# Freedom of political speech under the Australian Constitution

**Ian McGill reviews the freedom of speech case widely recognised as a turning point in Australian constitutional history**

The decision of the High Court in *Australian Capital Television Pty Limited v The Commonwealth* is one of the most significant cases in the recent history of the Court. Indeed, as a participant, I would like to think the most significant in terms of constitutional interpretation since the *Engineers* case overturned the doctrines of reserved State powers and intergovernmental immunity.

In the arguably legalistic *Engineers* case, the High Court insisted that the words of the Constitution be given their ordinary, natural meaning without making vague and subjective implications based on some unstated concept of federalism. In *Australian Capital Television* the Court by majority found, in the written text of the Constitution, an implied guarantee of freedom of political communication arising from the principle of responsible government. By majority, the whole of Part IIID of the *Broadcasting Act* ("the Ad Ban provisions") was found invalid as inconsistent with the implied guarantee. Apart from Messrs Justices Deane and Toohey (who wrote a joint judgment ) all majority judges wrote separate judgments taking slightly different approaches to the derivation of the guarantee and, most importantly, its content. Although resoundingly rejecting the implication of a guarantee of freedom of communications, Mr Justice Dawson did admit the existence of a more limited constitutional implication.

## An outrageous Act

Some cynics find it difficult to understand how the existence of an implication has been magically uncovered in 1992. In answer, it was not until 1992 that the legislature decided to introduce outrageous legislation which risked distorting the electoral process and thereby interfering with representative democracy. Another answer is that the Constitution is not merely an Act of the Imperial Parliament but an instrument capable of development in step with Australia.

Constitutional interpretation is neither a simple nor scientific exercise. With regard to implied limits on Federal power it is a most difficult exercise indeed. On the one hand, the Court has (despite some nonsensical comment on the case by some Senators recently) the undoubted power to declare invalid laws of a democratically elected Parliament. On the other hand, it must maintain the credibility and legitimacy of judicial review.

For this reason the High Court tends to proceed not by revolutionary or sweeping steps. It proceeds incrementally and usually says no more than is necessary to dispose of the case before it. Accordingly, the repercussions of the implication of a freedom of political communication are tantalisingly unclear in some respects.

## The legislation

The effect of the Ad Ban provisions was to exclude the use of radio and television during election periods as a medium for political campaigning. Even their use for the dissemination of political information, comment and argument and as a forum of discussion was prohibited except insofar as:

(a) Section 95A permitted the broadcasting of news and current affairs items and talk back radio programmes;
(b) Division 3 of the Act permitted free election broadcasts; and
(c) Division 4 permitted the broadcasting of policy launches.

There were some elements of the Ad Ban provisions that clearly troubled the majority of the High Court. Firstly, the discriminatory way in which the free-time provisions operated was disturbing. The statements by the Minister in his Second Reading Speech were not lost on the Court. There was a very substantial element of "jockeying the boys home" in the free-time provisions. If you were not a political party or, even if you were, and you were not already represented in Parliament, the free-time rights were illusory.

Secondly, the Commonwealth argued that the ban did not inhibit broadcasting of news and current affairs items, talk-back radio programs and announcements affecting matters of specific public interest. However, the majority of the Court had obvious and considerable difficulty in the Parliament preferring one form of lawful electoral communication over another.

## The proceedings

The galvanising force behind *Australian Capital Television* was the Nine Network. There is some irony in this because the Nine Network's last brush with the Constitution and the High Court (in *Miller v TCN Channel Nine Pty Limited*) appeared to dampen any possibility of an implied right of freedom of movement or communication. However, in *Australian Capital Television* the decision in *Miller* was explained away as proceeding on the narrow ground of rejecting an implied guarantee operating in the very area of the express guarantee in Section 92 of the Constitution.

The television stations sought interlocutory injunctions on 14 January 1992 restraining the Commonwealth from enforcing or causing to be enforced the Ad Ban provisions and, in the alternative, an expedited hearing of the action. The proceedings were heard by the Chief Justice.

At the time of the interlocutory proceedings elections current or in prospect were:

(a) the by-election for the New South Wales Electoral District of The Entrance (for which the polling day was 18 January 1992);
(b) the election of the House of Assembly in Tasmania for which the polling day was 1 February 1992; and
(c) an ordinary election for the Legislative Assembly for the Australian Capital Territory to be held on 15 February 1992.

The eight plaintiffs had been carefully selected in order to have standing in relation to each of those elections.

## The arguments

The arguments advanced by the plaintiffs were that the Ad Ban provisions constituted a contravention of:

(a) an implied guarantee of a freedom of communication in relation to political and electoral processes;
(b) the express guarantee of freedom of intercourse in Section 92 of the Constitution;

(c) an implied guarantee of freedom of communication arising from the common citzenship of the Australian people;
(d) the implied prohibition against Commonwealth interference with the capacity of a State to function; and
(e) the express Constitutional guarantee of acquisition of property only on just terms.

## Interlocutory relief

It is notoriously difficult to obtain interlocutory relief in constitutional cases. The Court, without compelling grounds, will defer to the enactment of the legislature until the final determination of the matter. However, the commercial television stations drew comfort from strong statements by the Chief Justice in his decision on the injunction proceedings that the arguments raised by the plaintiffs merited the attention of the Full Court.

With the benefit of hindsight, however, I believe that the television stations went within millimetres of an interlocutory injunction. While we had put before the Chief Justice evidence that the affected licensees would suffer a material adverse effect on their revenues as a result of the ban, we were unable to quantify that revenue because (in a legislative error) the Commonwealth had not — at the time the proceedings commenced — gazetted regulations implementing the ban. Without the regulations, and the calculation of free time that had to be broadcast, we could not conclusively prove detriment. In any event an expedited hearing of the action was ordered and the matter was set down for hearing in March 1992.

## The decision

All Judges on the Court found the existence of a Constitutional implication derived from responsible Government. The most narrow was Mr Justice Dawson. To his mind the Constitution provides for a Parliament directly chosen by the people and that must mean a "true choice". Accordingly, an election affected by legislation that denied electors access to the information necessary for the exercise of a true choice *"is not the kind of election envisaged by the Constitution"*, would be *"incompatible with the Constitution"* and would (presumably) be invalid. A slightly broader position was taken by Mr Justice McHugh. Having regard to the provisions of the Constitution relating to representative and responsible Government, *"the people have a Constitutional right to convey and receive opinions, arguments and information concerning matter intended or likely to affect voting in an election for the Senate or the House of Representatives"*.

To Mr Justice Brennan, the Constitution implied a freedom of discussion of political and economic matters essential to maintain the system of representative Government in the Constitution.

Messrs Justices Deane and Toohey characterised the implication as a freedom, within the Commonwealth, of communication about matters relating to the Government of the Commonwealth and of the States and of all levels of public Government within the Commonwealth. The extension of the implication to all three levels of Government is significant and was supported by the Chief Justice, Mr Justice Mason. To the Chief Justice, the implication was constituted by a freedom of communication about public affairs and political discussion at all levels of Government. Such discussion was, in the Chief Justice's mind, indivisible.

To her Honour Justice Gaudron, the Commonwealth's legislative power did not extend to the making of laws that *"impaired the full flow of information and ideas on matters falling within the area of political discourse"*.

In finding the Ad Ban provisions invalid the majority proceeded with due regard and deference to the objectives of the Parliament referred to above. Having found the Constitutional implication, it was necessary then to test the legislation against the implication. That is, to ascertain the extent of the restriction on the implied guarantee of freedom of political discussion, to examine the interests served by that restriction and to examine the proportionality of the restriction to the interest served. Those Judges in the majority who found that the Ad Ban provisions were invalid, necessarily found that the provisions were out of all proportion to the interest or the aims sought by the Parliament.

## Implications

Whether or not the freedom of political discussion amounts to an individual right awaits to be seen. Clearly the freedom is not absolute. There are many restrictions on the dissemination of ideas and information and in each case the question is whether the burden is disproportionate to the competing public interest. For example, there is a clear public interest in the protection of reputation and any State or Commonwealth law conferring the right to protect that reputation would clearly be valid.

Under section 106 of the Constitution the Constitutions of the States are subject to the Federal Constitution. Any exercise of State legislative power inconsistent with the implied guarantee would be invalid. Future developments of the implied guarantee are now awaited with great interest.

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# CAMLA EVENTS

The Communications and Media Law Association is committed to the development, circulation and analysis of communications law and policy issues. In 1992 the Association organised a schedule of luncheons and seminars to further discussion of these issues. Another schedule of events is being prepared for 1993 and will be published in future issues of the Bulletin.

The Bulletin is an important part of CAMLA's commitment to the promotion of debate about communications-related issues. We wish to thank all contributors to the Bulletin during 1992, who gave freely of their time to write articles for publication.

1993 promises to be an equally exciting year, as major new issues are emerging. Contributions to the 1993 Bulletin are welcome and will no doubt earn their authors some special place in heaven.