

THE PUBLIC INTEREST, REPRESENTATIVE GOVERNMENT AND THE ‘LEGITIMATE ENDS’ OF RESTRICTING POLITICAL SPEECH

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The question of what constitutes a ‘legitimate end’ for burdening the implied freedom of political communication has remained unclear and divisive for nearly two decades, in spite of the unanimity of the High Court in Lange v Australian Broadcasting Corporation (1997) 189 CLR 520. Until recently, the test for ‘legitimate ends’ appeared to require evaluation by the High Court of the ‘public interest’ that the impugned legislation was directed at. However, the ambiguous operation of ‘legitimacy testing’ has now been simultaneously clarified and problematised by the High Court in McCloy v New South Wales (2015) 257 CLR 178. In that case the High Court switched the focus of legitimacy testing from an impugned purpose’s effect on the ‘public interest’ to its effect on ‘representative government’. This article examines how the bare majority’s judgment in McCloy has both removed some confusion, but also laid the groundwork for continued uncertainty in other respects, and places the landmark decision in the wider context of legitimacy testing. In particular, questions remain concerning the continued role of public interest considerations and what constitutes ‘representative and responsible government prescribed by the Constitution’.

I INTRODUCTION

The constitutional implied freedom of political communication has never been absolute, and the High Court in *Lange v Australian Broadcasting Corporation* (*Lange*) unanimously agreed that Parliament has the capacity to pass laws that restrict political communications for certain ‘legitimate’ legislative purposes.¹ However, the lack of an authoritative statement of principle by a majority of the High Court regarding what constitute such legitimate purposes has caused ambiguity for the nearly two decades since *Lange* surrounding the question. That omission was categorically addressed by the majority of the High Court

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1 (1997) 189 CLR 520, 561; see also *McCloy v New South Wales* (2015) 257 CLR 178, 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ), 229 [121] (Gageler J), 280 [305] (Gordon J).

in the 2015 decision of *McCloy v New South Wales* (*McCloy*).² The judgment of the bare majority of French CJ, Kiefel, Bell and Keane JJ redefined the prior understanding of what constituted a ‘legitimate’ legislative end for the operation of the *Lange* test (hereafter *‘legitimacy testing’*). The majority did this in such a way that the new formulation from *McCloy* will likely subsume the actual words of the second limb of the *Lange* test in importance. This article examines how, in reformulating the test, the High Court has both removed some confusion but also sowed the seeds for further dispute in the future, and places the landmark decision for the implied freedom in the wider jurisprudential context of legitimacy testing.

In *Lange*, the High Court in a celebrated compromise developed the *Lange* test for the implied freedom of political communication,³ which has since been adopted as settled law.⁴ The second limb of the *Lange* test stated that Parliament can pass laws that burden political communication when those laws are ‘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’ (the *‘Second Limb’*).⁵ Unsurprisingly, the vague and amorphous description of ‘legitimate ends’ led to divisions and confusion in the High Court about how to apply the *Lange* test,⁶ with the Second Limb being criticised for ‘indefinite and highly abstract language’,⁷ and a general lack of clarity.⁸ The majority of the High Court in *McCloy* settled nearly twenty years of tangled and chaotic jurisprudence on the point by adopting a deceptively simple formulation: an end will be ‘legitimate’ if it is ‘compatible’ with representative government, which in turn means that it does ‘not adversely impinge upon the functioning of the system of representative government’.⁹

This article, by examining the decades-long jurisprudence of legitimacy testing and the substance of the majority’s new test in *McCloy* for ‘legitimate’ ends, examines how the previous understanding of what constitutes ‘legitimate’ legislative ends in the second limb has been significantly altered by the new formulation. This article will not substantively address the ever-contentious question of how the High Court determines whether a law is ‘appropriate and adapted’ (or ‘proportionate’) to a particular end beyond how the High Court’s new approach in *McCloy* to the testing of proportionality has affected the testing of legitimacy and vice versa.

2 (2015) 257 CLR 178.

3 (1997) 189 CLR 520, 567–8.

4 *McCloy* (2015) 257 CLR 178, 200–1 [23] (French CJ, Kiefel, Bell and Keane JJ), 230 [124] (Gageler J), 258 [220] (Nettle J), 282 [310] (Gordon J); *Wotton v Queensland* (2012) 246 CLR 1, 15 [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ) (*‘Wotton’*), citing *Hogan v Hinch* (2011) 243 CLR 506, 542 [47] (French CJ), 555–6 [94]–[97] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

5 *Lange* (1997) 189 CLR 520, 567–8.

6 *McCloy* (2015) 257 CLR 178, 258–9 [221] (Nettle J); *Unions NSW v New South Wales* (2013) 252 CLR 530, 576 [129] (Keane J) (*‘Unions NSW’*); contra *McCloy* (2015) 257 CLR 178, 282 [310] (Gordon J).

7 *Unions NSW* (2013) 252 CLR 530, 576 [129] (Keane J).

8 *Monis v The Queen* (2013) 249 CLR 92, 181–2 [244] (Heydon J) (*‘Monis’*).

9 *McCloy* (2015) 257 CLR 178, 194 [2] (French CJ, Kiefel, Bell and Keane JJ); see also at 203 [31], 212–13 [67].

In the absence of an express catalogue of legitimate ends, this article will first show that the High Court had, before *McCloy*, approached legitimacy testing of ends in an ad hoc manner without any clear consensus, rather than determining a comprehensive test for legitimacy. This inaction, mirrored by a relative paucity of comprehensive academic analysis of 'legitimacy' as a constitutional concept,¹⁰ manifested in a complex grouping of tests for determining legitimate ends, some of which, by requiring the determination of 'public interest' considerations, were susceptible to the personal political values of judges.

Then, the article will demonstrate that, in a welcome and sorely needed shift away from this lack of clarity, the majority of the High Court in *McCloy* adopted a simpler and clearer test for the identification of legitimate ends. This new test focused on whether the impugned end 'adversely impinges upon' representative and responsible government as prescribed by the *Constitution*. In doing so, this article will show that the majority of the Court gave greater deference to Parliament's political processes in the testing of legitimacy, while shifting analysis of controversial 'public interest' considerations away from the testing of *legitimacy of ends* to being solely concerned with the testing of '*proportionality of means*'.

Finally, this article then identifies the likely consequences of the new legitimacy test for the implied freedom, given the shifting in emphasis of 'public interest' considerations from one part of the Second Limb to another. Furthermore, this article argues that in future implied freedom cases the question of what constitutes 'representative government' will be the main point of contention in legitimacy testing, not whether the impugned end serves a 'public interest'. This article argues that whilst the understanding of legitimacy testing has been positively advanced by the majority's judgment in *McCloy*, in terms of substantially clarifying the law concerning the Second Limb, the majority has also inadvertently shifted the areas of jurisprudential controversy to other parts of the *Lange* test with unpredictable effects.

II LEGITIMACY TESTING IN THE *LANGE* TEST

A *What Does the Lange Test Require?*

Before discussing how the testing of legitimacy has evolved over time, it is necessary to understand how the *Lange* test operates.

10 This lack of academic analysis on legitimacy testing has continued since *McCloy*: of the four academic articles that have since been published that meaningfully address the decision (see Anne Carter, 'Case Note: *McCloy v New South Wales*: Political Donations, Political Communication and the Place of Proportionality Analysis' (2015) 26 *Public Law Review* 245; Murray Wesson, 'Crafting a Concept of Deference for the Implied Freedom of Political Communication' (2016) 27 *Public Law Review* 101; Sir Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2016) 27 *Public Law Review* 109; Mark Watts, 'Reasonably Appropriate and Adapted? Assessing Proportionality and the "Spectrum" of Scrutiny in *McCloy v New South Wales*' (2016) 35 *University of Queensland Law Journal* 349), only Carter has undertaken any analysis on legitimacy testing. See below n 95.

The test, as outlined in the unanimous *Lange* judgment, requires two questions to be answered:

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.¹¹

This formulation, though modified in *Coleman v Power* (*‘Coleman’*),¹² has been adopted as the authoritative statement of the test for the implied freedom.¹³ It is useful to divide the Second Limb into two inquiries:

1. Whether the end (or object) of the law is a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.
2. Whether the law, with its burden on freedom of communication, is reasonably appropriate and adapted (or ‘proportionate’)¹⁴ to serve that end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

In other words, the first inquiry (after a burden on the implied freedom has been established, being the ‘first limb’ of the *Lange* test) is whether the legislative end is valid in being a legitimate end (being *legitimacy testing*) as well as being compatible with the constitutionally prescribed system of representative and responsible government (*compatibility testing*). The second inquiry is whether the *means*, being how the law operates, is reasonably ‘appropriate and adapted’ to the legitimate and compatible end, somewhat controversially referred to as being a test of proportionality (*proportionality testing*).¹⁵ As noted above, this article does not address the second inquiry in detail.

11 (1997) 189 CLR 520, 567–8 (citations omitted).

12 (2004) 220 CLR 1, 50 [93] (McHugh J), 78 [196] (Gummow and Hayne JJ), 82 [211] (Kirby J), citing *Levy v Victoria* (1997) 189 CLR 579, 645–6 (Kirby J) (*‘Levy’*); *McCloy* (2015) 257 CLR 178, 193–4 [2] (French CJ, Kiefel, Bell and Keane JJ), 231 [129] (Gageler J), 258 [220] (Nettle J), 281 [308] (Gordon J). See below for more on the effect of the modification.

13 *McCloy* (2015) 257 CLR 178, 200–1 [23] (French CJ, Kiefel, Bell and Keane JJ), 230 [124] (Gageler J), 258 [220] (Nettle J), 282 [310] (Gordon J); *Wotton* (2012) 246 CLR 1, 15 [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ), citing *Hogan v Hinch* (2011) 243 CLR 506, 542 [47] (French CJ), 555–6 [94]–[97] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

14 *McCloy* (2015) 257 CLR 178, 194–5 [2] (French CJ, Kiefel, Bell and Keane JJ), 234 [138]–[139] (Gageler J), 258 [220] (Nettle J), 281–2 [309] (Gordon J).

15 *Monis* (2013) 249 CLR 92, 193 [277]–[278] (Crennan, Kiefel and Bell JJ); *Coleman* (2004) 220 CLR 1, 86 [222] (Kirby J); *Tajjour v New South Wales* (2014) 254 CLR 508, 549–50 [35] (French CJ) (*‘Tajjour’*); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 324 (Brennan J) (*‘Cunliffe’*); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 202 [95] (Gummow, Kirby and Crennan JJ) (*‘Roach’*); *McCloy* (2015) 257 CLR 178, 194–5 [2] (French CJ, Kiefel, Bell and Keane JJ), 234 [138]–[139] (Gageler J), 258 [220] (Nettle J), 281–2 [309] (Gordon J).

It should be noted that in *Coleman*, McHugh J reformulated the *Lange* test to be 'is the law reasonably appropriate and adapted to serve a legitimate end [in a manner] which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?'¹⁶ The alteration, to better reflect the existing practice of the Court in applying the *Lange* test, required that the *means* of a law, in addition to the *ends*, also be tested for compatibility.¹⁷ This does not affect the question of what constitutes a legitimate (or compatible) end, which is the focus of this article.

B What Did Legitimacy Testing Entail?

In looking at the previously confused state of the law of legitimacy testing, the groundbreaking nature of the majority's judgment in *McCloy* in adopting a singular, clear test becomes evident. However, before *McCloy*, there were two important principles concerning legitimacy testing that had largely been uniformly determined.

The first principle is that, at a minimum, a law that restricts political communication must have a 'justifying purpose' beyond the law's own achievement, as per the majority in *Unions NSW*¹⁸ who were unwilling to 'speculat[e]' as to what the impugned provision otherwise sought to achieve.¹⁹ For example, French CJ in *Monis* held that the impugned end was illegitimate, as the purpose was to prevent the conduct that the law prohibited (being offensive use of the postal services).²⁰

The second principle concerned the question of whether the *Lange* test required that the object of a law be both 'legitimate' and 'compatible with the maintenance of constitutionally prescribed representative government' or whether it required that the object be legitimate *in that it is* compatible. In simpler terms, did the *Lange* test require the law to be subject to both legitimacy testing and compatibility testing or does legitimacy testing simply mean compatibility testing? Despite some High Court judges for a time treating legitimacy and compatibility of ends as substantively different questions and inquiries,²¹ the weight of High Court authority before *McCloy* established that legitimacy testing and compatibility

16 (2004) 220 CLR 1, 50 [93]; see also at 78 [196] (Gummow and Hayne JJ), 82 [211] (Kirby J); *Levy* (1997) 189 CLR 579, 645–6 (Kirby J).

17 *Coleman* (2004) 220 CLR 1, 50 [93] (McHugh J); see also *Levy* (1997) 189 CLR 579, 645–6 (Kirby J). See below n 95.

18 (2013) 252 CLR 530, 557 [51] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); see also *Monis* (2013) 249 CLR 92, 133–4 [73] (French CJ).

19 *Unions NSW* (2013) 252 CLR 530, 559 [56] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

20 (2013) 249 CLR 92, 133–4 [73].

21 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 305 [358]–[359] (Heydon J) ('*Mulholland*'); *Coleman* (2004) 220 CLR 1, 121 [322], 122 [325] (Heydon J); *A-G (SA) v Adelaide City Corporation* ('*A-G v Adelaide*') (2013) 249 CLR 1, 84–5 [203], 90 [221] (Crennan and Kiefel JJ, Bell J agreeing); see also *Levy* (1997) 189 CLR 579, 647–8 (Kirby J); Nicholas Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28 *Sydney Law Review* 505, 531.

testing were the same inquiry,²² or, alternately, indicated that legitimacy was of no importance to the real question of compatibility.²³ This was also the position taken by various academics, including Professor Campbell and Crilly, Professor Stellios, and Professor Williams and Hume.²⁴

It is therefore appropriate to proceed on the basis that legitimacy testing required compatibility testing alone to be satisfied,²⁵ and that therefore the terms ‘legitimacy’ and compatibility’ can be used interchangeably. Therefore the new question became: what did compatibility testing require?

The answer to this, somewhat absurdly, resulted in different tests for what compatibility entailed when an end *concerned* representative government (or political communication, being a necessary incident of representative government) and for when an end was *unconcerned* with representative government. Consequently, each category of ends shall be dealt with separately.

1 *Compatibility Testing for Ends concerning Representative Government*

When an end concerned representative government, it was easier to assess the compatibility of a legislative end with representative government, as the impact on representative government served as a ‘common point of reference’.²⁶ The jurisprudence on compatibility testing before *McCloy* was consistent in that purposes that were aimed at enhancing representative government or fixing perceived problems in representative government were compatible. This included purposes that advanced the freedom of political communication (being a necessary incident of representative government) as well as purposes advancing other elements of representative government.²⁷ High Court judgments accordingly identified purposes with a positive effect on representative government or

22 *Mulholland* (2004) 220 CLR 181, 197 [33] (Gleeson CJ); *Monis* (2013) 249 CLR 92, 153–4 [145] (Hayne J); *Tajjour* (2014) 254 CLR 508, 579 [148] (Gageler J); *Wotton* (2012) 246 CLR 1, 31 [81] (Kiefel J).

23 *Levy* (1997) 189 CLR 579, 627 (McHugh J); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 282 [199]–[200] (Kirby J); *Coleman* (2004) 220 CLR 1, 51–2 [96]–[97] (McHugh J); *Roach* (2007) 233 CLR 162, 199 [85] (Gummow, Kirby and Crennan JJ), quoted in *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 59 [161] (Gummow and Bell JJ) (*Rowe*); see also *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207, 266 [210] (Neave JA).

24 Tom Campbell and Stephen Crilly, ‘The Implied Freedom of Political Communication, Twenty Years On’ (2011) 30 *University of Queensland Law Journal* 59, 70; James Stellios, ‘The Second Limb of *Lange*: The Continuing Uncertainties with the Implied Freedom of Political Communication’ (Research Paper No 14-49, ANU College of Law, 1 February 2015) 6 <<http://ssrn.com/abstract=2558942>>; George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 202.

25 Which was ultimately what was conclusively determined by the High Court in *McCloy*. See below Part III.

26 *Monis* (2013) 249 CLR 92, 151 [138], 154 [146] (Hayne J).

27 Williams and Hume, above n 24, 205.

political communication as thus being compatible.²⁸ Other judgments even expressly stated that when the purpose of the law was to enhance representative government or the exercise of democratic rights (including enhancing of 'the democratic processes of the States'),²⁹ the purpose was compatible or legitimate.³⁰ Moreover, the threshold for compatibility was stated by some judges to be lower than 'enhancement' of representative government; mere compatibility with the 'maintenance' of representative government could suffice.³¹

Accordingly, the High Court consistently used the language of being 'not incompatible' as the determinant of compatibility.³² In practical terms, this appeared to mean that if a legislative object concerned representative government then, so long as it did not undermine or impede the functioning of representative government, and thus could be said to be 'not incompatible', the purpose would be 'compatible' and therefore legitimate.³³

2 Compatibility Testing for Ends Not concerning Representative Government

The High Court, however, was less clear as to what constituted compatibility with representative government when a law had an end that was *unrelated* to representative government, as it required a 'comparing of the incomparable'.³⁴ This is where the greatest confusion regarding compatibility testing arose.

Some limited authority adopted a narrow and demanding approach: that compatibility testing required that the law's purpose be directed at representative government or at the implied freedom, in that the purpose must promote and

28 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 234 (McHugh J) ('ACTV'); *Langer v Commonwealth* (1996) 186 CLR 302, 351 (Gummow J); *Rowe* (2010) 243 CLR 1, 147 [489] (Kiefel J); cf *ACTV* (1992) 177 CLR 106, 146 (Mason CJ); see also Williams and Hume, above n 24, 205.

29 *Muldowney v South Australia* (1996) 186 CLR 352, 376 (Gaudron J); see also at 366–7 (Brennan CJ).

30 *ACTV* (1992) 177 CLR 106, 189 (Dawson J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 51 (Brennan J) ('*Nationwide News*'); *Coleman* (2004) 220 CLR 1, 122 [325] (Heydon J); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 192 (Dawson J) ('*Theophanous*'); *Langer v Commonwealth* (1996) 186 CLR 302, 334 (Toohey and Gaudron JJ); *Rowe* (2010) 243 CLR 1, 38–9 [78]–[79] (French CJ); *Mulholland* (2004) 220 CLR 181, 201 [41] (Gleeson CJ); see also *McCloy* (2015) 257 CLR 178, 206 [42], 208 [47] (French CJ, Kiefel, Bell and Keane JJ), 257–8 [218], 267 [249] (Nettle J), 290 [344] (Gordon J); *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240, 259 [68] (Basten JA).

31 *Muldowney v South Australia* (1996) 186 CLR 352, 374 (Toohey J); see also Crennan, Kiefel and Bell JJ in *Monis* (2013) 249 CLR 92, 193 [277], albeit speaking generally and not in the context of a purpose expressly related to representative government.

32 *Lange* (1997) 189 CLR 520, 568; *ACTV* (1992) 177 CLR 106, 189 (Dawson J); *Coleman* (2004) 220 CLR 1, 49–50 [91] (McHugh J); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 351 [29] (Gleeson CJ and Heydon J) ('*APLA*'); *Rowe* (2010) 243 CLR 1, 147 [489] (Kiefel J); *A-G v Adelaide* (2013) 249 CLR 1, 90 [221]–[222] (Crennan and Kiefel JJ, Bell J agreeing); *Monis* (2013) 249 CLR 92, 194 [281], 215 [349] (Crennan, Kiefel and Bell JJ); *Tajjour* (2014) 254 CLR 508, 571 [112] (Crennan, Kiefel and Bell JJ); see also *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 282 [199] (Kirby J).

33 See, eg, *Coleman* (2004) 220 CLR 1, 50 [92] (McHugh J).

34 *Monis* (2013) 249 CLR 92, 154 [146] (Hayne J).

protect the constitutionally prescribed system of representative government.³⁵ Along these lines, Dawson J in *Langer v Commonwealth* and Keane J in *Unions NSW* respectively found that because the respective impugned ends did not ‘aid the proper conduct of elections’³⁶ or ‘enhance or protect the free flow of political communication’³⁷ the ends were not legitimate or compatible. However, this restrictive view (hereafter the ‘*enhancement test*’) has been contradicted by the variety of ends that had been adopted by the High Court, many without any clear connection to representative government, for example, protecting ‘the integrity of the post’,³⁸ or encouraging the rehabilitation of convicts.³⁹ As Hayne J made clear in *Monis*, compatibility encompassed a wider scope of legislative objects beyond purely those aimed at the ‘maintenance or enhancement of the system of representative and responsible government or of the freedom of political communication’.⁴⁰

Another different pre-*McCloy* test restricted legitimate ends to interests ‘recognised by law’, referring to the common law, in an ordered society.⁴¹ This approach met with opposition. It was qualified by Mason CJ, Toohey and Gaudron JJ in *Theophanous*, stating that ‘[t]he antecedent common law can at most be a guide in this analysis’⁴² and therefore, the ‘protections conferred by statute and common law’ do not limit the content of constitutional implications.⁴³ Further, as Stellios argued, in giving a great degree of deference to the common law rather than Parliament, this test for compatibility necessarily limited the political processes of the legislature in balancing rights and interests.⁴⁴

Alternately, Gaudron J in *ACTV*, *Nationwide News* and *Levy* suggested a different test: that any purpose that was unrelated to the freedom or representative government, that was otherwise ‘within power’, being within the s 51 grants of power (or any of the other grants of power such as under ss 52, 90, 96 and 122 of the *Constitution*) and not otherwise prohibited by some other part of the *Constitution*, was legitimate.⁴⁵ The term ‘within power’ was also used as a qualifier by Mason

35 *Coleman* (2004) 220 CLR 1, 52 [98]; see also at 52 [99] (McHugh J); see generally Williams and Hume, above n 24, 211.

36 (1996) 186 CLR 302, 327.

37 (2013) 252 CLR 530, 586 [168]; see also at 577–8 [134], 581 [146].

38 *Monis v The Queen* (2011) 256 FLR 28, 46 [78] (Allsop P), quoted in *Monis* (2013) 249 CLR 92, 115 [26] (French CJ), 205 [319]–[320] (Crennan, Kiefel and Bell JJ); *contra* 133 [73] (French CJ).

39 *Wotton* (2012) 246 CLR 1, 16 [31] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

40 (2013) 249 CLR 92, 148 [128].

41 *ACTV* (1992) 177 CLR 106, 142 (Mason CJ), 159 (Brennan J), 217 (Gaudron J); *Nationwide News* (1992) 177 CLR 1, 44–5, 50 (Brennan J); *Cunliffe* (1994) 182 CLR 272, 336–7 (Deane J) (‘under the law’); *Levy* (1997) 189 CLR 579, 607 (Dawson J); *Monis* (2013) 249 CLR 92, 148–9 [128], 175 [223] (Hayne J); see also *Theophanous* (1994) 182 CLR 104, 198–9 (McHugh J); James Stellios, *Zines’s The High Court and the Constitution* (Federation Press, 6th ed, 2015) 593; Kristen Walker, ‘Justice Hayne and the Implied Freedom of Political Communication’ (2015) 26 *Public Law Review* 292, 296.

42 (1994) 182 CLR 104, 126.

43 *Ibid* 128; note that Gaudron J departed from her previous stance in *ACTV* (1992) 177 CLR 106, 217.

44 Stellios, *Zines’s The High Court and the Constitution*, above n 41, 593.

45 *ACTV* (1992) 177 CLR 106, 217–18; *Nationwide News* (1992) 177 CLR 1, 94–5; *Levy* (1997) 189 CLR 579, 619.

CJ in *Nationwide News*,⁴⁶ Brennan J in *Cunliffe* and *Theophanous*,⁴⁷ and Kiefel J in *Wotton*.⁴⁸ However, as the government can by definition only legislate within power, this test provided no substantive limitation on legislative ends.⁴⁹ Consequently, the majority in *McCloy* expressly rejected this test, and agreed that the *Lange* test requirement of legitimacy 'requires more' than what is 'permitted by the relevant constitution'.⁵⁰

Despite the multiplicity of these tests, in all likelihood, the accepted approach to compatibility testing (and therefore legitimacy testing) prior to *McCloy* when the legislative purpose was unrelated to representative government was that the law's purpose had to be related to some sort of public interest (the '*public interest test*'). The language of the 'public interest' was used as a metric for the legitimacy of legislative purpose in many of the earlier implied freedom cases.⁵¹ Whilst later judgments moved away from the specific language of the 'public interest', they adopted similar language in assessing what the legislative end needed to achieve as a precondition to considering proportionality; most notably, the purpose of protecting reputation in the unanimous judgment of *Lange* was referred to as being 'conducive to the public good' in the context of the Court discussing whether such a purpose was compatible with the implied freedom.⁵² Such language also included 'matters of public importance or pressing social need',⁵³ 'overriding public purpose',⁵⁴ 'legitimate interest'⁵⁵ and 'legitimate public end'.⁵⁶ That the requirement of 'compatibility' with representative government somewhat counter-intuitively required the consideration of the 'public interest' is likely the unintended result of the conflation of compatibility testing with legitimacy testing as concepts.

This public interest test then raised the question of what 'public interest' actually meant, and how it could be determined. Some content to the public interest test was provided by Deane and Toohey JJ in *ACTV*, who listed ends 'justified as being in the public interest'⁵⁷ as including ends that improve political communications,

46 (1992) 177 CLR 1, 30–1, citing *Davis v Commonwealth* (1988) 166 CLR 79.

47 *Cunliffe* (1994) 182 CLR 272, 324; *Theophanous* (1994) 182 CLR 104, 151.

48 (2012) 246 CLR 1, 32 [83]; see also *Mulholland* (2004) 220 CLR 181, 197 [33] (Gleeson CJ).

49 *Monis* (2013) 249 CLR 92, 150 [134] (Hayne J); see also at 151 [138].

50 (2015) 257 CLR 178, 213 [67] (French CJ, Kiefel, Bell and Keane JJ).

51 *ACTV* (1992) 177 CLR 106, 142–5 (Mason CJ), 169, 174–5 (Deane and Toohey JJ), 235 (McHugh J); *Nationwide News* (1992) 177 CLR 1, 33 (Mason CJ), 50 (Brennan J), 78–9 (Deane and Toohey JJ), 102 (McHugh J); *Theophanous* (1994) 182 CLR 104, 179 (Deane J); *Cunliffe* (1994) 182 CLR 272, 300 (Mason CJ), 339, 342–3, 346 (Deane J), 363 (Dawson J), 388 (Gaudron J); *Levy* (1997) 189 CLR 579, 614–15 (Toohey and Gummow JJ).

52 (1997) 189 CLR 520, 568.

53 *Kruger v Commonwealth* (1997) 190 CLR 1, 128 (Gaudron J).

54 *Levy* (1997) 189 CLR 579, 620 (Gaudron J); see also *ibid*.

55 *Nationwide News* (1992) 177 CLR 1, 50–1 (Brennan J); *ACTV* (1992) 177 CLR 106, 150 (Brennan J); *Theophanous* (1994) 182 CLR 104, 147 (Brennan J); *Levy* (1997) 189 CLR 579, 647 (Kirby J), see also at 648; *Monis* (2013) 249 CLR 92, 180 [242] (Heydon J); see also *Roach* (2007) 233 CLR 162, 177 [12] (Gleeson CJ).

56 *Coleman* (2004) 220 CLR 1, 78 [198] (Gummow and Hayne JJ).

57 (1992) 177 CLR 106, 169; see also *Nationwide News* (1992) 177 CLR 1, 77 (Deane and Toohey JJ); *Theophanous* (1994) 182 CLR 104, 178–9 (Deane J); *Cunliffe* (1994) 182 CLR 272, 339 (Deane J).

public order, democracy, the peaceful existence of individuals, or the dignity of individuals.⁵⁸ Furthermore, whilst the later cases did not go into detail as to the nature of what ‘public interest’ involved, some content could be imputed to the notion of ‘public interest’ by reference to the concept that the freedom must be balanced against interests in an ‘ordered society’, as raised in the earlier cases.⁵⁹ Other judges paired the concept of an ordered society with some element of democracy or freedom.⁶⁰ Of course, such an idea was predicated on what a judge’s view of an ‘ordered society’ looks like, which (as noted below) is ultimately in turn reliant on political ideas extrinsic to the *Constitution*. This is probably why Gageler J in *McCloy* expressly rejected the concept of the ‘freedom in an “ordered society”’.⁶¹

Other judges identified similar mechanisms for giving content to public interest grounds. Callinan J in *Coleman* noted that it was legitimate for a legislative purpose to not just have an object aimed at preventing an actual wrong (for example, a danger to the public), but also to mitigate the risk of a potential wrong.⁶² Gleeson CJ in *Roach*, albeit in discussing justifications of exclusions from the electoral franchise, identified ‘society’s legitimate interest’ as ‘promoting recognition of responsibilities as well as acknowledgment of rights’.⁶³

Problems with the public interest test are self-evident. The Court necessarily has limited capability, both in terms of institutional ability as well as democratic legitimacy, to critically assess the public interest in legislation as determined by Parliament.⁶⁴ Moreover, as much as the concept of an ‘ordered society’ may have provided content to the concept of ‘public interest’, the Court, in determining whether a particular legislative end satisfied some public interest, necessarily required the application of extra-constitutional considerations and political

58 *ACTV* (1992) 177 CLR 106, 169; see also *Nationwide News* (1992) 177 CLR 1, 77 (Deane and Toohey JJ); *Theophanous* (1994) 182 CLR 104, 178–9 (Deane J); *Cunliffe* (1994) 182 CLR 272, 339 (Deane J), 383 (Toohey J); *Coleman* (2004) 220 CLR 1, 122 [324] (Heydon J).

59 *ACTV* (1992) 177 CLR 106, 142–3 (Mason CJ), citing *Hughes and Vale Pty Ltd v New South Wales [No 2]* (1955) 93 CLR 127, 219 (Kitto J); *Nationwide News* (1992) 177 CLR 1, 76 (Deane and Toohey JJ); *Cunliffe* (1994) 182 CLR 272, 300–1, 308 (Mason CJ), 336–7, 339 (Deane J); *Levy* (1997) 189 CLR 579, 607–8 (Dawson J); *contra McCloy* (2015) 257 CLR 178, 229–30 [122] (Gageler J).

60 *ACTV* (1992) 177 CLR 106, 169 (Deane and Toohey JJ) (‘ordered and democratic society’), cited in *Sunol v Collier [No 2]* (2012) 260 FLR 414, 425 [47] (Bathurst CJ); *Nationwide News* (1992) 177 CLR 1, 51 (Brennan J) (‘interests of a free and stable society’); *Cunliffe* (1994) 182 CLR 272, 300–1, 308 (Mason CJ) (‘preservation or maintenance of an ordered society under a system of representative democracy and government’); *Theophanous* (1994) 182 CLR 104, 191 (Dawson J) (‘ordered society (or system of representative government)’); *Coleman* (2004) 220 CLR 1, 112 [297] (Callinan J) (‘peaceable, civilised, democratic community’).

61 (2015) 257 CLR 178, 229 [122] (citations omitted).

62 (2004) 220 CLR 1, 111–12 [296].

63 (2007) 233 CLR 162, 177 [12].

64 Campbell and Crilly, above n 24, 74; Dan Meagher, ‘The Brennan Conception of the Implied Freedom: Theory, Proportionality and Deference’ (2011) 30 *University of Queensland Law Journal* 119, 123, 128; *McGinty v Western Australia* (1996) 186 CLR 140, 288 (Gummow J); Jeremy Kirk, ‘The Second Limb of Lange: The Continuing Uncertainties with the Implied Freedom of Political Communication’ (Discussion at the Australian Association of Constitutional Law, Federal Court, Sydney, 8 September 2015); *contra Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1050 [102] (Gageler J) (*Murphy*) regarding the institutional competence of the Court.

theories in determining what constituted the public interest.⁶⁵ Professor Aroney argued that such a test invoked 'categories of indeterminate reference' in making 'unspecified appeal[s]' to the 'legitimacy of a legislative goal'.⁶⁶ Williams and Hume have warned that there is a 'serious risk of courts entering into questions of politics, policy or propriety which they ordinarily prefer to leave to parliaments'.⁶⁷ For example, both Kirk⁶⁸ and Campbell and Crilly⁶⁹ have noted the predominance of 'liberal philosophy' in the determination of legitimate ends by the High Court. Like the 'recognised legal interests' test discussed above, such a test risked limiting legislative power and undermining the political processes of Parliament in determining the legitimacy and compatibility of ends.⁷⁰ Along not dissimilar lines, Gleeson CJ in *Roach*⁷¹ and Keane J in *Unions NSW*⁷² have respectively expressed general concerns about adopting approaches towards the implied freedom that would 'confer a wider power of judicial review than that ordinarily applied under our *Constitution*' and that would confer legislative power on the Court.

For whatever reason, members of the High Court have more recently been appropriately wary of construing the 'public interest' requirement too strictly. Hayne J in *Monis* expressly disagreed with the principle that 'any end conducive to the public interest will do' or that 'protection of any other general good is a legitimate end'.⁷³ Crennan, Kiefel and Bell JJ in *Tajjour* expressed a reluctance to dwell on the 'desirability of [the impugned] provisions', saying that such an inquiry 'is not relevant to the task before the Court',⁷⁴ and expressed their own test for compatibility, discussed below, instead.

The final and most recently advanced test for compatibility that was proposed in the pre-*McCloy* period was also doctrinally the simplest. This view said that a legislative end is compatible if it is 'not directed' at either political communications or at representative government generally. As such, if a legislative purpose was entirely unconnected with political communication or representative government, that purpose would be automatically considered compatible. This view, that any purposes not 'directed to the freedom' were compatible, was expressly adopted

65 Campbell and Crilly, above n 24, 73–4.

66 Nicholas Aroney, 'Julius Stone and the End of Sociological Jurisprudence: Articulating the Reasons for Decision in Political Communication Cases' (2008) 31 *University of New South Wales Law Journal* 107, 132.

67 Williams and Hume, above n 24, 211.

68 Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 50.

69 Campbell and Crilly, above n 24, 71.

70 Stellios, *Zines's The High Court and the Constitution*, above n 41, 593. See also McHugh J in *Theophanous* (1994) 182 CLR 104, 198, who warned against using extrinsic political theories in interpreting the text and structure of the *Constitution*.

71 (2007) 233 CLR 162, 178–9 [17].

72 (2013) 252 CLR 530, 576 [129].

73 (2013) 249 CLR 92, 149 [130]; see also at 153 [143].

74 (2014) 254 CLR 508, 571 [112]; see also *Muldowney v South Australia* (1996) 186 CLR 352, 375 (Toohey J).

by Crennan and Kiefel JJ (Bell J agreeing) in *A-G (SA) v Adelaide*⁷⁵ and Crennan, Kiefel and Bell JJ in *Monis*.⁷⁶ As Walker characterises this test, it was thus ‘not for the courts to second-guess the legislature on legitimate ends’, provided the end was unrelated to political communications.⁷⁷ As noted earlier, other judges implicitly adopted a position similar to this test as well in noting the lack of a negative relationship of incompatibility between an identified end and representative government, for instance, Gleeson CJ, Heydon and Callinan JJ in *APLA*.⁷⁸ This did not mean that an end that was *directed* at representative government would be incompatible, but rather the aforementioned ‘not incompatible’ test would then apply.⁷⁹

In other words, if an end was ‘not directed’ at representative government, then it would be compatible and legitimate,⁸⁰ and if an end was ‘directed’ at representative government, then so long as it did not undermine representative government (or indeed if it enhanced it), then it would not be ‘incompatible’, and would therefore be legitimate.⁸¹

3 Conclusion on the Pre-McCloy Definition of Compatibility

It is difficult to say with any confidence what test for compatibility and legitimacy the law actually required before the *McCloy* decision. The best view, based on the aforementioned analysis, is that ends that clearly addressed representative government were compatible if they either enhanced or at least did not undermine representative government (being the ‘not incompatible’ test), whilst ends unrelated to representative government required some other public interest to be compatible (the ‘public interest’ test). However, the lack of any clear judicial statement to this effect evidently led to a great deal of confusion. Consequently there was a significant need for the High Court to comprehensively identify what actually constitutes compatibility with representative government, and thereby conclusively define what constitutes the ‘legitimacy’ of legislative ends.

III THE MCCLOY TEST FOR LEGITIMACY AND COMPATIBILITY

Jeff McCloy, a property developer under investigation by the Independent Commission Against Corruption for making donations to candidates in the New

75 (2013) 249 CLR 1, 90 [221]–[222].

76 (2013) 249 CLR 92, 214–15 [348]–[349].

77 Walker, above n 41, 296.

78 (2005) 224 CLR 322, 351 [29] (Gleeson CJ and Heydon J), 480 [457] (Callinan J); see also *Sellars v Coleman* [2001] 2 Qd R 565, 567 [9], 569 [15] (Pincus JA).

79 Specifically that a purpose which is ‘not incompatible’ with representative government, by not undermining or impairing it, is compatible. See above Part II(B)(1).

80 *A-G v Adelaide* (2013) 249 CLR 1, 90 [221]–[222] (Crennan and Kiefel JJ, Bell J agreeing); *Monis* (2013) 249 CLR 92, 215–16 [348]–[349] (Crennan, Kiefel J and Bell JJ).

81 See above Part II(B)(1).

South Wales state election of 2011, brought a challenge against certain provisions in the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ('*EFED Act*'), submitting that the provisions which imposed a cap on political donations (*EFED Act* pt 6 div 2A), prohibited property developers from making such donations (s 96GA), and restricted indirect campaign contributions (s 96E), were invalid for impermissibly infringing the implied freedom.

The written and oral submissions in the case clearly demonstrated the confused and divergent approach to legitimacy and compatibility testing. The legislative purpose of the impugned end was (amongst others) to 'help prevent corruption and undue influence in the government of the State'.⁸² This evidently concerned representative government, and would therefore, probably, require the 'not incompatible' test; that is, given the impugned purpose concerns representative government, does the prevention of corruption and undue influence (in the form of campaign donations) undermine the operation of representative government such that it could be said to be incompatible? The plaintiff and defendant's written submissions both reflected this approach,⁸³ and accordingly spent a great deal of time characterising the nature of Australia's constitutionally prescribed system of representative government and arguing whether the prevention of corruption and undue influence, through campaign donations, enhance or impair its operation.⁸⁴

However, this was not the only approach to compatibility testing that was taken in the submissions. The written submissions of the various intervening parties posited wildly different tests; the Commonwealth suggested that 'bifurcation' of the Second Limb is 'inappropriate' and therefore argued that compatibility testing and proportionality testing should constitute a single test,⁸⁵ South Australia adopted Hayne J's reasoning regarding the importance of the common law,⁸⁶ and suggested that a 'connection' was needed between the impugned end and representative government,⁸⁷ and Queensland, Victoria and Western Australia simply relied on the previous decision of *Unions NSW*, where the High Court had found that the general anti-corruption purposes of the *EFED Act* were legitimate,⁸⁸ without any of the three parties explaining *why* such purposes were

82 *EFED Act* s 4A(c); *McCloy* (2015) 257 CLR 178, 203 [33], 209 [53] (French CJ, Kiefel, Bell and Keane JJ), 248 [184] (Gageler J), 259 [224] (Nettle J), 285 [324], 292 [355] (Gordon J).

83 Jeffrey Raymond McCloy, *McCloy Administration Pty Ltd and North Lakes Pty Ltd*, 'Plaintiffs' Submissions', Submission in *McCloy v NSW*, S211/2014, 9 February 2015, [18]; New South Wales, 'Annotated Submissions of the First Defendant', Submission in *McCloy v NSW*, S211/2014, 2 March 2015, [76].

84 Jeffrey Raymond McCloy, *McCloy Administration Pty Ltd and North Lakes Pty Ltd*, 'Plaintiffs' Submissions', Submission in *McCloy v New South Wales*, S211/2014, 9 February 2015, [18]–[23]; New South Wales, 'Annotated Submissions of the First Defendant', Submission in *McCloy v New South Wales*, S211/2014, 2 March 2015, [76]–[80].

85 Attorney-General (Cth), 'Annotated Submissions of the Attorney-General of the Commonwealth of Australia (Intervening)', Submission in *McCloy v New South Wales*, S211/2014, 10 March 2015, [33].

86 Attorney-General (SA), 'Annotated Submissions of the Attorney-General for South Australia (Intervening)', Submission in *McCloy v New South Wales*, S211/2014, 10 March 2015, [27].

87 *Ibid* [30].

88 *Unions NSW* (2013) 252 CLR 530, 558 [53], 559 [56] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

legitimate.⁸⁹ Western Australia even conceded that ‘[n]o doubt, the means by which compatibility of purpose is assessed against maintenance of representative and responsible government will be developed’, without proposing any such means for assessing such compatibility of purpose.⁹⁰ In oral argument, both David Bennett QC appearing for the plaintiff and Jeremy Kirk SC appearing for the defendant made submissions concerning compatibility testing based on whether or not the impugned ends conflicted with their particular characterisation of Australian representative government, but Michael Sexton SC, the Solicitor-General of New South Wales, (also appearing for the defendant) seemed to associate legislation with having a legitimate end where it serves ‘some kind of public interest’.⁹¹

Whilst the High Court could have conceivably relied on their previous finding in *Unions NSW* without controversy, as suggested by the written submissions of Queensland, Victoria and Western Australia,⁹² the majority of the High Court, comprising of French CJ, Kiefel, Bell and Keane JJ, decided to take the opportunity to comprehensively outline precisely what the *Lange* test, and in particular the Second Limb, requires. After briefly explaining the facts, the majority at the second paragraph of the judgment expounded their new formulation of the Second Limb, which for clarity’s sake is extracted below:⁹³

As explained in the reasons that follow, the question whether an impugned law infringes the freedom requires application of the following propositions derived from previous decisions of this Court and particularly *Lange v Australian Broadcasting Corporation* and *Coleman v Power*:

...

A. The question whether a law exceeds the implied limitation depends upon the answers to the following questions, reflecting those propounded in *Lange* as modified in *Coleman v Power*:

1. Does the law effectively burden the freedom in its terms, operation or effect?

If ‘no’, then the law does not exceed the implied limitation and the enquiry as to validity ends.

89 Attorney-General (Qld), ‘Annotated Submissions for the Attorney-General for the State of Queensland (Intervening)’, Submission in *McCloy v New South Wales*, S211/2014, 9 March 2015, [31]; Attorney-General (Vic), ‘Submissions of the Attorney-General for the State of Victoria (Intervening)’, Submission in *McCloy v New South Wales*, S211/2014, 10 March 2015, [40]; Attorney-General (WA), ‘Annotated Written Submissions of the Attorney-General for Western Australia (Intervening)’, Submission in *McCloy v New South Wales*, S211/2014, 9 March 2015, [15].

90 Attorney-General (WA), ‘Annotated Written Submissions of the Attorney-General for Western Australia (Intervening)’, Submission in *McCloy v State of New South Wales*, S211/2014, 9 March 2015, [13].

91 Transcript of Proceedings, *McCloy v New South Wales* [2015] HCATrans 141 (10 June 2015) 1080–95 (D M J Bennett QC), 1830 (M G Sexton QC), 2305–54 (J K Kirk SC).

92 See also Anne Twomey, ‘*McCloy v New South Wales*: Developer Donations and Banning the Buying of Influence’ (2015) 37 *Sydney Law Review* 275, 277–8.

93 *McCloy* (2015) 257 CLR 178, 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted) (emphasis in original).

2. If 'yes' to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to in these reasons as 'compatibility testing'.

The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.

If the answer to question 2 is 'no', then the law exceeds the implied limitation and the enquiry as to validity ends.

3. If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object? This question involves what is referred to in these reasons as 'proportionality testing' to determine whether the restriction which the provision imposes on the freedom is justified.

The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test — these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

...

If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be 'no' and the measure will exceed the implied limitation on legislative power.

Given the prior lack of such a comprehensive statement on the interpretation of the *Lange* test by a majority of the High Court since *Lange*, it is hard to imagine that the new *McCloy* formulation will not become a template for what advocates and judges must do in applying the *Lange* test. The impacts of this new formulation, especially with respect to the arguably novel adoption of 'balancing' in proportionality testing, will accordingly continue to be debated and felt for a long time.⁹⁴

However, regardless of the majority's novel changes to proportionality testing, in adopting this new formulation, it is also revolutionary in its approach to the question of what constitutes a legitimate and compatible end.⁹⁵ first, by conclusively providing a clear and unambiguous definition of what legitimacy

94 See, eg, *Murphy* (2016) 90 ALJR 1027, 1038–9 [37] (French CJ and Bell J), 1044 [64]–[65] (Kiefel J), 1050 [101] (Gageler J), 1079 [299] (Gordon J); Mason, above n 10; Watts, above n 10.

95 It is briefly worth noting that the reference in *McCloy* to whether the 'purpose of the law and the means adopted' is legitimate and compatible merely incorporates the aforementioned modification of the *Lange* test from *Coleman*. Accordingly, the requirement to test the *means* adopted by the law for compatibility as per the *McCloy* test is *not* a novel addition to the *Lange* test, McHugh J's modification from *Coleman* having long been part of the Second Limb before *McCloy*. See above Part II(A); *contra* Carter, above n 10, 248.

and compatibility testing requires, a previously elusive task, and secondly, by substantively redefining the prior understanding of what constituted a legitimate and compatible end.

The majority initially confirmed the aforementioned principle that legitimacy testing is solely determined by considering compatibility testing,⁹⁶ by phrasing the first inquiry of the Second Limb as whether the purposes of the legislation are ‘legitimate, *in the sense that they are compatible*’,⁹⁷ and later stated that ‘[a] legitimate purpose *is one which is compatible*’.⁹⁸ However, the radical step for the majority was implicitly rejecting the public interest test for determining compatibility. Instead, the majority expressly adopted a modified version of the ‘not directed’ test of Crennan and Kiefel JJ (Bell J agreeing) in *A-G (SA) v Adelaide*⁹⁹ and Crennan, Kiefel and Bell JJ in *Monis*.¹⁰⁰

The majority repeatedly stated in *McCloy* that compatibility testing of ends will be satisfied provided that the end does not adversely impinge upon representative government. First, in the main reformulation of the *Lange* test, they stated that legitimate ends ‘are compatible with the constitutionally prescribed system in the sense that they do not *adversely impinge* upon the functioning of the system of representative government’.¹⁰¹ Later in the judgment, their Honours stated:

The other questions posed by *Lange* are not reached unless the purpose of the provisions in question is legitimate. A legitimate purpose is one which is compatible with the system of representative government provided for by the *Constitution*; which is to say that the purpose *does not impede the functioning of that system* and all that it entails.¹⁰²

Finally, at the end of the majority judgment, the new *McCloy* test for compatibility was elaborated on:

[The test in *Lange* for legitimacy] requires, at the outset, that consideration be given to the purpose of the legislative provisions and the means adopted to achieve that purpose in order to determine whether the provisions *are directed to, or operate to, impinge* upon the functionality of the system of representative government. If this is so, no further enquiry is necessary. The result will be constitutional invalidity.¹⁰³

Therefore, the new test for compatibility can comprehensively be summarised as the following: an end will be legitimate (in that it is compatible with representative government) where the end is not directed to ‘adversely impinging upon’ or ‘impeding’ the functioning of the system of representative government and all

96 See above Part II(B).

97 *McCloy* (2015) 257 CLR 178, 194 [2] (French CJ, Kiefel, Bell and Keane JJ) (emphasis added), citing *Lange* (1997) 189 CLR 520, 561–2, 567.

98 *McCloy* (2015) 257 CLR 178, 203 [31] (French CJ, Kiefel, Bell and Keane JJ) (emphasis added); see also at 231 [130] (Gageler J), 284 [320], 291 [349], 296 [374] (Gordon J).

99 (2013) 249 CLR 1, 90 [221].

100 (2013) 249 CLR 92, 215 [349].

101 *McCloy* (2015) 257 CLR 178, 194 [2] (French CJ, Kiefel, Bell and Keane JJ) (emphasis added).

102 *Ibid* 203 [31] (French CJ, Kiefel, Bell and Keane JJ) (emphasis added) (citations omitted).

103 *Ibid* 213 [67] (French CJ, Kiefel, Bell and Keane JJ) (emphasis added).

that it entails (hereafter the '*adversely impinge*' test). There is no requirement of a public interest being addressed by the legislative end.

Applying this to the legislation in *McCloy*, the High Court found that the ends of the impugned provisions, specifically the prevention of 'corruption and undue influence in the government of the State',¹⁰⁴ 'overcoming perceptions of corruption and undue influence, which may undermine public confidence in government and in the electoral system itself',¹⁰⁵ and levelling the 'playing field' of campaign donations¹⁰⁶ were legitimate.¹⁰⁷ In particular, the majority characterised '[e]quality of opportunity to participate in the exercise of political sovereignty' as 'an aspect of the representative democracy guaranteed by our *Constitution*', and therefore such purposes, by enhancing, and not undermining, this element of representative government were legitimate.¹⁰⁸

In operation, the new formulation is a seemingly simple test: does the legislative end adversely impinge upon representative government? Obviously, ends that do not concern or are not directed to representative government are, consequently, automatically compatible, this being inherited from the pre-*McCloy* 'not directed' test. But if the legislative end does concern representative government, as was the case in *McCloy*, then the critical question is whether the legislative end adversely impinges or impedes its functioning, this being inherited from the pre-*McCloy* 'not incompatible' test. If not, then the legislative end is compatible. Consequently, the only ends that are incompatible under this test are those that both concern representative government and whose effect on representative government is that of impinging or impeding its functioning. Conversely, an end that lacks a public interest will now no longer be considered illegitimate for that reason alone. As a legislative end may have a relationship to, or connection to, representative government without being self-consciously 'directed' to representative government on the face of the legislation, the query of whether the end adversely impinges upon or impedes representative government is the critical part of the new test for legitimacy. This is the main difference between the 'adversely impinge' test and its spiritual predecessor, the 'not directed' test of *Crennan, Kiefel and Bell JJ*.

The difference between this test and the former dominant 'public interest' test can be illustrated by the following hypothetical. Assume the Australian government desired to encourage Australians to hop on one leg, and, to that effect, passed laws intended to incentivise leg-hopping, including, relevantly, a law that, in prohibiting broadcast of opposition to leg-hopping, breaches the implied freedom. As the ban had as its legislative purpose the encouraging of Australians to hop on one leg, then under the 'public interest' test such a legislative purpose would be invalid. In lacking any identifiable public interest (as there is no obvious public interest in encouraging Australians to hop on one leg), such a purpose would be said to

104 Ibid 203 [33] (French CJ, Kiefel, Bell and Keane JJ), quoting *EFED Act* s 4A(c).

105 Ibid 204 [34] (French CJ, Kiefel, Bell and Keane JJ).

106 Ibid 206 [41] (French CJ, Kiefel, Bell and Keane JJ).

107 Ibid 207 [45], 208 [47], 209 [53] (French CJ, Kiefel, Bell and Keane JJ).

108 Ibid 207 [45] (French CJ, Kiefel, Bell and Keane JJ); see also at 207–8 [46].

not be legitimate. However, under the new *McCloy* formulation, as the purpose of encouraging leg hopping evidently does not adversely impinge upon or impede representative government, the law would be considered to have a legitimate end.

Consequently, this new test substantially increases the amount of possible legitimate ends and broadens the meaning of compatibility to every legislative purpose unrelated to representative government, irrespective of the existence of any public interest of such an impugned purpose. The new test also means that legitimacy testing now entirely concerns an end's connection and relationship to representative government, rather than the end's utility in achieving some sort of public interest in the abstract. To go back to the example, the relevant inquiry is now not whether the legislative object of the promotion of leg-hopping is 'directed' at a public interest (regardless of how that question is to be answered), but rather, whether the legislative object of the promotion of leg-hopping in any way adversely impinges upon or impedes representative government.

This new test is consistent with the earlier stated principle that a law which restricts political communication must have a 'justifying purpose' beyond the law's own achievement,¹⁰⁹ as when the impugned legislative *object* is to restrict political communication (as to merely being a consequence of a different legislative purpose), the end is evidently directed at adversely affecting representative government and would therefore be an incompatible and 'illegitimate' end. Similarly, the examples of illegitimate and incompatible ends that Gageler J gave in *Tajjour* of 'quelling a political controversy or of handicapping political opposition'¹¹⁰ are also consistent with this test, as such legitimate objectives are *prima facie* directed at impinging the operation of representative government.

It is worth noting that the new *McCloy* test was only expressly adopted by a bare majority of the High Court, and that the three other High Court justices came to different conclusions. Instead of adopting the majority's version of the 'adversely impinge' test, or indeed any part of the majority's reformulation of the Second Limb, Gageler J, in his separate opinion, instead stated his own formulation for the Second Limb: that what is required under the Second Limb to 'sustain the validity' of impugned provisions that burden the implied freedom is that the restriction 'is imposed in pursuit of an end *which is appropriately characterised within our system of representative and responsible government as compelling*; and that the imposition of the restriction in pursuit of that compelling end can be seen on close scrutiny to be a reasonable necessity'.¹¹¹ Because Gageler J concluded 'that the restrictions on political communication imposed by the provisions are no greater than are reasonably necessary to be imposed in pursuit of a compelling statutory object', his Honour found that the provisions were constitutional.¹¹² Relevantly, Gageler J identified 'the object of preventing corruption and undue influence

109 See *Unions NSW* (2013) 252 CLR 530, 557 [51] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); see also *Monis* (2013) 249 CLR 92, 133–4 [73] (French CJ). See above Part II.

110 (2014) 254 CLR 508, 579 [148].

111 *McCloy* (2015) 257 CLR 178, 194 (French CJ, Kiefel, Bell and Keane JJ), 239 [155] (Gageler J) (emphasis added).

112 *Ibid* 222 [98].

in the government of the State' as being a compelling object.¹¹³ His Honour found that such an end was legitimate, given the decision by the High Court in *Unions NSW*,¹¹⁴ and, critically, with 'reference to the system of representative and responsible government established by Chs I and II of the *Constitution*'.¹¹⁵

Gageler J's view of the Second Limb, accordingly, appears to be that first, a 'compelling' statutory object must be identified, and secondly, that the restrictions imposed by the provisions are no greater than reasonably necessary. The former question appears to accord with legitimacy testing, and the latter with proportionality testing, although of a kind markedly different to the majority's 'template of standardised proportionality analysis'.¹¹⁶ Whilst the language of 'compelling' is prima facie similar to the now abandoned public interest test, because Gageler J emphasises such characterisation as being determined 'within our system of representative and responsible government',¹¹⁷ it appears as though his Honour has adopted a modified version of the 'enhancement test' favoured by McHugh J in *Coleman*.¹¹⁸ That is to say, it may be that Gageler J supports a more restrictive requirement for legitimacy testing, in that a statutory object must enhance, promote, or protect (or have some other positive effect on) the system of representative and responsible government prescribed by the *Constitution* in order to be described as 'compelling' and therefore to be legitimate and compatible. In particular, Gageler J emphasises that '[n]either the scope nor the content of the freedom can adequately be understood except by reference to the features of that system of representative and responsible government, and that method of constitutional alteration, which give rise to the necessity for its implication'.¹¹⁹

Given that statement, it is difficult to imagine that his Honour intended that a determination of what constitutes a 'compelling' end requires consideration of the public interest, unmoored from analysis of the constitutionally prescribed system of representative and responsible government.

Nettle J, in his partially dissenting opinion, was more unclear. Whilst his Honour did find that the impugned objectives (to 'reduce the risk of State political parties and individual politicians being induced to extend political patronage to large-scale political donors', and reduce the perception of this taking place)¹²⁰ were 'legitimate'¹²¹ and 'consistent' with the implied freedom,¹²² his Honour provided no test for this conclusion beyond arguing that 'unregulated political donations pose a threat to the integrity of the system of representative and responsible

113 Ibid.

114 Ibid 248 [183], citing *Unions NSW* (2013) 252 CLR 530, 545 [8], 557 [51], 579 [138].

115 Ibid 248 [184].

116 Ibid 222 [98]; see also *Murphy* (2016) 90 ALJR 1027, 1050 [101] (Gageler J).

117 Ibid 239 [155].

118 *Coleman* (2004) 220 CLR 1, 52 [98]–[99]. See above Part II(B)(2). See further Watts, above n 10 for analysis of Gageler J's 'Compelling Purpose Test'.

119 *McCloy* (2015) 257 CLR 178, 223 [102].

120 Ibid 259 [224].

121 Ibid 259 [225].

122 Ibid 260 [227], citing *Unions NSW* (2013) 252 CLR 530, 578 [136] (Keane J).

government established by the *Constitution*.¹²³ This may imply similar support for the ‘enhancement test’,¹²⁴ but without more from Nettle J, such extrapolation is mere speculation.

Gordon J similarly did not state which test was to be adopted, beyond noting that a legitimate end is one which is compatible.¹²⁵ After identifying three different purposes for the provisions, regarding improving the ‘actual and perceived integrity of governmental processes’, reducing the extent of political influence that the materially wealthy have, and encouraging all individuals to have ‘an equal share ... in political power’,¹²⁶ her Honour asserted that ‘[e]ach of those objects or ends is legitimate and compatible’ without explaining why.¹²⁷

In any case, there is little doubt that, despite the views of the minority judges, the *McCloy* formulation, being the most comprehensive analysis of the specific requirements of the *Lange* test by a majority of the Court since *Lange*, will form the basis for the immediate future of implied freedom cases.

IV THE FUTURE OF LEGITIMACY TESTING

At one level, the new approach of the majority in *McCloy* to the *Lange* test’s requirement of legitimacy testing should be welcomed. First, it provides clarity and certainty to a sorely confused area of constitutional law. Secondly, the majority’s implicit rejection of public interest considerations¹²⁸ now gives due deference to Parliament. It does this deliberately by refusing to make any political value judgments as to the value of legislative aims where those aims are not directed to the implied freedom or representative government. Therefore, there is no need to use extra-constitutional sources to decide legitimacy or what constitutes a ‘public interest’, and such political questions can be confined to the proportionality testing stage.¹²⁹ Consequently, multiple academics before *McCloy* supported the adoption of this broad conception of legitimacy, including Professor Stone, who argued that this approach would be consistent with that of the High Court to s 92 of the *Constitution*,¹³⁰ and Stellios, who argued that this broad approach would allow for the political legislative process to determine the legitimacy

123 Ibid 260 [228].

124 See above Part II(B)(2).

125 *McCloy* (2015) 257 CLR 178, 284 [320], 291 [349], 296 [374].

126 Ibid 284–5 [322]–[324] (emphasis altered).

127 Ibid 285 [325].

128 Ibid 193–5 [2], 203 [31], 212–13 [67] (French CJ, Kiefel, Bell and Keane JJ), *contra* 222 [98], 239 [155], 241 [165], 248 [184] (Gageler J).

129 But see Aroney, ‘Justice McHugh’, above n 21, 528.

130 Adrienne Stone, ‘The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication’ (1999) 23 *Melbourne University Law Review* 668, 684 n 95, citing *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 472–3 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

of ends.¹³¹ Consequently, this new test has simplified the previously confusing jurisprudence and reduced the possibility of the Court being influenced by 'extra-constitutional values, ideas or theories' by having to consider the 'public interest' in the abstract.¹³² Accordingly, the adoption by the majority of the High Court of this new *McCloy* test is a positive development of the law.

However, whilst the new clarity of the *McCloy* judgment for legitimacy testing is a welcome relief, the majority's rejection of the public interest test and reformulation of the 'adversely impinge' test comes with two substantial qualifications that will pose future difficulties for legitimacy testing in the Second Limb.

A The Spectre of Public Interest Considerations

First, whilst public interest considerations are no longer relevant to the compatibility and legitimacy of the legislative end, the requirement for there to be some public interest or benefit is still relevant in the determination of whether a law is 'appropriate and adapted' or proportionate to the legislative end.¹³³

The proportionality testing stage of the Second Limb now comprises of three separate stages. The law must be:

Suitable — as having a rational connection to the purpose of the provision;

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

adequate in its balance — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.¹³⁴

The third stage of legislation being 'adequate in its balance' (*balancing*) in particular, with its requirement of determining the 'importance of the purpose', is a concerning re-manifestation of the former public interest considerations. The majority went on in *McCloy* to expressly state that determining the 'importance' or 'public benefits' of the impugned legislation is required in the third stage of balancing in proportionality testing.¹³⁵ Nettle J adopted a similar approach of looking at the competing 'public interest[s]'.¹³⁶ This is consistent with *Stellios*' recommendation of confining analysis of the public interest to the 'rigour and

131 *Stellios, Zines's The High Court and the Constitution*, above n 41, 593; *Stellios*, 'The Second Limb of *Lange*', above n 24, 8.

132 Aroney, 'Justice McHugh', above n 21, 528.

133 *McCloy* (2015) 257 CLR 178, 218–19 [86]–[87], 220 [90] (French CJ, Kiefel, Bell and Keane JJ), 262 [236], 267 [249]–[250], 271 [262] (Nettle J).

134 *Ibid* 195 [2] (emphasis in original) (citations omitted).

135 *Ibid* 193–5 [2], 218–19 [86]–[87], 220 [90] (French CJ, Kiefel, Bell and Keane JJ).

136 *Ibid* 262 [236]; see also at 267 [249]–[250], 271 [262] (Nettle J).

transparency’ of proportionality testing.¹³⁷ However, both Gageler and Gordon JJ expressed concerns with the consequences of adopting this new balancing approach.¹³⁸

Consequently, instead of the majority of the High Court taking the opportunity to minimise the role of problematic (as this article has suggested) public interest considerations in the *Lange* test, their Honours merely shifted their emphasis from compatibility testing to proportionality testing. Of course, the extent to which public interest considerations extrinsic to the *Constitution* can ever be entirely removed from any method of proportionality testing is questionable.¹³⁹ In fact, it is debatable whether a standard for proportionality exists that does not involve consideration of the extra-constitutional importance of the legislative end that is being pursued by Parliament.¹⁴⁰ However, there are arguably ways that a focus on public interest considerations in proportionality could have been *minimised* by the majority, rather than fully and expressly incorporated as part of the new structured proportionality test. One need only compare the focus that the majority’s reasoning expressly places on public interest considerations in their application of balancing in proportionality¹⁴¹ to that of Gageler J’s formulation of ‘reasonable necessity’.¹⁴² Similarly, McHugh J’s analysis in *Coleman* of the ‘appropriate and adapted’ element of *Lange* as concerning whether the protected communication is still ‘free in the relevant sense’ also downplays the role of public interest considerations extrinsic to the *Constitution* whilst expressly rejecting ‘ad hoc balancing’¹⁴³ as a mechanism for applying the Second Limb.¹⁴⁴

In any case, the majority’s emphasis on the public interest in balancing is less than ideal, not only due to the inherent problems with public interest considerations addressed in the above critique of the ‘public interest’ test,¹⁴⁵ but also because it has undermined the clarity and certainty of the *McCloy* test. By shifting public interest considerations from compatibility and legitimacy testing to proportionality testing, it has made compatibility testing more predictable but proportionality testing (already the more contentious part of the test) more complicated. Moreover, notwithstanding the impacts of the express

137 Stellios and Zines, *The High Court and the Constitution*, above n 41, 593; *contra* Aroney, ‘Justice McHugh’, above n 21, 528.

138 *McCloy* (2015) 257 CLR 178, 236 [145] (Gageler J), 287–8 [336], 288 [338] (Gordon J). See also Mason, above n 10; Anne Twomey, ‘Proportionality and the *Constitution*’ (Speech delivered at the ALRC Freedoms Symposium, Federal Court, Sydney, 8 October 2015).

139 See Stone, ‘The Limits of Constitutional Text and Structure’, above n 130, 704; *contra* *Coleman* (2004) 220 CLR 1, 49 [90], 52 [98] (McHugh J).

140 See the McHugh J–Adrienne Stone debate in Stone, ‘The Limits of Constitutional Text and Structure’, above n 130; *Coleman* (2004) 220 CLR 1, 46–53 [83]–[100] (McHugh J); Adrienne Stone, ‘The Limits of Constitutional Text and Structure Revisited’ (2005) 28 *University of New South Wales Law Journal* 842. Resolving that debate goes beyond the scope of this article.

141 *McCloy* (2015) 257 CLR 178, 193–5 [2], 219 [87], 219–20 [89], 220–1 [93].

142 *Ibid* 222 [98], 239 [155].

143 *Coleman* (2004) 220 CLR 1, 48 [88].

144 *Ibid* 52–3 [100].

145 See above Part II(B)(2), *contra* *Murphy* (2016) 90 ALJR 1027, 1039 [38]–[39] (French CJ and Bell J) regarding criticisms concerning deference to Parliament and 1050 [102] (Gageler J) regarding criticisms of the ‘institutional competence’ of the Court.

public interest requirements for proportionality testing, the fact that the 'public interest' expressly continues to be a major factor in the Second Limb necessarily overcomplicates the analysis of compatibility testing. As put by Carter, noting the potential for overlap between testing compatibility and testing proportionality, the new *McCloy* test 'could obfuscate the underlying reasoning process and encourage conclusory reasoning' for the Second Limb.¹⁴⁶ This is despite the adoption of the seemingly simple 'adversely impinge' test and the supposed removal of public interest considerations in compatibility testing. As flagged by Gageler J, the consequences of this new approach to proportionality testing are yet to be fully seen.¹⁴⁷

The ramifications of the majority's reincorporation of, and emphasis on, public interest considerations can be seen in subsequent cases where the reformulated *McCloy* test has been fully applied.¹⁴⁸ First, *Gaynor v Chief of the Defence Force [No 3]*¹⁴⁹ concerned the dismissal of an army reservist, Bernard Gaynor, under reg 85 of the *Defence (Personnel) Regulations 2002* (Cth) made under the *Defence Act 1903* (Cth) for derogatory comments published on Gaynor's personal website about the Australian Defence Force's ('ADF') treatment of homosexual and transgender issues. Gaynor, amongst other arguments, posited that the exercise of reg 85 contravened the implied freedom. The Chief of the Defence Force in response submitted that reg 85 was reasonably appropriate and adapted to 'the legitimate ends of maintaining efficacy, efficiency and morale of, and confidence in, the Defence Force'. In that argument, the Chief of the Defence Force made submissions regarding the policy rationale of reg 85¹⁵⁰ that were evidently closer in keeping with the former public interest test for legitimacy than the new 'adversely impinge' test prescribed for legitimacy by *McCloy*.

Buchanan J of the Federal Court in *Gaynor*, after citing the above extracted *McCloy* formulation in full, and referring to it as a 'distillation of the *Lange* tests',¹⁵¹ found that the first limb of the *Lange* test was satisfied and that the 'real focus' in that case should be on the Second Limb.¹⁵² Despite this focus on the Second Limb and the citation of the *McCloy* formulation, his Honour at no point expressly identified his own conception of the intended end of reg 85, did not expressly apply the *McCloy* 'adversely impinge' test, and did not comprehensively state the ends as identified by the Defence Force to be legitimate. The closest his Honour came to testing the legitimacy or compatibility of the regulation's ends was his statement:

146 Carter, above n 10, 253.

147 *McCloy* (2015) 257 CLR 178, 235 [141].

148 See also the cases of *Griffin v Council of the Law Society of New South Wales* [2016] NSWCA 275 (20 September 2016) [29]–[33]; *Griffin v Council of the Law Society of New South Wales* [2016] NSWCA 364 (16 December 2016) [85], where the *McCloy* test was briefly discussed. However, in the latter case, the Court of Appeal found at [95]–[96] that the first limb of the *Lange* test was not satisfied, and therefore there was no need to consider compatibility.

149 (2015) 237 FCR 188.

150 *Ibid* 242–3 [226].

151 *Ibid* 247–8 [240].

152 *Ibid* 250 [251].

I accept that *there is a need* for discipline, obedience to orders and adherence to standards in the ADF by its members. A restriction on public comment of the kind I am considering (i.e. termination of a commission) was a ‘suitable’ response to infringement of those requirements.¹⁵³

Here, Buchanan J, before moving onto the first of the threefold *McCloy* requirements of proportionality testing (being ‘suitability’ to a legitimate end), appears to, briefly, implicitly identify that encouraging ‘discipline, obedience to orders and adherence to standards in the ADF’ in its members is a legitimate end. As the end here, unlike in *McCloy*, clearly did not concern representative government, it would have been very easy for Buchanan J to apply the *McCloy* definition of incompatibility by merely noting that the impugned end of encouraging martial discipline, obedience and standards is not adversely directed to representative government, and is therefore automatically compatible. Instead, his Honour merged both inquiries of the Second Limb into a singular question of proportionality testing. In doing so, his Honour reverted to the now abandoned public interest requirement in assessing the validity of the end, and indicated that the impugned end was legitimate because ‘there is a need for [it]’.

The judgment was ultimately overturned on appeal to the Full Court of the Federal Court in *Chief of the Defence Force v Gaynor*.¹⁵⁴ The Full Court, comprised of Perram, Mortimer and Gleeson JJ, found that Buchanan J had erred in his application of the implied freedom on unrelated grounds, and noted that it was therefore necessary for that Court to determine for itself whether reg 85 was invalid.¹⁵⁵ The Court determined that the purpose of reg 85 was to serve ‘a disciplinary purpose’ and that reg 85 was ‘one mechanism by which the Defence Force was able to maintain the tight and high standards of discipline necessary for any armed force’.¹⁵⁶ The Full Court’s conclusion as to compatibility and legitimacy of that end was wholly limited to a single paragraph:

We see no difficulty with the proposition that the purposes of reg 85 were compatible with the system of representative and responsible government established by the *Constitution*. It is critical to the performance by the armed forces of all their various duties that there be a high level of confidence that officers (who also exercise command and control functions, and serve as leadership models within the ADF) are willing to perform, and capable of performing, the roles assigned to them ... The ends pursued by reg 85, as but one of a number of powers available to control the behaviour and regulate the membership of the ADF, including by termination, were in our opinion consistent with preserving the integrity of the system of representative and responsible government.¹⁵⁷

It is worth noting that the Full Court did not apply the ‘adversely impinge’ test but, after emphasising the importance of martial discipline, only asserted that the disciplinary purpose was compatible, without discussing or applying the

153 Ibid 255 [282] (emphasis added).

154 [2017] FCAFC 41 (8 March 2017).

155 Ibid [81]–[82].

156 Ibid [95].

157 Ibid [106].

McCloy definition of incompatibility. This is especially curious as the Full Court had earlier, in discussing whether the first limb of the *Lange* test was satisfied, provided analysis as to how the 'role and function of the ADF, and of each of its Service branches, is integral to the functioning of Australia's representative democracy' by reference to ss 51(vi) and 68 of the *Constitution*.¹⁵⁸ It would have been a simple application of the 'adversely impinge' test to repeat that reasoning, and accordingly state conclusively that given the centrality of the ADF to the functioning of Australia's representative democracy, the function of reg 85 in ensuring high standards of discipline of the ADF could not be said to adversely impinge upon the system of representative government.

As such, the judgments of Buchanan J and the Full Court indicate that the shuffling of the deck chairs of public interest considerations in *McCloy* has had little impact, and instead has continued the confusing application of the *Lange* test. Despite *McCloy* explicitly shifting public interest considerations from legitimacy testing to proportionality testing, questions of what is in the public interest or what is 'needed', being still an integral part of the Second Limb, were clearly present in both the Chief of the Defence Force's submissions and Buchanan J's reasoning without any clear delineation between the two parts of the Second Limb. Moreover, the non-application of the *McCloy* majority's 'adversely impinge', at both first instance and on appeal, further indicates the surprising absence of meaningful impact following the new test.

Consequently, it is likely that advocates will continue to raise public interest questions for *both* parts of the Second Limb, and courts will continue to be influenced by such public interest factorial analysis in answering both questions, possibly at the same time. This necessarily undermines the beneficial value of *McCloy* both in terms of the certainty that the High Court was evidently striving for, and the minimisation of notions of the public interest from legitimacy and compatibility testing. At the very least, the *Gaynor* litigation shows that proportionality will remain the contested area of the Second Limb, with public interest considerations having a primary role to play. Consequently, the aforementioned challenges posed by courts considering public interest considerations, particularly with respect to arrogating the political function of the legislature, are yet to be significantly mitigated.

More recently, there was an attempt to apply the *McCloy* test by the plaintiffs in the High Court case of *Murphy*.¹⁵⁹ In that case, concerned with the closing of the Electoral Roll, there was no dispute at all (and consequently, little analysis) about the legitimacy of the ends of the impugned legislative provisions.¹⁶⁰ There was relevantly, however, continued disagreement as to the appropriateness of the new balancing element of the *McCloy* test for proportionality. French CJ and Bell J, unsurprisingly, strongly defended the *McCloy* test,¹⁶¹ as did Kiefel J,¹⁶²

158 Ibid [104].

159 (2016) 90 ALJR 1027.

160 But see *ibid* 1040 [41] (French CJ and Bell J), 1050 [100] (Gageler J).

161 *Ibid* 1038–9 [37].

162 *Ibid* 1044 [64]–[65].

whilst Gageler J flagged his opposition to it as an ‘ill-fitted analytical tool’,¹⁶³ and, separately, Gordon J noted questions concerning the necessity stage of proportionality testing.¹⁶⁴ Without delving into analysis of *Murphy* and balancing in proportionality testing, which goes significantly beyond the scope of this article, it is thus worth noting that the balancing element of the *McCloy* test, including its implicit consideration of the public interest, continues to create controversy, especially in the face of Gageler J’s sustained opposition.¹⁶⁵

Finally, in May 2017, the High Court heard oral submissions in *Brown v Tasmania*, concerning whether a prohibition in Tasmania on protests that disrupt business activities¹⁶⁶ is unconstitutional by reference to the implied freedom. Relevantly the written submissions of the Plaintiffs argue, inter alia, that the purpose of the impugned provisions, to protect businesses from disruption by those engaged in political communication, is not legitimate by reference to the former ‘not directed’ test of Crennan, Kiefel and Bell JJ, rather than the current ‘adversely impinge’ test from the majority in *McCloy*.¹⁶⁷ At the same time, the Defendant’s submissions seek to reopen for examination the *McCloy*’s majority’s formulation of proportionality testing.¹⁶⁸ Whether either approach will be successful will be seen when the judgment, which is reserved as at the time of writing, is handed down by the High Court.

B Determining What Constitutes ‘Representative and Responsible’ Government

The second major qualification that will engender future debate concerning the *McCloy* test is the fact that legitimacy testing is now intricately tied to notions of, and value judgments concerning, representative government, both in terms of what it actually constitutes and what is said to impinge upon it. Submissions as to what constitutes a legitimate end will now not concern what is in the public interest, but rather whether the end is concerned with representative government and what the impact on representative government is. If the government can restrictively define representative government to exclude the legislative purpose, then the purpose is automatically considered legitimate. Conversely, if the challenging party can expansively define representative government to include the legislative end and can characterise the impact of the end as impinging on representative government, then the end will be considered illegitimate before even getting to proportionality testing.

Such arguments as to what does and does not constitute the constitutionally prescribed system of representative and responsible government, and whether

163 Ibid 1050 [101].

164 Ibid 1079 [299].

165 See also *Chief of the Defence Force v Gaynor* [2017] FCAFC 41 (8 March 2017) [91].

166 *Workplace (Protection from Protesters) Act 2014* (Tas) ss 6–7.

167 Robert James Brown and Jessica Anne Willis Hoyt, ‘Plaintiffs’ Submissions’, Submission in *Brown v Tasmania*, H3/2016, 27 February 2017, [38]–[40].

168 Tasmania, ‘Submissions’, Submission in *Brown v Tasmania*, H3/2016, 21 March 2017, [54]–[61].

an impugned legislative end enhances or impairs the operation of representative government, were in turn raised in the plaintiff and defendants' written submissions in *McCloy*.¹⁶⁹ The importance of this inquiry can be seen in the judgment of *McCloy*, where the majority of the Court characterised '[e]quality of opportunity to participate in the exercise of political sovereignty' as being part of representative government, and found that the impact of the impugned purposes was to enhance such equality of opportunity (by removing the risk of undue influence through campaign donations).¹⁷⁰

As legislative ends that do not impede or adversely impinge upon 'the functioning of [the] system [of representative and responsible government] and all that it entails' (referred to as '*representative government*') are compatible and legitimate,¹⁷¹ it is crucial to understand what actually constitutes 'representative government'. Consequently, despite the apparent simplicity of the compatibility test adopted by the High Court in *McCloy*, the future application of the compatibility test is likely to turn on the Court's understanding of the elements of representative government and, especially, what enhances or impinges upon its functioning. Therefore, an examination of how to define the nature of representative government and what representative government entails is necessary for determining whether a legislative end is compatible, as now required by the *McCloy* test.

1 The Method of Determining the Elements of 'Representative Government'

The first relevant inquiry concerns how courts should determine the elements of representative government in applying compatibility testing. The High Court has been clear that the first port of call is what the terms and structure of the *Constitution* prohibit, authorise or require, and not what is required by the idea of 'representative and responsible government'. The relevant sections that have been consistently identified by the High Court in *Lange* for this purpose are ss 7, 24, 64 and 128.¹⁷² High Court judges have consistently made it clear that the *Constitution* does not incorporate the concept of representative government beyond what can be discerned from the text itself,¹⁷³ and therefore

169 Jeffrey Raymond McCloy, *McCloy Administration Pty Ltd and North Lakes Pty Ltd, 'Plaintiffs' Submissions*, Submission in *McCloy v New South Wales*, S211/2014, 9 February 2015, [18]–[23]; New South Wales, 'Annotated Submissions of the First Defendant', Submission in *McCloy v New South Wales*, S211/2014, 2 March 2015, [76]–[80].

170 (2015) 257 CLR 178, 207 [45] (French CJ, Kiefel, Bell and Keane JJ).

171 *Ibid* 203 [31] (French CJ, Kiefel, Bell and Keane JJ); see also at 193–5 [2], 212–13 [67] (French CJ, Kiefel, Bell and Keane JJ).

172 (1997) 189 CLR 520, 567.

173 *Theophanous* (1994) 182 CLR 104, 199 (McHugh J); *Levy* (1997) 189 CLR 579, 606 (Dawson J); *Nationwide News* (1992) 177 CLR 1, 44 (Brennan J), citing *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers' Case*') and *Commonwealth v Tasmania* (1983) 158 CLR 1, 129, 254 ('*Tasmanian Dam Case*'); *ACTV* (1992) 177 CLR 106, 181 (Dawson J), quoting *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 231 (Brennan J); *McGinty v Western Australia* (1996) 186 CLR 140, 169–71 (Brennan CJ), 188 (Dawson J); *Mulholland* (2004) 220 CLR 181, 274 [273] (Kirby J); see also *Muldowney v South Australia* (1996) 186 CLR 352, 373–4 (Toohey J), 375 (Gaudron J).

the High Court cannot have reference to ‘any underlying or overarching concept of representative government’.¹⁷⁴ McHugh J made this point most forcefully in emphasising that there is ‘no support in the *Constitution* for an implication that the institution of representative government or representative democracy is part of the *Constitution* independently of the terms of ss 1, 7, 24, 30 and 41’.¹⁷⁵ Rather, the reference to representative government is mere ‘shorthand’ for referring to what the relevant sections of the *Constitution* specifically require.¹⁷⁶ Similarly, both Brennan J in *Nationwide News* and McHugh J in *Theophanous* respectively rejected any attempt to use ‘extrinsic sources’¹⁷⁷ and extra-constitutional theories of ‘federalism, politics or political economy’¹⁷⁸ in determining what constitutes representative government. Helpfully, Gageler J in *McCloy* provided a comprehensive summation of what the relevant sections expressly require,¹⁷⁹ which is possibly to be used as a template for what representative government entails in the future.

Multiple judges have referred to the operation of Australian representative government in history as a guide for determining its elements (and compatibility with them),¹⁸⁰ as in the unanimous judgment of *Lange* by referring to ‘the history of representative government and the holding of elections under that system in Australia prior to federation’ in discerning that elections under the *Constitution* are intended to be ‘free’.¹⁸¹ This can result in divergent views of history, as in *Coleman*, where Kirby J criticised Heydon J’s understanding of the history of the Australian political system as being ‘not, with respect, an accurate description’.¹⁸² This focus on ‘past practice’ has been critiqued as being ‘conservative’¹⁸³ and problematic given that conceptions of both legitimacy and representative government (for example, who is included in the electoral franchise) may have

174 *Levy* (1997) 189 CLR 579, 607 (Dawson J); see also *McGinty v Western Australia* (1996) 186 CLR 140, 169–71 (Brennan CJ).

175 *Theophanous* (1994) 182 CLR 104, 199 (McHugh J); see also at 200; see also *Lange* (1997) 189 CLR 520, 566–7; *McGinty v Western Australia* (1996) 186 CLR 140, 169–70 (Brennan CJ), 182 (Dawson J).

176 Nicholas Aroney, *Freedom of Speech in the Constitution* (Centre for Independent Studies, 1998) 118, quoting *Lange* (1997) 189 CLR 520, 566–7; *contra APLA* (2005) 224 CLR 322, 351 [29] (Gleeson CJ and Heydon J).

177 *Nationwide News* (1992) 177 CLR 1, 44 (Brennan J), quoting *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 231 (Brennan J); see also *McGinty v Western Australia* (1996) 186 CLR 140, 169 (Brennan CJ), 188 (Dawson J).

178 *Theophanous* (1994) 182 CLR 104, 198 (McHugh J).

179 *McCloy* (2015) 257 CLR 178, 223–4 [103]–[106].

180 *McGinty v Western Australia* (1996) 186 CLR 140, 273–4 (Gummow J); *Coleman* (2004) 220 CLR 1, 78 [197] (Gummow and Hayne JJ), 91 [238]–[239] (Kirby J), 122 [325] (Heydon J); *APLA* (2005) 224 CLR 322, 351 [29] (Gleeson CJ and Heydon J); see also *Theophanous* (1994) 182 CLR 104, 146 (Brennan J), 198–9 (McHugh J), citing *Cole v Whitfield* (1988) 165 CLR 360 and *New South Wales v Commonwealth* (1990) 169 CLR 482 (*‘Incorporation Case’*).

181 (1997) 189 CLR 520, 560.

182 (2004) 220 CLR 1, 91 [238].

183 Campbell and Crilly, above n 24, 71.

changed since Federation,¹⁸⁴ but will regardless likely continue being a tool in the application of legitimacy testing.

Additionally, Gummow, Kirby and Crennan JJ in *Roach* noted that 'an understanding of [the *Constitution's*] text and structure may be assisted by reference to the systems of representative government with which the framers were most familiar as colonial politicians'.¹⁸⁵ However, both Hayne and Heydon JJ in *Roach* make it clear that international systems of representative government, international human rights instruments and decisions of international courts regarding the qualification of those rights which postdate the *Australian Constitution* cannot give content to an understanding of representative government as prescribed by the *Constitution*.¹⁸⁶ Similarly, international instruments would likely not have any value in determining 'legitimate ends'.¹⁸⁷ However, in *McCloy*, the majority referred to the fact that caps on political donations had 'been adopted by many countries with systems of representative government' as evidence of the compatibility of such caps with representative government.¹⁸⁸ This indicates that whilst international systems of representative government cannot be used to give *content* to representative government as understood in the *Australian Constitution*, international examples can be used to test whether the purported *effect* on representative government would be positive or adverse.

It is briefly worth noting that the *Lange* test, and therefore the *McCloy* test, applies to representative *government*, not representative *democracy*. Whilst multiple judges have previously referred to the two concepts interchangeably,¹⁸⁹ they in fact have two different meanings. Representative government is the more 'precise and accurate term'¹⁹⁰ that is given effect to by the relevant provisions of the *Constitution*.¹⁹¹ On the other hand, representative democracy is a more ambiguous, value-laden concept that 'is commonly used to describe a society which provides for equality of rights and privileges',¹⁹² but with 'varying ideas' as to what it actually means.¹⁹³ As aptly put by Dawson J, 'democracy, like beauty, tends to be in the eye of the beholder'.¹⁹⁴

184 Jo Lennan, 'Laws against Insult: History and Legitimacy in *Coleman v Power*' (2006) 10 *Legal History* 239, 253; see also *McGinty v Western Australia* (1996) 186 CLR 140, 200–1 (Toohey J).

185 (2007) 233 CLR 162, 188 [53].

186 *Ibid* 220–1 [163]–[164] (Hayne J), 224–5 [181] (Heydon J).

187 *ACTV* (1992) 177 CLR 106, 240 (McHugh J); *Monis* (2013) 249 CLR 92, 149 [128] (Hayne J); see also *McCloy* (2015) 257 CLR 178, 229 [120] (Gageler J), 258 [219] (Nettle J); *contra* Melinda Jones, 'Free Speech Revisited: The Implications of *Lange & Levy*' (1997) 4(1) *Australian Journal of Human Rights* 188, 204–5.

188 (2015) 257 CLR 178, 207–8 [46]–[47] (French CJ, Kiefel, Bell and Keane JJ).

189 *ACTV* (1992) 177 CLR 106, 210 (Gaudron J); *Nationwide News* (1992) 177 CLR 1, 50 (Brennan J); *Muldorney v South Australia* (1996) 186 CLR 352, 370 (Dawson J), 373 (Toohey J), 375 (Gaudron J); *McGinty v Western Australia* (1996) 186 CLR 140, 169 (Brennan CJ); see also at 198 (Toohey J).

190 *Theophanous* (1994) 182 CLR 104, 189 n 56 (Dawson J); see also *McGinty v Western Australia* (1996) 186 CLR 140, 182–3 (Dawson J), 269 (Gummow J).

191 *Theophanous* (1994) 182 CLR 104, 199 (McHugh J).

192 *Ibid*.

193 *Ibid* 200 (McHugh J).

194 *Ibid* 189 n 56 (Dawson J).

2 The Elements of ‘Representative Government’

Understanding the actual elements of representative government is a prerequisite for the application of the new *McCloy* test of compatibility. Whilst Campbell and Crilly have expressed scepticism about it being ‘possible to compile a list of necessary preconditions’ for representative government in practice, and Arcioni argued that ‘the precise description of [representative government] and the requirements for its operation are not settled’,¹⁹⁵ a minimum understanding of what representative government entails, for the purposes of the future operation of the *McCloy* formulation of the Second Limb, can be partially derived from the case law as follows.

The constitutionally prescribed system of representative government requires that sovereign power reside in the people, exercised by representatives.¹⁹⁶ This occurs through the ‘enfranchisement of electors’¹⁹⁷ in ‘free’¹⁹⁸ and periodic¹⁹⁹ elections, involving ‘full, equal and effective participation’ of the people.²⁰⁰ The electors select representatives²⁰¹ chosen directly (as opposed to by Parliament, the executive or an electoral college)²⁰² according to ss 7 and 24 of the *Constitution*,²⁰³ whilst making a ‘true or genuine choice’ as electors²⁰⁴ with ‘an opportunity to gain an appreciation of the available alternatives’.²⁰⁵ These elections require the

- 195 Campbell and Crilly, above n 24, 70; Elisa Arcioni, ‘Politics, Police and Proportionality — An Opportunity to Explore the *Lange* Test: *Coleman v Power*’ (2003) 25 *Sydney Law Review* 379, 380; see also *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 56 (Stephen J), quoted in *McGinty v Western Australia* (1996) 186 CLR 140, 182 (Dawson J).
- 196 *ACTV* (1992) 177 CLR 106, 137 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 201 (Toohey J), 274–5 (Gummow J); see also A H Birch, *Representative and Responsible Government: An Essay on the British Constitution* (George Allen and Unwin, 1964) 13–14, quoted in *McGinty v Western Australia* (1996) 186 CLR 140, 247 (McHugh J).
- 197 *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 56 (Stephen J), quoted in *McGinty v Western Australia* (1996) 186 CLR 140, 182 (Dawson J).
- 198 *Levy* (1997) 189 CLR 579, 608 (Dawson J); *Lange* (1997) 189 CLR 520, 559–60, quoting Birch, above n 196, 17.
- 199 *Levy* (1997) 189 CLR 579, 607 (Dawson J); *McGinty v Western Australia* (1996) 186 CLR 140, 273, 285, 287 (Gummow J).
- 200 *Langer v Commonwealth* (1996) 186 CLR 302, 334 (Toohey and Gaudron JJ); *Muldowney v South Australia* (1996) 186 CLR 352, 378 (Gaudron J); *contra Rowe* (2010) 243 CLR 1, 73 [210] (Hayne J); see generally Anne Twomey, ‘*Rowe v Electoral Commissioner* — Evolution or Creationism?’ (2012) 31 *University of Queensland Law Journal* 181, 190.
- 201 *Levy* (1997) 189 CLR 579, 606 (Dawson J); *Lange* (1997) 189 CLR 520, 559, citing Birch, above n 196, 17 and *Theophanous* (1994) 182 CLR 104, 200 (McHugh J).
- 202 *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 44 (Gibbs J), quoted in *McGinty v Western Australia* (1996) 186 CLR 140, 276 (Gummow J).
- 203 *Levy* (1997) 189 CLR 579, 606–7 (Dawson J).
- 204 *Ibid* 607 (Dawson J); see also *Muldowney v South Australia* (1996) 186 CLR 352, 370 (Dawson J); *ACTV* (1992) 177 CLR 106, 231 (McHugh J) (‘effective and responsible choice’); *McCloy* (2015) 250 CLR 178, 280 [303] (Gordon J) (‘free and informed choice’).
- 205 *ACTV* (1992) 177 CLR 106, 187 (Dawson J), quoting *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185, 210 (Windeyer J); see also *Muldowney v South Australia* (1996) 186 CLR 352, 370 (Dawson J); *Lange* (1997) 189 CLR 520, 560; *Levy* (1997) 189 CLR 579, 607 (Dawson J); *McCloy* (2015) 250 CLR 178, 280 [303] (Gordon J).

'effective exercise of the franchise',²⁰⁶ but do not necessarily require electorates of equal numerical size or, consequently, equality of voting power.²⁰⁷

Legislative functions are bestowed on those elected representatives,²⁰⁸ and the legislature they create 'occupies the most powerful position in the political system'.²⁰⁹ Through this electoral process, legislators and Ministers of State are chosen and 'exercise their legislative and executive powers as representatives of the people'.²¹⁰ This means the government must have the confidence of the people.²¹¹ The legislators and Ministers consequently 'have a responsibility to take account of the views of the people'²¹² and a responsibility 'to explain and account for their decisions and actions in government'.²¹³

Those representatives 'are accountable to the people',²¹⁴ and not just those with 'the means of buying political influence'.²¹⁵ This means that '[t]he electors must be able to ascertain and examine the performances of their elected representatives and the capabilities and policies of all candidates for election'.²¹⁶ This requires having 'access to the information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed'.²¹⁷ Ultimately, 'the business of the government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box'.²¹⁸ These elections include the use of volunteers in providing services to candidates and political parties by distributing election material.²¹⁹ This occurs in a society governed by the rule of law.²²⁰

206 *Muldowney v South Australia* (1996) 186 CLR 352, 386 (Gummow J, McHugh J agreeing); see also at 371 (Dawson J).

207 *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 (Barwick CJ, McTiernan, Gibbs, Stephen, Mason, Jacobs JJ, Murphy J dissenting); *McGinty v Western Australia* (1996) 186 CLR 140, 171, 177 (Brennan CJ), 185 (Dawson J), 250 (McHugh J), 284 (Gummow J).

208 *ACTV* (1992) 177 CLR 106, 230 (McHugh J), quoting Birch, above n 196, 17; *Lange* (1997) 189 CLR 520, 559; *Levy* (1997) 189 CLR 579, 606 (Dawson J), quoting *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 56 (Stephen J) *McGinty v Western Australia* (1996) 186 CLR 140, 182 (Dawson J), quoting *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 56 (Stephen J).

209 *Lange* (1997) 189 CLR 520, 559, citing Birch, above n 196, 17 and *Theophanous* (1994) 182 CLR 104, 200 (McHugh J).

210 *ACTV* (1992) 177 CLR 106, 138 (Mason CJ).

211 *Ibid* 230 (McHugh J), quoting Sir Samuel Griffith, *Notes on Australian Federation: Its Nature and Probable Effects* (Edmund Gregory, 1896) 17.

212 *ACTV* (1992) 177 CLR 106, 138 (Mason CJ).

213 *Ibid* 139 (Mason CJ).

214 *Ibid* 138 (Mason CJ), 231 (McHugh J); *McCloy* (2015) 257 CLR 178, 230 [122] (Gageler J).

215 *McCloy* (2015) 257 CLR 178, 257 [217] (Nettle J), citing *Unions NSW* (2013) 252 CLR 530, 578 [136] (Keane J).

216 *ACTV* (1992) 177 CLR 106, 231 (McHugh J).

217 *Ibid*; see also at 138–9 (Mason CJ); *Nationwide News* (1992) 177 CLR 1, 72 (Deane and Toohey JJ).

218 *ACTV* (1992) 177 CLR 106, 231 (McHugh J).

219 *Roberts v Bass* (2002) 212 CLR 1, 40–1 [102] (Gaudron, McHugh and Gummow JJ).

220 Justice Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85, 93, citing Sir Anthony Mason, 'Courts, Constitutions and Fundamental Rights' in Geoffrey Lindell (ed), *The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason* (Federation Press, 2007) 219, 225.

‘Responsible’ government, being part of the ‘fabric’ of the *Constitution*,²²¹ involves the notion that the Ministers of State are responsible to the elected legislature, and must resign after losing its confidence,²²² and therefore the confidence of the Australian people as expressed through the electoral process.²²³ This way, through responsible government, electoral choice acts as a constraint on the exercise of both legislative and executive power.²²⁴ Responsible government also entails the requirements that the Ministers of the government be a member of the Senate or the House of Representatives,²²⁵ the separation of judicial power, and judicial review of legislative acts and executive decisions.²²⁶

As a result of the requirement for free choice in elections, there must be freedom of communications concerning political and governmental matters,²²⁷ between electors and representatives,²²⁸ between electors and candidates²²⁹ and between electors themselves.²³⁰ Such political communications can be used to ‘criticize government decisions and actions, seek to bring about change, call for action where none has been taken and ... influence the elected representatives’.²³¹ Following *McCloy*, this freedom of political communication includes both ‘[e]quality of opportunity to participate in the exercise of political sovereignty’²³² and ‘an equal share in political power’.²³³

This political communication extends ‘to all forms and methods of communication which are lawfully available for general use in the community’,²³⁴ and concerns

221 *McCloy* (2015) 257 CLR 178, 224 [106] (Gageler J), quoting *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 413 (Isaacs J).

222 *McCloy* (2015) 257 CLR 178, 224–5 [107] (Gageler J), quoting Griffith, above n 211, 17, quoted in John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 704.

223 *McCloy* (2015) 257 CLR 178, 225 [108] (Gageler J), quoting *Nationwide News* (1992) 177 CLR 1, 47 (Brennan J).

224 *McCloy* (2015) 257 CLR 178, 226–7 [112] (Gageler J).

225 *Ibid* 224 [105]–[106] (Gageler J); *McGinty v Western Australia* (1996) 186 CLR 140, 269 (Gummow J); *Australian Constitution* s 64.

226 *McGinty v Western Australia* (1996) 186 CLR 140, 269 (Gummow J).

227 *Nationwide News* (1992) 177 CLR 1, 72–3 (Deane and Toohey JJ); *ACTV* (1992) 177 CLR 106, 231–2 (McHugh J); *Lange* (1997) 189 CLR 520, 560, citing *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 108 (Griffith CJ), 109–10 (Barton J).

228 *ACTV* (1992) 177 CLR 106, 231–2 (McHugh J); *Nationwide News* (1992) 177 CLR 1, 72–3 (Deane and Toohey JJ); *Lange* (1997) 189 CLR 520, 560, citing *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 108 (Griffith CJ), 109–10 (Barton J); *McCloy* (2015) 257 CLR 178, 279–80 [302] (Gordon J).

229 *ACTV* (1992) 177 CLR 106, 212 (Gaudron J), 231 (McHugh J); *Lange* (1997) 189 CLR 520, 560, citing *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 108 (Griffith CJ), 109–10 (Barton J).

230 *Nationwide News* (1992) 177 CLR 1, 72, 74 (Deane and Toohey JJ); *Lange* (1997) 189 CLR 520, 560, citing *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 108 (Griffith CJ), 109–10 (Barton J); *ACTV* (1992) 177 CLR 106, 212 (Gaudron J), 231–2 (McHugh J); *McCloy* (2015) 250 CLR 178, 279–80 [302] (Gordon J).

231 *ACTV* (1992) 177 CLR 106, 138 (Mason CJ).

232 (2015) 257 CLR 178, 207 [45] (French CJ, Kiefel, Bell and Keane JJ); see also at 265 [245], 273–4 [271] (Nettle J).

233 *Ibid* 202 [27] (French CJ, Kiefel, Bell and Keane JJ), 226 [110] (Gageler J), 258 [219] (Nettle J), quoting W Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 329; see also *ACTV* (1992) 177 CLR 106, 137 (Mason CJ), quoted in *McCloy* (2015) 257 CLR 178, 284 [318] (Gordon J).

234 *ACTV* (1992) 177 CLR 106, 232 (McHugh J).

all the political stages of 'nominating, campaigning, advertising, debating, criticizing and voting'.²³⁵ It is not confined to election periods,²³⁶ and includes insults,²³⁷ 'irony, humour [and] acerbic criticism',²³⁸ and 'the expression of unpopular or minority points of view'.²³⁹

The relevance of these elements for the operation of compatibility testing is that a law's purpose that restricts or adversely impinges upon one of these elements would be incompatible with the constitutionally prescribed system of representative government, and would therefore be illegitimate. For example, as identified by Gageler J in *Tajjour*, quelling a political controversy undermines the capacity of voters to get information as to how they have been governed,²⁴⁰ and would therefore be illegitimate.²⁴¹

However, even when the elements of representative government are identified, the controversy in applying the 'adversely impinge' test is that determining whether a law's purpose enhances or undermines those elements of representative government is still a 'value judgment on which minds may differ'.²⁴² For instance, the argument in *Coleman* as to whether insult was a necessary part of political speech (and therefore representative government), demonstrates how even the 'adversely impinge' test still ultimately relies on some degree of value judgment by judges as to what representative government does and does not include, and whether those elements will or will not be adversely impinged upon.

Consequently, despite the adoption of the new *McCloy* test, a focus on compatibility with representative government alone does not address all the weaknesses associated with the former 'public interest' test because of the value judgments concerning representative government now inherent in the new test. To the extent that the question of compatibility of ends is a live issue in proceedings, it will likely be with respect to whether an identified legislative end impacts on an element of representative government at all, and if so, whether the end enhances or adversely impinges upon representative government.

235 *Ibid.*

236 *Lange* (1997) 189 CLR 520, 561.

237 *Coleman* (2004) 220 CLR 1, 54 [105] (McHugh J), 78 [197] (Gummow and Hayne JJ), 91 [239] (Kirby J); *Monis* (2013) 249 CLR 92, 171 [208]–[209] (Hayne J); *contra Coleman* (2004) 220 CLR 1, 122 [324] (Heydon J); see generally Adrienne Stone, "'Insult and Emotion, Calumny and Invective': Twenty Years of Freedom of Political Communication" (2011) 30 *University of Queensland Law Journal* 79, 87–8.

238 *Coleman* (2004) 220 CLR 1, 45 [81] (McHugh J), quoted in *Monis* (2013) 249 CLR 92, 171 [208] (Hayne J).

239 *Monis* (2013) 249 CLR 92, 146 [122] (Hayne J); see also *Coleman* (2004) 220 CLR 1, 99–100 [260] (Kirby J); *McCloy* (2015) 257 CLR 178, 265 [245] (Nettle J), quoting *Tajjour* (2014) 254 CLR 508, 578 [145] (Gageler J).

240 See *ACTV* (1992) 177 CLR 106, 231; *Nationwide News* (1992) 177 CLR 1, 72–3 (Deane and Toohey JJ).

241 *Tajjour* (2014) 254 CLR 508, 579 [148] (Gageler J).

242 *Sellars v Coleman* [2000] 2 Qd R 565, 579 [64] (Jones J); see also *McCloy* (2015) 257 CLR 178, 281–2 [309] (Gordon J).

V CONCLUSION

The prior inaction of the High Court in clearly and comprehensively identifying the mechanism for determining what constitutes a legitimate and compatible end resulted in a great deal of confusion and conflicting jurisprudence, culminating in the problematic ‘public interest’ test. The susceptibility of such tests to political as opposed to legal judgment, unsurprisingly, resulted in tensions over what constituted the public interest. However, the majority of the High Court in *McCloy* has, to their credit, now simplified the process of testing for compatibility in theory by replacing the ‘public interest’ test with the ‘adversely impinge’ test.²⁴³

An examination of *McCloy* and, critically, the case law preceding it yields three conclusions about the ongoing evolution of the meaning of ‘legitimate’ ends. First, legitimacy and compatibility are functionally the same concept and need to be determined at the same time. Second, following *McCloy*, notions of both the ‘public interest’, despite prior jurisprudence indicating otherwise, are no longer part of the test for legitimacy. However, they have continued relevance for the latter inquiry of the Second Limb, being proportionality testing, which is now susceptible to similar concerns regarding extra-constitutional public interest considerations and judicial deference. Their continued presence will unnecessarily complicate the application of the *Lange* test and the bipartite nature of the Second Limb, thereby undermining the simplicity of the *McCloy* formulation. Third, under the *McCloy* test, any purpose that does not undermine representative government, including ends unrelated to representative government, will be compatible, but applying this test in future cases will require detailed examination and analysis of what constitutes, enhances, and undermines representative government. Accordingly, determining the legitimacy of legislative ends will no longer require arbitrary, unclear and necessarily political determinations of what constitutes a ‘public interest’, but rather will require the determination of what representative government entails and the impact of an impugned legislative end on its functioning, these being still necessarily political questions.

The virtue of *McCloy* was that it clarified what was an incredibly confused issue in the application of the Second Limb. The vice of *McCloy* is that it did not minimise the role of public interest considerations in the Second Limb, and it revealed different political questions that underlie legitimacy and compatibility testing: what constitutes representative government and whether an impugned end restricts or enhances it. If *McCloy* had provided the same clarity in determining how those questions should be answered, as it did in rewriting the previously confused test for compatibility, then the decision would have been an unambiguously welcome development in constitutional law. As it stands, answering those questions will necessarily be a future challenge for constitutional lawyers and the High Court.

243 (2015) 257 CLR 178, 203 [31] (French CJ, Kiefel, Bell and Keane JJ); see also at 212–13 [67] (French CJ, Kiefel, Bell and Keane JJ); *contra* at 222 [98], 239 [155], 241 [165], 248 [184] (Gageler J).