THE AUSTRALIAN PLEBISCITE ON SAME-SEX MARRIAGE

JOINT OPINION

INTRODUCTION AND SUMMARY

1 We have been briefed by the Human Rights Law Centre to provide an opinion on three questions concerning the proposed Australian plebiscite on same-sex marriage.

2 The questions, and our summary answers to them, are as follows:

(1) *Are there any legal considerations that pertain to the wording of the proposed plebiscite question?*

Answer: No. The question can be framed as a policy question such as "Should same-sex couples be allowed to marry in Australia?" or "Should Australia allow two adults to marry regardless of gender?" It need not ask for approval of a particular amendment Bill or refer to a change to the law by the Federal Parliament.

(2) *Is a requirement for compulsory voting in the plebiscite constitutionally permissible?*

Answer: Yes.

(3) *Is an amendment to the Marriage Act 1961 (Cth), which is expressed to come into force only upon a vote in favour in the plebiscite, constitutionally permissible?*

Answer: Yes. We have suggested a mechanism for this in paragraphs 66–69 below.

3 Our reasons are as follows.

QUESTION 1 — LEGAL CONSIDERATIONS PERTAINING TO THE WORDING OF THE PROPOSED PLEBISCITE QUESTION

The nature of a plebiscite

4 In ordinary language, the words "referendum" and "plebiscite" may be used largely interchangeably.[1] However, in modern Australian legal and political discourse, the words usually have more precise, and distinct, meanings.[2]

5 A "referendum" is the process by which the *Constitution* may be amended in accordance with s 128.[3] It relevantly provides:

> This Constitution shall not be altered except in the following manner:
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> The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.
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> …
>
> And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.
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> …

6 It will be seen that s 128 requires that an amendment to the *Constitution* be approved by the Federal Parliament and then by a majority of the electors throughout

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1 Brown (ed), *The New Shorter Oxford English Dictionary* (1993), vol 2, p 2248 defines "plebiscite" as: "A direct vote of the whole electorate of a State etc to decide a question of public importance, e.g. a proposed change in the constitution, union with another State, acceptance of a government programme, etc. (cf. REFERENDUM). Also, a public expression (with or without binding force) of the wishes or opinion of a community." Page 2520 defines "referendum" as: "The process or principle of referring an important political question, e.g. a proposed constitutional change, to the entire electorate to be decided by a general vote; a vote taken by referendum. Cf. PLEBISCITE".

2 We confine our comments to national referenda and plebiscites. There have been similar votes at State level since Federation as well: see Orr, *The Conduct of Referenda and Plebiscites in Australia: A Legal Perspective* (2000) 11 *Public Law Review* 117 at 119–121.

3 See *Referendum (Constitution Alteration) Act 1906* (Cth), s 3; *Referendum (Machinery Provisions) Act 1984* (Cth), s 3(1).

Australia and a majority of the electors in a majority of the States. This requires that the actual amending law be put before the people.[4]

7 The *Constitution* makes no provision for the submission of a question to electors unrelated to the amendment of the *Constitution*, for the purpose of determining, without legally binding consequence, the view of a majority of electors. However, since Federation, there have been three occasions on which such a question has been put to electors: there were votes on conscription in 1916[5] and 1917,[6] and a vote on a "National Song" in 1977.[7]

8 It is this kind of vote which is usually referred to in modern Australian legal and political discourse as a "plebiscite".[8] Unlike a referendum, the vote does not, of its own force, cause an amendment of the *Constitution*, an amendment of existing legislation or the enactment of new legislation. Its purpose is to determine the "national view" on a question, as the foundation for action by the Federal Parliament. Also unlike a referendum, a plebiscite does not require a majority of electors in a majority of States.

9 A plebiscite is more flexible than a referendum, in at least two respects.

10 *First*, the question to be asked need have nothing to do with an amendment to the *Constitution*. For instance, it can concern the amendment of existing legislation or the enactment of new legislation.

11 *Secondly*, there is no express constitutionally mandated restriction on the way in which the question is framed. The question need not be framed as requiring a "yes" or "no" answer: the electors may be presented with multiple options, among which they are asked to express their preferences, as occurred in the 1977 plebiscite on the National Song. If the question relates to the amendment of existing legislation or the enactment of new

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4 See *Referendum (Machinery Provisions) Act 1984* (Cth), s 8(2), 24, 25; *Boland v Hughes* (1988) 83 ALR 673 (HCA) at 674–675 per Mason CJ.

5 *Military Service Referendum Act 1916* (Cth).

6 *War Precautions (Military Service Referendum) Regulations 1917* (Cth) made under the *War Precautions Act 1914* (Cth).

7 *Referendum (Constitution Alteration) Modification Act 1977* (Cth), s 3.

8 Each of the 1916 and 1917 votes was referred to at the time as a referendum. But neither was a referendum within the meaning explained above and both have been referred to subsequently as plebiscites: see eg *Wong v The Commonwealth* (2009) 236 CLR 573 at 583–584 [27]–[30] per French CJ and Gummow J.

legislation, the actual terms of the law need not be put before the people. Instead, a question could be framed by reference to the general effect or policy of the proposed amendment or new legislation.

12 The only limitations on the topic of a plebiscite or the phrasing of a plebiscite question arise from the fact that the Federal Parliament has power under the *Constitution* to make laws only with respect to certain specified subject matters. In order for the Federal Parliament to enact legislation providing for the holding of a plebiscite, such legislation must be supported by a head of power in the *Constitution*. Legislation providing for the holding of a plebiscite on a subject matter unconnected with such a head of power would be invalid.

13 Among the subject matters with respect to which the Federal Parliament is given power by the *Constitution*, s 51(xxi) confers power to make laws "with respect to … marriage". This is conveniently referred to as the "marriage power". In addition, s 51(xxxix) confers power to make laws "with respect to … matters incidental to the execution of any power vested by this Constitution in the Parliament". This is conveniently referred to as the "express incidental power".

14 It is pursuant to the marriage power that the Federal Parliament has enacted the *Marriage Act*. That Act currently defines "marriage" to mean "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life" (s 5(1)). The effect of this definition is that couples of the same sex are not able to marry in Australia.[9]

15 For the following reasons, we consider that legislation providing for a plebiscite directed to the question whether same-sex couples should be permitted to marry in Australia would be supported by the marriage power or the marriage power read with the incidental power.

Applicable principles

16 The applicable principles are as follows.

[9] We note that individuals who are recognised as neither or both male and female would also appear to be excluded by the current definition.

17 *First*, for a law to be valid, it must be "with respect to" one of the enumerated heads of power. Various formulations have been suggested of what these words require: "a relevance to or connection with the subject" of the power;[10] a "sufficient connection" with the subject of the power;[11] a "relevant and sufficient connection" with the subject of the power;[12] a connection with the subject of the power that is more than "insubstantial, tenuous or distant";[13] the "pith and substance" of the law must be with respect to the subject of the power.[14] As is clear from these expressions, a very close and direct connection is not required. To the contrary, "[n]o form of words has been suggested which would give a wider power".[15]

18 *Secondly*, the character of the law in question is determined by considering the "operation and effect"[16] of the law by reference "to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes".[17] The practical as well as legal operation and effect of the legislation must be considered.[18]

19 *Thirdly*, a law may be "with respect to" an enumerated head of power, even if the subject that it regulates is only "incidental" to the subject of the head of power. Thus, "every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter".[19] Notwithstanding the reference to "necessity" in this passage, subsequent cases have made clear that strict necessity is not required: it is

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[10] See, eg, *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 per Dixon CJ, McTiernan, Webb and Kitto JJ.

[11] See, eg, *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 351 per Dawson J.

[12] See, eg, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 27 per Mason CJ.

[13] See, eg, *Melbourne Corp v The Commonwealth* (1947) 74 CLR 31 at 76 per Dixon J.

[14] See, eg, *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 182–186 per Latham CJ.

[15] *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 186 per Latham CJ.

[16] *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 186 per Latham CJ; *Bayside CC v Telstra Corp Ltd* (2004) 216 CLR 595 at [23] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.

[17] *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7 per Kitto J; *Attorney-General (Vic) v Andrews* (2007) 230 CLR 369 at [80] per Gummow, Hayne, Heydon and Crennan JJ.

[18] *New South Wales v The Commonwealth* (2006) 229 CLR 1 at [142] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

[19] *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 per Dixon CJ, McTiernan, Webb and Kitto JJ.

sufficient that the law is "appropriate" to effectuate the purpose of the power,[20] if what the law does "may reasonably and properly be done" to effectuate the purpose of the power[21] or if the law is "reasonably and properly incidental" to the effectuation of the purpose of the power.[22]

20 This aspect of the connection between the law and the head of power is sometimes referred to as the incidental power which is implied within each enumerated head of power or, more shortly, the "implied incidental power". This description should not be taken to suggest that the nature of the legislative power is different in kind from that which is expressly stated in the *Constitution*. It is not. The legislative power over matters "incidental" to the subject of the head of power, within the meaning above, is simply one part of the power conferred by the *Constitution* to legislate with respect to the enumerated matters.

21 *Fourthly*, there is the express incidental power in s 51(xxxix). In connection with another enumerated head of legislative power, it is restricted to matters which are incidental to the *execution* of that head of power, not matters which are incidental to the *subject matter* of that head of power. The latter is the province of the aspect of the enumerated head of power referred to above.[23] However, in practice, that distinction has not proved important.[24]

Application of principles

22 As a result of the decision of the High Court in *The Commonwealth v Australian Capital Territory*,[25] there is no doubt that the word "marriage" in s 51(xxi) "is a term which includes a marriage between persons of the same sex". That being so, having regard to the principles above, we consider that a law providing for a plebiscite the purpose of which is

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[20] *Victoria v The Commonwealth* (1996) 187 CLR 416 at 548–549 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

[21] *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271 at 281 per *curiam.*

[22] *Federal Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 262 per Dixon CJ.

[23] *Le Mesurier v Connor* (1929) 42 CLR 481 at 497 per Knox CJ, Rich and Dixon JJ.

[24] See, eg, *Victoria v The Commonwealth* (1957) 99 CLR 575 at 613–614 per Dixon CJ; *Burton v Honan* (1952) 86 CLR 169 at 177–178 per Dixon CJ; *Gazzo v Comptroller of Stamps (Vic); Ex parte Attorney-General (Vic)* (1981) 149 CLR 227 at 236 per Gibbs CJ, 267 per Aickin J; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 85 per Dawson J.

[25] (2013) 250 CLR 441 at 463 [38] per *curiam*.

to determine the "national view" on whether such an amendment should be made would be a law "with respect to" marriage.

23 Such a law would not, itself, regulate the means by which two persons enter into a marriage, or the rights and duties of parties to a marriage. However, it would, in our view, be sufficiently incidental as to be within the marriage power or, alternatively, within the express incidental power when read with the marriage power. To hold a plebiscite directed to determining whether the Parliament should legislate to amend the definition of "marriage", a topic within the heart of the marriage power, is appropriate, or reasonably and properly incidental, to the effectuation of the purpose of the power to regulate the status of marriage within Australia.

24 An analogy may be seen with the power of the Federal Parliament to make laws for the conduct of inquiries into matters with respect to which the Federal Parliament has legislative power, including laws which confer power to compel the attendance of witnesses on pain of fine and/or imprisonment. Such laws are supported by either the head of legislative power covering the subject of the inquiry or the express incidental power.[26] Thus, legislation could validly provide for the conduct of an inquiry into whether the definition of "marriage" in the *Marriage Act* should be amended, including for the purpose of reporting on the "national view" as to this question. The object of a plebiscite is in substance no different.

25 These reasons apply equally no matter the precise form of the question. In order to be within a head of power, it would not be necessary for the plebiscite legislation to specify that the question be framed in the technical manner required by s 128 of the *Constitution* in the case of a referendum. Thus, it would not be necessary that the proposed amending law be put before the people and the question in the plebiscite take the form "Do you approve the [Amending Bill]?"[27] It would not even be necessary that the proposed question refer to the existing law being changed by the Parliament. It would be open for the question to take the form "Should same-sex couples be allowed to marry in Australia?" or "Should Australia allow two adults to marry regardless of gender?" However the question is

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[26] *Colonial Sugar Refining Co Ltd v Attorney-General (Cth)* (1912) 15 CLR 182 at 193–194 per Griffiths CJ, 205–206 per Barton J; *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* [1914] AC 237 (PC) at 256–257 per Viscount Haldane (for the Board); *Lockwood v The Commonwealth* (1954) 90 CLR 177 at 182–184 per Fullagar J; *Bercove v Hermes (No 3)* (1983) 51 ALR 109 (FCAFC) at 112–113 per *curiam*.

[27] cf *Referendum (Machinery Provisions) Act 1984* (Cth), sched 1, Form B.

framed, the object of the plebiscite legislation is to obtain the "national view" on a question, as the foundation for action by the Federal Parliament which is within the heart of the marriage power.

26 Accordingly, it is not legally necessary that the question be of a precise or technical kind. For example, as a technical matter, in some circumstances the *Marriage Act* already permits people who are not "adults" to marry. While s 11 provides that the "marriageable age" is 18 years of age, ss 12–21 make special provision for marriages of persons below 18 years of age where additional requirements (such as judicial authorisation and parental consent) are met. We assume that, if persons of the same sex were permitted to marry, the provisions concerning marriageable age would apply in the same way as they do presently for persons of the opposite sex. Thus, while it is true that, in the overwhelming majority of cases, the effect of the proposed amendment to the definition of "marriage" in the *Marriage Act* would be to permit two *adults* to marry regardless of gender, it would also permit two persons of the same sex below 18 years of age to marry in the special circumstances in which, currently, two persons of the opposite sex below 18 years of age may do so. A question framed as "Should Australia allow two adults to marry regardless of gender?" would not strictly capture this point. However, for the reasons above, that is not a legal impediment to the question being framed in this way.

27 It follows that there are no legal considerations that pertain to the wording of the proposed plebiscite question directed to whether same-sex couples should be permitted to marry in Australia.

QUESTION 2 — COMPULSORY VOTING

28 The next question we are asked is whether provisions in plebiscite legislation for "compulsory voting" would be constitutionally permissible. For the following reasons, we consider that they would be.

Compulsory voting in elections and referenda

29 In Australia, voting in federal elections and referenda is compulsory. Thus, s 245 of the *Commonwealth Electoral Act 1918* (Cth) is entitled "Compulsory voting". Sub-section (1) provides that it shall be the duty of every elector to vote at each election and sub-section (15) makes it an offence of strict liability if an elector fails to vote at an

election, the penalty for which is payment of a fine. Section 45(1) and (14) of the *Referendum (Machinery Provisions) Act 1984* (Cth) make equivalent provision for referenda.

30 In *Rowe v Electoral Commissioner*,[28] Gummow and Bell JJ observed: "The secrecy which attends this system [of secret voting] makes the description 'compulsory attendance' more appropriate than 'compulsory voting'." That observation would almost always be correct in practice, because if an elector simply does not complete their ballot paper the secrecy which attends that process will almost always make their offence unknown. It is not necessary for present purposes to consider whether obtaining but not completing a ballot paper, or obtaining but not completing a ballot paper in such a way as to constitute a formal vote, is in fact an offence.[29]

31 Nothing in the *Constitution* mandates compulsory voting for federal elections and referenda. Indeed, voting for federal elections and referenda was not compulsory until 1924.[30]

Power to legislate for compulsory voting at a plebiscite

32 Voting in each of the three plebiscites which have previously been held at a federal level was not compulsory.[31] However, subject to consideration of the implied freedom of

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[28] (2010) 243 CLR 1 at [82].

[29] See *Lubcke v Little* [1970] VR 807 at 811 per Crockett J; *Faderson v Bridger* (1971) 126 CLR 271 at 272 per Barwick CJ; *Douglass v Ninnes* (1976) 14 SASR 377 at 379, 383 per Hogarth J; *O'Brien v Warden* (1981) 37 ACTR 13 at 16 per Blackburn CJ; *Australian Electoral Commission v Van Moorst*, unreported, Supreme Court of Victoria, Vincent J, 2 July 1987, pp 5–7; *Holmdahl v Australian Electoral Commission (No 2)* (2012) 277 FLR 101 (SASCFC) at [1] per Kourakis CJ, [68]–[70] per Gray J.

[30] *Commonwealth Electoral Act 1924* (Cth), s 2 inserting s 128A into the *Commonwealth Electoral Act 1918* (Cth).

[31] In *Wong v The Commonwealth* (2009) 236 CLR 573 at [29], French CJ and Gummow J said: "The conduct of the 1916 plebiscite, called a "referendum", was controlled by provisions of the Referendum Act [*Referendum (Constitution Alteration) Act 1906* (Cth)] which were applied (by s 7 [of the *Military Service Referendum Act 1916* (Cth)]) as if the prescribed question were a proposed law to which s 128 of the Constitution applied. The Referendum Act included the compulsory voting provisions introduced by the *Compulsory Voting Act 1915* (Cth)." See also *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 51 [132] fn 180 per Gummow and Bell JJ. However, the *Compulsory Voting Act 1915* (Cth) introduced compulsory voting *only* for the referenda to be conducted in 1915 (s 3). Further, while s 4 provided for compulsory voting, and the Act was expressed to be "incorporated and read as one with" the *Referendum (Constitution Alteration) Act 1906* (Cth), the compulsory voting provision did not become a numbered part of the *Referendum (Constitution Alteration) Act 1906* (Cth). Section 7 of the *Military Service Referendum Act 1916* (Cth) applied only certain specified provisions of the *Referendum (Constitution Alteration) Act 1906* (Cth), which did not include the compulsory voting provision in the *Compulsory Voting Act 1915* (Cth).

political communication, we consider that the Federal Parliament has power to make voting at a plebiscite concerning same-sex marriage compulsory, in the same manner as voting at federal elections or referenda.

33 If the object of the plebiscite is to obtain the "national view", it is entirely consistent with that object to ensure that the national view is as complete as possible by making it the duty of all electors to vote. We do not think it can be said that a law providing for a voluntary plebiscite is with respect to marriage but a law providing for a compulsory plebiscite is not.

34 It is no objection that a law providing for compulsion, upon criminal penalty, is supported by the implied incidental power which is part of the marriage power or the express incidental power when read with the marriage power. The same may be said of an inquiry of the kind referred to in paragraph 24 above. As noted there, it is established that such an inquiry may be given power to compel attendance of witnesses, on pain of fine or imprisonment.

The test for the implied freedom of political communication

35 As noted in paragraph 32 above, it is necessary to consider what, if any, restriction upon the compulsory nature of a plebiscite may be imposed by the implied freedom of political communication.

36 Until recently, the accepted approach to the implied freedom has turned on two questions, first stated by the High Court in *Lange v Australian Broadcasting Corporation*.[32] In *Wotton v Queensland*[33] they were summarised as follows:

> The first question asks whether in its terms, operation or effect, the law effectively burdens freedom of communication about government or political matters. If this is answered affirmatively, the second question asks whether the law nevertheless is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government.

[32] (1997) 189 CLR 520.

[33] (2012) 246 CLR 1 at [25] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

37 In *McCloy v New South Wales*,[34] a majority of four judges of the High Court restated the relevant approach as follows:

> A. The freedom under the Australian Constitution is a qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may "exercise a free and informed choice as electors." It is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the Constitution provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.
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> B. 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*:
>
> 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.
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> 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".
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> 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.
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> If the answer to question 2 is "no", then the law exceeds the implied limitation and the enquiry as to validity ends.
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> 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.

[34] (2015) 89 ALJR 857 at [2] per French CJ, Kiefel, Bell and Keane JJ (citations omitted); 331 ALR 386.

> 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:
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> *suitable* — as having a rational connection to the purpose of the provision;
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> *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;
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> *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.
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> 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.

38 The restatement in *McCloy* was the subject of strong dissents by the other three judges, in favour of the orthodox *Lange* test. It is not necessary for present purposes to consider the detail of these competing approaches.

39 Instead, it is convenient first to consider the authorities concerning compulsory voting at federal elections and referenda.

Authorities concerning compulsory voting

40 The High Court rejected a challenge to the validity of compulsory voting for federal elections in 1926 in *Judd v McKeon*.[35] Among other things, Isaacs J said:[36]

> [Parliament] may demand of a citizen his services as soldier or juror or voter. The community organized, being seised of the subject matter of parliamentary elections and finding no express restrictions in the Constitution, may properly do all it thinks necessary to make elections as expressive of the will of the community as they possibly can be.

That passage has been subsequently cited with approval on a number of occasions.[37]

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[35] (1926) 38 CLR 380.

[36] (1926) 38 CLR 380 at 385.

41 *Judd v McKeon* was decided before the recognition of an implied freedom of political communication in the *Constitution*. The High Court has not considered any challenge to compulsory voting in federal elections or referenda since that recognition. However, statements in subsequent authorities do not give any encouragement to such a challenge.

42 In *McGinty v Western Australia*,[38] Gummow J referred to compulsory voting without any suggestion that it infringed the implied freedom.

43 In *Langer v The Commonwealth*,[39] a majority of the Court concluded that a prohibition in s 329A of the *Commonwealth Electoral Act* upon publishing material encouraging persons to fill in a ballot paper otherwise than in accordance with the system for full preferential voting, was valid. The majority rejected the contention that the prohibition infringed the implied freedom.

44 In the course of their reasons, Toohey and Gaudron JJ said:[40]

> One matter that furthers the democratic process is full, equal and effective participation in the electoral process. If a voter's ballot paper is informal, as may be the case if it is not completed in accordance with s 240, he or she does not effectively participate in the electoral process. And a voter does not participate either fully or equally with those who indicate an order of preference for all candidates if his or her ballot paper is filled in in such a way that it is earlier exhausted. To the extent that s 329A operates to prevent conduct that is intended to encourage voters not to fill in a ballot paper in accordance with s 240 and, thus, either vote informally or to vote in such a way that their ballot papers are exhausted earlier than those of other voters, it is reasonably capable of being viewed as appropriate and adapted to furthering the democratic process.

45 McHugh J said:[41]

> It is not inconsistent with the implied freedom for Parliament to prohibit a person from encouraging voters to disregard a system of voting validly set

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[37] *Langer v The Commonwealth* (1996) 186 CLR 302 at 315–316 per Brennan CJ; *Rowe v Electoral Commission* (2010) 243 CLR 1 at [132] per Gummow and Bell JJ; *Holmdahl v Australian Electoral Commission (No 2)* (2012) 277 FLR 101 (SASCFC) at [53] per Gray J.

[38] (1996) 186 CLR 140 at 283.

[39] (1996) 186 CLR 302.

[40] (1996) 186 CLR 302 at 334.

[41] (1996) 186 CLR 302 at 340.

> up under the Constitution. If the Parliament could not compel persons to vote, the matter might be different. But the plaintiff refused to challenge the compulsory voting system. Moreover, this Court has held that compulsory voting in federal elections is within the power of the Parliament.

46 In *Mulholland v Australian Electoral Commission*,[42] the High Court rejected the contention that a rule prohibiting an unregistered political party from having its name printed on the ballot paper infringed the implied freedom. The reasons are replete with references to compulsory voting, without any suggestion that it infringed the implied freedom.[43]

47 Most recently, in *Day v Australian Electoral Officers (SA)*,[44] the Court referred to the system of compulsory voting established in 1924, without any suggestion that it might be an invalid infringement of the implied freedom.

48 In *Holmdahl v Australian Electoral Commission (No 2)*,[45] the Full Court of the Supreme Court of South Australia rejected a challenge to s 245 of the *Commonwealth Electoral Act*. The challenge was not framed on the basis of the freedom of political communication. However, in the course of his reasons, Gray J (with whom the rest of the Court agreed) said:[46]

> The Commonwealth electoral system, as described above, represents a system designed to support the election of the House of Representatives and of the Senate by the people of Australia. The *Commonwealth Electoral Act* has the purpose of ensuring representative democracy. The broad effect of the statute is to require all eligible persons to enrol as voters and then to require those electors to attend and vote. The terms of s 245(1) and (15) establish a duty to vote and a failure to vote attracts a criminal sanction. It is difficult to understand how the obligation to enrol and the obligation on an elector to vote could detract from a representative democracy in which the people of Australia choose who is to represent them in the House of Representatives and in the Senate. To my mind, the *Commonwealth Electoral Act* is legislation enacted within power. It provides a relevant system in contemporary times to ensure that Australia is a representative democracy.

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42 (2004) 220 CLR 181.

43 (2004) 220 CLR 181 at [7], [29] per Gleeson CJ, [64] per McHugh J, [154], [158] per Gummow and Hayne JJ, [213] per Kirby J.

44 (2016) 90 ALJR 639 at [9] per *curiam*; 331 ALR 386.

45 (2012) 277 FLR 101 (SASCFC).

46 (2012) 277 FLR 101 (SASCFC) at [71].

49 Finally, in *Pettet v Van Ver Merwe*,[47] the Queensland Court of Appeal rejected a challenge to the validity of Queensland compulsory voting provisions. Holmes CJ (with whom the rest of the Court agreed) said:[48]

> Finally, there seems to be an argument that compulsory voting is unconstitutional because it somehow suppresses political dissidence and freedom of speech. No explanation is given as to why laws making voting compulsory would not be within the constitutionally conferred law-making powers of the Queensland Government. Nor was any reference made to anything in the Constitution of the Commonwealth inconsistent with the existence of such a power. And, patently, to require a person to vote in no way impedes the exercise of freedom of political communication.

Compulsory voting and the implied freedom

50 Any contention that a requirement of compulsory voting at a plebiscite infringes the implied freedom of political communication must confront the fact that, if correct, it would be equally applicable to the requirement of compulsory voting at federal elections. The latter could not be defended as mandated by the *Constitution*. In both cases, the legislation reflects a choice by Parliament as to the means by which the choice of electors is to be determined.

51 It seems to us that, in both cases, there is arguably a burden on political communication. In the case of a federal election, an elector is not able to communicate, say, their disapproval of all the candidates standing for election in a particular seat or the polices of all the parties supporting those candidates, by refusing to vote. In the case of a plebiscite, an elector is not able to communicate, say, their opposition to the notion of a plebiscite, by refusing to vote. These are plainly political topics. The fact that the posited communication takes the form of a non-verbal protest does not take the communication outside the bounds of the freedom.[49] Accordingly, we doubt the correctness of the comments made in *Pettet*, quoted in paragraph 49 above.

52 That being said, the burden on political communication in either case is relatively slight. For the reasons in paragraph 30 above, electors are not, in practice, compelled to

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47 [2016] QCA 13.

48 [2016] QCA 13, p 4.

49 *Levy v Victoria* (1997) 189 CLR 579 at 594–595 per Brennan CJ, 609 per Dawson J, 613 per Toohey and Gummow JJ, 617 per Gaudron J, 622–624 per McHugh J, 637–642 per Kirby J.

cast a valid vote at a federal election and would not, in practice, be compelled to do so in a plebiscite. Indeed, as explained there, it may be that this is not only so as a matter of practice but as a matter of the proper understanding of the elements of the offence.

53 The comments from the cases extracted in paragraphs 40–48 above provide a justification for any burden on freedom of political communication in the case of compulsory voting at federal elections. We have no doubt that such justifications would be considered to satisfy the second *Lange* question or the "compatibility testing" to which the majority in *McCloy* referred. If it were otherwise, every federal election and referendum since 1924 would have been unlawfully conducted.

54 In our view, the comments from the cases extracted in paragraphs 40–48 above also provide, by analogy, a justification for any burden on freedom of political communication in the case of compulsory voting at a plebiscite. If the Parliament can validly seek the "national view" on a question by a plebiscite, as we think it can, it can validly "do all it thinks necessary to make [the plebiscite] as expressive of the will of the community as [it] possibly can be". Compulsory voting at a plebiscite "furthers the democratic process" by seeking to ensure "full, equal and effective participation".

55 For these reasons, we consider that, if there is to be a plebiscite on the question of whether same-sex marriage should be permitted in Australia, the burden on freedom of political of communication imposed by requiring compulsory voting in the same manner as under the *Commonwealth Electoral Act* (including provision for payment of a fine) is reasonably appropriate and adapted, or proportionate, to the legitimate end of ensuring that the plebiscite is as expressive of the "national view" as it possibly can be. It is suitable, necessary and adequate in its balance. (To be clear, the question here is *not* whether having a plebiscite at all is "suitable" or "necessary". That is a political question. The question presently under consideration is whether, if a plebiscite is to be held, it is constitutionally permissible for voting in the plebiscite to be made compulsory.)

56 Accordingly, we consider that provisions in the plebiscite legislation requiring compulsory voting, of the kind which may be found in the *Commonwealth Electoral Act* (including provision for payment of a fine), would not infringe the implied freedom of political communication.

QUESTION 3 — CONTINGENT COMMENCEMENT OF AMENDING LEGISLATION

57 The final question we have been asked is whether it would be constitutionally permissible for the Parliament to pass an amendment to the *Marriage Act*, which is expressed to come into force only upon a vote in favour in the plebiscite. For the following reasons, we consider that it would be.

Triggers for the commencement of legislation

58 It is well accepted that an Act can provide that it does not "commence" — ie have effect as law[50] — unless and until some specified future event occurs.[51] Often, that future event involves a step being taken by the Executive, such as the making of a proclamation or the publication of a notice in a government publication. However, that need not be so.

59 "It is a matter for Parliament to decide what provisions it will make for the commencement of any particular statute or any particular part of it."[52] Drafting Direction No 1.3, issued by the Commonwealth Office of Parliamentary Counsel, contains many different examples of the kinds of commencement provision that may be chosen.[53]

60 There is no prohibition on the commencement of legislation being contingent.[54] Thus, commencement provisions may be expressed to apply only if some other event occurs and, indeed, so as to make clear that the legislation *does not commence* if the event does not occur. An example is the following commencement provision contained in s 2 of the *International Monetary Agreements Amendment (Loans) Act 2012* (Cth):

> The later of:
>
> (a) immediately after the commencement of the provision(s) covered by table item 2; and

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[50] *Richards v McBride* (1882) 8 QBD 119 at 124 per Lopes J; *Croxford v Universal Insurance Co Ltd* [1936] 2 KB 253 (CA) at 270 per Slosser LJ; *R v Secretary of State for the Home Department; Ex parte Fire Brigades Union* [1995] 2 AC 513 (CA) at 529–530 per Hobhouse LJ.

[51] See generally Greenberg D (ed), *Craies on Legislation* (10th ed, Sweet & Maxwell, 2012) at [10.1.1].

[52] *R v Secretary of State for the Home Department; Ex parte Fire Brigades Union* [1995] 2 AC 513 (CA) at 527 per Hobhouse LJ. See also Jones, *Bennion on Statutory Interpretation* (6th ed, LexisNexis, 2013) at 256: "There is no limit to the ways in which Parliament may choose to fix the time of commencement".

[53] See Office of Parliamentary Counsel, *OPC Drafting Series No 1.3: Commencement Provisions*, 22 August 2016 at https://www.opc.gov.au/about/draft_directions.htm. See esp pp 18–22.

[54] See also Greenberg D (ed), *Craies on Legislation* (10th ed, Sweet & Maxwell, 2012) at [10.1.8], [10.1.25].

(b) the start of the day the changes in credit arrangements made by paragraph 1 of Decision No. 15073-(12/1), dated 21 December 2011, of the Executive Board of the International Monetary Fund become effective for Australia.

However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.

61 This example also demonstrates that the commencement of legislation may be contingent upon events over which neither the Executive nor the Parliament has control (or complete control). That is also seen in various Acts the commencement of provisions of which is contingent upon the coming into force of an international treaty, which is itself dependent on ratification by a sufficient number of countries.[55] In such cases, whether the provisions commence may be dependent upon the acts of one or more foreign countries in ratifying the relevant treaty. An example is s 2 of the *Comprehensive Nuclear-Test-Ban Treaty Act 1998* (Cth), which provides that certain parts of the Act commence on: "The day on which the Treaty enters into force for Australia." Since the Treaty has not yet entered into force, those parts of the Act have not commenced. If the Treaty does not enter into force, those parts of the Act will never commence.[56]

62 In each of these cases, the fact that the commencement of legislation is contingent upon the occurrence of some future event does not mean that legislative power is conferred on those responsible for taking that step. Nor does it mean that they are somehow made part of the legislative process. That is strikingly apparent when the examples in the previous two paragraphs are considered. It is even more apparent if one considers a hypothetical Act giving extraordinary defence powers to the Government the commencement of which is expressed to be contingent upon a terrorist attack killing a specified number of Australian citizens. It could not be said that the terrorists are thereby either the repositories of legislative power or part of the legislative process.

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55 See also Jones, *Bennion on Statutory Interpretation* (6th ed, LexisNexis, 2013) at 256.

56 See also *Environment Protection (Sea Dumping) Act 1981* (Cth), s 4B; *Trusts (Hague Convention) Act 1991* (Cth), s 2; *Chemical Weapons (Prohibition) Act 1994* (Cth), s 2; *Anti-Personnel Mines Convention Act 1998* (Cth), s 2; *Protection of the Sea (Harmful Anti-Fouling Systems) Act 2006* (Cth), s 2; *Defence Trade Controls Act 2012* (Cth), s 2.

Commencement based upon a plebiscite result

63 In light of the reasons above, we can see no constitutional reason precluding an amendment to the *Marriage Act* being passed but the commencement of which is made conditional upon the plebiscite result being in favour of same-sex marriage. Such a result is a future event, of a contingent kind, no different from the contingent future events to which we have referred above.[57] For the reasons explained there, such a commencement provision would not involve a conferral of legislative power upon electors or an involvement of electors in the legislative process.

64 It may be accepted that legislation of this kind would link a popular vote of electors to the legislative process in a way which has not been a hallmark of Australian democracy. It is more akin to "direct democracy" than the "representative democracy" for which the *Constitution* provides. However, these are political, not legal, matters.

65 For Parliament to pass legislation the commencement of which is dependent upon a popular vote would in no way be inconsistent with any express provision of the *Constitution*. It is no way inconsistent with any hitherto recognised implication from the *Constitution*. Nor do we think any such implication is to be recognised. The fact that the *Constitution* makes express provision for electors to participate in referenda to amend the *Constitution*, and to elect senators and members of the House of Representatives, does not imply that Parliament is forbidden from involving electors in some other way in the legislative process. It cannot be said that any such implication is "necessary".[58] It is entirely contrary to authority to seek to draw from the *Constitution* some broad implication of "representative democracy" and to say that legislation of the kind discussed above is contrary to such an implication. That kind of reasoning was precisely what was rejected by

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[57] See also Greenberg D (ed), *Craies on Legislation* (10th ed, Sweet & Maxwell, 2012) at [10.1.25].

[58] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 per *curiam*; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 225 CLR 322 at [33] per Gleeson CJ and Heydon J, [56]–[57] per McHugh J, [469]–[470] per Callinan J; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at [20], [39], [54] per Gleeson CJ, Gummow and Hayne JJ, [83] per Kirby J, [171] per Heydon, Crennan and Kiefel JJ. See also *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129 at 155 per Knox CJ, Isaacs, Rich and Starke JJ; *Victoria v The Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353 at 386 per McTiernan J, 417–418 per Gibbs J.

the High Court in its unanimous reasons in *Lange v Australian Broadcasting Corporation*.[59]

Form of a commencement provision

66 On the assumption that any plebiscite legislation would make provision for certification along the lines of s 98 of the *Referendum (Machinery Provisions) Act*, a commencement provision might take the following form (adopting the currently usual form for Commonwealth commencement provisions):

> (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this Act	If and only if the number of votes given in favour of the plebiscite for which the [*] Act provides (***the plebiscite***) as certified by the Electoral Commissioner pursuant to s [*] of that Act exceeds the number of votes given not in favour of the plebiscite. However, if the number of votes given in favour of the plebiscite does not exceed the number of votes given not in favour of the plebiscite, the provisions do not commence at all.	

[59] (1997) 189 CLR 520 at 566–567 per *curiam*. See also *McGinty v Western Australia* (1996) 186 CLR 140 at 168–169 per Brennan CJ, 182, 188 per Dawson J, 230–232 per McHugh J, 291 per Gummow J; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at [14] per Gaudron, McHugh, Gummow and Hayne JJ; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [32]–[33] per Gleeson CJ and Heydon J, [56]–[57] per McHugh J, [385]–[389] per Hayne J, see also at [240]–[242] per Gummow J, [469]–[470] per Callinan J; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at [20], [39], [54] per Gleeson CJ, Gummow and Hayne JJ, [82]–[85] per Kirby J, [171] per Heydon, Crennan and Kiefel JJ.

Note 1: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

Note 2: The [*] Act provides that the plebiscite must take place on or before [*date].

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

67 Of course, if the legislation for the plebiscite were contained within the amendment Act itself, which would be possible, the commencement provision would need to be amended accordingly.

68 In either case, we assume that the legislation for the plebiscite would make provision for the plebiscite to be held by a certain date so that it would be known by that date whether or not any amendment to the *Marriage Act* would come into force. That is the reason for "Note 2" in the suggested form above.

69 There may, of course, be other ways of expressing a similar idea. The language of "votes given in favour of the plebiscite" and "votes given not in favour of the plebiscite", which we have taken from s 98 of the *Referendum (Machinery Provisions) Act*, might be inapt, depending on the question asked in the plebiscite. Language such as "votes given in favour of the answer 'yes' in the plebiscite" and "votes given in favour of the answer 'no' in the plebiscite" might be more appropriate. However, these are matters of detail. They would not affect the constitutional validity of a contingent commencement provision of the kind we have described.

23 August 2016

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