

## Key case summary

*Sharkey*

*Koowarta*

*Thomas v Mowbray*

*Seas and Submerged Lands Case*

*Polyukhovich*

*Horta v Commonwealth*

*XYZ v Commonwealth*

*Tasmanian Dam Case*

*Industrial Relations Act Case*

*Pape v Federal Commissioner of Taxation*

*Richardson*

*R v Burgess; Ex parte Henry*

## Implied Freedom of Political Communication and the Franchise

### Application

#### **Implied right to vote**

Per *Roach*: Constitutional protection of implied right to vote extends to all adults and can only be abrogated if:

1. There is a substantial reason for infringing the right to vote (ie for excluding certain people); and
2. The means chosen is rationaly connected to this reason: that is, reasonably appropriate and adapted to a purpose which is consistent with the maintenance of representative government (ie proportionality)

Examples given in *Roach* of proportionate hypothetical laws

- restricting voting to citizens
- excluding persons of unsound mind (who lack capacity to exercise choice e.g. advanced dementia, serious intellectual disability)
- excluding persons who engage in acts of treason

Examples given in *Roach* of disproportionate hypothetical laws

- excluding Catholics
- excluding members of a major political party

- excluding residents of a particular area of a State
- excluding persons of Indigenous descent
- excluding bankrupts

### **Implied right to freedom of political communication**

The text and structure of the Constitution provide for representative government, elected by the Australian people: *Constitution ss 7, 24; Lange v ABC*. In order to give effect to the right to vote, there must be ‘freedom of communication of information and opinions about matters relating to the government of the Commonwealth’: *Nationwide News v Wills*. Thus, an implied freedom of political communication can be derived from the Constitution. Laws that impermissibly burden this freedom will be unconstitutional and therefore invalid. A three-step test was established in *Brown* which assess the effect, purpose and proportionality of the law. A law which fails to satisfy these elements is likely to be deemed constitutionally invalid. Validity of law that may burden freedom of political communication can be tested using *Brown* 3 step test and *McCloy* structured proportionality testing

1. Does the law effectively burden the freedom in its terms, operation or effect?
2. Is the **purpose of the law legitimate**, ie compatible with the maintenance of the constitutionally prescribed system of representative government (“**compatibility testing**“)
3. Is the law reasonably **appropriate and adapted** to advance that legitimate object in a **manner** that is compatible with the maintenance of the constitutionally prescribed system of representative government? (“**structured proportionality testing**“)
  - Per Kiefel in *McCloy*
  - **a. suitable** —having a rational connection to the purpose of the provision;
  - **b. necessary** —there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
  - **c. adequate in its balance** —a value judgment, balance the importance of the purpose and the extent of the restriction it imposes on the freedom.

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Extensive case summaries in Week 6 Notes doc