MR LANGER IS NOT ENTITLED TO BE AN AGITATOR:*

ALBERT LANGER v COMMONWEALTH†

A *Introduction*

In February 1996, Albert Langer was gaoled for 11 weeks for contempt of court for breaching an injunction which prevented him from encouraging people to vote in such a way as not to distribute preferences to either of the major political parties in the Australian federal election.[1] Mr Langer had sought to obtain a declaration from the High Court of Australia invalidating certain sections of the Commonwealth Electoral Act 1918 (Cth) ('the Act'), which purported to prevent encouragement of particular methods of voting and which was the basis of the injunction against him. This High Court action provided an opportunity for the Court to enhance political speech in Australia by ensuring that there are no unnecessary limits placed on the information presented to voters during an election period. Unfortunately, however, a majority of the Court did not take this opportunity. Rather, they dismissed Mr Langer's claim, finding that the Act did not violate the implied constitutional guarantee of freedom of political discussion nor any other provision of the Constitution. The decision lends itself to the criticism that the Court, in finding an implied guarantee of political speech, has simply engaged in protecting the interests of the already powerful in our community — to date, large media organisations[2] — and is not concerned with protecting those critics of the system who are without substantial wealth and influence.[3] While, no doubt, the Court has not set out to apply the guarantee so as to reinforce powerful interests that already dominate the production of ideas in Australian society, the decision in *Langer* has effectively demonstrated the indeterminacy and manipulability of rights discourse. Having found a guarantee of freedom of political speech in the Constitution, the Court has quickly resiled from the use of that right in a case where Mr Langer was engaged in speech

* Cf *Neal v R* (1982) 149 CLR 305, 317 (Murphy J): 'Mr Neal is entitled to be an agitator'.

† (1996) 134 ALR 400. High Court, Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ, 17 February 1996 ('*Langer*').

1 *Australian Electoral Commission v Langer* (Supreme Court of Victoria, Beach J, 8 February 1996). The severity of the sentence was ultimately overturned on appeal by the Full Federal Court, after Mr Langer had served 3 weeks of his sentence: *Langer v Australian Electoral Commission [No 2]* (Federal Court, Black CJ, Lockhart and Beaumont JJ, 7 March 1996).

2 See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*'); *Australian Capital Television Pty Ltd v Commonwealth [No 2]* (1992) 177 CLR 106 ('*ACTV*'); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 ('*Theophanous*'); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 ('*Stephens*'), all of which involved media interests as the primary proponent (and beneficiary) of a free speech argument.

3 See, eg, Hilary Charlesworth and Gerry Simpson, 'Objecting to Objectivity: The Radical Challenge to Legal Liberalism' in Rosemary Hunter, Richard Ingleby and Richard Johnstone (eds), *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law* (1995) 86, 98.

going to the heart of the electoral process. We suggest that the constitutional guarantee, if it is to be of any use to the community more widely, should be of use in such a case. In addition, as we shall attempt to demonstrate, the reasoning of the majority is based on a triumph of form over substance which tends to reinforce the more result-oriented criticisms of the decision.

B *Factual Background*

The plaintiff, Albert Langer, distributed election advertising material during the lead up to the 1996 federal election in which he advocated that voters fill in their ballot papers for the House of Representatives so as not to give their preferences to the two major parties. This method of voting, in which ballot papers are numbered, for example, '1, 2, 3, 3', with the Coalition and the ALP both numbered '3', is known as optional preferential voting. Under this system, preferences can be distributed to the first two candidates, but cannot be further distributed, and the ballot paper is thereafter exhausted.[4] Because he risked prosecution under s 329A of the Act for his activities, Mr Langer instituted proceedings in the original jurisdiction of the High Court seeking a declaration that s 329A of the Act was invalid.

Section 329A relevantly provided:

> (1) A person must not, during the relevant period in relation to a House of Representatives election under this Act, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper *otherwise than in accordance with section 240.* [emphasis added]
>
> Penalty: Imprisonment for 6 months.

Section 240 provided that:

> In a House of Representatives election a person shall mark his or her vote on the ballot-paper by:
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> (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference; and
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> (b) writing the numbers 2, 3 4 (and so on, as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them.

In order to minimise loss of votes through informal voting, the Act contained a number of saving provisions which took effect when a ballot paper had not been filled in accordance with s 240.[5] They saved certain ballot papers from invalidity where the intention of the voter could be deemed or implied. Of direct relevance

[4] Section 274(8) of the Commonwealth Electoral Act 1918 (Cth) ('the Act') provides that a ballot paper is to be 'set aside as exhausted where on a count it is found that the ballot paper expresses no preference for any unexcluded candidate'.

[5] Sections 268(1)(c) and 270(2) of the Act.

to Mr Langer's case is s 270(2). Subsections (2) and (3) of that section provided as follows:

> (2) Where a ballot-paper in a House of Representatives election in which there are three or more candidates:
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> (a) has the number 1 in the square opposite to the name of a candidates;
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> (b) has other numbers in all the other squares opposite to the names of candidates or in all those other squares except one square that is left blank; and
>
> (c) but for this sub-section, would be informal by virtue of paragraph 268(1)(c);
>
> then:
>
> (d) the ballot-paper shall not be informal by virtue of that paragraph;
>
> (e) the number 1 shall be taken to express the voter's first preference;
>
> (f) where the numbers in squares opposite to the names of candidates are in a sequence of consecutive numbers commencing with the number 1 — the voter shall be taken to have expressed a preference by the other number, or to have expressed preferences by the other numbers, in that sequence; and
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> (g) the voter shall not be taken to have expressed any other preference.
>
> (3) In considering, for the purposes of subsection (1) or (2), whether numbers are in a sequence of consecutive numbers, any number that is repeated shall be disregarded.

It did not appear to be disputed by the defendants that a ballot paper completed in accordance with the method advocated by the plaintiff would be deemed by this section not to be an informal vote.

C *The Ancillary Judicial Proceedings*

In addition to the High Court action, Mr Langer's conduct gave rise to other proceedings against him. These proceedings are not the subject of this case note, but they illustrate the concrete results of the High Court's decision and provide a fuller picture of the episode.

Upon becoming aware of the plaintiff's conduct, the Australian Electoral Commission applied to the Victorian Supreme Court for a injunction under s 383(1) of the Act to restrain Mr Langer from publishing material in breach of s 329A. This application was heard in February and Beach J granted the injunction after the High Court had dismissed Mr Langer's application for a declaration of invalidity, but before the Court had published its reasons. The injunction was instantly breached by Mr Langer and following this apparently wilful disregard for the Court's authority, contempt proceedings were instituted against Mr Langer and he was found in contempt of court and sentenced to 11 weeks in prison.

Mr Langer appealed to the Full Court of the Federal Court against both the granting of the injunction and the sentence imposed by Beach J.[6] The appeal against the injunction was based on the argument that Beach J had misconstrued s 240 of the Act and that that section, when properly construed, did not preclude optional preferential voting. This argument was rejected by the Federal Court on the basis that Beach J had correctly interpreted the section. Considerable support for this construction was drawn from the High Court's decision in *Langer*, in which the majority had clearly indicated that they considered that s 240 did preclude optional preferential voting.[7] The Federal Court thus dismissed Mr Langer's appeal against the granting of the injunction, but it allowed his appeal against the 11 week sentence imposed by Beach J and reduced it to, in effect, a period of 3 weeks.[8]

D *The High Court Decision*

1 *The Plaintiff's Argument*

The plaintiff's argument was based on s 24 of the Constitution, which requires that the members of the House of Representative be 'chosen by the people'.[9] The plaintiff argued that a voter must be free to indicate the candidates which the voter does not choose, as well as those which the voter does choose. By requiring voters to express a preference for each candidate, s 240 denied voters effective choice. Thus the plaintiff contended that s 240, and consequently s 329A, were invalid.[10] The second argument, not raised directly by Mr Langer but by the Court itself,[11] was that s 379A offended the freedom of communication in relation to political discussion which the High Court has held to be implied in the Constitution.[12]

2 *The Majority*

(a) *Section 24: 'Chosen by the people'*

The majority comprised Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ. In order to determine whether s 329A was in breach of the requirements

[6] The appeal was heard by the Full Court of the Federal Court, rather than the Victorian Court of Appeal, because the jurisdiction exercised by Beach J was federal jurisdiction and the Act directed that any appeal from an order made under s 383(1) lay to the Federal Court: see s 383(9).

[7] *Langer v Australian Electoral Commission [No 1]* (Federal Court of Australia, Black CJ, Lockhart and Beaumont JJ, 1 March 1996) 22.

[8] *Langer v Australian Electoral Commission [No 2]* (Federal Court of Australia, 7 March 1996).

[9] Section 24 provides:

> The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of Senators...

[10] While the Court was concerned solely with the validity of s 329A, it acknowledged the link made by the plaintiff between ss 240 and 329A and considered both sections accordingly.

[11] Three judges stated that Mr Langer did not raise the free speech argument, although Brennan CJ suggested that Mr Langer raised, but did not press, the argument: *Langer* (1996) 134 ALR 400, 418 (Toohey and Gaudron JJ), 423 (McHugh J), cf 403 (Brennan CJ).

[12] See *Nationwide News* (1992) 177 CLR 1; *ACTV* (1992) 177 CLR 106; *Theophanous* (1994) 182 CLR 104; *Stephens* (1994) 182 CLR 211.

of s 24, each of the judges considered it necessary to examine whether s 240 was in breach of s 24.[13]

Each of the majority judges held that s 24 has a general meaning and was not intended to prescribe the method of election of members of the House of Representatives.[14] Rather, it is the role of Parliament to select the method of election. This power is granted by ss 31 and 51(xxxvi) and is a plenary power.[15] While agreeing on its effect, the judges differed in their interpretations of the phrase 'chosen by the people'. According to Brennan CJ, s 24 requires only that the method prescribed by Parliament permits a free choice among the candidates for election.[16] It does not limit Parliament's plenary power to select the method of election. Justices McHugh and Gummow took a similar approach, holding that the phrase does not confer rights on individual voters to vote for the candidate of their choice or, conversely, to refuse to vote for candidates whom they dislike.[17] Rather, s 24 is a general power of 'inexact application'.[18] Justices Toohey and Gaudron, on the other hand, stated that the phrase 'must be taken as primarily mandating a democratic electoral system'.[19]

The five judges in the majority agreed that the system of full preferential voting prescribed by s 240 is a method which falls fully within the requirements of s 24.[20] The fact that the system requires voters to accord a preference to every candidate, regardless of whether the voter in fact wishes to vote for every candidate, did not make it invalid.[21] Chief Justice Brennan stated that the fact that a voter's political opinion might be better expressed if a ballot-paper were filled in differently does not affect the question of whether the method prescribed by s 240 is a valid one.[22]

Having dealt with and confirmed the validity of s 240 under s 24 of the Constitution, the majority turned to the validity of s 329A. Considering the plenary nature of the power granted by ss 31 and 51(xxxvi) and the validity of s 240, Brennan CJ and Gummow J had no hesitation in declaring s 329A to be a valid provision on the basis that it protected the method of voting laid down by s 240.[23] Justice McHugh agreed, stating that the power of the Parliament to enact laws 'relating to elections'[24] extends to laws preventing persons from interfering with or undermining the electoral system. According to his Honour, the object of s 329A was to protect the preference system set out in s 240 from being under-

[13] *Langer* (1996) 134 ALR 400, 405 (Brennan CJ), 415-16 (Toohey and Gaudron JJ), 420-2 (McHugh J), 430 (Gummow J).
[14] Ibid 403-5 (Brennan CJ), 417 (Toohey and Gaudron JJ), 424-5 (McHugh J), 430 (Gummow J).
[15] Ibid 403-4 (Brennan CJ).
[16] Ibid 405.
[17] Ibid 425 (McHugh J), 430 (Gummow J).
[18] Ibid 425 (McHugh J).
[19] Ibid 417 (Toohey and Gaudron JJ).
[20] Ibid 405 (Brennan CJ), 417 (Toohey and Gaudron JJ), 426 (McHugh J), 430 (Gummow J).
[21] Ibid 405 (Brennan CJ), 417 (Toohey and Gaudron JJ), 421 (McHugh J), 430 (Gummow J).
[22] Ibid 405 (Brennan CJ).
[23] Ibid 405 (Brennan CJ), 431 (Gummow J).
[24] Australian Constitution ss 51 (xxxvi), 31.

mined. Section 329A is, therefore, a law with respect to elections for the purposes of s 51(xxxvi) and s 31 of the Constitution, and is a valid provision.[25]

Justices Toohey and Gaudron were content to state that, having established the validity of s 240, the plaintiff's argument with respect to s 329A must fail.[26]

(b) *The implied constitutional guarantee of freedom of political communication*

All of the judges in the majority found that s 329A did not breach the implied constitutional freedom of political communication. The judgments here turned on the application of the implied guarantee, rather than its existence. Chief Justice Brennan relied on the concept of proportionality in his judgment. He stated that the powers of the Parliament are impliedly limited so as to preserve the level of freedom of political discussion essential to the maintenance of a representative democracy. However, the extent of the limitation depends on the circumstances. He continued:

> if the impairment of the freedom is reasonably capable of being regarded as appropriate and adapted to the achieving of a legitimate legislative purpose and the impairment is merely incidental to the achievement of that purpose, the law is within power.[27]

Chief Justice Brennan considered s 329A to be aimed at protecting the method chosen by Parliament for electing members of the House of Representatives. He considered that it operated to prohibit intentional encouragement of the filling in of ballot papers in a way which, without the saving provisions, resulted in a diminished expression of the elector's preferences. The restriction it imposed on free speech was not, he stated, imposed with a view to repressing freedom of political discussion; rather, it was imposed as an incident to the protection of the method of voting prescribed by s 240. Nor did s 329A prohibit a person from simply informing electors of the state of the law. The Chief Justice thus found that s 329A was proportional to its aim and that its effect on freedom of communication was incidental. As a result it did not infringe the implied freedom of political discussion.[28]

Justices Toohey and Gaudron agreed with Brennan CJ that 'the freedom [of political communication] is not absolute.'[29] They stated that 'laws which curtail freedom of communication, where that curtailment is reasonably capable of being viewed as appropriate and adapted to furthering or enhancing the democratic process' will not be struck down.[30] In their Honours' view, s 329A enhances the democratic process to the extent that it prevents voters from being encouraged to fill in their ballot papers in a manner not in compliance with s 240. Voters therefore participate fully and equally in the democratic process by filling in their

25 *Langer* (1996) 134 ALR 400, 422 (McHugh J).
26 Ibid 417 (Toohey and Gaudron JJ).
27 Ibid 405-6 (Brennan CJ).
28 Ibid 406 (Brennan CJ).
29 Ibid 418 (Toohey and Gaudron JJ).
30 Ibid.

ballot papers in such a way as to ensure that their preferences do not get exhausted at an early stage. Because it is directed to ensuring this, s 329A is reasonably capable of being viewed as appropriate and adapted to the enhancement of the democratic process and, therefore, does not infringe the implied freedom of political communication.[31] Justice Gummow approached the issue in a very similar way, also concluding that s 329A enhanced the electoral system and thus, in turn, enhanced representative government and so was constitutionally permissible.[32]

Justice McHugh took a different approach to the question. He was of the view that if Parliament can validly enact s 240, it is no breach of the implied freedom to punish those who seek to undermine the system of compulsory voting laid down by the Act.[33] He considered that the matter might be different if the Parliament were not able to compel people to vote. Without a challenge to the system of compulsory voting, however, it was not inconsistent with the implied freedom for Parliament to prohibit a person from encouraging voters to disregard a system of voting validly set up under the Constitution.[34]

It should also be noted that Brennan CJ, Toohey and Gaudron JJ, and McHugh J all relied on the distinction between the mere provision of information and the encouragement to not comply with s 240. They considered that s 329A was confined to conduct that is intended to encourage non-compliance with s 240 and was not concerned with conduct that is intended only to inform.[35] This distinction was important because if the legislation had gone further then it may have prohibited even speech which sought to criticise or advocate a change to the Act, a prohibition which it is unlikely that the Court would have accepted as constitutional.

3 *Dawson J*

(a) *Sections 7 and 24 of the Constitution*

Justice Dawson began by reiterating his refusal to accept the line of reasoning adopted by the majority of the Court in implying a constitutionally guaranteed freedom of communication derived from the concept of representative government.[36] Nonetheless, he concluded that the more limited freedom of communication, which in his view arose from the express provisions of the Constitution (ss 7 and 24),[37] was sufficient to invalidate s 329A. This more limited freedom is

31 Ibid 418-19.

32 Ibid 431-2. It is not entirely accurate to describe s 329A as encouraging informal voting. As discussed above, the saving provisions convert what would otherwise be an informal vote into a formal vote in certain circumstances. These include a vote such as that advocated by the plaintiff in this case.

33 *Langer* (1996) 134 ALR 400, 193 (McHugh J).

34 Ibid.

35 Ibid 406 (Brennan CJ), 418 (Toohey and Gaudron JJ), 423 (McHugh J).

36 Ibid 410 (Dawson J).

37 See *Nationwide News* (1992) 177 CLR 1, 50 (Brennan J), 72-3, 76-7 (Deane and Toohey JJ); *ACTV* (1992) 177 CLR 106, 138, 142 (Mason CJ), 169 (Deane and Toohey JJ), 214 (Gaudron J), 227, 233 (McHugh J); *Theophanous* (1994) 182 CLR 104, 120-1, 140 (Mason CJ, Toohey and Gaudron JJ).

confined to protecting what is required by the Constitution for the conduct of elections by direct popular vote.[38] According to Dawson J, s 24 requires that electors make a genuine or informed choice. This requires access to the available alternatives in the making of the choice, including alternative methods of voting. And, in Dawson J's view, the Act allowed for alternative methods of voting by virtue of the operation of the saving provisions.[39]

While Dawson J acknowledged that ss 268 and 270 were intended solely to save ballot papers from being informal that were unintentionally not in compliance with s 240, he pointed out that the effect of the three sections is to allow an elector to cast a ballot paper which is not in accordance with s 240, but which is nonetheless formal. Thus when ss 268 and 270 were read together with s 240, it was clear that the Act provided electors with alternative ways of casting a formal vote. Justice Dawson stated that as s 329A prohibited information about these alternative methods of voting, it thus kept from voters information which was required by them to enable them to make an informed vote. Accordingly, he found that s 329A did not allow voters to make an informed and genuine choice as required by s 24. Section 329A, he stated, was not a law that was reasonably and appropriately adapted to the achievement of the end which lies within power.[40] Accordingly, he declared s 329A to be invalid.

(b) *The implied constitutional guarantee of freedom of political communication*

In addition to his finding that the express provisions of the Constitution rendered s 329A invalid, Dawson J commented at the end of his judgment that he was unable to see how, on the reasoning employed by the majority in the previous free speech cases,[41] s 329A could not be said to infringe the implied constitutional guarantee. He rejected the distinction made by the majority between information that is intended to inform as opposed to information that is intended to encourage its application, stating that 'to make available useful information is ordinarily to encourage its use',[42] particularly in the context of an election. He doubted that implied freedom could be confined to the mere imparting of information, and declared that the encouragement of electors to vote in a particular way in an election was 'of the very essence of political discussion.'[43]

While he acknowledged that encouragement of voters to adopt a course which is inconsistent with the casting of a formal vote may not infringe the guarantee, because the casting of a formal vote is in the interests of representative govern-

38 *Langer* (1996) 134 ALR 400, 410 (Dawson J).

39 Ibid 408, cf 406 (Brennan CJ).

40 Ibid 411-12. The doctrine of proportionality was applied by Dawson J because, he stated, the power granted to Parliament by ss 51(xxxvi) and 31 of the Constitution is a purposive power; that is, it is a power to make laws for the purpose of implementing s 24. According to his approach, it is appropriate to assess the validity of laws enacted under a purposive power using the doctrine of proportionality. Otherwise, he stated, the test would be whether there was a sufficient degree of connection with the head of power.

41 See above n 2.

42 *Langer* (1996) 134 ALR 400, 412 (Dawson J).

43 Ibid.

ment, he was of the opinion that s 329A goes beyond this. Rather, it seeks to prevent encouragement of voters to cast their votes in a manner which is open to them. Accordingly, it inhibits freedom of political discussion in a manner which does nothing to aid the proper conduct of elections under the Act.

E *Comment*

1 *The Saving Provisions and s 24 of the Constitution*

One of the keys to the different views of Dawson J and Brennan CJ, McHugh and Gummow JJ is, in our view, the approach the judges took to the saving provisions. The majority approach involved a narrow focus on s 240 as the section directing the way in which electors are to vote and a construction of the saving provisions as present only to save from invalidity those votes that would otherwise be counted as informal. On this approach, the saving provisions were not construed as offering alternative methods of voting.[44] What followed from this conclusion was that it was permissible for Parliament to prevent voters from being encouraged to vote in ways which, although effective as votes, are not desired by the Parliament as the correct way of voting. Such a restriction did not fall foul of s 24 of the Constitution because it prevented the electoral system established by the Parliament from being undermined.[45]

Justice Dawson, however, looked more to the substance of the Act than to its form. Notwithstanding that Parliament clearly wished people to vote in accordance with s 240, it had also enacted provisions which deemed votes cast not in accordance with s 240 to be considered as formal votes in certain circumstances. Thus, as a matter of fact and law, if a voter votes in a way that falls within one of the saving provisions, then that vote will be effective to the extent possible. The saving provisions, although designed to save votes which were *mistakenly* filled in incorrectly, cannot be limited to such cases and must also extend to persons who *deliberately* choose to vote in a way permitted by the saving provisions. Thus, in effect, the saving provisions offer voters alternative ways to record a formal vote. The necessary conclusion, in Dawson J's reasoning, was that s 329A prevents people from advocating (and thus in some cases from being informed about) alternative methods of voting that will be effective. To deprive electors of information about alternative methods of voting, which may better express their actual preferences, strikes at the heart of the electoral process and cannot be sustained as valid either under ss 7 and 24 of the Constitution or under the more general guarantee of freedom of political speech. This conclusion, which focuses on the substantive effect of the saving provisions rather than on the form of the Act, is in our view a preferable approach to the question.

Justices Toohey and Gaudron took a somewhat different approach to the saving provisions from the other majority judges. They seemed to acknowledge that the effect of the provisions was to offer alternative methods of voting,[46] but none-

[44] Ibid 406 (Brennan CJ), 422 (McHugh J), 430 (Gummow J).
[45] Ibid 405 (Brennan CJ), 422 (McHugh J), 430-1 (Gummow J).
[46] Ibid 413 (Toohey and Gaudron JJ).

theless concluded that s 329A, which enhances voters' tendencies to vote in accordance with s 240, rather than in accordance with the methods described in the saving provisions, was valid. This conclusion was based on the view that:

> 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.[47]

Here, Toohey and Gaudron JJ take an entirely formalistic view of 'full and equal participation' in the electoral process. Whilst a *mistaken* filling out of the ballot paper does perhaps deprive a person of full and equal participation in the electoral process, their Honours seem to assume either that all non-s 240 voting is mistaken, not chosen, or that a voter's *choice* to fill out the ballot paper in a way that results in informality or early exhaustion in some way deprives the voter of equal participation. Arguably, however, it is this very ability to choose how to fill out the paper which ensures equality in the sense of equality of *choice*. Voters cannot, under the present electoral system, be compelled to vote for any candidate for whom they do not wish to vote[48] and it is this freedom that ensures that participation is full and equal.[49] Requiring a person to indicate a preference for a candidate he or she does not wish to vote for would remove substantive equality as it would privilege the political preferences of some voters over those of others (who prefer none or only some of the candidates). Indeed, Parliament has clearly chosen not to require persons to actually record a vote in accordance with s 240 — and we suggest that there would be serious doubts about the constitutionality

47 Ibid 418 (Toohey and Gaudron JJ).

48 Although the Australian electoral system is popularly regarded as embodying 'compulsory voting', this is somewhat misleading. If the phrase 'to vote' is defined so as to involve a voter marking or attempting to mark the ballot paper so as to record the voter's preference for the candidates presented, then strictly speaking, the electoral system in Australia, involving as it does a secret ballot, does not embody compulsory voting. Rather, what is mandated by the Commonwealth Electoral Act is compulsory attendance at a polling place and compulsory placement of a ballot paper in the ballot box (Commonwealth Electoral Act 1918 (Cth) ss 233(1), 245; see also *Langer* (1996) 134 ALR 400, 422 (McHugh J)). There is no legally enforceable duty to mark the ballot paper or to mark the ballot paper in such a way as to record a vote. An elector may place a blank ballot paper in the ballot box or may write on the ballot paper without recording a vote. Such an action is traditionally recorded as an informal vote, but in our view it is better characterised as a refusal to vote or as not voting. If, however, 'to vote' is defined to include the placement of a ballot paper into the ballot box, regardless of whether the ballot paper is blank or not, then it can be said that a system of compulsory voting is in operation. It is generally this latter concept which is referred to in discussing Australia's electoral system. The point remains, however, that a voter cannot be compelled to write anything, or any particular combination of numbers, on her or his ballot paper. The only sanction for failing to fill out a ballot paper in compliance with the directions in s 240 is that (subject to the saving provisions) the voter's preferences for candidates will not be taken into account for the purposes of determining which candidate has been elected to Parliament. This sanction cannot be regarded as a compulsion.

49 We note that in *McGinty v Western Australia* (1996) 134 ALR 289 ('*McGinty*') a majority of the Court indicated that there is no requirement of equality of *votes* in the Australian Constitution: see George Williams, 'Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform' (1996) 20 *Melbourne University Law Review* 848. However, this does not preclude the notion of equality of choice in the sense discussed.

of any such attempt to require persons to vote effectively or in accordance with s 240.[50]

In that context, their Honours' emphasis on equality stemming from compliance with s 240 seems excessively formalistic and ignores the fact that informal or other voting methods not envisaged by s 240 may be the result of a deliberate choice on the part of the voter, not simply the result of a mistake. Once this is acknowledged, then s 329A, which prohibits the encouragement of voting other than in accordance with s 240, does not enhance the electoral system — rather, it undermines the ability of the people to exercise a choice lawfully open to them at the ballot box. However, even if s 329A does not fall on the basis of s 24 of the Constitution and its requirement that representatives be 'directly chosen' by the people, it should fall, on the basis of its interference with freedom of political expression.

2 *The Implied Constitutional Guarantee of Freedom of Political Communication*

In our view, the low point in the majority judgments is to be found in the treatment of the implied constitutional guarantee of freedom of political communication. The guarantee was identified by the Court as an implication in the Constitution flowing from the principle of representative government, which can be discerned from the terms and structure of the Constitution.[51] Since the original decisions that discovered the implication, the guarantee of freedom of political communication has been applied by the High Court only in two other (linked) cases, *Theophanous v Herald & Weekly Times Ltd*[52] and *Stephens v West Australian Newspapers Ltd.*[53] In each of these cases, a large media organisation was the main proponent and beneficiary of the guarantee. The *Langer* case was therefore unique in that it involved an attempt to apply the guarantee to protect an individual. However, notwithstanding the fact that Mr Langer's speech was undeniably 'political' in nature,[54] the Court permitted the Commonwealth to impose an ultimately draconian limitation on the form of speech in which Mr Langer engaged. One technique used to deny Mr Langer's speech the protection of the constitutional guarantee was the doctrine of proportionality: Brennan CJ and Toohey and Gaudron JJ concluded that s 329A was proportionate to the end it sought to achieve (being the protection of the electoral system established by the

[50] A detailed consideration of this issue is beyond the scope of this note. However, we suggest that the potential for intimidation of voters and the 'chilling effect' of non-anonymous scrutiny of voters' ballot papers that would be required to enforce s 240 would render such scrutiny invalid. That is, we suggest that the secret ballot is essential for the efficacy of representative democracy.

[51] *Nationwide News* (1992) 177 CLR 1; *ACTV* (1992) 177 CLR 106.

[52] (1994) 182 CLR 104.

[53] (1994) 182 CLR 211. In *Cunliffe v Commonwealth* (1994) 182 CLR 272, the guarantee was argued, but a majority refused to apply the doctrine to invalidate laws restricting the provision of legal advice to persons seeking to immigrate to Australia.

[54] The problems of definition which occur with the notion of 'political' speech can be put to one side in this case because Mr Langer's speech did not fall at the margins of what might be considered 'political' (although we query whether 'political' as a category is a closed and determinate concept).

Act),[55] and McHugh and Gummow JJ likewise considered that s 329A protected the electoral system, although they did not directly refer to the proportionality doctrine.[56] Justices Toohey and Gaudron went so far as to say that s 329A *enhanced* representative democracy rather than undermining it.[57] This conclusion was reached notwithstanding Mason CJ's caution in *Australian Capital Television v Commonwealth* that provisions which limit freedom of political speech purportedly for the purpose of protecting representative democracy must be carefully scrutinised and that such claims should not be accepted at face value as such restrictions have all too often tended to 'stifle political discussion and criticism of government.'[58]

In this context, it is worth noting that Brennan CJ and Toohey and Gaudron JJ, in their use of the doctrine of proportionality, accorded greater deference to the legislative judgement than did Mason CJ in his decision in *Cunliffe v Commonwealth.*[59] There his Honour drew a distinction between the test for proportionality to be used in relation to assessing the validity of legislation enacted pursuant to a purposive power (whether the legislation 'is *capable of being reasonably considered to be* appropriate and adapted to the end sought to be achieved', which allows a 'certain margin' to the legislature[60]) and the test to be used in applying the implied freedom of political communication (whether the restriction on speech 'is reasonably appropriate and adapted, in the court's judgment to the legitimate end' sought to be achieved).[61] Thus Mason CJ envisaged a stricter test to be applied in cases concerning limitations on freedom of political discussion, allowing a lesser 'margin of appreciation'[62] for the legislature in such circumstances than is permitted when engaging in characterisation. The rationale for this difference was clearly the fact that a fundamental guarantee was at issue, for which a stricter approach was appropriate. Chief Justice Brennan, Toohey and Gaudron JJ, however, retained the more flexible formulation of the proportionality doctrine for the application of the implied guarantee, thus adopting a lower level of scrutiny of laws which restrict freedom of political speech than would Mason CJ.

However, legalistic distinctions between judicial approaches aside, the fundamental aspect of the implied freedom revealed by the judgments is its contingent nature, a contingency enhanced by the judicial use of the doctrine of proportionality. This critique of rights is, of course, not new to critical jurisprudence, but it

55 *Langer* (1996) 134 ALR 400, 405-6 (Brennan CJ), 418-19 (Toohey and Gaudron JJ).

56 Ibid 420, 422-3 (McHugh J), 431 (Gummow J).

57 Ibid 419.

58 *ACTV* (1992) 177 CLR 106, 145.

59 (1994) 182 CLR 272.

60 Ibid 300 (Mason CJ) (emphasis added), see also 296-7.

61 Ibid 300 (Mason CJ), see also 297-8.

62 The phrase is borrowed from European and international law on human rights issues, but has been discussed by Brennan J (as he then was) in *ACTV* (1992) 177 CLR 106, 159; *Theophanous* (1994) 182 CLR 104, 156; *Cunliffe v Commonwealth* (1994) 182 CLR 272, 325. It is arguable that it may not be appropriate to domestic law operating within a single nation (as opposed to the European and international contexts which involve supranational law affecting a number of different nations) but the point will not be pursued here.

is starkly revealed by the treatment of the Herald and Weekly Times and Australian Capital Television on the one hand, and Mr Langer on the other. Proportionality is a slippery concept open to manipulation and subjective views as to its application. When such a concept is applied to freedom of expression in the way it was used in *Langer*, it permits judges to justify decisions which constrain individuals from exercising their basic freedoms in a way that carries with it a surface appearance of logic. The answer to the problem, however, does not necessarily lie with the introduction of an absolute guarantee of freedom of speech; such a guarantee also remains manipulable (although in less obvious ways) and, in any event, carries with it other problems of automatic deference to speech as superior to other rights and interests that may be asserted by sections of the community for whom free speech in any meaningful sense has never been possible. Ultimately, what *Langer* and related decisions like *McGinty v Western Australia*[63] reveal is that rights are in fact of limited use in achieving actual change for the majority of the community and, in particular, for those who are most in need of rights — those who have been historically disadvantaged by legal and political structures. This is not to say that rights have never been, and can never be, useful for such groups;[64] it is, however, to insist on a recognition of the limitations of rights discourse, particularly where enforcement of rights is left in the hands of the judiciary. This last factor essentially makes rights dependent on the make up of the relevant court at any given time, which — though it does not mean that they must abandon rights as a strategy — means that marginalised groups must be aware of the inclinations of the court to which they are appealing for protection.

Justices McHugh and Gummow gave scant attention to the free speech point, notwithstanding its importance. Justice McHugh dismissed it as clearly untenable and simply concluded that, 'if the Parliament can validly enact s 240, it is no breach of the implied freedom to punish those who seek to undermine the system of compulsory voting.'[65] Justice Gummow's approach was similar.[66] Both judges depended on their earlier conclusion that speech directed to encouraging people to vote other than in accordance with s 240 undermines the electoral system, a conclusion that, as discussed above, is seriously flawed.

3 *Validity of the System of 'Compulsory Voting'*

The plaintiff did not challenge the validity of the 'compulsory voting' regime[67] established by the Act. Accordingly, the judges were not called upon to decide that question. However, McHugh J referred directly to the question and indicated

63 (1996) 134 ALR 289.

64 Indeed, one of the authors of this note has argued strongly that rights protection by the courts against the executive and legislative branches can be useful in protecting minorities from majorities, whilst acknowledging the dangers of such a strategy: see Kristen Walker, 'Who's the Boss? The Judiciary, the Executive and the Parliament and the Protection of Human Rights' (1995) 25 *University of Western Australia Law Review* 238.

65 *Langer* (1996) 134 ALR 400, 423.

66 Ibid 430-1.

67 See above n 48 for a discussion of the use of the phrase 'compulsory voting' to describe Australia's electoral system.

his view that compulsory voting is not unconstitutional[68] and Brennan CJ implicitly accepted the validity of such a regime,[69] citing with approval the 1926 case *Judd v McKeon*,[70] where the High Court held compulsory voting to be valid. Thus it seems unlikely that any future challenge to 'compulsory voting' in its present form would succeed.[71]

4 *Implications for Australia at the International Level*

One consequence of the Court's decision in *Langer* is that it potentially places Australia in breach of its international human rights obligations.[72] Certainly the gaoling of Mr Langer for his political speech[73] was regarded by Amnesty International as a violation of international human rights law and Amnesty issued a statement to the effect that Mr Langer was a prisoner of conscience.[74] Whilst there will not be any enforceable adjudication of the human rights issue, it remains possible for Mr Langer to make a communication to the UN Human Rights Committee in order to air the question. Even in the absence of such a course of action by Mr Langer, Australia stands in violation of international human rights norms, which will potentially undermine Australian efforts to further human rights protection in other nations.

A notable absence in the judgments of the Court was any reference to international human rights law, notwithstanding that a number of judges have indicated a willingness to look to international law in various areas of domestic legal interpretation,[75] including constitutional issues.[76] While it is accepted that

68 *Langer* (1996) 134 ALR 400, 423, 425-6 (McHugh J).

69 Ibid 179 (Brennan CJ). By implication, Dawson J also supported the validity of the current compulsory voting regime, also citing *Judd v McKeon*: ibid 183.

70 (1926) 38 CLR 380.

71 Whether a regime which attempted to compel electors to fill out the ballot papers in the way directed (involving scrutiny of papers before their deposit into the ballot box and hence removing the notion of a secret ballot), would be constitutionally valid was not addressed, but certainly arguments against the validity of such a regime might be persuasively made: see above n 50.

72 This is under art 19(2) of the International Covenant on Civil and Political Rights (opened for signature 16 December 1966, 999 UNTS 171 (entered into force 1976)) protecting freedom of expression, and, arguably, at customary international law. We note that art 19(3) permits some restrictions on speech, but only where such restrictions are *necessary* to protect the rights and reputations of others or for the protection of 'national security or of public order (*ordre public*), or of public health or morals'(emphasis added). Section 239A does not, in our view, satisfy any of these criteria for permissible restrictions.

73 Although, technically, he was jailed for contempt of court, there would have been no contempt had freedom of political communication been properly protected.

74 Amnesty International News Service, 'Australia: Political Activist Becomes First prisoner of Conscience for Over 20 Years', 23 February 1996 (News Service 35/96; AI Index: ASA 12/05/96; http://www.amnesty.org/news/Australia.96.02.23.txt). Amnesty 'uses the term "prisoner of conscience" to describe those imprisoned for their political, religious or other conscientiously held beliefs, or by reason of their ethnic origin, sex, colour, language, national or social origin, economic status, birth or other status who have not used or advocated violence'.

75 See, eg, *Mabo v The State of Queensland [No 2]* (1992) 175 CLR 1, 40-2 (Brennan J); *Teoh v Minister for Immigration and Ethnic Affairs* (1995) 183 CLR 273, 286-92 (Mason CJ and Deane J), 295-303 (Toohey J), 303-5 (Gaudron J), 306-7, 312-13, 315-20 (McHugh J).

76 See, eg, *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 612 (Deane J), 643 (Dawson J); *Nationwide News* (1992) 177 CLR 1, 43 (Brennan J); *ACTV* (1992) 177 CLR 106, 140 (Mason CJ), 154 (Brennan J), 211 (Gaudron J).

international law is not decisive of the state of Australian law,[77] particularly at a constitutional level, we suggest that it is desirable for courts to take into account international legal norms in the resolution of domestic legal issues, at least as a guide to appropriate directions for Australian law.[78] In this case, we suggest, international law could have provided guidance as to what might be considered to be appropriate and adapted to the protection of the electoral system, but unfortunately the judges did not consider international law at all. We acknowledge that, to some extent, this could have been a result of the lack of argument put on the free speech issue by Mr Langer, but this is an inadequate explanation. If the Court is to deal with an issue not raised by the parties, as it did in this case, then it should deal with that issue properly and thoroughly, rather than in a limited or cursory fashion.

F *Conclusion: A Triumph of Form Over Substance*

Ultimately, what the majority's decision in *Langer* amounts to is this: we may say 'you can vote 1, 2, 3, 3, 3'; we may say 'the law should permit you to vote 1, 2, 3, 3, 3'; but we may not say 'you should vote 1, 2, 3, 3, 3'. The tenuousness and artificiality of the distinction between the three forms of speech seems readily apparent, and it played some part in Dawson J's judgment, for he observed that:

> To impart information which can be used (and information about the availability of optional or selective preferential voting is of that kind) is necessarily to encourage its use if the recipient of the information is so inclined. ... To put the matter shortly, to make available useful information is ordinarily to encourage its use. This is particularly so in the context of an election. The effect of s 329A in any practical sense must ... be to discourage, if not prevent, persons from imparting to eligible voters knowledge that the electoral system permits optional or selective preferential voting.[79]

Viewed in this light, the conclusion must be that the provision is indeed disproportionate to its end and violated the implied constitutional guarantee of freedom of expression.

It is tempting to conclude that the recent changes to the composition of the Court have had a distinct impact on the application of the guarantee of freedom of political expression and, indeed, on the principle of representative government in constitutional interpretation. However, it is probably too early to reach such a conclusion and it must be noted that the first case where the court declined to apply the guarantee[80] occurred before the recent changes to the Bench. Nonetheless, Brennan CJ's comments on taking office — that the Court was entering a

[77] See, eg, *Dietrich v R* (1992) 177 CLR 292, 305 (Mason CJ and McHugh J), 321 (Brennan J), 347-9 (Dawson J), 360-1 (Toohey J); *Teoh v Minister for Immigration and Ethnic Affairs* (1995) 183 CLR 273, 286-7 (Mason CJ and Deane J), 298 (Toohey J), 304 (Gaudron J), 315 (McHugh J).

[78] See also Kristen Walker, 'Treaties and the Internationalisation of Australian Law' in Cheryl Saunders (ed), *The Mason Court and Beyond* (forthcoming).

[79] (1996) 134 ALR 400, 411-12 (Dawson J).

[80] *Cunliffe v Commonwealth* (1994) 182 CLR 272.

period of 'consolidation'[81] (presumably rather than continued activism) — accurately foreshadowed the outcome of both *Langer* and *McGinty*. It remains to be seen, however, what approach will be taken by Kirby J, as his Honour did not sit on either of these cases.

POSTSCRIPT: *MULDOWNEY V SOUTH AUSTRALIA*[82]

Since this piece was written, the High Court has handed down its judgment in *Muldowney*. That case was heard on the same day as *Langer* and concerned the constitutional validity of a similar, but not identical, provision in the South Australian Electoral Act.[83] The South Australian legislation provided for a system of compulsory preferential voting without the range of savings provisions found in the Commonwealth Electoral Act and, like the Commonwealth regime, included restrictions on speech which would encourage people to vote other than in accordance with the legislative scheme.[84] Unlike the Commonwealth restriction on speech, however, the South Australian restriction prevented only the public advocacy of voting methods which would render a vote informal and ineffective. In argument, the South Australian Solicitor-General conceded that the South Australian Constitution included provisions which contained an implication of representative government 'in like manner to the Commonwealth Constitution.'[85] The Court unanimously upheld the validity of the South Australian legislation.

Not surprisingly, most members of the Court in *Muldowney* adopted the same approach to the question whether the South Australian provisions violated any guarantee of freedom of political discussion as they had taken in *Langer*. However, there are two points worth noting. The first is that Dawson J found himself able to join with the majority in *Muldowney* on the basis that the speech restrictions in s 126 did not limit speech concerned with the voter's choice in how to vote in a formal manner (because the South Australian legislation did not contain the savings provisions found in the Commonwealth Act).[86] That is, the system of compulsory preferential voting in place in South Australia was constitutional and, where such a system was used, a limit on speech designed to prevent encouragement of informal (and hence invalid) voting was also constitutional.

The second, and more important, point concerns the applicability of the Commonwealth Constitution's guarantee of freedom of political communication to the state arena. In *ACTV* a majority of the Court had held that the notion of political speech is 'indivisible' (in that such speech cannot be easily divided up into state

81 See Mike Steketee, 'Brennan vows to pause for breath', *The Australian* (Sydney), 11 September 1995, 2.

82 (High Court, Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ, 24 April 1996) ('*Muldowney*').

83 Electoral Act 1985 (SA) s 76.

84 Ibid s 126.

85 *Muldowney* (High Court, 24 April 1996), 5 (Brennan CJ); see also 31 (Gummow J, with whom McHugh J agreed).

86 Ibid 11 (Dawson J).

and federal components) and thus the guarantee in the Commonwealth Constitution limited the legislative powers of the states in relation to freedom of political discussion generally.[87] That extension of the Commonwealth constitutional guarantee to the state sphere seems to have been whittled away to some extent in *Muldowney*, where three judges expressly rejected the argument that the Commonwealth constitutional guarantee could affect state legislation concerning the method of voting in state elections. Chief Justice Brennan, Dawson and Toohey JJ each considered that the only possible source of constitutional prohibition that could operate in *Muldowney* was the South Australian Constitution and that the effect of the Commonwealth implication was confined to the protection of the working of the system of government of the Commonwealth.[88] In this regard, they relied upon their judgments in *McGinty* and did not refer to the majority's comments in *ACTV*, *Theophanous* or *Stephens*.[89] However, Gaudron J expressly took the opposite approach, holding that the Commonwealth Constitution requires that the states be and remain 'essentially democratic', with the implied guarantee of freedom of political communication being an essential part of a democratic system and so limiting the power of the state parliaments.[90] The freedom would not, however, strike down laws which curtailed speech where the law was appropriate and adapted to enhancing the democratic processes of the states (as was the case here).[91] Justice Gummow, with whom McHugh J agreed, considered it unnecessary to decide whether the Commonwealth Constitution's guarantee of freedom of political communication extended to state elections, as the provision in question in this case did not violate the freedom.[92]

The crucial difference between *Muldowney* and *Langer* is that the regulation of speech in the former prevented only the encouragement of informal voting, whereas in the latter, encouragement of formal (but not fully preferential) voting was prohibited. While we are not altogether persuaded that such a limitation on speech is necessary or desirable, we shall not undertake a full analysis of the case here. Suffice it to say that the *Muldowney* limitation is, we suggest, qualitatively different from the *Langer* limitation and the arguments for restricting speech in the former are clearer and more persuasive than those used by the majority in *Langer*.

KRISTEN WALKER* AND KRISTIE DUNN†

87 *ACTV* (1992) 177 CLR 106, 142 (Mason CJ), 168-9 (Deane and Toohey JJ), 215-17 (Gaudron J). See also *Nationwide News* (1992) 177 CLR 1, 75-6 (Deane and Toohey JJ); *Theophanous* (1994) 182 CLR 104, 122 (Mason CJ, Toohey and Gaudron JJ); *Stephens* (1994) 182 CLR 211, 232 (Mason CJ, Toohey and Gaudron JJ), 257 (Deane J).

88 *Muldowney* (High Court, 24 April 1996), 3-4 (Brennan CJ), 9 (Dawson J), 14 (Toohey J). Dawson J, however, observed that this did not mean that the Commonwealth Constitution and any implications drawn from it did not extend to the states, but that such extension related only to federal elections and not state elections.

89 As to the Court's decision in *McGinty* on this issue, see Williams, above n 49.

90 *Muldowney* (High Court, 24 April 1996), 18 (Gaudron J). Justice Gaudron drew on s 106 of the Constitution, in conjunction with the democratic nature of the Federation.

91 Ibid 17-19.

92 Ibid 32 (Gummow J, with whom McHugh J agreed).

* BSc (Melb), LLB (Hons) (Melb); Lecturer in Law, University of Melbourne.

† Law/Arts student, University of Melbourne.