Case Note
Langer v *Commonwealth*

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The recent High Court decision in *Langer* v *Commonwealth*[1] deals with a challenge to the validity of section 329A of the *Electoral Act* 1918 (Cth) (the 'Act'). This section provides that:

> A person must not . . . in relation to a House of Representatives election . . . 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.

Contravention of s 329A attracts a penalty of six months' imprisonment.

Section 240 of the Act sets out the method of voting known as 'full preferential voting' which entails voters marking ballot papers with consecutive numbers opposite candidate's names in order of preference.

Langer had been convicted of contravening s 329A of the Act. He had been distributing 'how to vote' material encouraging voters not to vote in accordance with s 240 of the Act, but rather to engage in a method of voting known as 'optional' or 'selective' preferential voting. This method involves repeating one of the consecutive numbers on the ballot paper beside two or more candidates' names. The effect of such a vote, by virtue of s 270(3) of the Act, is that the repeated numbers are disregarded so that, in effect, no preference is recorded for the candidates whose names appear beside the repeated numbers. Because of this subsection it is technically possible for voters to cast a valid formal vote without giving any preference to certain candidates. Section 270 is regarded (at least by the majority of the High Court in this decision) as a 'saving provision' which allows certain votes which would otherwise be deemed informal (under s 268 of the Act) to be partially saved so that at least some of the voter's preferences are salvaged.

Langer was advocating that people should take advantage of this method of 'selective' preferential voting in order to cast valid, formal votes without having to cast a vote for a member of either of the major political parties. His conduct viewed as a whole therefore really consisted of two components: (1) informing people of the ability to cast a formal selective preferential vote; and, (2) encouraging people to vote in this way, specifically in order to avoid expressing preferences for members of either of the major parties.

Langer's challenge to the validity of s 329A appears to have rested largely on the requirements of s 24 of the Commonwealth Constitution in relation to elections for the House of Representatives. He contended that the requirement in s 24 that Members of the House of Representatives should be

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[1] (1996) 134 ALR 400.

'directly chosen by the people' gave him a right to engage in the conduct for which he had been convicted. He took the view that encouraging voters to cast their votes in a particular way that complied with a valid method of voting under the Act amounted to encouraging voters to give effect to a 'direct choice' of candidate in the election. Such choice was argued to be the kind protected by the requirements of s 24 of the Constitution and the system of representative government partially enshrined therein. This argument was not successful before a majority of the Court.[2]

Additionally, the High Court considered the possibility that s 329A of the Act infringed the implied freedom of political communication that had previously been identified as arising from the system of representative government enshrined in the Constitution.[3] It is unclear from the judgments to what extent Langer actually raised this argument himself and to what extent it was constructed by the judges. Brennan CJ refers to Langer having 'raised but not pressed' a secondary argument based on the implied freedom[4], whereas several other judges note that Langer did not attempt to rely on such an argument at all[5]. However, irrespective of the origins of this line of reasoning, the majority took the view that the provisions of s 329A of the Act were valid notwithstanding the existence of the implied freedom. The Court's reasoning in relation to each of these lines of argument respectively is considered below.

MEMBERS OF THE HOUSE OF REPRESENTATIVES 'DIRECTLY CHOSEN BY THE PEOPLE'

Although Langer was challenging the validity of s 329A of the Act, one of his significant objections to the legislation as a whole seemed to arise primarily because of the operation of s 240 of the Act. He appeared to be challenging the validity of s 329A because of its protection of the full preferential voting method set out in s 240. Inherent in his arguments is the idea that s 240 itself does not sit well with the requirements of s 24 of the Constitution. His reasoning was that a voting system which requires voters to express a preference for every candidate in the relevant constituency contravened the requirements of s 24 in that the 'direct choice' contemplated by that section required a genuine choice and not a choice which included a forced preference for someone for whom a voter did not wish to express a preference at all. Section 329A therefore was arguably invalid for supporting this method of voting.

The majority of the Court examined the provisions of the Constitution which gave the Commonwealth Parliament power to enact electoral laws and

[2] The majority consisted of Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ, Dawson J dissenting.

[3] See *Australian Capital Television Pty Ltd* v *Commonwealth* (1992) 177 CLR 106; 66 ALJR 695; *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1; 66 ALJR 652; *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104; 124 ALR 1; *Stephens* v *West Australian Newspapers Ltd* (1994) 182 CLR 211; 124 ALR 80.

[4] (1996) 134 ALR 400, 403.

[5] Id 418 per Toohey and Gaudron JJ; 423 per McHugh J.

to prescribe methods of voting for each House of Parliament. Section 51(36) of the Constitution, read in conjunction with s 31, gives the Parliament legislative competence over prescribing electoral methods for Commonwealth elections. Both of these sections are, however, to be read 'subject to this Constitution', which includes the requirements of s 24. Thus, if s 24 does support an inference that voters in a House of Representatives election have a right *not* to vote for candidates for whom they wish to express no preference, then ss 240 and 329A of the Act are of questionable validity.

However, the majority of the Court held that s 24 does not support such an inference. Brennan CJ stated that:

> Provided the prescribed method of voting permits a free choice among the candidates for election, it is within the legislative power of the parliament. Section 24 of the Constitution does not limit the parliament's selection of the method of voting by which a voter's choice is made known so long as the method allows a free choice. Section 240 permits a voter to make a discriminating choice among the candidates for election to the House of Representatives. An election in which members of the House of Representatives are elected pursuant to such a method of voting achieves what s 24 requires, namely, a House of Representatives composed of members directly chosen by the people.[6]

These comments seem consistent with previous statements made by judges of the High Court in relation to s 24 of the Constitution. Several of the majority judges in the earlier case of *Attorney-General (Cth); ex rel McKinlay* v *Commonwealth*[7] (*McKinlay's* case) made comments about the meaning of the section in the context of deciding whether it contained any implied guarantee of equality of electoral constituencies in a House of Representatives election. The majority view in that case was that the words 'directly chosen by the people' in s 24 refer to a direct election of members of the House of Representatives by electors voting themselves for candidates in the relevant constituency. This was contrasted to the indirect voting system for elections in the United States where an electoral college system is used. In his judgment in *McKinlay's* case, Barwick CJ noted:

> [T]he expression "directly chosen by the people" is merely emphatic of two factors: first, that the election of members should be direct and not indirect as, for example, through an electoral college, and, secondly, that it shall be a popular election. It is not an indirect reference to any particular theory of government.[8]

Although *McKinlay's* case dealt with an argument about equality of size of electorates, rather than with a particular system of voting, the majority reasoning in that case seems to support the decision in the *Langer* case. If 'directly chosen by the people' means merely that the electors themselves should choose their elected representatives, then there would seem to be no room for an implication within the words that the Commonwealth

[6] Id 405 per Brennan CJ; also 417 per Toohey and Gaudron JJ; 423–4 per McHugh J; 430 per Gummow J.
[7] (1975) 135 CLR 1.
[8] Id 21; see also 44 per Gibbs J and 61 per Stephen J.

Parliament cannot establish a full preferential voting system as its preferred method for electing those representatives. Under such a system, the Members of the House of Representatives are still 'directly chosen by the people' as required by s 24 of the Constitution.

Even Dawson J, who ultimately dissented on the question of the validity of s 329A of the Act in *Langer's* case, did not see any objection to the full preferential voting method prescribed by the Act. In respect of the s 240 method of voting, he stated that:

> The Constitution does not require the provision of any particular electoral system. Thus, the provision in s 240 for a preferential voting system is clearly within power notwithstanding that it requires a choice to be made in a specified manner and, standing alone, requires a preference to be expressed in respect of each candidate.[9]

Thus, notwithstanding that there was a five to one split in the court in favour of the validity of s 329A of the Act, the judges unanimously agreed that s 240 of the Act set out a valid method of voting in a House of Representatives election.

THE VALIDITY OF SECTION 329A OF THE ACT

The main differences between the majority view and Dawson J's view of s 329A rested on the judges' respective constructions of the interaction between the relevant sections of the Act, in particular ss 240, 268 and 270. The majority judges seemed to view s 270 as a saving provision which merely tempers the strict operation of s 268.

Section 268 provides, *inter alia*, that a vote which is not cast in accordance with the s 240 method of voting will be informal. However, this is expressed to be subject to the savings provisions for selective preferential votes in s 270. Thus, the scheme of the Act is to force people to cast their votes by the full preferential method to be formal votes with a saving provision for votes which are not cast by this method but which meet the criteria of s 270.

The majority in *Langer's* case seemed to feel that since s 240 was a valid enactment of the Commonwealth Parliament, s 329A was likewise valid as a protection of a constitutionally valid method of voting notwithstanding the existence of the saving provision for selective preferential votes. Brennan CJ stated that:

> Since s 240 can reasonably be regarded as prescribing a method of freely choosing members of the House of Representatives, a law which is appropriate and adapted to prevent the subversion of that method is within power. Section 329A is such a law. The saving provisions [in s 270] do not affect its validity. They are designed to minimise the exclusion of ballot papers from the scrutiny provided the voter's intention clearly appears from the voter's partial compliance with the method prescribed by s 240. But the saving provisions do not detract from the power to enact s 329A in

[9] (1996) 134 ALR 400, 410.

order to protect what the parliament intends to be the primary method of choosing members of the House of Representatives.[10]

It is this conception of s 270 as a mere 'saving provision' that appears to have been fatal to both Langer's main submission and any arguments that might be made in relation to the implied freedom of political communication. The judges who read s 270 in this way regarded it as a complementary provision to s 240 the aim of which was to promote representative government by saving votes which would otherwise be informal. They interpreted s 329A also as a provision which promoted the basic requirements of representative democracy by preventing conduct which might encourage people not to participate fully in the democratic electoral process. It was seen to be irrelevant for the validity of s 329A that its provisions might interfere with communication between electors about the validity of selective preferential voting. What mattered was that it was a provision appropriate and adapted to the protection of the full preferential voting method validly enacted in s 240 of the Act.

IMPLIED FREEDOM OF POLITICAL COMMUNICATION

As all of the judges recognised, despite Langer's failure to raise (or 'press') the argument, a law prohibiting conduct designed to encourage persons to vote otherwise than in accordance with s 240 might arguably be seen as a contravention of the implied freedom of political communication. This freedom had been recognised by the High Court in a number of cases prior to the *Langer* decision.[11] The freedom has been described variously as: 'freedom of public discussion of government'[12]; 'freedom of the Australian people to discuss governments and political matters'[13]; 'freedom of communication in relation to public affairs and political discussion'[14]; and, 'freedom of political discourse'[15]. The implication has been drawn from the concept of representative government said to be enshrined in the Commonwealth Constitution.

The concept of 'representative government', however, has not been precisely defined by the High Court (and perhaps to attempt to do so would be an impossible task). The idea of what constitutes 'representative government' or 'representative democracy' in Australia appears to be as vague as the precise connotations of the term 'directly chosen by the people' in s 24 of the Constitution from which the implication of representative government arises in part.

[10] Id 405; see also 422–3 per McHugh J.
[11] See *Australian Capital Television Pty Ltd* v *Commonwealth* (1992) 177 CLR 106; 66 ALJR 695; *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1; 66 ALJR 652; *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104; 124 ALR 1; *Stephens* v *West Australian Newspapers Ltd* (1994) 182 CLR 211; 124 ALR 80.
[12] (1992) 66 ALJR 652, 669 per Brennan J.
[13] Id 670.
[14] (1992) 66 ALJR 695, 703 per Mason CJ.
[15] Id 735 per Gaudron J.

As noted above, 'directly chosen by the people' has been taken to connote a direct, rather than indirect, choice of elected representatives by the electors with no clear constitutional requirements implied as to the franchise, a particular voting system or comparative sizes of electorates. Similarly, the notion of 'representative government', which is itself partly implied from s 24, does not contain many clear constitutionally required features. In the *Australian Capital Television* case, Mason CJ expressed a view that:

> The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives ... [T]he representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.[16]

Clearly, on this view, representative government requires members of Parliament to be chosen by electors and to be responsible to those electors in the legislative and executive actions they take. However, it does not go much further than that (other than to note that sovereign power in Australia should be seen as resting in the people, rather than in the United Kingdom parliament or sovereign[17]).

In the earlier case of *McKinlay*, Stephen J had set out in his judgment what he considered to be the basic elements of representative government, but in the final analysis, the content which he ascribed to the concept was also somewhat vague:

> The principle of representative democracy does indeed predicate the enfranchisement of electors, the existence of an electoral system capable of giving effect to their selection of representatives and the bestowal of legislative functions upon the representatives thus selected. However the particular quality and character of the content of each one of these three ingredients of representative democracy, and there may well be others, is not fixed and precise.[18]

He then goes on to say in the same judgment:

> It is ... quite apparent that representative democracy is descriptive of a whole spectrum of political institutions, each differing in countless respects yet answering to that generic description. The spectrum has finite limits and in a particular instance there may be absent some quality which is regarded as so essential to representative democracy as to place that instance outside those limits altogether; but at no one point within the range of the spectrum does there exist any single requirement so essential as to be determinative of the existence of representative democracy.[19]

[16] (1992) 66 ALJR 695, 703.
[17] This view has also been somewhat contentious in Australian constitutional law and politics but a detailed discussion of it is beyond the scope of this note.
[18] (1975) 135 CLR 1, 56.
[19] Id 57.

Again, Stephen J seems to be saying that representative democracy requires some kind of system whereby representatives are directly chosen by electors. These representatives then exercise a defined range of functions on behalf of the electors. However, Stephen J obviously feels that there is no clear way of definitively determining the content or essential features of a 'representative democracy' in all cases.

It must therefore be kept in mind when considering the scope of the implied freedom of political communication that it is derived from the somewhat vague concept of 'representative government' which is in turn implied from various provisions of the Commonwealth Constitution. Thus, there would seem to be no clearly determinative answer that will apply in all cases as to the exact scope of the freedom and to the appropriate scope of any purported restrictions on the freedom.

The original reasons for the High Court's acceptance of the implied freedom revolved around the necessity for participants in a representative system of government to be properly informed about matters essential to the proper functioning of the system. This was particularly seen to be the case in relation to communication about federal elections. McHugh J, for example, stated in the *Australian Capital Television* case that:

> The people of Australia have constitutional rights of freedom of participation, association and communication in relation to federal elections.[20]

Deane and Toohey JJ made similar comments in the case of *Nationwide News v Wills*:

> The people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person. The actual discharge of the very function of voting in an election ... involves communication.[21]

Here, it is easy to discern the way in which the freedom is inextricably linked with the ability of participants in a representative democracy to fully participate in such a system of government.

Various judges of the High Court have also clearly accepted that this freedom extends to more than just freedom of communication between electors and their representatives, but must also exist between electors. In *Theophanous v Herald & Weekly Times Ltd*, Mason CJ, Toohey and Gaudron JJ emphasised this point in their joint judgment:

> The implied freedom of communication is not limited to communication between the electors and the elected. Because the system of representative government depends for its efficacy on the free flow of information and ideas and of debate, the freedom extends to all those who participate in political discussion. By protecting the free flow of information, ideas and debate, the Constitution better equips the elected to make decisions

[20] (1992) 66 ALJR 695, 741.
[21] (1992) 66 ALJR 652, 680.

> and the electors to make choices and thereby enhances the efficacy of representative government.[22]

Although the precise scope of the implied freedom may be somewhat unclear in current Australian law, as are the precise limits of the concept which underlies the freedom, it would seem reasonably clear that the freedom extends to communication between electors about federal politicians and voting systems in the context of a federal election. In effect, this was exactly the type of communication in which Langer was engaging in the lead up to the 1996 federal election.

Langer was basically advocating that people should not vote for either of the major parties. This appears to amount to political discussion about the fitness of major party politicians for office. He was also advocating that people take advantage of the selective preferential system of voting in s 270 of the Act in order to avoid voting for the major parties. This would appear to amount to political discussion about alternative voting methods open to electors in a House of Representatives election.

Thus, Langer's conduct (and other conduct proscribed by s 329A generally) appears to fall directly within the terms of the implied freedom of political communication. In fact, most of the judges in the *Langer* case, with the possible exceptions of McHugh and Gummow JJ, seemed to accept, either expressly or impliedly, this to be the case.[23] Interestingly, Gummow J took the view that s 329A does not prohibit free political discussion at all:

> Section 329A does not impose any restriction upon political discussion generally nor, more particularly, upon discussion as to the suitability or disadvantages in the voting system. Rather, it is directed at the particular processes or mechanism by which the franchise is exercised and the vote is cast.[24]

He clearly takes a somewhat narrower view than the rest of the majority judges as to what constitutes 'political discussion' for the purposes of the implied freedom. In his opinion, political discussion about a voting system is to be regarded as limited to discussion about the suitability of the voting system to the society in question and will not include discussion about the mechanics of a validly enacted voting system. Most of the other majority judges seem to take a broader view of the concept of 'political discussion' which would incorporate discussion about the actual operation of a particular voting system.

However, the majority judges took the view that, despite the restrictions on free political speech imposed by s 329A, it is a valid law for the reason that it is 'appropriate and adapted' to protecting the underlying operation of the representative system of government at the federal level in Australia. Brennan CJ

[22] (1994) 124 ALR 1, 12.

[23] See, for example, (1996) 134 ALR 400, 406 per Brennan CJ; 412 per Dawson J, although it should be noted that Dawson J disagrees with the majority as to the ambit of the implied freedom in general; 418–9 per Toohey and Gaudron JJ.

[24] (1996) 134 ALR 400, 431.

attempted to set out a test for deciding whether a given law will be invalid for infringement of the implied freedom:

> 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.[25]

Gummow J, who disagreed that the freedom applied to the kind of discussion prohibited by s 329A, also endorsed such a 'proportionality' test. He noted that as the implied freedom is based on notions of representative democracy and operates to promote such a system of government, it cannot be said that the freedom will protect conduct which would weaken or deplete an essential component of that system. He considered that conduct which would encourage people to vote such that their vote would not be a completely effective exercise of their democratic right cannot be protected by the freedom in any case as it is conduct which damages, rather than promotes, representative government.[26]

In applying his proportionality test to the facts of the case, Brennan CJ made the following comments:

> Section 329A does not prohibit discussion about the operation or desirability of the method of voting prescribed by s 240 nor does it prohibit advocacy of its amendment or repeal. Section 329A operates in the context of the method of voting prescribed by s 240 and prohibits intentional encouragement of the filling in of ballot papers in a way which, if not within the saving provisions, will result in the exclusion of the ballot paper from the scrutiny and which, if within the saving provisions of s 270(2), will result in a diminished expression of the elector's preferences. The prohibition contained in s 329A is thus a means of protecting the method which parliament has selected for the choosing of members of the House of Representatives. The restriction on freedom of speech imposed by s 329A is not imposed with a view to repressing freedom of political discussion; it is imposed as an incident to the protection of the s 240 method of voting.[27]

It is interesting to note the fine distinction drawn here between the prohibition of conduct intended to encourage voters not to comply with s 240 and conduct which serves merely to inform people about the desirability of full preferential voting. Brennan CJ felt that legislative prohibition of conduct of the first type is valid whereas legislative prohibition of the second type of conduct may be an invalid exercise of power. This same distinction was made by McHugh J.[28] Toohey and Gaudron JJ also made similar comments, extending on Brennan CJ's idea to the extent that conduct intended merely to inform people about other valid voting methods outside s 240 would arguably be protected by the implied freedom:

[25] Id 405–6.
[26] Id 431–2.
[27] Id 406.
[28] Id 423.

> It should be noted that s 329A is confined to conduct that is intended to encourage non-compliance with s 240 and is not concerned with conduct that is intended only to inform. Thus, it is not directed to conduct intended to provide information as to the circumstances in which a ballot paper will be formal, notwithstanding non-compliance with s 240, or as to the manner in which it will be counted. Nor is it directed to conduct intended to inform voters as to the possible consequences of expressing a preference for each of the candidates whose names appear on the ballot paper.[29]

This distinction does seem somewhat tenuous in the context of the *Langer* case and was not accepted by Dawson J in his dissenting judgment. Dawson's judgment is considered separately below.

It does seem that where a valid alternative method of voting has been prescribed by the Act, notwithstanding that it may have been included only as a 'saving provision', it is nevertheless part of the Commonwealth electoral system. It is difficult to see how people talking about it in a manner akin to advocating its use: (a) at all; or, (b) in a particular way, could be seen as damaging the fundamental requirements of representative democracy. Surely the alternative method of voting must be considered as part of the Australian system of representative government in respect of House of Representatives elections.

Perhaps if s 270 had not been included in the Act, s 329A would seem less objectionable. In a system of representative government under which electors are forced to vote by a full preferential voting method to cast a formal vote, and there is no alternative method open to them, it may be easier to justify a law which prevents people discouraging full preferential voting. Such a law would seem to protect full participation in the electoral process (assuming, of course, the validity of such a voting system).

In fact, such a question has come before the High Court in the recent case of *Muldowney* v *South Australia*.[30] In this case the High Court unanimously ruled that provisions in the Electoral Act 1985 (SA), which were equivalent to ss 240 and 329A of the Commonwealth legislation under discussion in *Langer's* case, were valid. The electoral system in South Australia did not include any savings provisions of the kind set out in s 270 of the Commonwealth Act. Thus, the High Court appeared quite comfortable with finding that both the section setting out the full preferential voting method for Legislative Council and Legislative Assembly elections and that prohibiting people from advocating voting in another manner were valid. There was not the issue in the *Muldowney* case that the prohibition section inherently proscribed discussion of an alternative valid method of voting. Even Dawson J, who dissented in *Langer*, felt that the prohibition section in the South Australian legislation was valid and did not prevent South Australians from exercising a genuine choice between candidates in a state election.

[29] Id 415.

[30] (1996) 136 ALR 18. It should be noted that this case was argued and decided partly in relation to the implied freedom of political communication at the Commonwealth level of government and partly in relation to the existence of a similar freedom in relation to the South Australian constitutional requirements.

JUSTICE DAWSON'S DISSENTING JUDGMENT IN *LANGER*

Dawson J's judgment in *Langer's* case is very interesting to compare with the majority, particularly on the issue of the scope of the implied freedom of political communication and the extent to which such communication is necessary to protect the essential elements of a democratic voting system.

In his judgment, Dawson J examined comments made by the Joint Standing Committee on Electoral Matters in its 1990 Federal Election Report in relation to selective preferential voting. He noted the concerns expressed by the Committee that the incidence of selective preferential voting had increased dramatically between the 1987 and 1992 House of Representatives elections. However, the Committee appeared to feel that it was desirable to retain the selective preferential voting option because of the desirability of being able to 'save' unintentional selective preferential votes as formal votes. Section 329A was inserted into the Act subsequent to the handing down of this Report. As Dawson J noted in his judgment, the section is clearly directed at attempting to remedy this situation. It appears to be an attempt to retain the selective preferential voting 'safety net' while strongly discouraging people from exercising some kind of 'right' to vote in this way. Dawson J notes that in its attempt to achieve these ends, s 329A does not really 'deny the right but seeks to prevent voters becoming aware of its existence, at all events where the imparting of information concerning its existence is intended to encourage its use.'[31]

As noted above, Dawson J did not see any valid constitutional objection to the s 240 method of voting, reiterating the views of the majority judges that s 24 of the Constitution does not require the establishment of any particular electoral system, provided that members of the House of Representatives are directly chosen by the people.[32] He also agreed with the majority judges about the application of a 'proportionality' test to determine the validity of laws which on their face appear to interfere with such a choice.

However, Dawson J disagreed with the majority in several significant areas. They were: (1) the scope of the implied freedom of political communication; (2) the question whether s 329A is 'appropriate and adapted' to the achievement of a valid legislative purpose, notwithstanding its potential curtailment of an exercise of 'genuine' choice by electors and/or its potential restrictions on free political communication.

In terms of the implied freedom of political communication, Dawson J adhered to observations he had made in earlier cases as to the existence and potential scope of the freedom. Dawson J agrees that there is some kind of implied freedom of political communication inherent in the Constitution, but he disagrees that it is based on a notion of 'representative government'. His view is that the freedom is confined to communication necessary for the

[31] (1996) 134 ALR 400, 409.
[32] Id 410.

conduct of elections by direct popular vote as envisaged by ss 7 and 24 of the Constitution.[33]

Notwithstanding his narrower view of the scope of the freedom, he took the view in Langer's case that the type of communication prohibited by s 329A is exactly the type of discourse that must be protected by the freedom. Arising, as he says it does, from the sections of the Constitution dealing specifically with Commonwealth elections, Dawson J cannot see how the freedom can fail to protect discussion about the electoral system, particularly discussion about a legally valid method of voting in a House of Representatives election.

He also considered critically the distinction made by most of the majority judges between conduct intended to *encourage* people to vote in a particular way and conduct intended merely to *inform* people about a valid way of voting. As noted above, most of the majority judges felt that the former type of conduct was validly prohibited by s 329A, but a legislative provision attempting to proscribe the latter type of conduct may arguably be invalid as contravening the implied freedom. Dawson J was strongly critical of such a distinction:

> To impart information which can be used (and information about the availability of an optional or selective preferential vote is of that kind) is necessarily to encourage its use if the recipient of the information is so inclined. A person in making that information available to an eligible voter would, in the absence of active discouragement of its use, find it well nigh impossible to prove that it was made available without any intention that those to whom it was made available should make use of it. 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 information to eligible voters knowledge that the electoral system permits optional or selective preferential voting. It cannot, therefore, be a law which is reasonably and appropriately adapted to the achievement of an end which lies within the ambit of the relevant legislative power.[34]

Part of his reasoning appears to be based on a different conception of the legislative 'status' that should be accorded to s 270 of the Act. He takes the view that where an electoral system includes such a 'saving provision', electors have a right to be informed of its existence, even if the information amounts to 'encouragement' to electors to take advantage of the provision. He states that s 329A would be a valid protection of an electoral system that consisted of a full preferential voting requirement with no savings for selective preferential votes. According to him, this would be a valid protection of a constitutionally valid method of voting.[35] In fact, in his decision in the *Muldowney* case, he upheld this proposition in the very context of such an electoral system:

[33] Ibid.
[34] Id 411–412.
[35] Id 411.

> In *Langer* v *Commonwealth*, it was my view that s 329A of the Commonwealth Electoral Act 1918 (Cth) ... was inconsistent with s 24 of the Commonwealth Constitution, that being the section which provides for the direct choice by the people of members of the House of Representatives. It was my view that s 329A prevented, or at the very least discouraged, the communication to electors of an alternative method of voting which was available to them under that Act. It was inconsistent with their constitutional right to exercise a genuine, that is to say informed, choice because of its tendency to deprive them of information necessary for the purpose of making such a choice.
>
> This case is different. The South Australian Electoral Act provides for a full preferential system of voting and contains no alternative method in the form of an optional or selective preferential system. The effect of s 126(1) is merely to prohibit persons from publicly advocating that a person should so mark his or her ballot paper, or refrain from marking it, in such a way as to render it informal and thus ineffective for the purpose of casting a vote ... It cannot ... be incompatible with the exercise of a genuine choice by a voter that others be prohibited from encouraging that voter to do those things which will render a purported choice ineffective. Unlike the situation in *Langer*, s 126(1) does not have the aim of discouraging electors from exercising an option which is available to them in the casting of a formal vote but is designed to ensure that electors are not encouraged to cast an ineffective vote.[36]

Clearly, Dawson J disagrees with the other High Court judges as to the extent to which certain laws interfere with essential constitutional concepts. The majority judges in *Langer* held that a law preventing conduct which may interfere with people voting by the *preferred* electoral method will be valid as protecting fundamental aspects of representative democracy. Dawson J, on the other hand, suggested that only a law preventing conduct which may interfere with people voting by the *only valid* method will be unobjectionable as protecting the relevant electoral system. In his view, laws which merely protect a *preferred* method of voting by proscribing certain conduct are likely to interfere with constitutional protections over freedom between electors to communicate about available electoral methods and to make genuine choices in an election as required by s 24 of the Constitution. Dawson J clearly feels that laws of the second kind would be unlikely to be 'appropriate and adapted' to any valid Commonwealth legislative purpose.

This view has much to commend it. If an electoral system contains more than one way of casting a valid vote, notwithstanding that there is only one *preferred* method of voting, it does seem somewhat incongruous to attempt to limit communication about the system as a whole. Additionally, to attempt to make a distinction, as does the majority in *Langer*, between communication merely informing people of the workings of the system and communication encouraging people to vote by a non-preferred method seems, in practice, to be quite unworkable, largely for the reasons set out by Dawson J (above).

[36] (1996) 136 ALR 18, 26–27. See also (1996) 134 ALR 400, 412 per Dawson J.

FUTURE IMPLICATIONS FOR THE *ELECTORAL ACT* 1918 (CTH): NEED FOR REFORM

The *Langer* decision potentially creates significant difficulties for the future operation of the Act in its current form. Although the validity of s 329A has been upheld, the problem will remain as to the apparent incongruity between, on the one hand, ss 240 and 329A of the Act and, on the other hand, the savings provisions in ss 268 and 270.

The High Court decision has not resolved this incongruity in a practical way. A major problem with the majority view in *Langer* is its significant reliance on the drawing of the fine distinction between communication intended to inform voters about s 270 and communication intended to encourage its use. Arguably, political activists in the future could take advantage of the majority reasoning to draft their communications about selective preferential voting in such a way as to resemble an 'information imparting' exercise more than an encouragement not to vote for particular political parties. One way of doing this might be to draft pamphlets and other communications apparently 'about' the workings of the Commonwealth electoral system with an 'example' of selective preferential voting which happens to repeat preference numbers between candidates put forward by major parties.

In fact, mere discussion of the existence of s 270 and the possibility of casting valid formal votes by the selective preferential method without specifically mentioning particular candidates or political parties at all may amount to 'imparting of information' rather than encouraging its use, following the majority view in *Langer*. However, such discussions may lead to an upsurge in selective preferential votes at a subsequent House of Representatives election. Dawson J noted in his dissenting judgment in *Langer*, quoting from the Federal Election Report, that there was a large increase in the amount of selective preferential votes between the 1987 and 1990 House of Representatives elections due to public attention given to the matter in the intervening period. Thus, merely allowing conduct which imparts information about selective preferential voting probably frustrates the Commonwealth Parliament's legislative aims in enacting s 329A of the Act. However, the High Court's decision in *Langer* would seem to uphold such a result.

Even if it is accepted that *all* discussion about selective preferential voting in the future might run the risk of being branded as conduct 'encouraging' people to vote otherwise than in accordance with s 240 (and therefore in breach of s 329A), the person engaging in the conduct may nevertheless have achieved the desired end. Considering the *Langer* fact situation as an example, Langer was convicted of contravening s 329A. Nevertheless, the amount of publicity surrounding his activities and his subsequent conviction and High Court challenge drew more attention to the selective preferential voting option than his activities would probably have achieved in the absence of s 329A. Thus the operation of s 329A itself may be frustrating the ends it was enacted to achieve. The section itself seems so politically objectionable,

constitutional considerations aside, that whenever a person is convicted of contravening it, there appears to be a significant risk of a large amount of media attention being drawn to the relevant activities.

Thus, the upholding of the validity of the section by the High Court in *Langer* does not solve the practical and political problems associated with it. It would seem that the Commonwealth Parliament needs to reconsider the interaction of ss 240, 268, 270 and 329A of the Act before the next House of Representatives election if it is really concerned to promote effective electoral practices.

There appear to be two options open to Parliament. The first is to either remove s 329A from the Act altogether, or at least amend it, to remove the apparent inconsistency with s 270. Repealing the section would obviously remove the inconsistency. Alternatively, the section could be amended to proscribe conduct which encourages people to vote informally, but not to proscribe conduct which encourages people to vote by any method which will not result in an informal vote.

The second option would be to repeal the savings provisions for selective preferential votes. This would create a system under which full preferential voting becomes the only formal and valid way of voting in a House of Representatives. Such a system would be very similar to the system for voting in state elections in South Australia such as was considered in the *Muldowney* case. Section 329A would, in such a system, only operate to prevent encouragement of people to cast ineffective votes which would seem to be less of an affront to the proper workings of representative democracy than a system which prohibits the encouragement of people to vote in a valid, but non-preferred, way.

If the Commonwealth Parliament is really concerned to promote full participation by electors in the electoral process and to achieve this in part by 'saving' selective preferential votes, the best option to take would seem to be simply to amend s 329A so that it only prevents the encouragement of people to vote informally. If it is considered to be important to save such votes, then there does not seem to be a *practical* way of limiting the scope or amount of discussion about the selective preferential voting method, notwithstanding the *Langer* decision upholding the *legal and constitutional* validity of s 329A.