THE IMPLIED GUARANTEE OF FREE POLITICAL COMMUNICATION

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On 30 September 1992 the High Court published its reasons for decision in two cases[1] which may well mark an important change of direction in constitutional law in this country. In these decisions the Court recognised that the legislative powers of the Commonwealth are subject to an implied prohibition that the laws of the Commonwealth may not unduly restrict freedom of communication on political matters. The Court has previously recognised, although rarely invoked,[2] other implied limits on Commonwealth power, namely, those flowing from the federal structure of government created by the Constitution. There have also been occasions on which members of the Court have adverted to implied individual rights or freedoms.[3] However, the two decisions break new ground in invalidating statutory provisions for infringing an implied guarantee of what may be seen as an individual civil liberty. Despite the paucity of express constitutional guarantees of individual rights or liberties, these decisions open up the prospect of the Court finding by implication constitutional protection for a range of other individual rights.

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1. *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681; *Australian Capital Television Pty Ltd v The Commonwealth (No 2)* (1992) 108 ALR 577.
2. Since the decision in the *The Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* (1920) 28 CLR 129, the Court has only twice invalidated a Commonwealth law on the ground that it discriminated against the States or impaired the States' capacity to function as such: *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192.
3. See *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 667–670; *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 Murphy J, 88; *Queensland Electricity Commission v The Commonwealth* supra n 2, Deane J, 247–248.

THE SOURCE AND EXTENT OF THE GUARANTEE

In the course of the decisions, six of the judges[4] accepted that the Constitution guarantees a right to speak freely on political matters. Freedom to communicate about political matters was held to be an essential feature of representative government, which is the system ordained by the Constitution, as evidenced particularly by sections 7 and 24. They also accepted that the right is not absolute. Freedom of communication could be restricted, at least in respect of the *means*[5] of communication, by a law which is:

- "conducive to the overall availability of the effective means of such communications"[6]; or
- reasonably necessary or appropriate to pursue some other legitimate public interest.

APPLICATION OF THE GUARANTEE: A PROHIBITION ON COMMONWEALTH POWER

In *Nationwide News Pty Ltd v Wills*[7] ("*NWN*"), the court unanimously invalidated section 299 (1) (d) (ii) of the Industrial Relations Act 1988 (Cth), which made it an offence to use words likely to bring into disrepute the Australian Industrial Relations Commission or its members, irrespective of whether the words were true or false or amounted to fair comment.

Three judges[8] invalidated the provision on the ground that it was neither a law with respect to conciliation and arbitration nor with respect to a matter incidental to that subject.[9] The remaining four judges[10] were prepared to accept or assume that a law protecting the Commission from criticism was prima facie within section 51 (xxxv) of the Constitution. It was directed to a legitimate public interest, namely, protecting the good name of the Commis-

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4. Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ. McHugh J limited the right to the context of Federal elections.
5. The range of permissible restrictions of the *content* of the communications is far more limited: see *Australian Capital Television Pty Ltd v The Commonwealth (No 2)* supra n 1 Mason CJ, 597; McHugh J, 669–670.
6. *Nationwide News Pty Ltd v Wills* supra n 1 Deane and Toohey JJ, 727.
7. Supra n 1.
8. Mason CJ, Dawson and McHugh JJ.
9. The reasoning of Mason CJ in *NWN* supra n 1, 693, confirms a further significance for fundamental freedoms: a measure which adversely affects a fundamental freedom may well be judged disproportionate and hence beyond what is reasonably necessary for the fulfilment of the principal legislative power. See also *Davis v The Commonwealth* (1988) 166 CLR 79.
10. Brennan, Deane, Toohey and Gaudron JJ.

sion so as to enable it to perform its function of conciliation and arbitration. However, as grants of power in section 51 were "subject to this Constitution", a law otherwise within power would be invalid if it infringed the implied freedom of political communication. Accordingly, this measure was invalid: it was more restrictive of the freedom of political communication than was reasonably necessary to achieve its purpose. The proper functioning of the Commission would not be hindered by allowing fair or justifiable criticism; on the contrary, it might be enhanced.

The application of the same principles in *Australian Capital Television Pty Ltd v The Commonwealth (No 2)*[11] ("*ACTV*") was more difficult. The Political Broadcasts and Political Disclosures Act 1991 (Cth) in substance prohibited the broadcasting (on television or radio) of political advertisements in the pre-election period for Commonwealth, State or local government elections or for Commonwealth referenda. The Act did not affect the right to broadcast political information or opinion as part of news or current affairs programs or on talkback radio programmes. Nor did it affect the freedom to advertise in the electronic media outside the pre-election period or in the print media at any time. Further, the Act required broadcasters to provide periods of free air time for political broadcasts. The format for such broadcasts was also regulated: for television, it had to be a two minute "talking head" presentation by a single speaker. Ninety per cent of the free time was to be allocated between those political parties with sitting members in the relevant legislature. The remaining 10 per cent was to be allocated by the Broadcasting Tribunal between other candidates or parties.[12] Finally, it was provided that the entire regime did not apply to a Commonwealth, State or Territory election unless certain regulations had been made for that election.

There was no dispute that this law prima facie fell within the scope of one or more Commonwealth powers.[13] The issue was whether it infringed any express or implied prohibition within the Constitution. Of the six judges who accepted that the Constitution impliedly guarantees freedom of political communication, at least at Federal elections, all except Brennan J found that the guarantee had been infringed.[14]

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11. Supra n 1.
12. Senators seeking re-election but not qualifying for a share of the 90%, independent candidates and parties with no sitting members.
13. Under s 51(v) or, at least in part, under s 51 (xxxvi).
14. Brennan and McHugh JJ held that the provisions governing advertising for State elections infringed the implied prohibition recognised in *Melbourne Corporation v The Commonwealth* supra n 2. McHugh J upheld the provision relating to Territory elections, reasoning

The court identified the following as the (legitimate) objectives of the law:

- Reducing the risk of corruption of political parties by eliminating the principal expense in election campaigns;
- Enhancing equality of participation by reducing the advantages in influencing the political debate enjoyed by wealthier parties, pressure groups or individuals over poorer ones;
- Reducing the "trivialising effect" of 15 or 30 second advertisements which emphasise image rather than substance.

However, the majority ruled that the measures adopted in the Act to pursue the above policies constituted a disproportionate restriction on the freedom of political communication and thus infringed the implied prohibition. The core of the objection to the law was the effect of the free time regime: only those entitled to make free broadcasts or obtain exposure on news or current affairs programs could communicate with the electorate by the most effective mass media, namely, television and radio. In the main the regime favoured the existing political parties and those acceptable to the controllers of news programmes. Accordingly, the law failed to achieve the goal of equality of access; and in excluding a substantial part of the community from this means of communication, the law went further than was reasonably necessary or justifiable to achieve the other objectives.[15] A secondary line of objection was that the government of the day would be free to determine whether the regime should operate in a particular election (by making the prerequisite regulations or not). The restrictions could not be characterised as necessary if they were to apply only as and when the government should choose.

In short, the majority concluded that the costs of the law in terms of freedom of political communication outweighed the alleged advantages in protecting the electoral process, or alternatively that the putative benefits could be obtained by less restrictive alternatives.[16]

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that the freedom of political communication did not extend to the Territories. Dawson J held all the challenged provisions valid.

15. McHugh J also doubted that the measures would achieve the first goal, as the parties would still need substantial funds for other forms of campaigning: *ACTV* supra n 1, 673.

16. Eg McHugh J suggested creating special offences dealing with corruption, and requiring disclosure of, and limitations on, campaign contributions: *ACTV* id, 673.

CRITIQUE OF THE DECISIONS

A useful starting point for evaluating the decisions is Coper's observation that, while the Court remains prepared to find implied limits on Commonwealth power in the area of intergovernmental immunity:

> [T]he debate over implied rights really has to be about the plausibility of the particular implication rather than the legitimacy of the process.[17]

In the case of the implied freedom of political communication, several factors militate against the implication. First, it is clear that those who drafted the Constitution generally opposed the inclusion of guarantees of individual rights. More particularly, the inclusion of a guarantee of freedom of religion modelled on one clause in the First Amendment to the United States Constitution suggests an intention that the other freedoms protected by the First Amendment, including freedom of speech, should not be constitutionally guaranteed. Secondly, in 1944, a referendum on a proposal to prohibit laws abridging freedom of speech or of the press was soundly defeated. This suggests not only that the Constitution was thought to lack such a prohibition, but also that the electorate rejected the argument for its inclusion. The lack of success of subsequent proposals for reform,[18] including recommendations for a guarantee of free expression, reflects similar views as to what the Constitution does not and should not contain. The Court's finding to the contrary exposes it to criticism that it is undemocratic, in imposing a provision that the electorate and their elected representatives have rejected but cannot now realistically hope to remove.

It is against this background that the argument that "representative democracy" entails a guarantee of a particular degree of free political communication must be judged. It is difficult to see that such an imposing edifice can be supported by so insecure a foundation. Even if it is accepted that the Constitution prescribes (rather than assumes) a system of representative democracy, it is submitted that the concept is essentially a descriptive one and is incapable of yielding any precise constitutional requirement.

The point was made by Stephen J in *McKinlay*:[19]

> [R]epresentative democracy is descriptive of a whole spectrum of political institutions, each differing in countless respects yet answering to that description. The spectrum has finite limits and in a particular instance there may be absent some quality

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17. M Coper *Encounters with the Australian Constitution* (Sydney: CCH Australia Ltd, 1987) 353.
18. Eg the recommendations of the Constitutional Commission in 1988.
19. *Attorney General (Cth); ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1.

> which is regarded as so essential to representative democracy as to place that instance outside those limits altogether; but at no point within the range of the spectrum does there exist any single requirement so essential to be determinative of the existence of representative democracy."[20]

More particularly, even if it is accepted that there must be some measure of freedom of political discourse in a representative democracy, the concept does not provide guidance as to the degree of freedom required. This problem was acknowledged by Brennan J in *NWN*:

> To say that freedom to discuss governments and political matters is essential to the existence of a representative democracy is not to define with any precision the limitation on legislative power implied in the Constitution.[21]

The aptness of these observations is borne out by the fact that in a large number of other countries (including the United Kingdom, Ireland, France, Norway, Sweden, Denmark, Austria, the Netherlands, Israel, and Japan), which clearly fall within the spectrum of representative democracies, there exist restrictions on political advertising at least as extensive as those in the Political Broadcasts and Political Disclosures Act 1991 (Cth). By holding that Act invalid, the Court has demanded a degree of freedom of political communication greater than is required in many other representative democracies. Ironically, the level of freedom propounded by the Court is closely modelled upon that applied in the United States, the very model considered and rejected by the Founding Fathers, and one derived not from general notions of representative democracy but from an express guarantee, in absolute terms, of free speech.

A more specific criticism of the decision in *ACTV* relates to the consistency of the outcome with the principles it espouses. The Court invalidated the law because of its "distortion of the electoral process." But as a result of the decision, access to electronic media advertising is once again effectively enjoyed only by those with sufficient financial resources. Is this not a greater distortion of the electoral process than the measures in the Act? Those favoured by the Act's free time regime at least had qualified for the privilege by obtaining the support of the electorate.

One might respond that everyone is once more free in law to advertise on the electronic media.[22] But to ignore practical effect and shelter behind an

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20. Id, 57.
21. Id, 706.
22. Deane and Toohey JJ indicated that it was no objection that "some persons or groups may make more, or more effective use of the freedom than others involved in the political process" *ACTV* supra n 1, 622.

absence of legal discrimination seems at odds with the Court's prevailing approach to constitutional guarantees.[23] It deserves the rebuff delivered by J Skelly Wright to the United States Supreme Court:

> A latter day Anatole France might well write ... 'The law, in its majestic equality, allows the poor as well as the rich ... to drown out each other's voices by overwhelming expenditures in political campaigns.'...When money becomes more important than people, when media mastery weighs more heavily than appeals to judgment, when opportunities to communicate with voters are extremely unequal, the result is a cynical distortion of the electoral process. [24]

IMPLICATIONS OF THE DECISIONS

Several judges cautioned against thinking that a comprehensive Bill of Rights could be established by implication.[25] But it is inevitable that the Court will soon be called upon to explore the implications of their recognition of the existence of implied fundamental freedoms. The prospect of challenges to existing laws will increase if the Court decides, as seems probable, that rules of common law and the powers of the States are also subject to similar implied prohibitions.[26]

One may begin to explore the implications by asking what other laws might be said to infringe the right of political communication. In the realm of election laws, decisions in the United States and Canada validating restrictions on campaign expenditure[27] raise doubts about the possibility of using such measures in Australia. A more likely target for challenge is the

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23. See *Cole v Whitfield* (1988) 165 CLR 360; *Street v Queensland Bar Assoc* (1989) 168 CLR 461.
24. J S Wright "Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?" in V Blasi (ed) *Law and Liberalism in the 1980's: the Rubin Lectures at Colombia University* (New York: Columbia University Press, 1991) 14.
25. See *ACTV* supra n 1 Mason CJ, 592; Dawson J, 628; McHugh J, 665; *NWN* supra n 1 Brennan J, 701. It is a further objection to the approach of the Court that it may yield only a partial, lopsided list of guaranteed rights.
26. In *NWN* id, Deane and Toohey JJ, 726, indicated that it is "strongly arguable" that State legislative powers are limited by the implied freedom of communication. It can be argued that State restrictions on political free speech would impair representative democracy at the Federal level, since all political matters within the State are potentially relevant to the Commonwealth Parliament. More generally, State constitutions are, by ss 106 and 107, subject to any applicable implied prohibitions within the Commonwealth Constitution. Further, State constitutions may themselves entrench representative democracy: see eg Constitution Act 1889 (WA) s 73(2)(c).
27. *Buckley v Valeo* (1976) 424 US 1; *National Citizens' Coalition Inc v Attorney General (Canada)* (1985) 11 DLR (4th) 481. See also K D Ewing "The Legal Regulation of Electoral Campaign Financing in Australia: A Preliminary Study" (1992) 22 UWAL Rev 239.

existing defamation law, at least as applied to protect politicians and public officials. The United States Supreme Court has held that, to protect free speech, liability for defamatory statements of fact regarding public figures should be severely restricted: it should arise only upon proof that the statement was false and made with knowledge that it was false or with reckless disregard as to its truth.[28] Further, statements of opinion, not containing factual connotations, are simply not actionable, whether the comment be fair or otherwise.[29] On this view, defences of the kind available under Australian law, such as justification or fair comment, are considered too onerous and likely to stifle public debate by encouraging self-censorship. Whether this reasoning would be accepted by the High Court remains to be seen, although it may be noted that in *ACTV*, Gaudron J[30] indicated that freedom of political discourse does not include the right to disseminate false material, which may suggest support for the defence of justification.

It is also likely that the High Court will be required to decide whether representative democracy entails freedom of non-political communication, including speech for purely commercial purposes, an issue expressly left open in *ACTV*.[31] Although it may seem far removed from the textual basis for representative democracy in sections 7 and 24, it is arguable that freedom to advertise commercial products is essential to a free and democratic society, either as a value in its own right or as one conducive to enlightened public decision making.[32] But even if the court decides that the implied guarantee only protects political communications, it will then face the difficult task of drawing the boundary between political and commercial speech.

Expanding the impact of the decisions still further, it is clearly arguable that other traditional freedoms, such as freedom of assembly or association,

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28. *New York Times Co v Sullivan* (1964) 376 US 254.
29. *Milkovich v Lorain Journal Co.* (1990) 497 US; 111 L Ed 2d 1.
30. Supra n 1, 656.
31. Id, Mason CJ, 596; Gaudron J, 652.
32. *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc* (1976) 425 US 748, 765. This decision, invalidating restrictions on advertising by pharmacists, has cast doubt on an earlier decision upholding restrictions on tobacco advertising: *Capital Broadcasting Co v Mitchell* (1971) 333 F Supp 582, 584; affirmed sub nom *Capital Broadcasting Co v Acting Attorney General* (1972) 405 US 1000. See J E Nowak & R D Rotunda *Constitutional Law* 4th edn (St Paul: West, 1986) 1020. But restrictions on advertising for casinos were later upheld in *Posadas de Puerto Rico Associates v Tourism Co of Puerto Rico* (1986) 478 US 328. The court apparently approved of earlier decisions upholding restrictions on advertisements for cigarettes and alcohol: id, 344. In Canada, restrictions on television advertisements directed to children were upheld in *Irwin Toy Ltd v Procureur General du Quebec* (1989) 58 DLR (4th) 577.

are as essential to representative democracy as free political communication. Laws that restrict protest marches or meetings,[33] or curtail the right to strike[34] or picket,[35] might be challenged as infringing these implied freedoms. Laws requiring disclosure of contributions to political parties, assumed in *ACTV* to be compatible with freedom of political communication, might be said to undermine freedom of association, at least in cases where harassment is likely to follow disclosure of the identity of supporters of unpopular political parties.[36] It might also be argued that the Court's stricter approach to the demands of representative democracy requires a reconsideration of earlier decisions denying the need for equality of numbers in electoral districts.[37]

Finally, there remains the possibility that other fundamental rights might be inferred from features of the Constitution other than representative democracy. For example, in *Leeth v The Commonwealth*,[38] Deane and Toohey JJ held that a right to legal equality can be inferred from the federal nature of the Constitution.[39] It has also been argued that individual rights can be inferred from the principle of the separation of powers.[40]

Clearly, the Court may soon be required to rule on the validity of laws in a number of controversial areas. But those wishing to overturn longstanding statutes or rules of common law may well be disappointed. There are several indications that the Court is likely to validate such laws as reasonably necessary qualifications on the implied freedoms. For example, in *NWN*, the Court used the degree of freedom of speech allowed by the existing laws of defamation and contempt as the touchstone for determining what is reasonably necessary in a democratic society. Similarly, in *ACTV*, Gaudron J

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33. See *Shuttlesworth v City of Birmingham* (1969) 394 US 147; *Gregory v City of Chicago* (1969) 394 US 111; *Village of Skokie v National Socialist Party of America* (1978) 373 NE 21.
34. See *Reference re Public Service Employee Relations Act* (1987) 38 DLR (4th) 161.
35. See *Thornhill v State of Alabama* (1940) 310 US 88; *International Brotherhood of Teamsters v Vogt Inc* (1957) 354 US 284; *Re United Assoc of Journeymen & Apprentices of The Plumbing Industry of US & Canada, Local 740 & Pitts Atlantic Construction Ltd* (1984) 7 DLR (4th) 609.
36. *National Assoc for the Advancement of Coloured People v State of Alabama ex rel Patterson* (1958) 357 US 449; *Brown v Socialist Workers '74 Campaign Committee* (1982) 459 US 87.
37. *McKinlay v The Commonwealth* supra n 19; *Burke v Western Australia* [1982] WAR 248.
38. (1992) 107 ALR 672.
39. Id, 692–697. Mason CJ, Dawson and McHugh JJ specifically rejected this view at 679; Brennan and Gaudron JJ did not find it necessary to decide this issue.
40. *Polyukhovich v R* (1991) 101 ALR 545 Deane and Gaudron JJ. Mason CJ, Dawson, Toohey and McHugh JJ found that the law did not infringe any alleged right flowing from the separation of powers.

commented:

> [W]hat is reasonable and appropriate will, to a large extent, depend on whether the regulation is of a kind that has traditionally been permitted by the general law.[41]

While it maybe appropriate to use the "general law" to identify interests that may justify some restriction on free speech, it does seem complacent to assume that a proper balance has always been struck in the past. Denying retrospective effect to the implied prohibitions might be defended as promoting stability in the law. But insofar as this approach suggests that new legislative solutions to new (or old) problems are most at risk, it will do little to assuage the concerns of those who consider that, in the absence of a clear constitutional mandate, the Court should leave to the legislature the task of reconciling public interests and individual freedoms.

41. Supra n 1, 656; *NWN* supra n 1 Brennan J, 706; Deane and Toohey JJ, 728.