A PRINCIPLED APPLICATION OF AUSTRALIA'S IMPLIED FREEDOM TO COMMUNICATIONS ABOUT THE JUDICATURE

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Whilst the controversy surrounding Australia's implied freedom of political communication has largely retreated from scepticism as to its existence, disagreements remain as to the precise scope of protected communication. One striking example of such uncertainty is the fact that, despite occasional judicial contemplation, it is not settled whether communications pertaining to the judicature, itself often considered the third branch of "government", are protected by such a "freedom". This article argues that the implied freedom extends to relevant "public" discourse relating to the judicature by virtue of that relation. This, it contends, is logically consistent with present conceptions of the freedom as well as the text and structure of the Constitution *insofar as such communications are, where intrinsically of public relevance, likely to bear on electoral choice or, alternatively, relate to the extended process of exercising constitutional powers provided to the legislature and executive.*

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I INTRODUCTION

To the extent that the laws of the land as implemented by Parliament cannot be conclusively applied to individuals under Australia's democratic system without the work of the judicature, the courts cannot truly be separated from constitutional notions of government powers or, most importantly, electoral choices. Nonetheless, Australia, perhaps owing to its Westminster heritage,[1] continues to consider the judicature as apolitical, its actions as generally unrelated to electoral politics,[2] and its decisions as fundamentally independent from the exercise of legislative or executive power. Courts are seen as above politics and external to government in the constitutional sense of the phrase. The appointments of judges by the government, unlike for example those to the United States Supreme Court,[3] are generally not mired by public battles regarding the judges' opinions on political issues or government policy. The courts exercise Chapter III power, and are not, in applying the law, acting directly in relation to Chapters I and II of the *Constitution*, so the argument goes. Perhaps then it is understandable that analysis has considered commentary on the judicature as not being "political" and the judicature itself as not entangled with the wider electoral or governmental ecosystem.

At the same time, the Australian constitutional arrangement is idiosyncratic amongst developed democracies insofar as it lacks formal guarantees of numerous human rights.[4] Whereas, for example, the United States sees freedom of speech explicitly protected by the First Amendment,[5] Australia has witnessed the development of an 'implied freedom of political communication'[6] protecting the flow of information necessary for direct elections.[7] With this concept not found explicitly within the *Constitution*, the High Court must rely on implications to define its scope. In the modern day, this does not appear to inhibit consensus regarding the status of

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[1] John Williams, 'Judges' freedom of speech: Australia' in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 153, 154.

[2] Anthony Gleeson 'A Core Value' (Speech, Annual Colloquium of the Judicial Conference of Australia, 6 October 2006); HP Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2012) 5.

[3] Alex Badas and Elizabeth Simas, 'The Supreme Court as an electoral issue: evidence from three studies' (2021) 10(1) *Political Science Research and Methods* 49, 49.

[4] See, eg, *Coleman v Power* (2004) 220 CLR 1, 81 [208] (Kirby J) ('*Coleman v Power*').

[5] *United States Constitution* amend I.

[6] Ronald Sackville, 'How Fragile are the Courts? Freedom of Speech and Criticism of the Judiciary' (2005) 31(2) *Monash University Law Review* 191, 203. For the purposes of this article, the 'implied freedom of political communication' will be referred to as the 'implied freedom of political communication', the 'implied freedom', or simply 'the freedom' interchangeably.

[7] Anne Twomey, 'The application of the implied freedom of political communication to state electoral funding laws' (2012) 35(3) *University of New South Wales Law Journal* 625, 626.

the freedom as good law.[8] What speech is or is not protected, however, at least at the boundaries, is often unclear. [9]

The question of whether communications relating to the judicature are protected, for example, is not entirely settled, even where various cases, arguably epitomised by *APLA Ltd v Legal Services Commissioner (NSW)*,[10] have considered the issue. In this context, the present article proposes that relevant communications which relate to the judicature will fall within the scope of the implied freedom by virtue of that relation. It suggests as much not due to abstract notions of what is "governmental" or "political",[11] nor from any structural imperatives derived from Chapter III or the judicature itself. Rather, it derives the proposition from the very same textual grounds as the implied freedom as presently conceived is derived. It does so on two main bases.

First, even though the judicature is not provided for by the provisions of the *Constitution* which provide the freedom, communications regarding its functions

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[8] It also does not usually inhibit consensus that the freedom exists more generally. One notable exception to this observation is current member of the High Court Steward J, who stated in *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, 95 at [249] ('*LibertyWorks*') that 'it is arguable that the implied freedom does not exist'. This view was similarly adverted to in *Babet v Commonwealth* [2025] HCA 21 at [205], and most recently was taken further in *Ravbar v Commonwealth* [2025] HCA 25 ('*Ravbar*') where his Honour at [273] stated that 'I thus not only retain serious doubts about [the implied freedom's] cogency but am now convinced that it is very wrong.' Such sentiments are also found in his Honour's extra-curial writings. Justice Steward's view was, however, disapproved of in the strongly worded reasons of Gageler CJ in *Ravbar*, who wrote at [23]–[25] that '[n]o party or intervener sought leave to reopen the unanimous decision in *Lange v Australian Broadcasting Corporation* which confirmed the implied freedom of political communication…None sought leave to reopen any of the thirty decisions in which this Court has elaborated and applied the implied freedom of political communication in the nearly thirty years since *Lange*…Unless and until such an application is made, and if made is determined in favour of reopening and overruling, the duty of each member of this Court as constituted from time to time is to apply *Lange* and the decisions which have elaborated upon it, "not to be convinced by it"'.' The other members of the Court also did not adopt Steward J's position. Still, as seen in *Ravbar*, Steward J's scepticism has not precluded his Honour from applying the analysis insofar as the principle itself seems to be settled law, with his Honour conceding that the implied freedom must be applied, outlining at [295] that 'in the present matter, no party sought to dispute the existence of the implied freedom of political communication, and I, like Callinan J, am also obliged to apply it. It was on that basis that in both *LibertyWorks* and *Babet* I faithfully applied the implied freedom doctrine…But that said, as I explained in *LibertyWorks* and for the foregoing reasons, a reconsideration (with leave if necessary) of the implied freedom's existence may be justified and a matter for full argument on another occasion.'

[9] Justice James Edelman, 'Implications' (Spigelman Public Law Oration, Supreme Court of New South Wales, 21 April 2022) 5. See also the comments of Edelman J in *Ravbar* (n 8) at [212]–[225] regarding the effect of changing views relating to "structured proportionality" on the scope of communications that freedom will, in practice, protect.

[10] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 ('*APLA*').

[11] Indeed, to apply this form of top-down reasoning would be inconsistent with the High Court's implied freedom jurisprudence: See below nn 46–49.

and actions are intrinsically and distinctly likely to bear on electoral choice. Thus, for voters to exercise democratic rights as necessitated by the *Constitution* they must be afforded a freedom of communication on "public"[12] matters relating to the judicature. Second, in any event, the relevant actions of the judicature are intertwined with the exercise of powers afforded by the provisions grounding the implied freedom. Insofar as commentary on the powers of the legislature and executive appear to have been accepted as prima facie political and therefore protected, commentary on the *application* of these powers to the citizenry, which occurs through the judicature,[13] must also fall within the ambit of the freedom.

This article proceeds as follows. Part II defines the "judicature" and the communications of relevance to its argument, before briefly outlining two relevant jurisprudential considerations arising from the development of the freedom. Part III explores previous judicial consideration of the present question, both in the High Court and below, to demonstrate that it presently remains unsettled. Part IV proposes that the implied freedom does, on principle and by definition, apply to relevant communication about the judicature by virtue of that relation. It addresses arguments raised against this proposition by courts, and presents in detail the two grounds for inclusion described above.

II DEFINITIONS AND ORIGINS: LAYING THE FOUNDATION

It is important to first define what is meant by the "judicature", both to avoid uncertainty[14] and to outline the scope of the relevant communications this article contends are protected by the implied freedom. Having done so, this Part will then outline two relevant clarifications to the operation of the freedom.

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[12] In this article, the term 'public' is used in the same sense as, for example, Mason CJ, Toohey and Gaudron JJ in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 ('*Theophanous*'). That is, referring to 'public affairs' and matters relating to the body politic so as to fall within the definition of 'political discussion', rather than necessarily being made "publicly". This distinction is relevant insofar as these 'public' matters are those likely to be intertwined with other branches of government and bear on electoral choice, as opposed to personal choices.

[13] Dan Meagher, 'What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28(2) *Melbourne University Law Review* 43, 452.

[14] See, eg, Matthew Joyce, 'The Nationhood Power and the Prerogative: Three Unanswered Questions from Pape' (2025) 36(2) *Public Law Review* 157, 158**;** *Davis v Minister for Immigration, Citizenship, Migration Services, and Multicultural Affairs* (2023) 97 ALJR 214, 240 [117] (Edelman J).

A *The Judicature and Relevant Communications Defined*

The term "judicature", in addition to its ordinary meaning,[15] elicits recollection of a number of well-known documents, such as Chapter III of the *Constitution*[16] and the various *Judicature Acts*.[17] Indeed, the scope of such documents and the matters to which they relate provide useful guidance for defining the ambit of concepts this article will refer to as the "judicature". Similar guidance is provided by Mason CJ in *Cunliffe v Commonwealth*,[18] where the Chief Justice described that the '[implied] freedom necessarily extends to the workings of the *courts and tribunals which administer and enforce the laws of this country*'.[19] Noting this, for the purposes of this article, the term judicature will encompass courts and tribunals themselves, judges, specific exercises of judicial power, judicial proceedings, and other matters incidental to the function and nature of each.[20] This term is therefore a broad one, reflecting the institutions, individuals, and instances involved in the administration of justice. Noting as we will the increasingly "integrated" nature of state and federal affairs,[21] as well as the "integrated" nature of state and federal judicatures,[22] the term is not limited merely to federal matters,[23] but also their state-based equivalents.

The above definition naturally informs the scope of communications which are argued to be protected by the implied freedom. This article reasons that any communication about these matters may fall within the scope of the freedom in the same way that they would if made about the executive or legislature. That is, if they take on a sufficiently 'public' nature, insofar as they may bear on electoral choice or relate to the extended process involving the application of the constitutional powers of the legislature or executive.[24] If they relate, conversely, to personal decision-making or preferences, and are not disseminated in a manner potentially informing 'public' acts or decisions such as voting, then they shall not be protected.[25] As will be outlined, this position may slightly differ for applications of judicial power to the common law or non-statutory equitable principles, where the implied freedom

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[15] *Australian Law Dictionary (3rd ed)* (online at 9 June 2025) 'Judicature'.
[16] *Constitution* Ch III.
[17] 38 & 39 Vict c 77.
[18] *Cunliffe v The Commonwealth* (1994) 182 CLR 272 ('*Cunliffe*').
[19] Ibid 298 (emphasis added).
[20] See above n 15.
[21] See below nn 226–228.
[22] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 84 (Dawson J), 101–3 (Gaudron J), 112–4 (McHugh J), 137–143 (Gummow J) ('*Kable*'). See also Matt Harvey et al, *Australian Constitutional Law and Government* (LexisNexis, 2021) 244.
[23] Cf generally *Constitution* Ch III.
[24] See below Part II(B).
[25] See, eg, below nn 59–63.

might not apply;[26] this however does not affect the general principles this article proffers.

This proposition widens the scope of communications which might fall under the freedom when compared to current High Court orthodoxy. It presently appears that only communications about the judicature which relate directly to the government are captured by the freedom.[27] Comments on the exercise of judicial power or other matters relating to the judicature which do not directly involve the other branches of government will not, under this orthodoxy, be protected. This article argues for a broader conception of this scope although does so based on the same principled grounds. Importantly, however, it does not argue that the freedom needs to be "extended", and does not seek to justify an "extension" on policy grounds or by reference to practical benefits. Rather, it argues that the appropriate interpretation of the underlying jurisprudential approaches taken to derive and apply the freedom to date does capture relevant communications about the judicature.

B *The Practical Applicability of this Proposition*

In questioning the utility of this article one might challenge its practical applicability. Two main points are made in response. First, as Daniel Reynolds notes, High Court jurisprudence shows that the fact something may be an uncommon or even exceptional form of political communication, or a unique topic thereof, 'is no reason to reject the need to protect it'[28] under the implied freedom.

Second, and perhaps of greater practical relevance, is the fact that a variety of examples are apt to demonstrate that actually this question is not merely academic, but may foreseeably arise in a number of scenarios. Such examples are, of course, not exhaustive but are sufficiently indicative for present purposes.[29]

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[26] See below Part IV.

[27] See below Part III.

[28] Daniel Reynolds, 'An Implied Freedom of Political Observation in the *Australian Constitution*' (2018) 42(1) *Melbourne University Law Review* 199, 228.

[29] It is worth noting that the fact such communications may fall within the ambit of the implied freedom does not mean they shall be protected in practice. It is readily foreseeable that many present "justified" burdens on communication may be permitted under the second limb of the *Lange* test. This article does not argue that this should therefore render all laws which burden these communications as invalid, but only that the communications are prima facie capable of being protected by the scope of the freedom. That is, the question in practice will be one which revolves around the nature of any specific law which infringes this communication. This inclusion of the judicature, as we will see, is distinct from current High Court orthodoxy. Indeed, even if one argued that this may over-extend the freedom, given the constitutional provisions from which it is derived, this would nonetheless be consistent with the general approaches of providing rights with broad and beneficial construction

The most readily envisaged example is laws which relate to contempt.[30] Individuals engaging in conduct which may be considered contempt in the face of the court[31] might, in certain instances, be engaging in verbal or symbolic[32] communication about the judicature.[33] Contempt by publication, *sub judice*[34] or in contravention of an order,[35] of specific matters relating to judicial proceedings alongside contempt by scandalising the court[36] all readily fall within the envisaged bounds as communication about the judicature with a 'public' element.[37] It may be so that contempt laws as generally in force would remain validly in force owing to a structured proportionality analysis, but this does not mean that the communications they limit would not prima facie fall within the scope of the implied freedom,[38] or that proposed expansions of such laws would not potentially be invalid on that basis. In a related sense, allegedly defamatory comments made about judicial officers may fall into this realm, bringing defamation laws into consideration.[39]

Furthermore, commentary made regarding judicial decisions or determinations, including the performance of a specific officer, falls within this article's definition, and laws which restricted this communication would burden the freedom. This might include prevention of communications regarding the correctness of the decision, or perhaps the effects and ramifications it may have. Similarly, protests against these decisions or the courts themselves, such as those in the aftermath of the United States Supreme Court decision in *Dobbs v Jackson Women's Health Organization*[40] which overturned *Roe v Wade*,[41] would be captured as relevantly

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and the principles of legality. It is also of principled benefit insofar as drawing a distinct line between what is and is not political, at the margins, is difficult and an overly cautious approach would err on the side of restricting such rights when the practical detriments of such an approach would be alleviated by structured proportionality analysis anyway. This article will later return to consider arguments against an overly broad freedom, and in particular the concerns raised by Steward J in *Ravbar* (n 8).

[30] See, eg, below n 101.

[31] See David Rolph, *Contempt* (Federation Press, 2023) 414–466.

[32] For more on symbolic political communication, see, eg, *Levy v Victoria* (1997) 189 CLR 579, 595 (Brennan CJ); 638 (Kirby J) ('*Levy*').

[33] See, eg, *Elzahed v Kaban* [2019] NSWSC 670; *Prothonotary of the Supreme Court of New South Wales v Shane Dowling* [2017] NSWSC 664.

[34] See Rolph (n 31) 162–231.

[35] See ibid 703–749.

[36] See ibid 253–289.

[37] See, eg, below n 101.

[38] See above n 29.

[39] See, eg, below n 111.

[40] 597 US 215 (2022).

[41] 410 US 113 (1973).

political speech for the purposes of the implied freedom and a law which sought to prohibit such behaviour would be open to challenge.

There may also be tangible application of the doctrine to instances where reporting, coverage, or discussion of specific legal matters is restricted. For example, in instances where the court may be able, or required, to move *in camera* or where suppression of media coverage is mandated by statute. Again, as with contempt laws this may be justified as proportionate, for example, as a response to terrorism or to protect vulnerable parties, yet it may nonetheless *burden* communications within the ambit of the implied freedom.[42]

However, even if there were not so many examples of situations where this question might arise, or these examples would be captured under the freedom in other ways, it is argued that this article would still be of value in extending the specificity with which the implied freedom is understood. Even if it *were* largely academic, which it is not, the question would remain an important one.

C *Important Features of the Freedom's Derivation and Clarification*

Various authors have produced historical accounts of the implied freedom and its evolutions.[43] This article does not seek to provide such a comprehensive outline. Rather, it shall reiterate two developments of relevance to the present enquiry.

First is the direct grounding of the freedom in the specific text of the relevant provisions of the Constitution rather than abstract notions. After uncertainty in the early 1990s, the Court would distil the nature of the implied freedom through the middle of the decade. Of particular note is the seminal analysis of McHugh J in *McGinty v Western Australia*.[44] In rejecting implications of equal voting power in Australia's democracy, McHugh J rejected a 'free standing' notion of 'representative democracy' in the *Constitution* that could be relied upon as the basis of any constitutional analysis.[45] His Honour outlined that 'top-down reasoning' is not a

[42] After all, this article considers the character of speech relating to the judicature and questions if it falls within the metes and bounds of the implied freedom. It does not seek to analyse the laws which burden this protected speech on a case by case basis, and appreciates that many laws burdening this speech might be upheld as valid not because they did not burden political communication, but because they were legitimate and proportionate in doing so.

[43] See, eg, James Stellios, *Zines and Stellios's The High Court and the Constitution* (The Federation Press, 7th ed, 2022) 598–634; Rebecca Ananian-Welsh et al, *Blackshield and Williams Australian Constitutional Law and Theory* (Federation Press, 8th ed, 2024) 1352–1434; Hon Geoffrey Nettle AC, 'Whither the Implied Freedom of Political Communication?' (2021) 47(1) *Monash University Law Review* 1, 2–23.

[44] (1996) 186 CLR 140 ('*McGinty*').

[45] Ibid 236 (McHugh J).

legitimate approach to interpreting the *Constitution*,[46] meaning any 'representative government' must be found in the *Constitution* itself, rather than be overlaid onto its provisions as a guiding principle.[47] Such an approach would 'arguably' become the 'fulcrum upon which [High Court] free speech jurisprudence has turned'.[48] This is particularly pertinent for the present enquiry; in ascertaining an implied freedom of communication concerning the judicature, it will not be sufficient to point to abstract notions — be they 'representative government' or 'responsible government' — and seek to demonstrate that the judicature falls within their ambit. An approach grounded in the provisions of the *Constitution* and what they necessitate is required.[49]

This was further affirmed in *Lange v Australian Broadcasting Corporation*,[50] the 'modern starting point' of the implied freedom.[51] *Lange* is notable amongst other key developments[52] for its continued grounding of a textualist freedom[53] and departure from borrowed, Americanised notions of free speech.[54] The Court found that, as McHugh J noted in *McGinty*, it was not a question of what is 'required by representative and responsible government' as a concept, but a question of what the actual, and specific, 'terms and structure of the *Constitution*, prohibit, authorise or require'.[55] In this process, the phrases 'directly chosen by the people' in ss 7 and 24 and 'submitted…to the electors' in s 128 were given particular emphasis in grounding the freedom.[56] Thus, *Lange* held that the freedom must protect communications which could, or might, influence the exercise of the functions afforded to voters under the relevant provisions.[57] That is, communication was protected '*because it is a means* by which electors may inform themselves…and

[46] Ibid 232 (McHugh J).
[47] Ibid.
[48] Nicholas Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28(3) *Sydney Law Review* 505, 505.
[49] For further analysis of the Australian "bottom-up" approach, see, eg, the comments of Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 544–545 [73], which cite McHugh J's reasoning in *McGinty* (n 44) with approval.
[50] (1997) 189 CLR 520 ('*Lange*').
[51] Stellios (n 43) 608.
[52] Such as the agreement by the court that the implied freedom, unlike the First Amendment in the United States, did not provide a personal right, but was rather a limit on powers of the state: *Lange* (n 50) 560.
[53] Richard Jolly, 'The Implied Freedom of Political Communication and Disclosure of Government Information' (2000) 28(1) *Federal Law Review* 41, 42.
[54] Meagher (n 13) 445.
[55] *Lange* (n 50) 567; Costa Avgoustinos, 'Deriving Constitutional Implications: The Role of "External" Sources in the Text and Structure Approach' (2022) 50(2) *Federal Law Review* 249, 249–250.
[56] *Lange* (n 50) 557; Anne Twomey, '"Expansion or Contraction": A Comment' (1998) 20(1) *Adelaide Law Review* 147, 149–150.
[57] *Lange* (n 50) 560.

thereby exercise a free and informed choice'.[58] The link was made to the act of electoral choice, as required specifically by the relevant sections (as opposed to the Chapters as a whole).

The second development of importance relates to the requisite public nature of communications. The Court has appeared to distinguish between communications which relate to political *choices* — which are protected — and communications merely on topics which are *politically controversial*. For example, in *Clubb v Edwards; Preston v Avery*,[59] Kiefel CJ, Bell and Keane JJ noted that certain conversations about abortion might pertain to ethical choices or be politically sensitive, but if they speak to individual decisions as opposed to bearing on electoral choice then they would not be protected.[60] This has implications for the extent to which communications about the judicature might be protected. Nonetheless, noting 'public debate' was distinguished from 'individual choices',[61] it is eminently more likely that discussion of the judicature would relate to matters of public discourse rather than the behaviour of an individual privately.[62] After all, judges do not respond or adjust their behaviour in response to criticism,[63] meaning that such commentary or critique will generally be aimed to the public to influence their views or actions instead, especially as the personal actions of the individual citizen hearing the commentary are precisely limited to their engagement with the public sphere. They cannot, in their private actions, act in any way in response to the acts of the judicature spoken of, except in their engagement in public life.

III Previous Consideration of Communication about the Judicature

Amongst the litany of cases dealing with the freedom to date, a number have questioned whether or not communication about the judicature may find protection within the *Constitution*. However, these authorities have not conclusively answered this question.

A *The High Court*

It is useful to begin by noting that to date there exists no High Court case the *ratio* of which stands for the proposition that the implied freedom does not encompass communications regarding the judicature. That is not to say that this question has

[58] Reynolds (n 28) 201.
[59] (2019) 267 CLR 171 ('*Clubb*').
[60] Ibid 191 [29].
[61] Ibid.
[62] Sackville (n 6) 204.
[63] *Peek v Channel Seven Adelaide Pty Ltd* (2006) 94 SASR 196, 226 [95] (Besanko J) ('*Peek*').

not been considered, nor that the comments to which this article turns do not carry persuasive or even precedential value. Still, it would not be required to re-open any case should this article's reasoning be adopted.[64]

1 APLA

As indicated previously, the formative High Court case in which this issue has seen judicial consideration is *APLA*. *APLA* was not, however, a case in which the relevant inhibited communications pertained to the judicature. Rather, the plaintiffs took issue with the impugned regulations under the *Legal Profession Act 1987* (NSW) which prevented advertisement of certain legal services.[65] To that extent, the case did not turn on the application of the freedom to the judicature itself. Nonetheless, the plaintiff's contentions were made, inter alia, on the basis that prohibited communications either fell within the traditional implied freedom, or that Chapter III of the *Constitution* provided a distinct yet parallel implied freedom of communication about legal rights.[66]

Chief Justice Gleeson and Heydon J delivered a joint judgment acknowledging that the phrase 'government or political matters' was imprecise,[67] but holding that regulations limiting the marketing of professional services by lawyers did not inhibit political communication.[68] Writing individually, Gummow and Hayne JJ each held that such advertisements did not attract the freedom as they were not sufficiently 'political'.[69] Justice Callinan, while maintaining scepticism as to the implied freedom generally, outlined that nothing in the relevant communications could reasonably influence exercises of electors' rights or the actions of elected representatives.[70] The direct question of whether the implied freedom applied to comments about the judicature was only considered by two Justices: McHugh and Kirby JJ.

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[64] It is also acknowledged that, whilst the comments of Mason CJ in *Cunliffe* (n 18) that the freedom 'necessarily extends to the workings of the courts and tribunals', the findings in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*') that commentary regarding the Industrial Relations Commission was protected by the freedom, and the judgment of Mason CJ, Toohey and Gaudron JJ in *Theophanous* (n 12) which considered discussion of the 'judicial process' to be 'political discussion' all support the inclusion of the judicature in the scope of the freedom, these cases pre-date the reformulation in *Lange* (n 50) placing emphasis on the constitutional text and the approach in *McGinty* (n 44), and therefore it is likely appropriate not to deal with, nor rely on, these cases in depth *as precedent*: Meagher (n 13) 440. That said, this article argues that they were correct to include the judicature in this manner, and that elements of their reasoning remain persuasive.

[65] *APLA* (n 10) 358 [55] (McHugh J).

[66] Ibid 358.

[67] Ibid 350 [27] (Gleeson CJ and Heydon J).

[68] Ibid 351 [29] (Gleeson CJ and Heydon J).

[69] Ibid 403 [218] (Gummow J); 450–1 [378]–[379] (Hayne J).

[70] Ibid 480 [457] (Callinan J).

In deciding the case, McHugh J found that the impugned cl 139 was invalid as its object and effect was 'to reduce litigation in respect of personal injury in…courts exercising federal jurisdiction'.[71] His Honour did, however, elsewhere explicitly consider the scope of the *Lange* freedom. That portion of the judgment begins in a manner characteristic of McHugh J's influential perception of the implied freedom, framing the analysis by noting that the freedom 'arises by necessary implication from the text of certain sections of the Constitution…[not] from any general notion of representative government'.[72] These 'certain sections' were described as

> necessary to give effect to the requirements of direct elections for the Senate and the House of Representatives in ss 7 and 24 respectively, the involvement of electors in a referendum under s 128, the exercise of executive power by Ministers who are members of the House of Representatives or Senate and thus responsible to the electorate under ss 62 and 64, and the control of supply to the Executive by the Parliament in s 83.[73]

I pause here briefly to emphasise McHugh J's focus vis-à-vis ss 7 and 24. His Honour acknowledges that the freedom is derived not from the sections themselves providing for the Senate and House of Representatives *as institutions*, which are also provided for elsewhere in Chapter I, but from the need to 'give effect' to direct elections as a *process*.[74] Nor did his Honour argue that the freedom was provided for by the relevant Chapters themselves. There is a difference between ensuring that the Houses existed and functioned as provided by the relevant provisions on one hand, and ensuring that their composition was 'directly chosen' by the electorate on the other. The same is true of his Honour's analysis of s 128, and is the reason the executive was included by virtue of its accountability to the electorate.

Nonetheless, by emphasising the derivation of the implied freedom from the totality of these provisions, McHugh J distinguishes 'government' as a term used when describing protected speech in the implied freedom sense from the term 'government' used broadly.[75] The former was described as referring only to 'acts and omissions of the kind that fall within Chapters I, II and VIII of the Constitution'.[76] This, to his Honour, did not mean that the freedom extended to 'the exercise of…judicial power', as it was said not to be tied to the powers granted by the provisions from which the freedom was derived but was rather found elsewhere,

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[71] Ibid 357 [52] (McHugh J).
[72] Ibid 358 [56] (McHugh J).
[73] Ibid 360 [61] (McHugh J).
[74] Ibid 362 [61], [68] (McHugh J).
[75] Ibid 360 [63] (McHugh J).
[76] Ibid.

namely in the unrelated Chapter III.[77] Interestingly, to some extent this appeared to differ from his Honour's earlier emphasis on giving effect to direct elections, as opposed to exercising powers afforded to specific bodies under Chapters I, II, and VIII, being the parts of the *Constitution* containing the provisions from which the freedom is derived.

Justice McHugh did caveat the exclusion of the judicature, however, stating that:

> Discussion of the appointment or removal of judges, the prosecution of offences, the withdrawal of charges, the provision of legal aid and the funding of courts, for example, are communications that attract the *Lange* freedom. That is because they concern, expressly or inferentially, acts or omissions of the legislature or the Executive Government…However, communications concerning the results of cases or the reasoning or conduct of the judges who decide them are not ordinarily within the *Lange* freedom. In some exceptional cases, they may be. But when they are, it will be because in some way such communications also concern the acts or omissions of the legislature or the Executive Government.[78]

That is, commentary regarding the judicature may concern the executive or legislature, and thus would be covered to his Honour only by virtue of concerning the latter two institutions, but communications relating only to the judicature are not sufficiently tied to the relevant provisions to be protected.[79]

Justice Kirby was of the opposite opinion. Whilst his Honour acknowledged that 'consideration by this Court…has been directed to…the legislatures of the representative democracy which the Constitution establishes (Ch I) and the accountable executive government for which it provides (Ch II)',[80] he did not find that the freedom was limited to this by necessity. Rather, Kirby J made explicit reference, inter alia, to the comments of Mason CJ in *Cunliffe* referred to above,[81] before going on to state that the protection of communication regarding the judicature 'cannot be doubted'.[82]

A considerable portion of Kirby J's analysis was directed to whether such a freedom could alternatively be derived from Chapter III.[83] This was conducted with reference, inter alia, to the historical derivation of implications defensive of the judicature from

[77] Ibid.
[78] Ibid 361 [65] (McHugh J).
[79] Ibid.
[80] Ibid 438 [342] (Kirby J).
[81] See above nn 19, 64.
[82] *APLA* (n 10) 439 [346] (Kirby J).
[83] His Honour would hold that it could.

that Chapter,[84] and the 'assumption of a high level of unimpeded communication' underpinning the *Constitution*.[85] This analysis, however, ought not be confused as stating that such a freedom could only be derived independently of that in *Lange*. Whilst, respectfully, at times the lines do appear blurred in his Honour's judgment, the distinction is made clear in principle when Kirby J held '*[e]ven if* this Court were to confine *Lange* to a principle protective of communications about the legislature and the executive, a separate implication of similar or identical scope *would* arise to protect communications necessary to the operation of the Judicature provided for in Ch III of the Constitution'.[86] Reliance on *Lange* and Chapter III were advanced as alternative yet co-existent.

Regarding the former, relevantly for present purposes Kirby J held that 'courts are part of government…[t]hey resolve issues that are, in the broad sense, political, as this case clearly demonstrates',[87] and therefore fall within the *Lange* ambit. In doing so his Honour acknowledged that 'it may be true that re-expressing the *Lange* rule as I would favour, so that it applies to the judicial branch of government as much as to the legislative and executive, would involve a new step'.[88] However, this was followed by the conclusion that this was inherent in, and consistent with, the *Lange* principles as understood.[89]

2 Hogan v Hinch

After *APLA*, it cannot be said that the High Court had reached any conclusion, binding or not.[90] Two Justices had each commented on the matter, and such comments were in disagreement.[91] The High Court would however again consider the question in *Hogan v Hinch*.[92]

In that case, the defendant was charged with contravening suppression orders made under the *Serious Sex Offenders Monitoring Act 2005* (Vic) by publishing information which might enable identification of certain offenders. Among other grounds, Mr Hinch alleged that s 42 of that Act infringed the implied freedom by preventing the ability to '(a) criticise legislation and its application in the courts; and (b) to seek

[84] *APLA* (n 10) 439 [344]–[346] (Kirby J).
[85] Ibid 439 [346] (Kirby J).
[86] Ibid 441 [350] (Kirby J) (emphasis added).
[87] Ibid 440 [347] (Kirby J).
[88] Ibid 444 [358] (Kirby J).
[89] Ibid.
[90] Williams (n 1) 172.
[91] Even if one of those Justices was, largely, in dissent in the overall case.
[92] (2011) 243 CLR 506 ('*Hogan v Hinch*').

legislative and constitutional changes in court practice by public assembly and protest, and the dissemination of factual data concerning court proceedings.'[93]

In considering whether s 42 did infringe the implied freedom, Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ described that communications 'concerning the exercise of judicial power stand apart in the sense discussed in detail by McHugh J in *APLA*'.[94] Their Honours reproduced McHugh J's comments that courts, judges, and the exercise of judicial power were not covered by the freedom, and noted again that acts which related to the courts are protected only by virtue of their relation to other arms of government.[95] A majority of the Court thus appeared to prefer McHugh J's analysis over that of Kirby J. Insofar as the matter has not received consideration in the High Court since, it appears that the approach represents the Court's current orthodoxy.

However, despite this apparent approval, the analysis was not actually applied but was instead merely noted. It was certainly not analysed critically. Indeed, the application of the implied freedom to the judicature was once again not actually at issue in *Hogan v Hinch*. Rather, the defendant submitted that the relevant communications *did* concern the legislature and executive.[96] The majority 'accepted that an affirmative answer should be given to' the first *Lange* question.[97] The Court would hold that the legislation causing the burden, being incidental in its inhibition of the speech characterised by the defendant, satisfied the second limb of the *Lange* test, and therefore was upheld.[98] Nonetheless, there had been a burden found, rendering the comments regarding *APLA* best considered akin to *obiter*.

As a result, the ramifications of *Hogan v Hinch* are mixed. On one hand, the majority lent credence to McHugh J's view in *APLA*, even if only cursorily. However, on the other, there was not an extensive analysis or actual application of these principles. To that extent, even *Hogan v Hinch* cannot be said to answer our present question.[99] After considering the findings of the High Court, therefore, we are left only with cases

[93] Ibid 527 [2] (French CJ).
[94] Ibid 555 [92] (Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ).
[95] Ibid 555 [93] (Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ).
[96] Ibid 556 [94] (Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ).
[97] Ibid 556 [95] (Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ).
[98] Ibid 556–7 [96]–[100] (Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ).
[99] Although even if it were the case that the comments in *Hogan v Hinch* (n 92) formed part of the ratio, the argument made in this article would remain in its current form. In practice, however, the High Court might then need to expressly depart from this previous reasoning or reopen its earlier findings.

in which points made were not necessary for the decisions, and therefore 'cannot be authority'.[100]

B *Notable Appellate Court Decisions*

Judicial consideration of the present question has also arisen in appellate courts on various occasions both before and after *APLA*'s influential discussion.

1 *Pre*-APLA

The relationship between the judicature and the implied freedom came before the New South Wales Court of Appeal several years before the High Court heard *APLA* in *John Fairfax Publications Pty Ltd v Attorney-General (NSW)*.[101] In that case, the NSW Attorney-General had charged Fairfax with contempt for publishing articles including allegations regarding a man faced with impending drug charges. On appeal, Fairfax sought declarations of invalidity for the contempt provisions of the *Supreme Court Act 1970* (NSW).[102]

Chief Justice Spigelman (with whom Priestley JA agreed regarding 'the *Lange* point')[103] responded directly to the submission that 'judges and courts are…bodies about whom the freedom could be exercised',[104] holding that the 'conduct of courts is not, of itself, a *manifestation of* any of the provisions…upon which the freedom is based.'[105] That is, much like McHugh J would find in *APLA*, the judicature of Chapter III stood separately from the structures *created by* the provisions elsewhere in the *Constitution* which are relied upon to derive the freedom and therefore not protected.

The reliance by the appellant on cases outlining the public interest in communications regarding public officials, including the judiciary, was distinguished as applying for the purposes of the qualified privilege defence, rather than to the implied freedom.[106] Moreover, the fact that Chapter III could be amended by referendum, and therefore may be linked to s 128, was deemed 'too tenuous',[107]

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[100] *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506, 579 [198] (Edelman J); *CSR Ltd v Eddy* (2005) 226 CLR 1, 11 [13] (Gleeson CJ, Gummow, and Heydon JJ).
[101] (2000) 181 ALR 694 ('*Fairfax*').
[102] Ibid 696 [2].
[103] Ibid 721 [157] (Priestley JA).
[104] Ibid 709 [82] (Spigelman CJ).
[105] Ibid 709 [83] (Spigelman CJ) (emphasis added).
[106] Ibid.
[107] Ibid 710 [84] (Spigelman CJ).

as in theory any matter may be the subject of a constitutional amendment.[108] His Honour did, however, accept that the institution and conduct of proceedings by the Attorney-General would be a 'governmental and political matter' for the purposes of the freedom.[109] Ultimately, however, the relationship between the judicature and the implied freedom was not determinative to the appeal, which was nonetheless successful in invalidating ss 101A(7), (8)(a), and (9).[110]

The Victorian Court of Appeal was faced with similar questions in *Herald & Weekly Times Ltd v Popovic*,[111] where a Deputy Chief Magistrate sought damages for libel in response to an article which allegedly imputed that she subverted the law, bullied a prosecutor, and warranted removal from office. Winneke ACJ expressed the view that criticism of the performance of a magistrate, even if strong enough to imply unfitness for office, 'is not a discussion of government or political matters',[112] referring to the grounding of the freedom in the text of the *Constitution* and its enabling of communication allowing for free and informed electoral choice.[113] His Honour would go on to discuss *Fairfax*, outlining that 'the conduct of courts "is not, of itself, a manifestation of any of the provisions relating to representative government upon which the freedom is based", the conduct of individual judicial officers is carried out independently of the legislative and executive', and that more general relations between the judicature and other government branches

> do not carry with them the implication that a discussion about the discharge by a judicial officer of his or her function in a particular case is a discussion concerning political or government matters in the relevant sense…. Such comment and criticism could, in my view, have no impact or influence upon the choice of [elected] representatives.[114]

To that extent Winneke ACJ more directly dealt with the content of the provisions grounding the freedom and the need to give effect to those *processes*,[115] being direct election, as opposed to reasoning simply that the judicature itself was not provided

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[108] It might be argued that the fact something is already within the *Constitution* may provide a greater nexus to the power of referendum to amend that *Constitution*, as opposed to a vague notion that "anything" could be subject to a referendum because anything could in theory be added to it. This would capture Ch III and the judicature. This question remains outside the scope of this article, however.

[109] *Fairfax* (n 101) 713 [107] (Spigelman CJ). This appears again to have been reflected in McHugh J's judgment in *APLA* (n 10) and the caveat discussed above: see above n 78.

[110] *Fairfax* (n 101) 718 [134] (Spigelman CJ); 722 [162] (Priestley JA).

[111] (2003) 9 VR 1 ('*Popovic*').

[112] Ibid 8–9 [6] (Winneke ACJ).

[113] Ibid 9 [7] (Winneke ACJ).

[114] Ibid 10 [9] (Winneke ACJ).

[115] See above n 74.

for by the provisions from which the freedom was derived.[116] This is, as jurisprudential development would prove, the correct approach. In drawing this conclusion however, Winneke ACJ expressed the significant necessary assumption that such commentary could 'have no impact or influence' on the exercise of voting powers.[117] As this article will argue,[118] this assumption is, respectfully, misplaced, and renders his Honour's conclusion *non sequitur*.

That said, the caveat which would later arise in McHugh J's *APLA* reasoning was to follow, with his Honour accepting that communication which 'impacts directly or indirectly on the executive government itself…may well bear the characteristics of one which is capable of informing and shaping the views of the electors about the performance of their elected representatives'.[119]

The reasoning of Winneke ACJ was largely agreed with by Warren AJA, who also appropriately explained that the fact the separation of powers was often referred to as 'three arms of government' did not mean that the *Lange* doctrine extended to the judiciary.[120] Her Honour engaged in both an exegesis of *Lange* — where 'repeated use of the expressions "government" and "politics" [were] always in a legislative or executive context, never…a judicial one'[121] — and a historical exploration of the 'separation of powers' itself to demonstrate a difference in the nature of the 'objective'[122] judiciary from that of the other branches of 'government'.[123] Her Honour ultimately rejected the inclusion of the judiciary in the defence of qualified privilege, but did so with significant reference to policy grounds and political theory, specifically the need to maintain confidence in an independent judiciary, rather than in reliance on the terms of the *Constitution*.[124] As *McGinty* and other cases had demonstrated, this approach would not be appropriate in the context of the implied freedom, grounded in the text and structure of the document.[125] Moreover, cases have been clear that qualified privilege is not necessarily co-extensive with the implied freedom.[126]

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[116] Cf Spigelman CJ in *Fairfax* (n 101): see above n 105.
[117] *Popovic* (n 111) 10 [9] (Winneke ACJ).
[118] See below Part IV.
[119] *Popovic* (n 111) 10–11 [10] (Winneke ACJ).
[120] Ibid 103 [500] (Warren AJA).
[121] Ibid.
[122] Ibid 104 [503] (Warren AJA).
[123] Ibid 103 [501] (Warren AJA).
[124] Ibid 105 [507] (Warren AJA).
[125] See above nn 45–49, 55.
[126] *Fairfax* (n 111) 709 [83] (Spigelman CJ); *Coleman v Power* (n 4) 79 [199] (Gummow and Hayne JJ); *Peek* (n 63) 218 [66] (Besanko J).

Justice Gillard took an alternative approach. To his Honour, even though communications regarding a magistrate acting in that capacity were not political, they were still 'governmental' and could be covered by the implied freedom.[127] His Honour took the term 'political and governmental' and reasoned from the meaning of 'government'[128] that the administration of justice is a vital component of said government,[129] and therefore the public has a 'real and legitimate interest' in knowing of the conduct of this 'vital and essential ingredient in the system of government'.[130] In doing so, his Honour concluded, albeit provisionally, that the information fell 'within the meaning of the *Lange* defence'.[131]

2 *Post*-APLA

The decisions of intermediate courts after *APLA* further demonstrate that the question of the inclusion of the judicature in the implied freedom remained, and remains, alive.

In *Catch the Fire Ministries Inc and Ors v Islamic Council of Victoria Inc*,[132] Neave JA briefly referred to *Popovic*, noting that commentary on judicial officers was held as generally not covered by the freedom, except insofar as it affects the executive government.[133] This was not, however, applied but was merely referred to descriptively.

The extension of the freedom to the courts was expressly considered by the Full Court of the Supreme Court of South Australia in *Peek*. There, both Debelle J and Besanko J (with whom Duggan J agreed) decided that the freedom did not encompass the judicature. Justice Debelle began his consideration of the implied freedom by recognising that the 'expression "communication about a government and political matter"…is imprecise'.[134] However, his Honour went on to state that '[a]lthough the judiciary is one of the three arms of government, it does not follow that remarks concerning a court…concern[] government and political matters'[135] as the implied freedom 'was grounded on provisions in the *Constitution* which

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[127] *Popovic* (n 111) 53 [252]–[253] (Gillard AJA).
[128] Ibid 52 [249] (Gillard AJA).
[129] Despite his Honour taking, respectfully, what has been now shown to be an incorrect jurisprudential approach, the reasoning that the judiciary *does* implement the powers provided for by the relevant provisions of the *Constitution*, and the fact that the role of the judiciary in the administration of justice *may* influence electoral choice, render Gillard AJA's reasoning of persuasive value: see below Part IV.
[130] *Popovic* (n 111) 53 [250] (Gillard AJA).
[131] Ibid 53 [253] (Gillard AJA).
[132] (2006) 15 VR 207.
[133] Ibid 265 [207] (Neave JA).
[134] *Peek* (n 63) 199 [6] (Debelle J).
[135] Ibid 199 [7] (Duggan J).

concerned the legislative and executive arms of government as well as…referend[a].'[136] This was stated with reference to McHugh J's judgment in *APLA*,[137] and appears reminiscent of the analysis of Spigelman CJ in *Fairfax*.[138] It also subsequently involved describing that Kirby J in *APLA* 'fail[ed] to give due weight to the grounds on which the implied freedom rests'.[139] His Honour also provided his support for the reasoning of Winneke ACJ in *Popovic* and Besanko J in *Conservation Council of SA Inc v Chapman*,[140] a case decided prior to *APLA* which broadly agreed with *Fairfax* to find that the fact a publication referred to the Federal Court and court orders was insufficient to ground constitutional protection.[141]

Justice Besanko would reiterate his own view from *Chapman* that judicial power is neither an element of representative nor responsible government as:

> Judges are not elected; nor do they advance or apply policies in the course of discharging their duties. They do not respond to criticisms of particular decisions they may make. Leaving aside the power of removal, they are not accountable to parliament for those decisions…[they are] not themselves elements of representative or responsible government.[142]

His Honour also dealt with the contention that the communication in that case was implicitly about the legislature or the executive, as it was criticism of the court system which can only be addressed by the other arms of government.[143] His Honour held, however, that the call for remedial action was not a reasonable inference from the specific communication before the court.[144] Nonetheless, it was Besanko J's opinion that the relevant communications were not about the court system, and therefore these comments were once again not determinative of the present question.[145]

The New South Wales Court of Appeal returned its mind to the implied freedom in two 2018 hearings which considered a judgment of the Supreme Court that found the applicant guilty on three charges of contempt.[146] The first hearing, before

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[136] Ibid.
[137] Ibid 199 [7]–[8] (Duggan J).
[138] See above n 105.
[139] *Peek* (n 63) 200 [9] (Duggan J).
[140] (2003) 87 SASR 62 ('*Chapman*').
[141] *Peek* (n 63) 201 [10], [11], [18], [20] (Debelle J).
[142] Ibid 226–7 [95] (Besanko J).
[143] Ibid 227 [98] (Besanko J).
[144] Ibid.
[145] Ibid 227 [96] (Besanko J).
[146] *Prothonotary of the Supreme Court of New South Wales v Shane Dowling* [2017] NSWSC 664.

Leeming JA, was an application for bail.[147] At first instance, Wilson J had referred to *Fairfax* to state that '[d]iscussion of or comment upon the role of judges or the work that an individual judge has undertaken could not be regarded as communication concerning political or government matters'.[148] Justice Leeming was not so ready to accept that the answer was this straightforward. Rather, his Honour noted that 'it is reasonably arguable that the relationship between the so-called implied freedom of political communication and the three counts on which Mr Dowling has been convicted is a little more complex'.[149] His Honour would go on to outline:

> I do not regard communications…concerning the judicial officers of a State court, as necessarily outside the scope of the implied freedom. *Nationwide News* needs to be read carefully, predating as it does the reformulation in *Lange*, but it concerned the conduct of a federal industrial tribunal. More relevantly, I respectfully agree with Winneke ACJ that political communication for the purposes of the immunity is capable of extending to the discussion of a judicial officer of a State court. I consider there is at least a reasonable argument that may be made contrary to the *in limine* rejection of the *Lange* "defence".[150]

At this point his Honour concluded that 'the submissions based on *Lange*…may be of greater complexity than has hitherto been addressed',[151] yet did not find that this conceptual question would reasonably impugn the convictions themselves.[152]

The points regarding the implied freedom were taken up in the appeal itself.[153] Justice Basten, with whom Meagher JA agreed, did not consider whether communications regarding the judicature were captured by the freedom. Rather, his Honour concluded that stripping the powers to prevent contempt would 'deprive the court of an essential characteristic of a superior court of record'.[154] Thus 'reliance on the implied freedom [was] misplaced'.[155] Justice Macfarlan did engage with the implied freedom, referring to *Hogan v Hinch*,[156] its approval of McHugh J's

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[147] *Dowling v Prothonotary of the Supreme Court of New South Wales* [2018] NSWCA 233.
[148] *Prothonotary of the Supreme Court of New South Wales v Shane Dowling* [2017] NSWSC 664, [57] (Wilson J).
[149] *Dowling v Prothonotary of the Supreme Court of New South Wales* [2018] NSWCA 233, [23] (Leeming JA).
[150] Ibid [24] (Leeming JA).
[151] Ibid [30] (Leeming JA).
[152] Ibid.
[153] *Dowling v Prothonotary of the Supreme Court of New South Wales* (2018) 99 NSWLR 229.
[154] Ibid 234 [15] (Basten JA).
[155] Ibid 234 [16] (Basten JA).
[156] Ibid 252–3 [107] (Macfarlan JA).

observations in *APLA*,[157] and the opinion of Winneke ACJ in *Popovic*.[158] Thus, to his Honour, as the relevant communications concerned judicial officers, they were not protected by the implied freedom based on those authorities alone.[159] His Honour did not however, respectfully, engage with the question in any more depth than brief reference to precedent.

IV A Principled Application of Present Jurisprudence

Under present orthodoxy, it appears that there are three main contentions against including the judicature within the ambit of the implied freedom. The first is that the judicature is not a manifestation of the provisions or chapters which ground the freedom (described as '[an] implication arising from ss 7, 24, 62, 64 and 128'[160]). The second is that the judicature is not part of representative and responsible government (as it is not elected nor responsible to the elected representatives, save for the power of removal). The third is that communications about the judicature without direct reference to the legislature or executive will not rationally bear on electoral choice. Through the lens of *APLA*, this Part will first address these three concerns responsively. A fourth, albeit less prominent, contention may be derived from Steward J's recent comments in *Ravbar* which lamented that the implied freedom had become 'too broad'.[161] That is, that the inclusion of the judicature is a continuation of the 'ongoing march of the implied freedom'[162] and would leave its ambit impermissibly wide. Whilst this Part respectfully considers this contention to be less persuasive than those noted above, it will also address Steward J's concerns before turning to the remaining contentions.

The argument made subsequently in this Part is not that a novel derivation must be made from Chapter III,[163] but rather that the requirements of the relevant constitutional provisions do necessitate protection of the judicature. Indeed, as Gageler J (as the Chief Justice then was) alluded to, the question turns on if the relevant communications 'are capable of bearing on electoral choice',[164] which the judicature is particularly likely to do, rather than if the communications relate to the

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[157] Ibid.
[158] Ibid 253 [108] (Macfarlan JA).
[159] Ibid 253 [109] (Macfarlan JA).
[160] *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537, 586 [152] (Gordon J) ('*Farm Transparency*').
[161] *Ravbar* (n 8) [273] (Steward J).
[162] Ibid [275] (Steward J).
[163] As argued for by Kirby J in *APLA*.
[164] *Brown v Tasmania* (2017) 261 CLR 328, 384 [188] (Gageler J) ('*Brown v Tasmania*'); *Farm Transparency* (n 160) 569 [88] (Gageler J).

institutions of Chapters I, II, and VIII as a prerequisite or if the judicature is itself part of representative and responsible government.

A *Judicial Reservations Addressed*

1 *The Steward J concern: unacceptable breadth?*

As noted above, Steward J in *Ravbar* once again raised doubts as to the correctness of the implied freedom. This article addresses one specific concern raised by his Honour, being that the freedom has grown 'too broad, ungainly and uncontrollable'.[165] It does so not to mount a fully formed defence of the freedom itself, or to respond to every point made by his Honour, but as concerns about unacceptable breadth may similarly arise when considering if the freedom extends to the judicature.

In a section of the judgment headed '*Its breadth is problematic*', Steward J characterises a broad implied freedom as 'just not sustainable'.[166] This is because

> even outside of the electoral process it must be accepted that politics touches, whether directly or indirectly, upon so many diverse issues; it is a boundless field of discourse. Any law which burdens, howsoever lightly, that vast field of political communication potentially presently triggers an application of the implied freedom.[167]

But contrary to this being a reason for confining the scope of the freedom, it is an apt indication of why the breadth is in fact so necessary. If one accepts, as the Court has for decades and so this article will continue to, that the implied freedom exists generally, then to constrain what may enliven its operation while simultaneously accepting that the direct choice is informed by a wider breadth of communications is to fly in the face of the very touchstone of necessity vis-à-vis the relevant provisions that is so central. Either the provisions by necessity require communication on matters which inform the choice (and are broad), or they do not ground any necessary binding freedom at all. There cannot be a middle ground where *some* communications which influence the process necessitated are protected. This may be a question of discerning just what could influence that choice, and not everything can, but it is not a reason to rely on the breadth of influential communications to restrict the ambit of the freedom.

Justice Steward's concern for breadth also arises in the practical contention that '[i]t is difficult, with respect, to see how any of the foregoing impugned laws might have

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[165] *Ravbar* (n 8) [272] (Steward J).
[166] Ibid [273] (Steward J).
[167] Ibid [277] (Steward J).

substantially affected the *Constitution*'s guarantee of a direct choice by the people in a federal election'.[168] Even accepting a broad conception of the implied freedom, this might be a valid contention in certain cases regarding certain laws.[169] But it speaks to the specific laws in question. It may even speak to the correctness of previous decisions regarding the implied freedom. It does not, however, at the level of law or principle, demonstrate error in a broad understanding of what might actually 'substantially affect[] the *Constitution*'s guarantee of a direct choice'. It certainly is not a contention that demonstrates the judicature cannot fall within this scope, if it is shown that the communications in question do bear on that direct choice.

And so, taking the above reasoning, one is then able to agree fully with the reasoning of Steward J, but come to a different conclusion:

> Naturally, there are many who may think that there is much to admire about an implied freedom with this breadth of application. There are no doubt many who would say that such a guarantee of freedom enhances and protects our democratic institutions. But the merits of the implication are not what matters. What matters is whether it is necessarily mandated by the *Constitution*…[170]

And what is necessarily mandated by the *Constitution* is a broad conception of communications which enliven the implied freedom, not only to protect democratic institutions, but to protect the democratic processes enshrined therein.[171]

A concern is then raised that this means in many cases a burden is either easily discerned or is conceded to exist.[172] Justice Steward, citing the observations of Heydon J in *Wotton v Queensland*,[173] laments the fact that the trend of the burden limb being satisfied 'meant that the second limb of *Lange* — being that of justification — had thereby assumed much greater prominence in the jurisprudence

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[168] Ibid [280] (Steward J).

[169] Save, perhaps, for the introduction of the "substantially" qualifier, which might better be considered, as appears to be orthodoxy, at later stages of the implied freedom inquiry. Indeed, in the cases his Honour refers to, this is how the Court reasoned.

[170] *Ravbar* (n 8) [283] (Steward J).

[171] This article will not engage in depth with Steward J's contention at [284] regarding 'necessity' that '[t]he capacity of a democratic society to preserve for itself its own shared values explains why our democratic institutions were able to thrive for so long without the implied freedom. In that sense the implied freedom is a remedy that we have never really needed; it is a constitutional device designed to battle imaginary demons', except to say that various examples of democratic backsliding throughout the world and throughout history would tend to indicate otherwise. See, eg, Brett Milano, 'When democracies backslide', *Harvard Law Today* (online, 25 March 2025) <https://hls.harvard.edu/today/when-democracies-backslide/>.

[172] *Ravbar* (n 8) [279] (Steward J).

[173] (2012) 246 CLR 1, 23 [53] (Heydon J).

of this Court and had led to "sharp divisions".'[174] In response to this argument, this article gratefully adopts the persuasive reasoning of Gageler CJ:

> Neither the breadth of the concepts employed, nor the lack of unanimity amongst members of the Court…as to…the third stage…detracts from the orthodoxy of [the implied freedom] inquiry…Unresolved differences as to how the third stage of the inquiry is best undertaken cannot undermine the common ground upon which those differences have emerged — that the inquiry must be undertaken.[175]

Or, put another way adjusted for present purposes, the emerging doctrinal differences regarding structured proportionality do not provide justification to limit the breadth of the implied freedom or raise concerns for the impact of such breadth.

It must also here be noted that there are various practical matters which stand in the way of any potential floodgates-style argument that a broad conceptualisation of the freedom is problematic or unsustainable, as it will lead to litigants raising the issue in a wide variety of cases which do not warrant it, or will devolve into a mass of cases requiring the Court to apply its third stage analysis. The existence of the special leave mechanism; the ability to refuse, dismiss, or summarily remit cases in the Court's original jurisdiction; the costs involved in running such an argument (and even more so in doing so unsuccessfully or vexatiously); and the obviousness in many cases of the third stage analysis (such as where the burden is enlivened yet trivial) to either the potential applicant or the Court, would all work to constrain recourse to the implied freedom in such a scenario. The practical experience of the United States of America, a context correctly differentiated by his Honour,[176] is also telling. The First Amendment protects speech generally, without Australia's limitation to 'political communication',[177] and is therefore broader even than Steward J's description of the 'boundless field'[178] of political discourse. Yet the United States court system is not overrun with First Amendment litigation, often for some of the reasons cited above in relation to the hypothetical in Australia.

Respectfully, therefore, even leaving aside Steward J's scepticism as to the implied freedom more generally, it cannot be said that concerns for unacceptable breadth militate meaningfully against the judicature's inclusion in its scope. Indeed, if the question to be asked is "where should the line be drawn?" in terms of the scope of the implied freedom, then the answer is clear: somewhere, yes, but plainly not here.

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[174] *Ravbar* (n 8) [282] (Steward J).
[175] Ibid [28]–[29] (Gageler CJ).
[176] Ibid [283] (Steward J).
[177] *United States Constitution* amend I.
[178] *Ravbar* (n 8) [277] (Steward J).

2 *The McHugh J approach: processes or institutions?*

Given the status of McHugh J's comments in *APLA* — both as High Court *dicta* and their having been met with approval in later decisions — that case stands as perhaps the largest obstacle to this paper's propositions. To a significant extent by addressing that reasoning one may simultaneously address the appellate cases his Honour appeared to follow and those which later relied on *APLA* as authority, insofar as the reasoning appears largely consistent.[179] Therefore, and most respectfully, we will now turn to consider the correctness of his Honour's reasoning in the modern context and noting subsequent jurisprudential developments.

This article does not cavil with McHugh J's statement that 'the extent to which communications…are protected'[180] is dictated by the provisions which ground the freedom, nor that the limitation is to that which is '*necessary*' for the 'effective operation' of what those provisions provide for.[181] The issue, it appears, is one of interpreting whether communication regarding the judicature is so *necessary* for those provisions.

As alluded to above,[182] in seeking to exclude the judicature, McHugh J, with respect, appears to conflate, or at the least take, two approaches to interpreting the derivation of the freedom and its scope, even where appropriately maintaining the textual grounding required. His Honour initially claims that the freedom protects that which is provided for by the relevant provisions of the *Constitution* — being a direct election by the people of their 'representative' government — and thus protects what is required to 'give effect' to that *process*.[183] This, naturally, would encompass the free flow of information which may bear on electoral choice, as accepted in other decisions of the High Court,[184] and would leave our present enquiry focused on the third contention above regarding electoral choice.

His Honour then, however, restricts this operation to that which directly relates to the *institutions created by* the Chapters containing these provisions (or, on a more

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[179] Considering the contentions put forward by various decisions of state and federal courts is a considerably easier exercise having addressed the reasons of McHugh J in *APLA* in depth, insofar as cases which preceded *APLA* have largely seen their reasoning adopted in that judgment, and cases following *APLA* largely rely on it as authority to outline the supposedly applicable principles.
[180] *APLA* (n 10) 358 [56] (McHugh J).
[181] Ibid 359 [57] (McHugh J); *Lange* (n 50) 561 (emphasis added).
[182] See above nn 74–77.
[183] *APLA* (n 10) 360 [61] (McHugh J).
[184] See, eg, above n 164.

generous reading, the institutions created by the provisions themselves), being the specific elements of the system of government:[185]

> *Lange* refers to "political or government matters". But those words must be read in the context of the decision. That context leaves no doubt that the term "government" is used to describe acts and omissions of the kind that fall within Chs I, II, and VIII …
>
> …
>
> *Lange* confined the scope of freedom of communication by requiring a relationship of necessity between the provisions giving rise to the freedom and the communication to be protected. The provisions that the Court identified as giving rise to an implied freedom of communication necessitate some level of communicative freedom in Australian society about matters relevant to executive responsibility and an informed electoral choice. The ends required the means. The requirement of necessity indicates that the communication must bear a close relationship to the Ch I, II and VIII sections from which the protection flows.

This therefore begins to shift the goalposts for inclusion within the implied freedom. Rather than restrict the analysis to the third argument against the inclusion of the judicature outlined above, McHugh J introduces a subject matter requirement that underpins the additional first two arguments above regarding the specific provisions grounding the freedom and notions of 'responsible government'. Essentially, his Honour confines what must "inform" electoral choice only to matters relating to those specific bodies to which the relevant provisions relate and their powers. This is so even where it is couched in the language of only having to 'bear a close relationship' thereto.[186] This reflects the contentions made earlier in *Fairfax* and *Popovic*, and would appear to inform those made later in *Chapman* and *Peek*, regarding the matters relevant being those flowing *from* the provisions.[187]

However, it is, and was, well-trodden ground that the freedom was derived from the 'requirement for free and direct elections' to which McHugh J referred two paragraphs prior. This requirement not only grounded the freedom but defined its scope.[188] Yet McHugh J, respectfully, appears to confine the scope of a free election, even if only in the 'constitutional sense', to an election where votes are only cast based on information that his Honour deemed as relevant and necessary insofar as

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[185] *APLA* (n 10) 360–2 [63]–[68] (McHugh J).
[186] Ibid 362 [68] (McHugh J).
[187] To that extent, the responses offered here also relate directly to the reasoning of, and weight afforded to, those cases.
[188] *APLA* (n 10) 360 [61] (McHugh J).

it relates to the relevant constitutionally-created institutions. That is, to his Honour, the communication may only validly, or constitutionally, influence electoral choice if it 'bear[s] a close relationship to the Ch I, II, and VIII sections from which the protection flows'.[189] This however falls victim to the same issues as the aforementioned appellate judgments insofar as it neglects that to 'give effect' to the *process* of direct election, the relevant information flows *to* the process provided by those provisions. The fact it does not relate to the institutions of the relevant chapters does not mean it cannot legitimately, and constitutionally, inform that process. Taking the *McGinty* approach, it is imperative to focus on what is *required* by the text of the specific provisions, rather than trying to restrict the content of that requirement to what is 'governmental', even if in a constitutional sense.[190]

The question of 'what is necessary to give effect to the term "directly chosen by the people" under ss 7 and 24?'[191] is not the same as 'what can the elected representatives do once they are "directly chosen by the people" under the relevant Chapters?".[192] It is not the acts or omissions of the bodies created by the *Constitution* which are most relevant, but rather the acts and rights specifically provided for by the sections of the *Constitution* from which the freedom is derived, namely the direct election of representatives *by the voters themselves*. The freedom is not derived from the aspects of those sections pertaining to the nature of the bodies. It is derived from the nature of the mechanism by which they are elected and its requirement of the free flow of information. Thus, questions of whether the judicature is related to the institutions of Chapters I, II, and VII, or is part of representative government, are relevant only insofar as they impact the likelihood that communications about the judicature bear on electoral choice relating to those institutions, not because they form an excluding pre-requisite of the implied freedom.

The effective function of the 'free and informed' decision-making relies on a wider conception of 'political' matters than is accepted by McHugh J's judgment, and by extension those in *Fairfax*, *Popovic*, *Chapman, Peek*, and in the cases which cite these authorities. The structures provided for in ss 7, 24, 64, and 128 necessitate as much. They provide the structure and *mechanism* required, being a direct and free choice, but not the content which animates them. As Adrienne Stone argues, perhaps this is a limitation of the textual derivation of Australia's freedom in this area,[193] yet

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[189] Ibid 362 [68] (McHugh J).
[190] See above nn 44–49.
[191] Being the specific phrase within, in particular, ss 7 and 24 from which the freedom is derived.
[192] Which would accord more closely to the reasoning that the relevant communications must relate to the institutions created by the provisions and the powers they may exercise.
[193] Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 696.

nonetheless it is a necessary consequence thereof that a free and informed choice *in the constitutional sense* be informed by more than just the specific enumerated powers or institutions of the legislature and executive.

Indeed, in *APLA*, McHugh J notes that the 'ends require the means' and accepts that the freedom exists specifically to enable an informed electoral choice.[194] Even the imposition of the 'constitutional' qualifier regarding the system of government does not speak to the nature of a direct choice made by a voter as necessitated *by the Constitution*. At no point in ss 7 and 24 is the qualifier 'on grounds based in the structures they are voting for' added to the requirement that representatives be 'directly chosen' by the people.[195] To give effect to this text is to ask, as modern jurisprudence has, if the content of a communication may find itself within this political mechanism with causative or disruptive effect.[196] To protect the function of the provisions means that one must protect the mechanism *as such*. It may be that the *Constitution* might not protect speech which might enhance the qualities of a voter leading to an 'enlightened and well-reasoned ballot',[197] yet it is clear that it does protect that which may *influence* the specific casting of that vote.

Even accepting a requirement of some relation to the systems of government required by the *Constitution*, it is, respectfully, not for the Court to determine the basis on which an elector might exercise their vote, or what information they may require to make that choice. To artificially restrict the freedom in such a way represents judicial incursion into the validity of the electoral choices made by each individual voter, and undemocratic judicial dictation of what information is necessary, or indeed valid, to ground an electoral decision. An elector is not required to exercise their right to vote based on considerations relating to Chapters I, II, and VIII, and therefore it is unrealistic and inappropriate to say that only information of that kind bears the sufficient 'necessity' to protect the electoral mechanism. If this approach requires a broad conception of the relevant communications, then it is argued that this is inherent in the provisions of the *Constitution* relied upon and the derivation of the freedom itself.

One need not resort to the absolutist position that *all* communication is 'capable' of bearing on electoral choice to further the proposition that communication regarding the judicature would fall within the ambit of such a threshold by virtue of that

[194] *APLA* (n 10) 362 [68] (McHugh J).
[195] *Constitution* ss 7 and 24.
[196] See, eg, above n 164.
[197] Meagher (n 13) 451.

relation.[198] As has been and will be outlined, even if '[c]ourts and judges and the exercise of judicial power are not themselves subjects that are involved in representative or responsible government in the *Constitutional sense*',[199] that does not mean that discussion of those matters cannot, or indeed are unlikely to, bear influence on the free and direct election of that government. Discussion of the judicature — based on its position in the structure of government, the power it possesses and exercises, and the consequences of its actions — is acutely likely to influence this direct choice even on a more limited reading.[200] In that sense, it can be considered independently without resorting to the wider proposition.

Thus, the phrase 'directly chosen by the people' must be read as imparting a wider protection than merely for communications relating to the structures created by the provisions in which it is found. This no doubt extends to communications about the judicature. To take the approach *APLA* appears to stand for is to introduce one of two assumptions: either the assumption that the only electoral choices that are protected by the implied freedom are those based on information relating to the Chapters grounding the freedom, or that only information relating to the Chapters grounding the freedom could influence any electoral choice. The former, it is argued, is jurisprudentially incorrect. The latter, meanwhile, falls down on the facts. It therefore becomes clear that the first two contentions described above fall away, or are at least subsumed by the third contention. Whether a certain relationship exists with the specific provisions of the *Constitution*, or whether a body is part of 'responsible government', will be relevant to the extent it informs the influence of electoral choice, not as a mandatory prerequisite. At the end of this section, therefore, we are left to consider more closely the third and final argument.

B *Grounds for a Novel Application*

Having provided responsive reasoning to previous consideration of this issue, this section shall provide active rationale for why the judiciary should, or perhaps more strongly does, fall under the implied freedom.[201]

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[198] Though to some extent, as recognised somewhat ironically for present purposes in the concerns raised in judgments such as that of Steward J in *Ravbar*, this may be a necessary logical conclusion of implied freedom jurisprudence.

[199] *APLA* (n 10) 361 [66] (McHugh J) (emphasis added).

[200] Zoë Guest, 'The judiciary and the freedom of political communication: the protection of judgment on Australia's judges' (2006) 17 *Public Law Review* 5, 8. See also below Part IV(B)(1).

[201] It also without further comment adopts the points made by Leeming JA in *Dowling v Prothonotary of the Supreme Court of New South Wales* [2018] NSWCA 233, as well as his Honour's reference to *Nationwide News* and similar holdings.

1 *Propensity to bear on electoral choice*

To this juncture the point has been laboured that the need to 'give effect' to the mechanisms provided for in the *Constitution* means that the scope of the implied freedom must apply, where relevant, to matters which may bear on electoral choice. This section will outline why discussion of the judicature is inherently likely to bear on this choice.

It is also necessary to briefly note that the fact that that the judicature is not representative does not undermine the following analysis insofar as the reliance placed by this article when discussing the "electoral choice basis" is on the ability for communications about the judicature to affect the electoral process for *other* branches of government which are representative. The free flow of information about the judicature is required to allow for the free flow of full information informing the election of other branches of government. The relevant structural imperatives need not translate directly *to* the judicature to arise in their appropriate contexts by virtue of consideration *of* the judicature.

(a) Political nature of court functions

Whilst it is no doubt the case that subject matter will not fall under the implied freedom merely on account of being 'political' in the general sense of the term,[202] actions of the courts shall generally take on a constitutionally 'political' element in that they are likely to bear on electoral choices when discussed in a 'public' sense. The work of the Court will, in almost all its manifestations, have political consequences the nature of which are sufficient to inform electoral outcomes, even if on a small scale or to specific individuals. This means that comments on these actions, both in terms of their correctness and their normative desirability, lead to political consideration.

This is perhaps most clear in constitutional contexts, owing to the relation to the allocation of State power and their subject matter more generally. For a clear example one need only look to the recent decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*.[203] The decision to overrule *Al-Kateb v Godwin*[204] may not have been made for political reasons or as part of the political process, but discussion of the decision and its ramifications would no doubt be political both in the traditional sense and in that it could rationally affect voting decisions. These discussions were tied to matters of migration and the treatment of

[202] Noting the textual grounding of the freedom makes no reference to 'political' subject matter, but rather only the mechanism of direct choice.
[203] (2023) 97 ALJR 1005 ('*NZYQ*').
[204] (2004) 219 CLR 562.

aliens in terms removed from discussion of the government and focusing solely on the effect of the *decision* on society.[205] Discussion of the correctness of the decision itself then also spoke to the efficacy of previous government policy and legislation, in much the same way that any court decision overruling or denying policies would, and more broadly any judicial decision on legislation implemented by the government could.[206] Discussion of the role of the Court spoke to the function of the system of government and was fundamental to the way that governments operate within the legal system *as adjudicated by the judicature*;[207] the way that new legislation was subsequently imposed;[208] and so on and so forth. Even in instances these discussions did not specifically relate to the executive or legislature in the vein of McHugh J's caveat in *APLA*,[209] they were intrinsically political in nature and bore the capacity to influence consideration of the apparatus of the state. This applied to all forms of communication; discussion of the legal sphere, discussion of the decision itself, discussion of the ramifications, and discussion of the role of the Court in the migration realm all manifested in ways that were likely to influence future electoral decisions. Granted, cases such as *NZYQ* are more extreme, yet the principles remain the same for almost all constitutional cases, even if not attracting such widespread public controversy.

Similarly, one can imagine the full spectrum of decisions applying statute law, both federal and (in the *Coleman v Power* sense) state, having the propensity to prompt engagement with political realities and how the political state impacts individuals' lives.[210] Each decision would necessarily reflect the status quo of the system of laws

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[205] Lorraine Finlay, 'Hasty detainee laws raise human rights concerns', *Australian Human Rights Commission* (online, 7 December 2023) <https://humanrights.gov.au/about/news/opinions/hasty-detainee-laws-raise-human-rights-concerns>; Brett Worthington, 'The landmark High Court ruling that's left Anthony Albanese in a political pincher', *ABC News* (online, 9 November 2023) <https://www.abc.net.au/news/2023-11-09/twenty-year-detention-laws-overturned-in-high-court/103081400>.

[206] Brett Worthington, 'Decades after a boat arrived in Australia, the government suddenly found itself with an immigration detention system in disarray', *ABC News* (online, 14 April 2024) <https://www.abc.net.au/news/2024-04-14/nzyq-immigration-detention-timeline-high-court-government/103699478>; George Williams, 'Perilous legal path through migrant detention quagmire', *The Australian* (online, 19 April 2024) <https://www.theaustralian.com.au/commentary/perilous-legal-path-through-migrant-detention-quagmire/news-story/>.

[207] Mick Tsikas, 'The government is fighting a new High Court case on immigration detainees. What's it about and what's at stake?', *The Conversation* (online, 20 March 2024) <https://theconversation.com/the-government-is-fighting-a-new-high-court-case-on-immigration-detainees-whats-it-about-and-whats-at-stake-226120>.

[208] The Honourable Andrew Giles MP, 'Legislation in response to NZYQ high court decision', *Minister for Immigration, Citizenship and Multicultural Affairs* (Media Release, 16 November 2023).

[209] See above n 78.

[210] Immediately, examples such as the application of criminal laws, sentencing and punishment, defamation laws, laws relating to liability or negligence, and many more.

and their operation, an area of responsibility, at least in formulation and creation, of the government that implemented them or had not altered or removed them. The representatives elected under the *Constitution*, and about whom electoral choice is exercised, have an electoral responsibility for the contents of statutes and a constitutional power to change that law. Even if the judicial adjudication of these laws was not itself the same as the role of the government, it is so intertwined as to rationally bear on decisions and opinions about those who were responsible for it. Communications about such decisions would then too take on this 'political' element capable of bearing on electoral choice. Examples include questions of applying criminal statutes and determining what is or is not criminalised under the present law, particularly when involving particularly heinous crimes or the antiquated criminalisation of now-accepted behaviour, the adequacy of a compensation regime provided for by statute; and the issues in drafting laid bare by judicial interpretation. It may be that discussion of these matters would, if couched in those terms, be captured by the implied freedom under current orthodoxy. This article argues that even if discussed in a less direct form, such as through commentary on the judge's interpretation or the decision itself, such indirect discussion will prompt reflection and consideration, even internally within individuals, that will have the propensity to influence their electoral choice. This is so with or without a clear call for remedial action or intent to influence discussed in past cases.

This propensity to prompt engagement may be particularly potent when decisions are made on policy grounds or based on policy considerations 'about which the community [might have] strongly divergent views'.[211] Consider a decision to permit or to prohibit a protest,[212] a decision in which the sentence given to one individual convicted differs compared to another,[213] and the manner in which each decision affects the rights and obligations of citizens. Such examples, and more, demonstrate that even decisions with less reverberating ramifications than *NZYQ*, and which might not prompt specific commentary on the government, shall have political elements in the constitutional sense which cannot be separated. Discussion of these matters is not merely "political", but would affect the electorate's view of its elected representatives and their work, or lack thereof, in these spaces. This is so even relating to more "mundane" areas of law governed by statute. A comment that a certain outcome is appropriate, or, more strongly, is inappropriate or bewildering,

[211] Guest (n 200) 8.
[212] See, eg, *Bassi v Commissioner of Police (NSW)* (2020) 283 A Crim R 186; *Commissioner of Police, New South Wales Police Force v Kumar (OBO National Union of Students)* [2020] NSWSC 804; *Commissioner of Police v Thomson* [2020] NSWSC 1424; *Commissioner of Police (NSW) v Gibson* [2020] NSWSC 953.
[213] Particularly if there is some feature distinguishing those convicted, such as race.

particularly where commercial or financial matters are involved, begs questions of why or how the law is the way it is. Where this is the result of statute, being within the purview of the government, this may, regardless of the subject area, prompt electoral reflection. Even the commentary that the application of a certain law was unjust, or that the way in which it operates in a certain case was unfair, is tied to the legislative and legal scheme presided over by the government and applied by the judicature. Commentary on this system in practice is especially likely to affect the electoral views on those who are responsible for it. It may lead to questions as to why one, some, or all parties do or do not have particular policies, for example. It may influence the assessment of policies announced at a future date. This is a divergence from the views expressed in *APLA* and *Hogan v Hinch*, which allowed for the possibility that where directly and clearly referable to the executive or legislature this potential exists. This article argues that this potential is considerably more potent and of wide application. Just because the terms used are not direct, this does not mean that the communications are not targeted at, or at the least likely to, influence this choice. This is particularly so where individuals in the communication's audience may react differently.

Despite the High Court noting that an issue merely being one with the potential to be politically controversial shall not bring it within the freedom, these comments have been made in situations where the relevant commentary was not 'public' in nature and therefore unlikely to influence the choice provided in the constitutional mechanism.[214] The same is not necessarily applicable to the judicature, exercising public power in a public setting. The political consequences and discussion thereof of court decisions *are* directed toward the public; the only way they can be impactful is by informing actions in the public (including through elected representatives and the executive). Of course, considering the analysis of the Court, in particular this distinction between public and private choices,[215] not *all* commentary relating to the judicature is going to fall within this article's conception of the implied freedom. Indeed, conceivably comments made might not have a sufficient nexus to electoral choice. However, an assessment of, or commentary on, the judicature in its exercise of this State power, or its ability to impact citizens in some way, no doubt shall. It is only comments outside this scope with no public element which would not.[216]

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[214] For example, comments made to an individual about their choice regarding abortion: *Clubb* (n 59) 191 [31].

[215] Ibid.

[216] For example, commentary on the appearance of a judicial officer, or on the emotion felt in response to something by an individual, or even, in perhaps the most borderline of examples, that the judicial officer was generally incompetent or wrong in a particular decision (which arguably may still fall

The point was made earlier that decisions relating to the common law or non-statutory principles of equity may not be captured by this revised conceptualisation of the implied freedom. This point will be of greater relevance when considering the second basis under which it is contended the judicature may fall under the freedom, being the extended exercise of constitutional power. In terms of considering the "electoral choice basis", cases concerning the judge-made law ought to be considered similarly captured. In the same way that commentary on existing laws can influence views on those with the power to change them (as distinct here, when considering judge-made law, from those that made them), commentary on a state of law that the government is uniquely placed to change will have the same influence. If there is a decision made that the people do not like, this reflects on the fact that the government has not fixed, or cannot fix, the legal position. It reflects on political groups that have proposed to fix the issue, or have not made such a proposal. Even if all political groups have the same position, or no position, it speaks to a need in the eyes of the electorate for this issue to enter political discourse.

(b) Integrated governmental system

Much was made in cases such as *Lange* and *Coleman v Power* of the fact that the scope of matters which may inform electoral choice is broadened by the integrated nature of the federal polity.[217] For example, state matters may inform assessment of federal matters, or the Police may inform assessment of the responsible executive cabinet.[218] The fundamental effect of this analysis is that matters which are *not* provided by the relevant provisions in text may nonetheless be protected by the implied freedom if they bear on them in effect. Interestingly, in the analysis posited in support of this principle, it is not said that the commentary needs to explicitly, or even particularly implicitly, relate to the federal system in theory. It is only required, using the example of state police from *Coleman v Power*, that the commentary would have this effect at the federal political level in practice.[219]

The transposition of this approach to the judicature is particularly fruitful. This is so both "vertically", being the integration of state and federal matters, and "horizontally", being the integration of matters concerning the judicature with the exercise of the powers of the other 'branches of government'. Little needs to be said

within this ambit to the extent it reflects on those appointing them, though this would likely turn on the specific commentary made), might not be captured by the implied freedom. It would of course be strange if to some extent communications might not be considered political, but may be "spoken into protection" merely by adding "magic words" relating to the judicature. Indeed, such an approach was expressly disclaimed in *APLA* with reference to the legislature and executive.

[217] *Coleman v Power* (n 4) 44 [77] (McHugh J) citing *Lange* (n 50) 572.

[218] *Coleman v Power* (n 4) 44 [77] (McHugh J).

[219] *Lange* (n 50) 571.

regarding the former, which appears broadly accepted in wider jurisprudence.[220] We will focus then on the latter.

The integrated nature of the federal governmental system necessarily includes the judicature, even if it is not a component of the 'arms of government' the freedom is constitutionally derived from (neither are state governments) and is ostensibly independent thereof (as in theory are state governments in a federal polity[221]). The imposition of government, as an institution and in its powers as enumerated in the Chapters often referred to by the courts, on the populace is intrinsically intertwined with the judicature. In particular, the emphasis placed in the case law was on not only the integration of government, but on the integration of the 'social, economic, and political life of Australia'.[222] Each and every one of these areas is directly influenced by, and involves the discussion of, the exercise of authoritative judicial functions, even in individual cases.[223] Moreover, the judicature itself forms part of those areas that are integrated in the Australian body politic.

The integration of the judicature and the other branches of government in practice is plain. These bodies appoint the members of the judicature. The judicature acts to interpret and apply the legislation, and this practical application reflects directly on those who conceived, drafted, and passed it. The very fact that judges are unelected, independent, and have security of tenure directs the ire or support of the affected citizen to their elected representatives who can remedy perceived issues. It is for this reason that often the response to a decision which is disagreed with, and to particular consequences which are deemed unacceptable, is that calls are made to amend or introduce legislation rather than to dismiss the judicial officers. The workings of the court are outside the realm of specific recourse from citizens, and so these decisions are likely to influence electoral behaviour as this is the only way to respond. With respect to Besanko J, who as noted above held that a specific remedial call to action would be required to link the judicature to the other arms of government,[224] such specificity would not be required to rationally and capably bear on electoral choice. After all, it may not be that remedial action is called for specifically for other gripes with the elected government. It may also be the case that the rational elector, having heard this commentary on the judicature which reflects

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[220] See the discussion in *Kable* (n 22).
[221] Henry M Hart Jr, 'The Relations between State and Federal Law' (1954) 54(4) *Columbia Law Review* 489, 491; Roderick M Hills Jr, 'Federalism in Constitutional Context' (1998) 22(1) *Harvard Journal of Law & Public Policy* 181, 186.
[222] *Lange* (n 50) 571.
[223] Itself a curious qualifier often used in the case law, as after all single cases can be substantially influential and form binding precedent in later cases.
[224] See above n 144.

on the directly elected representatives, exercises their electoral choice having considered this communication, even if the call for remedial action was not explicit. They may even read in this call for action themselves, and yet the communication will still have influenced their electoral choice. Often the ballot box is where such a call is made, and the sounding and spreading of discontent or support, so as to influence the exercise of that direct choice, will be what is relied upon. Communicating that it is unjust, for example, that sentencing trends disproportionately impacted a specific group without more may still impact a voter to prefer a party who has campaigned elsewhere on similar issues, even if there is no *specific remedial call* within the commentary on the case itself. It might be that it demonstrates the pressing nature of those issues, which may have the electoral effect given wider political contexts. This is a reflection of the fundamental integration of these separate bodies exercising separate powers.

The point was raised above in discussing the analysis of Gillard AJA that his Honour was respectfully in error in considering that the inclusion of the judicature as a branch of 'government' alone rendered it within the scope of the implied freedom.[225] That said, whilst this taxonomical inclusion is insufficient in isolation, the perception of the judicature, even where independent, as falling within 'government' naturally bolsters the point that consideration of its actions or performance will, in the eyes of the public, reflect on the 'government'. It impacts their perception of the apparatuses of the State. It is all too easy to picture a voter who feels "hard done by", be it through the laws themselves or the impact of the justice system or wider society, who places the blame at the feet of the government, and in doing so laments all three branches as one. Their decisions in engaging in that system, including democratically, are likely to be significantly impacted. This is especially so with regards to the judicature, which as we shall see will apply the laws that cause this reaction directly. Judges may be seen as archaic, uncaring, contemptuous, and as the servants of the state who implement the laws of the land. Discussion of the judicature, therefore, is likely to have the potential to influence the perceptions and actions of voters exercising their democratic rights because of this integration.

This point may be further borne out by closer analysis of the reasoning in *Coleman v Power*, where the implied freedom was held by McHugh, Gummow, and Hayne JJ to apply to communications about the police, notwithstanding that the police are not themselves directly responsible to Parliament.[226] Justice McHugh would explicitly

[225] See above nn 127–131.

[226] *Coleman v Power* (n 4) 45 [80] (McHugh J); 78 [197] (Gummow and Hayne JJ). See also 88–9 [229] (Kirby J). This concept was cited with approval by the majority in *Unions New South Wales v New*

note in *Coleman v Power* that '[t]he 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.'[227] This is plainly relevant when considering the judicature. Federal and State criminal laws, as well as civil laws, are administered and enforced through the courts and by judges. Without the courts, the administration and application cannot be complete, nor finally imposed on the citizenry. The judicature's role in the administration and enforcement of the law is, therefore, of similar importance to the role played by the police. To that extent, the judicature must necessarily be 'relevant to the system of representative and responsible government',[228] even if one argues that the judicature is not a *part* of that system in the constitutional sense.

The bases of this reasoning were expanded further by McHugh J, stating that '[p]ublic evaluation of the performance of Federal Ministers…may be influenced…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 undermine public confidence in the administration of the federal, as well as the State, criminal justice system.'[229] Thus, the inclusion of the police within the scope of the implied freedom was not merely by virtue of their nominal inclusion within the executive. Rather, it was additionally grounded in the way the evaluation of Federal Ministers and the general public's confidence in the administration of justice *may* be influenced by discussion of the police. This was so even where the communications were not specifically about ministers; such was the strength of the connection between the police and the evaluation of the government that commentary on the former alone was indirectly linked. Each of these reasons apply similarly to the judicature. The analysis above about the manner in which the judicature is intrinsically intertwined, in practice and in perception, to the federal government demonstrates that assessment of the courts may come to bear on assessing said government. This is only bolstered by the fact that the government approves the appointment of judges. Regarding the latter basis, it would plainly be untenable to claim that allegations of corruption, or even incompetence, vis-à-vis the judiciary, as distinct from the police, would not undermine confidence in the

South Wales (2013) 252 CLR 530, 549–550 [23] (French CJ, Hayne, Crennan, Kiefel, and Bell JJ) ('*Unions NSW v NSW*').

[227] *Coleman v Power* (n 4) 45 [80] (McHugh J).

[228] Ibid; *Levy* (n 32) 622 (Gaudron J).

[229] *Coleman v Power* (n 4) 45 [80] (McHugh J).

administration of federal and state criminal justice systems[230] in the sense contemplated by McHugh J.

Ultimately, in practice the integration of the facets of public life and of the implementation of the laws of the land means that the actions of the judicature and commentary thereon are of significant influence on public opinion and are likely to rationally bear on electoral decisions. Thus, they would be covered by the implied freedom.

(c) The courts as an institution

In addition to the commentary described above vis-à-vis court decisions or the actions of judicial officers specifically, it is also worth clarifying the inclusion of commentary about the institutional elements of the judicature: courts and tribunals, their structure and operations, and matters such as their legitimacy. To the extent these are fundamentally either matters of the exercise of government power or constitutional issues, it is argued they ought also be protected. If a communication related to the former, such as the appointment of certain judges or statutory decisions relating to judicial bodies, then under the McHugh J formulation they would be protected. It is argued that if they fall under the latter, then there is a sufficient nexus to the idea of a need for constitutional amendment, necessarily via referendum, to also be protected under s 128. Unlike the findings of Besanko J described above where this nexus was not an inference from the relevant speech, it should be argued that any speech claiming an issue exists in the *Constitution* is speech which could, and would be likely to, influence either the perception that constitutional change is needed or the perception in a particular referendum that a vote should be cast in a certain way. There is no other way to interpret this speech — a complaint that the status quo is inadequate will prompt reflection on how to fix that issue, and when the issue is constitutional the answer is a referendum, which is political speech under the freedom. This can be distinguished from situations of seeking to say anything could be subject to a referendum, which may very well be true. It may therefore be valid to say that this is too vague to render it protected. The ability to distinguish this case comes from the fact the issue is already constitutional, and claiming the provisions are wrong or something needs to change can only be changed by the specific mechanism of a referendum, unlike any issue that is not already in the *Constitution* which may have alternative, non-constitutional, remedies.

[230] Tom Bathurst, 'Community Confidence in the Justice System: The Role of Public Opinion' (2014) 12(1) *The Judicial Review* 27, 38.

2 *Relation to and extension of relevant constitutional provisions*

In addition to the propensity to bear on electoral choice, it can be argued that as the courts exist as a repository of the powers of the state and act to apply that power to the individual, their actions are an inseparable element of the legislative and executive powers afforded by the relevant sections of the *Constitution* and therefore commentary on the judicature would be relevantly protected. That is, if commentary on the exercise of these constitutional powers is captured by the implied freedom, and the actions of the judicature represent a component of the extended process of applying these powers, being necessary to actually enforce and apply them, then the judicature is also captured by the freedom.

Much attention in implied freedom jurisprudence has been paid to the fact that the provisions from which the freedom is derived are those which provide for a constitutional system of 'representative and responsible government'.[231] Of course, as we have seen it is not the notion itself which gives rise to any protection, but that which is necessary to give effect to their content or ensure their effective function *as provided by the provisions of the Constitution*. These provisions are found, as noted, in Chapters I, II, and VIII but not Chapter III. This fact has often been used to exclude the judicature from the ambit of the freedom. Yet despite courts warning against the use of the term 'representative and responsible government' as a touchstone, there is an interesting focus on what institutions are provided for by very specific sections, which are noted as forming such a 'government'. Indeed, in this context a blind eye is then often turned as to how these institutions interact in practice with institutions created elsewhere in the very same document which are necessary for the former's effective function in practice. The fact is, the judicature exists as a body implementing the same powers and provisions about which commentary is essentially deemed prima facie captured by the implied freedom.

Despite not being created by Chapters I, II, and VII, the judicature cannot be separated from notions of 'responsible and representative government'.[232] This is so not in the sense that the phrase might ordinarily be understood, but as the phrase is derived from the *Constitution*.[233] Accepting that the freedom is based on ss 7, 24, 64, and 128 does not mean that the judicature must be excluded. Rather, the very same provisions, even where not creating the judicature, are responsible for its inclusion. The courts are, at their most fundamental level, the body which enables the application of legislative and executive power upon citizens and without which

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[231] See above Part II.

[232] Guest (n 200) 8.

[233] This approach, even where perhaps appearing at first intuitively similar, can therefore be distinguished from that taken by Gillard AJA and criticized above.

considerable elements of these powers could not be enacted. Even where exercising judicial power as contemplated by Chapter III in their actions, it is these actions which form a part of the exercise of the functions of the legislature and executive. A criminal statute being *implemented* is a far greater process than its mere passing onto the statute books, but rather involves its passing,[234] its policing by the executive,[235] and its formal application to the rights of citizens by the courts.[236] The legislature cannot pass laws which will not have an effect determined by the judicature. The executive cannot apply these laws to the citizenry without the judicature, at some stage, interpreting and applying these laws to ascertain the relevant legal position.[237] The decisions of the judicature are inextricably linked to the powers of the legislature and executive. Commentary on the former is, in essence though with exception, commentary on the latter.

Leaving aside momentarily scenarios relating to the common law or non-statutory equitable principles, the judicature does not act on areas of law which are not subject to the powers of legislation and enforcement provided for in the *Constitution*, except in applying constitutional analysis *directly to* the legislature and executive. The former renders this judicial exercise a manifestation of, and tied to, the provisions which ground the freedom. The latter renders the judicial exercise directly captured by McHugh J's caveat in *APLA* discussed above.

The powers and structures provided for in the relevant provisions grounding the implied freedom find manifestation in the judicature. As Professor Stellios (as his Honour then was) described, the authoritative and applicable meaning of legislation, itself captured by the implied freedom as a manifestation of the powers of the elected government, is not that which is passed by Parliament, but that which is interpreted and applied by the courts.[238] Moreover, courts act to 'maintain the federal compact' and the function of the structures provided for in the *Constitution*, including those in Chapters I, II, and VIII, as part of a 'division of legislative power between differently constituted bodies politic'.[239] Even if this in itself does not mean that the freedom applies to the judicature, it speaks to the fact that commentary on

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[234] At this stage, the legislature who passed the law are uncontroversially within the scope of the freedom.
[235] The police, of course as outlined in *Coleman v Power* (n 4), falling within the scope of the freedom.
[236] RA Duff, 'A Criminal Law We Can Call Our Own' (2017) 11(6) *Northwestern University Law Review* 1491, 1497–8.
[237] Even in cases where the executive passes laws giving itself powers which impact rights and do not require judicial decision-making, such as the power to cancel visas, these decisions are still amenable to judicial review and even the constitutionality of the law itself may be subject to judicial decision.
[238] Stellios (n 43) 622.
[239] James Stellios, 'Using Federalism to Protect Political Communication: Implications from Federal Representative Government' (2007) 31(1) *Melbourne University Law Review* 239, 246–7.

the exercise of this judicial authority is commentary on the implementation of these provisions, and is relevant to exercising a free choice on such matters especially insofar as it is commentary on how they, as citizens living in a society, will be affected by the powers of the state.[240]

Again as foreshadowed previously, this analysis does not hold in instances where the judicature is applying the common law or non-statutory principles of equity, insofar as the common law is not law created by a government and therefore its application is not an extension of these powers. Still, this article would argue for the reasons discussed vis-à-vis the "electoral choice basis" that this is not necessarily fatal to including communications about such decisions within the freedom.

Overall, however, if one accepts that commentary on the powers and actions of the legislature and executive as provided for in Chapters I and II are by their intrinsic nature within the scope of the implied freedom of political communication, one should consider that commentary on the extended process of implementation and application of these powers, the process that sees the powers translated from mere declaration into legally binding constitutional action, is similarly within that scope.

V CONCLUSIONS

Questions pertaining to the metes and bounds of the communications protected by an *Australian Constitution* which lacks a formal bill of rights have provided fruitful ground for jurisprudential debate for decades. Yet in a context where the High Court's recent consideration of the issue has focused around the 'march of structured proportionality',[241] this article has sought to wade back into more qualitative discussion and argue that communications relating to the judicature ought to be considered within the scope of the implied freedom of political communication.

The application of the freedom to communications about the judicature is concomitant with the historical derivation and development of the implied freedom as presently understood. It affords due deference to the continued emphasis of the High Court requiring that the implied freedom be confined to a scope provided for by the terms of the *Constitution*. This focus, reasoning that any protection must not be derived from ambiguous notions of 'representative and responsible government',[242] but directly found in the text itself,[243] militates in favour of the

[240] See above Part IV(B)(1).
[241] *Palmer v Western Australia* (2021) 272 CLR 505, 552 [141] (Gageler J).
[242] *McGinty* (n 44) 229–230 (McHugh J).
[243] Ibid 168 (Brennan CJ).

inclusion of the judicature under the ambit of the implied freedom; the direct election of representatives, or free voting in referenda, requires that discussion of an issue so intrinsically linked to the state and matters of an electorally political nature, or which plays such a significant role in societal discourse, be free and unincumbered by the legislature. In any event, insofar as the judicature acts as an indispensable element of the process of applying the powers of the legislature and executive to the citizenry, commentary on the judicature will be captured as being commentary on issues covered by the relevant constitutional provisions.

Whilst the balance of comments made by the High Court and intermediate appellate courts do stand opposed to the reasoning of this article, it has respectfully been suggested that the modern-day political realities in which the *Constitution* operates and the development in implied freedom jurisprudence over decades following *APLA* mean that these opinions should be revisited. Commentary on the judicature plainly has the significant ability to affect the choice of electors in the free and direct election of their representative and responsible government, and the judicature is the institution which enables and finally applies the powers afforded to the legislature and executive to the citizenry.

Thus, it can be concluded that should the opportunity arise again for the High Court to consider this issue, it ought to accept that the requirements of the text and structure of the *Constitution* extend beyond present conceptions of the implied freedom to communications relating to the judicature. After all, even if the arguments made in the present article run against previous decisions to some extent, as Kirby J once opined, '[i]t may be true that re-expressing the *Lange* rule as I would favour, so that it applies to the judicial branch of government as much as to the legislative and executive, would involve a new step. However, it is one inherent in the principle that *Lange* expresses.'[244]

[244] *APLA* (n 10) 444 [358] (Kirby J).