REPRESENTATIVE GOVERNMENT UNDER THE SOUTH AUSTRALIAN CONSTITUTION AND THE FRAGILE FREEDOM OF COMMUNICATION OF STATE POLITICAL AFFAIRS

ABSTRACT

There has been a great deal of consideration, both academic and judicial, of the implications that arise from the Commonwealth Constitution. By comparison, State constitutions remain relatively under-analysed. In light of this deficit in thinking about our State constitutions, this article considers what application the High Court’s implied rights jurisprudence of the 1990s might have at the State level. In particular, this article addresses two questions. First, this article considers whether the freedom of political communication implied from the terms of the Commonwealth Constitution protects political communication concerning matters of purely State concern. Upon current authority it appears that the freedom implied from the Commonwealth Constitution does not always extend so far. Therefore, this article goes on to address a second question, namely whether a freedom of political communication to discuss State affairs is protected as a matter of State constitutional law.

INTRODUCTION

During the 1990s the Mason and Brennan Courts held, in a series of ground-breaking decisions, that the Commonwealth Constitution enshrined a system of representative government. In order to facilitate that system of government, the High Court held that the Australian people must enjoy the freedom to communicate both with their elected representatives and amongst themselves about political matters.

The question that I seek to address in this paper is whether the doctrine of representative government can also be implied from the terms of the Constitution.
Act 1934 (SA).\(^2\) If it can, does it give rise to a constitutional freedom, similar to that implied from the Commonwealth Constitution, to discuss matters of State political concern.

However, before I turn to consider the terms of the Constitution Act 1934 (SA) in an attempt to discern any implications of representative government, there is a preliminary question that should be addressed: does the Commonwealth freedom of political communication extend so broadly that it protects speech concerning purely State political issues? If political communication of State affairs is protected by the Commonwealth Constitution, then my primary question, namely whether or not a State-based freedom of political communication operates, becomes merely academic.

I THE SCOPE OF THE COMMONWEALTH FREEDOM OF POLITICAL COMMUNICATION

The doctrine of representative government is said to be implied from various provisions of the Commonwealth Constitution. Most importantly, s 7 provides that:

*The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.*\(^3\)

Section 24 provides that:

*The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of senators.*\(^4\)

From these provisions, amongst others, the High Court has held that the freedom of political communication is to be implied. In order to exercise a free choice at elections the people must to be free to discuss political matters.

Does the freedom of political communication that is derived from the Commonwealth Constitution protect purely State-based political communication?

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\(^2\) I use the term ‘South Australian Constitution’ below in contrast to references to the Constitution Act 1934 (SA) when referring to that Act together with ‘other prerogative instruments or statutory and common law rules and principles which define and regulate the legislative, executive and judicial elements of government’: *McGinty v Western Australia* (1996) 186 CLR 140, 259 (Gummow J) (‘McGinty’).

\(^3\) *Commonwealth Constitution* s 7 (emphasis added).

\(^4\) *Commonwealth Constitution* s 24 (emphasis added).
A The Integrated Approach

The early decisions in which the freedom of political communication first emerged adopted an expansive view as to what communications would be caught by the Commonwealth freedom of political communication. It was said that the Commonwealth freedom extended beyond issues of federal politics, to purely State-based political matters, on the basis that political communication was indivisible:

The concept of freedom to communicate with respect to public affairs and political discussion does not lend itself to subdivision. Public affairs and political discussion are indivisible and cannot be subdivided into compartments that correspond with, or relate to, the various tiers of government in Australia. Unlike the legislative powers of the Commonwealth Parliament, there are no limits to the range of matters that may be relevant to debate in the Commonwealth Parliament or to its workings. The consequence is that the implied freedom of communication extends to all matters of public affairs and political discussion, notwithstanding that a particular matter at a given time might appear to have a primary or immediate connexion with the affairs of a State, a local authority or a Territory and little or no connexion with Commonwealth affairs.5

The integrated view was said to be necessitated for at least three reasons: first, the parallel party political structures operating at State and Commonwealth levels caused political reverberations from one tier to the other; second, the financial dependence of the States on the Commonwealth meant that State political issues were rarely disconnected from the politics of federal financing; and, third, the ‘increasing integration of social, economic and political matters in Australia’.6

The integrated approach was applied in Stephens. Mr Stephens, a member of the Legislative Council of Western Australia, sued West Australian Newspaper Limited for publishing an article which stated that an overseas study trip taken by him and a number of other Western Australian parliamentarians was ‘a junket of mammoth proportions’. Without identifying a connection to federal politics, a majority of the High Court accepted that the Commonwealth freedom extended ‘to public dis-

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6 This third reason was suggested in Lange (1997) 189 CLR 520, 572 to support the extended defence of qualified privilege. However, for the reasons given below, Lange (1997) 189 CLR 520 marks a shift away from the integrated approach with respect to the operation of the freedom as a limitation upon legislative power.
discussion of the performance, conduct and fitness for office of members of a state legislature.\textsuperscript{7}

\textbf{B} \textit{The Divisible Approach}

The integrated view faced a setback when the High Court handed down its unanimous judgment in \textit{Lange}, which reformulated the foundation for the implied freedom of political communication. In its judgment the Court emphasised that the freedom was not derived from an ‘underlying’ or ‘overarching’ constitutional doctrine of representative government. Rather, following a return to a more textual approach foreshadowed in \textit{McGinty},\textsuperscript{8} the Court said that ‘the relevant question is not, “What is required by representative and responsible government?” It is, “What do the terms and structure of the Constitution prohibit, authorise or require?”’\textsuperscript{9}

The freedom was no longer to be regarded as a positive constitutional right. Rather, the freedom manifested itself in two distinct ways: first, as a restriction upon the legislative power of the Commonwealth and State parliaments; and, second, as an influence upon the development of the common law.\textsuperscript{10}

In relation to the manner in which the freedom operated as a restriction upon Commonwealth and State legislative power, it was said that the freedom was ‘limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution’.\textsuperscript{11} In this regard, their Honours said:

\begin{quote}
[t]o the extent that the requirement of freedom of communication is an implication drawn from ss 7, 24, 64, 128 and related sections of the Constitution, the implication can validly extend only so far as is necessary to give effect to these sections.\textsuperscript{12}
\end{quote}

Adopting this textual approach, mandated by \textit{Lange}, it does seem ‘difficult to understand how a freedom to discuss purely State political affairs with no connection to Commonwealth political affairs can be derived from ss 7 and 24 of

\begin{footnotes}
\item[7] Stephens (1994) 182 CLR 211, 232 (Mason CJ, Toohey and Gaudron JJ), 257 (Deane J). On the other hand, Brennan J held at 235 that, ‘the publication of the material complained of in these proceedings touching the performance of members of the Western Australian Parliament of their official functions is irrelevant to the government of the Commonwealth and is unaffected by the implication’.
\item[8] See also \textit{Lange} (1997) 189 CLR 520, 566.
\item[10] \textit{Lange} (1997) 189 CLR 520, 564.
\item[11] Ibid 561.
\item[12] Ibid 567.
\end{footnotes}
the *Commonwealth Constitution*. For example, could it really be maintained that it is necessary, in order to allow the Australian people to make a choice at federal elections, that South Australians be free to criticise the recent tramline extension in Adelaide from Victoria Square to North Terrace?

In relation to the manner in which the common law may be developed, the Court took a less restrictive approach. The Court held that the common law could not develop in a manner that was inconsistent with the *Commonwealth Constitution*. However, ‘[t]he common law may be developed to confer a head or heads of privilege in terms broader than those which conform to the constitutionally required freedom, but those terms cannot be any narrower.’ Following this approach, the Court held that:

> the common law defence [of qualified privilege] as so extended goes beyond what is required for the common law of defamation to be compatible with the freedom of communication required by the *Constitution*. For example, discussion of matters concerning the United Nations or other countries may be protected by the extended defence of qualified privilege, even if those discussions cannot illuminate the choice for electors at federal elections or in amending the *Constitution* or cannot throw light on the administration of federal government. Similarly, discussion of government or politics at State or Territory level and even at local government level is amenable to protection by the extended category of qualified privilege, whether or not it bears on matters at the federal level.

The extended defence of qualified privilege applied to protect communications ‘concerning government and political matters that affect the people of Australia.’ Similarly, the common law regarding what might constitute malice for the purposes of a defamation action was affected by the constitutional freedom in *Roberts v Bass*: ‘statements made by electors, candidates or their helpers to electors in a State electorate concerning the record and suitability of a candidate for election to a State Parliament’ were said by the joint judgment in that case to lie ‘at the heart of the freedom of communication protected by the Constitution’.

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14 *Lange* (1997) 189 CLR 520, 566.
15 Ibid 571 (emphasis added).
16 Ibid.
17 *Roberts v Bass* (2002) 212 CLR 1, 29–30 [73] (Gaudron, McHugh and Gummow JJ), 58 [159] (Kirby J). It has been argued by Professor Geoff Lindell that this passage in the reasoning of the joint judgment provides general support for the integrated approach in relation to both the operation of the freedom as both an influence on the development of the common law and as a restriction on legislative power: Geoff Lindell, ‘The Constitutional and Other Significance of *Roberts v Bass* — Stephens v *West Australian Newspapers Ltd* Reinstated?’ (2003) 14 Public Law Review 197.
To summarise, the effect of the decision in *Lange* was that the integrated approach applied to the extension of the common law defence of qualified privilege, so that a defamatory comment about a purely State-based political issue would be protected. However, the Court conspicuously failed to affirm the integrated approach in relation to the operation of the freedom as a restriction upon legislative power. Indeed, the acknowledgement by the Court that the extension of the defence of qualified privilege to State politics went ‘beyond what is required’ to facilitate representative government at the Commonwealth level strongly suggests that the Court considered that it was not necessary for the limitation upon legislative power to extend so far.

In *Levy v Victoria*,18 handed down on the same day as *Lange*, the High Court had a further opportunity to affirm the integrated approach as a restriction upon legislative power. In that case, Mr Levy, an animal rights activist, argued that Victorian duck shooting regulations,19 which restricted his capacity to photograph maimed ducks and to collect dead ducks for the purpose of placing them on the steps of the Victorian Parliament,20 were invalid. The Court unanimously found that the regulations were reasonably appropriate and adapted to the protection of public safety, and that it was therefore unnecessary to decide whether or not Mr Levy’s speech, which was primarily directed to a State-based audience, was protected by the Commonwealth freedom.21 Yet, despite not being strictly necessary to his conclusion, McHugh J said that:

> It is not easy to see a connection between the message that the protesters wished to send to the public of Victoria and the freedom of communication protected by the Constitution. It seems remote from choosing members of the Senate or House of Representatives or the conduct of the federal government.22

However, in my view the passage is concerned only with the effect that the freedom has on the development of the common law. In other words, the joint judgment was emphasising that the manner in which the freedom may influence the development of the common law is not limited to the law of qualified privilege. Rather, the freedom may influence the development of the common law in various ways.

18 *Levy v Victoria* (1997) 189 CLR 579 (‘Levy’).
19 *Wildlife (Game) (Hunting Season) Regulations 1994* (Vic) r 5.
22 *Levy* (1997) 189 CLR 579, 626. Brennan CJ also noted at 596 that, ‘[t]he plaintiff’s intended protest related to the discrete State issue of the appropriateness of the relevant Victorian laws, especially the Hunting Season Regulations.’ This was consistent with his Honour’s observations in *Stephens* (1994) 182 CLR 211, 235 (see
Coleman v Power\textsuperscript{23} provides further evidence that at least some members of the High Court have now rejected the integrated approach in relation to the operation of the implied freedom as a restriction on legislative power. Mr Coleman was convicted pursuant to the Vagrants, Gaming and Other Offences Act 1931 (Qld) for distributing a pamphlet about alleged corruption in the Queensland Police Force and insulting a member of the Queensland Police Force. It was conceded by the parties that the legislation burdened the freedom of communication derived from the Commonwealth Constitution (the issue before the Court was, therefore, limited to whether or not the law was reasonably appropriate and adapted). McHugh J noted the concession and went on to endorse its correctness on the following basis:

The conduct of State police officers is relevant to the system of representative and responsible government set up by the Constitution. State police officers are involved in the administration and enforcement of federal as well as State criminal law … Public evaluation of the performance of Federal Ministers, such as the Attorney-General, the Minister for Justice and the Minister for Customs, may be influenced, therefore, by the manner in which State police officers enforce federal law and investigate federal offences. Allegations that members of the Queensland police force are corrupt may reflect on federal Ministers as well as the responsible State Ministers. Such allegations may undermine public confidence in the administration of the federal, as well as the State, criminal justice system.\textsuperscript{24}

Similarly, Gummow and Hayne JJ said:

Given the extent to which law enforcement and policing in Australia depends both practically, and structurally … upon close co-operation of federal, State and Territory police forces, there is evident strength in the proposition that an allegation that a State police officer is corrupt might concern a government or political matter that affects the people of Australia. It is, however, not necessary to decide the point.\textsuperscript{25}

\textsuperscript{23} (2004) 220 CLR 1 (‘Coleman’)
\textsuperscript{24} Ibid 45 [80].
\textsuperscript{25} Ibid 78 [197] (citations omitted). Although I consider, for the reasons below, that this passage suggests that their Honours endorse the divisible approach, some doubt is cast upon this conclusion by their Honours’ footnote reference to a passage in Lange (1997) 189 CLR 520, which deals with the extension of qualified privilege on an integrated basis. In other words, rather than pointing to joint policing responsibilities to establish a link between a seemingly purely State political matter and federal political affairs, it is possible that their Honours were emphasising that policing is an example of a governmental issue that demonstrates just how integrated Australian political affairs are generally. I believe that the comments of Kirby J in Coleman, at 87 [229], should be interpreted in this way, particularly in light of his comments in Australian Broadcasting Corporation v Lenah Game Meats (2001) 208 CLR 199,
In dissent, Callinan J rejected the concession made and said of the impugned provisions of the Queensland legislation that they ‘offer ... no realistic threat to any freedom of communication about federal political, or governmental affairs. It is no burden upon it.’ Therefore, although disagreeing about whether or not a sufficient federal connection existed in this case, it seems that at least four judges in Coleman believed that a State political issue would not automatically attract the protection. To do so the State issue must have some federal aspect. Given that the burden on political communication was conceded in this case, Coleman cannot be taken to have authoritatively endorsed the divisible approach. Nonetheless, the approach adopted by a majority of the Court, in looking to identify a federal link, is inconsistent with an integrated understanding of the Commonwealth freedom.

C Criticism of the Divisible Approach

The divisible approach has been subject to criticism. First, real difficulties arise in attempting to sanction off purely ‘State’ issues. Therefore, it has been argued that the integrated approach is to be preferred on pragmatic grounds. The integrated approach avoids the drawing of, at times, apparently artificial distinctions between those issues that may be considered to be sufficiently federally connected and those that may not. For example, the attempts by McHugh J to identify links between the performance of the Queensland Police Force and Commonwealth elections in Coleman appear to me, with respect, to be somewhat strained. Yet, the adoption of the integrated approach in the name of pragmatism would appear to offend the strictures laid down in Lange that the freedom must be ‘limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution’.

More fundamentally, however, the divisible approach to political communication appears to ignore the critical importance of s 128 to the implication of...
Gaudron J put the argument succinctly in \textit{ACTV} in the following terms:

[Section] 128 recognizes that the \textit{Constitution} and, hence, the federal arrangements depend on the will of the people and may be altered by the people in accordance with the procedures there laid down. The power of the States to refer matters to the Commonwealth and the power of the people to change the \textit{Constitution} require that freedom of political discourse extend to every aspect of the federal arrangements, including the powers of the States and the manner of their exercise.\footnote{Gaudron J, \textit{ACTV} (1992) 177 CLR 106, 216 (Gaudron J). I have, to my surprise, been unable to find further discussion of the significance of s 128 specifically in this context. Gaudron J’s approach to this issue is consistent with her Honour’s approach to the freedom of association. In \textit{Kruger} her Honour suggested that the freedom to associate was a freedom to associate at large, and not merely for political purposes, because ‘any abridgment of the right of the move in society and to associate with one’s fellow citizens necessarily restricts the opportunity to obtain and impart information and ideas with respect to political matters’: \textit{Kruger v The Commonwealth} (1997) 190 CLR 1, 126–7.}

In other words, the \textit{Commonwealth Constitution} requires that the people be free to discuss matters of purely State concern, because that discussion may provide the impetus for an enlargement or diminution in Commonwealth powers, or even a constitutional recalibration of such powers. For example, a discussion about the inadequacy of State gambling regulations may lead to calls for a referral of power to the Commonwealth, pursuant to s 51(37) of the \textit{Commonwealth Constitution}, or for constitutional amendment.

Greater consideration of the role of s 128 may also shed light on the proper ambit of what communication is properly protected by the implied freedom. When account is taken of the breadth of potential constitutional reform, a very broad view of what is ‘political’ ought to be adopted. Indeed, given that there is no obvious limit upon what issues have the potential to bear upon the people’s choice to amend the \textit{Commonwealth Constitution} (or not to), it may be that the freedom of political communication ought to be developed into a freedom of communication generally.\footnote{However, I note that such reasoning has been rejected in \textit{John Fairfax Pty Ltd v Attorney-General (NSW)} (2000) 158 FLR 81, 96 [84] (Spigelman CJ), and in \textit{Conservation Council v Chapman} (2003) 87 SASR 62, 71 [17] (Doyle CJ). I am grateful to Professor Lindell for referring me to the interesting decision in \textit{Colonial Sugar Refining Co Ltd v Attorney-General for the Commonwealth} (1912) 15 CLR 182, which may have an analogous bearing on this issue. In that case, the High Court was evenly divided on whether the \textit{Royal Commissions Act 1902} (Cth) could support...}
D Conclusion on the Scope of the Commonwealth Freedom

The High Court has not authoritatively determined whether or not the limitation imposed by the freedom of political communication upon the legislative power of the States or the Commonwealth is limited to political communications with a federal connection.\(^32\) In *Australian Broadcasting Corporation v Lenah Game Meats*,\(^33\) Kirby J described the issue as to whether or not the integrated approach had survived *Lange* as ‘undecided’.\(^34\) However, despite the criticisms of the narrower view of the freedom canvassed above, in my view, the approach of the Court in *Lange* and *Coleman* suggests that the integrated approach has not survived the *Lange* reformulation of the freedom. Whilst it appears that the federal connection need not be a strong one to attract the protection afforded by the *Commonwealth Constitution*, such a connection would, nonetheless, appear to be necessary.\(^35\)

II A STATE FREEDOM OF POLITICAL COMMUNICATION?

My conclusion that the protection of political communication provided by the *Commonwealth Constitution* does not protect discussion of purely State-based issues brings me squarely to the second question that I seek to address in this article: does the *Constitution Act 1934* (SA) contain its own implication of representative government and an attendant freedom of political communication?

In *Stephens* the High Court held that the freedom of political communication was implied from the terms of the *Constitution Act 1889* (WA).\(^36\) Subsequently, in commissions of inquiry into matters beyond the enumerated legislative powers of the Commonwealth Parliament set out in s 51 of the *Commonwealth Constitution*. Isaacs and Higgins JJ relied on s 128 in holding that any commission of inquiry might be relevant to the question of the desirability of constitutional change. However, the reasoning of Griffith CJ and Barton J, limiting the scope of inquiries to those subjects identified in s 51, prevailed in the Privy Council: *Attorney-General for the Commonwealth v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644 (PC).


\(^{33}\) *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199 (‘*Lenah*’).

\(^{34}\) Ibid 281 [196] (Kirby J). Although, at 282 [198], Kirby J endorsed the integrated approach: ‘broadcasting of ideas about government or politics relevant to the activities of the Federal Parliament or of a State Parliament would fall within the principle expressed in *Lange*.’

\(^{35}\) This approach has been adopted in cases decided after *Lange* (1997) 189 CLR 520. See *John Fairfax Pty Ltd v Attorney-General (NSW)* (2000) 158 FLR 81, 97–8 [86]–[89] (Spigelman CJ), 109 [157] (Priestley J); *Direct Factory Outlets Homebush Pty Ltd v Property Council of Australia Ltd* (2005) 148 FCR 12, 30 [71]–[72] (Sackville J).

\(^{36}\) *Stephens* (1994) 182 CLR 211.
Cameron v Becker, the Supreme Court of South Australia held that

the principle of representative democracy inherent within the Commonwealth Constitution and that of a State such as South Australia implies a freedom of public discussion as to matters of political significance. In that regard I see no conceptual difference between the constitution of Western Australia discussed in Stephens and that of this State.

However, perhaps in light of the conclusion reached in Cameron v Becker that the impugned provision of the Electoral Act 1985 (SA) was appropriate and adapted, the anterior question, namely whether an implication of representative government arises, was not given the detailed consideration that it might otherwise have been.

In Muldowney, the Solicitor-General for South Australia, Mr Brad Selway QC, conceded that the freedom of political communication was independently implied from the Constitution Act 1934 (SA). However, the timing of this concession may have been of significance to its making. It was made before Lange was decided, at a time when the integrated approach was not seriously challenged, such that it appeared that purely State-based political communications were protected by the Commonwealth Constitution in any event. In that context, the concession made about the Constitution Act 1934 (SA) did not have the practical significance that it would now seem to have.

Prior to Lange, there had been suggestions in various dicta and academic writings that there may be an implication of representative government in the states to be drawn from the Commonwealth Constitution. See, eg, McGinty (1996) 186 CLR 140, 216, where Gaudron J said that: ‘when proper regard is had to the system of representative democracy which inheres in the text and structure of the Australian Constitution, s 106 of the Constitution operates to require that the States, as constituent bodies of the federation, be and remain essentially democratic.’ See also Nationwide News (1992) 177 CLR 1, 75, where Deane and Toohey JJ referred to ‘an assumption of representative government within the States’. If these dicta are correct, then it is arguable that a freedom of political discussion of state affairs may thereby be implied. Other references to the potential for such an implication include: ACTV (1992) 177 CLR 106, 216 (Gaudron J); McGinty (1996) 186 CLR 140, 206 (Toohey J), 293 (Gummow J); Levy (1997) 189 CLR 579, 632–3 (Kirby J), citing Re Alberta Statutes [1938] SCR 99, 133 (Duff CJ and Davis J); Egan v Willis (1998) 195 CLR

\[\text{Cameron v Becker}^{37} \text{ (1995) 64 SASR 238.}\]

\[\text{Ibid 247 (Olsson J), 239 (Bollen J). Lander J, at 253, found it unnecessary to decide whether a freedom of political communication was implied from the terms of the Constitution Act 1934 (SA) on the basis that the Commonwealth freedom was sufficiently broad to apply.}\]

\[\text{Ibid 248 (Olsson J), 239 (Bollen J), 257 (Lander J).}\]

\[\text{Muldowney v South Australia (1996) 186 CLR 352 (‘Muldowney’).}\]

\[\text{Ibid 357 (during argument). The Victorian Solicitor General, Mr D Graham QC, who appeared on behalf of the Victorian Attorney-General, intervening in the matter, did not accept the correctness of this concession: at 362 (during argument).}\]

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In light of the apparent adoption of the divisible approach discussed above, fresh consideration ought to be given as to whether or not the Solicitor-General’s concession in *Muldowney* was properly made. It is interesting to note that he himself seemed somewhat equivocal on the issue. In *The Constitution of South Australia*, published after the decision in *Muldowney*, Selway wrote that the Constitution Act 1934 (SA) ‘probably’ contained an implication of representative government.\(^43\)

In considering whether political communication is protected by the Constitution Act 1934 (SA) two questions arise. First, is a freedom of political communication implied from the terms of the Constitution Act 1934 (SA)? And, second, is that implication effectively entrenched?

**A An Implication of Free Political Communication**

Sections 11 and 27 of the Constitution Act 1934 (SA) bear a strong functional resemblance to ss 7 and 24 of the Commonwealth Constitution. Section 11 of the Constitution Act 1934 (SA) provides that:

The Legislative Council shall consist of twenty-two members elected by the inhabitants of the State legally qualified to vote.\(^44\)

Section 27 of the Constitution Act 1934 (SA) provides that:

The House of Assembly shall consist of forty-seven members elected by the inhabitants of the State legally qualified to vote.\(^45\)

An attempt to distinguish the terms of Constitution Act 1934 (SA) could be mounted by reference to the arguably more rhetorical terms found in the Commonwealth Constitution which refers to ‘the people’ and the ‘choice’ that they must make. Many of the cases concerning representative government have focused their attention very closely upon the particular phrase found in ss 7 and 24 of the Commonwealth Constitution: ‘directly chosen by the people’. Indeed, the reasoning by analogy from the Commonwealth to the State sphere by various members of the Court in *Stephens* and *McGinty* appears to have turned upon the fact that ss 73 of the Constitution Act 1889 (WA) adopted virtually identical language to that found in ss

\(^424, 494\) (Kirby J); \(^44\) *Lenah* (2001) 208 CLR 199, 282 [198] (Kirby J); **Attorney-General (WA) v Marquet** (2003) 217 CLR 545, 600 [166] (Kirby J); cf *Theophanous* (1994) 182 CLR 104, 201 (McHugh J). However, given that such reasoning does not appear likely to garner majority support on the High Court in the near future, I have limited the scope of this paper to potential implications arising from the terms of the Constitution Act 1934 (SA).


\(^44\) Constitution Act 1934 (SA) s 11.

\(^45\) Constitution Act 1934 (SA) s 27.
7 and 24 of the *Commonwealth Constitution*. Sections 11 and 24 of the *Constitution Act 1934* (SA), on the other hand, are not cast in such similar terms to those found in the *Commonwealth Constitution*. Further, it might be argued that being of ‘the people’ may have a particular constitutional significance that one’s status as a mere ‘inhabitant … legally qualified to vote’ does not share.

However, in a substantive sense, ss 11 and 27 of the *Constitution Act 1934* (SA) appear to achieve a result very similar to that of their Commonwealth counterparts. In *Muldowney*, Dawson J considered that ss 11 and 27 were not relevantly distinguishable from ss 7 and 24 of the *Commonwealth Constitution*:

> These provisions do not expressly provide that the members be directly chosen by the people … but in effect they are the same because they provide for elections by inhabitants eligible to vote and elections necessarily require a choice to be made by voters.

In my view, adopting his Honour’s approach, the logic that gives rise to an implication from the *Commonwealth Constitution* also applies to support an implication of free political communication from the *Constitution Act 1934* (SA).

### B  Entrenchment

As a matter of State law, merely drawing an implication from the *Constitution Act 1934* (SA) is not sufficient to protect the freedom of political communication. In the absence of entrenchment, the *Constitution Act 1934* (SA), including any implications derived from it, may be amended or impliedly repealed simply by the passage of inconsistent legislation. In this respect, the *Constitution Act 1934* (SA) ‘occupies precisely the same position as a Dog Act’. A court applying unentrenched provisions that give rise to the implication of freedom of communication on the one hand, and provisions that breach that freedom on the other, must simply apply the ordinary rules of statutory construction. Therefore, the

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47 However, to the extent that such a distinction might seek to draw upon constitutional principles said to arise from the sovereignty of the Australian people (see *ACTV* (1992) 177 CLR 106, 138 (Mason CJ), *Nationwide News* (1992) 177 CLR 1, 47 (Brennan J), 70–2 (Deane and Toohey JJ); *Theophanous* (1994) 182 CLR 104, 171–3 (Deane J)), such reasoning would seem, since *McGinty* (1996) 186 CLR 140, to be too far removed from textual considerations.


49 However, as ss 11 and 27 of the *Constitution Act 1934* (SA) operate by reference to those who are legally entitled to vote, it is unlikely that these provisions (at least, in themselves) can support a general right to vote as ss 7 and 24 of the *Commonwealth Constitution* do: see *Roach v Electoral Commissioner* (2007) 233 CLR 162.

50 *McCawley v The King* (1920) 28 CLR 106 (PC), 115–6 (Lord Birkenhead).
freedom would be vulnerable to legislation that was, for example, later in time or more specific in its terms.

However, entrenchment is a means by which State legislatures may confer a higher status on various constitutional provisions by imposing restrictions upon their own legislative capacity to amend such provisions in the future. Entrenchment may be achieved by imposing manner and form limitations. Where the legislature fails to abide by the applicable manner and form requirements, the latter inconsistent law is of no effect. As the South Australian Parliament’s legislative power is plenary, the source of its capacity to restrict its own legislative capacity (by manner and form provisions) must be traced to a paramount legal authority sourced outside the South Australian Constitution that has the capacity to define the State’s legislative power. Otherwise, the manner and form provision itself would be overridden by later inconsistent legislation.

Section 6 of the Australia Act 1986 (Cth) provides such a source. It empowers the State legislatures to bind their successors by manner and form provisions. Section 6 provides as follows:

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52 Section 6 of the Australia Act 1986 (Cth) provides a source for manner and form protection from legislation passed on or after 3 March 1986. Section 5 of the Colonial Laws Validity Act 1865 (UK) provides a similar source in relation to legislation passed before that date. The principle in Bribery Commissioner v Ranasinghe [1965] AC 172, 197 (‘a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law’), is sometimes said to provide an alternative potential source of the capacity of State legislatures to entrench legislation by way of manner and form requirements. This, amongst other alternative sources, is discussed in some length in Anne Twomey, The Constitution of New South Wales (2004) 291–8 and Gerard Carney, The Constitutional Systems of the Australian States and Territories (2006) 179–93 [6.4.2]. However, in light of the disparaging dicta concerning these sources for manner and form entrenchment expressed in the joint judgment in Attorney-General (WA) v Marquet (2003) 217 CLR 545, 574 [80], I have not considered whether the implied freedom of political communication might be entrenched by these alternate means in this article. In my view, the preferable view is that s 6 of the Australia Act 1986 (Cth) is intended to be exhaustive of the manner and form limitations by which State parliaments may curtail their own plenary power. Justice Dixon considered that this was the purpose of s 5 of the Colonial Laws Validity Acts (Imp) in Attorney-General (NSW) v Trethowan (1931) 44 CLR 394, 429. Indeed, it might be asked, if there are alternate sources for Parliament to enact manner and form provisions, why was s 6 of the Australia Act 1986 (Cth) regarded as necessary; cf
a law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act.53

The Selway concession was made on the basis that ss 11 and 27 of the Constitution Act 1934 (SA) are protected by manner and form provisions found in ss 8 and 10A. Section 8 of the Constitution Act 1934 (SA) provides that:

The Parliament may, from time to time, by any Act, repeal, alter, or vary all or any of the provisions of this Act, and substitute others in lieu thereof: Provided that -

(a) it shall not be lawful to present to the Governor, for His Majesty’s assent, any Bill by which an alteration in the constitution of the Legislative Council or House of Assembly is made, unless the second and third readings of that Bill have been passed with the concurrence of an absolute majority of the whole number of the members of the Legislative Council and of the House of Assembly respectively;

(b) every such Bill which has been so passed shall be reserved for the signification of His Majesty’s pleasure thereon.54

The concept of ‘absolute majority’ required by s 8 is that it is not sufficient for a bill to be passed by a mere majority of parliamentarians present in their respective chambers. Rather, a majority of the membership of each chamber, that is 12 members of the Legislative Council and 24 members of the House of Assembly, must support the amendment.

Section 8 is then, in turn, entrenched by s 10A(2) of the Constitution Act 1934 (SA), which relevantly provides that:

A Bill providing for or effecting:

(a) the abolition of the House of Assembly; or


53 Australia Act 1986 (Cth) s 6 (emphasis added). Section 5 of the Colonial Laws Validity Act 1865 (UK) similarly confined the capacity of State legislatures to entrench laws to those, ‘respecting the constitution, powers and procedure of such legislature’. It is broadly understood that the Colonial Laws Validity Act 1865 (Imp) and the Australia Act 1986 (Cth) are the only sources of state legislative capacity to support manner and form provisions.

54 Constitution Act 1934 (SA) s 8 (emphasis added).
(b) the abolition of the Legislative Council; or

c) any alteration of the powers of the Legislative Council; or

d) *the repeal or amendment of section 8 or section 41 of this Act*; or

e) the repeal or amendment of any provision of this section,

shall be reserved for the signification of Her Majesty’s pleasure thereon, and*

shall not be presented to the Governor for Her Majesty’s assent until the Bill has been approved by the electors [by referendum].**

The procedures for the holding of a referendum are then provided for in subsections (3), (4) and (5).

1 *Laws ‘respecting the constitution … of the Parliament’*

As noted above, s 6 of the *Australia Act 1986* (Cth) empowers the South Australian Parliament to bind its successors. However, it also imposes various important limitations on Parliament’s capacity to do so. This raises the question: has the freedom of political communication been *effectively* entrenched under the *Constitution Act 1934* (SA), in accordance with the requirements of s 6 of the *Australia Act 1986* (Cth)?

Section 6 only empowers State legislatures to impose manner and form limitations in relation to ‘law[s] … respecting the constitution, powers or procedure of the Parliament of the State’.** The ‘constitution … of the Parliament’** has been held to

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55 *Constitution Act 1934* (SA) s 10A(2) (emphasis added).
56 Where consideration is being given as to whether or not a law relates to the ‘constitution, powers or procedure of the Parliament of the State’, care must be taken not to confuse the focus of the inquiry. Section 6 of the *Australia Act 1986* (Cth) only authorises manner and form protection against amending laws that meet this description. It is not the law that is protected by a manner and form provision that must be characterised as relating to the ‘constitution, powers or procedure of the Parliament of the State’. Rather, it is the law that is potentially inconsistent with a protected law that must be so characterised. In other words, although ss 11 and 27 of the *Constitution Act 1934* (SA), and the implication of freedom of political communication that emerges from them, can be characterised as relating to the ‘constitution, powers or procedure of the Parliament of the State’, this is not the relevant question. The question is whether a law that is thought to be inconsistent with the implication of freedom of political communication is such a law. This approach was adopted by the joint judgment in *Attorney-General (WA) v Marquet* (2003) 217 CLR 545. The mistaken approach appears to have been made by the High Court itself in *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603. This error was noted in R D Lumb, *The Constitutions of the Australian States* (4th ed, 1977), 99, and was in turn referred to by Matheson J in...
include the number of its houses,\textsuperscript{58} the number of its members and the electoral divisions defining the various constituencies.\textsuperscript{59} However, in \textit{Marquet} the High Court adopted an expansive meaning of this phrase that extended to the representative character of a parliament. The joint judgment said that:

The ‘constitution’ of a State Parliament includes (perhaps it is confined to) its own ‘nature and composition’ … For some purposes, the nature and composition of the Western Australian Parliament might be described sufficiently as ‘bicameral and representative’. But … s 6 is not to be read as confined to laws which abolish a House, or altogether take away the ‘representative’ character of a State Parliament or one of its Houses. At least to some extent the ‘constitution’ of the Parliament extends to features which go to give it, and its Houses, a representative character. Thus, s 6 may be engaged in cases in which the legislation deals with matters that are encompassed by the general description ‘representative’ and go to give that word its application in the particular case. So, for example, an upper House whose members are elected in a single State-wide electorate by proportional representation is differently constituted from an upper House whose members are separately elected in single member provinces by first past the post voting. Each may properly be described as a ‘representative’ chamber, but the parliament would be differently constituted if one form of election to the upper House were to be adopted in place of the other.\textsuperscript{60}

However, the joint judgment went on to caution that ‘[n]ot every matter which touches the election of members of a Parliament is a matter affecting the Parliament’s constitution’.\textsuperscript{61} In support of this qualification their Honours referred to the decision of \textit{Clydesdale v Hughes},\textsuperscript{62} in which a law which provided that the holding of an office of profit under the Crown did not disable or disqualify a person from sitting as a member of the Legislative Council of Western Australia did not alter the constitution of the Parliament.\textsuperscript{63}

Applying these remarks to laws that curtail the freedom of political communication is not a simple exercise. To take an extreme example, it is not entirely clear that even a law which prohibited journalists from reporting on opposition policy in the lead up to a State election could be characterised as a law ‘respecting the consti-


\textit{Attorney-General (NSW) v Trethowan} (1931) 44 CLR 394.

\textit{Attorney-General (WA) v Marquet} (2003) 217 CLR 545, 574 [79] (Gleeson CJ, Gummow, Hayne and Heydon JJ) (‘\textit{Marquet}’).

Ibid 572–3 [75]–[77] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

Ibid 573 [77] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

\textit{Clydesdale v Hughes} (1934) 51 CLR 518.

Ibid 528.
tution … of the Parliament’. On one view, such a law may be said to regulate conduct that is too far removed from the nature and composition of Parliament to be related to its ‘constitution’. Kirby J apparently adopted such an approach in *Marquet*. He considered that the word ‘constitution’ in this context was concerned with fundamental provisions affecting the design and institutional composition of the legislature in question … It addresses questions such as whether one of the Houses of Parliament might be abolished … *The word is not concerned with matters of detail such as* individual membership of a parliamentary chamber or elections.\(^{64}\)

On the other hand, the posited law may be said to relate to the constitution of the Parliament because it affects the method by which the Parliament is constituted, namely following an open and informed election process. In this sense the posited law may be said, in the words of the joint judgment, to ‘extend … to features which go to give [Parliament], and its Houses, a representative character.’\(^{65}\)

Yet, even if it is accepted that a frontal assault on the freedom of political communication may relate to the ‘constitution … of the Parliament’, laws that only incidentally abrogate the freedom may be much more difficult to characterise as law ‘respecting the constitution … of the Parliament’. To take my earlier example, it would be difficult to so characterise a law that prohibited criticism of the tramline extension. This difficulty becomes greater where the restriction of free speech is remote to the electoral process. For instance, it would seem to stretch the language of s 6 of the *Australia Act 1986* (Cth) beyond breaking point to suggest that a law which required that all Supreme Court proceedings be conducted in camera was a law ‘respecting the constitution … of the Parliament’. In my view, there may be many laws that impinge upon free speech that need not comply with the manner and form requirements contained in ss 8 and 10A of the *Constitution Act 1934* (SA), and may, therefore, override, in part, the implied state freedom of political communication.

To summarise, it is clear that a law which altered the terms of ss 11 and 27 of the *Constitution Act 1934* (SA) to, for example, halve the number of representatives would clearly relate to the constitution of the Parliament such that failure to comply

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\(^{64}\) *Marquet* (2003) 217 CLR 545, 610–1 [197] (Kirby J) (emphasis added). His Honour’s narrow interpretation of ‘constitution’ was informed by his earlier expressed view, at 610 [195], that, ‘*[t]he capacity of the CLVA to act as a means of imposing on Australia’s State Parliaments (and their electors) the dead hand of past political notions and factional interests affords a good reason for restricting the operation of s 5 of the CLVA in accordance with its terms.’ Although in this passage his Honour discussed the operation of the *Colonial Laws Validity Act 1865* (Imp), these comments would appear to apply equally to s 6 of the *Australia Act 1986* (Cth): see *Marquet* (2003) 217 CLR 545, 616 [212].

with the manner and form requirements, provided for by ss 8 and 10A of the
Constitution Act 1934 (SA), would render the amendment inoperative by virtue of s
6 of the Australia Act 1986 (Cth). However, it is much less clear whether a law
which interfered with the freedom of political communication, implied from ss 11
and 27 of the Constitution Act 1934 (SA), could also be said to relate to the
‘constitution … of the Parliament’. Where the interference is merely incidental and
has only a marginal impact upon the electoral process then, in my view, it will not
be possible to so characterise the law. In this way s 6 of the Australia Act 1986
(Cth) imposes a very significant restriction upon the potential scope of any State
constitutional guarantee of free political communication.

2 Double Entrenchment

On current authority, in order to entrench a provision in a State constitution it is not
enough merely to provide for a single layer of manner and form protection.
Additionally, the entrenching provision itself must be entrenched. This is known
as double entrenchment. It is said that in the absence of double entrenchment an
inconsistent enactment which did not meet a singly entrenched manner and form
provision might prevail over both the single layer of manner and form protection
and the substantive provision to be protected also.

In Muldowney, Selway conceded that ss 7 and 11 of the Constitution Act 1934 (SA)
were doubly entrenched by ss 8 and 10A (set out above). It seems clear that s
10A(2)(d) effectively entrenches s 8 of the Constitution Act 1934 (SA) by means of
referenda. Thus, the second step of our double entrenchment seems secure.
However, the first step is not so certain. Section 8 of the Constitution Act 1934 (SA)
relevantly provides that, ‘it shall not be lawful to present to the Governor, any Bill
by which an alteration in the constitution of the Legislative Council or House of
Assembly is made, unless the second and third readings of that Bill have been

66 See West Lakes v South Australia (1980) 25 SASR 389, 414 (Zelling J); Anne
Constitution of South Australia (1997) 66 [5.5.2]; Gerard Carney, The Constitutional

67 It is not at all clear to the author why double entrenchment should be necessary.
Section 6 of the Australia Act 1986 (Cth) does not appear to require it, and there does
not seem to be any reason in logic why a single level of entrenchment will be
ineffective against further inconsistent legislation, whereas an additional layer will
protect against the otherwise plenary power of the a State parliament. Further, I note
that the authority that is regularly cited for the requirement of double entrenchment is
West Lakes v South Australia (1980) 25 SASR 389, 414 (Zelling J). However,
Zelling J discusses the matter very briefly and cites no further authority for the
proposition.

68 Muldowney (1996) 186 CLR 352, 358 (during argument). However, there are doubts
as to the effectiveness of the entrenchment: see Gerard Carney, ‘Freedom of Political
passed … [by] absolute majority.\textsuperscript{69} Therefore, according to s 8 of the \textit{Constitution Act 1934} (SA), only a law that alters the constitution of one of the houses of Parliament is entrenched.

This raises similar issues to those discussed above in the context of s 6 of the \textit{Australia Act 1986} (Cth). However, there may be a difference to be drawn between the phrase ‘constitution … of the Parliament’ found in s 6 of the \textit{Australia Act 1986} (Cth) and ‘constitution of the Legislative Council or House of Assembly’ found in s 8 of the \textit{Constitution Act 1934} (SA). The latter phrase is apparently focused more upon internal structural features of the houses, rather than matters external to the Parliament itself. For this reason, it is strongly arguable that the approach adopted by Kirby J in \textit{Marquet} in relation to the phrase ‘constitution … of the Parliament’\textsuperscript{70} should be preferred to that of the joint judgment in relation to s 8 of the \textit{Constitution Act 1934} (SA).\textsuperscript{71} Therefore, it would seem to follow that even a law that directly abrogated the freedom of political communication would fall outside the protection of s 8 because such a law could not be said to be ‘concerned with fundamental provisions affecting the design and institutional composition of’\textsuperscript{72} the Legislative Council or House of Assembly.

3 \textit{The Level of Protection Afforded by Entrenchment}

However, even assuming that ss 8 and 10A of the \textit{Constitution Act 1934} (SA) effectively double entrench the implied freedom of political communication, it should be noted that s 8 provides only a weak protection of the freedom. Any law passed by an absolute majority of both houses will pass the manner and form requirement imposed by s 8, and may accordingly abrogate the implied freedom of political communication. Laws are not infrequently passed by absolute majority. It is by no means unusual for a government to command the support of an absolute majority in each house. Indeed, as noted by the Victorian Parliament’s Legal and Constitutional Committee, ‘it is difficult to envisage a less onerous degree of entrenchment than that comprised in an absolute majority requirement.’\textsuperscript{73} It is even possible that the Parliament might inadvertently abrogate the freedom by passing a law that only incidentally burdened the freedom by absolute majority.\textsuperscript{74} Therefore,

\begin{itemize}
  \item \textit{Constitution Act 1934} (SA) s 8 (emphasis added).
  \item See above n 63.
  \item On the other hand, it may be argued that s 8 of the \textit{Constitution Act 1934} (SA) refers only to the representative components of Parliament such that the approach of the joint judgment in \textit{Marquet} (2003) 217 CLR 545, 572–3 [75]–[77], is appropriate to this question too.
  \item \textit{Marquet} (2003) 217 CLR 545, 610–1 [197] (Kirby J).
\end{itemize}
even if the freedom of political communication is protected by the *Constitution Act 1934* (SA), that freedom is a fragile one.

C Conclusion on the Scope of the State Freedom

In summary, the concession made by Selway in *Muldowney* was correct, in my view, insofar as it accepted that an implication of freedom of political communication arises from the terms of the *Constitution Act 1934* (SA). However, to say that the South Australian ‘people’ enjoy a constitutionally guaranteed freedom of political communication in relation to matters of purely State concern is a more dubious proposition. The freedom arising under the *Constitution Act 1934* (SA) is vulnerable to legislative abrogation in a number of ways.

Importantly, a law that only incidentally impinges upon the freedom of political communication is unlikely to be characterised as a law ‘respecting the constitution … of the Parliament’ such that the freedom cannot be protected by manner and form limitation deriving their paramount force from s 6 of the *Australia Act 1986* (Cth). Furthermore, even a law that directly and designedly abrogates the freedom may not be a law which alters the ‘constitution of Legislative Council or House of Assembly’ such that it does not fall within the manner and form requirements imposed by s 8 of the *Constitution Act 1934* (SA). Finally, even if the freedom is effectively entrenched, it only requires an absolute majority of Parliament to strip away this most important of freedoms.