Roberts v Bass
(2002) 194 ALR 161

At the 1997 election for the Parliament of South Australia, Mr Geoffrey Roberts waged a public campaign against the re-election of Mr Rodney Bass (Liberal, Florey). Roberts was not himself a candidate and did not represent a political party, though he claimed to speak on behalf of a "Clean Government Coalition". His grievances against Bass related in particular to the privatisation of a local hospital. His campaign involved the distribution, in letter boxes throughout the electorate, of a simulated postcard supposedly mailed from Nauru, and a "Free Travel" pamphlet (including a fictitious Frequent Flyer Statement), both designed to suggest (falsely) that Bass made a practice of self-indulgent overseas travel. In addition, a how-to-vote card given out on polling day accused Bass of "numerous junkets *at your expense*" to overseas countries. For fuller descriptions and reproductions of the documents, see 194 ALR at 223-26.

After the election, Bass sued Roberts for defamation. He also sued Mr Kenneth Case, who had handed out the how-to-vote card at one of the polling booths.

In the District Court of South Australia the trial judge (sitting without a jury) ordered Case (who had merely distributed the how-to-vote card) to pay damages of $5,000, and Roberts to pay damages of $60,000, including $5,000 as exemplary damages. He found that both Roberts and Case had been actuated by malice, and that this defeated their claim to qualified privilege at common law. He distinguished that "traditional" claim from what he called "the extended form of qualified privilege" arising from *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, but held that any claim to the latter form of protection must also fail.

The Supreme Court of South Australia dismissed an appeal, and increased the damages payable by Roberts to $100,000 (*Roberts v Bass* (2000) 78 SASR 302). From that decision Roberts and Case appealed to the High Court. Initially, in April 2001, Kirby J was disposed to grant their application for special leave to appeal and Gleeson CJ to refuse it. The matter was reheard by a larger bench (Gleeson CJ, McHugh and Kirby JJ), and special leave was granted.

In the event, Callinan J (in dissent) would simply have dismissed the appeal. In his view the appellants' conduct was clearly unreasonable, so that even if a *Lange* defence had been available, it must have failed. The other six justices allowed Case's appeal, holding that, as against him, the finding of malice could not be sustained. As to Roberts, however, the Court divided 4:3. Gleeson CJ and Hayne J (to this extent joining Callinan J in dissent) would simply have dismissed his appeal; but Gaudron, McHugh, Gummow and Kirby JJ held that there must be a new trial. They insisted that, while lack of belief in the truth of a published statement may sometimes be *evidence* of malice, the common law concept of "malice" in this context cannot be *reduced* to mere absence of belief; "malice" is a separate concept, to be satisfied only by evidence that an occasion of qualified privilege has been used for an improper *purpose*.

Despite the distinction drawn by the trial judge between the "traditional" and "extended" versions of qualified privilege, the defendants had not expressly invoked the latter "extended" form of defence; and in the Supreme Court they had expressly disavowed it. (Gleeson CJ assumed that this was because their conduct could not satisfy the *Lange* requirement of "reasonableness".) Accordingly, the three dissenting judges held that the constitutional issues arising from *Lange* could not now be introduced in the High Court. They therefore decided the matter solely on the basis of the common law. The four majority judges also relied on the common law conceptions of "qualified privilege" and "malice", but insisted that, despite the earlier course of the litigation, it was necessary to take account of the modification of those conceptions by the implied constitutional freedom of political communication.

Central to the disposition of the case on a common law basis was the view that the common law concept of "qualified privilege" could extend to electioneering contexts. The English Court of Appeal in *Braddock v Bevins* [1948] 1 KB 580 had held that it could so extend. The actual result in the High Court in *Lang v Willis* (1934) 52 CLR 637 had also allowed a wide latitude to electioneering statements, though dicta in that case (especially those of Dixon J in dissent) had found it "**[667]** untenable [to suggest] that election speeches made to a large audience of unidentified persons are privileged because the speaker deals with matters in which the electors have an interest". For the four majority judges in *Roberts v Bass*, these dicta could not avail against the implied constitutional freedom.

The dissenting judges declined to consider the implications of the *Lange* decision, but for different reasons. Gleeson CJ found it "**[163]** difficult to understand" the supposed "**[162]** co-existence of two significantly different tests for qualified privilege in the context of political debate", one based on *Braddock v Bevins* and the other on *Lange*. Hayne J, though he agreed that the Court was "**[219]** precluded by the course that the proceedings have taken" from exploring the impact of *Lange*, was concerned to stress that the resulting reliance solely on the common law was "**[216]** an artificial and flawed basis" for decision. He noted that Roberts' letterboxing campaign was distinguishable from the statement in *Braddock v Bevins* (which was "**[217]** circulated *only* to electors"); and suggested that even if *Braddock v Bevins* had correctly stated the common law, it might not survive the development in *Lange*.

Hayne J: [218] There appears much to be said for the view that widespread publication about government or political matters, even if restricted to electors, should not be found to be a publication invoking the pre-*Lange* [(1997) 189 CLR 520] principles of qualified privilege. The better view may well be that a publication about government and political matters made to a large audience, even if it is drawn only from the body of electors, should fall for consideration on the same basis as publications made to both electors and others. A publication to electors **[219]** generally, despite what was said in *Braddock* [[1948] 1 KB 580] …, might be thought not to be an occasion of qualified privilege as those occasions were understood at common law before *Lange*. That would be consistent with what was said in *Lang v Willis* [(1934) 52 CLR 637] and it would be consistent with the coherent development of the common law after *Lange*.

The development of the common law which *Lange* made was scarcely necessary if qualified privilege would be attracted to every case where the communication of political matter was said to have been *aimed* at electors generally or even where the communication was *made* only to those who, together, formed the body of electors. Further, and very importantly, to distinguish between the principles to be applied in cases where a how-to-vote card or other form of political advertising is handed to voters as they approach the polling booth, rather than published in the local newspaper or dropped in letterboxes in the electorate, would be to draw a distinction which would be very difficult to justify if it required the application of a different criterion of operation …

All three kinds of communication I have identified (handing to voters, publishing in the local newspaper and dropping copies in letterboxes) are evidently aimed at persuading voters. In the nature of electoral contests, all will be intended to work some detriment to those whose candidacy is not favoured. All may seek to do so by any of a very diverse set of methods intended to persuade the reader — statements of what are said to be facts, statements of opinion, predictions of future conduct, reason, caricature, irony, sarcasm … While the platonic ideal may be that the political debate would be confined by reason, and thus be confined to a contest between ideas that can be held by reasonable persons, experience reveals that this is not always so. Not all political views would be regarded as falling within the range of ideas considered by the hypothetical right thinking members of society to be reasonably tenable. If these views are to be disseminated widely, and to be disseminated for the express purpose of inflicting detrimental consequences on electoral rivals, application of a test of honesty and absence of malice has obvious difficulties. These become more acute as the views being tested become more extreme and their holding more a matter of visceral and passionate conviction than analytical reason. It is precisely because what is said in a political campaign may not be founded in reason, yet be views that are sincerely and, in that sense, honestly held, that *Lange* required the focus to be shifted from the honesty of the publisher to the reasonableness of the publisher's conduct.

> Only by making that shift is account properly taken of the political nature of the subject-matter of the publication and the size of the audience to which it is published.

By contrast, Callinan J reaffirmed his criticism in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 of the whole idea of an implied constitutional freedom of political communication.

Gaudron, McHugh and Gummow JJ also agreed that "**[178]** having conducted their cases in the manner that they did in the Full Court, [the parties] should not be allowed to depart from the courses they then adopted". Nevertheless, they considered it "**[177]** necessary" to consider the impact of the constitutional freedom upon the common law rules.

> **Gaudron, McHugh and Gummow JJ: [176]** In *Lange*, the Court unanimously held that freedom of communication on matters of government and politics is an indispensable incident of the system of representative government created by the Constitution. The Court emphasised [189 CLR at 560] that "[c]ommunications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation". Hence, this litigation is concerned with matters at the heart of the constitutional freedom of communication respecting political or government matters.
>
> **[177]** In *Lange*, the Court pointed out that, although the constitutional freedom confers no rights on individuals, it invalidates any statutory rule that is inconsistent with the freedom. It also requires that the rules of the common law conform with the Constitution, for "the common law in Australia cannot run counter to constitutional imperatives" [189 CLR at 566]. It is necessary therefore to determine the extent to which, if at all, the common law rules concerning the traditional defence of qualified privilege applicable in this case are consistent with the constitutional freedom of communication.
>
> In determining whether a rule of the common law is consistent with the constitutional freedom of communication, two questions have to be answered. First, does the rule effectively burden the freedom? Second, if so, is the rule reasonably appropriate and adapted to serve a legitimate end compatible with the constitutionally prescribed system of representative and responsible government? If the answer to the second question is "no", the common law rule must yield to the constitutional norm, for the common law's impact on the freedom cannot be greater than that permitted by the constitutional norm.
>
> In *Lange*, the Court held that the law of defamation effectively burdened the constitutional freedom and that the law of qualified privilege, as traditionally understood, did not qualify that burden in a way that was consistent with the freedom … Under the common law as previously understood, the law of qualified privilege did not generally recognise an interest or duty to publish defamatory matter to the general public. Hence, without that privilege, the common law imposed an unreasonable restraint upon the constitutional freedom. That necessitated the development of the common law as expounded in the balance of the judgment of the Court.
>
> Three points in particular should be noted concerning the development of the defence of qualified privilege in *Lange*. First, in extending the law of qualified privilege to protect publications concerning governmental and political matters to mass audiences, the Court imposed as a condition of the extended privilege that the publisher's conduct be reasonable. But the Court emphasised [189 CLR at 573]:
>
> > … reasonableness of conduct is imported as an element only when the extended category of qualified privilege is invoked to protect a publication that would otherwise be held to have been made to too wide an audience. For example, reasonableness of conduct is not an element of that qualified privilege which protects a member of the public who makes a complaint to a Minister concerning the administration of his or her department. Reasonableness of conduct is an element for the judge to consider only **[178]** when a publication concerning a government or political matter is made in circumstances that, under the English common law, would have failed to attract a defence of qualified privilege.
>
> Second, in *Lange*, the Court held that, having regard to the subject matters of government and politics, the motive of causing political damage to the plaintiff or his or her party is not an improper motive that would destroy a defence of qualified privilege [189 CLR at 574]. The Court also held that the vigour of an attack or the pungency of a defamatory statement concerning such matters cannot, without more, discharge the plaintiff's onus on the issue of malice. Third, in some respects the Court's

development of the law of qualified privilege extended beyond what was required for conformity with the constitutional norm [189 CLR at 571].

The present case concerns publications relating to the record and policies of a candidate for election to State Parliament for the seat of Florey. They were directed to, and generally received by, a limited class of persons — the electors in the seat of Florey. As will appear, the traditional common law defence of qualified privilege protects such publications because the reciprocity of interest required for the traditional defence is present. As will also appear, given the decision in *Lange*, that privilege will not be lost because the publisher intends to cause political damage to the candidate or his or her party. Nor will the privilege be lost merely because of the vigour of an attack on a candidate for election to Parliament … Without more, the vigour of the attack is not evidence of improper motive … The privilege will be lost only if it is used for a purpose other than that for which it is granted … Thus, although the common law rules of defamation make defamatory statements concerning a candidate for election actionable and impose a burden on an elector's freedom of communication, those rules also protect an elector who uses the occasion for the purpose that gives rise to the constitutional freedom. Hence the burden does not affect what is required to give effect to the constitutional freedom.

Accordingly, the second of the two questions posed in *Lange* is answered by saying that, in the present case, the common law rules governing traditional qualified privilege are reasonably appropriate and adapted to serve a legitimate end compatible with the constitutionally prescribed system of representative and responsible government …

[179] It is a serious mistake to think that *Lange* exhaustively defined the constitutional freedom's impact on the law of defamation. *Lange* dealt with publications to the general public by the general media concerning "government and political matters". It was not concerned with statements made by electors or candidates or those working for a candidate, during an election, to electors in a State electorate, concerning the record and suitability of a candidate for election to a State Parliament. Such statements are at the heart of the freedom of communication protected by the Constitution. They are published to a comparatively small audience, most of whom have an immediate and direct interest in receiving information, arguments, facts and opinions concerning the candidates and their policies. In that context and constitutional framework, the application of traditional qualified privilege requires a holding that qualified privilege attaches to statements by electors, candidates and their helpers published to the electors of a State electorate on matters relevant to the record and suitability of candidates for the election. Nothing in *Lang v Willis* [(1934) 52 CLR 637] generally, and nothing in the judgment of Dixon J in that case in particular, requires a contrary finding. All that Dixon J said in *Lang* [52 CLR at 667] is that election speeches made to a large audience of unidentified persons are not privileged even though "the speaker deals with matters in which the electors have an interest". Those remarks were made nearly 60 years before this Court recognised the impact that the Constitution has on the law of defamation in respect of governmental and political matters. And the remarks were not directed to statements made by electors, candidates or their helpers to electors in a State electorate concerning the record and suitability of a candidate for election by those electors …

[187] In a case like the present, persons handing out how-to-vote cards may honestly believe that they are informing the electorate of their candidate's views and may not themselves have thought about whether much or any of the content of the how-to-vote card is true. Such persons will not lose the protection of the occasion because they had no positive belief in the truth of any defamatory matter in the how-to-vote card. It is proper for them to communicate their candidate's views to voters, and they do not lose their protection because, although acting for the purpose of the privileged occasion, they had no positive belief in the truth of the defamatory matter.

If the common law did hold that lack of belief or lack of honest belief in the truth of the defamatory matter was equivalent to knowledge of falsity or malice, it would have to be developed in respect of electoral communications to accord with the freedom of communication in respect of political matters that the Constitution protects. Earlier in these reasons we explained that … *Lange* requires two questions to be answered. First, do [the common law rules] effectively burden the constitutional implication of freedom of communication on political matters? Second, if so, are those rules reasonably appropriate and adapted to serve a legitimate end that is compatible with the constitutionally prescribed system of representative and responsible government?

The first question posed by *Lange* is answered affirmatively in cases like the present because the law of defamation by providing for damages for defamatory publications has a chilling effect on freedom of communication on political matters. The second question would have to be answered negatively if

lack of belief or lack of honest belief in defamatory electoral material would destroy a defence of qualified privilege. The Australian electoral process works, and can only effectively work, with the help of the thousands of volunteers who **[188]** at election time, and sometimes earlier, provide services to the candidates and political parties. Distributing election material in the form of posters, pamphlets and how-to-vote cards is one of the most important of those services … In many cases, the volunteers although honestly believing that they are providing information on electoral matters to the voters in the electorate, have no positive belief in the truth of what they are distributing. Often enough, they are persons, brought in from outside the electorate, to assist a candidate or political party and are unfamiliar with the particular issues that concern the electorate. In many cases, they will be handing out material they have not even read. To hold such persons liable in damages for untrue defamatory statements in that material because they had no positive belief in their truth would be to impose a burden that is incompatible with the constitutional freedom of communication. If, contrary to our view, the common law made a positive belief in the truth of electoral statements a condition of the defence of qualified privilege, it would be inconsistent with the Constitution and would have to be developed to accord with the Constitution's requirements …

[189] Publishing material with the intention of injuring a candidate's political reputation and causing him or her to lose office is central to the electoral and democratic process. There is nothing improper about publishing *relevant* material with such a motive as long as the defendant is using the occasion to express his or her views about a candidate for election. That purpose is not foreign to the occasion that gives qualified privilege to such publications. The Constitution's protection of freedom of communication on political and governmental matters would be of little effect if an elector was liable in damages because he or she had the motive of injuring the political reputation of a candidate for election to the legislature. The imputations made against Bass concerned the performance of his duties as a parliamentarian. The publications were aimed at lowering his reputation as a politician and parliamentarian. They were not directed to matters foreign to his political or parliamentary reputation. Roberts' and Case's motives in publishing the material … were not improper motives given the occasion of the publication. The learned trial judge erred in finding that Roberts and Case were guilty of malice because they sought to injure **[190]** the reputation of Bass and cause him to lose office …

The learned trial judge also held that the evidence established "that the defendants published the defamatory material without 'considering or caring whether it be true or not'". His Honour said … that, "when asked whether it had occurred to him that [Bass] might not have been a member of the frequent flyer program in preparing the [Free Travel Times] pamphlet, [Roberts'] answer was that 'it was not something I drew my mind to'". But to hold this answer to be recklessness in any relevant sense would be to equate it with carelessness or failure to check material. Roberts' evidence shows that he did not seek independent confirmation for his beliefs, that he jumped to conclusions from inadequate material and that his reasoning was often illogical. But these matters are insufficient to justify a finding that he used the occasion for an improper purpose when he published the pamphlet …

Roberts' reasoning process is open **[191]** to serious criticism and led him to an unfair conclusion concerning the nature of Bass' trip to Nauru. But no matter how irrational his reasoning might seem to a judge, it is unfortunately typical of "reasoning" that is often found in political discussions. If Roberts' conduct on this matter was held to constitute malice sufficient to destroy the privilege of communicating electoral material to voters, the freedom of communication protected by the Constitution would be little more than a grand idea of no practical importance.

Kirby J insisted more firmly that the earlier failure to address the implications of the *Lange* decision could not relieve the High Court of its duty to explore and explain those implications:

Kirby J: [194] It is scarcely surprising that the scope of qualified privilege at common law … [has] varied significantly since the defence was first developed.

In Australia, as elsewhere, a number of considerations have affected such questions. They include the creation of a distinct society with its own values, the changing nature and technology of communications through which those values are commonly expressed and the enactment of particular laws … Transcending all of these factors is the Constitution, establishing a particular kind of government for the nation. In the constitutional prescription are important implications about the conduct of the representative democracy, federal and State, for which the Constitution provides.

The adaptation of the law of defamation to a constitutional text (and, in particular, of that part of that law that deals with qualified privilege and the associated issue of malice) is not a problem that has confronted judges in England or New Zealand, at least until recently … Until a decade ago, except in the most general way, it was not recognised as relevant in Australia. Since that time, it has **[195]** become apparent that freedom of communication concerning political or governmental matters is necessary if the Australian people, as electors, are to exercise a free and informed choice in the manner contemplated by the Constitution.

It is against this background of evolving legal understandings that these appeals from the Full Court of the Supreme Court of South Australia must be approached …

[196] In light of the Australian cases over the past decade, the common law with respect to qualified privilege must now, where relevant, be considered with close attention to the Constitution. The applicable legal principles mould themselves to the constitutional requirements. They may not be inconsistent with (nor impose an impermissible burden upon) the constitutional presuppositions. Nor can they overlook the Constitution in a case to which it is relevant. In my opinion, in such a case, the Constitution, being the nation's supreme law, is not to be trifled with or ignored …

[199] This Court is not in a position to accept an incorrect understanding of the law. It cannot accept an agreement of the parties that does not reflect the binding law of qualified privilege, moulded to the Constitution where it applies. The Constitution cannot be ignored as a result of mistakes or misunderstandings of the parties or judges in earlier proceedings. Subject to law, parties can agree between themselves as they like. But if they invoke the courts of this country they cannot expect the courts to go along unquestioningly with their erroneous understandings of the law.

Given that there is but one common law in Australia and that it cannot be inconsistent with the constitutional text and structure, but adapts and moulds itself to that text and structure in circumstances to which the Constitution is applicable, it is impossible, at least after *Lange* and its companion decisions, to accept that any rule of the Australian common law as to qualified privilege stated before the significance of the Constitution in these matters was appreciated, can survive into contemporary expositions of the common law if it does not respect the constitutional norm …

In his reasons, Callinan J complains [194 ALR at 236] that the constitutional implication, detected in the cases culminating in *Lange*, took more than 90 years to be perceived. That is true. But it is the nature of the elucidation of a written constitution. It took more than 50 years for the implication relating to judicial power to be detected in the *Boilermakers' Case* [(1956) 94 CLR 254]. **[200]** It took nearly 100 years for the implication governing the independence of the State judiciary to be detected in *Kable v Director of Public Prosecutions (NSW)* [(1996) 189 CLR 51]. Some implications, such as that of due process in judicial proceedings, are still in the course of evolution. [He referred to *Leeth v Commonwealth* (1992) 174 CLR 455.] Others have only just begun their journey to acceptance. [He referred to *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.]

If it takes years and diverse opinions in this Court to throw light on the requirements of the constitutional implication of free speech, that is not a reason to reject the duty to state the law as it stands. Inconvenience has never been a reason for refusing to give effect to the Constitution. If it had been, the *Bank Nationalisation Case* [(1948) 76 CLR 1], the *Communist Party Case* [(1951) 83 CLR 1] and the *Cross-Vesting Case* [*Re Wakim* (1999) 198 CLR 511] would have been differently decided. When the Constitution speaks, this Court must give it effect …

[202] Counsel for Mr Bass raised the question whether, once the protection of qualified privilege is found to be "rooted in another source, namely the extended *Lange* privilege", the foundation for the "traditional qualified privilege" any longer exists in such a case. Reference was made, in this regard, to an observation in the United States courts [*Nevada Independent Broadcasting Corp v Allen*, 664 P 2d 337 at 344 (1983)] … that the constitutional protection of free speech there provided "gives at least as much protection as the common law privilege. Thus, in the context of a media defendant and public figure, there is no longer any need for the common law privilege".

This last submission renders it imperative … that this Court should clarify the scope and operation of the "common law privilege" applicable to this case … This Court is engaged in the disposition of appeals as contemplated by the Constitution. It is not involved in a game of legal charades …

[203] I do not doubt that, outside cases to which the Constitution applies, there will still be lively debates concerning the scope of qualified privilege at common law … However, fidelity to the Constitution, consistency in its application, and conformity to the Court's authority in *Lange* and in other cases, deny the co-existence of inconsistent principles once the circumstances attract the

operation of the Constitution. Then, it is only possible to have one legal rule. That is the rule of the common law adapted to the Constitution. Any narrower, or other, common law rule cannot survive …

The requirement of reasonableness [in *Lange*] only arises when the privilege is invoked "to protect a publication that would otherwise be held to have been made to *too wide an audience*" [189 CLR at 573]. There may indeed be difficulties in the application of this test. However, it was clearly and correctly held by the primary judge, and agreed with by the Full Court and the parties, that the publications the subject of these appeals were not made to "too wide an audience". Therefore, the *Lange* requirement of reasonableness does not arise in these appeals … Were it otherwise, far from protecting the freedom of expression in circumstances to which the Constitution applied, the common law would have added a new and general obligation to establish reasonableness of conduct, resulting in a potential reduction of privileged speech. This would be contrary to the object of the elaboration of the constitutional implication as it affects the common law. The Constitution, in matters that it touches, enlarges free speech. It does not add to restrictions and burdens upon it …

[204] It is undisputed that the law of defamation strives to achieve a balance between the protection of individual reputation and freedom of communication. In determining that balance, there is also a constitutional imperative to consider, that of ensuring that freedom of communication about governmental and political subjects is maintained. It is clear that the common law of defamation could otherwise burden the constitutional freedom. Thus, the determinative question is how that burden can be fashioned to be "reasonably appropriate and adapted" (or "proportionate") to the legitimate end of the protection of reputation, in order to ensure conformity with the Constitution …

The threshold issue of reciprocity of interest was not contested in this Court, nor was it addressed in the Full Court. However, it does need some clarification. Electors have an interest in receiving information concerning a candidate in governmental elections. Although this has not always been explicitly founded in the constitutional prescription of representative government, that prescription confirms that such an interest and corresponding duty exists. It follows that this Court cannot now return to, and consider as applicable to this case, the common law as stated, for example, in *Lang v Willis* [(1934) 52 CLR 637] before the significance of the constitutional implication was appreciated …

The comments in *Lang* related to a situation described as publication to an "unidentified" audience, where it could not be shown that each recipient of the material had a relevant interest in the subject matter. In contrast, the publications in the present appeals were made, at the widest, to the residents of the relevant electorate, most of whom would, inferentially, have had an interest in the material and would, substantially, have been electors in the State election. This would be **[205]** a sufficient basis for establishing reciprocity of interest, even if *Lange* had not gone so far as to affirm [189 CLR at 571] that "each member of the Australian community" has an interest in giving and receiving "information, opinions and arguments concerning government and political matters" …

Once it was plain that these proceedings concerned publications made in circumstances directly connected with the election of Mr Bass to a State Parliament … it became highly artificial and probably impossible for the Full Court to consider the submissions of the parties without regard to the Constitution. In a real sense, **[206]** these appeals concerned the very heartland of the matters of governmental and political concern enlivening the implications of the Constitution to which the decisions in *Lange* and the earlier cases referred. However, with every respect, the Full Court proceeded as if the Constitution were silent on the matters before it.

The purpose of federal, State and Territory elections in Australia is to ensure the selection of a chosen candidate or candidates to hold public office. The purpose of those who support candidates for such elections is necessarily to harm their opponents, at least electorally. Often, if not invariably, this purpose will involve attempts to harm the *reputation* of an opponent. In the nature of political campaigns in Australia, it is unrealistic to expect the genteel conduct that may be appropriate to other circumstances of privileged communication. Political communication in Australia is often robust, exaggerated, angry, mixing fact and comment and commonly appealing to prejudice, fear and self-interest …, [with] emphasis upon brevity, hyperbole, entertainment, image and vivid expression. The contemporary world of Australian politics has moved far from the meeting described in *Lang*. Yet, even such meetings were commonly pretty robust.

Because this is the real world in which elections are fought in Australia, any applicable legal rule concerning qualified privilege (and the related notion of malice) must be fashioned for cases such as the present to reflect such electoral realities. Otherwise, before or after the conduct of elections,

attempts will be made to bring to courts of law, under the guise of legal claims, the very disputes that it was the purpose of the representative democracy, established by the Constitution, to commit to the decision of the electors. Instead of the merits of contesting candidates being decided by thousands of citizens in vigorous exchanges before the electorate, the contest will be presented for decision to a small number of jurors or to a single judge, and reviewed on appeal by courts of small numbers. Instead of the evaluation of electoral, political and governmental conduct, excesses and aspersions being left with the electors at the ballot box, these matters will be analysed, over many days, by judges solemnly weighing their own opinions about the perceived truth or falsity, fairness or injustice of the respective assertions. Instead of political enthusiasts feeling able to express their opinions passionately, they will become tongue-tied for fear of being dragged into complex and expensive litigation and obliged to explain and justify their statements and opinions. Instead of volunteers being willing to hand out how to vote cards on election day, the pool will dry up because it will become known that such people may later be subject to cross-examination in a court of law as to the "research" they have undertaken about the truth or falsity of the documents that they have distributed …

[207] Unfortunately, these questions were not considered in that way by the Full Court. Misled by the parties, that Court dealt with the appeal as if *Lange* and the cases that had preceded it had not been written. Yet in my opinion, those authorities were crucial to determining the availability and scope of any qualified privilege and to deciding the circumstances in which any such privilege was lost …

The applicable law in South Australia … [was not] fashioned because of a decision of English judges in *Braddock v Bevins*. It was defined by the influence of the Constitution on the common law of this country, protecting the heartland of electoral discussion of matters of government and politics in a State of the Commonwealth. It might be argued that, because of coincidental advances in the general common law of qualified privilege, it was ultimately unnecessary to invoke the Constitution to uphold the occasions in question as privileged. However, it is essential to understand how the Constitution affects the definition of the occasion of qualified privilege, and its scope, before turning to the related issue of malice … For both the privilege and the exception of malice, the constitutional setting in a case such as the present is critical …

[209] In respect of Mr Case, the only relevant communication is the how to vote card … **[210]** He had neither printed nor authorised it. He had merely distributed it on election day …

It is unconvincing in these circumstances to suggest that Mr Case was obliged to check and verify the accuracy of the statements contained in the how to vote card before he could publish it on election day. Such a requirement of the common law would not conform to the constitutionally protected entitlement to have, and express, opinions about candidates in any electoral campaign. The notion that, on the morning of the poll, Mr Case should have inquired of Mr Bass about the truth or otherwise of the words complained of on that card, or that he should have given Mr Bass an opportunity to answer the allegations before handing out the card, strikes me as having no relationship to the realities of the distribution of such materials in State general elections as these are conducted in Australia. Were the common law of malice to have such a consequence, thereby depriving a person such as Mr Case of the qualified privilege that otherwise attached to the occasion of the publication, it would be inconsistent with the freedom implied from the Constitution. For this reason the common law adapts itself to the constitutional norm. In the context of distributing electoral material such as the how to vote card, to distribute such material without first having checked the truth of its content or offering the person referred to in the material the opportunity to comment on and correct any errors, does not constitute malice.

It is necessary to test the conduct of Mr Case by reference to what it was feasible for him to do when he arrived at the polling booth … The notion that he should there and then have undertaken "research", investigated the Hansard reports of the debates in the State Parliament, inquired into the exact amounts received by Mr Bass as travel allowances or otherwise taken responsibility for the contents of the card, strikes me as unrealistic and unreasonable. If such a standard were upheld by this Court as the legal requirement imposed upon the thousands of citizens, with varying degrees of involvement, knowledge and concern, who take part as volunteers on election days to hand out voting propaganda for competing candidates and political parties, a very significant **[211]** restraint would be imposed on this form of civic political involvement. If each volunteer-distributor were personally liable for the truth of the contents of such political communications, the pool of volunteers (already sometimes hard to muster) would dry up. That would not be consistent with the proper conduct of parliamentary elections in Australia as envisaged by the Constitution …

[212] A rule of the common law that held persons such as Mr Case and Mr Roberts liable in damages for untrue defamatory statements in electoral material simply because those publishing such materials had no affirmative belief in their truth would be one that imposed an impermissible burden on electoral communication. Such a burden would be incompatible with the constitutionally protected freedom of political communication. Even if the general common law otherwise made a positive belief in the truth of a statement a condition of the defence of qualified privilege (a question I do not need to decide in these appeals) it would be inconsistent with the Constitution to require that a publisher must have such a belief in an electoral context such as the present. No agreement of the parties that was different or contrary to this could be given effect to by this Court in disposing of these appeals. To do so would be to defy the constitutional prescription. We cannot be party to such a distortion of the law, for this Court's origin derives from, and its duty is owed to, the Constitution.