# Note

# Implying Guarantees of Freedom into the Constitution: *Nationwide News* and *Australian Capital Television*

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## 1. *Introduction*

In 1992, the High Court of Australia delivered three decisions of broad social and political significance. Consequently, the Court, and more specifically the seven judges who comprise the High Court, were subjected to a level of public scrutiny which has seldom been matched. The first was *Mabo*;[1] the second and third were *Nationwide News Pty Ltd v Wills*,[2] and *Australian Capital Television Pty Ltd v The Commonwealth*,[3] in which the High Court found an implication of a guarantee of freedom of communication in the Commonwealth Constitution. The High Court based this implication on democratic principles, derived from the Constitution and the nature of Australian society.[4]

## 2. *The Facts in* Nationwide News v Wills

This case concerned a challenge to the constitutional validity of section 299 of the *Industrial Relations Act* 1988 (Cth). The paragraph at issue read:

> (1) A person shall not: ...
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> (d) by writing or speech use words calculated: ...
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> (ii) to bring a member of the [Industrial Relations] Commission or the Commission into disrepute.

The section stipulated a penalty of $500 or imprisonment or both (in the case of a natural person) or a fine of $1000 (for a body corporate) for the offence.

The case concerns an article printed in *The Australian* on 14 November 1989 in which Mr Maxwell Newton described the members of the then Industrial Relations Commission as "a corrupt and compliant judiciary in the official Soviet-style Arbitration" and as "corrupt labour judges".[5] The edition of *The Australian*

* Special thanks to Professors P H Lane and W Sadurski for their guidance and assistance.

1 *Mabo v Queensland* (No 2) (1992) 66 175 CLR 1.

2 (1992) 66 ALJR 658 (hereinafter *Nationwide News*).

3 (1992) 66 ALJR 695 (hereinafter *Australian Capital Television*).

4 Id at 702 per Mason CJ; 708 per Brennan J, 715–7 per Deane and Toohey JJ; 733–6 per Gaudron J; 741 per McHugh J.

5 Above n2 at 690 per McHugh J.

in question was assembled and edited in Sydney, and distributed through agents to sales outlets in all the Australian States and internal Territories.

In June 1990 the respondent, an officer of the Australian Federal Police laid an information before the Federal Court alleging that the applicant, Nationwide News Pty Ltd, by publishing the article, was guilty of an offence under section 299(1)(d)(ii). In the course of the proceedings, it emerged that Nationwide's case included a claim that the paragraph was invalid for the reason that its enactment was beyond the legislative powers of the Commonwealth, and that part of the proceedings was removed to the High Court. The questions put to the High Court regarding the validity of section 299(1)(d)(ii) were as follows:

1. In all the circumstances... :

(a) Is s299(1)(d)(ii) of the Industrial Relations Act invalid?

(b) Does s92 of the Constitution prevent the application of s299(1)(d)(ii) to the printing, publication and distribution for sale by the applicant of the article?

(c) Does any guarantee implied by the Constitution prevent the application of s299(1)(d)(ii) of the Industrial Relations Act to the printing, publication and distribution for sale by the applicant of the article?

Nationwide submitted that section 299(1)(d)(ii) was not a valid law of the Commonwealth within the provisions of the Constitution, as it was not authorised by section 51(xxxv), the conciliation and arbitration power, or section 51(xxxix), the incidental power. It further argued that those sections should be read within the context of the Constitution as a whole, which includes an "implicit" guarantee of a freedom of communication on matters of public affairs, to the effect that "citizens ... should be free, subject always to laws imposing reasonable regulation, to voice their criticisms of governmental institutions, in particular law-making bodies such as the Parliament and the Industrial Relations Commission."[6] Alternatively it was submitted that the provisions of section 299(1)(d)(ii) were either invalid or rendered ineffective to the article in question by reason of the express guarantee of freedom of interstate intercourse entrenched in section 92 of the Constitution.

The respondent maintained that the paragraph was validly enacted pursuant to section 51(xxxv). It was argued in the alternative that the paragraph was reasonably incidental to the subject matter of the power conferred by section 51 (xxxv), and thus valid under the incidental power contained in section 51(xxxix).

## 3. *The Decision in* Nationwide News v Wills

The court based its decision on multiple grounds, including an implied freedom of communication between and by citizens with respect to matters of public concern. The interplay between fundamental rights and the test of reasonable proportionality was explored in several of the judgments, and three judges considered the protection offered by the express guarantee of freedom of intercourse enshrined in section 92 of the Constitution.

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6 Id at 676.

### *A. Interpretation of the Legislation*

The Court construed section 299(1)(d)(ii) of the *Industrial Relations Act* as pertaining to words calculated adversely to affect the reputation of a member of the Commission in his or her official capacity, rather than in a private role.[7] The paragraph was considered by Brennan J to confer protection on the Commission and its members from any oral or written communication that would be likely to bring them into disesteem, discredit or disgrace.[8] Unless the section were to be read down, section 299(1)(d)(ii) effectively suppresses writing or speech that attacks the repute of the Commission or a member of the Commission even where the attack is warranted.[9] Facts and criticism whether true, fair or reasonable, that have the effect of bringing the Commission or its members into disrepute are all forbidden, under the sanction of a fine and/or imprisonment, by the action of section 299(1)(d)(ii).

The respondent submitted that there should be implied into the section a number of special defences derived, by analogy, from the laws of contempt of court and defamation, thereby allowing valid or truthful criticisms of the Industrial Relations Commission. The Court unanimously rejected these implied defences on the ground that the language of the paragraph was absolute in its terms. Contrary to other sections of the Act, which specifically provided for exceptions or defences, section 299(1)(d)(ii) provided no support for the implication of any defences. Mason CJ held that it was inappropriate for the courts to adapt a statutory offence by reference to common law principles which have evolved for the sole purpose of protecting the courts and the administration of justice, as opposed to arbitral power, particularly where criminal sanctions were involved.[10] Brennan J considered that equating section 299(1)(d)(ii) to the law of sedition — that is, excitement to disaffection against the Sovereign, the Constitution or the institutions of government — was mistaken, in light of the rigid wording of the paragraph.[11]

All the judges held that the section was not severable from the main body of the statute. According to section 15A of the *Acts Interpretation Act* 1901 (Cth), the general terms of an Act may be given a distributive operation and may be severed so as to apply only to cases which fall within the constitutional powers of the Commonwealth.[12] However, because section 299(1)(d)(ii) applied indiscriminately to warranted and unwarranted attacks, the court would have to define the conditions limiting the operation of the provision to unwarranted attacks in order to define the area of valid operation of the provision.[13] The court would thus be exercising a legislative function.[14] Accordingly, the court could not read down the provision.

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7 "Calculated" was considered to mean "likely"; id at 659 per Mason CJ; at 665 per Brennan J; at 677 per Deane and Toohey JJ; at 685 per Dawson J; at 688 per Gaudron J; at 691 per McHugh J.

8 Id at 664.

9 Id at 665.

10 Id at 659.

11 Id at 666.

12 *Bank of NSW v Commonwealth* (1948) 76 CLR at 369–371.

13 Above n2 at 675 per Mason CJ.

14 Ibid.

### B. *The Implied Freedom of Communication*

Only Deane and Toohey JJ, in a joint judgment, and Brennan J discuss in detail the implied freedom of communication. They recognise that Commonwealth legislative power under section 51 is expressed to be "subject to" the Constitution and interpret that reference to include "the fundamental implications of the doctrines of government upon which the Constitution as a whole is structured and which form part of its fabric."[15] Gaudron J also finds that the powers conferred by section 51 do not authorise laws which impair or curtail the implied freedom of political discourse; however, she does not discuss the implication of the freedom in this case, but refers to her judgment in *Australian Capital Television*.[16]

Deane, Toohey and Brennan JJ agree that, on a proper interpretation, the *Engineer's Case*[17] does not preclude the drawing of implications from the Constitution.[18] Brennan J elaborates on the question of constitutional implications, and contrasts the legitimate act of "revealing" implications in and from the text of the Constitution with the misconceived application of limiting principles derived from extraneous sources. Furthermore, Brennan J states that "[i]n considering whether a particular limitation on a grant of power is implied in the Constitution, the text of the Constitution must be read in the light of the general law".[19]

### C. *Sources for the Implication*

Deane and Toohey JJ identify the fundamental doctrines underlying the Constitution and implemented by its provisions.[20] Firstly, there is the concept of federalism which predicates the division of power between a central government and regional governments. In cases such as *Melbourne Corporation*[21] and *Queensland Electricity Commission*,[22] the High Court has invoked this concept to invalidate federal laws which imperil the continued existence of the States. The second fundamental doctrine is the separation of powers, particularly Commonwealth judicial power. Lastly, there are the doctrines of representative democracy and responsible government which find expression in the Constitution. Central to these last-mentioned doctrines is "the thesis that all powers of government ultimately belong to, and are derived from, the governed", which vests legal sovereignty in the people.[23] Brennan J also recognises that these doctrines are "constitutional imperatives" intended to make "the government of the Commonwealth ultimately responsible to the people".[24]

The claim that legal sovereignty is vested in the people is inconsistent with accepted constitutional dogma, according to which ultimate power is vested in Parliament and the Crown. Accordingly, it is necessary for Deane and Toohey JJ

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15 Above n2 at 678 per Deane and Toohey JJ; 666 per Brennan J.
16 Id at 689.
17 (1920) 28 CLR 129.
18 Above n2 at 667 per Brennan J; at 679 per Deane and Toohey JJ.
19 Id at 667–668.
20 Id at 679–680.
21 *Melbourne Coporation v The Commonwealth* (1947) 74 CLR 31.
22 *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192.
23 Above n2 at 679.
24 Id at 669.

to defend their conclusion. They enumerate sections 7 and 24 of the Constitution to demonstrate the control wielded by the electorate over the legislature[25] and invoke section 128 as the ultimate expression of popular control.[26] They also assert that the executive government is subject to the people of the Commonwealth. They dismiss the vesting of executive power in the Crown by section 61 as "now mainly of formal significance".[27] Rather, the doctrine of responsible government as embodied by section 64 dictates that the people of the Commonwealth, in controlling the Parliament, also directly or indirectly control the executive government.[28] In effect, Deane and Toohey JJ equate the undeniable political sovereignty of the people with the legal sovereignty hitherto vested in the Crown. They attribute this change to the nature of constitutional monarchy and to the development of the Crown as an Australian sovereign.[29] Precisely when the Crown's legal sovereignty became a mere formality is not revealed.

### *D. Freedom of Political Discussion as a Necessary Implication*

Recognition of the doctrine of representative democracy as a principle underlying and enacted by the Constitution logically entails recognition of "those legal incidents which are essential to the effective maintenance of that form of government".[30] The judges see the freedom of discussion as one such essential incident. According to Brennan J, "[f]reedom of public discussion of government (including the institutions and agencies of government, is not merely a desirable political privilege; it is inherent in the idea of a representative democracy".[31] In his view, the denial of the freedom to the electorate would be "a parody of democracy".[32] His sentiments are echoed by Deane and Toohey JJ who observe that the people would be unable responsibly to cast a "fully informed vote" because good political judgment depends on adequate communication as to the identity, background, qualification and policies of the candidates for election.[33] Moreover, governmental institutions derive greater efficiency from public debate and criticism.[34] In contrast, suppression of criticism constitutes a threat to the existence of an ordered and democratic society because it "reduces the possibility of peaceful change and removes an essential restraint upon excess or misuse of governmental power".[35]

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25 Section 7 of the Constitution provides for the election of the Senate "chosen by the people of the State"; s24 provides for the election of the House of Representatives "chosen by the people of the Commonwealth".

26 Section 128 prescribes the mode of altering the Constitution, which requires the support of a majority of electors in a majority of the states as well as the support of an overall majority of all electors voting.

27 Id at 679.

28 Id at 680. Section 64 of the Constitution provides that the persons who are appointed to administer federal departments are "the Queen's Ministers of State for the Commonwealth".

29 Id at 679.

30 Id at 669.

31 Ibid.

32 Ibid.

33 Id at 680.

34 Id at 681.

35 Id at 683.

## 4. *The Conclusions in* Nationwide News v Wills

Brennan, Deane and Toohey JJ consider the implied prohibition on laws curtailing freedom of speech and agree that, while the legislation in question serves a valid purpose, section 299(1)(d)(ii) goes much further by prohibiting fair and reasonable criticism of governmental institutions. The judges conclude that section 299(1)(d)(ii) is invalid. Gaudron J reaches the same conclusion, but for the reason that section 299(1)(d)(ii) is not appropriate or adapted to the protection of the Commission or its proceedings authorised by section 51(xxxv). Mason CJ and McHugh and Dawson JJ also base their decision on the issue of section 51(xxxv). Mason CJ and McHugh J apply a purpose or object test to determine the delineations of section 51(xxxv). Mason CJ invokes freedom of expression as a "fundamental value traditionally protected by the common law" in finding that there is an insufficient connection between the purpose of section 299(1)(d)(iii) (namely, the protection of the reputation of and public interest in the Commission), and the means by which it effects that purpose (prohibition of all expression constituting criticism, even honest and fair criticism conducted in good faith).[36] McHugh J adopts a similar strategy. He invokes the freedom of expression as an accepted principle and concludes that, as a consequence of the provision's "far reaching interference" with this freedom, as well as the fact that the protection afforded to the Commission goes beyond that traditionally given to established courts, the provision is invalid.[37] Dawson J also finds that the provision is invalid, but on the basis that there is an insufficient connection between section 299(1)(d)(ii) and the scope of the power conferred by section 51(xxxv) Thus, the provision cannot be characterised as one which is incidental to the power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes. [38]

The argument of the applicant that the provision breaches the freedom of interstate intercourse in section 92 of the Constitution is considered by Brennan, Deane and Toohey JJ. They address two main issues: whether interstate intercourse is distinguishable from interstate trade and commerce, and if it is, what is the content of the guarantee it provides. According to Brennan J, section 299(1)(d)(ii) does not impose a discriminatory burden on interstate intercourse.[39] Deane and Toohey JJ make some general observations about the scope and operation of the guarantee of freedom of intercourse under section 92; however, because their conclusion is based on section 51(xxxv), they find it unnecessary to determine whether the provision is invalid by reason of section 92.[40]

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36 Id at 662.
37 Id at 694.
38 Id at 685–6.
39 Id at 673.
40 Id at 684–5.

## 5. *The Facts in* Australian Capital Television v The Commonwealth

### *A. Background*

This case involved a challenge to Part IIID of the *Broadcasting Act* 1942 (Cth). The amendments contained in Part IIID were introduced into the Act by the *Political Broadcasts and Political Disclosures Act* 1991 (Cth) and were the result of an inquiry by a Federal government Joint Standing Committee into the cost of election campaigns which yielded the report "Who Pays the Piper Calls the Tune".[41] In response to the recommendations of the report, the Commonwealth sought to regulate and restrict the use of electronic media during the run-up to an election, and further, to implement a regime of free broadcasting time for certain eligible persons or parties in lieu of political advertisements.

According to the Minister responsible for the report, the benefits of Part IIID include:

- eliminating possible corruption of the electoral process through a need to raise exorbitant funds for television and radio advertising;
- improving the quality of political communication by ending the use of brief political advertisements;
- creating a level playing field for use of the airwaves, since financial capability would no longer be the basis for allowing access to the electronic media.[42]

### *B. The Legislation*

#### (i) Extent of the Prohibitions

Section 95B imposes prohibitions upon the broadcasting of political advertisements and certain political matters concerned with Commonwealth parliamentary elections or referenda. It is expressed to encompass statements for or on behalf of the governments and government authorities of the Commonwealth,[43] the Territories[44] and the States[45] for the duration of the "election period".[46] Persons other than governments and government authorities are also subjected to these prohibitions, including any broadcaster who may wish to broadcast on their behalf.[47] Finally, the ban can be imposed upon a limited geographical area for the purpose of by-elections.[48] Similar prohibitions are imposed upon broadcasters in relation to elections in the Territories[49] and in the States.[50]

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41 Report No 4 of the Committee, June 1989.
42 House of Representatives *Parliamentary Debates (Hansard)* 9 May 1991 at 3479.
43 *Political Broadcasts and Political Disclosures Act* 1991 (Cth) s95B(1).
44 Id s95B(2).
45 Id s95B(3).
46 Id s4(1).
47 Id s95B(4).
48 Id s95B(5).
49 Id s95C.
50 Id s95D.

### (ii) Qualifications

Section 95B is expressed as prohibiting the broadcast of any matter, other than an exempt matter during an election period. Section 4(1) defines exempt matters as a range of matters relating to government business with little or no connection with political advertisements or political information. Section 95B(6) defines political advertisements as advertisements containing political matters, namely, instances of information which may influence voting in elections or referenda[51] or which make express or implied reference to other prohibited material relevant to a political affiliation or issue before the electorate.[52]

Another substantive qualification to the prohibition is found in section 95A which maintains the electronic media's freedom during the election period to broadcast news, current affairs and radio talkback programmes including commentaries on items relating to, inter alia,[53] public health broadcasts,[54] and broadcasts on behalf of charitable organisations.[55] The latter two categories are accompanied by a caveat providing that they remain apolitical, in the sense that they do not seek to influence voters' opinions in an election.[56]

### (iii) Free Air Time

There is an imposition on broadcasters of an obligation to make available free of charge units of time for election broadcasts. When drafting the provisions for allocating free broadcasting time, it seems that the political landscape of the present day was borne in mind, since the bulk of the allocation is bestowed upon the major parties. Under section 95H(1), 90 per cent of the available air time is given to political parties who have incumbent members of Parliament or who are contesting the election with a prescribed number of candidates. Further, their share of that 90 per cent is determined by calculating the ratio of the respective parties' first preference vote obtained at the last election compared to the total number of such votes.[57]

There is also provision for certain political parties or candidates not falling within section 95H to apply to the Australian Broadcasting Tribunal for a grant of free air time. An incumbent independent Senator standing for re-election is entitled to free air-time;[58] in addition, the Tribunal has a discretion to grant free air time to political parties or independent candidates provided certain criteria are met.[59]

Finally, a broadcaster may, on one occasion only, telecast a political party's policy launch,[60] provided that the broadcast is free of charge and no longer than 30 minutes, and that a reasonable opportunity is available for the other political parties to do likewise.[61]

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51 Id s95B(6)(a).
52 Id ss95B(6)(b)(a)–(b),(f).
53 Id ss95A(1)(a),(b).
54 Id s95A(4).
55 Id s95A(3).
56 Id ss95A(3)(b), 95A(5)(b).
57 Id s95H(2).
58 Id s95L(1).
59 Id s95M(1),(2).
60 Id s95S(1),(5).
61 Id s95S(3).

### C. *The Issues*

The first plaintiff, Australian Capital Television, and the State of New South Wales as second plaintiff, contended that Part IIID was invalid on the following grounds:

- an infringement of a freedom of communication relating to the discussion of political and governmental issues which is an implied fundamental right in the Constitution;
- a breach of the express guarantee of freedom of intercourse in section 92 of the Constitution;
- a severe impediment of the capacity to function of the States and Territories;
- an acquisition of property otherwise than on just terms in contravention of section 51(xxxi) of the Constitution.

## 6. *The Decision in* Australian Capital Television v The Commonwealth

Unlike *Nationwide News*, where the implication of a guarantee of freedom of communication was relied on by only four of the seven judges, in *Australian Capital Television* six of the judges relied on this implication in determining the validity of Part IIID and examined in greater detail the theory of the implied freedom of communication.

### A. *Principles of Interpretation*

On the question of constitutional implications generally, it was held that an implication can be made where "the efficacy of the system logically demands that the intention to imply the restriction of this sort is to be plainly seen in the very frame of the Constitution".[62] Thus, for example, implications from the federal structure of the Constitution have been drawn upon to prohibit the Commonwealth from threatening the continued existence of a State.[63]

Mason CJ states that the implication need not be logically or practically necessary for the preservation of the integrity of that structure, but merely manifest by the ordinary principles of interpretation. However, where the implication is structural and not textual, the implication must be in fact necessary.[64] Mason CJ also notes the critical distinction between an implication, that is, a term or concept that inheres in the instrument, and an unexpressed assumption which is external to the instrument.[65] Whereas an assumption "stands outside the instrument", an implication is "an integral element in the Constitution".[66]

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62 Above n3 at 701.
63 Id at 702.
64 Id at 701.
65 Ibid.
66 Id at 702.

### *B. Representative and Responsible Government*

The doctrines of representative democracy and responsible government, to which Brennan J and Deane and Toohey JJ refer in *Nationwide News*,[67] are considered by six members of the Court in *Australian Capital Television*. These concepts are held to be more than mere unexpressed assumptions, rather they are an integral element in the Constitution itself.

All members of the Court note that the framers of the Constitution rejected general guarantees of fundamental rights and freedoms, believing that these rights were best left to the protection of the people's representatives.[68] However, several provisions of the Constitution were used to establish the principles of representative government and direct popular election.[69]

Mason CJ states that the concept of representative government and representative democracy signifies government by the people through their representatives.[70] Therefore, the sovereign power that resides in the people is exercised by their representatives on their behalf. Mason CJ, and Dawson, McHugh, Deane and Toohey JJ note that this view is contrary to the legal foundation of the Constitution, which owes its force to being a statute of the Imperial Parliament in the legal exercise of its sovereignty. The Constitution was not founded upon the inherent authority of the Australian people to constitute a government.[71] However, Mason CJ acknowledges that this obstacle can be overcome. Despite its initial character, the Constitution is regarded as bringing into existence a system of representative government. Section 128 and the *Australia Act* (UK) 1986 recognise that ultimate authority does reside in the Australian people, as they are the only body that can amend the Constitution.[72]

Brennan and Gaudron JJ do not discuss the legal force of the Constitution in determining the issue of sovereignty. Brennan J makes a cursory mention of section 128 as acknowledging that sovereignty resides in the people.[73] Gaudron J looks to the words of the preamble to the Constitution which recites the agreement of the people to "unite in an indissoluble Federal Commonwealth ... under the Constitution".[74] The preamble, and the requirement that the Constitution can only be altered by the electorate, according to section 128, reinforce representative parliamentary democracy as a fundamental part of the Constitution. The Constitution is said to be "for the advancement of representative government" and contains nothing to derogate from this.[75] Dawson J rejects the notion that sovereignty lies with the people and argues

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67 Above n2 at 669, 679.
68 Above n3 at 702, 708, 716, 723, 733, 741–3.
69 They relied on the findings of Stephen J, in *Attorney General (Cth); ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, that ss7, 24 and 25 of the Commonwealth Constitution establish the principles of representative government and direct popular election.
70 Above n3 at 703.
71 Ibid; also at 721, 742, 716.
72 Id at 703. This approach echoes that of Deane and Toohey JJ in *Nationwide News*, that the "ultimate power of governmental control" resides in the Australian people: above n2 at 679.
73 Above n3 at 708.
74 Id at 734.
75 Ibid.

that any implications must be drawn from the terms of the Constitution and not from external factors.[76]

### C. *The Implication of a Freedom of Communication*

Mason CJ states that the effect of sovereignty residing in the people is that their representatives, in exercising legislative and executive powers, are accountable to the people for their actions and must take account of the views of the represented. An indispensable part of this accountability is freedom of communication, in relation to public affairs and political discussion, so that the people can communicate their views to their representatives:

> Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government ... would cease to be truly representative.[77]

Mason CJ then states that this freedom of communication cannot be confined to communications between the representatives and the electorate, but that "the efficacy of representative government depends also upon free communications on such matters between all persons, groups and other bodies in the community".[78]

All the members of the Court quote the views of Lord Simon of Glaisdale expressed in *Attorney General v Times Newspapers Ltd*: "People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions... the public press being an instrument."[79] Mason CJ concludes that "public participation in political discussion is a central element" in a representative democracy, therefore, freedom of communication is essential for the efficacy of the system of representative government and must be implied into the Constitution.[80]

In implying the freedom of communication in this case, Brennan J follows his line of reasoning in *Nationwide News*, where he held that the implied incidental power that attaches to each head of power under section 51 of the Constitution did not extend to supporting a law "trenching upon that freedom of discussion of political and economic matters which is essential to sustain the system of representative government prescribed by the Constitution".[81] Brennan J notes that the freedom is not a personal right, but rather "an immunity consequent on a limitation of legislative power", which is either derived from an incident of the right to vote or is "inherent in the system of representative and responsible government prescribed by Chapter 1 of the Constitution".[82]

Deane and Toohey JJ also apply their findings in *Nationwide News*. They mention that sections 7, 24 and 128 of the Constitution entitle all citizens to share equally in the exercise of the power of governmental control. This requires

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76 Id at 721.
77 Id at 703.
78 Ibid.
79 [1974] AC 273 at 315.
80 Above n3 at 703–4.
81 Id at 708.
82 Ibid.

the freedom of communication in order to responsibly discharge and exercise the powers of governmental control.[83]

Gaudron J holds that the provisions in the Constitution which provide for the election of the House of Representatives and the Senate "are predicated upon a free society in accordance with the principles of representative parliamentary democracy".[84] Representative democracy is regarded as fundamental to our Constitution. Representative democracy is said to entail consequences, one of which is that "freedom of discussion of matters of public importance is essential to the maintenance of a free and democratic society".[85]

Gaudron J takes an expansive view of the freedoms required by the implication of representative parliamentary democracy. She suggests that it "may entail freedom of movement, freedom of association ... and, perhaps, freedom of speech generally".[86] For Gaudron J, at the very least representative democracy entails the freedom of political discourse, which extends to communication between the members of society generally.[87]

McHugh J also draws the conclusion from sections 7 and 24 that "the people of Australia have constitutional rights of freedom of participation, association and communication in relation to federal elections".[88] The Parliament's powers under section 51 are conferred subject to the Constitution and so can not support legislation that will "derogate from these rights".[89] McHugh J states that "the purpose of the Constitution was to further the institutions of representative and responsible government".[90] This is effected by the provisions of the Constitution which give the people of the Commonwealth "control over the composition of Parliament", and is reinforced by sections 61, 62 and 64, which entrench the system of responsible government in our system.[91]

Dawson J argues that "there is no warrant in the Constitution for the implication of any guarantee of freedom of communication which operates to confer rights upon individuals or to limit the legislative power of the Commonwealth".[92] Dawson J notes that the basic freedoms as found in free and democratic societies exist in Australia, "not because they are provided for, but in the absence of any curtailment of them".[93] According to Dawson J, the true character of the Australian Constitution is that it places its faith in upholding fundamental rights and freedoms in the elected representatives of the people.[94] The principle of representative government, which Dawson J describes

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83 Id at 715–6; above n2 at 679–680.
84 Above n3 at 734.
85 Ibid.
86 Id at 735. While not deciding on these points, Gaudron J implicitly approves Murphy J's decisions on this issue in *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556; *Gallagher v Durack* (1983) 152 CLR 238; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633; and, *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54.
87 Above n3 at 735.
88 Id at 741.
89 Id at 744.
90 Id at 742.
91 Ibid.
92 Id at 722.
93 Ibid.
94 Id at 724.

as "the central feature of the Australian constitutional system" only applies to ensure that the elections of the Commonwealth Parliament involve a true choice by the electors, since "[a] choice is not a true choice when it is made without an appreciation of the available alternatives or, at least, without an opportunity to gain an appreciation".[95] In order to make a true choice, there must be access to information that is essential to make that choice, otherwise it is not an election envisaged by the Constitution. Thus, although Dawson J finds no implied freedom of communication in the Australian Constitution, he argues that it is important to ensure that freedom of speech is not unduly restricted during an election period.[96]

## 7. *The Extent of the Implied Freedom*

In *Nationwide News*, the judges who imply a freedom limit their implication to the discovery of the freedom of political discussion and do not find a general right to free speech. Only Deane and Toohey JJ were prepared to detail the contents of that freedom. First, the freedom is not limited to electoral processes because there is a continuing relationship between the representatives and the represented.[97] Secondly, the freedom operates at two levels to protect the right of communication and access between the people and Parliament and between the people themselves.[98] Thirdly, since it is unrealistic to isolate the three levels of government from one another, the freedom of communication should not be confined to the Commonwealth government but should extend "to all political matters, including matters relating to other levels of government within the national system which exists under the Constitution".[99]

The question of whether the freedom extends to the States and Territories was not decided in *Nationwide News*. Brennan J thought the implied freedom would at least apply to State laws purporting to impair the rights of the people in relation to Commonwealth matters.[100] In *Australian Capital Television*, Brennan J states that the freedom of political discussion extends to the States, although his reasons are not thoroughly disclosed. He acknowledges that the State Parliaments are recognised in the Commonwealth Constitution and that representative government is a characteristic of the State Constitutions and thus, he concludes that "the legislative power of the Commonwealth cannot be exercised substantially to impair freedom of discussion needed to maintain [State] representative government".[101] Furthermore, Brennan J finds that "a [Commonwealth] law which purports to control ... political discussion relating to the State elections purports to burden the functioning of the States with the constraint it imposes"[102] and will thus be invalid since it is contrary to a certain kind of implied independence of the States from Commonwealth control as explained in *Melbourne Corporation*.[103]

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95 Ibid.
96 Ibid.
97 Above n2 at 680.
98 Id at 681.
99 Ibid.
100 Id at 671.
101 Above n3 at 713.
102 Id at 714.
103 Above n21.

In *Nationwide News*, Deane and Toohey JJ suggest that since the States' Constitutions are preserved "subject to" the Australian Constitution by section 106, the implied freedom of political discussion would also operate to confine State legislative powers, presumably even in relation to State matters.[104] This argument was confirmed in their joint judgment in *Australian Capital Television*. Deane and Toohey JJ also refer to the arguments of Gaudron J in that case, to support their conclusion that the Constitution's implication of freedom of communication extends to all political matters on all levels of government.[105]

Gaudron J first establishes that, by virtue of section 122 which gives the Commonwealth power to make laws for the Territories, the freedom of political discourse extends to the governments of the Territories and then expounds three reasons why this freedom also extends to State governments. The first is based on sections 51(xxxvii) and 128 of the Constitution, which demonstrate that the distribution of powers and functions between the Commonwealth and the States is not immutable, since the States are given the power to refer matters to the Commonwealth and since the power to alter the Constitution is vested in the people. The second reason is that the nature of the federal compact is such that the power of the Commonwealth will often impact upon the States and, to a lesser extent, State powers may impact upon the Commonwealth. Thirdly, Gaudron J asserts that since the States' Constitutions, Parliaments and electoral processes are recognised in the Commonwealth Constitution, the States' democratic nature is necessarily recognised and thus it is imperative that the freedom of political discourse be extended to the States.[106]

For Mason CJ, the question of whether the guarantee of a freedom of communication was limited in application was easily solved. According to him, "the concept of freedom to communicate with respect to public affairs and political matters does not lend itself to subdivision", and thus, the implied freedom extends to all matters of public affairs and political discussion, including matters primarily connected with the affairs of a State, local authority or Territory.

To ascertain the extent of the freedom at issue, McHugh J looks at the words in sections 7 and 24 relating to direct popular election:

> The process includes all those steps which are directed to the people electing their representatives — nominating, campaigning, advertising, debating, criticising and voting. In respect of such steps, the people possess the right to participate, the right to associate and the right to communicate.[107]

Thus, the rights conferred by the principles of representative and responsible government extend to all matters that impact upon an election, and not merely the actual process of election itself.

McHugh J contends that the rights that derive from these principles may in fact have a greater reach, by having an application as a general freedom of communication with respect to the business of the government of the Commonwealth.[108] In addition, another result of representative government is the

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104 Above n2 at 682.
105 Above n3 at 716.
106 Id at 736–7.
107 Id at 743.
108 Id at 744.

duty of the representatives to ascertain the opinions of their constituents. This strengthens the case for a wide freedom of communication over all affairs of the Commonwealth Government, though McHugh J found it unnecessary to decide on this issue.[109]

## 8. *The Parameters of the Freedom: Regulations and Restrictions*

In both cases, the notion of an unfettered freedom of speech was rejected. According to Mason CJ in *Australian Capital Television*,

> In most jurisdictions in which there is a guarantee of freedom of communication, speech or expression, it has been recognised that the freedom is but one element ... in the constitution of "an ordered society"... . Hence, the concept of freedom of communication is not an absolute. The guarantee does not postulate that the freedom must always and necessarily prevail over competing interests of the public.[110]

This formulation, that the freedom is not "absolute", is echoed in the joint judgment of Deane and Toohey JJ [111] and by Gaudron J.[112] Brennan J makes a similar point,[113] repeating his comments in *Nationwide News*, that "the Constitution prohibits any legislative or executive infringement of the freedom to discuss governments and governmental institutions and political matters except to the extent necessary to protect other legitimate interests."[114] McHugh J also notes that the rights of the people to participate in federal elections are not absolute rights but are subject to regulation where this is necessary to promote an "honest and fair election process".[115]

Having thus established that the implied freedom may be subject to regulation and restriction, the next question to be considered is when such regulation is permitted. Four of the judges in *Australian Capital Television* base their conclusion on the type of restriction imposed. For Mason CJ, the stringent "compelling justification" test to be applied to those restrictions imposed on free communication targeting ideas or information is distinct from the test to be applied to restrictions imposed on activities or modes of communication.[116] These latter restrictions are justified if the burden on free communication imposed by the restriction is necessary for, and not disproportionate to, the attainment of some competing interest which the restriction is designed to serve. There are three steps implicit in this test; first, the purpose of the restriction must be determined; second, the extent of the restriction and its effect on free communication must be assessed; and finally, it is necessary to attempt to strike a balance between these competing forces.

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109 Ibid.
110 Id at 705.
111 Id at 716.
112 Id at 737.
113 Id at 708.
114 Above n2 at 670.
115 Above n3 at 744.
116 Id at 705.

Deane and Toohey JJ suggest that the justification required for those restrictions which only incidentally impact upon the freedom of communication is much more relaxed that the justification required to permit regulations where the ban is actually on political communication.[117] They make a similar point in *Nationwide News*, conceding that a law whose character is the prohibition or control of public discussion will be more difficult to justify than one which has another character, although both may infringe the freedom to some degree. The former law will be prima facie invalid unless it can be justified as being in the public interest or unless it does not go "beyond what is reasonably necessary for the preservation of an ordered society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity in such a society".[118] They note that from this perspective, "public interest" is to be construed in a "limited sense".[119] Similarly, for McHugh J the justification for laws which prohibit and regulate the very content of electoral communication is much more demanding than that required of laws which have an incidental impact on the freedom of communication.[120]

The test which Gaudron J applies in order to determine whether the regulations imposed are inconsistent with the freedom of political discourse is framed in the terms of *Davis v The Commonwealth*,[121] namely, whether the regulations are "reasonably and appropriately adapted" to achieve some end within the limits of a power conferred on the Commonwealth Parliament by the Constitution. Thus, it is necessary first to characterise the law as one with respect to a subject matter contained in section 51 or some other constitutional provision and subsequently to assess whether the regulation is reasonably and appropriately adapted to that subject matter.[122]

Brennan J does not distinguish between different types of restrictions. The test he establishes is similar to the more relaxed of the tests propounded by Mason CJ. According to him, "[t]he proportionality of the restriction to the interest served is incapable of a priori definition: in the case of each law, it is necessary to ascertain the extent of the restriction, the nature of the interest served and the proportionality to the interest served."[123] However, in *Nationwide News*, the formulation of Brennan J accords with that of Gaudron J in *Australian Capital Television*, that is, there must be a legitimate purpose to be served and the restriction must be "appropriate and adapted" to that purpose.[124] The appropriateness of the protection will be a matter of degree, depending on various considerations including:

- the practicability of a less severe curtailment of freedom
- the importance of the other interest to the rights of the people
- requirements of defence or national security

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117 Id at 716.
118 Above n2 at 682.
119 Above n3 at 717.
120 Id at 744.
121 (1988) 166 CLR 79.
122 Above n3 at 737.
123 Id at 708.
124 Above n2 at 670.

- the contemporary risk to other interests in need of protection
- the "interests of a free and stable society"[125]

According to Brennan J, it is for the Parliament to determine the appropriate balance of protection of an interest against the implied freedom. The court has only a supervisory role of declaring "whether a balance struck by the Parliament is within or without the range of legitimate legislative choice".[126] Similarly in *Australian Capital Television*, Brennan J notes that it is for the Parliament to assess the purpose to be served and "for the Court to say whether the assessment could be reasonably made".[127]

## 9. *The Conclusions in* Australian Capital Television

Of the six judges who implied a freedom of communication, Brennan J stands alone in concluding that the restrictions imposed by Part IIID of the *Political Broadcasting Act* are proportionate to the objects which the law seeks to achieve. He considers that the restrictions imposed by Part IIID are only "partial and temporary", in contrast to those in *Nationwide News* where "the suppression was so broad that the overreaching of the limitation on legislative power was manifest".[128]

In the majority, Mason CJ assumes that the purpose of Part IIID is to safeguard the integrity of the political process and to terminate both the advantage enjoyed by the wealthy in gaining access to the airwaves and the "trivialising" of political debate resulting from brief political advertisements. However, he concludes that the restrictions do not preserve or enhance fair access to the mode of communication which is the subject of the restriction and furthermore, because of the discriminatory effect of the scheme, the severe restriction on freedom of communication is not justified.[129] Deane and Toohey JJ also conclude that these purposes provide insufficient justification for what they term "an effective ban on political communication through two of the most effective means of such communication during the times when such communication is likely to be most significant and effective".[130] Gaudron J asserts that the restrictions imposed are not "reasonably and appropriately adapted" to the ends they seek to achieve[131] and McHugh J finds that the potential for or existence of corruption and undue influence in the political process can not justify the infringement of rights effected by Part IIID.[132]

Dawson J in dissent rejects the implication of a guarantee of a freedom of communication which operates to confer rights upon individuals or to limit the legislative power of the Commonwealth and it is thus necessary for him to consider the other arguments raised in the case. He concludes:

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125 Id at 671.
126 Ibid.
127 Above n3 at 712.
128 Id at 708.
129 Id at 707.
130 Id at 719.
131 Id at 739.
132 Id at 746.

- there is no contravention of the guarantee of freedom of intercourse given by section 92, since Part IIID does not restrict the movement of persons or things, tangible or intangible, across State borders and because the object of the legislation is clearly not to restrict broadcasting across State borders;[133]
- there is no acquisition of property otherwise than on just terms contravening section 51(xxxi), since there is no acquisition of anything of a proprietary nature;[134]
- there is no isolation of the States from the general law applicable to others and hence, there is no discriminatory effect in the legislation.[135]

Brennan J agrees with the findings of Dawson J on the questions of the "singling out" of the States and the acquisition of property and cites a long string of cases to support this conclusion.[136] McHugh J concurs with Brennan J on this point.[137] However, unlike Dawson J, Brennan J argues that the functioning of the States is impeded by section 95D(3) and (4) and thus, these provisions are invalid because they are offensive to the implication which protects the functioning of the States from the burden of the Commonwealth.[138]

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133 Id at 728.
134 Id at 728–9.
135 Id at 729–30.
136 Id at 714–5.
137 Id at 749.
138 Id at 714.