer to the electors, to the international bodies who supervise human rights treaties to which Australia is a party and to history. Whatever criticism some — maybe a great many — Australians make of such laws, their constitutionality is not open to doubt.’
 - Gleeson CJ (dissenting):
 - **[129]** The Act does not in terms provide for a person to be kept in administrative detention permanently, or indefinitely. A scheme of mandatory detention, operating regardless of the personal characteristics of the detainee, when the detention is for a limited purpose, and of finite duration, is one thing. It may take on a different aspect when the detention is indefinite, and possibly for life. In its application to the appellant, the Act says that he is to be kept in administrative detention until he is removed, and that he is to be removed as soon as reasonably practicable. That could mean that the appellant is to be kept in administrative detention for as long as it takes to remove him, and that, if it never becomes practicable to remove him, he must spend the rest of his life in

detention ...'

- '[130] Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.'
- '[131] The possibility that a person, regardless of personal circumstances, regardless of whether he or she is a danger to the community, and regardless of whether he or she might abscond, can be subjected to indefinite, and perhaps permanent, administrative detention is not one to be dealt with by implication.'
- 'I would find it easier to discern a legislative intention to confer a power of indefinite administrative detention if the power were coupled with a discretion enabling its operation to be related to the circumstances of individual cases, including, in particular, danger to the community and likelihood of absconding. The absence of any reference to such considerations, to my mind, reinforces the assumption that the purpose reflected in s 196 (removal) is capable of fulfilment, and supports a conclusion that the mandated detention is tied to the validity of that assumption.'

Decision

- (4:3) No
- McHugh, Hayne, Callinan and Heydon JJ:
 - As a matter of statutory construction, the *Migration Act* authorises detention even where there is no prospect of a detainee being removed from Australia in the reasonably foreseeable future
 - The Act lies within the legislative power of the Commonwealth
- Gleeson CJ, Gummow and Kirby JJ (dissenting):
 - The provisions of the *Migration Act* cannot be construed so as to curtail fundamental rights and freedoms without express acknowledgment from the legislature; s 196 appears to assume that it will always be possible to remove the detainee; in the absence of express provision for that circumstance, the law must be in breach of Ch III
 - The character of detention changes if it becomes indefinite and possibly life-long

As a result of *Al-Kateb*, it must be doubted whether the right to be free from indefinite executive detention extends to non-citizens. The majority characterised such detention as a non-judicial (ie, administrative) power because it was not punitive. By contrast, the minority saw detention as acquiring a punitive quality when it becomes indefinite. Because indefinite detention was not expressly contemplated by the legislation, Gleeson CJ, Gummow and Kirby JJ were unwilling to impute an intention to derogate from fundamental rights and freedoms to the legislature. However, if (or when) the *Migration Act* is next amended, this may be further clarified.