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The Commonwealth human rights framework

Peter Cashman

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UNSW Law & Justice
UNSW Sydney NSW 2052 Australia

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Research Paper 3: The Commonwealth human rights framework

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1. Introduction

> *The role of constitutions and constitutional law can be of great significance in the protection of fundamental human rights and freedoms…Ultimately, however, these things will only have the importance that people who are served by the Constitution and the laws attach to those freedoms.*[1]

As is often noted, Australia is an outlier among western nation states as the only democracy without a constitutional Bill of Rights or a national legislated human rights charter.[2]

The absence of a Bill of Rights in the Commonwealth *Constitution* is a function of the history of Australian federation, which was motivated primarily by economic and defence considerations of the

[1] Former Chief Justice Robert French, 'The Constitution and the Protection of Human Rights' (Speech delivered at the Edith Cowan University Vice-Chancellor's Oration, Perth, 20 November 2009) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20nov09.pdf>.

[2] See, for example, Scott Stephenson, 'Rights protection in Australia' in in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 905; Australian Human Rights Commission, 'About a Human Rights Act for Australia' <https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_questions.pdf>; Much has been written in support of such a Bill or charter. See, e.g., Hilary Charlesworth, 'Who wins under a Bill of Rights?' (2006) 25 *The University of Queensland Law Journal* 1; George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (UNSW Press, 4th ed, 2017); George Williams, A Bill of Rights for Australia (UNSW Press, 2000).

Australian colonies.[3] As observed by Former Chief Justice Gleeson of the High Court in *Roach v Electoral Commissioner*:

> The *Australian Constitution* was not the product of a legal and political culture, or of historical circumstances, that created expectations of extensive limitations upon legislative power for the purpose of protecting the rights of individuals. It was not the outcome of a revolution, or a struggle against oppression. It was designed to give effect to an agreement for a federal union, under the Crown, of the peoples of formerly self-governing British colonies.[4]

Australia's *Constitution* was drafted at two constitutional conventions held in 1891 and 1897-1898. Consistent with Chief Justice Gleeson's observations, the debates at those conventions reflect greater concern with how to define the structure and powers of federal institutions of government and federal-state and interstate relationships than the relationship between the Australian Government and individuals.

As Williams and Hume observe, the 'Conventions were largely unconcerned with the protection of human rights.'[5] Delegates did not debate a proposal to include a comprehensive Bill of Rights. Instead, they considered only a limited number of express rights or freedom-oriented provisions: 'a fragmentary bill of rights'[6] drafted by Tasmanian delegate Andrew Inglis Clark. Without Inglis Clark's pursuit of their inclusion, influenced by his study of the American *Constitution*, the Australian *Constitution* would contain no express rights.[7]

Among the rights Inglis Clark proposed was insertion of an equal protection and due process guarantee modelled upon the Fourteenth Amendment to the United States *Constitution*. The reasons that the proposal was rejected are instructive as to why the Australian *Constitution* does not contain more, and more expansive, guarantees of individual rights. Some delegates believed the inclusion was unnecessary as they considered a system of responsible Parliamentary government - a fundamental tradition of British constitutionalism - would provide individuals with adequate protection from excesses of government power. Delegates also expressed concern that the provision would restrict the ability of the Australian colonies, on becoming states, to make and maintain racially discriminatory laws.[8] This is counter to the argument of some constitutional historians that the Constitution's drafters considered that the common law would provide adequate rights protection to all.[9] Rather, it is apparent that the drafters were more concerned that the Constitution not protect racial minorities from discrimination. Indeed, as we discuss below, provisions that expressly discriminated against Indigenous Australians were not subject to alteration until the second half of the twentieth century.[10]

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[3] Former Chief Justice Robert French, 'The Constitution and the Protection of Human Rights' (Speech, Edith Cowan University Vice-Chancellor's Oration, 20 November 2009) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20nov09.pdf>.

[4] *Roach v Electoral Commissioner* (2007) 233 CLR 162, 172 [1] (Gleeson CJ).

[5] George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 60.

[6] Hilary Charlesworth, 'Who wins under a Bill of Rights?' (2006) 25 *University of Queensland Law Journal* 1, 1.

[7] George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 62.

[8] See, e.g., Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne 1898, Vol IV, p 665; Chief Justice Robert French, 'The Constitution and the Protection of Human Rights' (Speech delivered at the Edith Cowan University Vice-Chancellor's Oration, Perth, 20 November 2009) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20nov09.pdf>.

[9] See further: George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 69-70; Chief Justice Robert French, 'The Constitution and the Protection of Human Rights' (Speech delivered at the Edith Cowan University Vice-Chancellor's Oration, Perth, 20 November 2009) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20nov09.pdf>.

[10] Note also the persistence of racially discriminatory provisions in the *Constitution* today (see s 25).

Reflecting these historic considerations, there are few formal rights or freedoms in the Australian *Constitution* today. The Constitution mainly specifies the division of powers between the various branches of government and provides limitations on Commonwealth power. This is an important point of distinction compared with rights under international treaties.

The rights and freedoms that are explicitly protected in the *Constitution* are:

- s 80 – the right to trial by jury for indictable offences against Commonwealth law;[11]
- s 92 – a guarantee of freedom of 'trade, commerce and intercourse among the States';[12]
- s 116 – religious freedoms;[13] and
- s 117 – freedom from the imposition of disabilities or discrimination on the basis of state residence.[14]

In addition, section 51(xxxi) imposes a limitation upon the Commonwealth power to make laws with respect to the 'acquisition of property' from 'any State or person for any purpose in respect of which the Parliament has power to make laws' requiring that the acquisition be '*on just terms*' (emphasis added). The High Court has interpreted that provision as a 'constitutional guarantee'.[15]

Although some of the provisions set out above contain similar content to human rights in international human rights conventions, none would be recognised as 'human rights' within the meaning of those later instruments.[16] Rather, the express guarantees of rights and freedoms in the *Constitution* reflect, for example, common law principles (the guarantee of compensation on just terms for compulsory acquisition of property), pragmatic protection of the mechanics of federalism (the guarantee of free trade, commerce and intercourse among the states) and inspiration from the United States Constitution (religious freedoms).

The provisions of the Australian *Constitution* protecting rights and freedoms are highly specific rather than systematic, reflecting what Williams and Hume describe as Inglis Clark's 'idiosyncratic' choice of rights in his draft constitution.[17] It also reflects that preeminent concern of the drafters: to achieve an effective federal structure and system of government established by the *Constitution*. Individuals are protected as a necessary, but often indirect, result of the federal system's design. For instance, s 92, which provides for free trade within the Commonwealth, protects interstate trade and commerce rather than individual rights to trade. Certain sections do provide direct individual protections in the context of the federation, such as s 117. Others, such as s 80 (which constitutionally guarantees trial

[11] See also *R v Archdall & Roskruge* (1928) 41 CLR 128. There is no actual human right to trial by jury although article 14(1) of the ICCPR does require a right to a 'fair and public hearing by a competent, independent and impartial tribunal': Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 350.

[12] Note that this economic freedom has no connection to the human right to freedom of movement in article 12(1) of the ICCPR: Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 350.

[13] *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 ('DOGS Case'). This right is subject to 'restriction … essential to the preservation of the community'. See also *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth* (1943) 67 CLR 116, 149–50 (Rich J) *('Jehovah's Witnesses Case')*. Note, however, that s 116 does not give rise to rights such as those contained article 18 of the ICCPR: Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 350.

[14] See also *Street v Queensland Bar Association* (1989) 168 CLR 461. Note that this has no connection to the right to non-discrimination contained in various human rights treaties. Rather, it was a pragmatic inclusion to enable federalism: Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 350.

[15] See Part 2.2 below.

[16] Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 349-350.

[17] George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 62.

by jury for certain offences) can be viewed as protecting an individual interest in liberty, among other public interests.[18]

In addition to those express provisions, the High Court has also found constitutional freedoms to be implied by necessity of the text and structure of the Australian *Constitution*.[19] These implied freedoms are, however, to be regarded as offering protections from Australia's system of government, rather than as the conferral of individual rights. Thus, the implied freedom of political communication limits laws burdening political communication to those appropriate and adapted to serving a legitimate purpose in a manner compatible with maintenance of the system of constitutional representative and responsible government.[20] The freedom is attended by two derivative implications: freedom of political movement and political association.[21]

More recently, the High Court recognised a constitutional protection for the universal suffrage of adult citizens by reason of the requirement that representatives in the Commonwealth Parliament be chosen 'by the people'.[22] The protection restricts the Commonwealth's power to reduce the extent to which an election represents a choice of representatives 'by the people' and, as a limitation rather than individual right, operates with exceptions.

The High Court's jurisprudence has been greatly influenced by the understanding that the rights and freedoms in the *Constitution*, both express and implied, protect systemic rather than individual interests. Typically, the effect has been that the Australian *Constitution* provides limited protection only to individual rights and the scope of constitutional limitations has been restricted.

Notwithstanding the absence of express protections for enumerated human rights and the limited operation of implied freedoms, the structural principles of the Australian *Constitution* - federalism, the separation of powers, representative government, responsible government and the rule of law - work in rights-protective ways, albeit as a product of systemic considerations.[23] We discuss the express and implied freedoms and protections in the *Constitution* in part 2 of this research paper.

The other main source of protection for human rights in the Australian system is the common law which we discuss in part 3 of this research paper.

2. Rights under the Constitution

2.1 Political freedoms and protections

The Commonwealth Parliament has the legislative power to provide for the conduct of Commonwealth elections and the franchise, within the limitations imposed by the Australian *Constitution*.[24] While the *Constitution* does not contain an express enforceable right to vote, a line of

[18] George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 113.

[19] *McGinty v Western Australia* (1996) 186 CLR 140 at 168 (Brennan J).

[20] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562, 567; *McCloy v New South Wales* (2015) 257 CLR 178, 194; *Brown v Tasmania* (2017) 261 CLR 328, [104] (Kiefel CJ, Bell and Keane JJ), [271] (Nettle J). See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997)189 CLR 520; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

[21] *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567; *Kruger v Commonwealth* (1997) 190 CLR 1.

[22] *Roach v Electoral Commissioner* (2007) 233 CLR 162, 173 [6], 174 [7] (Gleeson CJ), 187-88 [48]-[49] (Gummow, Kirby and Crennan JJ), 206 [110] (Hayne J). See also *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

[23] George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 112. Our focus here is not on those overarching structural principles, except to the extent that they are relevant to those protections discussed below.

[24] The Commonwealth's power to make laws in respect of federal elections arises from its power to make laws concerning the qualification of voters under a combination of ss 8, 30 and 51(xxxvi) and to make laws concerning the method or system for electing the House of Representatives and Senate under a combination of ss 10, 31

High Court authorities provides that the legislative power to circumscribe the franchise is limited by the operation of ss 7 and 24. Those sections provide, respectively, that members of the Commonwealth Parliament shall be 'directly chosen by the people of the State' (in the case of the Senate) and 'directly chosen by the people of the Commonwealth' (in the case of the House of Representatives).

In addition, s 41 of the Australian *Constitution* provides:

> No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

In *R v Pearson; Ex parte Sipka* ('*Pearson*'), the High Court held that s 41 was a transitional provision protecting the voting rights of persons enfranchised under state law prior to the adoption of the *Franchise Act* in 1902 and no longer has effect.[25]

2.1.1 *Voting rights*

When the Australian *Constitution* was adopted in 1901, the words 'directly chosen by the people' in ss 7 and 24 were not considered to mandate universal adult suffrage. The operation of those sections was found to limit the power of the Commonwealth to restrict the franchise through a series of High Court decisions.

In *Roach v Electoral Commissioner* (*'Roach'*) and *Rowe v Electoral Commissioner* (*'Rowe'*) differently composed four-member majorities of the High Court recognised that the requirement of popular choice in ss 7 and 24 operates to limit the Commonwealth's power to restrict the exercise of universal adult suffrage, whether through legislation disqualifying groups from the franchise or through the practical effect of legislation regulating election procedures.[26]

The operation of the constitutional mandate was applied and clarified, in 2016, by the High Court in *Murphy v Electoral Commissioner* (*'Murphy'*).[27] Following *Murphy*, some readings of the majority judgments in *Rowe* as supporting a constitutional requirement to maximise opportunities to enrol and vote are no longer maintainable.[28] Rather, the constitutional mandate imposes a more limited obligation: burdens on the franchise must be supported by a 'substantial reason', a standard with affinity to a general proportionality test.

The test of proportionality as an interpretative tool in determining a constitutional question uses language that resonates with the proportionality test applied in determining the limitations of rights.[29]

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and 51(xxxvi) of the Constitution. For further discussion, see Brendan Hord, '*Murphy v Electoral Commissioner*: Between Severance and a Hard Place' (2017) 39(3) *Sydney Law Review* 395.

[25] (1983) 152 CLR 254. Some commentators argue that *Pearson* should be overruled and that s 41 of the Australian *Constitution* should be reinterpreted as a living provision protective of voting rights: Jonathan Crowe and Peta Stephenson, 'An Express Constitutional Right to Vote? The Case for Reviving Section 41' (2014) 36 *Sydney Law Review* 205; Anne Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28(1) *Federal Law Review* 125. However, that view did not find favor in High Court jurisprudence. See *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 14 [9] (French CJ).

[26] *Roach v Electoral Commissioner* (2007) 233 CLR 162, 173 [6], 174 [7] (Gleeson CJ), 187-88 [48]-[49] (Gummow, Kirby and Crennan JJ), 206 [110] (Hayne J). See also *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

[27] *Murphy v Electoral Commissioner* (2016) 261 CLR 28.

[28] Sarah Murray, 'The High Court on Constitutional Law: The 2016 Term' (2017) *UNSW Law Journal Forum* 1, 13.

[29] This is discussed in ALRC Report 129, *Traditional Rights and Freedoms-Encroachment by Commonwealth Laws*, Final Report, December 2015. See also Shipra Chordia, *Proportionality in Australian Constitutional Law*, (The Federation Press, 2020) and John Basten, 'Understanding Proportionality Analysis' (2021) 43(1) *Sydney Law Review* 119.

The mandate of direct popular choice in ss 7 and 24 is considered 'part of the constitutional bedrock of Australia's system of representative government' and, in interpreting those provisions to impose a limitation on the Commonwealth Parliament's power to regulate the franchise, members of the Court have described the limitation as necessary to protect that constitutional system.[30] For example, in *Roach*, Gleeson CJ held:

> Because the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of *any group of adult citizens* on a basis that does not constitute *a substantial reason* for exclusion from such participation would not be consistent with the choice by the people.[31]

The protection to voting rights is, therefore, incidental to the protection of Australia's system of representative democracy. One result of this distinction is that the limitation protects against exclusion of groups of adults from the franchise to serve the mandate of popular choice. It does not operate as an individual right to vote, without exception. A further consequence, evident in the High Court's jurisprudence, is that a law that burdens popular choice through restricting the exercise of franchise will not be constitutionally invalid if it can be shown to serve the systemic interest in popular choice in an appropriate and adapted way, for example – as the case in *Murphy* - through supporting the efficient and orderly operation of popular elections.[32]

The case of *Roach* concerned the validity of provisions disqualifying all sentenced prisoners from voting in federal elections. Chief Justice Gleeson concluded that the constitutional phrase 'chosen by the people' could not be understood, today, as 'anything less' than 'universal adult suffrage'.[33] Any exclusion of a group or class of people 'would need to have a rational connection with the identification of community membership or with the capacity to exercise free choice', such as a criterion of citizenship.[34] Gummow, Kirby and Crennan, held that limitations on franchise will be valid if there are 'substantial reasons' for excluding adults or adult citizens from the franchise. They held a reason would be 'substantial' if 'reasonably appropriate and adapted to serve an end consistent or compatible with the maintenance of the constitutionally prescribed system of representative government.'[35]

As observed by their Honours, that formulation bears an affinity to the second question in the *Lange* test, developed to determine the validity of exercises of powers that limit constitutional guarantees, immunities and freedoms, in particular the constitutionally implied freedom of political communication.[36] A substantial reason for the exception to franchise is required to satisfy the general proportionality criteria. The majority held that the indiscriminate exclusion of all sentenced prisoners from voting was invalid.

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[30] George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 230.

[31] *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174 [7] (Gleeson CJ) (emphases added). In taking up the view that the requirement of direct choice by the people imports a requirement that there be a substantial reason for restriction of adult franchise, Gleeson CJ followed the reasoning of Brennan CJ in *McGinty v Western Australia* (1996) 186 CLR 140, 170. Justice Gageler made similar observations in *Murphy* that the role of the judiciary in safeguarding the constitutional mandate of popular choice is to ensure that any restrictions on the franchise do not 'unjustifiably compromise the representative nature of a future Parliament': *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 71 [96] (Gageler J); see also 87 [180] (Keane J).

[32] *Murphy v Electoral Commissioner* (2016) 261 CLR 28.

[33] *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174 [7] (Gleeson CJ).

[34] *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174 [8] (Gleeson CJ).

[35] *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174 [85] (Gummow, Kirby and Crennan JJ).

[36] *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174-175 [86]-[87] (Gummow, Kirby and Crennan JJ).

As is evident from the decisions in *Roach* and *Rowe*, the constitutional mandate of direct choice by the people is not an absolute protection for universal adult suffrage. Rather, universal adult suffrage may be subject to limited exceptions.

As with the freedom of political communication, which is conceived of by the High Court as necessary to protect Australia's constitutional system of government rather than individual rights, the majority of High Court justices have described the constitutional protection as a constraint upon the Commonwealth's legislative power to restrict franchise, rather than as conferring an individual right to vote. Chief Justice Gleeson in *Roach* and Justice Crennan in *Rowe* were the only High Court Justices in the majorities in those cases to have described the constitutional protection as encompassing a 'right to vote'.[37]

The majority judgments in *Roach* and *Rowe* framed the tests for determining the constitutional validity of laws imposing limitations on universal adult suffrage slightly differently. However, in *Murphy*, Chief Justice French and Justice Bell commented that those different approaches reflected an 'essentially common approach to the criterion of validity' and a majority of the Court in that case took the same approach.[38]

Following *Murphy*, determining the validity of laws alleged to impose a legal or practical exclusion from the franchise follows a three-step analysis. Once a law can be shown to result in a legal or practical exclusion from universal suffrage, imposing a burden on the popular choice mandated by ss 7 and 24 of the Australian Constitution, there must be a substantial reason for the provisions for them to be valid.[39] The substantial reason requirement is met if the provisions effecting the exclusion are proportionate to a compatible end. That is, if they are 'reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government.'[40]

The Court's application of this test in *Murphy* is instructive. In that proceeding, the Court unanimously upheld the constitutionality of legislation suspending processing of enrolments and transfers of enrolment on the federal electoral rolls. The suspension period operated from seven days after the issue of the writ for election until after polling day. The plaintiffs argued that the scheme was repugnant to the requirement of popular choice in ss 7 and 24 of the *Constitution*, as the application of the suspension period practically excluded people who would otherwise be entitled to enrol to vote from doing so, without substantial reason.

A fact that was key to the outcome of the proceeding was that closing the electoral rolls in advance of an election has long been a feature of Australian election laws. The suspension period at issue in *Murphy*, starting seven days from the date of the election writ, had been in effect since 1983. Members of the Court therefore distinguished the case from *Roach* and *Rowe* in that the impugned legislation therefore did not impose a new restriction on, or expand an existing exclusion, on the exercise of the vote. A central submission to the plaintiffs' case was that advances in technology rendered it practicable to keep the electoral roll open to allow for enrolment closer to or up to polling day. The plaintiffs contended that failing to take advantage of modern technology to lessen the suspension period breached this requirement. Their submission relied upon statements of Gummow

[37] *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174 [7] (Gleeson CJ).

[38] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 47 [27] (French CJ and Bell J).

[39] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 60-62[61], [62]-[65] (Kiefel J); 67 [84]-[85] (Gageler J); 106 [244] (Nettle J); 124 [306] (Gordon J).

[40] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 50 [32]-[33] (French CJ and Bell J); 60-62[61], [62]-[65] (Kiefel J); 67 [84]-[85] (Gageler J); 106 [244] (Nettle J); 129-130 [332] (Gordon J).

and Bell JJ in *Rowe* that the constitutional requirement of popular choice in ss 7 and 24 obliged the Commonwealth to provide maximum opportunity for electoral participation.[41]

Four Justices in *Murphy* were also not satisfied that the suspension period imposed a burden on the constitutional mandate of popular choice. Chief Justice French and Justice Bell found that the existence of alternative possibilities to the suspension period under the legislation did not 'support a characterisation of the design limits of the existing Act as a "burden" upon the realisation of the constitutional mandate of popular choice' and that the 'impugned provisions do not become invalid because it is possible to identify alternative measures that may extend opportunities for enrolment.'[42] For French CJ and Bell J, this failure to demonstrate a burden was 'fatal' to the plaintiffs' case.[43] Justice Gordon held similarly that the impugned scheme did not impose a restriction on or exclusion from the franchise, observing that the legislation did not diminish any existing opportunity to enrol, transfer voting enrolment or vote.[44]

Justice Keane considered that the plaintiffs' analysis of popular choice erred by focusing on the act of voting as exhausting its content, a characterisation that he considered removed 'from view the broader aspects of the electoral system which are necessary to facilitate that choice and against which the desirability of maximising voting opportunities must be balanced.'[45] His Honour described the closure of polls before polling day as integral to facilitating orderly and peaceful polling, efficient scrutiny and a prompt and certain declaration of the poll, all of which he considered 'compatible with choice by the people'.[46] He held that the plaintiffs' focus on maximising voting meant that they failed to identify a burden on the constitutional mandate.[47]

Those Justices who addressed whether the law was justified by a substantial reason held that it was, accepting the Commonwealth's submissions that the cut-off for enrolment advanced the orderly and efficient conduct of elections.[48] Their reasoning highlights that the issue of exclusion from or restriction on the franchise cannot be considered in isolation from the broader operation of the electoral system. Gageler J, for example, held that the provisions gave effect 'to a standard incident of the traditional legislative scheme for the orderly conduct of national elections' and 'that reason is substantial.'[49]

2.1.2. Proportionality and the franchise

As noted above, a substantial reason for exclusion from the franchise requires the provisions effecting the exclusion to be reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of government. In *Murphy*, the Court considered whether this should entail the application of structured proportionality testing to that general proportionality standard. The question arose because, as acknowledged in

[41] In *Rowe*, Gummow and Bell JJ held the impugned legislation 'fails as a means to what should be the end of making elections as expressive of the popular choice as practical considerations properly permit': (2010) 243 CLR 1 at 57 [154]. The plaintiffs' characterisation of this statement in *Murphy* as equating to an obligation to maximise opportunities was unsuccessful. See *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 60 [58] (Kiefel J); 105 [240] (Nettle J); 87 [180] (Keane J); and 126-127 [316] (Gordon J).

[42] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 55 [42] (French CJ and Bell J).

[43] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 55 [42] (French CJ and Bell J).

[44] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 125 [308]-[309] (Gordon J).

[45] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 87-88 [181] (Keane J).

[46] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 89 [185] (Keane J).

[47] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 94 [202] (Keane J).

[48] For instance, *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 54 [41] (French CJ and Bell J); 62-63 [69] (Kiefel J); 109-111 [250]-[256] (Nettle J); 129-130 [332] (Gordon J).

[49] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 72 [104] (Gageler J). His Honour continued: 'Whether or not cutting off enrolment at a fixed time seven days after the issue of a writ might be regarded as outmoded, that cut-off is not so unfit for the purpose for which it was long ago designed that it can no longer be said to be reasonably appropriate and adapted to serve that purpose'.

Rowe, the general proportionality assessment in respect of the constitutional mandate of direct choice bears 'affinity' to the second limb of the test articulated in *Lange v Australian Broadcasting*, as modified in *Coleman v Power*, to determine the validity of a provision effecting a burden on the constitutional freedom of political communication.[50]

As discussed in this research paper, in the context of the implied constitutional freedom of political communication, the dominant approach taken by members of the High Court to has been to analyse proportionality in a structured manner by reference to three-factors. Those are whether the law is suitable, necessary or adequate in its balance.[51]

Members of the High Court in *Murphy* disagreed on whether structured proportionality testing is appropriate in the context of the constitutional mandate of popular choice in ss 7 and 24. Justice Kiefel was the only Justice to adopt such an approach, although without express application of the three-factor headings.[52] In doing so, her Honour expressed her general support for applying structured proportionality testing to show 'the method of reasoning' by which the judiciary concludes if a law is 'reasonably appropriate and adapted'.[53]

Chief Justice French and Justice Bell stated that the three-factor approach to the general proportionality criterion '*may* be relevant depending upon the character of the law said to diminish the extent of the realisation of that mandate … [but] may not always be available or appropriate'.[54] However, they found the *'McCloy* analysis inapposite in this case.'[55] Justice Nettle applied the 'reasonably appropriate and adapted' standard without reference to the *McCloy* test.[56] Justice Keane did not need to apply a proportionality test, as he did not consider that the impugned provisions imposed a burden on popular choice.[57]

In contrast, Justice Gageler referred to his reservations in *McCloy* about the appropriateness of applying structured proportionality testing in the Australian constitutional setting and commented that the plaintiffs' contentions in *Murphy* highlighted 'the inappropriateness of attempting to apply such a form of proportionality testing here.'[58] Justice Gordon also expressed the view that applying the approach adopted in *McCloy* would be inappropriate in the context of the constitutional mandate of direct choice of the people.[59] In addition, Gordon J observed that the Commonwealth Parliament's positive obligation to enact laws providing for an electoral system and broad legislative power with respect to elections distinguishes the constitutional mandate from the implied freedom of political communication.[60] Her Honour also expressed the view that the courts are not equipped to judge the application of its 'necessity' stage in this context, as it would require judgment on the availability of alternatives to select provisions in an entire integrated legislative scheme giving effect to the requirements of ss 7 and 24.[61]

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[50] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 67 [85] (Gageler J), citing *Roach* (2007) 233 CLR 162 at 199 [86]. For further discussion of the underlying theoretical reasons for the affinities between the implied freedom of political communication and the requirements of direct choice in ss 7 and 24, see: 67–68 [86] (Gageler J).

[51] *McCloy v New South Wales* (2015) 257 CLR 178, 194-195 [2]-[3]. We will refer to this here as 'structured proportionality testing'.

[52] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 61-62 [65] (Kiefel J).

[53] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 61 [64] (Kiefel J).

[54] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 53 [37]-[38] (French CJ and Bell J) (emphasis added).

[55] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 53 [39] (French CJ and Bell J).

[56] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 110 [251] (Nettle J).

[57] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 94 [202] (Keane J).

[58] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 72 [101] (Gageler J).

[59] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 122 [297] (Gordon J).

[60] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 122 -123 [295]-[302] (Gordon J).

[61] *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 123 [303] (Gordon J).

It remains to be seen how the structured proportionality analysis will be refined, and what scope there is for its application beyond the implied freedom of political communication, particularly in the context of other constitutional guarantees for which a similar standard is used.[62] It has recently arisen, for example, in relation to s 92 (discussed below).

2.1.3. Implied freedom of political communication

The High Court has emphasised repeatedly that the freedom of political communication operates as a limitation on legislative power to burden communication on matters of politics and government, rather than an individual right.[63] The implied freedom is recognised as necessary for the maintenance, through electoral accountability, of a constitutional system of representative and responsible government.[64]

As Gageler J observed in *McCloy v New South Wales*:[65]

> The ever-present risk within the system of representative and responsible government established by Chs I and II of the *Constitution* is that communication of information which is either unfavourable or uninteresting to those currently in a position to exercise legislative or executive power will, through design or oversight, be impeded by legislative or executive action to an extent which impairs the making of an informed electoral choice and therefore undermines the constitutive and constraining effect of electoral choice.[66]

The implied freedom is directed to the protection of communications on the subject of government and politics generally and operates to the extent that burdens upon them are inconsistent in purpose or means with the system of representative and responsible government inherent in the *Constitution.*

The High Court has recognised the integration of political matters in Australia whereby the freedom limits the exercise of legislative power inconsistent with it at each of the Commonwealth, State and Territory levels of government.[67]

Some jurisprudence has also developed on the content and application of the implied freedom. Both verbal and non-verbal forms of political communication are protected (the latter including, for example, assembly and movement for the purpose of political protest).[68] It has been argued by Professor Adrienne Stone that the text and structure of the *Constitution* are insufficient to define the

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[62] Anne Carter, '*Brown v Tasmania*: Proportionality and the reformulation of the Lange test' (2018) 29(3) *Public Law Review* 11, 16; Anne Twomey, '*McCloy v New South Wales*: Out with US corruption and in with German proportionality' (15 October 2015) *Australian Public Law* < https://auspublaw.org/2015/10/mccloy-v-new-south-wales/>. For a detailed examination of proportionality, see Shipra Chordia, *Proportionality in Australian Constitutional Law* (The Federation Press, 2020).

[63] See, for example, *Monis v The Queen* (2013) 249 CLR 92, where the Court upheld the validity of s 471.12 of the *Criminal Code Act* (Cth) which makes it an offence to use the postal service in an offensive way, on the basis that it did not breach the implied right to political communication. See also *Brown v Tasmania* (2017) 261 CLR 328, [88], [90]; *Levy v Victoria* (1997) 189 CLR 579, 625-6 (McHugh J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 223-5, 244-6, 268; *McLure v Australian Electoral Commission* (1999) 163 ALR 734, 740-1 (Hayne J). See also Adrienne Stone, 'Rights, Personal Rights and Freedoms: The nature of freedom of political communication' (2001) 25(2) *Melbourne University Law Review* 374.

[64] See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137-142 (Mason CJ); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557-62.

[65] (2015) 257 CLR 178 .

[66] *McCloy v New South Wales* (2015) 257 CLR 178, 227 [115] (Gageler J).

[67] See, for example, *Unions NSW v New South Wales* (2013) 252 CLR 530 at 548-551 [19]-[26], 552-553 [31]-[34]; *McCloy v New South Wales* (2015) 257 CLR 178 at 230 [125] (Gageler J), 280 [304] (Gordon J).

[68] *Levy v Victoria* (1997) 189 CLR 579, 595, 613, 622-3. See also *Coleman v Power* (2004) 220 CLR 1 and *Monis v The Queen* (2013) 249 CLR 92 on the type of communications which will be protected.

limits of the implied freedom.[69] While some clarification has been made by the various cases on the implied freedom in recent years, as O'Donnell observed in 2018, '[t]he reality is that the content and application of the implied freedom remains contested.'[70]

The test for whether a legislative burden on the implied freedom of expression of political opinion is justified or not was developed in *Lange v Australian Broadcasting Corporation* ('*Lange*'),[71] as adapted by *Coleman v Power*. In *Brown v Tasmania* (*'Brown'*), Kiefel, Bell and Keane JJ described the test as the 'indispensable means' to make this inquiry.[72]

The *Lange* test, as modified by *Coleman v Power*, is a two-stage analysis:[73]

1. Whether the imputed legislation effectively burdens the freedom of political communication by its terms, operation, or effect.[74]
2. If the freedom is burdened, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of government.

In each of the cases *Unions NSW v New South Wales*,[75] *Monis*[76] and *Tajjour,*[77] members of the High Court expressed different views as to how the *Lange* criteria, in particular its second-stage, is to be applied. This generated some uncertainty, until the analytical framework was clarified in the joint judgment in the majority in the case of *McCloy v NSW* ('*McCloy*'),[78] subject to some later refinement by the plurality in *Brown v Tasmania*.[79]

McCloy v New South Wales

In *McCloy v New South Wales*, the High Court considered a challenge to the validity of Divisions 2A and 4A of Part 6 and section 96E of the *Election Funding, Expenditure and Disclosure Act 1981* (NSW) ('EFD Act') as infringing the implied freedom of political communication, by either not being directed

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[69] Adrienne Stone, 'The limits of Constitutional Text and Structure: Standards or Review and Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668. See the comments of McHugh J in *Coleman v Power* (2004) 220 CLR 1, 46-7.

[70] Julian O'Donnell, 'Are Victoria's Safe-Access Zones Safe from the Constitution?' (10 October 2018) *Australian Public Law* <https://auspublaw.org/2018/10/are-victorias-safe-access-zones-safe-from-the-constitution/>. See also Adrienne Stone, 'Expression' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 952.

[71] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561-562; as explained in *McCloy v New South Wales* (2015) 257 CLR 178, 193-195 [2].

[72] *Brown v Tasmania* (2017) 261 CLR 328, [90] (Kiefel CJ, Bell and Keane JJ); see also *McCloy v New South Wales* (2015) 257 CLR 178 at 200 [23] (French CJ, Kiefel, Bell and Keane JJ) ('*Lange* is the authoritative statement of the test to be applied to determine whether a law contravenes the freedom.')

[73] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-8.

[74] That is, how the statute impacts upon the operation of the freedom generally, rather than in specific instances (except to the extent that they may illustrate the legislation's general practical effect) see *Brown v Tasmania* (2017) 261 CLR 328, [90].

[75] *Unions NSW v New South Wales* (2013) 252 CLR 530.

[76] *Monis v The Queen* (2013) 249 CLR 92.

[77] *Tajjour v New South Wales* (2014) 254 CLR 508, concerning freedom of association. See Murray Wesson, ' *Tajjour v New South Wales*, 'Freedom of association, and the High Court's uneven embrace of proportionality review' (2015) 40 *University of Western Australia Law Review* 102.

[78] *McCloy v New South Wales* (2015) 257 CLR 178.

[79] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562, 567; *McCloy v New South Wales* (2015) 257 CLR 178 at 194; *Brown v Tasmania Brown v Tasmania* (2017) 261 CLR 328, [104] (Kiefel CJ, Bell and Keane JJ), [271] (Nettle J).

at or rationally connected to a legitimate purpose, or in the alternative being disproportionate to any potential legitimate purpose. The EFD Act applied to New South Wales State and local elections.[80]

The relevant Parts and provisions:

- imposed caps upon 'political donations' made in State election campaigns, making it unlawful to accept a 'political donation' in excess of the cap (Division 2A);
- prohibited particular 'indirect campaign contributions' for both local and State election purposes (section 96E); and
- prohibited making or accepting a political donation from a 'prohibited donor' (Division 4A).[81] The EFD Act defined 'prohibited donor' to include 'a property developer', among others such as liquor, tobacco or alcohol businesses (s96GAA).

The first plaintiff, a former Newcastle mayor,[82] was a director of both the second and third plaintiffs. Both the first and third plaintiffs were 'property developers' within the meaning of the statute. The first plaintiff Mr McCloy had made 'political donations' in excess of the cap to candidates in the 2011 New South Wales State election and had been questioned by the second defendant the Independent Commission Against Corruption about that.[83] The second plaintiff also made 'indirect campaign contributions' within the meaning of the statute.

The majority of the High Court (French CJ, Kiefel, Bell and Keane JJ in a joint judgment, Gageler J and Gordon J in separate judgments) found that none of the provisions were invalid. Nettle J found that the provisions were invalid, except for Division 4A of the EFD Act in its application specifically to property developers.

The joint judgment held that the provisions effectively burdened the implied freedom of political communication. The judges followed the reasoning in the Court's earlier finding in *Unions NSW 2013* that, while the act of donation is not a direct 'political communication' within the constitutional meaning, the EFD Act burdened the implied freedom by restricting the funds available to political parties and candidates to meet the cost of political communications.[84]

The joint judges also rejected the plaintiffs' argument that the 'ability to pay money to secure access to a politician is itself an aspect of' the implied freedom of political communication, as a means of political participation through the building and asserting of political power.[85] Gordon J, Gageler and Nettle JJ each agreed with this finding.[86] In rejecting this characterisation, the joint judgment found that line of reasoning equated the implied freedom with an individual right.[87] The joint judgment reiterated that the implied freedom under the Australian *Constitution* is not a personal right but a

[80] Other provisions of the EFD Act were challenged and upheld by the Court in *Unions NSW v New South Wales* (2013) 252 CLR 530.

[81] *McCloy v New South Wales* (2015) 257 CLR 178, 197-9.

[82] Graeme Orr, 'In McCloy case, High Court finally embraces political equality ahead of political freedom' *The Conversation* (8 October 2015) <https://theconversation.com/in-mccloy-case-high-court-finally-embraces-political-equality-ahead-of-political-freedom-48746>

[83] Martin Clark, *McCloy v New South Wales* (7 October 2015) Opinions on High, Melbourne Law School <https://blogs.unimelb.edu.au/opinionsonhigh/2015/10/07/mccloy-case-page/>.

[84] *McCloy v New South Wales* (2015) 257 CLR 178 at 199 [24] (French CJ, Kiefel, Bell and Keane JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530 at 554 [38]. Gageler and Gordon JJ also followed this reasoning (at 240 [158]-[162] and 283 [315] respectively).

[85] *McCloy v New South Wales* (2015) 257 CLR 178 at 201 [25] (French CJ, Kiefel, Bell and Keane JJ).

[86] *McCloy v New South Wales* (2015) 257 CLR 178 at 241 [163]-[164] (Gageler J), 257 [217]-[218] (Nettle J) ('Political sovereignty further necessitates that those who govern take account of the interests of all those whom they govern and not just the few of them who have the means of buying political influence.'), 283 [316]-[319] (Gordon J).

[87] *McCloy v New South Wales* (2015) 257 CLR 178 at 202-203 [29]-[30], 205 [40]-[42] (French CJ, Kiefel, Bell and Keane JJ).

restriction on legislative power, rejecting the plaintiffs' implicit reference to United States' *Constitution* First Amendment case law in which the Supreme Court has interpreted political donations to be a protected act of political speech.[88]

The joint judgment also held that 'guaranteeing the ability of a few to make large political donations in order to secure access to those in power would seem to be antithetical to the great underlying principle' of representative democracy.[89] The judges here referred to the 1902 statement of Professor Harrison Moore that '[t]he great underlying principle of the Constitution was that the rights of individuals were sufficiently secured by ensuring each an equal share in political power.'[90] Gageler J went further stating that: 'The argument is as perceptive as it is brazen. It goes to the heart of the mischief to which the provisions are directed.'[91]

The joint judges returned to the issue of equality of access to political participation in finding that the cap upon political donations in Division 2A was compatible in purpose and means with the maintenance of representative government.[92] In concluding this, they recognised:

> Equality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our *Constitution*…The risk to equal participation posed by the uncontrolled use of wealth may warrant legislative action to ensure, or even enhance, the practical enjoyment of popular sovereignty.[93]

As others have commented, this finding is significant in that the High Court has 'embraced' the value of equality of access to participation in political sovereignty as inherent to the constitutional system of representative government.[94]

Australian cases here clearly diverge from United States Supreme Court case law rejecting limitations upon private campaign financing. Instead, the regulation of political donations was said by the joint judges to 'preserve and enhance' Australian representative government.[95]

The joint judges found the Division 4A provisions prohibiting property developers as political donors to be constitutionally valid. They held that targeting of property developers was warranted given the risk of undue or corrupt influence of official decision-makers in relation to planning decisions, due to the dependence of property developers' business activities on discretionary decision-making by government officials and the history of corruption and undue influence in this area in New South Wales.[96]

The joint judgment in *McCloy* also sought to clarify the doctrinal issue of how the *Lange* questions, as modified in *Coleman v Power*, are to be applied.[97] In the second stage of the *Lange* test, the legitimacy

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[88] *McCloy v New South Wales* (2015) 257 CLR 178 at 202-203 [29]-[30], 205 [40]-[42] (French CJ, Kiefel, Bell and Keane JJ).

[89] *McCloy v New South Wales* (2015) 257 CLR 178 at 202 [27]-[28] (per French CJ, Kiefel, Bell and Keane JJ).

[90] *McCloy v New South Wales* (2015) 257 CLR 178 at 202 [27]-[28] (per French CJ, Kiefel, Bell and Keane JJ).

[91] *McCloy v New South Wales* (2015) 257 CLR 178 at 241 [164] (Gageler J).

[92] *McCloy v New South Wales* (2015) 257 CLR 178 at 207-208 [45]-[46] (French CJ, Kiefel, Bell and Keane JJ).

[93] *McCloy v New South Wales* (2015) 257 CLR 178 at 208 [47] (French CJ, Kiefel, Bell and Keane JJ).

[94] Shipra Chordia, *Proportionality and McCloy v New South Wales: close but not quite?* (1 March 2016) *Australian Public Law* <https://auspublaw.org/2016/03/proportionality-and-mccloy/>; Anne Twomey, 'McCloy v New South Wales: Out with US corruption and in with German proportionality' (15 October 2015) *Australian Public Law* <https://auspublaw.org/2015/10/mccloy-v-new-south-wales/>. The scope of the concept of equality of opportunity to participate in the exercise of political sovereignty and the ends to which that might be pursued may be clarified further in future High Court consideration of the implied freedom. The importance of values underlying a law and their compatibility with representative and responsible government was discussed again in *Clubb v Edwards* (see part 2.1.3.3 below.)

[95] *McCloy v New South Wales* (2015) 257 CLR 178 at 208 [47].

[96] *McCloy v New South Wales* (2015) 257 CLR 178 at 208 [48] –[53] (French CJ, Kiefel, Bell and Keane JJ).

[97] *McCloy v New South Wales* (2015) 257 CLR 178 at 194-195 [2]-[3] (French CJ, Kiefel, Bell and Keane JJ).

of the object of the law is tested for its compatibility with the system of government established by the *Constitution*. The joint judges appeared to exchange this 'legitimate ends' test for a broader one, described as 'compatibility testing'. It was expressed as follows: 'Are the purpose of the law *and the means* adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government?'[98]

The joint judgment also adopted a 'proportionality testing' analysis to examine how reasonably appropriate and adapted the legislation was to its purpose: whether the measures were suitable, necessary and adequate in their balance.[99] The joint judges applied this to uphold the validity of the provisions, finding that '[t]he restriction on the freedom is more than balanced by the benefits sought to be achieved.'[100]

The other three Justices did not adopt a 'proportionality testing' analysis.[101] In finding with the joint judgment, Justice Gageler applied an alternate method for the second-stage of the *Lange* test. After holding that the EFD Act provisions were directed to regulating conduct in relation to elections for political office, Gageler J stated the relevant analysis was whether:

> such restriction as each imposes on political communication is imposed in pursuit of an end which is appropriately characterised within our system of representative and responsible government as compelling; and that the imposition of the restriction in pursuit of that compelling end can be seen on close scrutiny to be a reasonable necessity.[102]

Gageler J's approach has obvious intellectual roots in the spectrum of scrutiny approach of the United States Supreme Court.[103]

Both Gordon and Nettle JJ applied the *Lange* test to uphold the provisions imposing caps on political donations and the prohibition upon certain indirect campaign contributions. Nettle J dissented on the ban on property developers making donations, finding that it was a discriminatory burden upon 'a particular segment of the community', and that to restrict property developers' ability to participate in part of the political process was to mandate 'an inequality of political power which strikes at the heart of the system.'[104]

In *McCloy v New South Wales*, the joint judgment of French CJ, Kiefel, Bell and Keane JJ proposed a three-stage criteria to analyse the latter question by reference to whether the law is suitable, necessary and adequate in its balance (referred to as 'proportionality testing').[105] The joint judges used those terms in the following senses:

> *suitability* – as having a rational connection to the purpose of the provision.

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[98] *McCloy v New South Wales* (2015) 257 CLR 178 at 194 [2] (French CJ, Kiefel, Bell and Keane JJ) (emphasis added). Subsequently, in *Brown*, the majority confirmed this test should only refer to the purpose of the law and that the reference to 'means' is not included at this stage of testing: *Brown v Tasmania* (2017) 261 CLR 328, [104] (French CJ, Kiefel, Bell and Keane JJ).

[99] *McCloy v New South Wales* (2015) 257 CLR 178 at 194 [2] (French CJ, Kiefel, Bell and Keane JJ).

[100] *McCloy v New South Wales* (2015) 257 CLR 178 at 221 [93] (French CJ, Kiefel, Bell and Keane JJ).

[101] *McCloy v New South Wales* (2015) 257 CLR 178 at 235 [141]-[142] (Gageler J), 259 [223] (Nettle J), 288 [338]-[339] (Gordon J).

[102] *McCloy v New South Wales* (2015) 257 CLR 178 at 239 [155] (Gageler J).

[103] For more detailed analysis of both the plurality and Gageler J's approach in *McCloy*, and an analysis of the different visions of the function of judicial review in both, see Mark Watts, 'Reasonably appropriate and adapted? Assessing proportionality and the 'spectrum' of scrutiny in *McCloy v New South Wales*' (2016) 35(2) *University of Queensland Law Journal* 349.

[104] *McCloy v New South Wales* (2015) 257 CLR 178 at 267 [250], 273-274 [271] (Nettle J).

[105] (2015) 257 CLR 178 at 194-195 [2]-[3].

necessity – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom.

adequate in its balance – a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.[106]

This was, as others have observed, the first time that a judgment of the High Court has approved of the use of 'European-style structured proportionality testing' and integrated that analysis into the *Lange* tests.[107]

Brown v Tasmania

In *Brown v Tasmania*, the Court considered a challenge to the validity of provisions of the *Workplaces (Protection from Protestors) Act 2014* (Tas) ('the *Protestors Act*').

The challenge was made on the basis that the *Protestors Act*, as it operated in respect of forestry lands and access to them, was an unjustified burden on the implied freedom of political communication. The *Protestors Act* was directed to ensuring that protestors not damage business premises and business-related objects, or prevent, impede or obstruct business activities or access to business premises.

In the particular context and long history of forest conservation protests in Tasmania, the *Protestors Act* defined 'business premises' to include forestry land held by the Crown and 'business access areas'[108] to include permanent timber production zone land and forest roads. The *Protestors Act* empowered police to direct protestors, both individuals and groups, to leave and stay away from business premises and business access premises for statutorily defined periods under pain of arrest and criminal penalties. Police could exercise these powers on the basis of a reasonable belief that the protestor was about to hinder, obstruct or prevent the carrying out of business activities, including by entering or remaining on business premises or a business access area.

The plaintiffs – Dr Bob Brown (former Australian Senator and leader of the Greens Party) and Ms Jessica Hoyt – were charged under the Act for not complying with police directions made under the Act during protests for the conservation of the Lapoinya Forest in northwest Tasmania.[109]

The Court found that the legislation imposed an unjustified burden upon the implied freedom of political communication. Significantly, the majority determined that the legislation was directed to a legitimate purpose compatible with the system of representative and responsible government in, broadly, seeking to prevent damage and serious disruption to forestry operations occasioned by protestors.[110] Nevertheless, the law was not reasonably appropriate and adapted to the ends of the

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[106] *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2] (French CJ, Kiefel, Bell and Keane JJ).

[107] Shipra Chordia, *Proportionality and McCloy v New South Wales: close but not quite?* (1 March 2016) *Australian Public Law* <https://auspublaw.org/2016/03/proportionality-and-mccloy/>.

[108] Defined, in essence, to mean an area by which to enter or exit business premises.

[109] Both plaintiffs were engaging – at separate times - in protest activity against the logging of the forest when they were directed by police to remove themselves from the vicinity of the forestry operations, in purported exercise of their powers under the *Protestors Act.* On not complying, both plaintiffs were arrested and charged under the law; they were also thereby unable to return to the area while forestry operations were underway. Ultimately the charges against the plaintiffs were withdrawn by the State, on the basis that it was unlikely to be able to show whether or not the land the plaintiffs were on when subject to the police direction and arrested was in fact land covered by the *Protestors Act.* The standing of the plaintiffs was initially challenged as a result, but this was ultimately conceded by the defendant. See the obiter comment of Kiefel CJ, Bell and Keane JJ at [17] on the appropriateness of this concession. On issues of standing, see research paper 9.

[110] *Brown v Tasmania* (2017) 261 CLR 328, [141] (Kiefel CJ, Bell and Keane JJ), [212]-[213](Gageler J), [275] (Nettle J).

legislation. As stated by Chief Justice Kiefel, Justice Bell and Justice Keane, '[t]he concern of the Court is the extent to which the *Protesters Act* restricts protests more generally. It is likely to deter protest of all kinds and that is too high a cost to the freedom given the limited purpose of the *Protesters Act*.'[111]

Justice Gageler held similarly that 'The burden the impugned provisions impose on freedom to engage in political communication constituted by on-site political protests is greater than is reasonably necessary to protect' from serious interference with forest operations and access to them.[112] His Honour also commented on the 'significant respects in which the impugned provisions might be seen to be framed in terms that are broader and more burdensome on freedom of political communication than is reasonably necessary to achieve that purpose, in that they have the effect of penalising on-site protest activity which is plainly harmless'.[113] Justice Nettle also concluded that provisions of the Act were 'grossly disproportionate to the achievement of the state purpose of the legislation.'[114]

Considerations that members of the majority addressed in reaching this finding included the following:

- some of the provisions of the *Protectors Act* would apply to end protest activity regardless of whether damage or disruption to business activity or access to business premises were foreseen, some of the majority finding that the inference was available that they were directed to deterring and ending all protest;[115]
- the difficulty of defining the forestry land to which the *Protestors Act* applied, with the practical effect being that: (a) a police officer could end protest activity on the mistaken belief that it was situated on land to which the *Protestors Act* applied and in doing so prevent and deter lawful protests;[116] (b) protestors would also be deterred from engaging in lawful protests;[117]
- the impracticability of judicial review both before the termination of a protest by police, and after termination of a protest (or in sufficient time for protestors to continue the protest);[118]
- the significant criminal consequences for the offences, including an offence of merely being present in an area, went 'well beyond protecting the operations of Forestry Tasmania' and 'could not even be described as using a blunt instrument to achieve that purpose.'[119]

The Court's finding that burdens imposed upon political protest for the purpose of protecting business premises, activities and objects may be a legitimate statutory purpose, as well as the majority's proportionality analysis, have implications for Commonwealth and state legislation impacting on protests.[120]

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[111] *Brown v Tasmania* (2017) 261 CLR 328, [145] (Kiefel CJ, Bell and Keane JJ).
[112] *Brown v Tasmania* (2017) 261 CLR 328, [232] Gageler J.
[113] *Brown v Tasmania* (2017) 261 CLR 328, [219] (Gageler J).
[114] *Brown v Tasmania* (2017) 261 CLR 328, [295] (Nettle J).
[115] *Brown v Tasmania* (2017) 261 CLR 328, [132]-[136] (Kiefel CJ, Bell and Keane JJ).
[116] *Brown v Tasmania* (2017) 261 CLR 328, [73] (Kiefel CJ, Bell and Keane JJ).
[117] *Brown v Tasmania* (2017) 261 CLR 328, [77] (Kiefel CJ, Bell and Keane JJ).
[118] *Brown v Tasmania* (2017) 261 CLR 328, [78]-[79] (Kiefel CJ, Bell and Keane JJ).
[119] *Brown v Tasmania* (2017) 261 CLR 328, [228] (Gageler J).
[120] See, for example, Tom Gotsis, *The High Court's decision in Brown v Tasmania* (E-Brief, NSW Parliamentary Research Service, November 2017), Parliament of New South Wales <https://www.parliament.nsw.gov.au/researchpapers/Documents/The%20High%20Court's%20decision%20in%20Brown%20v%20Tasmania.pdf>. Note, however, the subsequent reintroduction of legislation with a similar effect and a reworded title. See, e.g., Alexandra Humphries, 'Greens defiant ahead of anti-protest law reboot to

Following the clarification in *Brown*, the second-stage of the *Lange* analysis requires the following questions to be addressed:

1. First, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? If not, the legislation will be invalid and it is unnecessary to address the second question.
2. If yes, is the law reasonably appropriate and adapted to advancing that purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?[121]

It was affirmed by a majority in *Brown* that proportionality testing is a valid method by which to approach the second part of the *Lange* test in respect of the freedom of political communication.[122] Nevertheless, it was observed by the joint judges in *McCloy*, and reiterated by the majority in *Brown*, that proportionality is not the only framework by which legislation restricting a freedom can be analysed under *Lange*.[123] Gageler J in *Brown* stressed that the three-stage proportionality test is 'at best, a tool'.[124]

Following *Brown*, more recent cases on the implied freedom of political communication have confirmed the application of the structured proportionality analysis, while reservations continue to be expressed by some members of the Court.

Unions NSW v New South Wales

Unions NSW v New South Wales[125] concerned a challenge to the constitutional validity of two provisions of the *Electoral Funding Act 2018* (NSW) ('EF Act'), as infringing the implied freedom of political communication.

Together, the impugned provisions, sections 29(10) and 35 of the EF Act, operated to cap expenditure on State elections by 'third-party campaigners'. 'Third party campaigners' are defined to exclude each of political parties, candidates, groups, elected members or their associated entities, and apply only to campaigners incurring more than $2,000 of electoral expenditure in the capped State election expenditure period or be registered for a particular election. The expenditure cap of $500,000 imposed on 'third-party campaigners' is significantly lower than that allowed to parties, candidates and other associated entities. The provisions also prevent third-party campaigners from 'acting in concert' during an election campaign to pool their resources and so exceed the expenditure cap. Penalties for contravening the provision include a ten-year gaol term for participating in such a scheme to circumvent the expenditure caps, and two-year gaol terms for contravening the other provisions.

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quell activists tabled in Parliament' *ABC News* (14 November 2019) <https://www.abc.net.au/news/2019-11-14/bob-brown-and-others-say-new-anti-protest-law-bid-wont-work/11705296>.

[121] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562, 567; *McCloy v New South Wales* (2015) 257 CLR 178, 194 (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, [104] (Kiefel CJ, Bell and Keane JJ), [271] (Nettle J).

[122] See Anne Carter, '*Brown v Tasmania*: Proportionality and the reformulation of the Lange test' (2018) 29(3) *Public Law Review* 11, 13.

[123] *McCloy v New South Wales* (2015) 257 CLR 178 at 215-216 [74]-[75]; *Brown v Tasmania* (2017) 261 CLR 328, [125], [131] (Kiefel CJ, Bell and Keane JJ), [158] (Gageler J), [280] (Nettle J).

[124] *Brown v Tasmania* (2017) 261 CLR 328, [159] (Gageler J).

[125] *Unions NSW v New South Wales* (2019) 264 CLR 595.

Kiefel CJ, Bell and Keane JJ found that s 29(10) did impermissibly burden the implied freedom, in that it was not justified as necessary, according to a structured proportionality analysis in which the legitimacy of the law's purpose was accepted in that context.[126] The approach in *Brown* was described by Edelman J as a 'clear and principled' approach.[127]

Clubb v Edwards

The High Court heard together two challenges to state laws concerning 'safe access zones' which prohibited certain behaviour close to healthcare sites where abortions were provided as an impermissible burden on the implied freedom of political communication.[128]

Clubb v Edwards ('*Clubb*') concerned a challenge to section 185D of the *Public Health and Wellbeing Act 2008* (Vic) ('PHWA').[129] The appellant, a member of anti-abortion advocacy group Helpers of God's Precious Infants, was charged with an offence under s185D after she allegedly approached a couple outside of the entrance of the Fertility Control Clinic in East Melbourne, spoke to them briefly and handed them a pamphlet.

Preston v Avery concerned a challenge to the validity of section 9(2) of the *Reproductive Health (Access to Terminations) Act 2013* (Tas).[130] The appellant was charged on three occasions with contravening that provision by: holding placards on two occasions, and handing out leaflets, near the entrance to the Specialist Gynaecology Centre in Hobart; holding a conversation with a women seeking to access the Centre; and failing to comply with a police direction to leave the immediate area of the Centre.

In both instances, the laws were unanimously found not to impose an impermissible burden on the implied freedom of political communication. However, the three-stage structured proportionality analysis was not applied consistently by all of the justices.

Kiefel CJ, Bell, Keane and Nettle JJ confirmed the application of the structured proportionality approach (involving analysis of the law's suitability, necessity and the adequacy of its balance).[131] Kiefel CJ, Bell, Keane stated that the approach in *McCloy* and *Brown* addresses the difficulty in applying the 'abstract and indeterminate language' of the second step in *Lange* as to whether a burden is 'undue', as well as providing:

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[126] *Unions NSW v New South Wales* (2019) 264 CLR 595, [31]-[35], [36], [53]-[54]. That conclusion having been made, it was not necessary to address s 35. See the approach of Gageler J, concluding that the amount of the cap could not be justified at [102], and Nettle J at [118]-[119]. Gordon J agreed with the conclusion reached by the majority judgment [122], finding that NSW had not persuaded the Court that the burden imposed was justified [152]. See the case note of Laura Ismay, 'Caps on Electoral Expenditure by Third-Party Campaigners: Unions NSW v New South Wales' (2019) 41(3) *Sydney Law Review* 397 on the 'level playing field' and 'equality' principles in the context of the implied freedom.

[127] *Unions NSW v New South Wales* (2019) 264 CLR 595, [[161]. His Honour held that the relevant provisions had an illegitimate purpose, at [220]-[223]. See also another 2019 case in which a law was found to have imposed a justified burden on the implied freedom, as the law was indistinguishable from that upheld in *McCloy: Spence v Queensland* (2019) ALJR 643, [97] (Kiefel CJ, Bell, Gageler and Keane JJ).

[128] *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171 ('*Clubb*').

[129] Section 185D makes it an offence to 'engage in prohibited behaviour within a safe access zone'. Section 185D of the PHWA is to be read with s185B(a) defining a 'safe access zone' as 'an area within a radius of 150 metres from premises at which abortions are provided'. 'Prohibited behaviour' is defined by the PHWA to be 'communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is likely to cause distress or anxiety.'

[130] Section 9(2) of the Tasmanian statute prohibits 'a protest in relation to terminations that is able to be seen or heard by a person accessing or attempting to access premises at which terminations are provided'.

[131] *Clubb v Edwards* (2019) 267 CLR 171, [5]-[6] (Kiefel CJ, Bell, Keane JJ) and [215], [266] (Nettle J). Note the change in the application of the test by Nettle J, particularly with regard to necessity at [267]-[269].

> …the means by which rational justification for the legislative burden on the implied freedom may be analysed, and it serves to encourage transparency in reasoning to an answer. It recognises that to an extent a value judgment is required but serves to reduce the extent of it. It does not attempt to conceal what would otherwise be an impressionistic or intuitive judgment of what is "reasonably appropriate and adapted".[132]

Edelman J noted and discussed the criticisms and reservations made on structured proportionality. He stated:[133]

> Structured proportionality testing provides an analytical, staged structure by which judicial reasoning can be made transparent. The extent of its value will depend upon the content of each stage... In Australia, a restrained approach to each stage is required because the freedom of political communication is a limited implication from the Constitution that applies only where it is necessary to ensure the existence and effective operation of the scheme of representative and responsible government protected by the terms of the Constitution.

The three-stage test provides benefits of avoiding duplication and promoting transparency[134] and is a tool but should not for that reason be regarded as 'dispensable'.[135] Edelman J noted that the structured approach will develop incrementally over time.[136]

Gordon J acknowledged structured proportionality as one means of identifying whether the implied freedom had been impermissibly burdened, but considered it is not 'a constitutional doctrine'.[137] Gordon J did not apply this test, noting that rigidity and formalistic rules derived from civil law may be detrimental to the development of the meaning and content of the standard in *Lange* through the common law method.[138] It is a contested tool, noting that in other jurisdictions it is not the only or even preferred tool.[139] Her Honour also emphasised that structured proportionality is applicable only to constitutionally entrenched rights, and that the implied freedom was not a right, and that not every law requires the same level of justification or scrutiny.[140] Even where a rule promotes transparency, the need or usefulness of the rule must still be established.[141]

Gageler J stated that the three stage analysis is 'anchored in our constitutional structure … [and] part of our constitutional doctrine' but that it has also not been asserted to be more than an 'intellectual tool'.[142] His Honour referred to, but did not press or expand upon the reservations made in *Brown*.[143] Despite being anchored in the constitutional structure, Gageler J did not expressly apply the analysis, instead adopting an approach of 'calibrated scrutiny', involving a determination of whether the law can 'withstand scrutiny under the final stages' of the *Lange-Coleman-McCloy-Brown* approach.[144]

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[132] *Clubb v Edwards* (2019) 267 CLR 171, [74] (Kiefel CJ, Bell, Keane JJ) (citations omitted).
[133] *Clubb v Edwards* (2019) 267 CLR 171, [408].
[134] *Clubb v Edwards* (2019) 267 CLR 171, [463].
[135] *Clubb v Edwards* (2019) 267 CLR 171, [468].
[136] *Clubb v Edwards* (2019) 267 CLR 171, [470].
[137] *Clubb v Edwards* (2019) 267 CLR 171, [390].
[138] *Clubb v Edwards* (2019) 267 CLR 171, [391], [404].
[139] *Clubb v Edwards* (2019) 267 CLR 171, [395]-[396].
[140] *Clubb v Edwards* (2019) 267 CLR 171, [391], [393].
[141] *Clubb v Edwards* (2019) 267 CLR 171, [400].
[142] *Clubb v Edwards* (2019) 267 CLR 171, [158].
[143] *Clubb v Edwards* (2019) 267 CLR 171, [160].
[144] *Clubb v Edwards* (2019) 267 CLR 171, [161]-[162], [185]. Note the analysis of Arisha Arif and Emily Azar that 'Arguably, Gageler J's approach begets the issue that structured proportionality is designed to prevent. That is, a lack of transparency in judicial reasoning in relation to the value judgment that occurs in the "adequacy of balance" stage of the *McCloy* proportionality formula. On the other hand, Gageler J's approach engages, rightly or wrongly, with the criticism that structured proportionality presents too rigid and formulaic a mode of analysis,

Kiefel CJ, Bell and Keane JJ noted that '[t]he balance of the challenged law can, in significant part, be assessed in terms of the same values as those that underpin the implied freedom itself in relation to the protection of the dignity of the people of the Commonwealth.'[145] In the instant case:[146]

> [T]he protection of the dignity of the people of the Commonwealth, whose political sovereignty is the basis of the implied freedom, is a purpose readily seen to be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

Comcare v Banerji

In *Comcare v Banerji*,[147] the High Court heard an appeal from a decision not to grant workers compensation to a Commonwealth public servant following the termination of her employment, the termination having exacerbated the respondent's underlying psychological condition.

The appellant was employed by the Department of Immigration and Citizenship ('the Department'), when she was dismissed on the basis that she had breached the Australian Public Service Code of Conduct by anonymously using Twitter to criticise the Government, the then Department's Minister, the Department and the Department's Communications manager in respect of government policy on refugees. The Tribunal had decided that the termination of the respondent's employment could not be characterised as 'reasonable administrative action', which would have barred her entitlement to compensation, because it was carried out in breach of the implied freedom of political communication.[148]

The Court concluded that it did not impose an unjustified burden on the implied freedom.[149] Again, the Court emphasised that the implied freedom did not constitute a personal right of free speech, and that 'even if a law significantly restricts the ability of an individual or a group of persons to engage in

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which works to constrain judicial reasoning and should be adopted with caution' ('Clubb v Edwards; Preston v Avery: Structured proportionality – has anything changed?' *Australian Public Law* (3 May 2019) <https://auspublaw.org/2019/05/clubb-v-edwards-preston-v-avery-structured-proportionality/>. For Adrienne Stone, the calibrated scrutiny approach can be reconciled with the approach of the majority and proportionality can be used without entailing commitment to a substantive conception of rights, such that it is suitable to the Australian constitutional context: 'Proportionality and its Alternatives' (2020) 48(1) *Federal Law Review* 123, 125, 138-9. See also the Hon Sir Anthony Mason, 'Proportionality and Calibrated Scrutiny: A Commentary' (2020) 48(1) *Federal Law Review* 286, who considers that the two may 'coexist peacefully'. See also the support for a hybrid approach, in which calibration of particular factors can inform the analysis of necessity and adequacy of balance in a structured proportionality test, providing clarity, predictability and greater transparency while retaining a focus on the circumstances of the instant case and a flexible application of these standards without the imposition of strict rules: 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92, 101-2. See, however, the note of caution about the acceptance of modifications to the *Lange-Coleman-McCloy-Brown* approach by the majority justices mentioned by Anne Carter, 'Bridging the Divide? Proportionality and Calibrated Scrutiny' (2020) 48(2) *Federal Law Review* 282.

[145] *Clubb v Edwards* (2019) 267 CLR 171, [101]. See also [60] and [99].

[146] *Clubb v Edwards* (2019) 267 CLR 171, [51].

[147] (2019) 372 ALR 42.

[148] *Banerji v Comcare* [2018] AATA 892 (16 April 2018). See also Kieran Pender, 'Comcare v Banerji: Public Servants and Political Communication' (2019) 41(1) *Sydney Law Review* 131.

[149] *Comcare v Banerji* (2019) 372 ALR 42, [1] (Kiefel CJ, Bell, Keane and Nettle JJ), [54] (Gageler J), [111] (Gordon J), [116] (Edelman J). See, for example, criticism of this finding in Kieran Pender, '"A powerful chill"? *Comcare v Banerji* [2019] HCA 23 and the political expression of public servants' *Australian Public Law* (28 August 2019) <https://auspublaw.org/2019/08/"a-powerful-chill"?-comcare-v-banerji-[2019]-hca-23/>. Cf Katherine Gelber, 'The precarious protection of free speech in Australia: the Banerji case' (2019) 23(5) *Australian Journal of Human Rights* 511, who argues that the problem is not with the determination of the High Court but with the lack of an external standard by which to hold governments to account in Australia.

political communication, the law will not infringe the implied freedom of political communication unless it has a material unjustified effect on political communication as a whole.'[150]

The two-stage test 'of whether the impugned law is for a legitimate purpose consistent with the system of representative and responsible government mandated by the Constitution and, if so, whether that law is reasonably appropriate and adapted to the achievement of that objective' was applied.[151] The maintenance of an apolitical and professional public service was such a legitimate purpose consistent with the system of representative and responsible government.[152] The majority judgement (and Edelman J in a separate judgment) applied the second stage of the test according to criteria of whether it was suitable, necessary and adequate in its balance.[153]

While there continue to be reservations expressed about the structured proportionality approach, there appears to be a growing acceptance of its application to questions of burdens placed on the implied freedom of political communication and, as noted above, there is a suggestion that the approaches of the Court can be reconciled in future jurisprudence.

2.2 Freedoms and protections relating to the courts, due process and detention

Section 80 provides for the right to trial by jury for indictable offences against Commonwealth law.[154] Despite notable dissents, its narrow interpretation has been confirmed in numerous cases before the High Court, such that its usefulness is quite limited.[155] The Court has held that it is mandatory in its operation where it applies.[156]

There are also a number of provisions and implications of the Australian *Constitution* which, although not generally recognised as explicit rights protections, impact upon the protection of human rights

[150] *Comcare v Banerji* (2019) 372 ALR 42, [20] (Kiefel CJ, Bell, Keane and Nettle JJ). See also Edelman J at [164].
[151] *Comcare v Banerji* (2019) 372 ALR 42, [29] (Kiefel CJ, Bell, Keane and Nettle JJ).
[152] *Comcare v Banerji* (2019) 372 ALR 42, [31] (Kiefel CJ, Bell, Keane and Nettle JJ).
[153] *Comcare v Banerji* (2019) 372 ALR 42, [32]-[42] (Kiefel CJ, Bell, Keane and Nettle JJ), Edelman J (188) (who stated that '[s]tructured proportionality testing promotes transparent reasoning in the application of an abstract constitutional implication. It requires the court to confront directly the suitability, reasonable necessity, and adequacy in the balance of laws that impose a burden upon political communication').
[154] As noted above, the closest international human rights provision to a recognition of a human right to trial by jury is article 14(1) of the ICCPR does require a right to a 'fair and public hearing by a competent, independent and impartial tribunal': Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 350. Noting, however, that some members of the High Court have considered that a right to a fair trial is inherent in the exercise of judicial power (*Dietrich v the Queen* (1992) 177 CLR 292, 408 (Deane J), 436 (Gaudron J). Although the right is expressed as a common law right, it has the effect of preventing a trial in the circumstances defined in the judgments and, based on the reasoning in *Kable v DPP (NSW)* (1996) 189 CLR 51, it follows that it is an aspect of the judicial power in the Commonwealth *Constitution* Ch III that at least in the federal jurisdiction could not be removed by legislation). See also Rebecca Ananian-Welsh, 'The Inherent Jurisdiction of Courts and the Fair Trial' (2019) 41(4) *Sydney Law Review* 423.
[155] *R v Bernasconi* (1915) 19 CLR 629, 637; *R v Archdall & Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128, 139-140; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 (noting the dissent of Dixon and Evatt JJ at 580-4); *Zarb v Kennedy* (1968) 121 CLR 283; *Li Chia Hsing v Rankin* (1978) 141 CLR 182 (noting the dissent of Murphy J at 198); *Kingswell v The Queen* (1985) 159 CLR 264 (noting the dissent of Deane J at 310); *Cheng v The Queen* (2000) 203 CLR 248 (noting the dissents of Gaudron and Kirby JJ at 278, 306-8, 321-2).
[156] See *Brown v The Queen* (1986) 160 CLR 171, 201-2; *Alqudsi v The Queen* (2016) 258 CLR 203. On s 80, see also James Stellios, 'The Constitutional Jury – "A Bulwark of Liberty"?' (2005) 27(1) *Sydney Law Review* 113 (who suggests that the section relates to the regulation of judicial power under the Constitution and is not necessarily a rights-protective provision), contrasted to, e.g., Amelia Simpson and Mary Wood, '"A Puny Thing Indeed"-Cheng v The Queen and the Constitutional Right to Trial by Jury' (2001) 29(1) *Federal Law Review* 95 (who advocate for a rights-protective interpretation).

including with respect to due process, arising out of Chapter III.[157] Judicial decisions must be free from the influence of the executive[158]

Chapter III may protect courts exercising federal jurisdiction from legislation requiring them to depart significantly from standards characterising the exercise of judicial power.

Chapter III of the *Constitution* 'contains an absolute prohibition on laws which involve the exercise of the judicial power of the Commonwealth.'[159] Given that the prohibition of the conferral of judicial power on a body or person not authorised by or which otherwise infringes Chapter III is absolute, questions of proportionality do not arise.[160]

Given that State constitutional powers are preserved by sections 106 and 107 of the *Constitution* the legislative power of the Commonwealth has been held to be subject to implied limitations.[161]

There are also constitutional limitations on the powers of State legislatures. Members of the High Court have referred to the summary of the principles derived from the earlier decision in *Kable*[162] and subsequent jurisprudence protecting the 'institutional integrity' of State courts relied upon by the plaintiffs in a case before it:

> 1. A State legislature cannot confer upon a State court a function or power which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Ch III of the *Constitution*, as a repository of federal jurisdiction and as a part of the integrated Australian court system.

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[157] *Mangaming v The Queen* (2013) 252 CLR 381, 400-1 [64] (Gageler J), cited in Fiona Wheeler, 'Due Process' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 928, 929. Albeit that this has been a 'matter of debate': *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 411 [247]; *Thomas v Mowbray* (2007) 233 CLR 307, 370 [111] (Gummow and Crennan JJ). See, e.g., Fiona Wheeler, 'Due Process, Judicial Power and Ch III in the New High Court' (2004) 32 *Federal Law Review* 2015; Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally entrenched due process in Australia' (1997) 23 *Monash University Law Review* 248. See also *Leeth v Commonwealth* (1992) 174 CLR 455, 502 (Gaudron J) and the discussion of state courts and *Kable v DPP (NSW)* (1996) 189 CLR 51 in various subsequent cases, including *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 278 ALR 1; *International Finance Trust Co Ltd v Crime Commission (NSW)* (2009) 240 CLR 319. Note also *Kruger v Commonwealth* (1997) 190 CLR 1, 66 (Dawson J) and 112 (Gaudron J), a case in which the majority potentially endorsed a constitutional right of procedural equality but rejected Deane and Toohey JJ's earlier suggestion in *Leeth v Commonwealth* (1992) 174 CLR 455 at 486 that there is a basic principle of equality underlying the Constitution. See also Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25(1) *Melbourne University Law Review* 24 and the Hon Michael McHugh, 'Does Chapter III of the Constitution protect substantive as well as procedural rights?' (2001) 21(3) *Australian Bar Review* 34; Denise Meyerson, 'Equality' in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 1053.

[158] See, e.g., *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29]; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 552–3 [10], 560 [39] (Gummow, Hayne, Heydon and Kiefel JJ).

[159] *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, [32] (per Kiefel CJ, Bell, Keane, Edelman JJ).

[160] *Re Woolley* (2004) 225 CLR 1 at 34 [80] (McHugh J) cited with approval in *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, [32] (per Kiefel CJ, Bell, Keane, Edelman JJ).

[161] See *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 and subsequent adaptations and modifications by the High Court (which are outside the scope of the present paaper).

[162] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

2. The term "institutional integrity" applied to a court refers to its possession of the defining or essential characteristics of a court including the reality and appearance of its independence and its impartiality.

3. It is also a defining characteristic of courts that they apply procedural fairness and adhere as a general rule to the open court principle and give reasons for their decisions.

4. A State legislature cannot, consistently with Ch III, enact a law which purports to abolish the Supreme Court of the State or excludes any class of official decision, made under a law of the State, from judicial review for jurisdictional error by the Supreme Court of the Sstate.

5. Nor can a State legislature validly enact a law which would effect an impermissible executive intrusion into the processes or decisions of a court.

6. A State legislature cannot authorise the executive to enlist a court to implement decisions of the executive in a manner incompatible with the court's institutional integrity or which would confer on the court a function (judicial or otherwise) incompatible with the role of the court as a repository of federal jurisdiction.

7. A State legislature cannot enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member.[163]

The High Court has discussed a limitation upon the imposition of *some* forms of administrative detention. The limitation prevents the Executive from imposing punitive detention, which within our system of government is only able to be imposed by a court vested with federal judicial power pursuant to Chapter III of the Constitution. Exceptions exist to this limitation upon legislative and executive power and 'the constitutional immunity itself has come under heavy judicial criticism',[164] in particular, administrative detention of an alien for the purpose of their exclusion, removal or processing of an application to remain in Australia will not offend Chapter III.[165]

As noted by Gageler J in *NAAJA*:

> The observation [in *Lim*] has its foundation in the concern for the protection of personal liberty lying at the core of our inherited constitutional tradition, which includes the inheritance of the common law. Liberty is "the most elementary and important" of those basic common law rights, which "traditionally, and therefore historically, are judged by the independent judiciary which is the bulwark of freedom."[166]

However, in *Falzon v Minister for Immigration and Border Protection*, the joint judges firmly dismissed the plaintiff's submissions that 'there is a constitutionally guaranteed freedom from executive

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[163] *North Australian Aboriginal Justice Agency Ltd v Northern Territory [2015]* 256 CLR 569 (French CJ, Kiefel and Bell JJ) [39] (footnotes omitted). One or more of these principles have been cited in a number of subsequent cases. See e.g., *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; 97 ALJR 857 [164]; *Vunilagi v The Queen* [2023] HCA 24; 97 ALJR 627; 411 ALR 224 [82]; *Varnhagen v State of South Australia (No 2)* [2022] SASCA 118; 406 ALR 587 [98].

[164] Administrative detention may be justified by some circumstances, such as, in periods of conflict through the operation of the defence power, for quarantine purposes, for detention under or mental health laws, or the detention of aliens prior to and for the purposes of their deportation (see, e.g., *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27). See also *Al-Kateb v Godwin* (2004) 219 CLR 562; *Re Woolley; Ex parte Applicants M276/2003 (by their next friend GS)* (2004) 225 CLR 1; *Plaintiff M68/2015 v Minister for Immigration* (2016) 257 CLR 42, 121-2 (Keane J).

[165] See, for example, *Falzon v Minister for Immigration* (2018) 262 CLR 333, [39] (per Kiefel CJ, Bell, Keane, Edelman JJ).

[166] *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569, 610 [94] (Gageler J) (citations omitted). See also 105-106 [162]-[163] (Gageler J) and Gordon J in *Plaintiff M68/2015 v Minister for Immigration* (2016) 257 CLR 42, 160 [379].

detention'.[167] The joint judgment (and Nettle J in a separate judgment) rejected submissions that proportionality testing should be applied to test the constitutional validity of executive detention for the purpose of deporting aliens per Ch III of the Constitution, indicating that proportionality testing will not be viewed as appropriate outside of the context of constitutionally guaranteed freedoms.[168]

The principle in *Lim* was recently found not to be infringed in *Minister for Home Affairs v Benbrika*.[169] The majority judgment noted that, along with exceptions for the detention of the mentally ill, '[i]t is the protective purpose that qualifies a power as an exception to a principle that is recognised under our system of government as a safeguard on liberty.'[170] It must be shown that the power is non-punitive and that '[a]s a matter of substance, the power must have as its object the protection of the community from harm.'[171] The judges confirmed that '[d]etention in prison is prima facie penal or punitive; however, that characterisation may be displaced by an evident non-punitive purpose', and that this was the case in *Benbrika*.[172]

Administrative detention under the *Migration Act* has been a topic of considerable legal and political controversy in light of the decision of the High Court in *Al Kateb v Godwin*.[173] In its recent decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*[174] the High Court held that the provisions of the *Migration Act 1958* (Cth) that purported to authorise the ongoing detention of the plaintiff were beyond the legislative power of the Commonwealth insofar as they purported to apply to the plaintiff. The invalidity of the sections of the *Migration Act* in question in their application to authorise the plaintiffs detention in the factual circumstances found to contravene the constitutional

[167] *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, [25] (per Kiefel CJ, Bell, Keane, Edelman JJ).

[168] *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 [30]-[32] (per Kiefel CJ, Bell, Keane, Edelman JJ)), [95] (Nettle J) ('At least in this context, proportionality analysis of the kind essayed in *McCloy v New South Wales* and more recently applied in *Brown v Tasmania* has no role to play.' [citations omitted])

[169] [2021] HCA 4, [2] (Kiefel CJ, Bell, Keane and Steward JJ). The challenge concerned the conferral of the power on the Victorian Supreme Court to make a continuing detention order in respect of people who had been convicted of terrorism offences under the Commonwealth Criminal Code and whose sentences of imprisonment had expired, on application from the Commonwealth Minister for Home Affairs. The order was, significantly, made after a determination, according to orthodox judicial process, that the person presented an unacceptable risk of committing a terrorist offence if the order is not made.

[170] *Minister for Home Affairs v Benbrika* [2021] HCA 4, [36] (Kiefel CJ, Bell, Keane and Steward JJ).

[171] *Minister for Home Affairs v Benbrika* [2021] HCA 4, [36] (Kiefel CJ, Bell, Keane and Steward JJ).

[172] *Minister for Home Affairs v Benbrika* [2021] HCA 4, [39]-[40] (Kiefel CJ, Bell, Keane and Steward JJ). This finding was consistent with the statements of various justices in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 592 [20], 597 [34], 654 [217]. See also the reasoning of Edelman J at [239]. Note, however, the dissenting judgments of Gageler J at [96]-[102] and Gordon J at [109]. The expansion or reformulation of the *Lim* principle suggested by Justice Gummow in *Fardon* was expressly rejected at, e.g. [215]-[219] by Edelman J. As noted by Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 at [34] the *Lim* principle was most recently applied in *Alexander v Minister for Home Affairs*, (2022) 96 ALJR 560; 401 ALR 438 in *Benbrika v Minister for Home Affair*s [2023] HCA 33 and in *Jones v The Commonwealth* [2023] HCA 34.

[173] (2004) 219 CLR 562. See *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322; *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285; s 197C(3) inserted by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth); Australia, House of Representatives, *Migration Amendment (Clarifying International Obligations for Removal) Bill* 2021, Explanatory Memorandum, Attachment A (Statement of Compatibility with Human Rights); *The Commonwealth v AJL20* (2021) 273 CLR 43. See also Ben Saul, 'Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds under International Human Rights Law' 134 *Melbourne Journal of International Law* 1, 2012.

[174] [2023] HCA 37.

limitation in Chapter III did not affect the validity of those provisions in their application to authorise detention in other circumstances.[175]

Thereafter the Commonwealth enacted further legislation to deal with previous detainees considered to be a risk to the community.[176] At the time of writing some of these provisions are under further legal challenge.

2.3 Religious freedoms

Religious freedoms, and their intersection interaction with particular human rights, has been a topic of some debate in Australia, particularly in recent years.[177] Fundamental (albeit limited) protections are available under s 116 of the *Constitution*, which provides:

> 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.

Section 116 has been interpreted narrowly by the High Court.[178] It contains four distinct elements: the free exercise, establishment, observance and religious test limitations on the power of the Commonwealth Parliament.

It does not impose any obligation on Parliament to protect religious freedom or give an individual a cause of action when their freedom of religious belief or observance is infringed.[179] It has been said to

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[175] Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ at [73].

[176] *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act* 2023. For an explanation and critique of the legislation see: Human Rights Law Centre, *Explainer: Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023*, 12 December 2023.

[177] See the 'Religious Freedom Review' report of the Expert Panel chaired by the Hon Philip Ruddock, (18 May 2018), and the subsequent religious freedom bills introduced in the Commonwealth Parliament. See, for example, the analysis of the draft Bill in Law Council of Australia, Submission to the Attorney-General's Department, *Religious Freedom Bills* (3 October 2019) <https://www.lawcouncil.asn.au/resources/submissions/religious-freedom-bills>.

[178] See, for example, the narrow interpretation of the establishment clause in *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559, 605, 609 (Stephen J), 615–16 (Mason J), 652–3 (Wilson J) ('DOGS Case'). In DOGS Case, the majority considered that the establishment clause prevents the Parliament from making a law conferring on a particular religion the status of the national religion, or on a body as the national church (at 582, 603-4, 612 and 653). Cf the dissent of Murphy J at 632-3. See also *Krygger v Williams* (1912) 15 CLR 366, 369 and Note that s 116 covers all religions and those who do not hold religious beliefs and can be viewed as protecting the religion of minorities: *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth* (1943) 67 CLR 116, 123-125 (Latham CJ), but the protection is 'not absolute' 149–50 (Rich J).

[179] See, e.g., Carolyn Evans, 'Balancing Religious Freedom Rights and Other Human Rights' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Law Book Co., 2013) 475, 477; Nicholas Aroney, 'Freedom of religion as an associational right' (2014) 33(1) *University of Queensland Law Journal* 153. See also the suggestion that s 116 can be viewed as a 'positive statement of freedom of religious expression' and a source of power for the Commonwealth to legislate for such a right, given the 'elasticity of the High Court's identification of freedoms in the Constitution' (Matthew White, 'Australia's Constitutional Right to Freedom of Religion' (2020) *Quadrant* 20, 23-4). On religion and anti-discrimination law in the state context see research paper 5. See also Luke Beck, 'The Australian Constitution's religious tests clause as an anti-discrimination provision' (2016) 42(3) *Monash University Law Review* 545; Anthony Gray, 'The reconciliation of freedom of religion with anti-discrimination rights' (2016) 42(1) *Monash University Law Review* 72; Margaret Thornton and Trish Luker, 'The Spectral Ground: Religious Belief Discrimination' (2009) 9 *Macquarie Law Journal* 71; Bobbi Murphy, 'Balancing Religious Freedom and Anti-Discrimination: *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd*' (2016) 40 *Melbourne University Law Review* 594. More generally, see Carolyn Evans, 'Religion' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 1033. Evans notes that the provision is a 'constitutional oddity', in its incongruous placement within the part of the text of the Constitution devoted to states while being

apply to the making of legislation, not the administration of laws, and the language of the section requires consideration of the purpose of the law.[180] Despite its place in Chapter V (relating to the states) s 116 is inapplicable to the states and referenda to extend its operation to the states and territories in 1944 and 1988 both failed.[181]

The protection of religious freedom is a broader topic than the narrow ambit of the constitutional limitation on Commonwealth laws in relation to religion. The Australian Human Rights Commission has prepared a comprehensive guide to protections for freedom of religion under Australian law. It is available on the Commission's website.[182]

In recent years there has been considerable debate over proposed religious freedom laws, including in respect of the *Religious Discrimination Bill* 2021 introduced by the Morrison Government along with the *Religious Discrimination (Consequential Amendments) Bill* 2021 and *Human Rights Legislation Amendment Bill* 2021. The Bills lapsed at the end of Parliament on 25 July 2022.

The Joint Standing Committee on Foreign Affairs, Defence and Trade conducted an inquiry into the status of the human right to freedom of religion or belief but the inquiry lapsed when the Committee ceased to exist at the dissolution of the House of Representatives on 11 April 2019. The Committee published a number of reports.[183] Prior to that an expert panel provided its report *Religious Freedom Review* to the then Prime Minister Malcolm Turnbull on 18 May 2018.

At the 2022 election, Labor promised to legislate to prevent discrimination and vilification against people of faith while protecting students and teachers from discrimination and allowing schools to preference religious staff.

In November 2023 the Australian Law Reform Commission released a Background Paper as part of its inquiry into Religious Educational Institutions and Anti-Discrimination Laws.[184]The Commission's Report[185] was tabled in Parliament by the Attorney -General on 21 March 2024 and released on-line.

The Commission recommended various legislative reforms to ensure Australia's policy regarding anti-discrimination laws and religious educational institutions is given legal effect in accordance with Australia's international legal obligations. Recommendations include amending the *Sex Discrimination Act 1984* (Cth) to forbid religious educational institutions from discriminating on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy in respect of teachers, other workers, students and their parents. It also recommended allowing religious educational institutions to indirectly discriminate, as long as reasonable, to accommodate special needs of the

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inapplicable to states, and in its appearance of being a rights-protective provision that is 'unmoored from any Bill of Rights or broader constitutional scheme of rights'. She suggests that the 'muted role' of the section and technical focus of the Court has meant that contested issues of religious freedom are to be resolved by political process, in contrast to other jurisdictions, having the result that this section has been rendered 'redundant' and a 'dead letter' law, at 1033-4, 1052. See also Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (The Federation Press, 2013); Reid Mortensen, 'The Unfinished Experiment: A Report on Religious Freedom in Australia' (2007) 21(1) *Emory International Law Review* 167; Reid Mortensen, 'The Establishment Clause: A search for meaning' (2014) 33 *University of Queensland Law Journal* 109; Luke Beck, 'The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the *Australian* Constitution' (2016) 44(3) *Federal Law Review* 505; Carolyn Evans, 'Religion as Politics Not Law: The Religion Clauses in the Australian Constitution' (2008) 36(3) *Religion, State and Society* 283.

[180] Compare the approaches of Toohey and Gaudron JJ in *Kruger v Commonwealth* (1997) 190 CLR 1.

[181] Compare the guarantee provided in section 46 of the Tasmanian *Constitution Act 1934* (and see research paper 5 on human rights acts and anti-discrimination legislation in the states and territories).

[182] https://humanrights.gov.au/our-work/rights-and-freedoms/projects/freedom-religion.

[183] See *Second Interim Report: freedom of religion and belief, the Australian experience*, 3 April 2019.

[184] ALRC, Background Paper ADL2, *Religious Educational Institutions and Anti-Discrimination Laws, What We Heard*, November 2023.

[185] ALRC Report 142, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws*, December 2023.

institutions and to protect their ability to train religious leaders in a manner that abides by the requirements of their faith. It further recommended that the *Fair Work Act 2009* (Cth) be amended to allow religious institutions to prefer persons of faith in hiring decisions but not to use such preference to disguise discrimination.

2.4 Protection from discrimination on the basis of state residence

Section 117 of the *Constitution* prohibits discrimination on the basis of state residence. It provides:

> '[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'.

While initial interpretation of s 117 was very narrow,[186] it has subsequently been viewed as providing freedom from the imposition of disabilities or discrimination on the basis of state residence, applying to all Australian citizens.[187] Its significance comes from its focus on the protection of the individual resident of the state.[188] The provision requires that the operation of the law, policy or action be examined with a view to determining whether it discriminates on the basis of state residence of that individual, and if so, confers an immunity on that person rather than invalidating the impugned law, policy or act.[189]

The prohibition is not absolute. For example, states may limit voting in their state elections to residents of the state. Although 'curiously under-litigated', as Reynolds notes, there are a surprisingly large number of laws and executive policies that may arguably fall foul of this constitutional provision.[190]

In the aftermath of the COVID-19 pandemic, and in light of the closure of state and territory borders, issued have arisen as to whether it is constitutionally permissible for states to close their borders to residents of other states. Constitutional protections are however subject to exceptions and the protection of public health has been regarded as a paramount consideration.[191]

2.5 Economic freedoms

[186] See *Davies and Jones v Western Australia* (1904) 2 CLR 29; *Henry v Boehm* (1973) 128 CLR 482.

[187] *Street v Queensland Bar Association* (1989) 168 CLR 461, 486 (Mason CJ), see also Toohey J at 553-4.

[188] *Street v Queensland Bar Association* (1989) 168 CLR 461, 502-3 (Brennan J), 566-7 (Gaudron J). It has been argued that the protection for individuals in this section should be viewed as merely 'a vehicle for securing federal-structural goals': Amelia Simpson, 'The (Limited) Significance of the Individual in Section 117 State Residence Discrimination' (2008) 32(2) *Melbourne University Law Review* 639, 639-40.

[189] *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463, 488; *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 408-10 (Gleeson CJ, Gummow, Kirby and Hayne JJ). See Denise Meyerson, 'Equality' in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 1053, 1057-61.

[190] Daniel Reynolds, 'Defining the limits of section 117 of the Constitution: The need for a theory of the role of the States', (2021) 44(2) *UNSW Law Journal* 786 at 787. As Reynolds notes, cases in which the provision has been directly invoked include *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463 and *Sweedman v Transport Accident Commission* (2006) 226 CLR 362. The section is also analysed by: Clifford L Pannam, 'Discrimination on the Basis of State Residence in Australia and the United States' (1967) 6(2) *Melbourne University Law Review* 105; Michael Mathieson, 'Section 117 of the Constitution: The Unfinished Rehabilitation' (1999) 27(3) *Federal Law Review* 393; Denise Meyerson, 'Equality' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 1053; Amelia Simpson, 'The (Limited) Significance of the Individual in Section 117 State Residence Discrimination' (2008) 32(2) *Melbourne University Law Review* 639, 641; Amelia Simpson, 'Sweedman v Transport Accident Commission: State Residence Discrimination and the High Court's Retreat into Characterisation' (2006) 34(2) *Federal Law Review* 363; and Amelia Simpson, 'The High Court's Conception of Discrimination: Origins, Applications, and Implications' (2007) 29(2) *Sydney Law Review* 263.

[191] See the discussion in research paper 1 of *Palmer v Western Australia* (2021) 95 ALJR 229. The challenge to the border closure was not on s 117 grounds.

Remaining protections and freedoms in the Commonwealth *Constitution* may be loosely grouped together, for the sake of convenience, as economic freedoms (such as freedoms related to trade and commerce). This part will focus on ss 92 and 51(xxxi).[192]

2.5.1 *Section 92*

Section 92 provides that trade, commerce, and intercourse among the states shall be 'absolutely free'. Following many decades of complex jurisprudence on the section, the settled approach is that a law will be invalid if it imposes discriminatory burdens of a protectionist kind or has a discriminatory effect on protectionist grounds.[193]

The character and effect of the law will be examined, and the section's reference to absolute freedom will not be read literally, such that some discriminatory burdens or barriers can be imposed where this is not for a protectionist purpose or where this is reasonably necessary to achieve a non-protectionist purpose of the law, involving an assessment of the proportionality of the law.[194]

The section was considered by the Court in *Palmer v Western Australia,* in relation to intercourse (as well as trade and commerce).[195] This was the most significant Court consideration of separate and distinct factors which might arise in relation to intercourse, as opposed to trade and commerce, since *Cole v Whitfield,* where it was suggested that the former could include an individual, personal guarantee of freedom of movement between the states (although as a restriction on legislative power and still not as a personal right), while the latter did not.[196] This bifurcation has not found support, however.[197]

As noted by Kiefel CJ and Keane J:[198]

> The distinction drawn in *Cole v Whitfield* has the obvious consequence that guarantees of freedoms appearing in the one provision of the *Constitution* are to be treated differently. This might suggest incoherence, which is not regarded as a desirable outcome for constitutional interpretation. More importantly, the distinction drawn in *Cole v Whitfield* is not consistent with a modern approach to constitutional interpretation. The distinction does not derive any support from the text of s 92. The text does not provide a basis for treating one of three elements of the

[192] Other protections, which are not discussed in detail, include the right to uniform customs levies (ss 80, 90); the prohibition on undue, unreasonable or unjust State railway charges (ss 102, 104); the prohibition on discrimination between states with regards to taxation laws (s 51(ii)); the prohibition on Commonwealth laws which preference a state or part of a State over another with regards to trade, commerce, or revenue (s 99); and the entitlement to work or to compensation or redundancy pay for public servants when transferred from the service of a state to the Commonwealth (s 84).

[193] *Cole v Whitfield* (1988) 165 CLR 360, 394, 407 (in which the impugned laws were found not to impose such a protectionist discriminatory effect on trade and commerce); *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 (relating to provisions which were found not to comply with the limitation in s 92).

[194] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 476-7 [101]-[103], 479-80 [109]-[112]. See also Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1.

[195] [2021] HCA 5. In that case, provisions relating to emergency management which empowered an authorised officer, inter alia, to direct or prohibit the movement of persons animals or vehicles within, into or out of an emergency area, or any part of an emergency area. The challenge related to border closures during the COVID-19 pandemic. The Court found that the relevant provisions (ss 56 and 67 of the *Emergency Management Act 2005* (WA)), applied to the emergency of a plague or epidemic, did not infringe the limitation in s 92.

[196] *Palmer v Western Australia* [2021] HCA 5, [40]-[41], citing *Cole v Whitfield* (1988) 165 CLR 360, 393.

[197] See, for example, Jeremy Kirk, 'Section 92 in its Second Century' in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (The Federation Press, 2020) 253, 276-7

[198] *Palmer v Western Australia* [2021] HCA 5, [45].

> composite expression "trade, commerce, and intercourse among the States" as connoting or requiring that some different test be applied to them.

Nevertheless, the *protectionist economic* considerations applied to trade and commerce (at least as were relevant in *Cole v Whitfield*[199]) do not have direct relevancy for intercourse, or movement. The correct approach, according to Kiefel CJ and Keane J (accepting the submissions of the State of Queensland, intervening) is that 'a law may be taken to burden freedom of interstate movement for the purposes of s 92 where it discriminates against that movement'; the test should require that the law discriminates, subject to a requirement of justification as is required for trade and commerce.[200]

Therefore, a law which has a discriminatory purpose or effect on interstate movement will be 'contrary to s 92 unless it is justified by reference to a non-discriminatory purpose… [and] may be justified if it goes no further than is reasonably necessary to achieve a legitimate object'.[201] In relation to both intercourse and trade and commerce, the requirement to enquire whether there are other less burdensome practicable alternatives was said to be 'clearly' aligned with the structured proportionality test in *McCloy*.[202]

Kiefel CJ and Keane J proceeded to comment that:

> It cannot be suggested that structured proportionality is a perfect method. None is, but some method is necessary if lawyers and legislators are to know how the question of justification is to be approached in a given case. Structured proportionality certainly seems preferable to its main competitors.

[199] See, Gordon J at [239], who notes that 'protectionism is only one form of discrimination in trade and commerce that imposes burdens on persons in one State compared with another. Although protectionism is by far the most common form of discrimination relevant to the trade and commerce aspect of s 92, and the form with which the Court was concerned in *Cole v Whitfield*, there are other forms of discrimination that could be just as damaging to the purpose of s 92.'

[200] *Palmer v Western Australia* [2021] HCA 5, [48]-[49].

[201] *Palmer v Western Australia* [2021] HCA 5, [50].

[202] *Palmer v Western Australia* [2021] HCA 5, [52].

In contrast, Gageler J expressly rejected the application of structured proportionality to s 92, as an overly rigid approach.[203] Instead, his Honour considered that the correct test to apply is that a differential burden on interstate intercourse can be justified 'as a constitutionally permissible means of pursuing a constitutionally permissible non-discriminatory legislative end', and that the two limbs of the section should be re-integrated.[204] Gordon J also rejected structured proportionality as a tool of analysis.[205]

Their approaches may be contrasted with the support for structured proportionality by Edelman J, who, in response to criticisms of the rigidity of the tool, commented that the '"structure" in structured proportionality is rigid in its refusal to countenance fictions or hidden grounds for invalidating legislation.[206]

Gageler noted that the reference to absolute freedom of intercourse signified freedom of movement of persons and 'cannot be taken to suggest the conferral of an individual right.'[207]

2.5.2 Section 51(xxxi)

S 51(xxxi) requires that Commonwealth power to make laws with respect to the 'acquisition of property' from 'any State or person for any purpose in respect of which the Parliament has power to make laws' must involve acquisition on just terms.

There must be an acquisition under a Commonwealth law, although this does not necessarily have to be done by the Commonwealth, and the Commonwealth must have acquired a corresponding benefit or advantage.[208] The High Court has interpreted 'property' broadly.[209] As has been noted elsewhere, however, it is somewhat 'misleading' to describe this protection as an express right, which might more accurately be labelled an 'implied guarantee'.[210]

2.6 Constitutional amendments

> We seek constitutional reforms to empower our people and take a *rightful place* in our own country. When we have power over our destiny our children will flourish. They will walk in

[203] *Palmer v Western Australia* [2021] HCA 5, [94], [142]-[146], [151].
[204] *Palmer v Western Australia* [2021] HCA 5, [106], [114].
[205] *Palmer v Western Australia* [2021] HCA 5, [198]-[199]. See also the criticism of the adoption of structured proportionality in s 92 jurisprudence in Amelia Simpson, 'Section 92 as a Transplant Recipient?' in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (The Federation Press, 2020) 283.
[206] *Palmer v Western Australia* [2021] HCA 5, [266].
[207] *Palmer v Western Australia* [2021] HCA 5, [105]. See also Gordon J, at [180].
[208] *PJ Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382; *Mutual Pools and Staff Pty Ltd v Commonwealth* (1949) 179 CLR 155; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513. On the question of whether there has been an acquisition in relation to statutory rights, see *Cunningham v The Commonwealth* (2016) 259 CLR 536, [43]-[48]; *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651, 664 [24]-[25].
[209] See *Cunningham v The Commonwealth* (2016) 259 CLR 536, [43] (French CJ, Kiefel and Bell JJ) citing The Commonwealth v New South Wales (1923) 33 CLR 1, 20-1; *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 276, 290; *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, 349; *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210, 230-231 [44].
[210] Lael K Weis, 'Property' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 1013, 1013-4, citing Gleeson CJ in *Theophanous v Commonwealth* (2006) 225 CLR 101, 112-3. Weis suggests that the anomalous characterisation analysis applied by the Court with respect to whether a particular 'property' has been 'acquired', rather than a rights analysis focusing on the values underpinning the protection in the guarantee, demonstrates the ambivalent position of rights in Australian constitutional analysis, at 1014, 1020-2.

two worlds and their culture will be a gift to their country. We call for the establishment of a First Nations Voice enshrined in the Constitution.[211]

Section 128 of the Australian *Constitution* provides a mechanism for its alteration. For a proposed amendment to succeed under s 128, it must be passed by an absolute majority in both Houses of the Commonwealth Parliament before it is submitted to a vote of all Australian electors at a referendum (although in certain circumstances, a proposed amendment can be submitted to referendum if passed on two separate occasions by only one House of Parliament).

At the referendum, the proposed alteration must be approved by a 'double majority' of national electors in the states and territories as well as a majority of electors in a majority of the states (i.e., at least four of the six states). In part because of the formidable barriers imposed by these requirements, only eight of 44 amendments put to the public in referenda have succeeded.[212] There appears to be little cause for optimism about the prospects for enshrining greater rights protections through this difficult process.

As discussed further in Williams and Hume, there have been attempts to amend the *Constitution* to incorporate further rights protections and to redress race-based discrimination in the original document.[213] For example, in 1944 and 1988, referenda on proposals for alterations including broader rights safeguards were unsuccessful. In 1967, two provisions which discriminated against Aboriginal Australians were successfully changed by a referendum: the removal of s 127 (which excluded Aboriginal Australians from the census) and the amendment of s 51 (xxvi), to allow the Parliament the power to make special laws with respect to Aboriginal people.[214]

One focus for reform is the longstanding movement to recognise Indigenous Australians in the Australian Constitution, such as through an entrenched First Nations Voice to the Australian Parliament. Reform proposals have evolved significantly through extensive consultation processes with Aboriginal and Torres Strait Islander representatives beginning in 2011.

In 2012, after public consultations on the model for recognition, an Expert Panel appointed by the then Commonwealth government issued a report on *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* which recommended the following constitutional reforms:

- repealing s 25, which contemplates states disqualifying persons of any race from voting;
- repealing the 'race power' (s 51(xxvi)) which the High Court of Australia has interpreted to allow for the Commonwealth Parliament to make laws that discriminate on the ground of race, for both beneficial and detrimental purposes;
- inserting a new provision s 51A, recognising Aboriginal and Torres Strait Islander peoples and conferring the power on the Commonwealth Parliament to make laws for their advancement;
- inserting a new s 116A, prohibiting racial discrimination by the Commonwealth, states and territories; and
- inserting a new provision s 127A, recognising Aboriginal and Torres Strait Islander languages.

In December 2015, a Referendum Council was appointed by then Prime Minister Malcolm Turnbull and Opposition Leader Bill Shorten to advise them on next steps towards a successful referendum on Aboriginal and Torres Strait Islander constitutional recognition, including building on the work of the 2012 Expert Panel.

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[211] *Uluru Statement from the Heart*.

[212] See, e.g., George Williams and David Hume, *Power People: The History and Future of the Referendum in Australia* (UNSW Press, 2010).

[213] George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 73-74.

[214] See, e.g., John Gardiner-Garden, *The origin of Commonwealth involvement in Indigenous Affairs and the 1967 Referendum* (Background paper No 11, 1996–97, Parliamentary Library, 1997).

On 23 to 26 May 2017, building on 13 regional dialogues, the Referendum Council convened a national constitutional convention at the foot of Uluru in Central Australia to discuss and agree on an approach to constitutional recognition. Over 250 Aboriginal and Torres Strait Islander leaders attended. The majority of the convention resolved in favour of the Uluru Statement from the Heart, directed to the Australian public.

The statement calls first for the establishment of a 'First Nations Voice' in the Australian Constitution and second for a 'Makaratta Commission' to supervise a process of agreement-making and truth-telling between governments and Aboriginal and Torres Strait Islander peoples. The Referendum Council issued its report on 30 June 2017, including recommending consistently with the statement that a referendum be held to provide for a representative body giving Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament, with its functions to be set out in legislation outside the Constitution.[215] The report considered it for the Commonwealth Parliament to address whether further definition of the referendum proposal is required and that the structure and functions of the Voice shall be defined by Parliament.

An interim report on the voice co-design process was published in October 2020. Thereafter public submissions were sought and considered. There appears to be broad public support for constitutional recognition for Indigenous peoples, but there is no clear consensus on the details of the model and how to ensure that it is more than a mere symbolic change.[216] A key point of contention moving forward will be whether the voice is enshrined in the Constitution (conferring legitimacy and possibly allowing a referendum campaign to serve an educative purpose) or merely established through statute (running the risk that the voice could be subsequently abolished entirely, or its impact watered down, through the legislative process).[217]

On 14 October 2023 Australian voted in the referendum concerning whether to change the *Constitution* to recognise the First Peoples of Australia by establishing a body called the Aboriginal and Torres Strait Islander Voice. The referendum failed to pass.

At the time the major Australian political parties remained divided on the issue. Some steps have recently been taken to introduce a similar initiative at state level.

3. Rights under the common law

There are numerous 'rights, freedoms and privileges' that arise out of or are reflected in the common law.

This part of the research paper identifies a number of the areas in which the common law provides a degree of protection for human rights.[218] However, unlike constitutional guarantees, such common law protections are subject to modification or abrogation by statute.

3.1 Parliament is presumed not to intend to limit fundamental rights

[215] Referendum Council, *Final Report of the Referendum Council* (2017).

[216] See, e.g., Gabrielle Appleby, 'Constitutionalising an indigenous voice in Australian law-making: Some institutional design challenges' (2016) 18(2) *Australian Indigenous Law Review* 98.

[217] See, for example, the submission by various public law academics. Rebecca Ananian-Welsh et al., Submission to the National Indigenous Australians Agency, *Indigenous Voice Co-Design Process* (20 January 2021); Murray Gleeson, 'Recognition in keeping with the Constitution: A worthwhile project' Uphold & Recognise (2019) <https://www.acu.edu.au/-/media/feature/pagecontent/richtext/about-acu/institutes-academies-and-centres/pm-glynn/_docs/recognition-in-keeping-with-the-constitution-pdf.pdf>.

[218] For an overview, see the summary provided by the Human Rights Commission: 'Common law rights, human rights scrutiny and the rule of law' <https://humanrights.gov.au/our-work/rights-and-freedoms/common-law-rights-human-rights-scrutiny-and-rule-law>. See also Melbourne University Law School's Guide to human rights law, available at <https://unimelb.libguides.com/human_rights_law/national/australia>.

In construing statutes, courts will act on the basis that Parliament will be presumed not to have intended to restrict or limit fundamental rights unless an intention to do so is clearly apparent. Such an intention must be evinced by clear and unambiguous language, either in the statute itself or through some other means which the courts may take into account, or necessary implication. This constitutes protection for what has been described as the 'principle of legality' and is an aspect of the 'rule of law'.

According to Gleeson CJ:

> Reliance was placed in argument upon what was said to be a general principle of construction that, where a statute takes away or interferes with common law rights, then it should be given, if possible, a narrow interpretation. The generality of that assertion of principle requires some qualification. It is true that courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. It is also true that there is a presumption, relevant for example to the construction of privative clauses, that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied. However, as McHugh J pointed out in *Gifford v Strang Patrick Stevedoring Pty Ltd* modern legislatures regularly enact laws that take away or modify common law rights. The assistance to be gained from a presumption will vary with the context in which it is applied. For example, in *George Wimpey & Co Ltd v British Overseas Airways Corporation*, Lord Reid said that in a case where the language of a statute is capable of applying to a situation that was unforeseen, and the arguments are fairly evenly balanced, "it is ... right to hold that ... that interpretation should be chosen which involves the least alteration of the existing law". That was a highly qualified statement and, if it reflects a presumption, then the presumption is weak and operates only in limited circumstances.[219]

His Honour proceeded to cite with approval an earlier statement by Mason CJ, Brennan, Gordon and Mc Hugh JJ:

> The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.[220]

As we discuss in some detail in research paper 2, in construing a statute or subordinate legislation a similar presumption applies with respect to international law obligations, including under human rights treaties, which were in force prior to the legislation in question. Where the Australian provision is unclear or ambiguous courts will favour a construction that accords with Australia's obligations under an international convention or treaty to which Australia is a party. Unless a

[219] *Electrolux Home Products Pty Ltd v Australian Workers 'Union* 221 CLR 309 [19] [footnotes omitted].
[220] *Coco v The Queen* (1994) 179 CLR 427,437 (footnote omitted).

contrary intention is apparent it will be presumed that Parliament intends to give effect to its obligations under international law.[221]

At the Commonwealth level (and in some instances at a state or territorial level) pending legislation will be subject to parliamentary scrutiny to ascertain whether it is in conformity with human rights.[222]

3.2 Common law recognition of rights

The common law incorporates a variety of rights a number of which may be categorised as important human rights. These encompass, amongst other things, various aspects of personal liberty, freedom of association and freedom from slavery. On its website, the Human Rights Commission provides links to a variety of resources which contain detailed information on the nature and extent of common law human rights.[223] The question of whether there is a common law right to privacy is less settled.[224]

As a former Chief Justice of the High Court has noted, a non-exhaustive list of common law rights in Australia encompasses:

- the right of access to the courts
- immunity from deprivation of property without compensation
- legal professional privilege
- privilege against self-incrimination
- immunity from the extension of the scope of a penal statute by a court
- freedom from extension of governmental immunity by a court
- immunity from interference with vested property rights
- immunity from interference with equality of religion
- the right to access legal counsel when accused of a serious crime
- no deprivation of liberty, except by law
- the right to procedural fairness when affected by the exercise of public power
- freedom of speech and of movement.[225]

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[221] See e.g., *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 274.
[222] See e.g., *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).
[223] https://humanrights.gov.au/our-work/rights-and-freedoms/common-law-rights-human-rights-scrutiny-and-rule-law.
[224] See e.g., https://www.alrc.gov.au/publication/for-your-information-australian-privacy-law-and-practice-alrc-report-108/74-protecting-a-right-to-personal-privacy/right-to-personal-privacy-developments-in-australia-and-elsewhere/
[225] Robert French, 'The Common Law and the Protection of Human Rights' (Speech, Anglo-Australasian Lawyers Society, 4 September 2009) <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj4sep09.pdf>. Reference was made to Jennifer Corrin, 'Australia: Country Report on Human Rights' (2009) 40 *Victoria University of Wellington Law Review* 37, 41-42. See also, Robert French, 'Protecting Human Rights Without a Bill of Rights' (Speech, John Marshall School of Law Chicago, 26 January

In some respects, various 'rights' may be distinguished from 'freedoms'.[226] Not all 'rights' are protected by positive laws. Many rights and freedoms arise out of the absence of legal constraints. As the High Court has noted, under a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law', so that one proceeds 'upon an assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it'.[227]

In *Wotton v State of Queensland*, a class action was brought on behalf of Indigenous inhabitants of Palm Island alleging unlawful discrimination in respect of events arising out of an Aboriginal death in custody. The claims encompassed a common law human right, said to be the right to 'go about their affairs in peace under protection of the police services'.[228]

3.3 Encroachment upon common law rights

In the course of its '*Freedoms Inquiry',* the Australian Law Reform Commission (ALRC) was asked to identify and examine Commonwealth laws that encroached upon traditional rights, freedoms and privileges recognised by the common law.

Such 'traditional' matters were said to encompass, inter alia:

- freedom of speech
- freedom of religion
- freedom of association
- freedom of movement
- vested property rights
- constraints on retrospectively changing legal rights and obligations
- constraints on creating offences with retrospective application
- constraints on altering criminal law practices based on the principle of a fair trial
- constraints on reversing or shifting the burden of proof
- the right to claim the privilege against self-incrimination
- client legal privilege
- constraints on applying strict or absolute liability to all physical elements of a criminal offence
- precluding an appeal from an acquittal
- procedural fairness to persons affected by the exercise of public power
- constraints on inappropriately delegate legislative power to the executive
- constraints on authorising the commission of a tort
- protection of personal reputation
- constraints on giving executive immunities a wide application
- access to the courts
- constraints on interference with any other similar legal right, freedom or privilege.[229]

2010) <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26jan10.pdf>.

[226] See Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (Lexis Nexis, 2009) 1.5.3.

[227] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) quoting *A-G v Guardian Newspapers* (No 2) [1990] 1 AC 109, 283.

[228] *Wotton v State of Queensland* [2015] FCA 910 [71] (Mortimer J). The matter was successfully settled in 2018.

[229] These specific 'rights, freedoms and privileges' were identified in the Terms of Reference given to the ALRC by the then Commonwealth Attorney-General: ALRC*, Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Final Report No 129, 2 March 2016), <www.alrc.gov.au/inquiries/freedoms>. Each of

Subject to any express or implied constitutional protections, such rights, freedoms and privileges may be (and often are) qualified, varied or overridden by statute provided that the parliamentary intention to circumscribe them is clear.

However, as we have noted above, the Australian *Constitution* expressly protects only a limited number of rights and implied protections are narrow in scope, albeit evolving.

International human rights laws do not have the status of binding domestic law but may be useful in interpreting statutes that are unclear or ambiguous.

As the ALRC noted, it is widely recognised that there are reasonable limits to most rights and a proportionality test is often used as a forensic tool to test the legality and limits of statutory incursions on constitutional rights.[230]

4. Commentary

As is evident from the consideration of the current limited protections available under the Commonwealth Constitution and common law, there are significant gaps in available human rights.[231] In recent years, legislation related to counter terrorism, national security, and migration has had a marked impact on traditional common law rights, freedoms and civil liberties.

Most recently, questions of individual rights, freedoms and civil liberties have arisen in response to lockdowns and state and federal legislation to deal with the COVID-19 crisis, such as the *Biosecurity Act 2015* (Cth). A number of cases are referred to in research paper 1.

At the time of writing the question of whether the common law of negligence could be invoked in a class action against the Australian Government for its alleged failure to take adequate measures to protect Indigenous inhabitants of the Torres Strait Islands from the current and projected adverse effects of climate change was under consideration by the Federal Court.[232]

As noted by Mortimer J:

> The applicants seek an injunction on their own behalf and on behalf of group members requiring the Commonwealth to implement such measures as are necessary to:
>
> (a) protect the land and marine environment of the Torres Strait Islands and the cultural and customary rights of the Torres Strait Islanders from greenhouse gas emissions into the Earth's atmosphere;
>
> (b) reduce Australia's greenhouse gas emissions consistent with the best available science target (a term defined in the current statement of claim to be the amount of

these matters is examined in chapters 4 to 20 of the Commission's Final Report. The ALRC identified numerous areas where Commonwealth laws may be said to have interfered with the abovementioned common law rights and freedoms. A detailed consideration of these is beyond the scope of the present paper.

[230] ALRC, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Final Report No 129, 2 March 2016), [14] <www.alrc.gov.au/inquiries/freedoms>. See however the discussion above and in research paper 1 of the divergence in opinion amongst Justices of the High Court.

[231] For an analysis of the manner in which express or implied constitutional rights impact on the common law see, e.g., Greg Taylor, 'The Constitution and the Common Law Again', (2019) 40 (2) *Adelaide Law Review* 573 and the references cited therein.

[232] *Pabai v Commonwealth of Australia*, VID 622 of 2021.The matter is before Wigney J.

greenhouse gases that can be emitted before the average global temperature rises by 1.5 degrees Celsius); and

(c) otherwise avoid injury and harm to Torres Strait Islanders from greenhouse gas emissions into the Earth's atmosphere.

They also seek damages for:

(a) degradation of the land and marine environment, including life and coral reef systems;

(b) loss of Ailan Kastom;

(c) damage to their native title rights; and

(d) physical and psychological injury.[233]

This is one of an increasing number of climate change cases world-wide, many of which seek to rely on human rights law and protections derived from environmental law.[234] The doctrinal and policy impediments to the imposition of a duty of care in tort on governments and minsters are apparent from the decision of the Full Federal Court in *Sharma*.[235]

Australian and international climate change litigation is considered in more detail in research paper 9.

[233] *Pabai v Commonwealth of Australia* [2022] FCA 836 [4]-[5].
[234] The Chief Judge of the NSW Land & Environment Court, Preston J, has written extensively on such litigation. See: https://lec.nsw.gov.au/publications-and-resources/judicial-speeches-and-papers.html.
[235] *Minister for the Environment v Sharma* [2022] FCAFC 35 (Allsop CJ; Beach and Wheelahan JJ) 291 FCR 311; 400 ALR 203; 15 ARLR 390.