CASE NOTES

AUSTRALIAN CAPITAL TELEVISION PTY LTD v. COMMONWEALTH[1]

THE FACTS

The first plaintiff, Australian Capital Television, and the second plaintiff, the State of New South Wales, sought declarations that Part IIID of the Broadcasting Act 1942 (Cth) 'the Act' was invalid. Part IIID was inserted into the Act by the Political Broadcasts and Political Disclosures Act 1991 (Cth) and established a regime regulating the broadcast on electronic media of political advertisements during an election period.[2] The regime applied to all Commonwealth, state and local government elections and referenda.

The Act prohibited the broadcast during an election period of 'a political advertisement', meaning an advertisement containing 'political matter'.[3] 'Political matter' was defined to mean matter intended or likely to affect voting in the relevant election or referendum or matter containing prescribed material.[4] A range of material appropriate to the business of government but having no significant connection with political advertisements or political information was exempted. Broadcasters were, however, permitted to broadcast political matter contained in news or current affairs items or commentary thereon, talkback radio programs, advertisements for or on behalf of charitable organizations, and public health items.[5]

While the Political Broadcasts and Political Disclosures Bill was before the Parliament, the Government introduced amendments imposing an obligation on broadcasters to provide free time for election broadcasts to a political party, person or group to whom the Australian Broadcasting Tribunal 'the Tribunal' had granted free time. Section 95H of the Act required the Tribunal to grant free time to any political party already represented in the relevant legislature and contesting the election with at least the prescribed number of candidates. The Act allocated 90% of the total free time for the election to political parties, distributed in accordance with the regulations. Regulations were, as far as possible, to allocate time according to the proportion of formal first preference votes obtained by

1 (1992) 108 A.L.R. 577 (hereafter referred to as '*ACTV*').

2 'Election period' was defined in s. 4(1) of the Act as the period between public announcement of the proposed polling day or the issue of the writs for the election, whichever was first, and the closing of the poll on polling day.

3 *E.g.* s. 95B(6).

4 *Ibid.* Prescribed material was defined to mean material containing an express or implicit reference to or comment on: the election or referendum concerned; a candidate or group of candidates in that election; an issue before electors in that election; any government or opposition of the relevant legislature; a member of the relevant legislature; and a political party or division thereof. See, *e.g.*, s. 95B(6).

5 S. 95A. The use of these exceptions for explicit political advocacy or criticism was prohibited.

each party at the previous election. In cases not covered by s. 95H, the Tribunal was to consider applications for the grant of free time. It was bound to grant free time to sitting independent senators seeking re-election, amounting in sum to between five per cent and ten per cent of the total free time available. Otherwise the Tribunal had a virtually unfettered discretion.[6] The free time granted was only to be used for 'talking head' advertisements.[7]

The only other exception to the sweeping prohibitions permitted broadcasters to broadcast a party's policy launch, once during the election period and free of charge.[8]

THE ISSUES

The plaintiffs contended that the prohibitions:

(1) contravened a freedom of communication in relation to the political and electoral processes implied in the Constitution;
(2) contravened the express guarantee of freedom of intercourse in s. 92 of the Constitution;
(3) in so far as they applied to state elections, contravened the implied prohibition against Commonwealth interference with the capacity of a state to exercise its legislative, executive and judicial functions.

They also argued that the obligation on broadcasters to broadcast election broadcasts free of charge amounted to an acquisition of property otherwise than on just terms, contrary to s. 51(31) of the Constitution. The majority of the court only needed to consider the first of these issues, so comments on the remainder should be treated with caution.

AN IMPLIED FREEDOM OF POLITICAL COMMUNICATION

Six members of the Court[9] found that the Constitution contains an implied prohibition against legislative or executive infringement of the freedom to discuss governments, governmental institutions and political matters. While the precise arguments adopted by different members of the Court differed in detail, the substance of their reasoning is as follows.

While it is legitimate to reveal implications in the text of the Constitution, it is impermissible to import an implication from extrinsic sources.[10] Two implications are well established: the prohibition of Commonwealth laws which discriminate against a State or unduly impair its capacity to function as such, derived from the federal structure of the Constitution;[11] and the absolute separation of Commonwealth judicial power from Commonwealth

6 Ss 95M(1), (2).
7 S. 95G.
8 S. 95S.
9 Dawson J. dissenting.
10 *West v. D.C.T. (N.S.W.)* (1937) 56 C.L.R. 657, 681-2 *per* Dixon J.; *Essendon Corporation v. Criterion Theatres* (1947) 74 C.L.R. 1, 22-3; *Victoria v. Commonwealth (Payroll Tax* case) (1971) 122 C.L.R. 353, 401-2.
11 See, *e.g.*, *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31; *Queensland Electricity Commission v. Commonwealth* (1985) 159 C.L.R. 192; *State Chamber of Commerce and Industry v. Commonwealth (Second Fringe Benefits Tax* case) (1987) 163 C.L.R. 329.

legislative and executive power.[12] In considering whether a particular limitation on a grant of power is implied in the Constitution, the text must be read in the light of the general law.[13]

Sections 7 and 24 of the Constitution enshrine the principle of representative democracy, that is, the legislative branch of government is ultimately answerable to the Australian people. A constitutionally entrenched representative democracy 'carries with it those legal incidents which are essential to the effective maintenance of that form of government', even though there is no common law right to free discussion of government.[14] Freedom of discussion of political matters is essential to the efficacy of Parliament and to allow electors to cast an effective and responsible vote.[15]

This argument encounters only one difficulty: the end result is arguably inconsistent with the intention of the framers of the Constitution. On this ground Dawson J. refused to find an implied freedom of political communication. His Honour asserted that 'the Australian Constitution, with few exceptions and in contrast to the American model, does not seek to establish personal liberty by constitutional restrictions upon the exercise of governmental power'.[16] The choice was deliberate: indeed, as Brennan J. noted,[17] the 1898 Constitutional Convention explicitly rejected a proposal to include an express guarantee of individual rights based substantially on the 14th Amendment to the Constitution of the United States. In Dawson J.'s view, the framers put their faith in the democratic process to protect Australian citizens against unwarranted incursions upon the freedoms they enjoy. They regarded constitutional guarantees of freedoms as exhibiting a distrust of the democratic process. According to his Honour, this was recognized in the *Engineers*' case,[18] which held that a court cannot prevent the misuse of legislative powers.[19]

The present case is notable for its paucity of discussion of this apparently fundamental issue. Only the Chief Justice gave any real attention to Dawson J.'s reasoning. Mason C.J. argued that the prevailing sentiment of the framers — that there was no need to incorporate a Bill of Rights to protect the rights and freedoms of citizens — is merely one of the unexpressed assumptions on which the Constitution was drafted. Such an assumption stands outside the text of the Constitution and is, therefore, no answer to a submission based on an implication which inheres in the instrument and operates as part of the instrument.[20]

12 *R. v. Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254; *Harris v. Caladine* (1991) 172 C.L.R. 84.

13 Dixon, Sir Owen, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240, 245.

14 *Nationwide News v. Wills* (1992) 108 A.L.R. 681 (*'Nationwide News'), 704-5* **per** *Brennan J.*

15 See especially *Attorney-General v. Times Newspapers* [1974] A.C. 273, 315 *per* Lord Simon of Glaisdale; *Reference re Alberta Statutes* [1938] S.C.R. 100, 132-3, 145-6.

16 *ACTV, supra* n. 1, 628.

17 *Nationwide News, supra* n. 14, 701.

18 *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129, 151-2.

19 *ACTV, supra* n. 1, 628-31.

20 *Ibid.* 591-2.

This argument raises serious questions about how the intent of the framers is to be used in constitutional interpretation.[21] Are not the views held by the framers of s. 92, relied on so heavily by the Court in *Cole v. Whitfield*,[22] and of s. 51(20), relied on in *New South Wales v. Commonwealth*,[23] merely 'unexpressed assumptions'? If so, why is it permissible to use such views? Perhaps the cases can be reconciled if one has resort to the Convention Debates only if two or more constructions of a provision of the Constitution are genuinely open. Here it might be contended that a freedom of political discourse is so clearly a corollary of representative government that the Convention Debates need not be taken into account.

An alternative answer to Dawson J.'s reasoning is that his Honour assumed the existence of that which is threatened by the impugned law. His Honour assumed that the democratic process will protect the rights and freedoms enjoyed by citizens, when the impugned law arguably diminishes the efficacy of that process. On this view, Dawson J.'s reasoning could be supported only if the practical effect of the impugned law was not to hinder substantially the efficacy of the democratic process.

THE SCOPE OF THE FREEDOM

Two questions arise as to the scope of the freedom. What kinds of restrictions, if any, are justified? Does the freedom extend to matters relating to state and local governments?

Under the 'law of an ordered society',[24] the freedom of political communication cannot be absolute. Dawson J., in dissent, allowed the greatest scope for restrictions upon political communication. In his Honour's view, a restriction on political discourse will only be invalid if it denies electors access to the information necessary for the exercise of a true choice of elected representatives.[25]

A full discussion of an intermediate position on the extent to which the freedom can be lawfully curtailed is to be found in the judgments of Brennan J. in *ACTV* and *Nationwide News*. Following *Davis v. Commonwealth*,[26] his Honour held that a law or executive action can infringe the freedom only in so far as it is reasonably and appropriately adapted to the fulfilment of a legitimate purpose (*i.e.* it is proportionate), and in any event cannot substantially impair the capacity of, or opportunity for, the Australian people to form the political judgments required for the exercise of their constitutional functions. The Court must strike an appropriate balance between competing interests: the freedom of political discourse and the public or private interest protected by curtailing the freedom. The practicability of protection by a less severe curtailment of the freedom is an

21 I assume, for the purposes of argument, that the framers' view was truly 'unexpressed'. This is a debatable proposition.

22 (1988) 165 C.L.R. 360.

23 (1990) 169 C.L.R. 482.

24 *Nationwide News, supra* n. 14, 726 *per* Deane and Toohey JJ.

25 *Ibid.* 632.

26 (1988) 166 C.L.R. 79, 100. This approach is consistent with that taken in regard to s. 92: see *Castlemaine Tooheys Ltd v. South Australia* (1990) 169 C.L.R. 436.

important consideration. It is necessary also to examine the nature of the interest served. Thus exigencies of defence or national security, the contemporary risk to other interests in need of protection and the extent to which the protection of the other interest itself enhances the ability of citizens to exercise their democratic rights and privileges are all relevant factors. In practice, at least common law restrictions of the freedom (such as the law of defamation and the law of sedition) are justifiable.[27] Gaudron J.'s judgment accords with this approach.[28]

The remaining members of the Court adopted a very strict view of restrictions on the freedom of political communication. Mason C.J. and McHugh J. distinguished between restrictions which explicitly target ideas and information (the content of electoral communications) and those which target the time, place or mode of communication of ideas or information. Restrictions in the first class will require a 'compelling justification' and will need to be no more than is reasonably necessary to protect the competing public interest.[29] Ordinarily, according to Mason C.J., such restrictions will be an unacceptable form of political censorship. Restrictions on the conduct of elections will be particularly vulnerable to being struck down because it is in that area that the freedom fulfils its primary purpose. Restrictions of the second kind will be more easily justifiable, though again the test is whether the restriction is reasonably necessary or proportionate to achieve the competing public interest.[30]

Deane and Toohey JJ. adopted a similar distinction. Restrictions on political communications 'by reference to their character as such' are permissible only if, 'viewed in the standards of our society', they are either conducive to the overall availability of the means of such communications or are no more than is reasonably necessary for the preservation of an 'ordered and democratic society' or for the protection or vindication of the 'legitimate claims of individuals to live peacefully and with dignity in such a society'.[31] Unlike the formulation of Mason C.J. and McHugh J., this test allows private interests to be considered in weighing up competing interests. It is doubtful whether the test of Deane and Toohey JJ. differs in other respects.

A majority of the Court held that the freedom extends to communications in relation to state and local government affairs. Public affairs and political discussion cannot be subdivided to correspond with the various tiers of government in Australia. Mason C.J. argued that there is no limit to the range of matters that may be relevant to debate in the Commonwealth Parliament or its working and that there is a continuing inter-relationship between the tiers of government, especially as regards federal financial

27 *Nationwide News*, *supra* n. 14, 706-7; *ACTV*, *supra* n. 1, 603-4.

28 *Nationwide News*, *supra* n.14, 656. Her Honour noted that the question of proportionality depends to a large extent on whether the regulation is of a kind traditionally permitted by the general law.

29 Mason, C. J. and McHugh J., referred only to competing public interests and not to competing private interests.

30 *ACTV*, *supra* n. 1, 597-8; 669-70.

31 *Ibid.* 618.

arrangements. Deane and Toohey JJ. noted that the Constitution assumes representative government in the States and, to a limited extent, assumes the cooperation of the States in the electoral process itself (especially ss 12, 15 and 19). Further, political parties or associations are unlikely to be confined to a single level of government. Gaudron J. relied on three considerations: first, ss 51(37) and 128 demonstrate that the distribution of powers and functions between the Commonwealth and the States is not immutable; secondly, the exercise of Commonwealth power frequently affects the States and equally the exercise or non-exercise of State powers may influence decisions as to the exercise of Commonwealth powers; thirdly, the Constitution expressly recognizes State Constitutions (s. 106), State Parliaments (ss 107, 108) and State electoral processes (ss 9, 10, 15, 25, 29, 30, 31, 41, 123, 128) and, in so doing, necessarily recognizes their democratic nature.[32]

A further question about the scope of the implied freedom of political communication is whether it imposes a limit on state legislative power. The likely answer is that, as in the case of s. 92, the limitation on legislative power applies equally to the States and the Commonwealth.[33]

VALIDITY OF THE RESTRICTIONS IN PART IIID OF THE ACT

Five members of the Court (Mason C.J., Deane, Toohey, Gaudron and McHugh JJ.) found that the restrictions imposed upon the freedom of political communication by Part IIID of the Act were impermissible, even though the restrictions did not directly regulate the subject-matter of communication. The reasoning of the majority relied primarily on the discriminatory operation of Part IIID. The free time provisions, weighted heavily in favour of established political parties, discriminated against new and independent candidates. Those excluded from the free time provisions — persons, groups and bodies who were not candidates in the relevant election and were not a political party, such as State and Territory governments, employer and employee associations, business, manufacturing and rural interest groups and public interest organizations — would be dependent on news, current affairs, commentary and talkback programmes. According to Mason C.J., those excluded would be at the mercy of the powerful interests controlling the electronic media.[34] The severe restrictions on freedom of communication failed to introduce a 'level playing-field' in which the majority of the community had access to the electronic media and failed to preserve or enhance fair access to the electronic media. They were, therefore, invalid.

32 *Ibid.* 597 *per* Mason C. J., 617-8 *per* Deane & Toohey JJ., 655-6 *per* Gaudron J. McHugh J. did not expressly discuss the issue, but his inclination towards a general freedom of communication in respect of the business of the government of the Commonwealth suggests he supported the majority on this point: 668. Brennan J.'s formulation of the freedom in the *Nationwide News* case suggests likewise: *Nationwide News*, *supra* n. 14, 706.

33 Brennan J. described the freedom as 'of the kind for which s. 92 of the Constitution provides': *ACTV*, *supra* n. 1, 603.

34 *Ibid.* 600.

McHugh J. focused on another form of discrimination: the restrictions applied only to radio and television and not to the print media. The Senate Select Committee on Political Broadcasts and Disclosures conceded that television was the most effective medium of communication. Parliament could not lawfully prefer one form of lawful communication over another.[35]

Other factors relied on by the majority included the availability of less drastic means to eradicate the evil corruption and undue influence in the political process[36] and the alternative means open to those bent on corrupting that process.[37] Gaudron J. relied on the fact that the ban operated not by reference to any criteria traditionally used to regulate the spoken or written word, but by reference to a period of time during which the freedom of political discourse is of the greatest importance.[38]

The majority refused to sever the free time provisions from the impermissible restrictions on political communication, despite the express intention in s. 95(2) of the Act that the several provisions of the Part should operate to the extent to which they are capable of operating. Their Honours argued that the legislature clearly intended the free time provisions to operate only in the context of the prohibitions. Accordingly, they held invalid the whole of Part IIID of the Act.[39]

Brennan J., however, found that the restrictions were 'comfortably proportionate' to the important object which the legslation sought to obtain, namely, tangibly minimizing the risk of political corruption. Essential to this finding was the experience of the majority of liberal democracies: 'representative government can survive and flourish without paid political advertising on the electronic media during election periods'. The discriminatory operation of the legislation in relation to individuals and interest groups unrepresented in the Parliament was an incidental consequence which did not entail invalidation, since such persons and groups had no personal right to advertise by the electronic media.[40]

FREEDOM OF INTERCOURSE: SECTION 92

The majority, having found implied in the text of the Constitution a freedom of political communication, did not need to consider the argument that the Act infringed the freedom of intercourse guaranteed in s. 92. The plaintiffs argued that 'intercourse' in s. 92 includes electronic commercial broadcasting, a proposition not seriously contested.

Dawson J. held that the restrictions on broadcasting in the Act did not contravene s. 92. Section 92 is concerned with movement or activity across

35 *Ibid.* 671. See also 621-3 *per* Deane and Toohey JJ.

36 *Ibid.* 673 *per* McHugh J., instancing the creation of special offences, disclosure of contributions by donors, public funding, limitations of contributions; 623 *per* Deane and Toohey JJ., describing the argument as 'unconvincing'.

37 *Ibid.* 673 *per* McHugh J.

38 *Ibid.* 657-9.

39 *Ibid.* 601 *per* Mason C. J., 623 *per* Deane and Toohey JJ., 657, 659, 661 *per* Gaudron J. McHugh J. held Part IIID valid in so far as it applied to the Territories: 679.

40 *Ibid.* 612.

state borders. The freedom of intercourse guaranteed in s. 92 is not a prescription for anarchy: *Cole v. Whitfield*[41] decided that the freedom may be qualified by permissible restrictions or regulation. Adopting the reasoning in that case, only laws which have the object of restricting movement across state borders will offend s. 92. A law which incidentally restricts such movement will not offend s. 92 provided that the law is not an inappropriate or disproportionate means of achieving a legitimate end. In the instant case, the Act did not aim to restrict broadcasting across state borders. It aimed to reduce the expenditure of funds on electronic media advertising during election or referendum campaigns. The means chosen to achieve this object were not disproportionate or inappropriate; they were conventional.[42]

APPLICATION OF THE ACT TO THE STATES AND TO LOCAL GOVERNMENT

Only Brennan and Dawson JJ. were compelled to consider the argument that the Act was invalid in so far as it applied to the States and to local government (a creature of the States) because it breached the implied prohibition first enunciated in the *Melbourne Corporation* case. The formulation of this principle which appears to be favoured by the Court is that of Mason J. (as he then was) in *Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation*:[43] the Commonwealth cannot 'in the exercise of its powers discriminate against or "single out" the States so as to impose some special burden or disability on them, unless the nature of a specific power otherwise indicates' and cannot 'inhibit or impair the continued existence of the States or their capacity to function'.

The operation of the Act was clearly not discriminatory: it applied equally to all elections, Commonwealth, state and local government. The Court was divided as to whether the Act infringed the second limb of the prohibition. Brennan J. held that the functions of a state include the discussion of political matters by electors, the formation of political judgments and the casting of votes in a state or local government election. A law curtailing freedom of political discussion in matters relating to the government of a state places a burden upon the functioning of the political branches of its government. Accordingly, s. 95D(3) and (4), which prohibited state governments and candidates and other interested parties in state elections from communicating on political matters with the electorate using the electronic media during an election period, were invalid.[44]

Dawson J., adopting a very narrow approach to the second limb of the *Melbourne Corporation* doctrine, held that s. 95D(3) and (4) were valid. According to his Honour, the section did not interfere with the electoral

41 (1988) 165 C.L.R. 360.
42 *ACTV*, *supra* n. 1, 636-9.
43 (1982) 152 C.L.R. 25, 93.
44 *ACTV*, *supra* n. 1, 614. McHugh J. held similarly that subsections 95D(3) and (4) were laws aimed at controlling the States and their people in the performance of their functions under the Constitutions of the States, although strictly his Honour did not need to consider the issue: 675-7.

process of the States in such a way as to threaten or endanger their continued functioning as essential elements in the Federation and did not unduly impair the capacity of the States to perform their constitutional functions.[45] This is a surprising conclusion in view of Dawson J.'s general approach to the scope of Commonwealth legislative power and particularly his Honour's judgment in *Queensland Electricity Commission v. Commonwealth*.[46] On any view, it is submitted, the Act constituted a substantial interference with the electoral process of the States. Moreover, the inability of the States to communicate with the electorate via the electronic media in relation to a referendum affecting the scope of Commonwealth power cannot be construed as an insignificant impairment of the States' executive functions.

OTHER ISSUES

The plaintiffs in the first action also contended that the free time provisions amounted to an acquisition of property without just terms. Both Brennan and Dawson JJ. rejected this argument. Rights which are not assignable are unlikely to be regarded as proprietary, although this consideration is not necessarily determinative. Part IIID of the Act did not create, extinguish or transfer assignable rights. Neither the Commonwealth nor the beneficiaries of the provisions acquired any proprietary right.

The fact that the Act reduced the value of broadcasting licences (a form of property) was irrelevant. Beneficiaries of the free time provisions did not acquire any of the rights or privileges conferred by such a licence: they acquired only a statutory right to the services of the broadcaster. Since broadcasting is the provision of a service and not property, the statutory right was not proprietary in nature.[47]

Gaudron and McHugh JJ. considered the question whether the Act could be supported in its application to Territory elections by virtue of s. 122 of the Constitution, although the Commonwealth did not press this point in argument. Gaudron J.'s review of authority led her Honour to the view that a law will be authorized by s. 122 if it has a 'sufficient connexion or nexus' with the government of a Territory. Here there existed no sufficient connexion because both the Australian Capital Territory and the Northern Territory had been granted a significant measure of self-government establishing representative and democratically elected legislatures.[48]

McHugh J. reached the opposite conclusion. His Honour did not give any attention to Gaudron J.'s argument, but merely asserted that 'there is no ground for supposing that s. 95C was invalid'. In his Honour's view, s. 122 is not subject to limitations arising from the concept of representative

45 *Ibid.* 644.

46 (1985) 159 C.L.R. 192, 260: 'a Commonwealth law may not unduly interfere with the exercise by a State of its constitutional or governmental functions'.

47 *ACTV*, *supra* n. 1, 616-7 *per* Brennan J., 640-2 *per* Dawson J. McHugh J. agreed with Brennan J.'s reasons on this point: 678.

48 *Ibid.* 661. Deane and Toohey JJ. tended towards the same conclusion: 624.

government. Neither is s. 51(v), in its application to the Territories, subject to any constitutional prohibition or limitation in the nature of the *Melbourne Corporation* doctrine.[49]

DISCUSSION

The reasons of the Court are unsatisfactory in a number of respects. In a case of enormous significance to the development of a theory of constitutional interpretation, there is very little discussion of the underlying issues. Though Dixonian legalism is out of vogue, there is almost no indication that the Court embarked upon a detailed description of the system of government enshrined in the Constitution.

The immediate question arising from the judgments is how many more implied freedoms are embedded in the text of the Constitution, waiting to be revealed. McHugh J. gave us a clue. His Honour's view of the system of representative government embodied in the Constitution involves the concepts of freedom of participation, association and communication. The concept of freedom of association is a potential basis for challenging anti-strike legislation of the kind recently enacted in Victoria.[50] Freedom of participation is a diffuse notion. It is unlikely to prevent undemocratic restrictions on the franchise. Universal adult suffrage did not exist in 1901 and the Constitution does not mandate it. Perhaps, however, we may find here a foundation in the Constitution for the doctrine of natural justice (or procedural fairness, as it is now more commonly known).

It is important to note that the freedom of political communication is not a personal right but a limitation on legislative and executive power. The First Amendment of the Constitution of the United States is not a valid analogy. It is most improbable that 'commercial free speech' is contained in the Commonwealth Constitution.

The most important underlying issue raised by the case is the delineation of legislative and judicial power. The real distinction between the judgments of Brennan J. and of the five members of the Court who held the Act to infringe the implied freedom of political communication lies in their conceptions of judicial power. Brennan J. acknowledged this; the other members of the Court ignored the fact that they usurped a political judgment made by both Houses of the Commonwealth Parliament. McHugh J. dismissively referred to the Commonwealth's argument that the remedy against an erroneous exercise of legislative power lies in the ballot box and not in the courts as the 'rhetoric of the *Engineers'* case'.[51]

Brennan J. was careful to acknowledge that the courts must not substitute a detailed and subjective concept of representative government for that which the legislature has deemed appropriate. The true function of the courts is to impose outer limits beyond which the legislature cannot trespass.

49 *Ibid.* 678-9. Deane and Toohey JJ. tentatively preferred the opposite view, namely that s. 122 is subject to implications drawn from the Constitution as a whole: 624.
50 Employee Relations Act 1992 (Vic.).
51 *ACTV*, *supra* n. 1, 668.

> The role of the court in judicially reviewing a law that is said to curtail the freedom unduly and thereby to exceed legislative power is essentially supervisory. It declares whether a balance struck by the Parliament is within or without the range of legitimate legislative choice. In a society vigilant of its democratic rights and privileges, it might be expected that the occasions when the Parliament deliberately steps outside the range of legitimate choice would be few.[52]

Because the validity of an impugned law must be considered within the contemporary political milieu in which it operates and cannot be determined its validity as a matter of form, the Court must allow the Parliament a 'margin of appreciation'.[53]

Five members of the Court in this case conspicuously failed to allow such a margin. The most telling fact is that many successful liberal democracies ban paid political advertising during election times: the United Kingdom is perhaps the best example. Almost as important is the unwarranted reliance placed on the discriminatory operation of the legislation in assessing the question of proportionality. It appears that a majority of the Court adopted as a principle of Constitutional interpretation the proposition that discriminatory legislation cannot *prima facie* be reasonably and appropriately adapted to achieving a legitimate end.

Perhaps the difference between Brennan J. and the other five members of the Court lies in a different view of acceptable evidence in constitutional cases. Brennan J. examined the argument in favour of the legislation put forward in the report *Who pays the piper calls the tune* by the Parliamentary Joint Standing Committee on Electoral Matters in June 1989. McHugh J. was the only other justice to consider this argument. His refutation of it is, however, unconvincing. Differentiating the freedom of political communication contained in the Australian Constitution from rights to freedom of expression in the constitutions of other liberal democracies does not answer the argument that those other democracies function successfully notwithstanding restrictions on paid political advertising in the electronic media. The other four members of the Court ignored this argument and referred only to the report of the Senate Select Committee on Political Broadcasts and Political Disclosures (November 1991), noting particularly the Senate Committee's comments about the effectiveness of advertising in the electronic media. They ignored the conclusion of the Senate Committee, which supported the legislation.

There is no discussion in any of the judgments about what constitutes acceptable evidence in constitutional cases. Without clear guidelines, the Court leaves itself open to the charge that its members take cognizance only of evidence which supports a view already formed. This case highlights the need for proper judicial consideration of the evidentiary problem, a problem discussed judicially in other jurisdictions and in Australian academic writing.[54]

52 *Nationwide News*, *supra* n. 14, 707.

53 *ACTV*, *supra* n. 1, 610. The phrase is taken from the European Court of Human Rights: *The Observer and the Guardian v. United Kingdom* (1991) 14 E.H.R.R. 153, 178.

54 Kenny, S., 'Constitutional Fact Ascertainment' (1990) 1 *Public Law Review* 134. Kenny discusses the principles adopted by the Supreme Court of the United States at 137-49. She concludes that 'the High Court has seldom discharged its fact-finding responsibility satisfactorily. It has failed . . . to develop appropriate measures of review, especially in challenges to legislative validity': 164.

Another unsatisfactory aspect of the case is the paucity of discussion on the circumstances in and purposes for which regard may be had to the Constitutional Convention Debates and other material contemporary to the framing of the Constitution. This is at the heart of the division between Dawson J. and the other members of the Court. The inference to be drawn from the case appears to be that the Court will resort to the Convention Debates only when there is genuine ambiguity in the meaning of a particular word or phrase in the text. This is consistent with the approach of construing the Constitution as a statute, generally accepted since the *Engineers'* case. Yet, as many cases on statutory interpretation demonstrate, finding ambiguity in a statute is a very easy matter if a court wishes to have regard to extrinsic material.

Finally, one may speculate whether the dominant attitude of the Court in this case towards abuse of legislative power will prevail in challenges to Commonwealth laws on the ground that they exceed the heads of power in s. 51. Accepting as fact the executive's dominance of the legislature has led some members of the Court to treat with derision the view strongly put by the majority in the *Tasmanian Dam* case: the possibility of abuse of a power is no reason for reading down the scope of the power. If the Court is to be consistent, this view might no longer be current in interpreting s. 51 heads of power.[55] It is not material to draw a distinction between protection of fundamental freedoms on the one hand and questions *inter se* on the other. What is lacking is a coherent theory of judicial power and its corollary, a theory of constitutional interpretation.

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55 *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1, 128, 169-70, 222, 254.

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