FREEDOM OF EXPRESSION UNDER THE AUSTRALIAN CONSTITUTION

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I. BACKGROUND

A. INTRODUCTION

Freedom of expression is a broad concept encompassing not only communication by words - written and oral - and pictorial representations but also communication by conduct including symbols and gestures.

While 'freedom of speech' would appear, as a matter of ordinary language, to have a narrower ambit than "freedom of expression" (or, for that matter, 'freedom of communication'), the former has been held, by the United States Supreme Court, to apply for example to:

- demonstrations, picketing and strikes;[1]

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- the wearing of arm bands by school students protesting against the Government's Vietnam war policy;[2]
- the burning of registration papers by a US Serviceman in front of a large crowd;[3]
- the wearing of Nazi uniforms in sympathy with the ideologies of that movement;[4] and
- the burning of a cross, Ku Klux Klan style, inside the fenced yard of a black family.[5]

Without attempting a precise definition of the term, it is sufficient for the purposes of this paper to note that, in this context, 'expression' covers a wide variety of speech and conduct.[6]

Particularly in recent years, freedom of expression has been identified as an essential feature of a representative democracy. For example, in 1986 the Supreme Court of Canada described freedom of expression as:

> ...one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.[7]

B. A QUESTION OF BALANCE

Despite its undoubted importance, freedom of expression is not an absolute freedom.

Calling for the violent overthrow of a government is an exercise of free expression. So, too, is mischievously shouting "fire" in a crowded theatre. So also is the publication of material which is defamatory or which reveals intimate personal details of an individual.

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1 For example, *Clark v Community for Creative Non-Violence* 468 US 288 (1984), *Grayned v City of Rockford* 408 US 104 (1971) and *Brown v Louisiana* 383 US 131 (1966).

2 *Tinker v Des Moines Independent Community School District* 393 US 503 (1969).

3 *United States v O'Brien* 391 US 367 (1968).

4 *Smith v Collin* 436 US 953 (1978).

5 *RAV v City of St Paul, Minnesota* 120 L Ed 2d 305 (1992).

6 There may be substantive, as well as semantic, differences between "speech", "expression" and "communication". Those differences are not explored further in this paper.

7 *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd* (1986) 33 DLR (4th) 174 at 183, McIntyre J, Supreme Court of Canada. See also, for example, Lord Denning, "The Spirit of the British Constitution" (1951) 29 *Canadian Bar Review* 1180 and Australian Constitutional Commission, *First Report of the Constitution Commission* (AGPS, Canberra, 1988) at paras 9.302-9.341.

It is generally accepted that in an ordered society freedom of expression cannot mean freedom to say or do *whatever* one pleases. Restrictions must be placed not only on what is said or done, but when, where and how it is said or done. In practice freedom of expression always involves the *balancing* of competing public interests.

Thus, the freedom of expression in calling for the violent overthrow of a government must be balanced against the community's interest in the stability of its institutions of government. The freedom to shout "fire" in a crowded theatre must be balanced against public health and safety considerations (as well as the public interest in being able to see a movie without unnecessary disruptions). The public interest in a 'free press' must be balanced against the traditional justifications for the laws of defamation. The interest (of at least some sections of the public) in discovering intimate personal details of others must be balanced against the community's increasing awareness of an individual's rights of privacy.

At the heart of the balancing process in each case is the need to identify and assess the moral and social values of the community. It will be contended in this paper that what these interests are and how they should be assessed are questions that are answered largely by reference not to legal principles but to community values and preferences.

The critical question that arises is which institution of government should be responsible - or ultimately responsible - for identifying the relevant values and assessing their relative merits in that balancing process.

That question raises, so far as the role of the courts are concerned, the distinction between statutory and constitutional interpretation.[8] Following the common law tradition, Australian courts have interpreted legislation having regard to fundamental common law rights and freedoms. Legislation has been construed in the light of a presumption that a parliament does not intend to abrogate human rights and fundamental freedoms. Recognising the importance of these rights and freedoms, Australian courts have required the clearest expression of intention before construing legislation in a way which would interfere with them.[9]

A modern analogy can be seen in the implication and application by the courts of the rules of natural justice or procedural fairness. A court will interpret legislation as though the parliament responsible for it intended the rules of procedural fairness to apply. In a particular case, however, a parliament might identify and give priority to a competing public interest that would exclude the application of the rules of procedural fairness. In such a case, provided the legislative intention is

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8 See G Winterton "Extra-Constitutional Notions in Australian Constitution Law" (1986) 16 *Federal Law Review* 223 at 225-6.

9 See eg *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523, *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635-6 and *Wheeler v Leicester City Council* [1985] AC 1054 at 1065.

clearly expressed, the courts - even if they were to hold a different view - must give effect to the will of the Parliament.[10]

If, on the other hand, the rules of procedural fairness were to be incorporated in, and be guaranteed by, a constitution, the courts - and not the parliament - would have the ultimate power and responsibility for identifying and assessing the relative priority to be given to the competing public interest issues.[11]

Similarly, where freedom of expression is recognised and applied by a court in the process of statutory interpretation the will of parliament prevails. Where the same freedom is entrenched in a constitution, the will of the court prevails over the will of parliament.

In many democracies, freedom of expression and other civil liberties are entrenched expressly as constitutional guarantees which operate as restrictions on the exercise of governmental - and particularly legislative - power. Most notable is the Constitution and the Bill of Rights of the United States of America. The First Amendment of that Constitution, hailed as its "most majestic guarantee",[12] provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[13]

C. THE AUSTRALIAN CONSTITUTION

The founders of the Australian Constitution had to decide whether to follow the American Bill of Rights model. They declined to do so. As Justice Dawson explained:

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10 See, for example, *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J.

11 Provided that the courts, under such a constitution, were given the relevant powers of judicial review in relation to the guarantee and that inclusion of the guarantee into the constitution had been effected properly - eg in accordance with the amendment provisions of the constitution.

12 L Tribe *American Constitutional Law* (2nd ed, 1988) p 785.

13 Following the adoption of the Fourteenth Amendment, "State action" became subject to a number or rights guaranteed by the First Amendment. Other countries with express constitutional provisions guaranteeing the right to freedom of expression include Canada, Denmark, Ireland, Japan, the Netherlands, Norway and Sweden (see eg discussion in *Australian Capital Television* note 14 *infra* at 747). The Constitution of the former Soviet Union also had a constitutional guarantee of this nature. Article 125 of the Constitution of the Soviet Union stated:

> In accordance with the interests of the working people, and in order to strengthen the socialist system, the citizens of the USSR are guaranteed by law:
> (a) Freedom of speech;
> (b) Freedom of the press;
> (c) Freedom of assembly and meeting;
> (d) Freedom of street processions and demonstrations.

> The choice was deliberate and based upon a faith in the democratic process to protect Australian citizens against unwanted incursions upon the freedoms which they enjoy. ...Indeed, those responsible for the drafting of the Constitution saw constitutional guarantee of freedoms as exhibiting a distrust of the democratic process. They preferred to place their trust in Parliament to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers. Their model in this respect was, not the United States Constitution, but the British Parliament, the supremacy of which was by then settled constitutional doctrine.[14]

As a result of this deliberate choice, the Australian Constitution contains "only a few scattered guarantees".[15] There is no provision guaranteeing freedom of expression.

Indeed, the guarantees that *are* contained in our Constitution provide a clear indication that the founders did *not* intend the Commonwealth Parliament's powers to be restricted by, and subject to, a freedom of expression guarantee.

Section 116 is particularly important in this context. That section not only picks up, but significantly adds to, those expressions used in the US First Amendment relating to religious freedom.[16] As a result, under the Australian Constitution the law making powers of the Commonwealth (but not the States) are subject to the religious freedoms in s 116.

In stark contrast, the Australian Constitution contains no similar references to other freedoms specified in the US First Amendment (ie freedom of speech, freedom of the press, the right of assembly and the right to petition the government for a redress of grievances).

This point is emphasised by the limited guarantee, in s 92 of the Constitution (and located in Chapter IV, dealing with "Finance and Trade") that "trade, commerce, and intercourse among the States...shall be absolutely free". In 1986 in *Miller v TCN Channel Nine Pty Ltd*[17] the High Court, relying specifically on the provisions of s 92, rejected Justice Murphy's contention that the Constitution should be construed to contain a general guarantee of freedom of expression.[18] As Mason J (as he then was) explained:

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14 *Australian Capital Television Pty Ltd v The Commonwealth [No 2]* (1992) 66 ALJR 695 at 722-3.

15 PJ Hanks *Australian Constitutional Law* (4th ed, 1990) para 1.020. Hanks also noted that "the trend of judicial decision has been to read down most of these guarantees".

16 Section 16 is in the following terms:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

17 (1986) 161 CLR 556.

18 *Ibid* at 569 (Gibbs CJ), 579 per Mason J, 615 per Brennan J and 636 per Dawson J. Justice Murphy discussed the issue at 581-582.

> It is sufficient to say that I cannot find any basis for implying a new s 92A into the Constitution.[19]

Because of the founders' selection of such narrow subjects for constitutional protection, there is a clear, if not compelling, argument that the Australian Constitution excludes, expressly and by implication, any general guarantee of fundamental rights and freedoms.

That argument, accepted by the High Court in *Miller v TCN Channel Nine Pty Ltd* in relation to freedom of expression, continued to have the general support of Chief Justice Mason in the *Australian Capital Television* case where he argued that:

> In the light of this well recognised background, it is difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.[20]

It is critical to appreciate that the omission from the Australian Constitution of an express constitutional guarantee of freedom of expression was *not* the result of an assessment that freedom of expression was, or should be, any less fundamental in Australian society than in American society. The issue was simply whether the courts should have a supervisory role over the Commonwealth Parliament in those matters.

At the time the Australian Constitution was drafted, the founders were aware that because of *Marbury v Madison*,[21] the judiciary in the United States had undertaken the role of interpreting the constitutional limits on state and federal legislative power and of determining, in a particular case, whether those limits had been exceeded. For this purpose, the courts assumed the awesome power of invalidating laws passed by the people's elected representatives.[22] There was no legal or practical requirement for them to do so because it is not necessary for the effective functioning of a democratic system of government - even in a federation - that the judiciary be given such powers.[23]

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19 *Ibid* at 579.

20 Note 14 *supra* at 702.

21 (1803) 1 Cranch, 137; 2 L Ed 60.

22 The Australian Constitution does not expressly confer on the High Court the power to review the validity of, and declare invalid, Commonwealth legislation. See Thomson "Constitutional Authority for Judicial Review: A Contribution from the Framers of the Australian Constitution" in G Graven (ed) *The Convention Debates 1891-1899: Commentaries, Indices and Guide* (1986) p 173.

23 See eg PH Lane "Judicial Review or Government by the High Court" (1966) 5 *Syd L Rev*, 203, GJ Lindell "Duty to Exercise Judicial Review" in L Zines (ed) *Commentaries on the Australian Constitution* (1977) pp

The US Bill of Rights, evidencing a mistrust of the legislature, set out additional *constitutional* limits - instead of relying on *political* limits - on the exercise of governmental powers. As a result, the ultimate responsibility for ensuring the observance of those limits was undertaken by the US judiciary.

In contrast, the founders of the Australian Constitution, with few exceptions,[24] rejected the US approach. In doing so, they limited the role of the High Court in supervising the exercise of power by the State and Federal parliaments.

By not including in the Australian Constitution, as constitutional guarantees, the rights and freedoms in the US Bill of Rights, it was intended that the courts could not invalidate legislation on the ground of inconsistency with a particular right or freedom. As Dawson J pointed out:

> The right to freedom of speech exists here because there is nothing to prevent its exercise and because governments recognise that if they are to attempt to limit it, save in accepted areas such as defamation or sedition, they must do so at their peril. ...In this country the guarantee of fundamental freedoms does not lie in any constitutional mandate but in the capacity of a democratic society to preserve for itself its own shared values.[25]

D. IMPLIED CONSTITUTIONAL LIMITATIONS ON LEGISLATIVE POWER

Under the Australian Constitution the Federal Parliament is empowered to make laws with respect to various matters, most of which are in s 51. If Parliament passes a law that is characterised as falling within the scope of an enumerated head of legislative power, it will be a valid law - unless an express or implied constitutional prohibition is infringed.[26]

In the presence of such express constitutional prohibitions, the vital question is: To what extent can - or should - the High Court make constitutional implications restricting Commonwealth (and State) legislative power?

150, 185-6 and GL Lindell "The Justiciability of Political Questions: Recent Developments" in H Lee and G Winterton (ed) *Australian Constitutional Perspectives* (1992) pp 180, 218-239.

24 For example ss 80 (trial by jury), 92 (freedom of interstate trade) and 116 (freedom of religion). See generally Hanks note 15 *supra*.

25 *Australian Capital Television* note 14 *supra* at 722. In this context it is relevant to note that "the capacity of [Australia's] democratic society to preserve for itself its own shared values" is illustrated not only by the very real political constraints on governments but also by the processes and procedures within the Australian parliaments to scrutinise primary and secondary legislation for compliance with rights standards - see eg P Bayne 'The Protection of Rights - an Intersection of Judicial, Legislative and Executive Action' (1992) 66 ALJR 844, especially at 846-847.

26 The law must also comply with justiciable requirements, including those that are procedural or formal, imposed by the Constitution (eg ss 53-57).

Since the *Engineers'* case,[27] the High Court had adopted only one implied constitutional limitation which could invalidate Commonwealth legislation.[28] That limitation, based on federalism principles, has been used to invalidate legislation on only two occasions.[29]

The notion that a court can invalidate legislation on the ground of incompatibility with a limitation, not expressed in the Constitution's text, but made by the court itself, raises fundamental constitutional and political issues of the (proper) role of the judiciary vis-a-vis the legislatures and the Australian people (or electors).

The High Court has acknowledged that its role under the Constitution of reviewing the validity of legislation is limited. A recent example is Justice Brennan's statement that:

> ...the Constitution reposes the function of determining whether a proposed law is for the peace, order or good government of the Commonwealth in the Parliament exclusively. The courts are concerned with the extent of legislative power but not with the wisdom or expedience of its exercise.[30]

Nevertheless, as Brennan J went on to say, the Court has, particularly in recent times, held that limitations on Commonwealth legislative powers "may be implied in and from the text of the Constitution itself".[31]

Whatever may be gleaned from these statements of principle, the High Court has cautiously approached the question of implied constitutional prohibitions on legislative power. Perhaps the best illustration is the Court's steadfast refusal to draw implications from the principle of federalism that would prevent or restrict the Commonwealth Parliament from making laws on matters that traditionally have been State concerns.[32] The most notable cases have involved the corporations power (s 51(xx)) and the external affairs power (s 51 (xxix)). In the *Tasmanian*

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27 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

28 Although the High Court has also held that the separation of powers is implied in the Constitution, this has been confined largely to the separation of judicial power from legislative and executive power which is consistent with the separation of Chapter III of the Constitution from Chapters I and II. See G Winterton *Parliament, the Executive and the Governor-General* (1983) Ch 4.

29 *Melbourne Corporation v Commonwealth (the State Banking case)* (1947) 74 CLR 31, and *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192. See generally NF Douglas "'Federal' Implications in the Construction of Commonwealth Legislative Power; a Legal Analysis of their Use" (1985) 16 *University of Western Australia Law Review* 105.

30 *Nationwide News Pty Ltd v Wills* (1992) 66 ALJR 658 at 668. It is by no means apparent that that overt acknowledgment - and others like it (eg *Burton v Honan* (1952) 86 CLR 169, 179) - reflect accurately the Courts approach to (or the outcome of) judicial review of Commonwealth legislation - particularly since the distinction between a legitimate inquiry into the extent of constitutional power and an inquiry into the wisdom or expedience of a particular law is, at least in some circumstances, tenuous.

31 *Id.*

32 N Douglas note 29 *supra* at 118-123 and 123-132.

Dam case,[33] three Justices of the Court argued that the ambit of s 51(xxix) should be construed and limited by reference to an implication based on the federal balance of powers. Otherwise:

> ...the Commonwealth would be able to acquire unlimited legislative power. The distribution of powers made by the Constitution could in time be completely obliterated; there would be no field of power which the Commonwealth could not invade, and the federal balance achieved by the Constitution could be entirely destroyed.[34]

Despite this potential result, the majority rejected the suggested implication. In doing so they relied on the *Engineers'* case proposition:

> Any 'extravagant' use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituency and not by the courts.[35]

Justice Brennan also rejected the suggestion that the High Court should:

> ...perform what was said to be the great curial function of sustaining the 'balance of our Constitution' ...[I]t is not the function of this court to strike some balance between the Commonwealth and the States; that would be to confuse the political rhetoric of States' rights with the constitutional question of Commonwealth legislative powers.[36]

Mason J (as he then was) drew attention to serious and delicate institutional problems which would have been involved had the High Court, by creating and using implications, adopted a more assertive role vis-a-vis the Executive and the Parliament. Those problems are aggravated when use is made of vague and subjective standards such as those rejected in the *Engineers'* case. According to Mason J, many of the tests suggested by the minority judges:

> ...are not questions on which the court can readily arrive at an informed opinion. Essentially they are issues involving nice questions of sensitive judgment which should be left to the Executive Government for determination. The Court should accept and act upon the decision of the Executive Government and upon the expression of the will of Parliament in giving legislative ratification to the treaty or convention.[37]

Against this background, the High Court considered arguments in the cases of *Nationwide News Pty Ltd v Wills*[38] and *Australian Capital Television Pty Ltd v The Commonwealth [No 2]*[39] - that it should invalidate two laws of the

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33 *Commonwealth v Tasmania* (1983) 158 CLR 1 (*Franklin Dam* case).

34 *Ibid* at 100 (Gibbs CJ), 196-197 (Wilson J) and 304-305 (Dawson J). The quote is from *Koowarta* (1982) 153 CLR 168 at 198 (Gibbs CJ).

35 *Engineers'* case, note 27 *supra* at 151 cited by Murphy J in *Franklin Dam, ibid* at 169-170.

36 *Franklin Dam* note 33 *supra* at 220, 222.

37 *Ibid* at 125-126.

38 [1992] 66 ALJR 658.

39 [1992] 66 ALJR 695.

Commonwealth Parliament on the basis that the Constitution should be construed to contain an implied guarantee of freedom of expression and that those laws were inconsistent with that guarantee.

The High Court handed down its reasons for its decision in each case on 30 September 1992.

II. THE NATIONWIDE NEWS CASE

Nationwide News Pty Ltd was the holding company of the proprietor of *The Australian*. On 14 November 1989 an article in that newspaper, headed "Advance Australian Fascist", contained a virulent attack on the integrity and independence of the Australian Industrial Relations Commission and its members. It included the following:

> The right to work has been taken away from ordinary Australian workers. Their work is regulated by a mass of official controls, imposed by a vast bureaucracy in the ministry of labour and *enforced by a corrupt and compliant 'judiciary' in the official Soviet-style Arbitration Commission.*
>
> Local trade union soviets, with the benefit of monopoly powers conferred on them by the State and *enforced by the corrupt labour 'judges'* in many industries regulate the employment of each individual ...[40]

Nationwide News Pty Ltd was prosecuted under s 299(1)(d)(ii) of the *Industrial Relations Act* 1988 (Cth).

Section 299(1) of that Act contained provisions designed chiefly for the purpose of establishing and maintaining confidence in the Commission and acceptance of the Commission's authority in performing its tasks.[41] Section 299(1)(d)(ii) provided:

> 299(1) A person shall not:
> ...
> (d) by writing or speech use words calculated:
> ...
> (ii) to bring a member of the Commission or the Commission into disrepute.

The defendant challenged the constitutional validity of s 299(1)(d)(ii) in the High Court. Much depended on the statutory construction of that provision. The respondents (including the Commonwealth) argued, on the basis of earlier judicial authority,[42] that s 299(1)(d)(ii) should be narrowly constructed and, in particular,

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40 Note 38 *supra* at 690. The italics are those of McHugh J.

41 *Ibid* at 668.

42 For example, *Howard v Gallagher* (1988) 79 ALR 111 at 131.

that it impliedly recognised not only general common law defences such as duress, honest and reasonable mistake and necessity but also defences known to the law of contempt and defamation such as justification and fair comment.

In essence, the respondents wanted to avoid the suggestion that the making of an allegation against the Commission could constitute an offence even if those allegations were true.

In rejecting this argument, the High Court unanimously construed s 299(1)(d)(ii) as operating:

> ...to make it an offence to publish matter which brings into disrepute the Commission or any of its members in his or her capacity as a member of the Commission, *irrespective of whether the publication is true or false or whether the offending material constitutes a fair comment on facts truly stated.*[43]

Although the Court unanimously held that the challenged provision was invalid, the six judgments differed widely in the reasons for that conclusion. Three Justices (Mason CJ, Dawson and McHugh JJ) argued, on characterisation grounds, that s 299(1)(d)(ii) was not a law within the core or ancillary scope of the constitutional power relating to conciliation and arbitration (s 51(xxxv).[44] Justices Brennan, Deane and Toohey (in a joint judgment) and Gaudron held that the law either was or may have been within the scope of s 51(xxxv) but, in any event, it infringed "the Constitution's implication of freedom of communication about matters relating to the government of the Commonwealth".[45]

III. THE AUSTRALIAN CAPITAL TELEVISION CASE

The second case, *Australian Capital Television*, squarely raised the issue of an implied prohibition relating to the communication of information and ideas.

The plaintiffs sought declarations that Part IIID of the *Broadcasting Act* 1942 (Cth) was invalid. That Part, headed "Political Broadcasts", was inserted into the Act by the *Political Broadcasts and Disclosures Act* 1991. It was designed to establish a regulatory regime governing broadcasting on television and radio of political advertisements and other matter. Under that regime:

1. political advertising and, with important exceptions, political broadcasting were prohibited during an election period;

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43 Note 38 *supra* at 691 (McHugh J) emphasis added. See also at 660 (Mason CJ), 666 (Brennan J), 678 (Deane and Toohey JJ), 685 (Dawson J) and 688 (Gaudron J).

44 *Ibid* at 660 (Mason CJ), 686 (Dawson J) and 693 (McHugh J).

45 *Ibid* at 666 (Brennan J), 678 (Deane and Toohey JJ) and 689 (Gaudron J).

2. broadcasters were obliged to make available free time for political broadcasts to a party, person or group to whom the Australian Broadcasting Tribunal had granted such free time;
3. criteria were set out according to which the ABT would grant free time for election broadcasts to a political party, person or group;
4. a right was granted to appeal to the Federal Court against a decision by the ABT; and
5. criteria were set out permitting and regulating the broadcasting of a "policy launch" by political parties.

It was conceded by the plaintiffs - and held unanimously by the Court - that all provisions of Part IIID were laws with respect to one or more heads of Commonwealth legislative power.[46] Therefore, the critical questions before the Court were whether there was an implied guarantee of freedom of expression, at least in relation to public and political discussion and, if so, whether Part IIID contravened that guarantee.

The Court held:

1. with Dawson J dissenting, that there should be implied into the Constitution a guarantee of freedom of political expression - although the description and scope of the implication varied widely; and
2. with Brennan and Dawson JJ dissenting, that Part IIID contravened that implication.

V. RESTRICTIONS ON POLITICAL ADVERTISING - SECTION 95B

One key element of the legislative regime challenged in *Australian Capital Television* was contained in s 95B which imposed restrictions on political advertising by means of the electronic media during elections for the Federal Parliament.

The majority of the High Court who ruled s 95B invalid took the view that the restrictions it imposed:

46 Primarily under s 51(v) (the power to make laws with respect to "postal, telegraphic, telephonic and other like services") and the various legislative powers conferred on the Parliament with respect to federal elections and the electoral process (eg ss 10, 29, 31, 51 (xxxvi) and (xxxix)).

> ...severely impair[ed] the freedoms previously enjoyed by citizens to discuss public and political affairs and to criticise federal institutions.[47]

Is that assessment one that would command general acceptance?

In answering that question it is relevant to have regard to the fact that, in the course of the enactment of s 95B, Parliament conducted - over a number of years - a detailed analysis of the need for, and consequences of, the legislation. In particular that analysis included the effect that the proposals would have on the right to freedom of speech under Article 19(2) of the *International Covenant on Civil and Political Rights* to which Australia is a party.[48] (In this respect s 95B stands in stark contrast to the challenged provision in the *Nationwide News* case which Brennan J speculated was the "consequence of a drafting error rather than the result of a deliberate legislative choice" to curtail the freedom to discuss an institution of government.)[49]

Investigations were carried out and reports prepared by two Parliamentary Committees. The first, in June 1989, by the Parliamentary Joint Standing Committee on Electoral Matters, was entitled "Who pays the piper calls the tune". The second, in November 1991, by the Senate Select Committee on Political Broadcasts and Political Disclosure, was a report on the Bill when it was before the Senate. Among the issues raised in these reports and the Minister's second reading speech[50] were:

1. Expenditure on political advertising for Federal elections in the electronic media rose from $4.4m in the 1984 election, to $9.2m in the 1987 election to more than $15m in the 1990 election.
2. There was a greatly increased reliance by political parties on corporate sponsorship.
3. This led to grave concerns that that reliance rendered parties vulnerable to corruption and undue influence by those who donated to political campaign funds. Hence the objective:

   > The electoral system should ensure that large financial sponsors, having paid the piper, do not also call the tune.[51]

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47 Note 39 *supra* at 699 (Mason CJ). See also at 718 (Deane and Toohey JJ who described the restrictions as "very substantial") and at 739 (Gaudron J who described them as "serious curtailment of the freedom of political discourse").

48 Article 19(2) requires parties to guarantee the right of freedom of expression. Article 19(3) provides that the right may be limited in the interests of public order.

49 Note 38 *supra* at 671.

50 House of Representatives, *Parliamentary Debates* (Hansard) 9 May 1991 at 3477 ff.

51 Preface to the Parliamentary Joint Standing Committee on Electoral Matters. Taking the matter a step further, Brennan J argued that:

4. The risks to the integrity of the political process was not confined to donations to major parties. For example, in the 1990 Federal election expenditure on political broadcasting by persons other than political parties was $1.7m. Of that figure, over $1.1m was spent by the logging industry. The Australian Conservation Foundation spent just over $25,000. As the Government argued:

> The reality is that only the rich can get their message across by...means [of electronic advertising].[52]

5. In addition, there were strong grounds for arguing that political advertising on television "trivialised the subject". The Committee was warned about the dangers of following the US example where, it has been contended, televised political advertising "at best lacks substance and at worst obscures and distorts crucial issues".[53] Indeed, the Senate report saw merit in the conclusions of two political scientists that:

> ... banning television advertising by political parties and pressure groups 'might well safe-guard aspects of Australian democracy which televised political advertising itself has put at risk'".[54]

In other words, "the advertising industry's loss might be democracy's gain".[55]

6. A direct way of minimising the risk of corruption, reducing the untoward advantage of wealth in the formation of political opinion and putting an end to the trivialising of political debate was to limit the expenditure which an individual or body could make on political advertising.
7. That approach had been tried but had "proved to be unworkable".[56]
8. These problems were not confined to Australia; nor was the solution adopted a novel experiment unique to Australia. The Senate examined the position of major liberal democracies throughout the world. Paid political advertising on the electronic media is prohibited - either absolutely or during election periods - in the United Kingdom, Ireland, France, Norway, Sweden,

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It can hardly be doubted that reduction in the cost of effective participation in an election campaign reduces one of the chief impediments to political democracy. (Note 39 *supra* at 710).

52 Note 50 *supra* at 3480.

53 T Moran "Format Restrictions on Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech" (1992) 67 *Indiana Law Journal* 663 cited by Brennan J in *Australian Capital Television*, note 39 *supra* at 713, and Senate Report p 28 para 4.6.5.

54 Senate Report p 34 para 4.11.7.

55 *Ibid.*

56 Minister's Second Reading Speech, note 50 *supra* at 2848.

> the Netherlands, Denmark, Austria, Israel and Japan.[57] Of the nineteen countries examined, only five - Australia, Canada, New Zealand, Germany and the United States allowed paid advertisements on the electronic media.[58]

Against that background, and for those reasons, the Parliament enacted s 95B banning political advertising on the electronic media during election periods.

Essentially, the ban was directed at the very expensive 30 or 60 second TV "grabs" that gained for the proprietors of the electronic media outlets - particularly commercial television stations - enormous financial profits. One might suggest, with only a little cynicism, that what was really at stake was not freedom of expression but rather the economic rewards associated with it.[59]

Left untouched by the Act were other ways in which political information and ideas could be communicated. The challenged legislation:

1. did not affect the electronic media's broadcast of news, current affairs (including the so-called 'great debates') or 'talk back' programmes;
2. left entirely untouched the print media; and
3. had no effect on the other methods of disseminating political views such as public meetings, door knocks and the distribution of hand bills.

Did this ban on political advertising during election periods really constitute a 'severe impairment' on the "freedoms previously enjoyed by [Australian] citizens?"[60] Did it constitute a "very substantial interference with the freedom of political communication of the people of the Commonwealth"?[61] Was it a "serious curtailment of [our] freedom of political discourse"?[62] Was it, as Justice McHugh stated, "a matter of no relevance" that the legislation:

> leaves open numerous campaign techniques and methods to candidates and other participants in the election process to get their ideas, policies, arguments and opinions across to the electorate?[63]

Did the ban so restrict the flow of political information or our ability to make a political assessment so as to affect adversely the exercise of our right (or duty) to

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57 It is significant that many of the countries which ban political advertising - either generally or only during election times - have constitutions guaranteeing the right to freedom of expression. These include Denmark, Ireland, Japan, the Netherlands, Norway and Sweden. It is also significant that the legal challenge to the UK ban, based on Article 10 of the European Convention for the Protection for Human Rights and Fundamental Freedoms, failed. (See Brennan J *supra* note 39 at 710).

58 Senate Report, Appendix 5.

59 Cf *Canadian Newspaper Co and Globe and Mail v City of Victoria* [1988] 2 WWR 22 at 252 and AW MacKay "Freedom of Expression: Is it All Just Talk?" (1989])68 *Canadian Bar Rev* 713 at 718-719.

60 *Australian Capital Television*, note 39 *supra* at 699.

61 *Ibid* at 718.

62 *Ibid* at 739.

63 *Ibid* at 745.

vote? Did it unduly inhibit the system of representative democratic government established by the Constitution?

Alternatively, was it the case that:

> It was open to the Parliament to make a low assessment of the contribution made by electronic advertising to the formation of political judgments. It was open to the Parliament to conclude, as the experience of the majority of liberal democracies had demonstrated, that representative government can survive and flourish without paid political advertising on the electronic media during election periods?[64]

Opinions on these policy issues vary enormously. The legislation concerned very serious matters that were subjected to years of parliamentary, community and scholarly analysis and debate. One could not expect unanimity . The High Court itself was divided. But even if one agrees with the assessments of the majority of the High Court and disagrees with the assessments of the majority of our Parliamentary representatives, the question remains: why should the views of the High Court, rather than those of Parliament, have determined the matter?

The opposing argument is set out in Dawson J's powerful dissenting opinion. The question for the Court, in his view, was:

> ...not whether the legislation ought to be regarded as desirable or undesirable in the interests of free speech or even of representative democracy... [I]t is for Parliament, within the limits prescribed by the Constitution, to provide the form of representative democracy which we are to have and in doing so it may adopt measures about which there may be a considerable variation of opinion... The object of the prohibition of political advertising was, therefore, to enhance rather than impair the democratic process. ...In these circumstances, I am unable to conclude that the prohibition of political advertising which the legislation in question effects is incompatible with the constitutional requirement that an elector be able to make an informed choice in an election. That being so, it is not for the Court to express any view whether the legislation goes far enough or further than is necessary to achieve its object. These are matters for Parliament and not the Court.[65]

Brennan J also dissented. At the heart of his judgment is the acknowledgement that:

> ...the Court must allow the Parliament what the European Court of Human Rights calls a 'margin of appreciation'.[66]

Who, but the High Court, is to determine, in a particular case, whether that margin should be wide or narrow? That is the critical difference between the reasoning of Dawson J and Brennan J. For Dawson J, whether certain legislation

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64 *Ibid* at 713. The matters set out in this passage would appear to be matters related to the "wisdom and expedience" of the exercise of legislative power - matters which Brennan J had earlier acknowledged were not the concern of the Court; note 30 *supra* with accompanying text.

65 *Ibid* at 724-5.

66 *Ibid* at 712.

is desirable or undesirable in the interests of free expression is for the Parliament itself to determine. For Brennan J, the Court might allow the Parliament some latitude but the Court would retain the ultimate power to determine that matter.

In reality, though, how much latitude would the Court allow the Parliament? In particular - and this is the crucial test - would the Court defer to the Parliament's view about the desirability of the challenged legislation if the Court held a contrary view? It is difficult to resist the conclusion, adopting Brennan J's approach, that the Court would assess for itself the "wisdom or expedience" of any challenged legislation - an enquiry about which, the Court has reiterated, it is not concerned.[67]

Brennan J's analysis of the challenged provisions led him to conclude that:

> If the limiting of expenditure incurred by or on behalf of candidates has proved to be unworkable in this country, the elimination of an opportunity for political parties, interest groups or individuals to engage in costly advertising on the electronic media is easily seen as an alternative means of minimising the risk of corruption or of reducing the untoward advantage of wealth on the formation of political opinion. Section 95B is appropriate and adapted to that end. The Parliament chosen by the people - not the Courts, not the Executive Government - bears the *chief responsibility* for maintaining representative democracy in the Australian Commonwealth. Representative democracy, as a principle or institution of our Constitution, can be protected to some extent by decree of the Court and can be fostered by Executive action but, if performance of the duties of members of the Parliament were to be subverted by obligations to large benefactors or if the parties to which they belong were to trade their commitment to published policies in exchange for funds to conduct expensive campaigns, no curial decree could, and no Executive action would, restore representative democracy to the Australian people.[68]

Nothing in that passage, or any other part of Justice Brennan's judgment, leaves much doubt that if he had been a federal Member of Parliament at the time the Parliament was considering the merits of s 95B he, too, would have been satisfied about the "wisdon and expedience" of that provision and would have voted for its enactment. If, however, he had not been satisfied about the wisdom and expedience of s 95B, would he, as a member of the High Court, have been prepared to accept the contrary judgment of the Australian Parliament? The answer to this question would help to illuminate the 'margin of appreciation'.

VI. THE TEXTUAL BASIS FOR AN IMPLICATION OF FREEDOM OF EXPRESSION

Section 1 of the Australian Constitution provides that:

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67 See note 30 *supra* and note 77 *infra* with accompanying text.

68 *Ibid* at 710-1 (emphasis added).

> The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate and a House of Representatives ...

Section 7 provides that:

> The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate ...

Section 24 provides that:

> The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators ...

In *McKinlay*,[69] Stephen J discerned in those provisions the principle of representative democracy in a form involving direct popular election.

On the basis of that principle, the High Court, except Dawson and McHugh JJ, in *Nationwide News* and *Australian Capital Television* argued, in essence, that:

1. the elected representatives exercise power on behalf of the Australian people;
2. the Australian electors have the ultimate power of governmental control;
3. that power of the Australian electors could not be exercised unless:
   (a) they had the freedom to participate, associate and communicate in relation to a federal election; and
   (b) both they and their representatives were free to communicate information and opinions about matters relating to the government of the Commonwealth; and
4. that freedom to communicate is so indispensable to the efficacy of the system of representative government that it should be regarded as an implied constitutional guarantee to restrict Parliament's law making powers.[70]

Justice Dawson argued for a far narrower implication. He accepted that ss 7 and 24 guaranteed a "true choice" and that a true choice could not be made unless a voter was given:

> ...an opportunity to gain an appreciation of the available alternatives... Thus an election in which the electors are denied access to the information necessary for the exercise of a true choice is not the kind of election envisaged by the Constitution. Legislation which would have the effect of denying access to that information by the electors would therefore be incompatible with the Constitution.[71]

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69 *Attorney-General of the Commonwealth; Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 55-6.

70 *Australian Capital Television*, note 39 *supra* at 702-704 (Mason CJ), and 736-737 (Gaudron J) and *Nationwide News*, note 38 *supra* at 668-672 (Brennan J) and 679-682 (Deane and Toohey JJ).

71 *Australian Capital Television*, note 39 *supra* at 724.

McHugh J also confined the implication to be drawn from ss 7 and 24 to the "constitutional rights of freedom of participation, association and communication *in relation to federal elections*".[72]

While initially suggesting that the guarantee was limited to the election period,[73] McHugh J went on to argue that:

> ... one of the conceptions of representative government is that members of Parliament have an obligation to listen to and ascertain the views of their constituents during the life of the Parliament.
>
> This conception strengthens the case for concluding that, by implication, the Constitution gives a general right of freedom of communication in respect of the business of government of the Commonwealth. But it is unnecessary for the purposes of this case to decide whether, by implication, the Constitution gives to the people of the Commonwealth such a general right of freedom of communication.[74]

The implication drawn by the majority of the High Court is by no means a *necessary* implication from the Constitution's text and, in particular, from the provisions relied upon - ss 7 and 24 and, perhaps, s 1. The notion of representative democracy, as established by the Constitution, had only basic prerequisites. A great deal was left to the Commonwealth Parliament about the extensive details of an electoral system to be employed in achieving representative democracy. For example, the Constitution does not guarantee universal adult suffrage and Parliament is given the power to decide the qualifications of electors (ss 8 and 30). For many years after federation, adults in Australia were constitutionally denied the right to vote in federal elections on the ground of sex, race or lack of property.

In 1975 the High Court, rejecting US decisions to the contrary, interpreted the same provisions - ss 7 and 24 - as denying constitutional status to the principle of 'one vote one value'.[75] Justice Gibbs, consistently with the tradition established in, and followed by the Court since, the *Engineers'* case,[76] stated:

> We have to decide whether s 24, properly interpreted, does have this effect. If it does not, we are not justified in importing new requirements into it simply because, as a matter of policy, they may seem to be desirable. Our duty is to declare the law as enacted in the Constitution and not to add to its provisions new doctrines which may happen to conform to our own prepossessions.[77]

Three years later, the High Court held that the rights conferred by s 41 of the Constitution extended only to an "adult" within the meaning of that term in 1900.

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72 *Ibid* at 741 (emphasis added).
73 *Ibid* at 743.
74 *Ibid* at 744.
75 *McKinlay's* case note 69 *supra*.
76 Note 27 *supra*.
77 *McKinlay's* case note 69 *supra* at 44.

As a result, Susan King, who was then over 18 and entitled to vote in South Australian State elections, had no constitutional right to vote in the 1972 federal elections.[78]

It is more than a little puzzling that the Constitution's electoral provisions, which (the High Court has held) provide:

1. no right of an adult to vote in federal elections; and
2. no right, to otherwise qualified federal electors, that their votes will have equal weight to that of others,

at the same time contain an implication guaranteeing freedom of political communication.

The majority judgments in the *Australian Capital Television* case give the clearest indication of a complete about face by the High Court in its approach to constitutional interpretation and, in particular, in its view of the substantive content of the Constitution. The High Court not only adopted an implied constitutional guarantee of free speech in relation to political discussion, but some Justices left open the question whether that guarantee would be extended to "an unlimited freedom of communication"[79] or, indeed, guarantees in addition to free speech.[80]

VII. CONTENT OF THE IMPLIED GUARANTEE

Among the Justices supporting a broad implied guarantee of freedom of expression, the terminology in which the guarantee was expressed varied significantly. For Mason CJ the guarantee was summarised as the "freedom to communicate with respect to public affairs and political discussion".[81]

Brennan J described the guarantee as:

> ...the freedom to discuss governments and governmental institutions and political matters.[82]

Justices Deane and Toohey held that there should be implied:

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78 *King v Jones* (1972) 128 CLR 221.

79 *Australian Capital Television*, note 39 *supra* at 704 (Mason CJ). However, Mason CJ also expressed the view that the US First Amendment was "broader in scope than the implied guarantee in the Australian Constitution" (705) and earlier in his judgment he stated:

> In the light of this well recognised background, it is difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms (at 702).

80 *Ibid* at 735 (Gaudron J) and see the report of a speech made by Justice Toohey supporting an implied Bill of Rights (Australian Law News, November 1992, 7-11).

81 *Australian Capital Television*,note 39 *supra* at 704.

82 *Nationwide News*, note 38 *supra* at 670.

> ...the freedom of communication of information and opinions about matters relating to the government of the Commonwealth.[83]

Justice Gaudron described the implication as:

> ...freedom of political discourse. And that discourse is not limited to communication between candidates and electors, but extends to communication between the members of society generally.[84]

Justices Deane and Toohey explained that, in their view, the implication of freedom of communication operates at two levels. The first is communication between, on the one hand, the Australian people and, on the other, their Parliamentary representatives as well as the members of other Commonwealth instrumentalities and institutions. The second level is communication "between the people", expressed as:

> ...the freedom of the people of the Commonwealth to communicate information, opinions and ideas about all aspects of the government of the Commonwealth, including the qualifications, conduct and performance of those entrusted (or who seek to be entrusted) with the exercise of any part of the legislative, executive or judicial powers of the government which are ultimately derived from the people themselves.[85]

In determining the nature and scope of the implied guarantee of freedom of expression, some important questions arise.

A. WHAT IS THE "GOVERNMENT" OF THE COMMONWEALTH?

In this context, "political" and "government" were clearly intended to cover the widest possible field. There is little doubt that, as expressed by the majority of the High Court, the implied freedom of communication extends not only to matters relating to the federal *Legislature* but also to the federal *Executive*, including government instrumentalities and agencies.

B. IS IT ONLY A LEGISLATIVE PROHIBITION?

Given the matter before the Court, it is not surprising that the primary focus in the judgments was on the implied guarantee as a *legislative* prohibition - a limitation on the extent of the constitutional powers of the Commonwealth Parliament to make laws. There are, however, indications that the implication would also prohibit *executive* infringements of the freedom and also other, as yet unspecified, "burdensome interference[s]".[86]

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83 *Ibid* at 680.

84 *Australian Capital Television*, note 39 *supra* at 735.

85 *Nationwide News*, note 38 *supra* at 681.

86 See for example, *ibid* at 680 and 681.

C. IS THE JUDICIARY BOUND?

Little mention was made by the High Court about the application of the implied guarantee to the role and powers of the courts. Like each of the Legislature and the Executive, the Judiciary has been acknowledged to be one of the three arms of government. On that basis, would not the implied freedom of communication, which applies to matters relating to 'the government of the Commonwealth,' also extend to invalidate *judicial* actions and decisions?

The US Constitution appears to be clear on this point by providing that:

> *Congress* shall make no *law*...abridging the freedom of speech...(emphasis added).[87]

In Australia, without any express constitutional guarantee, the position is not so clear. To ascertain the scope of the implication it is necessary to examine the *basis* for that implication. The terms of ss 7 and 24 and the concept of representative government do not require, and do little if anything to support, the proposition that the implied guarantee should be limited to a restriction on legislative and executive powers. Court rules and decisions relating to matters such as contempt of court, reporting of court proceedings, closed hearings and injunctions restraining publication (for example in defamation actions) would appear to be as inherently 'governmental' and as capable of offending freedom of communication as legislation having the same effect.

Australian courts, therefore, might be bound by the implied guarantee of the freedom of communication. As incompatible as it may be in a democratic society, the question whether the courts are to be bound and, if so, to what extent, are now matters for the courts themselves to determine. This seems particular ironic in view of the fact that the Court's justification for making the implied guarantee was that the Constitution established a system of representative *democracy*.

D. ARE THE STATES AND LOCAL GOVERNMENT BOUND?

Four Justices touched on issues affecting the question whether the implied guarantee would be extended to the States and local government. A distinction must be made between three categories of law.

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87 It does not follow, of course, that such a constitutional guarantee cannot be extended, by judicial implications, to apply to the exercise of executive or judicial power. On this point in relation to the US Constitution see HH Wellington "On Freedom of Expression" (1979) 88 *Yale LJ* 1105 at 1107-1108, especially fn 9 and JA Thomson "Mirages of Certitude: Justices Black and Douglas and Constitutional Law" (1992) 19 *Ohio Northern University Law Review* 67 at 78-79 and fn 80. In relation to the Australian Constitution, however, the construction of "law of the Commonwealth" in s 109 of that Constitution (see eg *Ex parte McLean* (1930) 43 CLR 472 at 484) would support a restricted ambit to a phrase such as "law of the Parliament".

(i) Commonwealth laws relating primarily or even solely to States or local government

These laws "have the potential to become matters of national concern"[88] and, for that reason, would fall clearly within the majority's view of the reach of the implied guarantee.

(ii) State or local government laws which might affect "the exercise by the people of their democratic rights and privileges in federal matters"[89]

There is some support for the view that these laws would also come within the scope of the implied guarantee.[90]

(iii) State or local government laws which have no relevant federal impact but which affect the freedom of communication at a State or local government level

There is support for the proposition that these laws, too, could be subject to the implied guarantee.

The strongest view was expressed by Gaudron J who concluded that:

> ... the freedom of political discourse must be seen as extending to matters within the province of the States.[91]

This conclusion, if not inevitable, is by no means surprising. After all, given that the basis for the implied guarantee is said to be the concept of representative democracy inherent in ss 7 and 24 of the Constitution, the existence of provisions in State Constitutions that support the implication of that concept at the State level,[92] as well as the application of ss 106 and 107 of the Commonwealth

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88 See for example, *Nationwide News*, note 38 *supra* at 681 and *Australian Capital Television*, note 39 *supra* at 705, 737.

89 *Nationwide News*, note 38 *supra* at 671.

90 *Ibid* at 671, 681 and *Australian Capital Television*, note 39 *supra* at 703, 737. Deane and Toohey JJ concluded (*Nationwide News*, note 38 *supra* at 682) that: "it is strongly arguable that the Constitution's implication of freedom of communication about matters relating to the government of the Commonwealth operates also to confine the scope of State legislative powers".

91 *Australian Capital Television*, note 39 *supra* at 737 and see also Mason CJ at 704-5.

92 See for example, *Constitution Act* (Vic) 1975, ss 26 and 34.

Constitution,[93] would make it difficult to resist the conclusion that a similar implied guarantee would apply to the States.[94]

E. WOULD THE GUARANTEE RESTRICT PRIVATE ACTIONS?

The terms of the US First Amendment are directed to the laws of the Congress.[95] In the absence of any relevant legislation, the guarantee does not appear to restrict the actions and decisions of private citizens or companies.[96]

The reach of the Australian implied guarantee to non-governmental agencies and instrumentalities was not considered by the High Court in *Nationwide News* or *Australian Capital Television.* It is by no means inconceivable, however, that the Court would so extend the implied guarantee. If, for example, a government employer were to prohibit an employee from distributing political material at the workplace, that could constitute, at least prima facie, an interference with the 'communication of information and opinions about matters relating to the government'. It is arguable, relying on s 7 and 24 of the Constitution, that similar action taken by a private employer should be classified in the same way.

If and to the extent to which the States, local government, the courts and private individuals and companies (or any of these) are to be bound by the implied guarantee of free expression, it follows that, contrary to the assertion by Mason CJ, the US First Amendment would not be "broader in scope than the implied guarantee in the Australian Constitution".[97]

The potential reach of our new implied guarantee is extraordinarily wide and, at least in some respects, beyond the US equivalent. Given the volume of American litigation relating to that guarantee, the future for Australian fundamental rights lawyers seems assured. The outlook is not so rosy in the battle to reduce court congestion and delay - at least for those courts whose workload cannot be regulated by special leave procedures.

F. WHAT ARE THE LIMITS TO THE IMPLIED GUARANTEE?

The Justices who supported a broad implied guarantee of freedom of political communication were careful to indicate the limits of the guarantee. Most

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93 See generally NF Douglas "The Western Australian Constitution: Its Source of Authority and Relationship with s 106 of the Australian Constitution" (1990) 20 *University of Western Australia Law Review* 340.

94 This would maintain the consistency with the position in the US where, by virtue of the Fourteenth Amendment, the First Amendment guarantees apply to the States and encompass "State action". See Thomson, note 87 *supra* at pp 78-90.

95 The Fourteenth Amendment, however, applies more broadly to "State action".

96 See generally, L Tribe note 12 *supra.*

97 *Australian Capital Television* note 39 *supra* at 705.

significantly, it was emphasised that the concept is "not an absolute".[98] In other words, it:

> ...is not an implication of an absolute and uncontrolled licence to say or write anything at all about matters relating to the government of the Commonwealth.[99]

Other, competing interests of the public may prevail over the implied guarantee. Therefore, what is required is a balancing, by the Court, of these competing interests.

Of course, that is precisely the exercise that traditionally has been undertaken - as a legislative function - by Australian Parliaments. For example, when introducing the challenged broadcasting legislation into the House of Representatives, the Minister stated:

> The government carefully considered the implications of the proposals on the right to freedom of speech, both as it is generally accepted and specifically under international law. The prohibition on the broadcasting of political advertising is directed squarely at preventing potential corruption and undue influence of the political process... The government is satisfied that the proposals are a necessary and proportionate response to this threat ...[100]

Not surprisingly the Court was reluctant to consider in detail "the precise categories of prohibition or control which are consistent with the implication".[101] There appeared to be general agreement, however, that the tests used for determining the validity of legislation in other constitutional contexts would also be used here. These included determining whether:

1. the restrictions sought to be imposed were "reasonably necessary" to achieve the competing public interest; and
2. any burden resulting from the restriction was "proportionate" to the attainment of the competing public interest.[102]

A cynic might suggest that these tests are deliberately intended to, and do in fact, provide judges with traditional legal terminology and formulae to cloak the real basis for their decisions - an assessment of the challenged legislation by reference to personal values and preferences. After all, a (legitimate) enquiry whether a law is "reasonably necessary" to achieve a particular object approximates very closely to an (illegitimate) enquiry into the desirability or undesirability of that law or the "wisdom or expedience" of the law.[103] Little sophistication is required to carry out the latter enquiry but express the reasons and conclusions in terms of the former.

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98 *Ibid* at 705. See also at 737, 748 and *Nationwide News* note 38 *supra* at 670-1, 682.

99 *Nationwide News ibid* at 682.

100 Note 50 *supra* at 3479.

101 *Nationwide News* note 38 *supra* at 682.

102 *Ibid* and *Australian Capital Television* note 39 *supra* at 705, 711, 737.

103 See note 64 *supra*.

Some members of the High Court also observed that the limits of the freedom are marked out by "the general law". Justices Deane and Toohey suggested that a law prohibiting conduct "that has traditionally been seen as criminal" would "readily be seen not to infringe an implication of political discussion".[104] Brennan J concluded that:

> The limitation of legislative power implied in the Constitution does not bring into question the validity of those laws which Cannon J described as 'the criminal code and the common law'... Those laws strike an appropriate balance between the postulated freedom of discussion and the private or public interest which is protected by the curtailing of the freedom ...[105]

Similarly, Gaudron J stated that:

> ...what is reasonable and appropriate will, to a large extent, depend on whether the regulation is of a kind that has traditionally been permitted by the general law.[106]

In particular, she explained that:

> .. in general terms the laws which have developed to regulate speech, including the laws with respect to defamation, sedition, blasphemy, obscenity and offensive language will indicate the kind of regulation that is consistent with the freedom of political discourse.[107]

These views would appear not to sustain the hopes of those who. in the light of the *Australian Capital Television* case, have anticipated wholesale invalidation of current laws restricting free speech.

However, the rationale for, and consequences of, those views are difficult to understand. The two laws invalidated by the High Court in *Nationwide News* and *Australian Capital Television* were surely part of "the general law". They may not, at least in Australia, have been "traditional" but why should a law be singled out for exposure to the implied guarantee simply because it is a contemporary response to a contemporary problem? Conversely, why should a law restricting free speech be permitted simply because it has operated for a long time? If the Court assumes the power to "determine whether the [implied] constitutional guarantee has been infringed in a given case",[108] surely that requires it to assess, on a case by case basis, challenges to any relevant law or action - regardless of when it was made or carried out.[109]

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104 *Nationwide News* note 38 *supra* at 682.

105 *Ibid* at 671. The reference to Cannon J is to the judgment in *Reference re Alberta Statutes* (1938) SCR 100 at 145-146.

106 *Australian Capital Television* note 39 *supra* at 737.

107 *Id.*

108 *Ibid* at 705.

109 Concern has been expressed in relation to the Canadian Charter of Rights and Freedoms that the freedom of expression guarantee may be interpreted to affirm the existing society: MacKay note 59 *supra* at 720. An American commentator has suggested that continued judicial deference to older statutes leads to "legal

G. GLIMPSES OF THE US EXPERIENCE

Decisions of the US courts on cases dealing with the First Amendment guarantee of free speech provide an insight into the types of controversies relevant to, if not generated by, such a guarantee.

In contrast to the implied Australian guarantee, the US First Amendment protects "speech" rather than 'political communications'. However, that distinction is of less significance than might at first appear because the US Supreme Court has accorded far greater protection to 'political' speech as compared to speech in a 'commercial' context. Abridgments of 'political' speech have been permitted only when the Court has been satisfied of "compelling justification".[110]

The preferred position of political speech is demonstrated by *New York Times Co v Sullivan*[111] where the US Supreme Court held that no one could be liable, civilly or criminally, for defaming a public official or figure in the absence of proof that the defamatory publication was made "with knowledge that it was false or with reckless disregard of whether it was false or not". Brennan J indicated that the Court's views were expressed:

> ...against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials ...[112]

Despite the 'general law' of defamation in Australia, it would be surprising if the *Sullivan* case were not used extensively in the next Australian defamation case involving a political figure.

Of particular interest in the current context is the range of circumstances held by the US Supreme Court to have come within the concept of 'political speech'. Obviously, that expression includes communication by words and pictorial representations. It has also been held to include a wide variety of non-linguistic symbols or gestures including:

- The conduct of school students who wore black armbands to protest against the Government's Vietnam policy. (The students sought and obtained

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petrification" (cited in HH Wellington "On Freedom of Expression" (1978) 88 *Yale Law Journal* 1105 at 1109).

110 Australian Constitutional Commission note 7 *supra*, para 9.312. In *Australian Capital Television* note 39 *supra* at 745, McHugh J used the same expression in stating that a law which regulated the content of electoral communication could be upheld only on grounds of "compelling justification".

111 376 US 254.

112 *Ibid* at 270.

nominal damages and an injunction against a school regulation banning the wearing of armbands.)[113]

- A US serviceman who burnt his Selective Service Registration Certificate before a large crowd to influence others to adopt anti-war beliefs. (In the circumstances, the regulation, under the *Universal Military Training and Services Act*, prohibiting such conduct was held to be valid.)[114]
- Wearing Nazi uniforms with the object and effect of expressing a point of view.[115]
- Overnight sleeping in a National Park (where all camping was prohibited) in connection with a demonstration.[116]
- Posting of political advertising signs on public property, including power poles and cross wires.[117]

Recently the US Supreme Court dealt with the validity of a law which was enacted to counter serious problems of racial hatred and vilification. Under that law it was a misdemeanour to:

> ...[place] on public or private property a symbol, object, appellation, characterisation or graffiti, including, but not limited to, a burning cross or Nazi swastika which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender ...[118]

A teenager in Minnesota who allegedly burnt a cross - Ku Klux Klan style - inside the fenced yard of a black family was charged with violating the ordinance. At trial the teenager moved to have the charge dismissed on the ground that the ordinance was invalid because it infringed the constitutional guarantee of free speech. On appeal the US Supreme Court held the ordinance to be invalid.

Many other cases involve local government laws. At issue in *City Council of the City of Los Angeles v Taxpayers for Vincent*[119] was the validity of a Los Angeles municipal code prohibition on the posting of signs on public property. The respondents, who were supporters of a candidate for election to the LA City Council, attached political advertising posters to utility pole cross wires at various locations throughout the City. City employees routinely removed all the posters, including the Vincent posters, which contravened the Code.

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113 Note 2 *supra*.
114 Note 3 *supra*.
115 Note 4 *supra*.
116 *Clark, Secretary for the Interior v Community for Creative Non Violence* 468 US 288 (1984).
117 *Members of the City Council of the City of Los Angeles v Taxpayers for Vincent* 466 US 789 (1984).
118 *City of St Paul Minnesota* note 5 *supra* at 315.
119 466 US 789 (1984).

The respondents sought damages and injunctive relief on the basis that the ordinance was 'presumptively unconstitutional'. While the respondents were ultimately unsuccessful, it is significant that three members of the Supreme Court[120] held that despite the public interest in preventing visual clutter, minimising traffic hazards and preventing interference with the use of public property, the ban on all signs on public property constituted an interference with free expression during an election campaign.

Among ordinances held to be inconsistent with the free speech guarantee and, therefore, invalid are those which purported to:

- outlaw public demonstrations and picketing;[121]
- forbid public assembly in streets or parks of a City without a permit and where a permit could be refused to prevent "riots, disturbances or disorderly assemblage";[122] and
- prohibit distribution of all circulars, hand bills, placards etc in any street or public place.[123]

In *Lehman v City of Shaker Heights*[124] a political candidate was refused advertising space on vehicles of a city transit system on the basis of the municipal policy of not permitting any political advertising on the public transit system.

The Supreme Court held that advertising space on the City transit system was not a First Amendment forum and that the decision to limit transit advertisements to innocuous and less controversial commercial and service orientated advertising - thus minimising chances of abuse, appearances of political favouritism and the risk of imposing upon a captive audience - was within the City's discretion and involved no First or Fourteenth Amendment violation.

Significantly, however, four of the nine Justices were prepared to conclude that the constitutional right to free speech went so far as to enable a person "to force his message upon a captive audience which uses public transport vehicles not as a place for discussion but only as a means of transport".[125] The case also illustrates another issue of fundamental importance to the executive and the legislature - that

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120 Brennan, Marshall and Blackmun JJ.

121 *Grayned v City of Rockford* 408 US 104 (1971).

122 *Hague v Committee for Industrial Organisation* 307 US 496 (1939).

123 *Lovell v Griffin* 303 US 444 (1929).

124 418 US 298 (1973).

125 *Id.* Those dissenting were Brennan, Stewart, Marshall and Powell JJ. A similar result occurred in *Perry Education Association v Perry Local Educators' Association* 460 US 37 (1983) where the question was whether a union should be given free access (as a constitutional right) to an inter-school mail system and teachers mail boxes. The majority held that neither the mail system nor the boxes was a public forum for public communication. Brennan, Marshall, Powell and Stevens JJ dissented.

is, the need to appoint the 'right' judges to courts which have the power to invalidate legislation on, essentially, political, social or moral grounds.

H. AN IMPLICATION FOR THE BETTER?

Assuming that an implication, of the type drawn by the majority of the High Court in *Australian Capital Television*, *could* be made, the question arises whether it *should* have been made.

In Australian constitutional cases, judges seldom overtly address the 'should' question. Almost without exception judgments are framed in terms of what the Constitution requires rather than - where there is a choice, as is often the case - the grounds, including policy grounds, for preferring one construction to another.

Indeed, there is a marked reluctance to acknowledge the existence of the discretion that the High Court has in exercising its undoubted law making powers. The unreality of this approach is particularly highlighted in cases concerning constitutional implications. In such cases the Court is asked to make an implication. The task of counsel for at least one of the parties is to convince the Court that an implication *should* be made. Yet the Court has maintained a consistent coyness about acknowledging the true nature of the judicial decision-making process.

The judgments in *Australian Capital Television* followed this trend. Brennan J cited the following sentence from a judgment of Windeyer J to illustrate the Court's reluctance to acknowledge the relevance, or even existence, of the Court's discretion in determining whether an implication should be made:

> The only emendation that I would venture is that I would prefer not to say "making implications", because our avowed task is simply the revealing or uncovering of implications that are already there.[126]

That, with respect, is nonsense.

For many years, Murphy J - alone in dissent - had argued that the electoral provisions of the Constitution contained an implied guarantee of free speech.[127] The arguments were known and acknowledged but not supported by any other Justice. Clearly there is an arguable, if shaky, textual basis in the Constitution for an implied constitutional guarantee of free speech - at least in the electoral or political context. The task before the High Court was not "simply" to 'reveal' or

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126 *Nationwide News* note 38 *supra* at 667 (quoting Windeyer J in *Victoria v the Commonwealth* (1971) 122 CLR 353 at 401-402).

127 See for example, *Miller v TCN Channel Nine Pty Ltd* note 17 *supra* at 581-583. Murphy J also argued for other implied constitutional guarantees - "freedom so elementary that it was not necessary to mention them in the Constitution" (*Ansett Transport Industries (Operations) Pty Ltd v the Commonwealth* (1977) 139 CLR 54 at 88). See generally *Australian Capital Television*, note 39 *supra* at 735 (Gaudron J).

'uncover' an implication. The critical question before the Court was whether it *should* change direction and *make* that implication.

Unfortunately, but typically, the judgments in *Australian Capital Television* are deafeningly silent on the issues relevant to that question. What are those issues? In particular, what are the factors against the Court implying fundamental rights and freedoms into the Constitution? In essence, these enquiries centre on the proper and constitutional limits of judicial power and judicial creativity.

(i) The people's view

The Constitution - by deliberate choice of the founders which was endorsed by the Australian electors prior to federation - contains no general express guarantee of free speech.

Nor, since federation, has there been any indication of widespread support for any change to that position. Indeed, the proposed introduction of a *statutory* (not constitutional) Bill of Rights in Australia during the 1970s and 1980s raised a storm of controversy. The intensity of opposition - across a wide spectrum of the community - resulted in the shelving of the proposed legislation.

Further, in the 3 September 1988 referendum, one of the proposed amendments to the Constitution would have guaranteed "fair and democratic elections throughout Australia".[128] Another sought to introduce express constitutional rights and freedoms, extending throughout Australia:

1. the right to trial by jury;
2. freedom of religion; and
3. compensation or "fair terms" for a person whose property was acquired by any government.

Each was comprehensively rejected.[129] While the reasons for that result are many and varied, the community debate that accompanied the referendum evidenced, once again, that there is no consensus in Australia that we should follow the US lead in entrenching fundamental rights and, as a consequence, give to the courts rather than to Parliament the responsibility of identifying and assessing the community values on which such rights are based.

The significance of this point has been put forcefully by Professor Winterton:

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128 The Australian Constitutional Commission's Report, note 7 *supra*, recommended that the Constitution be altered by inserting a comprehensive statement of constitutionally protected rights and freedoms in a new "Chapter VIA - Rights and Freedoms" including proposed s 125E(c): "Everyone has the right to...freedom of expression..." (p 39).

129 See, generally, B Galligan "The 1988 Referendums in Perspective" in B Galligan and J Nethercote (eds) *The Constitutional Commission and the 1988 Referendums* (1989) (Centre for Research on Federal Financial Relations, ANU).

> ...the imposition of an open-ended *constitutional* Bill of Rights by judicial fiat appears both surreptitious and, indeed, undemocratic - which is particularly ironic in view of its justification in *community* values, including democracy.[130]

(ii) Problem with Implied Guarantees

There are inherent problems in determining the scope and content of any constitutional prohibition. In Australia the outstanding example is the High Court's sorry record involving the construction and application of s 92 of the Constitution.[131] No doubt s 92 litigation has been a bonanza for lawyers for 90 years but it has been of dubious value to the Australian community.

Serious as those general problems of the interpretation of constitutional prohibitions may be, they are exacerbated where the constitutional prohibition is *implied.*

An *express* constitutional guarantee, approved by the electors, appears in the text of the Constitution. In contrast, the very existence, nature and scope of an implied guarantee can be found only by an analysis of numerous and varying judicial opinions. For example, to find out whether there is or may be a federal constitutional guarantee of free expression in Australia, six separate judgments in *Australian Capital Television* must be examined as well as some of the six separate judgments in *Nationwide News.*

Even after studying those cases basic questions remain unanswered. Does the guarantee limit executive and judicial as well as legislative action? Does it apply to the States and local government? Does it apply to private, as well as governmental, action? If the right to communicate includes a right to assemble is it, as in the US Constitution, limited to a right "peaceably to assemble"?

While not inevitable, there is a greater chance that answers to such issues would have been evident from the text had the law been made by the legislature (and the people) rather than the courts alone.

(iii) Social and moral values

Fundamental rights such as free speech make wonderful slogans. One example is Voltaire's rallying call:

> I disapprove of what you say, but I will defend to the death your right to say it.[132]

The difficulty in practice is that freedom of speech, in Australian society, cannot be a value so absolute as to override all interests which the law would otherwise protect. There are clear examples where the actual or perceived interests of an

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130 G Winterton note 8 *supra* at 234.

131 See, generally M Coper *Freedom of Interstate Trade* (1983) Butterworths.

132 *Oxford Dictionary of Quotations* (3rd ed, 1979) p 561.

individual or of the community have been assessed as warranting precedence over another's right to communicate without restriction. As a result of that kind of assessment, there are laws about defamation, treason, sedition, blasphemy, obscenity, offensive language and, more recently, privacy.

In the context of fundamental rights and guarantees, the interests that must be balanced are essentially moral or social values. As Robert Bork has argued with respect to other fundamental rights and freedoms:

> These are matters of morality, of judgment, of prudence. They belong, therefore, to the political community. In the fullest sense, these are political questions.[133]

One of the strongest objections to constitutionally entrenched Bill of Rights provisions is that their content cannot be determined other than by the subjective opinion of each judge as to the content of the moral or social values in question. As Professor Winterton asks:

> Would we not have a Murphy Bill of Rights, a Barwick Bill of Rights, a Dawson Bill of Rights and so on?[134]

The six judgments in *Australian Capital Television* clearly provide an affirmative answer.

Of course, judges are regularly involved in the process of identifying and balancing community values - and not only in the public law field. The implication and application of the rules of natural justice or procedural fairness provide a useful analogy. But, as has been observed earlier, there is a critical difference.

In procedural fairness cases, courts are involved in the process of statutory construction - making implications for the purpose (supposedly) of giving effect to the 'the legislative intent'.[135] If Parliament's view of what procedural fairness requires differs from the court's view, Parliament can legislate to implement its view and the courts must apply that law accordingly.

Under a *constitutional* guarantee, however, a court's assessment of the relative values can override any inconsistent Parliamentary assessment of the same values.

Again, the paramount question arises: in the context of fundamental rights, whose views should prevail - the Parliament's or the Court's? More significantly, in a democracy, who should decide that question - the people, parliaments or the courts?

People may well have different opinions about which institution (Parliament or the High Court) under our system of representative government is better placed and better able to identify and balance competing community values and interests. Some have suggested that there is such a thing as 'shared political morality' on

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133 R Bork "Neutral Principles and Some First Amendment Problems" (1971) 47 *Indian Law Journal* 1 at 12.

134 G Winterton note 8 *supra* at 234.

135 See, for example, *Annetts v McCann* (1990) 170 CLR 596 at 600.

which fundamental rights are based and that judges are in a good position to identify and assess that morality.[136] Others have argued that:

> There seems little reason to suppose...that unelected and virtually irremovable judges are better placed than elected, accountable and removable politicians to ascend the ladder in search of any...shared political morality.[137]

Whatever line one takes, surely any change of such a momentous nature to the Constitution should not have been made unless and until the electors had discussed the issues and made a choice under s 128's referendum procedure. For all practical purposes, the implication of a constitutional guarantee of freedom of expression by the High Court may well have removed that option.

(v) The High Court's role in political and social controversies

Another factor is relevant to the question of whether the High Court should make implications of constitutional guarantees. In the 92 years since federation, the High Court has avoided, to a very large extent, the sorts of controversies which have accompanied numerous US Supreme Court decisions - many of them dealing with Bill of Rights cases.

To a substantial extent, this has resulted from the High Court's adherence to the *Engineers'* approach of avoiding the temptation to make any constitutional implication which is, or may be, perceived to be:

> ...referable to no more definite standard than the personal opinion of the judge who declares it...[or based] on hopes and expectations respecting vague external conditions.[138]

Consistently with this approach was the Court's adoption of the view in 1920 that:

> American authorities, however illustrious the Tribunals may be, are not a secure basis on which to build fundamentally with respect to our Constitution.[139]

Thus, in the midst of the publicity and controversy surrounding the *Franklin Dam* decision, the High Court attempted to keep out of the political fray by maintaining that approach. In the Court's "Statement" preceding the individual judgments in that case, it was emphasised that the Court was dealing with:

> ...strictly legal questions. The Court is in no way concerned with the question whether it is desirable or undesirable, either from the whole or from any particular

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136 See, for example, TRS Allen "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" [1985] CLJ 111 and *The Limits of Parliamentary Sovereignty* [1985] PL 614, cited and discussed by Winterton, note 8 *supra* at 225-226, 233-234.

137 See, for example, S Lee *Comment* [1985] PL 632, 633, also cited in G Winterton note 8 *supra* at 234-235.

138 *Engineers'* case note 27 *supra* at 142, 145.

139 *Ibid* at 146.

> point of view, that the construction of the dam should proceed. The assessment of the possible advantages and disadvantages of constructing the dam, and the balancing of the one against the other, are not matters for the Court, and the Court's judgment does not reflect any view of the merits of the dispute.[140]

Because the High Court has not, until last year, made constitutional implications about fundamental rights which would involve the Court in the interpretation and assessment of social and moral values, Australian society has benefited in a number of ways.

The community generally has been spared the enormous number of Bill of Rights cases which have contributed substantially to court congestion and delays. They have also been spared the divisions and bitterness which have arisen, and continue to arise, from cases of that type.[141]

Justices of the Court, too, have benefited by not being subject to the closer public scrutiny that would inevitably follow the Court's involvement in cases that do not concern - and are readily seen not to concern - 'strictly legal questions'. Perhaps the US Supreme Court justices would prefer to avoid the tortuously searching selection and confirmation procedures which were vividly illustrated to the world by the recent Senate hearings into the appointment of Justice Clarence Thomas.

So far there has been no widespread support for a similar process in Australia. But when a court is given - or worse still, gives itself - the power to invalidate a law on the ground that it conflicts with the judges' assessment of what community values should prevail, it is inevitable that the judicial selection process will be affected. Governments, to a far greater degree than is presently the case, would want to know the social and moral views of potential appointees. In those circumstances, a review of a person's private life would assist, and may be necessary, in determining the value considered by the person to be important.

And such a review must surely be in public. After all, the court would be exercising, on behalf of the public, a role previously exercised by politicians. If the private lives of politicians are brought into the political arena as part of the electoral and accountability process, why should not the same apply to judges who, under the new regime, would be even more powerful public figures? And, as in the case in the United States, why should not at least some judges be subject to election and re-election?

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140 *Franklin Dam* note 33 *supra* at 58.

141 Recently in Canada hate propaganda has become a serious problem. It has been argued that the freedom of expression cases involving hate propaganda provide a forum for proponents to express their views, and, as a result, exacerbates the controversy and divisiveness within the community: see Mackay note 59 *supra* at 733-6.

VIII. CONCLUSION

These issues - among many others - would be relevant in a debate about whether Australia *should* have a constitutionally guaranteed freedom of expression.

The greatest objection to the High Court's decision in *Australian Capital Television* is that it effectively removed the opportunity for the people of Australia to discuss and make a choice about the matter. The High Court has unilaterally imposed on the Australian people an entrenched guarantee of political expression.

In countries such as the United States and Canada which have a constitutionally guaranteed freedom of expression, the courts decide what price the community must pay for free expression. In the US, whatever the views of the people and their legislatures, it is the opinion of the majority of the Supreme Court which is determinative. But that was the choice made by the American people when they approved the First and Fourteenth Amendments.

In Australia, the people have made no such choice. We have a High Court-imposed guaranteed freedom of expression. The opinions of four of the seven High Court judges and not the views of the majority of Australian electors or their Parliamentary representatives, will now determine the limits of free speech.

This most dramatic change to our Constitution has taken place without any reference to the Australian people. And the High Court would like us to believe that its implication was justified on the basis of principles of representative democracy.

There can be discerned from the High Court's judgments a paternalistic and condescending philosophy that 'we know what is best for you whether you like it or not'. In my view that is entirely at odds with our system of democratic government. It is also fundamentally inconsistent with the express constitutional provision that requires the approval of the Australian people to any constitutional amendment.[142]

One can only hope that, before too long, there is a return to the *Engineers'* approach that the High Court's function and its duty is to interpret the Constitution *as it is* and not as individual judges would *like it to be*.[143]

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142 Section 128.

143 As Gibbs J stated in *McKinlay's* case note 69 *supra* at 44:

> Our duty is to declare the law as enacted in the Constitution and not to add to its provisions new doctrines which may happen to conform to our own prepossessions.