THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION AND DISCLOSURE OF GOVERNMENT INFORMATION

*Richard Jolly**

INTRODUCTION

The implied freedom of communication about government and political matters is now firmly entrenched in constitutional jurisprudence, following the High Court decisions in *Lange v Australian Broadcasting Corporation*[1] and *Levy v Victoria*.[2] Both its existence and the manner of its implication, namely from the text and structure of the constitution, are "not open to doubt".[3] Although this more "traditional" approach to the derivation of constitutional implications appears to reduce the likelihood of further implications based upon representative government,[4] the scope and extent of the implied freedom still require considerable elaboration. However, the application of accepted principles to particular areas, even if that leads to an expanded interpretation of the freedom, has a surer foundation than the derivation of new freedoms.

To date the decisions on the implied freedom, and most commentary, have largely concentrated on the more obvious aspects of "free speech" and electoral laws.[5] An area where the implied freedom may have considerable, but as yet unknown, effect is in relation to the disclosure to the public of government information. In terms of freedom

---

* BCom (Hons) (Qld), LLB (Hons) (Qld), LLM (QUT), Senior Legal Officer, Queensland Treasury. The views expressed in this article are those of the author and do not represent the views of Queensland Treasury.

1 (1997) 189 CLR 520.

2 (1997) 189 CLR 579.

3 Ibid at 622 per McHugh J.

4 G Williams, "Sounding the Core of Representative Democracy: Implied Rights and Electoral Reform" (1996) 20 *MULR* 848.

5 In relation to free speech, *Nationwide News Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v WA Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579. In relation to electoral laws, *McGinty v Western Australia* (1996) 186 CLR 140; *Langer v Commonwealth* (1996) 186 CLR 302; *Muldowney v South Australia* (1996) 186 CLR 352. See also *Cunliffe v Commonwealth* (1994) 182 CLR 272; *Kruger v Commonwealth* (1997) 190 CLR 1.

of communication, the ability to obtain information is just as important for the proper functioning of a democratic society as the ability to discuss that information.[6]

The object of this article is to examine the impact of the implied freedom, both upon restrictions on the disclosure of government information and upon the concept of freedom of information, including the more difficult issue of whether the implied freedom may be used to obtain access to government information. Before examining these issues, it is first necessary to consider the nature and scope of the implied freedom, and whether it includes access to government-held information.

THE IMPLIED FREEDOM—ITS APPLICATION TO GOVERNMENT-HELD INFORMATION

Relevant features of the implied freedom

The decision in *Lange* firmly bases the implied freedom in the text and structure of the Constitution relating to representative and responsible government, particularly ss 7, 24, 64 and 128.[7] The implication is thus derived not by asking what is required by representative and responsible government, but "what do the terms and structure of the Constitution prohibit, authorise or require?"[8] The reference to the derivation of implied freedoms from the provisions in the Constitution relating to responsible government is an interesting and new development.[9] The values of the Westminster model of government, of which the concept of responsible government is a central element, were traditionally cited in support of opposition to the disclosure of information directly to the public, prior to the introduction of freedom of information laws.[10] In this regard, the convention of the responsibility of the executive to Parliament, rather than directly to the electorate, was seen as a sufficient democratic safeguard. However the Court made it clear that the principle of responsible government does support the operation of the implied freedom.

The Court also suggested in *Lange* that the provisions in the Constitution relating to responsible government[11] give rise to their own implications, which might expand the scope of the implied freedom. The principal implication is that the responsibility of the executive and ministers to Parliament provides a further basis for the operation of the implied freedom, not only during election periods but during the entire life of Parliament, and a basis for bringing discussion of the conduct of the executive within the implied freedom.[12] However, it could also conceivably imply a limitation on the ability of the executive to deny Parliament information regarding its conduct. Although the conventions of responsible government generally provide for a political

---

6 Australian Law Reform Commission / Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982* (ALRC 77/ARC 40, 1995) at 11-14.

7 Also ss 1, 6, 8, 13, 25, 28, 30, 49, 62 and 83: *Lange* (1997) 189 CLR 520 at 559-562. This confirms the approach of the majority in *McGinty* (1996) 186 CLR 140.

8 *Lange* (1997) 189 CLR 520 at 567.

9 Although see *Nationwide News* (1992) 177 CLR 1 at 47 per Brennan J.

10 P Bayne, *Freedom of Information* (1984) at 13-18; E Campbell, "Public Access to Government Documents" (1967) 41 *ALJ* 73 at 75; K Bishop, "Openness in Government: Can the Government Keep a Secret?" (1997) 4 *ALAJ* 35 at 36-37.

11 Sections 6, 49, 63, 64 and 83.

12 (1997) 189 CLR 520 at 561.

rather than legal remedy in such a situation,[13] an implication arising from the provisions of the Constitution may supplement and strengthen those conventions. The Court in *Lange* referred to the comment of Lord Wilberforce in *British Steel Corporation v Granada Television Ltd* that "the legitimate interest of the public" in knowing about the affairs of statutory authorities and public utilities was served by the obligation of those bodies to report to Parliament or to a minister responsible to Parliament.[14] However the Court left open the nature of the implications which may arise from responsible government.[15]

The relationship between the constitutional freedom and the common law has now been clarified.[16] *Lange* confirmed that the implied freedom affects the common law of defamation by requiring the defence of qualified privilege to be expanded to protect reasonable communication to the public on government and political matters. In this respect the common law must conform to the Constitution to the same extent as statute law.[17] This replaces the "constitutional defence" which a majority held to exist in *Theophanous v Herald and Weekly Times Ltd*[18] and *Stephens v West Australian Newspapers Ltd*,[19] although the end result is effectively the same. The Constitution thus operates to modify the common law rights of persons defamed against the publisher of defamatory matter, rather than directly conferring rights on those persons. However the common law, as affected by the implied freedom, is of a special kind, being constitutionally entrenched and unable to be abrogated by legislation.

Lange confirmed the negative nature of the implied freedom as an immunity from State and Territory laws as well as Commonwealth laws,[20] rather than as a source of individual rights of communication. The Court provided a two-part test for validity of laws:

> First, does the law effectively burden the freedom of communication about government or political matters either in its terms, operation or effect? Secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the [system of government prescribed by the Constitution]? If the first question is answered 'yes' and the second question is answered 'no', the law is invalid.[21]

Although expressed only in terms of legislative power, the same test applies to consideration of whether the common law conforms with the constitutional freedom.[22] Further, as had been suggested in a number of previous decisions,[23] the implied

---

13 However Parliament does have the ability to coerce information from its members, who may also be members of the executive: *Egan v Willis* (1998) 195 CLR 424.

14 [1981] AC 1096 at 1168.

15 (1997) 189 CLR 520 at 561.

16 Compare B Walker, "Has *Lange* Really Settled the Common Law?" (1997) 8 *PLR* 216.

17 (1997) 189 CLR 520 at 562-566, 568-575. However, the precise theoretical basis for this conclusion is difficult to locate: G Kennett, "The Freedom Ride: Where to Now?" (1998) 9 *PLR* 111 at 115-116.

18 (1994) 182 CLR 104.

19 (1994) 182 CLR 211.

20 (1997) 189 CLR 520 at 566, 567.

21 Ibid at 567-568.

22 Ibid at 568.

23 *Nationwide News* (1992) 177 CLR 1 at 51 per Brennan J; *Theophanous* (1994) 182 CLR 104 at 125 per Mason CJ, Toohey and Gaudron JJ, at 149 per Brennan J.

freedom also restricts executive power.[24] In the same way as with legislative power, the implied freedom confers an immunity from action by the executive which would curtail that freedom.[25] This would seemingly apply to common law executive powers,[26] which include the prerogatives of the Crown[27] and those powers that may be exercised by the Crown in common with its subjects,[28] as well as those conferred by legislation.[29] The Court did not provide a test for validity of executive action, but it would seem that the same test is intended to apply. However, the difficulty with the application of the implied freedom to executive power is that, unlike legislative power which may only be exercised by positive action, executive power might also possibly be characterised by an absence of action. For example, a refusal of the executive to disclose information could be characterised as an exercise of executive power (although the act of refusal itself might be seen as a positive act). If the implied freedom were to operate at all in those circumstances, it would compel the executive to act. The Court did not address this difference, and how it might affect the negative operation of the implied freedom as an immunity from legislative or executive action. The way in which the implied freedom affects executive power therefore remains unexplored.

Further, it is not entirely clear as a matter of logic why the constitutionally altered common law should only operate in a negative way. If the Constitution does shape the common law, why should it only assist those who are defending an action and not those who are seeking a remedy?[30] Common law rights include positive rights as well as immunities from legal control.

Scope of the implied freedom

In determining whether the implied freedom applies in general terms to the disclosure of government-held information to the public (or a member of the public), its scope must be considered in two ways: the subjects of communication; and types of communication which are protected. In relation to subjects, the implied freedom protects "government and political matters".[31] Neither *Lange* nor *Levy* definitively decided whether the majority view in *Theophanous* and *Stephens*—that the indivisibility of matters at each level of government means that the implied freedom must apply to government and political matters at all levels of government—was still applicable. In

24 *Lange* (1997) 189 CLR 520 at 561.

25 Ibid at 560.

26 Executive powers are conferred upon the Commonwealth by s 61 of the Constitution, and upon the States by their Constitutions, which by s 106 are made subject to the Commonwealth Constitution: *McGinty* (1996) 186 CLR 140 at 171-172 per Brennan CJ.

27 That is, in the narrow sense of belonging to the Crown only, which include executive prerogatives, privileges and immunities, and proprietary rights: H Evatt, *The Royal Prerogative* (1987); *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 at 320-321 per Evatt J.

28 *Davis v Commonwealth* (1988) 166 CLR 79 at 108 per Brennan J; L Zines, *The High Court and the Constitution* (4th ed 1997) at 254.

29 *Theophanous* (1994) 182 CLR 104 at 164 per Deane J.

30 G Kennett, above n 17 at 112-114.

31 This term would appear to be no different in substance from the different formulations given in earlier cases: *Theophanous* (1994) 182 CLR 104 at 121 per Mason CJ, Toohey and Gaudron JJ.

Levy, both Brennan CJ[32] and McHugh J[33] appeared to doubt this reasoning, the latter requiring matters to be relevant to the system of representative and responsible government provided for by the Constitution.[34] But Kirby J stated that the assumption that the implied freedom applied equally at State and Commonwealth level was "neither fanciful nor unreasonable".[35] However, in *Lange* the Court included discussion of matters at all levels of government within the common law defence to defamation of qualified privilege, due to the increasing integration of social, economic and political matters in Australia,[36] and it is difficult to see why the same reasoning would not also apply to legislative and executive action.[37]

The implied freedom may operate in respect of any matter that may be considered "governmental" or "political", in the sense of relevant to electoral choice. In *Lange* the Court considered that responsible as well as representative government required the freedom to apply to any information concerning "the conduct of the executive branch of government" and the "functioning of government in Australia", which includes ministers, departments, public servants and government instrumentalities.[38] This seems to encompass the wider majority view in *Theophanous*, as including discussion of the conduct of public bodies and public officers,[39] and in *Cunliffe v Commonwealth*, regarding any matters involving a minister of government,[40] and public administration in general.[41] This may perhaps exclude purely private matters,[42] but the scope of any exclusion is likely to be limited. There would be little information held by executive government that is not in some way relevant to voting choice.

In relation to types of communication, the freedom protects communications between the electors and their representatives, as well as between the electors themselves.[43] The concept of representatives would seem broad enough to include members of the executive.[44] In any case the identity of the communicators is not vital: the protection is for the broad environment in which communication occurs, namely "the freedom to receive and disseminate information".[45] Further, it does not only invalidate laws which prohibit or regulate communications, but any law that "effectively burdens" communications by "denying the members of the Australian

32 (1997) 189 CLR 579 at 596.
33 Ibid at 626.
34 Ibid at 622.
35 Ibid at 644.
36 (1997) 189 CLR 520 at 571-572. Also see *Stephens* (1994) 182 CLR 211 at 264 per McHugh J.
37 It will be assumed for the purposes of this discussion that the implied freedom does apply to political matters at all levels of government without distinction: L Zines, *The High Court and the Constitution* (4th ed 1990) at 391; cf G Carney, "The Implied Freedom of Political Discussion—Its Impact on State Constitutions" (1995) 23 *F L Rev* 180 at 187.
38 (1997) 189 CLR 520 at 561.
39 *Theophanous* (1994) 182 CLR 104 at 124 per Mason CJ, Toohey and Gaudron JJ.
40 (1994) 182 CLR 272 at 380 per Toohey J; G Williams, "Engineers is Dead, Long Live the Engineers" (1995) 17 *Syd LR* 62 at 79.
41 (1994) 182 CLR 272 at 298-299 per Mason CJ, at 340 per Deane J.
42 *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 571 per Owen J.
43 *Nationwide News* (1992) 177 CLR 1 at 73-74 per Deane and Toohey JJ; *ACTV* (1992) 177 CLR 106 at 174 per Deane and Toohey JJ; *Lange* (1997) 189 CLR 520 at 560.
44 *Cunliffe* (1994) 182 CLR 272 at 335 per Deane J.
45 *Lange* (1997) 189 CLR 520 at 561; also *Cunliffe* (1994) 182 CLR 272 at 336 per Deane J.

community the opportunity to communicate with each other on political and government matters."[46]

It therefore seems that the implied freedom operates to protect the provision to the public of information held by the executive government. As stated by the Court in *Lange*, "legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia."[47] As the ability to obtain information is an essential part of effective communication, the protection of communications between citizens regarding electoral choices would be ineffective if citizens were denied the information necessary to conduct those communications. The clearest statement of this application of the implied freedom was made in *Lange*:

> Similarly, those provisions which prescribe the system of responsible government necessarily imply *a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government* throughout the life of a federal parliament. Moreover, the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.[48]

Any restriction imposed by legislative or executive action or by the operation of the common law, which reduces the availability of information concerning the executive branch of government to the public or the legislature, will effectively burden the constitutional freedom of communication. However the second limb of the *Lange* test ensures that this does not require government to be conducted in the open at all times. The implied freedom will only invalidate laws that impose restrictions that are not reasonably appropriate and adapted to serving legitimate government interests that are compatible with the maintenance of representative and responsible government.

There are a number of recognised legitimate interests which clearly require secrecy for their protection, such as national security, international relations, law enforcement, Cabinet solidarity, confidential personal and commercial information and non-interference with the effective functioning of government. However, other reasons that have been used to justify secrecy, such as to ensure frankness and candour of discussions and advice at all levels of government, or to prevent ill-informed and unreasonable criticism of government, have a less sound basis. It has been doubted whether the former is necessary other than for Cabinet, or perhaps high level policy, discussions,[49] and the latter would seem to conflict with the comments in *Levy* that criticism of government need not be reasonable or rational.[50] In considering the validity of a law or action, the question will be whether it seeks to achieve an appropriate balance between the legitimate interests of secrecy and freedom of communication. The cogency of these interests will also be relevant to that issue.

---

46 *Levy* (1997) 189 CLR 579 at 623 per McHugh J.

47 (1997) 189 CLR 520 at 560, citing Dawson J in *ACTV* (1992) 177 CLR 106 at 187.

48 Ibid at 561 (emphasis added).

49 *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090 at 1112 per Lord Wilberforce; *Sankey v Whitlam* (1978) 142 CLR 1; *Commonwealth v Northern Land Council* (1993) 176 CLR 604; *Conway v Rimmer* [1968] AC 910.

50 (1997) 189 CLR 579 at 614 per Toohey and Gummow JJ, at 623 per McHugh J.

RESTRICTIONS UPON DISCLOSURE OF GOVERNMENT INFORMATION

Measures which prohibit the voluntary disclosure of government information to the public are the most likely to be affected by the implied freedom. The most apparent of these are government secrecy laws, punitive action taken against "whistleblowers" and the law of confidentiality.

Secrecy laws

A wide array of government secrecy laws in all jurisdictions[51] expressly prevent the disclosure of government information. Although freedom of information (FOI) legislation may override such laws,[52] they still apply to voluntary disclosures made outside the FOI regime. Secrecy laws are likely to be affected by the implied freedom because they impose a direct burden on the freedom to communicate, and so must be reasonably appropriate and adapted to serving a legitimate public interest compatible with the constitutional system of government. Because they specifically target the communication of information about government, such laws may even require "compelling justification".[53] Many legitimate interests which require secrecy—compelling in many cases—could be invoked, but a law could not impose a level of prohibition beyond that necessary to protect those interests.

For example, reg 2.1 of the Public Service Regulations 1999 (Cth) provides that an Australian Public Service (APS) employee must not, except in the course of duty as an APS employee or with the Agency Head's express authority, give or disclose, directly or indirectly, any information about "public business or anything of which the employee has official knowledge". Non-compliance with this obligation renders the officer liable to disciplinary action.[54] In addition, s 70 of the Crimes Act 1914 (Cth) makes it an offence for a Commonwealth officer, past or present, to publish or communicate, except to some person to whom he or she is authorised to publish or communicate it, any fact or document which comes into his or her knowledge or possession by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose.[55]

These provisions are extremely wide, and are not restricted to information for which disclosure would be contrary to the public interest;[56] nor do they allow a defence where disclosure is in the public interest, such as the disclosure of corruption or misconduct. Although blanket secrecy might be justified in certain areas of high sensitivity such as law enforcement, defence and intelligence, it is difficult to justify for all information in all departments. Unless the provisions can be read down to comply

---

51 P Finn, *Official Information* Integrity in Government Project, Interim Report I, (1991).

52 For example, Freedom of Information Act 1992 (Qld), s 16.

53 *ACTV* (1992) 177 CLR 106 at 143 per Mason CJ; *Levy* (1997) 189 CLR 579 at 614 per Toohey and Gummow JJ, at 618-619 per Gaudron J, at 647-648 per Kirby J.

54 Pursuant to Public Service Act 1999 (Cth), ss 13(13) and 15.

55 See also s 79(3) which prohibits disclosure of certain material. These provisions were criticised by the Gibbs Committee Report, which recommended their repeal and replacement with more specific prohibitions: *Final Report of the Review of Commonwealth Criminal Law*, Parl Paper No 371 of 1991.

56 Compare Criminal Code 1899 (Qld), s 86, which only applies to information or documents that it is the person's "duty to keep secret".

with the implied freedom, for example by reading the words "duty not to disclose" as including only inherently "secret" information, or not including those matters which it is in the public interest to disclose, they may be difficult to categorise as reasonably appropriate and adapted measures.

Protection of whistleblowers

An unfavourable aspect of secrecy laws in terms of the implied freedom is their restriction of the disclosure of government corruption, misconduct or maladministration by "whistleblowers". If secrecy laws provide an exemption for whistleblowers, they may be easier to justify as reasonable measures. In this respect, specific whistleblower protection laws have objectives that are compatible with the implied freedom.[57] By providing legislative protection for government employees seeking to expose unlawful, negligent or improper conduct in the public sector,[58] they promote the discussion of government and political matters.

The implied freedom also provides some constitutional protection for whistleblowers. In relation to defamation actions, McHugh J in *Stephens* specifically referred to the beneficial function served by whistleblowers, which required the application of qualified privilege to their honest disclosures.[59] The protection could also extend to other actions taken by the government against such persons, either to prevent disclosure or to punish them, and it is unlikely that any public interest would justify the complete prohibition on disclosure of misconduct or corruption. If actions such as the commencement of prosecution, an application for an injunction, the taking of disciplinary action against an employee or the enforcement of contractual restrictions on disclosure are characterised as the exercise of executive power, those actions could themsleves be constitutionally invalid if they result in the unjustified curtailment of the freedom to communicate. As these measures seem to subject the person to "legal control",[60] the implied freedom may provide some measure of immunity for the whistleblower from legal or disciplinary action. This may be an area where the operation of the implied freedom on executive power is significant.

The law of confidentiality

The equitable principle of confidentiality also restricts the release of government information. Although equity will protect the confidences of government, it is not entitled to the same level of protection as a private person. In *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd*, McHugh J said:

> Governments act, or at all events are required to act, in the public interest. Information is held, received and imparted by governments, their departments and agencies to further the public interest. Public and not private interest, therefore, must be the criterion by

57 For example, Whistleblowers Protection Act 1994 (SA); Whistleblowers Protection Act 1993 (Qld). J McMillan, "The Whistleblower versus the Organization—Who Should be Protected?" in T Campbell and W Sadurski (eds), *Freedom of Communication* (1994) at 226; J McMillan, "Blowing the Whistle on Fraud in Government" (1988) 56 *Canberra Bulletin of Public Administration* 118 at 120.

58 Whistleblowers Protection Act 1994 (Qld), s 3.

59 (1994) 182 CLR 211 at 265.

60 *Lange* (1997) 189 CLR 520 at 561.

> which Equity determines whether it will protect information which a government or governmental body claims is confidential.[61]

Disclosure will therefore not be prevented unless it is likely to injure the public interest because of its effect on matters such as national security, relations with foreign countries or it is prejudicial to the ordinary business of government.[62] Even then, that public interest may be weighed against the public interest in publication, which includes "the public interest in freedom of information and discussion."[63] This also applies to statutory authorities and public utilities.[64]

The law relating to government confidentiality seems to be consistent with the application of the implied freedom, and is grounded in the same concerns:

> It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.[65]

In addition, to the extent that secrecy law burdens the implied freedom by preventing disclosure in some cases, the balancing of the competing legitimate public interests of government in non-disclosure, and of freedom of communication in disclosure, would seem to ensure that the law is no more than is reasonably appropriate and adapted to achieve legitimate government objectives. It provides a further level of protection for the disclosure of government information in appropriate circumstances.

A further consequence of the operation of the implied freedom in relation to confidentiality may be that the executive does not have the capacity to give, obtain, enforce or comply with obligations of confidentiality in relation to governmental or political matters unless that would serve a legitimate public interest consistent with the implied freedom.[66] If this is the case, non-government parties who have provided confidential information to government may also be unable to prevent disclosure of that information, if to do so would improperly burden the implied freedom.

FREEDOM OF INFORMATION AND RIGHTS OF ACCESS

The refusal to disclose information when it is sought by the public may effectively burden the freedom to communicate as much as prohibitions on voluntary disclosure. Thus it needs to be considered whether the implied freedom may operate to require the disclosure of, or provide rights of access to, government-held information. At first glance this issue is largely hypothetical while FOI laws, enacted by the

---

61 (1987) 10 NSWLR 86 at 191.

62 *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52 per Mason J; *Attorney-General v Jonathan Cape Ltd* [1976] QB 752.

63 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 45 per Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ.

64 *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 31 per Mason CJ (Dawson and McHugh JJ agreeing); cf *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 at 1168 per Lord Wilberforce, at 1185 per Lord Salmon (dissenting).

65 *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52 per Mason J.

66 T Brennan, "Undertakings of Confidence by the Commonwealth—Are there Limits?" (1998) 18 *AIAL Forum* 8.

Commonwealth, all States and the Australian Capital Territory,[67] continue to provide citizens with a legally enforceable right to obtain information from government, subject to certain exemptions.[68] However the issue is worth considering for two reasons. Firstly, a jurisdiction might repeal or reduce the scope of its FOI legislation. If there were no FOI legislation, would the implied freedom require governments to release documents to citizens in appropriate circumstances?[69] Secondly, such a right could also have some impact on present FOI laws. In any case the wider question of how the implied freedom generally affects the failure of governments to act deserves some attention.

Constitutional Rights of Access

To use the implied freedom to require access to government information would effectively impose a duty to disclose upon government. There is some difficulty in using the constitutional freedom to define positive rights, thereby using it as a sword and not a shield. It is one thing to *protect* the disclosure of government information, it is another to *require* the disclosure of that information. This would take the implied freedom into new territory.

A limited constitutional right of access to government information has been recognised under the First Amendment of the United States Constitution.[70] A number of Supreme Court decisions in the 1970s had rejected claims of such a right,[71] the view being that "the Constitution does no more than assure the public and the press equal access once government has opened its doors".[72] However in their dissenting judgment in *Houchins v KQED Inc*, Stevens, Brennan and Powell JJ relied on the importance of free speech to self-government to derive a right of access to government information:

> It is not sufficient therefore, that the channels of communication be free of government restraints. Without some form of protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the framers would be stripped of its substance. For that reason information gathering is entitled to some measure of constitutional protection.[73]

In *Richmond Newspapers v Virginia*,[74] the Supreme Court held that the First Amendment prohibited government from preventing public access to criminal trials in

---

67 Freedom of Information Act 1989 (Cth); Freedom of Information Act 1982 (ACT); Freedom of Information Act 1992 (NSW); Freedom of Information Act 1989 (SA); Freedom of Information Act 1982 (Tas); Freedom of Information Act 1991 (Qld); Freedom of Information Act 1992 (Vic); Freedom of Information Act 1991 (WA).

68 FOI laws relate to documents held by government, rather than "information" generally. The discussion of rights of access in this part relates only to documentary information.

69 The Northern Territory has no FOI legislation, but the application of the implied freedom to the Territories remains uncertain: *Kruger v Commonwealth* (1997) 190 CLR 1 at 70 per Dawson J, at 143-144 per McHugh J; contra at 92 per Toohey J, at 118-121 per Gaudron J. See also G Kennett, above n 17 at 122-123.

70 The First Amendment provides: "Congress shall make no law...abridging the freedom of speech or of the press..."

71 *Pell v Procunier* 417 US 817 (1974); *Saxbe v Washington Post Co* 417 US 843 (1974); *Nixon v Warner Communications Inc* 435 US 589 (1978); *Houchins v KQED Inc* 438 US 1 (1978).

72 *Houchins v KQED Inc* 438 US 1 (1978) at 16 per Stewart J.

73 Ibid at 32.

74 100 S Ct 2814 (1980).

the absence of an overriding interest, such as the right of the accused to a fair trial. Although for most of the majority this finding was largely based on an "unbroken, uncontradicted history" of open trials,[75] some members went further and applied the principle to access to government information generally.[76] Brennan and Marshall JJ considered that the First Amendment requires more than free speech: "it has a *structural* role to play in securing and fostering our republican system of self government".[77]

Although a wider right to government information has not yet been adopted by the Supreme Court,[78] it has received considerable support.[79] The opposing school of thought is that the First Amendment provides adequate protection for self-government without the need for access rights. According to this "equilibrium theory", the equilibrium between openness and secrecy is best served by allowing governments to refuse access, but allowing the publication of almost all lawfully acquired information once it is in the open.[80]

Notwithstanding the differences between the United States and Australian constitutional systems that must be kept in mind,[81] these cases have some relevance to the way the implied freedom affects rights of access. The access right is based not on the protection of free speech as a human right, but on the structural role played by political speech in protecting the system of self-government. This "political" theory of free speech developed by the American scholar Alexander Meiklejohn[82] is also reflected in the Australian decisions.[83]

The problem is that the Australian constitutional freedom to communicate is not an individual right. The implied freedom operates only in a negative sense, as an immunity consequent on a limitation upon the exercise of legislative or executive power.[84] In *Levy*, McHugh J explained this operation:

---

75 Ibid at 2825 per Burger CJ, White and Stevens JJ concurring.

76 Ibid at 2831 per Stevens J, at 2833 per Brennan and Marshall JJ.

77 Ibid at 2833 (emphasis added).

78 However the public right to attend criminal trials was confirmed in subsequent decisions: *Globe Newspaper Co v Superior Court* 102 S Ct 2613 (1982); *Press Enterprises v Superior Court* 104 S Ct 819 (1984); *Press Enterprises v Superior Court* 106 S Ct 2735 (1986).

79 A Cox, "Foreword: Freedom of Expression in the Burger Court" (1980) 94 *Harv LR* 1 at 23-4; A Lewis, "A Public Right to Know About Public Institutions: The First Amendment as Sword" (1980) *The Supreme Court Review* 1; A Lewis, "Comment: The First Amendment Right to Gather State-Held Information" (1980) 89 *Yale LJ* 923; T Emerson, "Legal Foundations of the Right to Know" (1976) *Washington ULQ* 1; V Blasi, "The Checking Value of the First Amendment" (1977) 3 *American Bar Foundation Research Journal* 521; M Hayes, "Whatever Happened to the Right to Know?: Access to Government-Controlled Information Since Richmond Newspapers" (1987) 73 *Virginia LR* 1111 at 1121.

80 C Sunstein, "Government Control of Information (1986) 74 *Calif LR* 859.

81 *Theophanous* (1994) 182 CLR 104 at 125 per Mason CJ, Toohey and Gaudron JJ; *Levy* (1997) 189 CLR 579 at 638 per Kirby J.

82 A Meiklejohn, *Free Speech and its Relation to Self Government* (1948) discussed in E Barendt, *Freedom of Speech* (1987) at 20-23.

83 The majority in *Theophanous* made specific reference to Meiklejohn: (1994) 182 CLR 104 at 124 per Mason CJ, Toohey and Gaudron JJ.

84 *Lange* (1997) 189 CLR 520 at 560; *ACTV* (1992) 177 CLR 106 at 150 per Brennan J; *Levy* (1997) 189 CLR 579 at 644 per Kirby J. Also S Gageler, "Implied Rights" in M Coper and G Williams (eds), *The Cauldron of Constitutional Change* (1997) at 85.

> The freedom protected by the Constitution is not, however, a freedom *to* communicate. It is a freedom *from* laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution. Unlike the Constitution of the United States, our Constitution does not create rights of communication. It gives immunity from the operation of laws that inhibit a right or privilege to communicate political or government matters. But as *Lange* shows, that right or privilege must exist under the general law.[85]

The High Court has not ruled out the implication of constitutional rights of access from other sources. In *Australian Capital Television Pty Ltd v Commonwealth*, McHugh J had speculated that there may be a "general right of freedom of communication in respect of the business of government of the Commonwealth".[86] In this respect he cited the statement of Quick and Garran that the Constitution gave rights to examine the public records of the Federal courts and institutions.[87] A right of access to the seat of government was also considered to exist by Griffith CJ and Barton J in *R v Smithers: ex parte Benson*,[88] as implicit in the concept of a federation. However it seems unlikely that the requirement to derive implications from the text and structure of the Constitution would enable the derivation of general rights of access to information held by the Commonwealth government, and certainly not by State governments. In any case, in view of his comments in *Theophanous*[89] and in *Levy* above, it would seem that McHugh J was also referring to this "right" as an immunity from legal abrogation.[90] This issue is therefore better considered from this perspective rather than one of constitutional rights, even though the result may be effectively the same.

Using the implied freedom to obtain access to government information

Rights of access to government-held information might arise from the implied freedom consistently with its negative nature, either as a restriction on executive power, or from the constitutionally altered common law. If the act of denial of access to information could be categorised as an exercise of executive power that is restricted by the implied freedom, the prevention of this action would effectively require the executive to disclose the information. However the only reference in *Lange* to the nature of executive power which may infringe the implied freedom is a power which results in "legal control".[91] This is narrower than the concept of executive power as including "mere capacities",[92] which might include any lawful act or omission on the part of the executive. Such an act or omission could involve the exercise of executive power and "affect" a citizen. However, a mere refusal to provide information requested by a citizen does not subject the citizen to legal control if it does not inhibit any right of the citizen. Further, no "capacity" or authority may be required for a refusal to act, so that it is not an exercise of power. Even if the wider concept of power is applicable, it seems difficult to apply the implied freedom to a denial of access by the executive, unless that

85 *Levy* (1997) 189 CLR 579 at 622 per McHugh J.
86 (1992) 177 CLR 106 at 232.
87 J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 958.
88 (1912) 16 CLR 99 at 108, 109-110, citing *Crandall v State of Nevada* 73 US 35 (1868) at 44.
89 (1994) 182 CLR 104 at 206 per McHugh J.
90 Also *Kruger v Commonwealth* (1997) 190 CLR 1 at 92 per Toohey J, at 116 per Gaudron J.
91 *Lange* (1997) 189 CLR 520 at 560, citing Brennan J in *Cunliffe* (1994) 182 CLR 272 at 327.
92 *Davis v Commonwealth* (1998) 166 CLR 79 at 108 per Brennan J.

denial affects some existing right. That right would have to arise from the common law.

In this respect, if a right of access was sought outside of FOI laws, it would need to be argued that the common law relating to access to government information allows some right of access; or, if it does not, that the common law does not conform with the implied freedom and therefore must be developed to provide rights of access, or at least require some level of disclosure. If the right exists "under the general law", the refusal of access by the executive does become "legal control", because it curtails that right. The citizen may then obtain access either by asserting the common law right or by challenging the constitutional validity of the refusal of access by the executive. There is nothing in the principles set out in *Lange* that logically denies the common law providing positive rights. In contrast to the negative operation of the implied freedom on legislative or executive power, the common law defines the existence and scope of personal rights rather than defining the area of immunity.[93]

The traditional common law position is that, in the absence of a particular legal right or statutory entitlement, there is no right for citizens to obtain information from government.[94] In fact the common law has been conducive to an environment of government secrecy.[95] This was the mischief which FOI legislation was intended to remedy. The law of property, which provides for ownership by the Crown of documents and information held by the executive, also reinforces this position. On a more individual level, the 1985 High Court decision in *Public Service Board of New South Wales v Osmond*[96] held that the common law did not require reasons for administrative decisions to be given.[97] However, the principles of voluntary disclosure, namely the confidentiality cases referred to above, and the defamation defence of qualified privilege, have developed to reflect the importance of the disclosure of government information for democracy, and the need for "compelled openness, and not burgeoning secrecy".[98] These developments could perhaps lead to reconsideration of the decision in *Osmond*. Although that decision related to issues of natural justice for individual persons, rather than the broader purpose of promoting representative government, it seems inconsistent with the general trend.[99]

In relation to the constitutionally modified defence of qualified privilege, in *Stephens* McHugh J considered that information on "the exercise of functions and powers vested in public representatives and officials" is "of real and legitimate interest to every member of the community".[100] On that basis, in *Lange* the Court declared that:

---

93 *Lange* (1997) 189 CLR 520 at 566.

94 P Birkinshaw, *Government and Information* (1990) at 1.

95 E Campbell, "Public Access to Government Documents" (1967) 41 *ALJ* 73; *R v Southwold Corporation; Ex Parte Wrightson* (1907) 97 LT 431; K Bishop, above n 10.

96 (1986) 159 CLR 656, overturning *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447, particularly Kirby P at 465.

97 This right is now provided by judicial review legislation, eg, Administrative Decisions (Judicial Review) Act 1977 (Cth), s 13.

98 P Finn, "Confidentiality and the Public Interest" (1984) 58 *ALJ* 497 at 505 cited by Mason CJ in *Esso Resources Australia Ltd v Plowman* (1995) 183 CLR 10 at 31.

99 P Finn, "A Sovereign People, A Public Trust" in P Finn (Ed), *Essays on Law and Government (Volume 1: Principles and Values)* (1995) at 16.

100 (1994) 182 CLR 211 at 264; see also *Attorney-General v Times Newspapers* [1974] AC 273 at 315 per Lord Simon of Glaisdale.

> Each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia...The common convenience and welfare of Australian society are advanced by discussion—the giving and receiving of information—about government and political matters.[101]

None of these developments has yet given rise to any common law rights of access, or obligation of governments to disclose. The common law could however be developed to do so in any case, without access being constitutionally required. For example, in shaping the common law, the court could take account of the above developments, and the "steady trend in legislation" of FOI laws which reflects the view of parliaments of "what the public interest demands".[102] Although the common law is more conducive to "open government", it seems unlikely that these other developments alone justify the creation of such significant common law rights. To translate the legitimate interest of the public in *receiving* information into a common law right to *obtain* the information seems too large a step. It would therefore seem that the common law presently provides no right of access, and would not do so independently of the implied freedom.

In determining whether the common law conforms with the implied freedom, the approach taken in *Lange*, using the two-part test of validity, is to consider whether the common law rules "as they have been traditionally understood" unnecessarily or unreasonably impair the freedom of government or political communication.[103]

In considering this issue, *Lange* provides no guidance on what is the relevant "common law" to be considered. It may be legitimate to take into account the law relating to disclosure of government information in general, including areas such as confidentiality and the modified law of qualified privilege. If this approach is adopted, the common law is less likely to impair freedom of communication because of the protection it gives to voluntary disclosure. The court might therefore be prepared to adopt an "equilibrium theory" similar to that which applies in the United States, where the public interest in the proper functioning of government is served by allowing government to refuse to disclose information, but the values of the implied freedom are properly served by the protection given to information once it is disclosed. In that case no rights of access to information would be necessary.

If those related areas are not taken into account, it seems clear that the common law effectively burdens the freedom of communication in the manner referred to in *Lange*, by denying to the electors information regarding the government necessary to make an informed electoral choice. The issue then is whether the common law is reasonably appropriate and adapted to serving a legitimate end. Many reasons, including those already referred to above, may be cited in justification of the need for secrecy. However it is doubtful whether a complete denial of access in all circumstances is reasonably appropriate and adapted to protecting those legitimate interests, even considering the developments in related areas of the law, because those other areas provide no assistance where there is no person willing to disclose the information.

---

101 (1997) 189 CLR 520 at 571.

102 *Warnink v Townend & Sons (Hull) Ltd* [1979] AC 731 at 743 per Lord Diplock; cf *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 669 per Gibbs CJ.

103 (1997) 189 CLR 520 at 568.

Arguably the legitimate interests of government could still be adequately protected by a less restrictive position than presently exists under the common law.

If in a constitutional sense the common law is seen to unreasonably impair the implied freedom, it must be adapted so that it conforms with the requirements of the implied freedom in providing some rights of access. How then could it be adapted, and still accommodate those interests which it seeks to protect? Decisions on "public interest immunity" may provide a guide in this regard. Those decisions indicate that for the limited purposes of court proceedings, a blanket prohibition on disclosure of government information is not justified. The protection given to classes of documents cannot be absolute, and the court must balance the injury to the public interest caused by disclosure, against the injury to the administration of justice caused by the exclusion of the evidence.[104] Legitimate government interests can be properly accommodated by this balancing process and orders for limited disclosure or judicial inspection where necessary. However, the courts are extremely reluctant to allow disclosure of some documents such as those disclosing recent Cabinet deliberations unless a compelling reason exists, which will probably only exist in a criminal trial.[105]

If the courts are prepared to compel disclosure for this reason, logically they could also do so to protect representative and responsible government. However the same approach may not be appropriate in this area. Public interest immunity has a different rationale to the implied freedom, namely the protection of the interests of justice and a fair trial. The negative effects of non-disclosure in a trial can be quite severe and immediate, particularly in a criminal trial. Any negative effect of non-disclosure of information to the public on representative government is less direct, as it merely denies some information relevant to voting choice. In addition, when access is sought, the government could invoke the additional interest of the interference with government because of the expense and time involved in dealing with requests for information under such a general right, although those concerns could seemingly be accommodated in the same way as under FOI legislation. There is no evidence that FOI laws have had a deleterious effect on the functioning of government.

Although it is unlikely that any right of access would be as broad as the principles of public interest immunity, or go as far as a right equivalent to a legal FOI right, the "public interest" may not justify the compete denial of access in all cases. It is not fanciful to suggest that a citizen could rely on a right under the modified common law which conforms with the implied freedom to compel disclosure of information in limited cases, where the information is relevant to a highly important issue, such as allegations of corruption, and the "only vice" of disclosure is to subject the government to criticism, or to obtain reasons for administrative decisions affecting that person.[106] However, if the common law is to be modified, it would seem more likely that the Court would do so by strengthening the protection for voluntary disclosure, rather than compelling disclosure. This would avoid the conceptual difficulties associated

104 *Sankey v Whitlam* (1978) 142 CLR 1; *Commonwealth v Northern Land Council* (1993) 176 CLR 604; *Conway v Rimmer* [1968] AC 910. Generally, P Hogg, *Liability of the Crown* (2nd ed 1990) ch 4.

105 *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 618 per Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ.

106 However the latter may require the High Court to overrule *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

with "rights" arising as a result of the operation of the implied freedom, and with overturning well-established common law principles.

Even if the protection of the constitutional system of government given by the implied freedom does not provide direct rights of access to citizens, comments in *Lange* seem consistent with at least a minimal protection for the supply of information to the public, either directly or through Parliament. This may prevent such a complete denial or extensive prohibition of the disclosure of information to the public that would render political communication ineffective. In addition the implied freedom may prevent the denial of information by the executive to Parliament. For example, individual members of Parliament might have rights of access to information held by the executive, even if citizens do not. This becomes more important where Parliament is controlled by the executive and opposition members are unable to obtain information through parliamentary processes. The constitutional protection of the supply of information to Parliament may be a legitimate implication arising from responsible government.[107] This would also be consistent with the comments of the High Court in *Egan v Willis*[108] relating to the necessity for parliamentary scrutiny of the executive.

Impact on freedom of information legislation

There are clear parallels between the constitutional freedom of communication and FOI laws. Both are based upon considerations of democracy and representative government.[109] The rationale of FOI laws is that for government to be truly "representative", it is imperative that citizens be able to obtain information which enables them to make informed choices, and participate in and influence policy making processes. In addition a government that is more open to public scrutiny is more directly accountable to the people.[110]

Although the objectives of FOI legislation are compatible with the implied freedom, it may not be entirely free from constitutional scrutiny. If there is no common law access "right" or minimum standard of disclosure of government information, FOI legislation in its present form seems unlikely to constitute a burden upon the freedom, as it increases rights of access.

However, if a common law right or standard does exist, the effect may be more dramatic. The implied freedom might give rise to an immunity from the operation of

---

107 *Lange* (1997) 189 CLR 520 at 561; *British Steel Corp v Granada Television Ltd* [1981] AC 1096 at 1168.

108 (1998) 195 CLR 424 at 451-452 per Gaudron, Gummow and Hayne JJ, at 475-476 per McHugh J, at 501-503 per Kirby J.

109 *Re Cleary and Department of the Treasury* (1993) AAR 83 at 87; P Bayne, "Recurring Themes in the Commonwealth Freedom of Information Act" (1996) 24 *F L Rev* 287; A Cossins, "Revisiting Open Government: Recent Developments in Shifting the Boundaries of Government Secrecy under Public Interest Immunity and Freedom of Information Law" (1995) 23 *F L Rev* 226; P Bayne and K Rubenstein, "Freedom of Information and Democracy: A Return to the Basics?" (1994) 1 *AJAL* 107; P Bayne, "Freedom of Information and Political Speech" in T Campbell and W Sadurski (eds), *Freedom of Communication* (1994); J Mo, "Freedom of Speech, Freedom of Information and Open Government in Queensland" (1991) 36 *FOI Rev* 58.

110 Freedom of Information Act 1992 (Qld), s 3. FOI Acts also contain rights to obtain, and if necessary correct, personal information, but these are not relevant to this discussion.

laws that inhibit such a right or privilege existing under the general law.[111] If the constitutional standard requires a minimum level of disclosure, the FOI legislation would therefore need to provide an equivalent level of access. If not, its validity might be challenged or the citizen might be able to rely on the access right rather than the legislation to obtain information, and it would be beyond the capacity of Parliament or the executive to exclude that right. Further, specific exemptions could be subject to attack if they effectively burden the implied freedom, unless they are seen to serve a legitimate public interest purpose that is consistent with the constitutional system of government.

Legislatures may also be restricted in the extent to which they can effectively reduce the level of access to information. If exemptions were so widely drafted as to effectively prevent access, or FOI laws were repealed or greatly restricted, then in substance there could be a burden on the freedom of communication. Although the power to make laws also includes the power to repeal them,[112] legislation which reduced the level of disclosure below the constitutionally mandated level could be invalid, either because the amending law itself, or the law which remains after the amendment, improperly burdens the implied freedom.

The existing FOI exemptions are intended to serve the public interest. In *Manly v Ministry of Premier and Cabinet* Owen J considered there to be no tension between the implied freedom and the balancing of competing public interests for FOI purposes.[113] It would seem that the implied freedom at least would be a relevant consideration for determining the "public interest" in disclosure determinations,[114] and may arguably justify a more generous interpretation of FOI laws in favour of disclosure.[115] The implied freedom may therefore have an impact on exemptions that are widely drafted or are used in a way which goes beyond what is necessary to protect legitimate public interests. For example:

- The exemption for Cabinet and Executive Council documents, particularly those which merely have been submitted, or are proposed to be submitted, to Cabinet or Executive Council, even if they have not been specifically prepared for that purpose.[116] Although there is a strong public interest in not disclosing Cabinet deliberative processes, the mere submission to Cabinet of a document does not of itself give rise to any public interest which would prevent its disclosure.
- The "deliberative processes of government" exemption, which prevents disclosure of opinions, advices or deliberations within government at any level, on the basis that they may discourage frankness and candour by public servants, or create ill informed criticism.[117] For the reasons already referred to, these may not be adequate justifications. However where the exemption applies only if disclosure is

111 *Levy* (1997) 189 CLR 579 at 622 per McHugh J.
112 *Kartinyeri v Commonwealth* (1998) 195 CLR 337.
113 (1995) 14 WAR 550 at 571.
114 *Re Cleary and Department of the Treasury* (1993) AAR 83; *Re Eccleston and Department of Aboriginal Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60; *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550.
115 P Bayne and K Rubenstein, above n 109.
116 Freedom of Information Act 1982 (Cth), ss 34 and 35; Freedom of Information Act 1992 (Qld), ss 36 and 37; Freedom of Information Act 1982 (Vic), ss 28.
117 Freedom of Information Act 1982 (Cth), s 36; Freedom of Information Act 1992 (Qld), s 41.

"contrary to the public interest", if that requirement is interpreted to comply with the implied freedom, the exemption may be appropriate.

- The complete exemption of statutory authorities and government owned corporations, from the operation of the FOI law.[118] The Court in *Lange* indicated that the affairs of statutory authorities and public utilities are matters of legitimate interest to the public, and thus communication of those affairs may be protected by the implied freedom, although it is doubtful whether that comment extends to corporations incorporated under the Corporations Law owned by government. The exclusion of a body from the ambit of FOI may require some legitimate interest to be shown, such as the deleterious effect of access on its functions or its commercial performance, although it is possible that such "legitimate interest" is fully served if it is ultimately answerable to Parliament.[119]
- The "commercial in confidence" exemption, for matters for which disclosure would found an action for breach of confidence.[120] If the implied freedom does operate to prevent the executive from entering into certain obligations of confidentiality,[121] the extent to which this exemption can be relied upon by governments will be severely restricted. An undertaking of confidentiality by government which is unenforceable could not found an action for breach of confidence, and thus would not be a valid reason for refusal of disclosure. Accordingly the implied freedom may at least have an indirect effect on this exemption, through its effect on the law of confidentiality.

Whatever the impact of the implied freedom on present FOI laws, it may now be difficult for governments to repeal entirely their FOI laws or drastically reduce the scope of their application with complete impunity, if that amounts to an effective denial of access.

CONCLUSION

The implied freedom of political communication provides some protection for the disclosure of government information, and restricts the curtailment by governments of that disclosure. It is also arguable (but less likely) that the implied freedom may require access to government information to be provided where it is necessary for political communication to be effective. In any case, the common theme of the various areas of law considered in this article has been the need for an appropriate balancing of the "public interest" served by disclosure against that served by non-disclosure. There will always be a need for a certain level of secrecy in government, but any law that does not properly balance these competing interests will come under constitutional scrutiny.

It may now therefore be beyond the capacity of governments to impose an excessive level of secrecy, and the implied freedom will play a crucial role in the

---

118 Freedom of Information Act 1982 (Cth), s 4 exempts Commonwealth owned companies from the Act unless prescribed by regulation, and s 7 exempts the bodies named in Schedule 2.

119 *Lange* (1997) 189 CLR 520 at 561. For example, Government Owned Corporations Act 1993 (Qld), ch 3 Part 11.

120 Freedom of Information Act 1982 (Cth), s 45; Freedom of Information Act 1992 (Qld), s 46.

121 T Brennan, above n 66.

encouragement of a healthy and robust democracy. In this respect, the words of James Madison continue to have a timeless relevance:

> Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information, or the means of obtaining it, is but a prologue to a farce or a tragedy, or perhaps both.[122]

122 G Hunt (ed), 9 *Writings of James Madison* (1910) 103 cited in *Houchins v KQED Inc* 438 US 1 (1978) at 31-32 per Stevens, Brennan and Powell JJ.