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## **CAN THE IMPLIED FREEDOM OF POLITICAL DISCOURSE APPLY TO SPEECH BY OR ABOUT RELIGIOUS LEADERS?**

### ABSTRACT

Religious leaders in Australia sometimes contribute to public debate. Can the implied freedom protect speech by and about religious leaders from a burden (legislative, common law, executive) either current (eg, religious vilification laws) or proposed? In part, the answer to this question depends on whether such expression is recognised as ‘political speech’ under constitutional law. Mason, Toohey and Gaudron JJ’s joint judgment in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 suggests that political speech includes discourse about the political views and public conduct of all persons involved in activities that have become the subject of political debate, a description that could possibly apply to speech by and about religious leaders. By contrast, the High Court’s later unanimous judgment in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 arguably suggests a narrower view of the scope of the implied freedom. It indicates that the implied freedom only protects speech that is relevant to representative government, responsible government or referenda. Is it possible to reconcile *Theophanous* and *Lange*? What do the terms ‘representative government’ and ‘responsible government’ mean? Is it possible to discern a clear view from the High Court judgments about whether speech by or about religious leaders can be political speech?

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## I INTRODUCTION

Some political topics discussed in Australia, such as gay marriage, touch upon religious interests. Australian religious leaders<sup>1</sup> sometimes contribute to public debate.<sup>2</sup> In view of their contributions to public discourse this article explores whether the speech of and about religious leaders may attract protection from a legislative, common law or executive burden.<sup>3</sup> Such burdens *may* include religious tolerance laws or defamation laws if those laws limit constitutionally protected speech by or about religious leaders.<sup>4</sup>

There is a considerable body of academic writing relating to the implied freedom. The literature includes some striking insights into the implied freedom and how it might apply to aspects of religious expression. In this article, however, I chart a mostly unexplored channel of inquiry and ask how the High Court's guidance in relation to protecting political speech might apply to expression by or about religious leaders. Implicit in this investigation is an inquiry into whether speech by or about religious leaders is so qualitatively different to expression about other matters that the implied freedom may not protect such speech. I, therefore, seek to answer the following questions:

- What is political speech?
- Can the implied freedom of political discourse protect speech by and about religious leaders from a burden either current or proposed?<sup>5</sup>

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<sup>1</sup> In this article, the phrase 'religious leaders', refers to those in senior roles in organisations whose primary responsibility is 'religious ministry' (by which I mean support and spiritual guidance for a sizeable group of people who share broadly common beliefs about the same god). My interest is, accordingly, in the speech of muftis, deans, bishops and cardinals (typically men) who occasionally (or, depending on their style, possibly more regularly) shift their gaze from spiritual matters to the public square and then contribute to political discussion (however political might be defined) on behalf of those groups, such as might fall within the protective boundaries of the implied freedom. I do not include in this definition those with strong religious affiliations who also happen to be politicians (say, like Reverend Fred Nile), nor do I include those who are primarily involved in charitable work or even semi-political work who may happen to represent religious groups (say, like Reverend Tim Costello).

<sup>2</sup> See, eg, Cardinal George Pell, Catholic Archbishop of Sydney, 'One Christian Perspective on Climate Change' (Speech delivered at the Annual Global Warming Policy Foundation Lecture, London, 26 October 2011) <<http://www.youtube.com/watch?v=EgsyYXfaIWw>>.

<sup>3</sup> Any reference to a burden in this article is a reference to a legislative, executive or common law burden.

<sup>4</sup> Another possibly relevant burden is blasphemous libel — a prohibition which continues to operate in some Australian jurisdictions. See, eg, s 119 *Criminal Code Act 1924* (Tas).

<sup>5</sup> This article does not specifically seek to explore aspects of any separation of church and state in Australia nor whether religion belongs in the private sphere.

Answering the first question is a prerequisite to addressing the second question and requires analysis of the underlying legal principles in the relevant High Court cases on the implied freedom of political discourse.

The structure of the article is as follows. In pt II(A), I discuss the views of several writers in relation to defining political speech. In pt II(B), I review whether there are any constitutional limitations to political speech applying to expression about religion, including by reason of s 116 of the Constitution. In pt II(C), I study some of the earlier High Court decisions in relation to characterising political speech and, in pt II(D), I consider the some more recent cases on the implied freedom.

In pt III(A), I analyse in detail the legal principles relating to ‘political discourse’. I note a possible ongoing tension between the kinds of ‘political and governmental matters’ referred to in *Theophanous v Herald & Weekly Times Ltd* (*‘Theophanous’*)<sup>6</sup> and *Lange v Australian Broadcasting Corporation* (*‘Lange’*)<sup>7</sup>. Then, in pt III(B), I explore what it *means* for the scope of the implied freedom to include speech about representative and responsible government.

In pt IV, I analyse examples of speech by two religious leaders. I review speech by and about the former Australian Mufti, Sheikh Taj El-Din Hamid Hilaly, as well as a response to the Mufti from a Senior Anglican, Dean Phillip Jensen of the Sydney Anglican Diocese. I ask whether the Sheikh’s sermon could be political speech and also consider whether Dean Jensen’s comments about Sheikh Hilaly could fall within the protective boundaries of the implied freedom.<sup>8</sup> Part V is the conclusion, in which I briefly answer the aforementioned questions.

## II WHAT IS POLITICAL SPEECH?

### *A Commentators’ Views*

Dan Meagher argues that political communication consists of any form of expression which ‘may reasonably be relevant to the federal voting choices of its likely audience’.<sup>9</sup> Meagher bases his approach on his view that ‘a minimalist model of judicially-protected popular sovereignty’ underpins Australia’s implied free speech

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<sup>6</sup> (1994) 182 CLR 104.

<sup>7</sup> (1997) 189 CLR 520.

<sup>8</sup> I do not consider in detail whether any *particular* burden — legislative, common law or executive — might operate in relation to the speech of these religious leaders. The purpose of the exercise is to instead consider whether their speech could constitute political speech under constitutional law. So far as I am aware, there was no constraint on either man expressing their views.

<sup>9</sup> Dan Meagher, ‘What is “Political Communication”? The Rationale and Scope of the Implied Freedom of Political Communication’ (2004) 28 *Melbourne University Law Review* 438, 467.

protections rather than any traditional free speech rationale.<sup>10</sup> From this perspective, speech by or about religious leaders could fall within the protective scope of the implied freedom if it is relevant to the voting choices of its intended audience.

Upon examining the High Court's decision in *Lange*,<sup>11</sup> Adrienne Stone advocates redrawing the boundaries of the scope of the implied freedom in order to facilitate the *proper* functioning of the institutions the implied freedom seeks to protect.<sup>12</sup> In doing so, Stone proposes four kinds of speech that may be regarded as 'political communication' while acknowledging that these proposed categories of free speech may tend to dramatically expand the scope of protected speech.<sup>13</sup>

The first category Stone proposes is explicitly political communication — ie, speech substantively about the government.<sup>14</sup> The second kind of political communication Stone posits is speech about issues that could *become* matters of federal law or policy or, which in some other way, could be the subject of federal governmental action.<sup>15</sup> This category anticipates the possibility for change in a current political agenda and could include discourse that *becomes* relevant to governmental decision-making.<sup>16</sup> A third type of political communication suggested by Stone is communications about matters which may not themselves be the subject of law or government action but which may nonetheless influence voters' attitudes toward the government.<sup>17</sup> Finally, Stone suggests as a fourth class of political communication speech which is 'relevant to democratic government because of the qualities it develops in the citizenry'.<sup>18</sup> Stone describes this kind of political speech as that which 'develop[s] among voters the capacities or qualities necessary to make a 'true choice' in a federal election'.<sup>19</sup>

In studying the scope of the implied freedom, Nicholas Aroney<sup>20</sup> traces the influential judgments of McHugh J in the High Court.<sup>21</sup> Aroney observes that his Honour

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<sup>10</sup> Ibid 438.

<sup>11</sup> (1997) 189 CLR 520.

<sup>12</sup> Adrienne Stone 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374, 383.

<sup>13</sup> Ibid 383–4.

<sup>14</sup> Ibid 384.

<sup>15</sup> Ibid 385.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid 386.

<sup>18</sup> Ibid 387.

<sup>19</sup> Ibid.

<sup>20</sup> See, eg, Nicholas Aroney 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28 *Sydney Law Review* 505; Nicholas Aroney 'The Structure of Constitutional Revolutions: Are the *Lange*, *Levy* and *Kruger* Cases a Return to Normal Science?' (1998) 21 *University of New South Wales Law Journal* 645.

<sup>21</sup> See, eg, *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *McGinty v Western Australia* (1996) 134 ALR 289.

focused on the systems of representative government and responsible government as the twin foundations for delineating the scope of the implied freedom. McHugh J maintained that these systems are not free-ranging principles but are supported by the text and structure of the Constitution.<sup>22</sup> Further, McHugh J distinguished representative government — generally understood to mean that people in free elections choose representatives who govern on their behalf — from *representative democracy* — a wider concept, often taken to be descriptive of a society in which there is an equality of rights and privileges.<sup>23</sup>

A paper by David Hume about the rationale for the implied freedom suggests that it protects the receipt of relevant information by those responsible for making constitutionally-prescribed decisions.<sup>24</sup> Hume observes that responsible government, representative government and referenda each involve the making of political choices. He contends that the efficacy of these systems requires that government not restrict the choosers' opportunity to access relevant information concerning the choices contemplated by the *Constitution* and that *this* makes the implied freedom necessary.<sup>25</sup> On this view, the implied freedom is a tool for facilitating the making of informed choices which support the systems of responsible government, representative government and referenda.<sup>26</sup>

Two broad themes emerge from this brief analysis of some of the literature.

First, as Meagher suggests, political speech may consist of speech that is relevant to an audience's federal voting choices. This is a useful touchstone for describing the protective scope of the implied freedom. Yet, the High Court under McHugh J's influence has taken the view that speech which is relevant to representative government *and* responsible government<sup>27</sup> may fall within the constitutional freedom. A conception of the implied freedom that is grounded only in speech relevant to the audience's *voting choices* may not adequately reflect the scope of the freedom as it has been described by the High Court.

Secondly, speech by or about religious leaders may come within the protective scope of the constitutional freedom if the (burdened) discourse is relevant to the Commonwealth systems of representative government and responsible government. Stone, as noted, suggests that the High Court in *Lange* narrowed the protective scope of the implied freedom. While this may be so, I propose that there may be fewer differences

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<sup>22</sup> Aroney, 'Representative Government and Elimination of Balancing', above n 20, 514.

<sup>23</sup> *Ibid.*

<sup>24</sup> David Hume, 'Wotton v Queensland — "Islands of Power" and Political Speech on Palm Island' (Paper presented at the 2012 Constitutional Law Conference, Faculty of Law Research Series 2012, University of New South Wales, 17 February 2012).

<sup>25</sup> *Ibid.* 8.

<sup>26</sup> *Ibid.* 9.

<sup>27</sup> The constitutional freedom may also include speech relevant to referenda. Any further reference to representative and responsible government includes a reference to referenda.

between *Theophanous* and *Lange* than might at first seem apparent, particularly if the courts undertake a generous temporal perspective of representative and responsible government. Further, both decisions have the potential to recognise speech by and about religious leaders as political speech.

*B Are there Constitutional Limitations to Speech about Religion being Political Speech?*

Does the *Commonwealth Constitution* prevent the implied freedom applying to speech about religion?<sup>28</sup> Aroney explores whether there may be constitutional barriers to the implied freedom protecting speech about religion.<sup>29</sup> He specifically examines whether s 116 of the *Constitution* might imply a barrier to the implied freedom protecting religious expression.<sup>30</sup> Aroney's line of inquiry is this: if s 116 of the *Constitution* prevents the Commonwealth from making religiously based laws (including laws for establishment of religion or for prohibiting the free exercise of religion), then this may mean religious speech cannot form a constitutionally legitimate part of political communication. This in turn may suggest that, *by definition*, the implied freedom cannot protect speech about religion.<sup>31</sup>

After carefully reviewing the legal authorities and academic literature, Aroney concludes that there are no a priori reasons why speech about religious matters cannot simultaneously be characterised as political communication for the purposes of the implied freedom.<sup>32</sup> I agree with Aroney's conclusion. I elaborate upon his reasoning and consider other possible a priori limitations on the implied freedom applying to speech about religion — but, as will be seen, I then discount these propositions.

To provide further context to this inquiry — s 116 purports to constrain the Commonwealth government's legislative powers. It provides that the Commonwealth (though not the states or territories) cannot make laws for proscribed purposes or require a religious test as a qualification for office.<sup>33</sup> The 'free exercise' limb of

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<sup>28</sup> If the *Constitution* poses no barrier to the implied freedom applying to expression about religion, then it would seem to follow that there is no a priori obstacle to the implied freedom applying to speech by or about religious leaders.

<sup>29</sup> Nicholas Aroney, 'The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 *Federal Law Review* 288, 292.

<sup>30</sup> Section 116 provides that the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion; and no religious test shall be required as a qualification for any office or public trust under the Commonwealth. To date, there has been no successful High Court action brought under s 116.

<sup>31</sup> Aroney, 'Constitutional (In)Validity of Religious Vilification Laws', above n 29, 292.

<sup>32</sup> Cf *Harkianakis v Skalkos* (1997) 47 NSWLR 302, 307 (Dunford J) (also referred to in *ibid*).

<sup>33</sup> The provision does not purport to apply to rules or standing orders or exercises of executive power.

s 116<sup>34</sup> specifically prohibits the Commonwealth making *laws* for *prohibiting* the free exercise of religion. It does not apply to exercises of executive power and instead governs the making of *laws* which seek to effect *prohibitions* on religious expression.<sup>35</sup> The High Court has not given a broad interpretation to the free exercise provision or s 116 more generally.<sup>36</sup>

Given these apparently minimal constraints on Commonwealth legislative power, it is hard to see why s 116 should lead to any excision of religious speech from the protective scope of the implied freedom. Further, as Aroney notes, s 116 could be amended by referenda and the prohibitions in s 116 could not circumscribe the scope of the implied freedom of political communication in relation to potential changes to s 116.<sup>37</sup> Accordingly, there is no strong argument as to why any ‘rights’ conferred by s 116 may limit the operation of the implied freedom with respect to speech about religion.

A further argument (which I also discount) may be made: that s 116 limits the reach of the implied freedom in relation to speech about religion when state or territory laws are involved. Section 116 does not prohibit the states or territories from making laws for religion. It might therefore be argued that the states and territories should be able to administer laws relating to religious matters without the implied freedom encroaching upon their constitutional powers.<sup>38</sup> It may even be said that if the implied freedom were to *protect* the kind of religious speech that the states are authorised to *prohibit* (say, vilifying speech that is regulated under state-based religious tolerance laws), then, at that point, the implied freedom has reached too far, constitutionally speaking.

Even if one accepts that the states and territories *can* make laws about religious affairs (by reason of s 116 or otherwise), there are significant limitations with this ‘overreach’ logic. Specifically, this reasoning has two weaknesses. First, even *if* a state government

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<sup>34</sup> This would seem to be the subclause of s 116 that plaintiffs would most likely invoke to protect religious expression. A plaintiff may also, or alternatively, plead the ‘no establishment’ (or even the ‘no imposing religious observance’) limb of s 116 to support a constitutional ‘religious expression’ claim.

<sup>35</sup> Aroney, ‘Constitutional (In)Validity of Religious Vilification Laws’, above n 29, 300.

<sup>36</sup> See, eg, *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116; *Krygger v Williams* (1912) 15 CLR 366. The provision arguably would not apply to laws (or executive acts) which merely seek to stifle or suppress (cf *prohibit*) the free expression of religion.

<sup>37</sup> Aroney, ‘Constitutional (In)Validity of Religious Vilification Laws’, above n 29, 301.

<sup>38</sup> In *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, Callinan J at 478 expressed concern that the definition of political speech could, if not ‘bounded’, include religious speech and might thereby conflict with the states’ powers to make laws for religion under s 116 of the *Constitution*. Arguably s 116 does not confer any powers over religion upon the states or territories (although it may do by implication). There were suggestions during the Constitutional Convention debates that some framers likely *did* intend to preserve to the states the power to enact Sunday observance laws: author PhD research. The states also may have plenary or more limited powers in relation to religion under their own ‘constitutions’.

has constitutional power over a topic, people may have an interest in discussing *how* that government exercises its powers with respect to that topic. An assumed limitation on constitutional free speech in relation to either state laws or state government actions may lead to voters having no constitutional free speech protection if the states happen to prosecute religious agendas.<sup>39</sup> The implied freedom would become a hollow constitutional safeguard if it could not, *by definition*, protect speech about state governments that introduce laws affecting or relating to religious interests. A second reason is a pragmatic one relating to the likelihood that the implied freedom would regularly interfere with states' powers. As will be seen more clearly after reviewing some of the High Court cases — to *be* political speech, the expression must in some way relate to the *Commonwealth* systems of representative and responsible government. Speech about religion in relation to a state law which has *no* implications for the Commonwealth would likely not qualify for the constitutional protection.

There is a final argument that is similar (but subtly different) to that explored by Aroney which could be an alternative reason for the implied freedom not protecting speech about religion. It might be observed that the Commonwealth has no specifically enunciated constitutional power over religion (notwithstanding that it may be able to pass laws with respect to religion if they are also with respect to a matter or purpose within power, say in areas such as naturalisation and immigration/emigration<sup>40</sup>).<sup>41</sup> It might *then* be posited as part of this argument that political discourse — speech about the government — *ought not to* include speech about religion. Accordingly, as a kind of counterpart to Aroney's argument, it may be contended that the Commonwealth's *lack* of legislative powers over religion is *itself* a reason to exclude speech about religion from the protective scope of the implied freedom.

In my view, however, it could not be argued — at least not with conviction — that an absence of express Commonwealth power over religion ought to lead to any excision of speech about religion from the protective scope of the implied freedom. To begin with, the lack of legislative powers over religion is no guarantee that a government will eschew religious objectives.<sup>42</sup> Excluding speech about religion

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<sup>39</sup> Such an approach would arguably also be at odds with the High Court's acceptance that the implied freedom *can* protect speech that is affected by state (or territory) laws. See, eg, *Coleman v Power* (2004) 220 CLR 1.

<sup>40</sup> See *Official Report of the National Australasian Convention Debates*, Melbourne, 2 March 1898, 1771–72 (Edmund Barton).

<sup>41</sup> While the Preamble was not intended to be an operative provision (or to confer any direct power on the Commonwealth), the Preamble recognises 'god' by acknowledging an Almighty God.

<sup>42</sup> The federal Labor government's funding of school chaplains is arguably evidence of the pursuit of quasi religious objectives, particularly in light of then Prime Minister Gillard agreeing with the suggestion of the head of the Australian Christian Lobby (Jim Wallace), in an interview on 6 August 2010, that there was little doubt that the chaplaincy program would continue after 2011 even though the program's continuation at the time was yet to be reviewed. See Interview with Jim Wallace, Christian Lobby, (Make It Count 2010, 6 August 2010) <<http://www.acl.org.au/make-it-count/>>; *Williams v Commonwealth* (2012) 288 ALR 410.



from the scope of the implied freedom would potentially mean there would be *no* protection for speech about *how* the government exercises any quasi-religious powers. Such a restriction on the limitations of political speech would be antithetical to any notion that the implied freedom can promote the government's accountability to the electorate by allowing voters to share and exchange political ideas, including — perhaps most critically in this context — if a government seeks to implement religiously motivated policies.

It follows from what I have said in this part that there are no 'in principle' reasons as to why the implied freedom cannot apply to speech about religion or to expression by or about religious leaders. As will also be seen, no legal limitations about the implied freedom applying to speech about religion or to speech by or about religious leaders appear to emerge from the High Court cases on the implied freedom.

### *C The High Court's Early Views on Political Speech*

In *Nationwide News Pty Ltd v Wills* ('*Nationwide News*')<sup>43</sup> and *Australian Capital Television v Commonwealth* ('*ACTV*'),<sup>44</sup> the High Court recognised an implied freedom in relation to speech about governmental and political matters. In 1994, in *Theophanous*<sup>45</sup>, the High Court offered a more detailed insight into what political speech means. Writing a joint judgment, Mason CJ, Toohey and Gaudron JJ (in the majority, with Deane J) said political speech includes:

discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, eg, trade union leaders, Aboriginal political leaders, political and economic commentators. Indeed, in our view, the concept is not exhausted by political publications and addresses which are calculated to influence choices.<sup>46</sup>

Left unaltered by later High Court judgments, this description of political discussion would indicate that the implied freedom applies to speech about the political views and public conduct of all persons involved in activities that have become the subject of political debate, possibly including religious leaders. It is a persuasive judgment, being jointly written by three judges in a majority High Court decision and has never been expressly overruled.

Even though the application of the implied freedom to *state* political matters was not directly in issue in *Theophanous* (it was a defamation action brought against a newspaper by a Commonwealth politician), Mason CJ, Toohey and Gaudron JJ indicated that the implied freedom could not be confined to matters about the

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<sup>43</sup> (1992) 177 CLR 1.

<sup>44</sup> (1992) 177 CLR 106.

<sup>45</sup> (1994) 182 CLR 104.

<sup>46</sup> *Ibid* 123.

Commonwealth government, holding that it would be ‘unrealistic’ to attempt to confine the freedom to matters relating to the Commonwealth government.<sup>47</sup>

The question of whether the implied freedom applied to state political affairs was considered by the High Court in another defamation case — *Stephens v West Australian Newspapers Limited* (‘*Stephens*’)<sup>48</sup> — decided shortly after *Theophanous*. *Stephens* concerned six members of the Legislative Council of Western Australia who took an overseas trip as members of a standing committee on state government agencies. The *West Australian* newspaper implied that the six state politicians wasted public money on an overseas trip in order to investigate matters which, it was claimed, could have been conducted in Western Australia.<sup>49</sup>

Consistent with the view they expressed in *Theophanous*, Mason CJ, Toohey and Gaudron JJ jointly held in *Stephens* that the implied freedom also applied to state political affairs.<sup>50</sup> Deane J, the fourth member of the High Court’s majority (as he had been in *Theophanous*), noted that state laws may burden freedom of communication on Commonwealth or state matters.<sup>51</sup> Brennan J, dissenting, could not see any obvious connection between the political affairs of the Commonwealth and the Western Australian politicians.<sup>52</sup> His Honour held that the publication of the material was unaffected by the implied freedom.<sup>53</sup> In doing so, Brennan J hinted that the implied freedom applied to Commonwealth political matters and state political affairs only insofar as the latter related to Commonwealth powers.

After the High Court’s majority decisions in *Theophanous* and *Stephens*, it may have seemed that the implied freedom could apply to a very wide range of political matters. Yet, in some of the High Court cases that followed — in large part due to the influence of McHugh J<sup>54</sup> — the Court began to more closely link the application of the implied freedom to the terms of the *Commonwealth Constitution*. The High Court also began to assess more rigorously whether the protective scope of the implied freedom conformed to the systems of representative and responsible government as these principles operated under the *Commonwealth Constitution*.

In 1997 in the High Court’s landmark decision in *Lange*, seven judges jointly held that *Theophanous* and *Stephens* precluded any further unqualified operation of

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<sup>47</sup> Ibid 122.

<sup>48</sup> (1994) 124 ALR 80.

<sup>49</sup> Ibid 92 (Brennan J).

<sup>50</sup> Ibid 88. In their joint judgment in *Stephens*, Mason CJ, Toohey and Gaudron JJ accepted that a constitutional defence could be available to the defendants under the *Commonwealth Constitution* and/or under the *Constitution of Western Australia*.

<sup>51</sup> Ibid 108.

<sup>52</sup> Ibid 91.

<sup>53</sup> Ibid.

<sup>54</sup> See, eg, *McGinty v Western Australia* (1996) 134 ALR 289, 348 (McHugh J); Aroney, ‘Representative Government and Elimination of Balancing’, above n 20.

the law of defamation with respect to political discussion and, thereafter, the High Court required recognition of the implied freedom in defamation suits concerning publications about political affairs.<sup>55</sup> The Court described the test for identifying whether a law is consistent with the implied freedom in the following terms:

[w]hen a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the *Constitution*, two questions must be answered before the validity of the law can be determined. *First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?* Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the *Constitution* to the informed decision of the people ... If the first question is answered 'yes' and the second is answered 'no', the law is invalid.<sup>56</sup>

The italicised question in the above passage — the first step in the *Lange* test — asks whether a 'law effectively burden[s] freedom of communication about government or political matters either in its terms, operation or effect?'<sup>57</sup> The answer to this question depends on what is meant by 'government or political matters'.

In addressing the issue of *what is meant by* government or political matters, the High Court held that the protective scope of the implied freedom applies to communications that are relevant to people making voting choices (ie, representative government). Yet, the judges also found that the implied freedom extends to communications about *responsible* government, stating that:

[the implied freedom] necessarily implies a limitation on legislative and executive power to deny the electors and their representatives information concerning the executive branch of the government throughout the life of a federal Parliament. Moreover, the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.<sup>58</sup>

Responsible government therefore comprises speech relating to the actions of the Commonwealth government and its ministers, including through departments, statutory authorities and public utilities over which ministers have responsibility.

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<sup>55</sup> *Lange* (1997) 189 CLR 555.

<sup>56</sup> *Ibid* 567 (emphasis added).

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid* 559.

*Lange* thus emerged as authority for the proposition that communication about government or political matters includes speech that facilitates informed voting choices *and* discourse which is relevant to the effectiveness of the government, including through its statutory authorities and public utilities. Yet, *Lange* did not overrule *Theophanous*. The cases arguably stand for different propositions, with the earlier case possibly allowing greater latitude to recognise as political speech the contributions of those (eg, church leaders) who enter into, or contribute towards, public debate. Whether the cases are substantively dissimilar on closer analysis is a question I consider further in pt III.

#### D *The High Court's Later Views on Political Speech*

In later implied freedom cases, the High Court ruled, for example, that speech was not limited to the written or spoken word and that it could include other kinds of expressive acts,<sup>59</sup> even possibly public acts of prayer.<sup>60</sup> In *APLA Ltd v Legal Services Commissioner (NSW)*<sup>61</sup> (*'APLA'*), the High Court heard a challenge to restrictions on the advertising of legal services by regulations introduced under NSW legislation, namely the *Legal Profession Act 1987* (NSW). The applicants in *APLA* argued that cl 139 of the *Legal Profession Regulation 2002* (NSW) (*'Legal Professional Regulation'*)<sup>62</sup> infringed the implied freedom. By majority, however, the High Court upheld the validity of the clause.

The five majority judges — Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ — considered that *Lange* did not support protecting the commercial matters that were the subject of the *Legal Profession Regulation*. In a joint judgment, Gleeson CJ and Heydon J wrote that they did not accept that the *Legal Profession Regulation* infringed the implied freedom merely because the regulation might restrict the mentioning of some government or political issue, or prohibit the naming of a particular politician.<sup>63</sup> Their Honours held that the implied freedom does not protect communications that are an essentially commercial activity.<sup>64</sup> By similar reasoning, it might be said that the implied freedom does not protect communications that are essentially or predominantly *religious* in character.

McHugh J in *APLA*, though dissenting, observed that the *Lange* freedom arises from the need to promote and protect representative and responsible government.<sup>65</sup>

<sup>59</sup> See *Kruger v Commonwealth* (1997) 190 CLR 1; *Coleman v Power* (2004) 220 CLR 1.

<sup>60</sup> See *Levy v Victoria* (1997) 189 CLR 579, 631 (Kirby J) (*'Levy'*). Toohey and Gummow JJ also recognised that the constitutional freedom is not limited to verbal activity: at 613.

<sup>61</sup> (2005) 224 CLR 322.

<sup>62</sup> The *Legal Profession Regulation 2002* (NSW) has since been repealed and replaced with the *Legal Profession Regulation 2005* (NSW).

<sup>63</sup> *APLA* (2005) 224 CLR 322, 351.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid* 362.

Referring to the scope of the implied freedom, his Honour described these twin governmental systems as necessitating ‘some level of communicative freedom in Australian society about matters relevant to executive responsibility and an informed electoral choice’.<sup>66</sup> Accordingly, McHugh J confirmed that the implied freedom protects: first, discussion about the actions of government and, secondly, communication that facilitates the making of informed voting choices.<sup>67</sup>

In 2011, in *Hogan v Hinch*<sup>68</sup>, the High Court considered the application of the implied freedom to Victorian state-based suppression orders. The Melbourne broadcaster, Derryn Hinch, was charged with contravening suppression orders made by the County Court of Melbourne. The High Court unanimously dismissed Hinch’s claim. French CJ described the implied freedom as protecting speech about matters ‘potentially within the purview of government’, which might, with flavours of the joint judgment in *Theophanous*, imply a more generous view of the scope of the implied freedom than might be otherwise suggested by the *Lange* decision.<sup>69</sup> Referring to the ‘significant interaction between the different levels of government in Australia’<sup>70</sup>, French CJ quoted the following passage in *Lange* when rejecting counsel’s contention that the implied freedom only applied to politics at the Commonwealth level:

this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia.<sup>71</sup>

French CJ also cited *Lange* to support his view that the implied freedom applied to other levels of government as well as the Commonwealth. His Honour considered this conclusion to be inevitable in view of the existence of national political parties operating at all levels of government, the financial dependence of state, territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia.<sup>72</sup>

Arguably, the above quoted *Lange* passage does not describe the jurisdictional scope of the implied freedom per se. The extract describes the extended political category of qualified privilege that the High Court developed in *Lange* in relation to the law of

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<sup>66</sup> Ibid.

<sup>67</sup> In *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 272 ALR 417, 429 (*Aid/Watch*), French CJ, Gummow, Hayne, Crennan and Bell J endorsed and reinforced *Lange*’s description of the scope of the implied freedom. (The case was about the tax status of a charity with political purposes).

<sup>68</sup> (2011) 275 ALR 408.

<sup>69</sup> Ibid 426.

<sup>70</sup> Ibid 425.

<sup>71</sup> Ibid 426.

<sup>72</sup> Ibid.

defamation. On the other hand, if the High Court developed the concept of qualified privilege to ensure compliance *with the Constitution*, then it is perhaps harder to see why the constitutional protection should not extend to the same extent as the qualified privilege.<sup>73</sup> French CJ nevertheless (again citing *Lange*) described the implied freedom as protecting discourse that ‘bear[s] on the choice that the people have to make in federal elections or in voting to amend the *Constitution*, and on their evaluation of the performance of federal Ministers and their departments’.<sup>74</sup> His Honour thus affirmed that the foundation of the implied freedom is in the Commonwealth systems of representative government and responsible government, and it may protect speech that is relevant to people’s *choices* with respect to those systems.<sup>75</sup>

In *Wotton v Queensland* (*‘Wotton’*),<sup>76</sup> the plaintiff (Wotton), an Aboriginal and political protester, participated in a riot on Palm Island in 2004 following the death in custody of another Aboriginal man. Wotton challenged the provisions of the *Corrective Services Act 2006* (Qld) (*‘Corrective Services Act’*) (which imposed limits on his speech as a parole condition) on the basis that the provisions impermissibly burdened freedom of political communication. The High Court unanimously dismissed Wotton’s application, reasoning that the relevant provisions of the state legislation complied with the constitutional limitation upon the legislative power of the state.

In a joint judgment, French CJ, Gummow, Hayne, Crennan and Bell JJ (with whom Kiefel J generally concurred), described their task in *Wotton* as analysing the nature of any restraint the implied freedom imposed upon the legislative power of the Queensland legislature and examining whether the *Corrective Services Act* conformed to that restraint.<sup>77</sup> Their Honours differentiated this exercise from that of assessing an alleged ultra vires exercise of discretionary power under legislation — a claim which the judges held lies in administrative law review of that decision.<sup>78</sup>

Concerning the first limb of *Lange* (ie, whether the expression was political speech), the joint judgment held that the affected speech *was* relevant to the Commonwealth tier of government. Their Honours found that public discussion of matters relating to Aboriginal and Indigenous affairs, including perceived or alleged injustices, involves communication at a national level, rather than a purely state

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<sup>73</sup> Assuming that is, that the suppressed speech is sufficiently relevant to the systems of representative and responsible government.

<sup>74</sup> *Hogan v Hinch* (2011) 243 CLR 506, 543–4 [49].

<sup>75</sup> The other six judges in *Hogan v Hinch* — Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ — published a joint judgment concurring with French CJ in the result. While their Honours were prepared to accept that the Victorian legislation *may* offend the implied freedom, in applying the second limb of *Lange*, their Honours held that the legislation did not display any ‘direct’ burden upon that communication, as opposed to an incidental one: at 555–6 [95]. The High Court would return to this theme in *Wotton v Queensland* (2012) 285 ALR 1.

<sup>76</sup> (2012) 285 ALR 1.

<sup>77</sup> *Ibid* 8.

<sup>78</sup> *Ibid*.

level.<sup>79</sup> The five judges also noted that law enforcement and policing depends on cooperation between federal, state and territory police forces and that the interaction between those services and Aboriginal people is a matter of national rather than purely local political concern.<sup>80</sup> Their Honours thus emphasised the connections between the state laws and the *federal* system of government.

In 2013, the High Court decided *Attorney-General (SA) v Corporation of the City of Adelaide and Others* ('*A-G v Adelaide*').<sup>81</sup> Caleb and Samuel Corneloup, members of Street Church (Caleb was President), preached the Christian gospel in Rundle Mall, a central retail area in Adelaide. A City of Adelaide by-law prohibited, inter alia, any person from 'preaching', 'canvassing' or 'haranguing' on any street or thoroughfare in the City of Adelaide without a permit from the Council.<sup>82</sup> The Corneloup brothers challenged the by-law in the District Court of South Australia on the bases that the relevant provisions of the by-law were: first, outside the by-law making power of the primary legislation and, secondly, infringed their implied freedom of political discourse. After the brothers' initial legal success in the District Court<sup>83</sup> and then after they successfully defended an appeal by the City of Adelaide in the Full Court of the South Australian Supreme Court,<sup>84</sup> a majority of the High Court<sup>85</sup> heard and allowed an appeal by the Attorney General for South Australia. The High Court reversed the decision of the Full Court and upheld the validity of the City of Adelaide by-law.

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<sup>79</sup> Ibid 9.

<sup>80</sup> Ibid. Examining the second limb of *Lange*, the five judges referred to the distinction the High Court made in *Hogan v Hinch*, namely, between a law which only incidentally restricts political communication and a law which prohibits or regulates communications which are political or are a necessary ingredient of political communication. Stating that the Queensland laws in this instance were in the former category, the five judges held that the burden upon communication is more readily seen to satisfy the second limb of *Lange* if the law is of the former rather than the latter description.

<sup>81</sup> (2013) 295 ALR 197. The High Court consisted of six judges.

<sup>82</sup> Ibid 199.

<sup>83</sup> Finding in the brothers' favour, his Honour Judge Stretton in the District Court held that the by-law was not authorised under the relevant primary legislation. Judge Stretton did not consider it necessary to review whether the by-law also infringed the implied freedom. See *Corneloup v Adelaide City Council* [2010] SADC 144 (25 November 2010).

<sup>84</sup> On appeal, the Full Court of the South Australian Supreme Court held (unanimously) that the by-law was a valid exercise of the power under the primary legislation but that the by-law *did* infringe the implied freedom. It thus also found in the brothers' favour. See *Corporation of The City of Adelaide v Corneloup* (2011) 110 SASR 334.

<sup>85</sup> Before the High Court, the Corneloups argued that the by-law was ultra vires the primary legislation, that proper procedural steps were not followed in the making of the by-law and that the by-law infringed the implied freedom. French CJ, Hayne, Crennan, Kiefel and Bell JJ (the latter agreeing with Hayne J) held that the by-law was authorised under the primary legislation and that it did not infringe the implied freedom. Heydon J, dissenting, ruled that the by-law was not authorised under the primary legislation. I do not review in detail the aspects of the decision relating to the claim that the by-law was not a valid exercise of power under the primary legislation.

Before the High Court, the Solicitor General for South Australia conceded that the provisions of the City of Adelaide by-law could burden communications about political communications.<sup>86</sup> The concession, potentially limited the opportunity for the Court to determine whether a law which restricts preaching has *such* a slight or inconsequential effect on political speech as to not burden it.<sup>87</sup> This point is borne out by examining the speech ostensibly burdened in this case. Caleb Corneloup's affidavit stated that his speech related to federal affairs (eg, gay marriage, internet filtering, teenage binge drinking and abortion).<sup>88</sup> These topics plainly seem to be related to federal (or federal and state) politics. Caleb, however, also preached about 'the unscientific nature of evolution being taught in schools etc', and the 'supremacy of god over man'; his brother Samuel Corneloup described himself as an 'expositor of the gospel'.<sup>89</sup> Arguably, the brothers' speech was only peripherally connected with politics because — however well expressed — it was a message of Christian salvation. The High Court did not explain how preaching a message about eternal life in Jesus Christ might relate to representative or responsible government in the Commonwealth Parliament.

The High Court published another implied freedom case — *Monis*<sup>90</sup> — on the same day as *A-G v Adelaide*. In *Monis*, the appellant, Man Haron Monis, was alleged to have sent letters and CDs to the families and relatives of those Australian soldiers

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<sup>86</sup> See *A-G v Adelaide* (2013) 295 ALR 197, 221 (French CJ). French CJ noted that preaching, canvassing, haranguing and the distribution of literature are all activities which may be undertaken in order to communicate to members of the public matters and which may be directly or indirectly relevant to politics or government at the Commonwealth level: at 222. Hayne J was prepared to assume that because the by-law prohibited certain conduct on a road without permission that it effectively burdened political communication: at 236. Crennan and Kiefel JJ, in a joint judgment, noted that it was not disputed that the requirement to obtain a permit effected a burden on some communications of a political kind sought to be made in the process of preaching or canvassing: at 254. Despite the Solicitor General's concession in relation to the first limb of *Lange*, French CJ, Hayne, Crennan and Kiefel JJ (Heydon J not deciding on this point and Bell J concurring with Hayne J) held that the subject provisions of the by-law were consistent with the second limb of *Lange*.

<sup>87</sup> See *Monis v The Queen* (2013) 295 ALR 259 ('*Monis*'). In *Monis*, published on the same day as *A-G v Adelaide*, Crennan, Kiefel and Bell JJ noted that an 'effect upon political communication which is so slight as to be inconsequential may not require an affirmative answer to the first limb enquiry': at 344 [343].

<sup>88</sup> See affidavit cited in the District Court proceedings in *Corneloup v Adelaide City Council* [2010] SADC 144 (25 November 2010) [8]. Caleb also claimed to be 'working closely with and on behalf of Joseph Stephen ... a candidate for "The Christian Democratic Party"': at *ibid*.

<sup>89</sup> See *Corneloup v Adelaide City Council* [2010] SADC 144 (25 November 2010) [8], [10]. Samuel Corneloup refused to apply for a preaching permit because he said it was against his religious beliefs to ask for permission to do so: at [10]. Street Church's message was about the authority of the Christian Bible: see, eg, Vassil Malandris from ABC Television, Interview with Adelaide Street Preachers Caleb and Samuel Corneloup (Television Interview, 19 March 2013) <[http://www.youtube.com/watch?v=J6-R\\_YIcP6Y](http://www.youtube.com/watch?v=J6-R_YIcP6Y)>.

<sup>90</sup> (2013) 295 ALR 259.



who were killed during active duty in Afghanistan. The letters typically began by expressing condolences to the recipients and then described each deceased soldier in increasingly critical terms as, being amongst other things, murderers. Copies of some of the correspondence were sent to senior political leaders.

Monis was charged with offences under s 471.12 of the *Criminal Code 1995* (Cth).<sup>91</sup> The second appellant, Ms Amirah Droudis, was alleged to have aided and abetted Monis in relation to some of the same offences.<sup>92</sup> After unsuccessfully trying to have the allegations against them quashed in both the NSW District Court and the NSW Court of Criminal Appeal on the basis that s 471.12 of the *Criminal Code* infringed the implied freedom, Monis and Droudis lodged a further appeal with the High Court arguing that the provision infringed the implied freedom.

The High Court (consisting of six judges as it had done in *A-G v Adelaide*) held unanimously that s 471.12 of the *Criminal Code* burdened political communication.<sup>93</sup> Yet, the six judges were evenly divided on the question of whether the law satisfied the test in the second limb of *Lange*. In three separate judgments, French CJ, Hayne and Heydon JJ decided that the law was inconsistent with the second limb of *Lange* (their Honours therefore declared s 471.12 invalid and would have granted the appeal). In a joint judgment, however, Crennan, Keifel and Bell JJ held that the law was consistent with the second limb of *Lange* and their Honours rejected the appeal.<sup>94</sup>

All the judges in *Monis* concluded that s 471.12 of the *Criminal Code* — which regulated offensive uses of postal and similar services — burdened political

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<sup>91</sup> This provision prevents the use of a postal or similar service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive. Twelve of the charges against Monis related to ‘offensive’ use of the postal service, and one related to using the postal service to harass. The appellants did not pursue an appeal on constitutional grounds in relation to the alleged harassment offence. The appeal from the District Court (and the later appeal) was concerned with the constitutionality of s 471.12 insofar as it concerned ‘offensive’ uses of a postal service.

<sup>92</sup> At the time of the High Court hearing, the appellants were yet to be tried on the substantive offences.

<sup>93</sup> See *Monis* (2013) 295 ALR 259, 280–2 (French CJ), 287 (Hayne J), 318 (Heydon J), 344 (Crennan, Keifel and Bell JJ).

<sup>94</sup> The appeal therefore failed. Section 23(2)(a) of the *Judiciary Act 1903* (Cth) provides that where the High Court is evenly divided with respect to its opinion on a lower court’s decision, the decision of the lower court is affirmed. Had the appellants sought to challenge the validity of the legislation in the original jurisdiction of the High Court, the same decision would have resulted in their favour, since that decision would have been governed by s 23(2)(b) of the *Judiciary Act 1903* (Cth) which provides that if judicial opinion is divided in a case brought in the original jurisdiction of the High Court, then the Chief Justice’s judgment will prevail. The appellants later pleaded guilty to the offences. Monis was sentenced to 300 hours of community service and received a two year good behaviour bond. Droudis received a two year good behaviour bond for aiding and abetting Monis in relation to one count.

speech.<sup>95</sup> Chief Justice French noted that some political communications may cause disgust, hatred or outrage.<sup>96</sup> Hayne J similarly reasoned that constitutionally protected speech can be offensive. His Honour held that invective as well as abuse can be part of political discourse.<sup>97</sup>

On the question of what constitutes a burden on political speech, the Commonwealth Director of Public Prosecutions (as well as the Commonwealth and the States of Queensland, South Australia and Victoria) submitted to the High Court that some restraints on speech apply to such a narrow category of political communication that the burden *cannot* be inconsistent with the implied freedom because it would not effectively burden political communication.<sup>98</sup> Dismissing this argument, Hayne J (supported by other members of the High Court) held that ‘effectively burden’ means no more than ‘prohibit, or put some limitation on, the making or content of political communications’.<sup>99</sup>

Crennan, Kiefel and Bell concluded in *Monis* that s 471.12 did place an effective burden on political discourse.<sup>100</sup> Their Honours accordingly focused on legal arguments relating to whether s 471.12 met the test in the second limb of *Lange*. The three judges considered s 471.12 valid because it did not ‘go too far’ in protecting people from receiving unsolicited offensive material in their ‘personal domain’.<sup>101</sup>

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<sup>95</sup> In *Coleman v Power* (2004) 220 CLR 1 the judges on the High Court reached different conclusions about whether offensive communications can be political. McHugh J observed that ‘insults are a legitimate part of the political discussion protected by the *Constitution* [and] an unqualified prohibition on their use cannot be justified as compatible with the constitutional freedom’: 54 [105]. In the same case, Gummow and Hayne JJ, wrote that ‘[i]nsult and invective have been employed in political communication at least since the time of Demosthenes’: at 78 [197]. Kirby J noted that Australian political discourse frequently involved ‘insult and emotion, calumny and invective’: at 91 [239]. Gleeson CJ stated that the language was ‘not party political, and ... had nothing to do with any laws, or government policy’: at 31 [30]. Heydon J, who was more prosaic, said it was unnecessary for people to use *insulting words* to communicate about government and political matters: 30 [28].

<sup>96</sup> *Monis* (2013) 295 ALR 259, 281. French CJ, 282, also noted the broad application of the prohibition. His Honour also held that s 471.12 did *not* serve a legitimate end in a manner compatible with the constitutionally prescribed system of government and did not satisfy the second limb of *Lange*. Heydon J generally agreed with the reasoning of French CJ (and with the orders of French CJ and Hayne J).

<sup>97</sup> *Ibid* 315. In relation to the second limb of *Lange*, Hayne J did not believe that the end or object pursued by s 471.12 *was* a legitimate end. His Honour held that the provision did no more than regulate the giving of offence.

<sup>98</sup> *Ibid* 291.

<sup>99</sup> *Ibid* 290. See French CJ, 280, and Crennan, Kiefel and Bell JJ, 344. Crennan, Kiefel and Bell JJ, 344, noted, however, that an ‘effect upon political communication which is so slight as to be inconsequential may not require an affirmative answer to the first limb enquiry’.

<sup>100</sup> *Ibid* 344.

<sup>101</sup> *Ibid* 340 (Crennan, Kiefel and Bell JJ).

Noting that s 471.12 was not *directed* to limiting political communications and that it only incidentally burdened such speech (citing, inter alia, *Wotton* for the relevance of this point<sup>102</sup>), Crennan, Kiefel and Bell JJ reasoned that the statute's objective of protecting citizens from receiving offensive correspondence in the home or workplace was compatible with the implied freedom.<sup>103</sup> Their Honours also noted that s 471.12 limited communications of a *seriously* offensive kind.<sup>104</sup> Crennan, Kiefel and Bell JJ thus found that s 471.12 did not impermissibly burden freedom of political speech and held that the appeals should be dismissed.<sup>105</sup>

### III HOW FAR DOES THE IMPLIED FREEDOM GO?

#### *A Lange's Strengths and Limitations*

*Lange* remains the High Court's authoritative statement of the law relating to the implied freedom. It can be reasoned from *Lange* that the scope of the implied freedom is not limited to the speech of individuals or non corporations. The implied freedom may, for example, protect political speech by media organisations who are reporting or commenting on others' views, or who may be expressing their own political opinions (or those of their journalists, either freelance or employed).<sup>106</sup> By the same reasoning, the implied freedom *may* apply to speech of the delegates or leaders of organisations (perhaps even religious leaders) who — directly or indirectly; explicitly or implicitly — communicate about matters relevant to representative and responsible government on behalf of their people.

The protective scope of the implied freedom is determined by reference to what the burden does on political expression; its scope does not depend on how a person might want to characterise a particular communication.<sup>107</sup> This approach is consistent with the implied freedom not conferring constitutional *rights* to freedom

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<sup>102</sup> *Wotton* (2012) 285 ALR 1; *ibid* 344.

<sup>103</sup> *Ibid* 346.

<sup>104</sup> *Ibid* 346–7.

<sup>105</sup> *Ibid* 347.

<sup>106</sup> *Lange* concerned speech by the Australian Broadcasting Corporation.

<sup>107</sup> See *APLA* (2005) 224 CLR 322, 451 (Hayne J) cited with approval in *Monis* (2013) 295 ALR 259, 280 (French CJ); *Sunol v Collier [No 2]* [2012] NSWCA 44 (22 March 2012) [24] (Bathurst CJ) who nevertheless noted that 'the acts complained of may be of assistance in identifying the type of publications or speech which would generally fall within the challenged sections'. I note, briefly, that there is awkwardness in the suggestion that the inquiry under the first limb of *Lange* should be assessed by reference to the general effect of a burden on political speech. It is rare for courts to hear evidence on how a burden generally affects political speech (and the High Court would almost never hear direct evidence on this question given its appellate role in most implied freedom matters). It is also not clear how this approach would work in practice if there is a burden on the specific speech of an individual (such as might, say, occur in relation to a contempt of Parliament allegation).

of expression.<sup>108</sup> It can nevertheless be expected that the courts will consider the scope of the implied freedom by reference to *how* the relevant burden affects expression (including, perhaps most obviously, with respect to the person who is alleging the limitation on their political speech).<sup>109</sup> It is also now clear, if there were any doubt, that protected political speech may comprise offensive discourse<sup>110</sup> and/or views that some consider lie at the fringe of political discussion.<sup>111</sup> A related point is that a law may burden political speech in its terms, operation or effect even if the law burdens only *some* political discourse.<sup>112</sup> Burdened political discourse *may* arguably include expression of religious viewpoints — *perhaps* even evangelistic messages — *if* the speech relates to federal politics.<sup>113</sup>

*Lange*, however, offers courts no bright line test in order to determine whether speech is political. Indeed, in *Lange*, the High Court sanguinely hinted that even *it* might be uncertain about the scope of the implied freedom, noting that ‘[w]hatever the scope of the implications arising from responsible government ... , those implications cannot be confined to election periods relating to the federal Parliament’.<sup>114</sup> This suggests legal uncertainty about what kind of speech the implied freedom protects. This is to say nothing of the difficulties litigants, experts or commentators might face in predicting how courts might assess the *second* limb of *Lange* (as varied by McHugh J in *Coleman v Power*<sup>115</sup>) — which requires assessing whether the relevant legislation is reasonably appropriate and adapted to serve a legitimate

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<sup>108</sup> *Lange* (1997) 189 CLR 520, 559.

<sup>109</sup> See *Sunol v Collier [No 2]* [2012] NSWCA 44 (22 March 2012) [24] (Bathurst CJ).

<sup>110</sup> As noted, all six High Court judges in *Monis* concluded that s 471.12 of the *Criminal Code* burdened the defendant’s alleged offensive political speech.

<sup>111</sup> See *Monis* (2013) 295 ALR 259, 281 (French CJ), 293 (Hayne J). Cf *Coleman v Power* (2004) 220 CLR 1, 30 (Gleeson CJ).

<sup>112</sup> *Monis* (2013) 295 ALR 259, 290 (Hayne J), 280 (French CJ), 344 (Crennan, Kiefel and Bell JJ). Crennan, Kiefel and Bell JJ, 344, noted, however, that an ‘effect upon political communication which is so slight as to be inconsequential may not require an affirmative answer to the first limb enquiry’.

<sup>113</sup> *A-G v Adelaide* (2013) 295 ALR 197 is *arguably* authority for this proposition. None of the majority judgments in *A-G v Adelaide* expressed doubt about whether ‘preaching’ could be constitutionally protected speech (Heydon J, the only dissenting judge in *A-G v Adelaide*, did not dissent on *this* point). That said, as noted, the South Australian Solicitor General *conceded* that the by-law burdened political speech. On the question of whether Caleb Corneloup (President of Street Church) or, in the case of *Monis*, Man Haron Monis (Sheikh Monis), were religious leaders, it is not clear to me whether they were, or are, religious leaders in the sense that they have ‘sizeable’ groups of followers — a working criterion for religious leader as I suggested at above n 1. In the *Monis* decision, the High Court did not mention whether Man Haron Monis’ speech may have been religiously motivated and it is not clear to me whether, though a Sheikh, Monis had or has a sizeable group of followers.

<sup>114</sup> *Lange* (1997) 189 CLR 520, 561 (emphasis added).

<sup>115</sup> (2004) 220 CLR 1.

end in a manner compatible with the maintenance of representative and responsible government provided for in the *Constitution*.<sup>116</sup>

Another challenge in using *Lange* (and other High Court cases) to determine the protective scope of the implied freedom is that *Lange* purports to ground political speech in the text and structure of the *Commonwealth Constitution*.<sup>117</sup> While sourcing the implied freedom in the text of the *Constitution* does help to clarify its potential protective scope, the principle raises two important points. First, in several of its later decisions the High Court has sought to explain how speech affected by state laws relates to the *federal* system of government,<sup>118</sup> but the High Court has not always done so. For example, in *Levy* (decided in 1997), there was no obvious political connection between Victorian regulations prohibiting duck hunting and federal political affairs (and nor did the High Court seek to explain why there might be one). Secondly, while the implied freedom is said to be based in the words of the *Commonwealth Constitution*, there is sparse guidance for defining political speech in the text of the *Constitution*. It is unlikely that the words in the *Constitution* alone will ever provide a *complete* guide to assist courts in identifying the scope of the implied freedom.

There also remains a tension between the scope of the implied freedom as described in the joint judgment in *Theophanous* and the High Court's later decision in *Lange*. In *Theophanous*, as noted, Mason CJ, Toohey and Gaudron JJ indicated that political discussion includes all speech that is relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.<sup>119</sup> At the time of the High Court's decision in *Theophanous*, the High Court had not universally agreed upon the proper basis for the implied freedom. While the High Court in *Lange* did not expressly overrule Mason CJ, Toohey and Gaudron J's judgment

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<sup>116</sup> The High Court affirmed this approach in *Aid/Watch* (2010) 272 ALR 417. The doctrines of representative and responsible government are, as suggested, the constitutional touchstones for defining political speech under the first limb of *Lange*. These doctrines are, however, also key elements of the criteria under the second limb of *Lange* for determining whether a law is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of representative and responsible government provided for in the *Constitution*.

<sup>117</sup> That is, unless the implied freedom arises under a relevant state constitution. See *Muldowney v South Australia* (1996) 136 ALR 18, 23. Brennan CJ noted that the Solicitor-General for South Australia conceded that there was a constitutionally entrenched limitation upon state legislative power 'in like manner to the *Commonwealth Constitution*' and that that limitation precluded interference by an ordinary law with freedom of discussion about political affairs (quotation marks in Brennan CJ's judgment referring to words of Solicitor-General).

<sup>118</sup> See, eg, French CJ in *Hogan v Hinch* (2011) 275 ALR 408, 426, and the High Court's joint judgment in *Wotton* (2012) 285 ALR 1, 9.

<sup>119</sup> *Theophanous* (1994) 182 CLR 104, 123.

in *Theophanous*, it is arguable that the subsequent clarification of the law in *Lange* narrowed its scope.<sup>120</sup>

Yet, despite their differences, both *Theophanous* and *Lange* indicate that the implied freedom includes speech about representative government *and* responsible government. For example, the *Theophanous* joint judgment describes political speech in terms of the government's 'conduct' and 'policies' (executive actions) as well as the 'fitness for office of government ... and those seeking public office' (voting choices).<sup>121</sup> Similarly, the High Court in *Lange* held that the protective scope of the implied freedom includes communications that are relevant to people making informed voting choices<sup>122</sup> and the actions (presumably the inactions too) of the Commonwealth Government and its ministers, including through the ministers' departments, statutory authorities and public utilities.<sup>123</sup> The Court also observed in *Lange* that 'the conduct of the executive branch is not confined to ministers and the public service'.<sup>124</sup> While it would be stretching the interpretation of these words to contend that *Lange* recognised speech about, say, lobbyists (including religious leaders or leaders of religious lobby groups), as part of political discussion,<sup>125</sup> it would seem from this phrase in *Lange* that the High Court *did not* have a narrow conception of executive responsibility (ie, speech about executive responsibility under the implied freedom at least reaches *beyond* only discussion of ministers and public servants).

In subtly different ways, each joint judgment — *Theophanous* and *Lange* — describes the implied freedom in terms of speech about voting choices and executive responsibility. While there are obvious differences in the decisions (reflecting the High Court's evolving reasoning in this field of law), this observation hints at there being possibly fewer differences between the *Lange* and *Theophanous* judgments than might initially meet the eye. It is even possible that a generous view of the kind of political speech that is relevant to voting choices and responsible government might reveal additional concentricity between the *Theophanous* and *Lange* judgments. For example, it might be said that each judgment supports the view that the protective scope of the implied freedom extends to matters over which the government *does not yet have* responsibility. Additionally, if political discourse is viewed as dynamic, and if the Court accepts that the development of public opinion can, over time, influence voting choices or even

<sup>120</sup> See *Brown v Classification Review Board* (1998) 154 ALR 67, 85–6. Heerey J suggested that *Lange* necessarily qualified the definition of political speech that Mason CJ, Toohey and Gaudron JJ proposed in *Theophanous*. See also *Sunol v Collier [No 2]* [2012] NSWCA 44 (22 March 2012) [84] where Basten JA expressed doubt about whether *Theophanous* 'accurately reflects an immunity limited to that which is necessarily implied from the text and structure of the *Constitution*' as required by *Lange*.

<sup>121</sup> *Theophanous* (1994) 182 CLR 104, 123.

<sup>122</sup> *Lange* (1997) 189 CLR 520, 559.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> The joint judgment in *Theophanous*, by contrast, would likely support such an interpretation.

the electorate's expectations of standards of responsible government, then it may be possible to, in some way, *further* reconcile the two judgments.

B *What does Speech about Representative and Responsible Government Mean?*

What then, does it *mean* for the implied freedom to protect speech that is relevant to representative and responsible government? In the following passages, I try to answer this question in seven points. I begin by describing the interrelationships between representative and responsible government. I then consider the significance of voting preferences with respect to speech that might fall within the protective scope of the implied freedom. I later explore the importance of temporal considerations in relation to the concepts of representative and responsible government and, in doing so, briefly return to *Lange*. The objective in doing so is to try to identify more clearly whether political speech as the High Court described it in *Lange* can include speech by or about religious leaders.

First, the touchstone of *responsible* government is that the executive must answer to the Commonwealth Parliament. By contrast, *representative* government refers to a system whereby elected representatives are accountable to the people who vote for them. In theory, representative government and responsible government are *distinct* political frameworks and yet there may a degree of interconnectedness between the two systems. A government's actions when it is in office — its actions and inactions — can (and do) affect voter choices. Additionally, speech about the kinds of things a government *does* when governing (and also what it does not do or *perhaps* what it *should* do) can influence voters' perceptions of the government's effectiveness. This, in turn, may affect voters' decisions at the ballot box. It may, as a result, be difficult to distinguish speech that is relevant to responsible government from speech that pertains to representative government and vice versa.

Secondly, arguably the most salient guidance in relation to any system of government in the *Constitution* is in ss 7 and 24. Notwithstanding the possible above-mentioned overlaps between representative government and responsible government, ss 7 and 24 tend to focus on voters' choices and reveal that *representative* government is, at least from the text of the *Constitution*, a governmental system that underpins the constitutional arrangements. Using the expression 'directly chosen by the people', ss 7 and 24 indicate that voters have a direct *choice* — ie, that the voting public can 'choose' between different Commonwealth parliamentary candidates — conversely, voters can elect to *not* choose political candidates who lack sufficient appeal. Dawson J in *ACTV* noted the significance of ss 7 and 24 of the *Constitution* and the importance of voter choices for the implied freedom.<sup>126</sup> Hayne J also referred to those sections (and ss 64 and 128) in *Monis*.<sup>127</sup> Expression that is relevant to

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<sup>126</sup> (1992) 177 CLR 106, 186–7.

<sup>127</sup> (2013) 295 ALR 259, 288. Justice Hayne observed, further, that 'those who are elected as members of the parliament and those who are appointed as ministers of state are necessarily accountable to "the people"'. (His Honour thus implicitly distinguished representative government from responsible government while highlighting the accountability of political representatives to the electorate).

Commonwealth voting choices will be, and will likely remain (in the absence of constitutional change), a cornerstone of political expression.

Thirdly, different voters will likely have different wants in relation to acquiring and passing on information that is relevant to their voting choices. People do not have homogenous desires for political information. The kind of material that an individual regards as relevant to their voting decisions is that which allows the person to exercise a genuine choice. Voting is a matter of *personal* preference and the word ‘direct’ in ss 7 and 24 in relation to that voting choice supports this view.<sup>128</sup> Disinterested or disaffected voters may need little evidence to inform their voting decisions. Others, by contrast, may seek as much material as possible. Some voters may be primarily concerned with the political matters of the day and their political concerns may be short term. Others, by comparison, may take a longer term view of political affairs. For some individuals, the kind of expression that is relevant to their own ballot box choices and to their perceptions of the government’s actions could be about a topic that is barely spoken of, except for, say, in academic journals or in their local church. For others, the topic of primary political interest may be at the forefront of contemporary parliamentary debate. At the ballot box, one voter could be interested in the personal background, professional affiliations or lived ethical standards of a political candidate in the voter’s own electorate or elsewhere. Another voter may, by contrast, be concerned about the policies or practices of an entire political party. A voter’s choice about whether to elect a particular electoral candidate could be influenced by considerations outside his/her electorate or in other tiers of government. A voter’s decision may be influenced by a policy in relation to which a government does *not* want to take responsibility; or over which governments tend to share responsibilities.

Some voters may be influenced by the views or teachings of religious leaders and may search for political parties or candidates whose views resonate with those teachings. Depending on voters’ dispositions for acquiring political information and their perceptions of the importance of political matters (and the significance of politicians to them), for some voters, perhaps even *many*, politics will be about government over the long term — leadership, welfare, health, economic wellbeing and the good of society. For others, ballot box decisions may involve little more than the whimsical filling out of ballot papers at the local school on a Saturday every few years and may have no more political significance than that. Whoever the voter may be, it is inherent in them making an *informed* voting choice that they are able to take into account such *information as they see as relevant to their choice about who to elect to political office*.

Fourthly, a wide range of matters fall within Commonwealth government executive responsibility. Speech about executive responsibility could include commentary about the decisions (or words or speeches) of ministers or the actions of the Prime Minister and also — as the High Court wrote in *Lange* — discourse about the

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<sup>128</sup> ‘Direct’ implies that the voter’s choice at the ballot box is paramount, in contrast to the views of, say, lobby groups or even political parties.



actions (or inactions) of ministers' departments and statutory authorities. Speech that is relevant to responsible government could comprise expression about the government's actions in creating legislation, executing policies or implementing programs. Political speech could be about what the government refuses to do, or does not do. Speech about responsible government may include expression about possible perceived *religious* objectives the government may prosecute. Such religious objectives might, for example, comprise opposing legalisation of euthanasia or — a more contentious suggestion — opposing onshore processing of asylum seekers because of implicit objections to the possible settlement of Muslims in Australia.

Fifthly, over time, executive responsibility can switch between tiers of government and government responsibilities can change. Governments often jointly administer policies (eg, there are joint Commonwealth and state roles in relation to law enforcement, aspects of taxation, education, and health). Hearings and findings of commissions of inquiry may highlight connections between members of political parties at different tiers of government. Some politicians may switch from state government positions to the federal government (or from local government to state government roles). There may be a morphing of executive responsibilities and a blending of perceived accountabilities for legislative and executive decisions between Commonwealth, state, or even local branches of government. The changing nature of these governmental responsibilities may make it difficult — especially over time — to identify any single tier of government as having responsibility for a particular field.

Sixthly, political speech is not a static concept nor is it fixed in time. A generous view of political speech may facilitate discourse about nascent political matters. French CJ seemed to accept as much in *Hogan v Hinch* when his Honour described the implied freedom as applying to expression about 'matters *potentially within the purview of government* (emphasis added).<sup>129</sup> Political speech may alter depending on the composition of Parliament. Consider climate change. Perhaps only two decades ago, notwithstanding that the Commonwealth government already had a well-established role in environmental law, many Australian voters may *not* have conceived of climate change as an area of significant government responsibility, let alone a topic that might be relevant to people's voting choices. Yet, scientific research and academic debate in this field — *speech* and *expression* — arguably drove political leaders in the Western world (including Australia) to recognise climate change as a bellwether topic for progressive Parliaments. To *not* recognise climate change as within the scope of the implied freedom in, say, 1990 could have denied the Australian electorate the ability to communicate about a matter that would emerge little more than two decades later as an arguably critical consideration in influencing voting choices for Australians. The same might be said of asylum seeker policy in Australia; Islam; poker machines; and real-time advertising of online bookmakers' odds on the outcomes of broadcast sporting

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<sup>129</sup> (2011) 275 ALR 408, 426.

games — that is, these matters *became* political topics without necessarily being inherently so.<sup>130</sup>

Seventhly, voting choices may traverse parliamentary terms. Clearly, the actions of a government *while it is governing*, can stimulate public debate and affect public sentiment (and voting choices) for long periods, again hinting (though the concepts are distinct) at the lockstep nature of voting choices and executive responsibility. Government budgetary decisions in one term can affect perceptions about the economic competence of later governments. Conversely, ostensibly ‘old’ political topics — for example, the government’s role in previous World Wars or governments’ treatment of the Stolen Generations to take just two examples — can *remain* political, affecting peoples’ lives (and influencing their voting choices) for decades. Voters may choose political parties and independent MPs on their *long-term* records. Political topics resurface as do former political leaders. Even *retired* political figures can exert strong influence amongst voters beyond their parliamentary careers.

Returning to *Lange* — beyond saying the implied freedom did not only apply during election periods, the High Court did not restrict the scope of the implied freedom to any time frame. The High Court in *Lange* also acknowledged that most of the information that people need to make an informed voting choice exists *between the holding of one and the calling of the next election* — meaning, a government’s actions in government can influence *voting* choices at *future* elections.<sup>131</sup> Similarly, Heydon J in *Coleman v Power* described the implied freedom as protecting expression ‘which might lead to voter appreciation of the available alternatives’, implying that voters make future ballot box choices based on how candidates perform after being elected to office.<sup>132</sup>

The High Court said in *Lange* that the information that is relevant to responsible government arises ‘throughout the life of a federal Parliament’.<sup>133</sup> This does not suggest a conservative approach to the temporal aspects of speech about responsible government. Similarly, in *Hogan v Hinch*, French CJ said political matters are ‘not limited to matters concerning the current functioning of government’.<sup>134</sup> People may (and do) remember the actions of their governments — fondly or otherwise — after those governments have been elected out of office. *Historic* acts of government can permeate peoples’ perceptions of *future* governments — in positive and negative ways — for years and perhaps even decades. By contrast, younger voters may have naive, though genuine, expectations of their government and may have their own perceptions of what

<sup>130</sup> Poker machines became a political topic for the Commonwealth as a result of Independent MP Andrew Wilkie requiring, in 2009, that the Gillard-led Labor Government support voluntary poker machine pre-commitment reforms to help ‘problem’ poker machine users in return for Mr Wilkie giving then Prime Minister Gillard his parliamentary vote on crucial supply bills.

<sup>131</sup> (1997) 189 CLR 520, 561. The High Court thus rejected McHugh J’s suggestion in *ACTV* (1992) 177 CLR 106, 277 that the implied freedom only applies during election periods.

<sup>132</sup> (2004) 220 CLR 1, 126.

<sup>133</sup> (1997) 189 CLR 520, 561.

<sup>134</sup> (2011) 275 ALR 408, 426.

is relevantly political in the short term or longer run. Emphasising the non transitory nature of executive responsibilities, ministers in previous state and federal governments can be called to account for their actions before later parliaments. Committees regularly review the actions and activities of former governments, ministers and departments. Conversely, House of Representatives and Senate committees often undertake inquiries to better inform the policies of current and *future* governments.

Given these considerations, it would be unrealistic to propose *any* rigid time frame for speech about responsible or representative government. I suggest there is another reason for the courts to avoid a rigid, static or short-term approach to deciding whether speech falls within the protective scope of the implied freedom. As I have hinted, topics can become *political* if people have sufficient freedom (and time) to discuss them. A less than generous approach to interpreting the temporal aspects of the implied freedom — in effect, not granting topics the opportunity to grow into political subjects in the longer run — could deny Australian voters the opportunity to freely communicate about nascent political subjects that may, over time, *become* important topics for governments if there is enough confidence to discuss them.

#### IV ILLUSTRATING THE LEGAL PRINCIPLES: SPEECH BY AND ABOUT RELIGIOUS LEADERS

I now briefly analyse whether speech by or about religious leaders might fall within the first limb of *Lange*. Two examples are considered. As suggested, the purpose of this study is not to review any specific burden that might apply to the speech. By reviewing these examples, I consider whether, if burdened, speech by or about religious leaders could fall within the protective scope of the implied freedom (ie, the first limb of *Lange*).

Consider the former Australia Mufti, Sheikh Taj El-Din Hamid Hilaly. In 2006, the Sheikh was reported to have said in a sermon that women who do not wear a hijab are like ‘uncovered meat’ (to whom men might be attracted sexually, as would a cat).<sup>135</sup> In context, the Sheikh’s comments were about criminal sentencing for young Muslim sexual offenders. Specifically, the Sheikh’s sermon referred to Sydney gang rapes and included the following passage (as reportedly translated from Arabic to English):

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<sup>135</sup> In an edited English translation prepared by SBS, the Sheikh is reported to have said: ‘If you take uncovered meat and put it on the street, on the pavement, in a garden, in a park or in the backyard, without a cover and the cats eat it, is it the fault of the cat or the uncovered meat? The uncovered meat is the problem. If the meat was covered, the cats wouldn’t roam around it. If the meat is inside the fridge, they won’t get it. If the meat was in the fridge and it (the cat) smelled it, it can bang its head as much as it wants, but it’s no use. If the woman is in her boudoir, in her house and if she’s wearing the veil and if she shows modesty, disasters don’t happen’; see Dalia Mattar (SBS Translator), ‘What Sheikh al-Hilaly Said’, *The Australian* (online), 27 October 2006 <<http://www.news.com.au/breaking-news/what-sheik-al-hilaly-said/story-e6frfkp9-111112425700>>.

when it comes to adultery, it's 90 percent the woman's responsibility. Why? Because a woman owns the weapon of seduction. It's she who takes off her clothes, shortens them, flirts, puts on make-up and powder and takes to the streets ... It's she who shortens, raises and lowers. Then it's a look, a smile, a conversation, a greeting, a talk, a date, a meeting, a crime, then Long Bay Jail.<sup>136</sup>

The references to 'a crime' and 'Long Bay Jail' were generally understood to mean the arrest and sentencing of Bilal Skaf, a young Muslim convicted of sexual assault.<sup>137</sup> Skaf was the leader of a gang of up to 14 Lebanese Muslim men who raped four women in Sydney in August 2000.

Arrested in November 2000, sent to trial, later convicted and sentenced to 55 years imprisonment (his sentence was later reduced on appeal to 40 years jail), Skaf's imprisonment became a political topic. For example, in 2003, the NSW Opposition Justice spokesman, John Ryan, accused the then NSW Justice Minister, John Hatzistergos, of being complicit in releasing cartoons that Skaf drew in prison (one depicted Skaf's fiancé being pack raped). Ryan claimed Hatzistergos allowed the pictures to be released in order to 'enhance [the government's] law and order credentials' for the purpose of showing off to the public the government's 'Super Max' jail.<sup>138</sup> Hatzistergos denied the allegation.

The Sheikh's audience — men in a Lakemba mosque during *Ramadan* — would likely have understood the Sheikh's message to be about prison sentences for Muslim men convicted of sexual assault. It might be said that the Mufti's comments were made in a private setting of religious worship — a Lakemba mosque — and the speech lacked any quality of political expression because of the separation of church and state (or, more accurately, mosque and state) and that 'mosque speech' cannot be political speech. I am not, however, aware of any constitutional principle preventing political speech including speech in mosques.

The reported aspects of the Mufti's sermon constituted speech about the courts' sentencing of male Muslim rapists; it was not speech about the (Commonwealth) executive nor was it particularly relevant to (Commonwealth) voting choices.<sup>139</sup>

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<sup>136</sup> Ibid. Reported translation by Dalia Mattar.

<sup>137</sup> For example, when referring to the Mufti's sermon in 2006, the then Commonwealth Treasurer Peter Costello was in no doubt that Sheikh Hilali was referring to the case of Bilal Skaf. See Interview with Alan Jones (31 October 2006) <<http://www.treasurer.gov.au/tsr/content/transcripts/2006/159.asp>>.

<sup>138</sup> See Stephen Gibbs, 'Skaf Stories Part of a Freak Show: Libs', *Sydney Morning Herald* (online), 26 July 2003, <<http://www.smh.com.au/articles/2003/07/25/1059084204009.html>>.

<sup>139</sup> See McHugh J in *APLA* (2005) 224 CLR 322, 361, who was in no doubt that the implied freedom would protect communications about judicial officers and courts concerning matters arising from legislative acts or executive decisions or omissions. By contrast, on Spigelman CJ's reasoning in *John Fairfax Publications Pty Ltd v A-G (NSW)* (2000) 181 ALR 694, 709, the implied freedom would not protect such expression.

In my view, if it were burdened, the Mufti's speech was *insufficiently* relevant to representative and responsible government — particularly in relation to the *Commonwealth* Parliament — to fall within the protective scope of the implied freedom.<sup>140</sup>

While I believe that the Mufti's speech was not relevantly political, speech *about the Mufti's sermon could* still fall within the protective boundaries of the implied freedom if *that* speech, assuming it was burdened, had a sufficient connection with voting choices or executive responsibility in respect of the Commonwealth Parliament. The Mufti's statements generated a vast amount of commentary amongst senior state and federal politicians, all critical of the Mufti.<sup>141</sup> The fact that so many senior politicians (state and federal) contributed to the debate about the reported aspects of the Mufti's sermon perhaps points to his comments touching on topics of political interest (ie, *the status of women or Islamic extremism*).

A senior Sydney Anglican — Dean Philip Jensen — spoke about the Sheikh's sermon and the Dean's comments bring an interesting perspective to the implied freedom and the Mufti's statements. The Dean's comments also raise the question of whether one religious leader's comments about *another* religious leader's statements could fall within the protective boundaries of the implied freedom. Dean Jensen claimed that the Mufti's sermon was about *adultery* and the media commentary failed to adequately appreciate the Sheikh's culture. Dean Jensen said:

The Sheik's comments were about the difference between men and women. The sermon was about adultery. It was about a gender distinction made in Quranic judgement between theft and adultery ...

The biggest failed shibboleth of the week was the separation of church and state. Political leaders from both sides of the house in both state and federal parliaments have pressured the Muslim community to sack a man for what he preached in a religious service. Secularists have been notably quiet on this issue of separation of State and Church. *They have written and spoken out against the Prime Minister's plan to subsidize chaplains in schools but not in his outspoken pressure to remove the Sheik from his post* (emphasis added).<sup>142</sup>

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<sup>140</sup> See *APLA* (2005) 224 CLR 322, 351 (Gleeson CJ and Heydon J), 362 (McHugh J); 450 (Callinan J).

<sup>141</sup> The political figures critical of the Mufti included the then Prime Minister, John Howard and the then Treasurer, Peter Costello. There were explicit demands for the Mufti's resignation from the then Shadow Foreign Affairs Minister Kevin Rudd; the then NSW Premier, Morris Iemma; the then Victorian Premier Steve Bracks; and the then Federal Sex Discrimination Commissioner, Pru Goward (later to become NSW State Member for the Seat of Goulburn and who recommended the Sheikh be deported for allegedly inciting men to rape). The then NSW Minister for Emergency Services, Nathan Rees (later a NSW Labor Premier) called the Sheikh a 'serial boofhead'.

<sup>142</sup> Phillip Jensen, *Sheikh Hilali* (2 November 2006) <<http://phillipjensen.com/articles/sheik-hilali2/>>.

The emphasised passage carries implicit criticism of those people who opposed then Prime Minister John Howard's policy of supporting funding for school chaplains. This was a controversial topic for the then Coalition government (and for Labor governments afterwards) — perhaps hinting at a government policy merging church and state. What is more, the chaplaincy program became the subject of a High Court challenge against the Commonwealth government.<sup>143</sup> The implication of the Dean's paper is that advocates of church-state separation were hypocrites for criticising Prime Minister Howard's support for funding school chaplains while not also objecting to the Prime Minister's public urges to remove the Sheikh from his religious position. The Dean's expressed support for the Howard government's policy of funding school chaplains, was, in my view, relevant to Sydney Anglicans' voting choices and/or their understanding of the actions of the Commonwealth executive and this speech, assuming there was a relevant burden, would likely fall within the protective boundaries of the implied freedom (ie, under the first limb of *Lange*).

## V CONCLUSION

*Lange* remains the authoritative High Court case on the scope of the implied freedom. According to *Lange*, the implied freedom applies to speech that facilitates informed voting choices *and* discourse which is relevant to the effectiveness of the government, including through its statutory authorities and public utilities, in governing for people who exercise those voting choices. By contrast, Mason CJ, Toohey and Gaudron J's joint judgment in *Theophanous* indicates that the implied freedom applies to speech about the political views and public conduct of all persons involved in activities that have become the subject of political debate.

The *Theophanous* view of the scope of the implied freedom appears broader than what the High Court decided in *Lange*. The earlier joint judgment would also appear to more readily recognise religious leaders' contributions to public debate as political speech. I have contended, however, that a generous interpretation of the High Court's description of the implied freedom in *Lange* could result in the differences between *Lange* and *Theophanous* being less stark than otherwise may appear. It is also possible that, over time, speech which is relevant to the development of public opinion can *become* the kind of speech that is important for peoples' voting choices or their perceptions of executive responsibility and this may again imply more similarities between *Theophanous* and *Lange* than might otherwise initially seem apparent.

I have also suggested that a generous temporal view of political speech could protect discussion about topics that are of emerging political relevance and this may allow discourse about those subjects to grow or even flourish. Political speech *may* thus include the contributions of religious leaders to public debate even if the subject matter is of nascent relevance to representative and responsible government (or, by contrast, is apparently of primarily historic relevance).

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<sup>143</sup> See *Williams v Commonwealth* (2012) 288 ALR 410.

It is, accordingly, possible to answer the questions I posed at the start of this article. First, political speech is speech or other expression that is relevant to voting choices or executive responsibility in relation to the Commonwealth Parliament. Political speech can include speech about state government matters if these are relevant to voting choices or executive responsibility in relation to the Commonwealth Parliament. Secondly, the implied freedom may protect speech by and about religious leaders from a burden if the speech is political speech as defined above (and the plaintiff can also show that the relevant burden does not fall within the second limb of *Lange*, as varied by McHugh J in *Coleman v Power*).

These answers, I suggest, reflect the minimum limits of political speech. Based on the *Theophanous* view of political speech, though perhaps not inconsistent with *Lange*, the implied freedom could protect speech by or about religious leaders who seek to influence government decision making (eg, by lobbying). It might also be argued that *A-G v Adelaide*<sup>144</sup> supports the view that political discourse can include expression of religious viewpoints — perhaps even evangelism — if the speech relates in some way to federal politics.<sup>145</sup> The above responses may have important implications for the speech of religious leaders in Australia who contribute to public debate (and for those who participate in discourse about them), for, on this reasoning, that kind of speech *may* fall within the protective scope of the implied freedom (ie, the first limb of *Lange*).

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<sup>144</sup> (2013) 295 ALR 197.

<sup>145</sup> As suggested, because of the South Australian Solicitor General's concession in *A-G v Adelaide* that the by-law restricted political expression, the authority of the case may be somewhat limited in respect of the suggestion that political speech may include expression of religious viewpoints, including evangelism. Significantly, the High Court found in that case that the by-law *was* valid (as a matter of statutory construction and under the second limb of *Lange*).

