Australian Capital Television Pty Ltd & New South Wales v Commonwealth [1992] HCA 45; (1992) 177 CLR 106 (30 September 1992)

HIGH COURT OF AUSTRALIA

AUSTRALIAN CAPITAL TELEVISION PTY. LIMITED AND OTHERS and THE STATE OF NEW SOUTH WALES v. THE COMMONWEALTH OF AUSTRALIA and ANOTHER [1992] HCA 45; (1992) 177 CLR 106
F.C. 92/033

Constitutional Law (Cth)

MASON CJ(1), BRENNAN(2), DEANE(3), DAWSON(4), TOOHEY(3), GAUDRON(5) AND McHUGH(6) JJ

CATCHWORDS

Constitutional Law (Cth) - Powers of Commonwealth Parliament - Broadcasting - Elections - Implied right of freedom of communication in relation to elections - Prohibition on broadcasting political matters during elections - Validity - Whether burden on functions of States - Validity in relation to Territories - Whether obnoxious to freedom of intercourse between States - Broadcasters required to provide free time to political parties - Whether acquisition of property otherwise than on just terms - The Constitution (63 and 64 Vict. c. 12), ss. 51(v), (xxxi), 92, 122 - Broadcasting Act 1942 (Cth), ss. 95A, 95B, 95C, 95D, 95H, 95L, 95M, 95Q, 95S.

HEARING

CANBERRA, 1992, MARCH 17-19, SEPTEMBER 30; MELBOURNE, 1992, AUGUST 28.
30:9:1992

DECISION

MASON C.J. In each action the Commonwealth has demurred to the statement of claim of the plaintiff or plaintiffs. In each action declarations are sought that Pt IIID of the Broadcasting Act 1942 (Cth) ("the Act") is invalid. In the first action, the plaintiffs, who are commercial television broadcasters holding commercial television licences and licence warrants under the Act, seek in the alternative a declaration that s.95D and ss.95B, 95C, 95E, 95Q and 95S of the Act in their application to a broadcaster who is a licensee are invalid. In the second action, the State of New South Wales seeks a second declaration, namely, that Pt IIID of the Act does not apply to Parliamentary by-elections.

2. Part IIID of the Act was introduced into the Act by the Political Broadcasts and Political Disclosures Act 1991 (Cth). As its heading "Political Broadcasts" signifies, the Part is designed to establish a regulatory regime governing the broadcasting on television and radio of political advertisements and other matter. There are a number of elements in the regulatory scheme.

3. The principal elements are:
(1) the sweeping prohibitions((1) ss.95B, 95C, 95D, 95E), subject to certain exceptions, including the broadcasting of news and current affairs items and talkback radio programmes((2) s.95A), of the broadcasting during an election period((3) See the definition of "election period" in s.4(1). Subject to certain qualifications, the period begins on the day when the proposed polling day is publicly announced or the day on which the writs for the election are issued, whichever is first, and ends at the closing of the poll on the polling day. The period during which the prohibitions operate is extended in the case of elections to the Commonwealth Parliament and the Legislative Assembly of the Australian Capital Territory (s.95E) but nothing presently turns on this extension) of relevant material in relation to a Commonwealth Parliamentary election or referendum or an election to a legislature or local government authority of a Territory or a State;
(2) the imposition on broadcasters of an obligation to make available free of charge units of "free time" for election broadcasts to a political party, person or group to whom the Australian Broadcasting Tribunal ("the Tribunal") has granted such free time ((4) Div.3);
(3) the prescription of criteria according to which the Tribunal will grant free time for election broadcasts to a political party, person or group ((5) ss.95H, 95K, 95L, 95M);
(4) the provision of a right of appeal to the Federal Court of Australia against a decision by the Tribunal refusing an application for grant of free time ((6) s.95R);
(5) the permitting and regulation of the broadcast of a "policy launch" by a political party that meets certain prescribed criteria ((7) Div.4).

4. Part IIID does not apply in relation to an election to the Parliament of the Commonwealth or of a State or in relation to an election to the legislature of a Territory until the making of regulations for the purposes of s.95H, which provides for the automatic grant of free time to certain political parties, that relate to that election ((8) s.95J).
Prohibitions against broadcasters

5. The comprehensive reach of the prohibitions imposed on broadcasters is sufficiently illustrated by the provisions of s.95B of the Act which deal with broadcasting in relation to Commonwealth Parliamentary elections and referenda. First, a broadcaster is prohibited from broadcasting "any matter (other than exempt matter)" during an election period "for or on behalf of the government, oR a government authority, of the Commonwealth" ((9) s.95B(1)). The expression "exempt matter" is defined narrowly ((10) s.4(1)) so as to denote a range of matters, announcements and advertisements appropriate to the business of government, having no connection, or no significant connection, with political advertisements oR political information. Secondly, a broadcaster is prohibited from broadcasting during such an election period "a political advertisement" for or on behalf of a government, or government authority, of a Territory ((11) s.95B(2)), or for or on behalf

of a government, or a government authority, of a State ((12) s.95B(3)). Thirdly, subject to Divs 3 and 4 ((13) The provisions in Divs 3 and 4 deal respectively with free election broadcasts and broadcasts of policy launches), a broadcaster is prohibited during such an election period from broadcasting a "political advertisement" for or on behalf of a person other than a government, or a government authority, or on his or her own behalf ((14) s.95B(4)). The geographical area of operation of the prohibitions is limited in the case of a by-election ((15) s.95B(5)).

6. The expression "political advertisement" is defined to mean an advertisement that contains "political matter" ((16) s.95B(6)). That term is in turn defined to mean ((17) ibid.):

> "(a) matter intended or likely to affect voting in the
> election or referendum concerned; or
> (b) matter containing prescribed material;
> but does not mean exempt matter".

"Prescribed material" is defined to mean ((18) ibid):

> "material containing an express or implicit reference to, or comment on,
> any of the following:
> (a) the election or referendum concerned;
> (b) a candidate or group of candidates in that election;
> (c) an issue submitted or otherwise before electors in that
> election;
> (d) the government, the opposition, or a previous government
> or opposition, of the Commonwealth;
> (e) a member of the Parliament of the Commonwealth;
> (f) a political party, or a branch or division of a
> political party".

"Exempt matter" bears the same narrow meaning described above.

7. Section 95A qualifies the reach of the prohibitions affecting broadcasting in relation to Commonwealth elections, referenda and Territory and State elections. Sub-sections (1) to (4) provide:

> "(1) Nothing in this Part prevents a broadcaster from broadcasting:
> (a) an item of news or current affairs, or a comment
> on any such item; or
> (b) a talkback radio program.
> (2) Nothing in this Part prevents the holder of a public radio licence
> who provides a service for visually handicapped persons from broadcasting
> any material that he or she is permitted to broadcast under section

119AB.

> (3) Nothing in this Part prevents a broadcaster from broadcasting an
> advertisement for, or on behalf of, a charitable organisation if:
> (a) the advertisement is aimed at promoting the
> objects of the organisation; and
> (b) the advertisement does not explicitly advocate
> voting for or against a candidate in an election or a political party.
> (4) Nothing in this Part prevents a broadcaster from broadcasting public
> health matter, whether by way of advertisement or otherwise."

The expression "public health matter" is defined in a way that is designed to prevent sub-s.(4) from becoming a source of authority for the broadcasting of political advocacy or criticism.

8. In the case of an election to the legislature or local government authority of a Territory or a State, prohibitions similar to those applicable in the case of Commonwealth Parliamentary elections apply to a broadcaster ((19) ss.95C, 95D). In the case of a Territory election, there is an additional prohibition against the broadcasting of a political advertisement for or on behalf of the government, or a government authority, of another Territory ((20) s.95C(2)).
Allocation of free election broadcasting time

9. The Tribunal is required to grant a period of free time to each political party that ((21) s.95H (1)):

> "(a) was represented by one or more members in the relevant Parliament or legislature immediately before the end of the last sittings

of

> that Parliament or legislature held before the election; and
> (b) is contesting the election with at least the prescribed number of candidates".

The total free time to be granted to political parties pursuant to that requirement is 90 per cent of the total time in respect of that election and the Tribunal must grant each of those parties such part of the total free time period as it determines in accordance with the regulations ((22) s.95H(2)). So far as is practicable, the regulations should give effect to the principle that the amount of free time granted to each party should bear the same proportion to the total free time period as the number of formal first preference votes obtained by that party or its candidates at the last election to the relevant Parliament or legislature bears to the total number of such votes obtained by all of the political parties mentioned in s.95H(1) or their candidates at that last election ((23) s.95H(3)). The requirement does not apply to by-elections or local government elections ((24) s.95H(4)).

10. In cases not provided for in s.95H, the Tribunal is required to consider applications for the grant of free time. Subject to being satisfied that an applicant is a candidate for a Senate election and was a member of the Senate immediately before the end of the last sittings of the Senate before the election and is not a member of a party to whom a grant of time has been made under s.95H, the Tribunal must grant the applicant free time ((25) s.95L(1)). Again, the period granted to a person must accord with the regulations and must, in total, be not less than 5 per cent and not more than 10 per cent of the total time in respect of the election ((26) s.95L(2)). If the Tribunal is required to grant free time to two or more applicants under s.95L, the time must be divided equally between or among them ((27) s.95L(3)). Otherwise, the Tribunal has a discretion to grant free time to political parties and independent candidates on an application determined in accordance with the regulations, provided that the Tribunal is satisfied of certain matters ((28) s.95M(1) and (2)).

11. The Tribunal is required to divide each period of free time granted into units of free time in conformity with the regulations ((29) s.95P(1)) and allocate units of free time accordingly to broadcasters ((30) s.95P(3)). A broadcaster to whom units of free time are so allocated must make them available for use in making one or more election broadcasts during the relevant election period on behalf of the political party, person or group to whom the time is granted ((31) s.95Q (1)) and must do so free of charge ((32) s.95Q(5)). The broadcaster must use the units in accordance with the regulations and guidelines determined by the Tribunal ((33) s.95Q(2)). The broadcaster must make, during the election period, in the case of a Commonwealth election, at least three election broadcasts by television on each day on which the broadcaster is required to

use units of free time; in the case of a Territory election, the prescribed number of election broadcasts by television on each such day; and, in the case of a State election, at least two election broadcasts by television on each such day ((34) s.95Q(4)). A licensee who is required to make an election broadcast is entitled to such additional broadcasting time for the purpose of broadcasting other material as is determined in accordance with the regulations ((35) s.95Q(7)). The expression "election broadcast" is defined in such a way as to prescribe the format of the broadcast, that is, amongst other things, it must be the broadcast of an advertisement consisting of words spoken by a single speaker (without dramatic enactment oR impersonation) and take the form of a "talking head" presentation lasting two minutes in the case of a television broadcast and one minute in the case of a radio broadcast ((36) s.95G).

Broadcast of policy launches

12. A broadcaster is permitted to broadcast a party's policy launch, provided it meets certain prescribed requirements, once only during the relevant election period ((37) s.95S(1) and (5)) for not more than thirty minutes and free of charge ((38) s.95S(4)). The broadcaster who so broadcasts a party policy launch must give a reasonable opportunity to every other political party that satisfies prescribed requirements for the broadcasting of that party's policy launch ((39) s.95S (3)).

Contraventions of Part IIID

13. The Tribunal is obliged to take all reasonable steps to consider and deal immediately with a complaint or information about a contravention of ss.95B, 95C, 95D, 95E or 95S ((40) s.95T). On application by the Tribunal, the Federal Court may make such orders as it thinks necessary or expedient foR the purpose of preventing, or preventing a repetition of, a contravention of any of those five sections ((41) s.95U).

Effect of Part IIID

14. The effect of Pt IIID, especially ss.95B, 95C and 95D, is, as the plaintiffs submit, to exclude the use of radio and television during election periods as a medium of political campaigning and even as a medium for the dissemination of political information, comment and argument and as a forum of discussion except in so far as (a) s.95A permits the broadcasting of news and current affairs items and talkback radio programmes; (b) Div.3 permits free election broadcasts; and (c) Div.4 permits the broadcasting of policy launches.

15. Not much turns on the extent of the protection given by s.95A(1). It is designed to ensure that the prohibitions which, generally speaking, strike at the broadcasting of matter which is likely to affect voting at an election and matter which includes an implied or explicit reference to an issue in an election do not inhibit the broadcasting of news and current affairs items, talkback radio programmes and announcements affecting matters of specific public interest. But the protection elevates news, current affairs and talkback radio programmes to a position of very considerable importance during an election period. If Pt IIID were valid, talkback and current affairs programmes would unquestionably become, if they are not already, the principal vehicle for political discussion during an election period. And the prohibitions may make it more difficult for a political party, person or group to make an effective response to information oR comment contained in such a programme which is adverse to the interests of that party, person or group.

16. The consequence is that Pt IIID severely impairs the freedoms previously enjoyed by citizens to discuss public and political affairs and to criticize federal institutions. Part IIID impairs those freedoms by restricting the broadcasters' freedom to broadcast and by restricting the access of political parties, groups, candidates and persons generally to express views with respect to public and political affairs on radio and television.

17. The Commonwealth's response is that the evident and principal purpose of Pt IIID is to safeguard the integrity of the political system by reducing, if not eliminating, pressure on political parties and candidates to raise substantial sums of money in order to engage in political campaigning on television and radio, a pressure which renders them vulnerable to corruption and to undue influence by those who donate to political campaign funds. The high costs of broadcast advertising have the effect, so it is said, of exposing political parties and candidates for election to attempts by substantial donors to exert influence. The escalating costs of political campaigning, particularly the costs of advertising on the electronic media, thus increase the risk that corruption and undue influence may affect the integrity of the political process. In his second reading speech when introducing the legislation in the House of Representatives ((42) House of Representatives Parliamentary Debates (Hansard), 9 May 1991, p 3477), the Minister referred to these problems and stated that the Bill sought to address them by the measures now contained in Pt IIID and by requiring and regulating public disclosure of the election funding of political parties. The Minister made the point that the effect of Pt IIID was to cleanse the electoral process by reducing the possibility that it would be corrupted by reason of the financial vulnerability of the political parties and theiR need to defray the very high costs of political campaigning. It is plain that the legislation would achieve this result by prohibiting political advertising in election periods and replacing it with a regulated system of election broadcasts free of charge, including the broadcast of policy launches. The Minister referred to the Report of the Joint Standing Committee on Electoral Matters, Who pays the piper calls the tune ((43) Report No.4 of the Committee, June 1989), in connection with the Bill.

18. The Minister went on to say ((44) House of Representatives Parliamentary Debates (Hansard), 9 May 1991, p 3479):

> "The proposed ban is aimed directly at the single greatest factor in campaign costs. The exorbitant cost of broadcast advertising precludes

the
majority of the community and all but the major political parties and large

> corporate interests from paid access to the airwaves. 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. In respect of the latter, article 19(2) of the International Covenant on Civil and Political Rights, to which Australia

is
a party, requires parties to guarantee the right of freedom of expression.

> This right is not absolute.
> Article 19(3) of the covenant provides that the right may be limited in

the
interests of public order. The prohibition of 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 and

do not constitute a breach of our international obligations."

19. The Minister referred to two further benefits which Pt IIID would bring about. The prohibitions against broadcasting political advertising would terminate the privileged status of the few in the community who could afford to pay the high costs of such advertising and "place all in the community on an equal footing so far as the use of the public airwaves is concerned" ((45) ibid., p 3480). The Minister also asserted that the prohibitions would put an end to the "trivialising" of political debate which resulted from the transmission of very brief political advertisements ((46) ibid).

20. The Senate referred the Bill to a Select Committee foR inquiry and report. The report of the Select Committee ((47) The Political Broadcasts and Political Disclosures Bill 1991, Report by the Senate Select Committee on Political Broadcasts and Disclosures, November 1991) points out that the high cost of political campaigning on television and radio has been acknowledged in other countries. Indeed, restrictions on political advertising have been introduced in a number of countries in order to deal with these problems ((48) See ibid., Appendix 5). Thus, of nineteen countries examined in the Report of the Joint Standing Committee on Electoral Matters, Who pays the piper calls the tune ((49) op cit), only five - Australia, Canada, New Zealand, Germany and the United States - allow paid advertisements on electronic media ((50) In addition, the report of the Senate Select committee states that paid political advertising is permitted in Ireland and Switzerland: The Political Broadcasts and Political Disclosures Bill, op cit, p 123. In Ireland, the amount of advertising time is restricted during an election period and the available time is allocated in proportion to representation in the parliament.). But paid political advertising on the electronic media is not permitted in the United Kingdom, France, Norway, Sweden, the Netherlands, Denmark (during an election period), Austria (during an election period), Israel (during an election period) and Japan (during an election period). Free time is allocated in an election period for political advertising on the electronic media in Canada, France, New Zealand, Denmark, Austria, Israel, Japan, Germany and the Netherlands.

21. The measures taken overseas evidence the existence of the problems identified in the report of the Senate Select Committee. Those measures also indicate that in some jurisdictions prohibitions on political advertising on electronic media and the provision of free time for election broadcasts have been adopted with a view to solving these problems.

22. But, and this is the critical point, the overseas experience does not refute the proposition that Pt IIID impairs freedom of discussion of public and political affairs and freedom to criticize federal institutions in the respects previously mentioned. Thus, the Commonwealth's claim that Pt IIID introduces and maintains a "level playing field" cannot be supported if that claim is to be understood as offering equality of access to all in relation to television and radio. It is obvious that the provisions of Div.3 regulating the allocation of free time give preferential treatment to political parties represented in the preceding Parliament or legislature which are contesting the relevant election with at least the prescribed number of candidates. Their entitlement amounts to 90 per cent of the total free time. Others must of necessity rely on the exercise of discretion by the Tribunal. As among the political parties, the principle of allocation to be applied will tend to favour the party or parties in government because it gives weight to the first preference voting in the preceding election. Furthermore, a senator who seeks re-election is given preferential treatment over a candidate, not being a senator, who stands for election to the Senate. The former, but not the latter, is entitled to a grant of free time. The latter must rely on an exercise of discretion by the Tribunal and the Act makes no attempt to enunciate the criteria according to which that discretion is to be exercised. The provisions of Pt IIID manifestly favouR the status quo. More than that, the provisions regulating the allocation of free time allow no scope for participation in the election campaign by persons who are not candidates or by groups who are not putting forward candidates for election. Employers' organizations, trade unions, manufacturers' and farmers'

organizations, social welfare groups and societies generally are excluded from participation otherwise than through the means protected by s.95A. The consequence is that freedom of speech oR expression on electronic media in relation to public affairs and the political process is severely restricted by a regulatory regime which evidently favours the established political parties and their candidates without securing compensating advantages or benefits for others who wish to participate in the electoral process or in the political debate which is an integral part of that process.

The Issues

23. The plaintiffs in the first action contend that ss.95B, 95C and 95D constitute a contravention of -

> (1) an implied guarantee of freedom of access to, participation in and criticism of federal and State institutions amounting to a freedom

of

> communication in relation to the political and electoral processes;
> (2) the express guarantee of freedom of intercourse in s.92 of the Constitution; and
> (3) an implied guarantee of freedom of communication arising from the common citizenship of the Australian people.

They also contend that the prohibitions in s.95D concerning State elections are beyond legislative power or are contrary to the implied prohibition against Commonwealth interference with the capacity of a State to function in its legislative, executive and judicial capacities. The plaintiffs further argue that the provisions of Pt IIID requiring the broadcasting of election broadcasts free of charge, particularly s.95Q, amount to an acquisition of property otherwise than on just terms and the provisions are invalid on this ground. In the second action, the plaintiff presents similar arguments, its principal argument being that interference with State elections is a substantial interference with the functioning of constituent organs of the State and their structural integrity.

24. The plaintiffs do not suggest that Pt IIID would lie outside the scope of the legislative powers of the Parliament of the Commonwealth were it not for the implied and express prohibitions and guarantees on which they rely. The plaintiffs accept, correctly in my view, that the legislative powers conferred by s.51(v) with respect to "postal, telegraphic, telephonic and other like services" and the various legislative powers conferred on the Parliament by the Constitution with respect to federal elections and the electoral process would support the Act but for the arguments raised in these actions ((51) It is to be noted that the statement of this Court in Fabre v. Ley [1972] HCA 65; (1972) 127 CLR 665, at p 669, that the power of the Parliament to enact an electoral law "is not subject to any restriction other than that which flows from s.41 of the Constitution" was not directed to arguments of the kind raised in this case.

It is to be noted also that the statements of members of this Court in Miller v. TCN Channel Nine Pty. Ltd. [1986] HCA 60; (1986) 161 CLR 556, per Gibbs C.J. at p 569; Mason J. at p 579; Brennan J. at p 615; Dawson J. at p 636, that, given s.92 of the Constitution, it was not possible to imply a separate guarantee of freedom of communication, were directed to the rejection of an argument for the implication of a guarantee of freedom of interstate communication, that is, a guarantee operating in the very area provided foR 0004 by s.92.).

25. But, on the view which I take of these actions, Pt IIID contravenes an implied guarantee of freedom of communication, at least in relation to public and political discussion. I shall therefore confine my discussion of the issues to that aspect of the actions, without embarking upon the otheR issues which were argued.

Constitutional implications

26. Sir Owen Dixon noted that, following the decision in Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. ("the Engineers' Case") ((52) [1920] HCA 54; (1920) 28 CLR 129), the notion seemed to gain currency that no implications could be made in interpreting the Constitution ((53) West v. Commissioner of Taxation (N.S.W.) [1937] HCA 26; (1937) 56 CLR 657, at p 681). The Engineers' Case certainly did not support such a Draconian and unthinking approach to constitutional interpretation ((54) ibid., peR Dixon J. at p 682). Sir Owen expressed his own opposition to that approach when he said ((55) ibid., at p 681):

> "Such a method of construction would defeat the intention of any instrument, but of all instruments a written constitution seems the last

to

> which it could be applied."

Later, he was to say ((56) Australian National Airways Pty. Ltd. v. The Commonwealth [1945] HCA 41; (1945) 71 CLR 29, at p 85; see also Lamshed v. Lake [1958] HCA 14; (1945) 99 CLR 132, peR Dixon C.J. at p 144):

> "We should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications."

Subsequently, Windeyer J., in a passage in which he referred to that statement, remarked ((57) Victoria v. The Commonwealth ("the Payroll Tax Case") [1971] HCA 16; 122 CLR 353, at pp 401-402) "implications have a place in the interpretation of the Constitution" and "our avowed task is simply the revealing or uncovering of implications that are already there".

27. In conformity with this approach, the Court has drawn implications from the federal structure prohibiting the Commonwealth from exercising its legislative and executive powers in such a way as to impose upon a State some special disability or burden unless the relevant power authorized that imposition or in such a way as to threaten the continued existence of a State as an independent entity oR its capacity to function as such ((58) Queensland Electricity Commission v. The Commonwealth [1985] HCa 56; (1985) 159 CLR 192, at pp 205, 217, 226, 231, 247, 260-262). But there is no reason to limit the process of constitutional implication to that particular source.

28. Of course, any implication must be securely based. Thus, it has been said that "ordinary principles of construction are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning" ((59) The Engineers' Case (1920) 28 CLR, per Knox C.J., Isaacs, Rich and Starke JJ. at p 155) (emphasis added). This statement is too restrictive because, if taken literally, it would deny the very basis - the federal nature of the Constitution - from which the Court has implied restrictions on Commonwealth and State legislative powers ((60) West v. Commissioner of Taxation (N.S.W.); Essendon Corporation v. Criterion Theatres Ltd. (1947) 74 CLR l; Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31; Queensland Electricity Commission v. The Commonwealth; State Chamber of Commerce and Industry v. The Commonwealth (The Second Fringe Benefits Tax Case) [1987] HCA 38; (1987) 163 CLR 329). That the statement is too restrictive is evident from the remarks of Dixon J. in Melbourne Corporation v. The Commonwealth ((61) (1947) 74 CLR , at p 83) where his Honour stated that "the efficacy of the system logically demands" the restriction which has been implied and that "an intention of this sort is ... to be plainly seen in the very frame of the Constitution".

29. It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is sought to be derived from the actual terms of the Constitution it may be

sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure.

30. It is essential to keep steadily in mind the critical difference between an implication and an unexpressed assumption upon which the framers proceeded in drafting the Constitution ((62) Australian National Airways Pty. Ltd. v. The Commonwealth (1945) 71 CLR , per Dixon J. at p 81). The former is a term oR concept which inheres in the instrument and as such operates as part of the instrument, whereas an assumption stands outside the instrument. Thus, the founders assumed that the Senate would protect the States but in the result it did not do so. On the other hand, the principle of responsible government - the system of government by which the executive is responsible to the legislature - is not merely an assumption upon which the actual provisions are based; it is an integral element in the Constitution ((63) The Engineers' Case (1920) 28 CLR, per Knox C.J., Isaacs, Rich and Starke JJ. at p 147). In the words of Isaacs J. in The Commonwealth v. Kreglinger and Fernau Ltd. and Bardsley ((64) [1926] HCA 8; (1926) 37 CLR 393, at p 413): "It is part of the fabric on which the written words of the Constitution are superimposed."
The implication of fundamental rights

31. The adoption by the framers of the Constitution of the principle of responsible government was perhaps the majoR reason for their disinclination to incorporate in the Constitution comprehensive guarantees of individual rights ((65) "(T)he Australian Constitution is built upon confidence in a system of parliamentary Government with ministerial responsibility": Attorney-General (Cth); Ex rel. McKinlay v. The Commonwealth [1975] HCA 53; (1975) 135 CLR 1, per Barwick C.J. at p 24). They refused to adopt a counterpart to the Fourteenth Amendment to the Constitution of the United States. Sir Owen Dixon said ((66) Sir Owen Dixon, "Two Constitutions Compared", Jesting Pilate, (1965), p 102):

> "(they) were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full

content
of legislative power. The history of their country had not taught them the

> need of provisions directed to control of the legislature itself."

The framers of the Constitution accepted, in accordance with prevailing English thinking, that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy ((67) Sir Anthony Mason, "The Role of a Constitutional Court in a Federation", [1986] FedLawRw 1; (1986) 16 Federal Law Review 1, at p 8).

32. So it was that Professor Harrison Moore, writing in 1901, was able to say of the Constitution ((68) The Constitution of the Commonwealth of Australia, 1st ed. (1902), p 329):

> "The great underlying principle is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share,

and

> an equal share, in political power."

33. In the light of this well recognized 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.

34. However, the existence of that sentiment when the Constitution was adopted and the influence which it had on the shaping of the Constitution are no answer to the case which the plaintiffs now present. Their case is that a guarantee of freedom of expression in relation to public and political affairs must necessarily be implied from the provision which the Constitution makes for a system of representative government. The plaintiffs say that, because such a freedom is an essential concomitant of representative government, it is necessarily implied in the prescription of that system.

Representative government

35. The Constitution provided for representative government by creating the Parliament, consisting of the Queen, a House of Representatives and a Senate, in which legislative poweR is vested ((69) s.1), the members of each House being elected by popular vote, and by vesting the executive poweR in the Queen and making it exercisable by the Governor-General on the advice of the Federal Executive Council ((70) ss.61, 62), consisting of the Queen's Ministers of State drawn, subject to a minor qualification, from the House of Representatives and the Senate ((71) s.64. "AfteR the first general election no Minister shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives."). In the case of the Senate, s.7 provides that it:

> "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".

In the case of the House of Representatives, s.24 provides that it:

> "shall be composed of members directly chosen by the people of the Commonwealth".

Although s.24 contains no reference to voting, s.25 makes it clear that "chosen" means "chosen by vote at an election".

36. In Attorney-General (Cth); Ex rel McKinlay v. The Commonwealth ((72) (1975) 135 CLR , at pp 55-56), Stephen J. discerned in these two provisions the principles of representative democracy (by which he meant that the legislators are directly chosen by the people) and direct popular election. The correctness of his Honour's view is incontestable, notwithstanding that the Constitution does not prescribe universal adult suffrage. Such a suffrage did not exist at that time. Although prescription of the qualifications of electors was left for the ultimate determination of the Parliament ((73) ss.8, 30), the Constitution nonetheless brought into existence a system of representative government in which those who exercise legislative and executive power are directly chosen by the people. The Governor-General, though the repository of executive power, does not personally exercise that power, being bound to act with the advice of the Executive Council ((74) It should be noted that the notion of representative government leaves out of account the judicial branch of government.).

37. The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it

denotes that the sovereign poweR which resides in the people is exercised on their behalf by their representatives. In the case of the Australian Constitution, one obstacle to the acceptance of that view is that the Constitution owes its legal force to its character as a statute of the Imperial Parliament enacted in the exercise of its legal sovereignty; the Constitution was not a supreme law proceeding from the people's inherent authority to constitute a government ((75) Sir Owen Dixon, "The Law and the Constitution", (1935) 51 Law Quarterly Review 590, at p 597.), notwithstanding that it was adopted, subject to minor amendments, by the representatives of the Australian colonies at a Convention and approved by a majority of the electors in each of the colonies at the several referenda. Despite its initial character as a statute of the Imperial Parliament, the Constitution brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people. Hence, the prescribed procedure for amendment of the Constitution hinges upon a referendum at which the proposed amendment is approved by a majority of electors and a majority of electors in a majority of the States ((76) s.128). And, most recently, the Australia Act 1986 (U.K.) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people ((77) Lindell,"Why is Australia's Constitution Binding? - The Reasons in 1900 and Now, and the Effect of Independence", [1986] FedLawRw 2; (1986) 16 Federal Law Review 29, at p 49.). The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act. Freedom of communication as an indispensable element in representative government

38. Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticize government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives. By these means the elected representatives are equipped to discharge their role so that they may take account of and respond to the will of the people. Communication in the exercise of the freedom is by no means a one-way traffic, for the elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform the people so that they may make informed judgments on relevant matters. Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative.

39. Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community. That is because individual judgment, whether that of the elector, the representative or the candidate, on so many issues turns upon free public discussion in the media of the views of all interested persons, groups and bodies and on public participation in, and access to, that discussion ((78) Lord Simon of Glaisdale made the point in Attorney-General v. Times Newspapers Ltd. (1974) AC 273, at p 315, when he said:

> "People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and

> arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press
>
> being a principal instrument."). In truth, in a representative democracy, public participation in political discussion is a central element of the political process.

40. Archibald Cox made a similar point when he said ((79) The Court and the Constitution, (1987), p 212.):

> "Only by uninhibited publication can the flow of information be secured and the people informed concerning men, measures, and the conduct of government ... Only by freedom of speech, of the press, and of association
> can people build and assert political power, including the power to change
>
> the men who govern them."

The last sentence in the passage just quoted is a striking comment on Professor Harrison Moore's statement that "(t)he great underlying principle" of the Constitution ((80) The Constitution of the Commonwealth of Australia, op cit, p 329.) was that the rights of individuals were sufficiently secured by ensuring each an equal share in political power. Absent freedom of communication, there would be scant prospect of the exercise of that power.

41. The fundamental importance, indeed the essentiality, of freedom of communication, including freedom to criticize government action, in the system of modern representative government has been recognized by courts in many jurisdictions. They include Australia ((81) Commonwealth of Australia v. John Fairfax and Sons Ltd. [1980] HCA 44; (1980) 147 CLR 39, per Mason J. at p 52; this statement was approved in Attorney-General v. Guardian Newspapers Ltd. (No.2) [1988] UKHL 6; (1990) 1 AC 109, at pp 258, 270, 283.), England ((82) Attorney-General v. Guardian Newspapers Ltd (No. 2); Hector v. Attorney-General of Antigua and Barbuda (1990) 2 AC 312, per Lord Bridge of Harwich at p 318; Derbyshire County Council v. Times Newspapers Ltd. (1992) 3 WLR 28, peR Balcombe L.J. at p 46; Ralph Gibson L.J. at pp 54-55; Butler-Sloss L.J. at p 62.), the United States ((83) New York Times Co. v. Sullivan [1964] USSC 40; (1964) 376 US 254; Smith v. Daily Mail Publishing Co. (1979) 443 US 97, per Rehnquist J. at p 106: "Historically, we have viewed freedom of the speech as indispensable to a free society and its government."), Canada ((84) Re Alberta Legislation (1938) 2 DLR 81, per Duff C.J. and Davis J. at pp 107-108; Re Fraser and Public Service Staff Relations Board (1985) 23 DLR (4th) 122, per curiam, at p 128; Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd. (1986) 33 DLR (4th) 174, per McIntyre J. (with whom all members of the Supreme Court of Canada agreed on this point) at p 183:

> "Freedom of expression is not ... a creature of the Charter. It is one of the fundamental concepts that has formed the basis of 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.") and the European Court of Human Rights ((85) Handyside v. United Kingdom [1976] ECHR 5; (1976) 1 EHRR
> 737, at p 754; The Sunday Times Case (The Sunday Times v. The United

> Kingdom) [1979] ECHR 1; (1979) 2 EHRR 245; Lingens v. Austria [1986] ECHR 7; (1986) 8 EHRR 407,
> at p 418; The Observer and the Guardian v. United Kingdom [1991] ECHR 49; (1991) 14
> EHRR 153, at pp 191, 200, 206-207, 216, 217, 218; The Sunday Times v.
> United Kingdom (No.2) [1991] ECHR 50; (1991) 14 EHRR 229, at p 247.).

Implication of a guarantee of freedom of communication on matters relevant to public affairs and political discussion

42. Freedom of communication in the sense just discussed is so indispensable to the efficacy of the system of representative government for which the Constitution makes provision that it is necessarily implied in the making of that provision. Much the same view was taken in Canada under the British North America Act 1867 (Imp) (30 and 31 Vict. c.3) which contained no express guarantee of freedom of speech or freedom of communication. The preamble to that Act manifested an intention to bring into existence a Constitution for Canada similar in principle to that of the United Kingdom. From the existence of the preamble, and from the grant of representative government in the form of parliamentary democracy and the dependence of that institution for its efficacy on the exercise of the right of free public discussion, Duff C.J., Cannon and Davis JJ. in Re Alberta Legislation concluded that the Parliament of Canada had by necessary implication legislative power to protect that right and that, correspondingly, provincial legislatures lacked power to curtail the right or at any rate so "as substantially to interfere with the working of the parliamentary institutions of Canada" ((86) (1938) 2 DLR 81, at pp 107-109, 119-120). In Switzman v. Elbling ((87) (1957) 7 DLR (2d) 337, at p 371), Abbott J. expressed the view that neither federal nor provincial legislatures could abrogate the right, a view which was endorsed by Beetz J. (writing foR himself and three other Judges) in Re Ontario Public Service Employees' Union and Attorney-General for Ontario ((88) (1987) 41 DLR (4th) 1, at p 40). In the result, to repeat the words of McIntyre J. in Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd. ((89) (1986) 33 DLR (4th), at p 184), it may now be said that:

> "(p)rior to the adoption of the Charter, freedom of speech and
> expression had been recognized as an essential feature of Canadian
> parliamentary democracy."

His Lordship added the comment: "Indeed, this Court may be said to have given it constitutional status." ((90) ibid. See also the endorsement of these remarks by Dickson C.J. in Re Ontario Public Service Employees' Union (1987) 41 DLR (4th), at p 16, and a similar statement in Re Fraser and Public Service Staff Relations Board (1985) 23 DLR (4th), per curiam, at pp 127-128.)

43. It seems that the Supreme Court of Canada has ascertained from the structure of the Constitution granted by the British North America Act and its preamble an implied freedom of speech and expression which may be more extensive as to subject-matter than the implied freedom I have identified so far from my analysis of the Australian Constitution. Whether freedom of communication in relation to public affairs and political discussion is substantially different from an unlimited freedom of communication and, if so, what is the extent of the difference, are questions which were not debated and do not call for decision. What is presently significant is that the implied freedom of speech and expression in Canada is founded on the view that it is indispensable to the efficacious working of Canadian representative parliamentary democracy.
The indivisibility of freedom of communication in relation to public affairs and political discussion

44. The concept of freedom to communicate with respect to public affairs and political discussion does not lend itself to subdivision. Public affairs and political discussion are indivisible and cannot

be subdivided into compartments that correspond with, or relate to, the various tiers of government in Australia. Unlike the legislative powers of the Commonwealth Parliament, there are no limits to the range of matters that may be relevant to debate in the Commonwealth Parliament or to its workings. The consequence is that the implied freedom of communication extends to all matters of public affairs and political discussion, notwithstanding that a particulaR matter at a given time might appear to have a primary or immediate connection with the affairs of a State, a local authority or a Territory and little or no connection with Commonwealth affairs. Furthermore, there is a continuing inter-relationship between the various tiers of government. To take one example, the Parliament provides funding for the State governments, Territory governments and local governing bodies and enterprises. That continuing inter-relationship makes it inevitable that matters of local concern have the potential to become matters of national concern. That potential is in turn enhanced by the predominant financial power which the Commonwealth Parliament and the Commonwealth government enjoy in the Australian federal system ((91) Sir Anthony Mason, op cit, p 14).

Infringement: the test to be applied.

45. In most jurisdictions in which there is a guarantee of freedom of communication, speech or expression, it has been recognized that the freedom is but one element, though an essential element, in the constitution of "an ordered society" ((92) Hughes and Vale Pty. Ltd. v. The State of New South Wales (No.2) [1955] HCA 28; (1955) 93 CLR 127, per Kitto J. at p 219) or a "society organized under and controlled by law" ((93) Samuels v. Readers' Digest Association Pty. Ltd. [1969] HCA 6; (1969) 120 CLR 1, per Barwick C.J. at p 15). Hence, the concept of freedom of communication is not an absolute. The guarantee does not postulate that the freedom must always and necessarily prevail over competing interests of the public. Thus, to take an example, Parliament may regulate the conduct of persons with regard to elections so as to prevent intimidation and undue influence, even though that regulation may fetter what otherwise would be free communication ((94) Smith v. Oldham [1912] HCA 61; (1912) 15 CLR 355, per Griffith C.J. at pp 358-359). And, in the United States, despite the First Amendment, the media is subject to laws of general application ((95) Cohen v. Cowles Media Co. (1991) 59 LW. 4773, at p 4775).

46. A distinction should perhaps be made between restrictions on communication which target ideas or information and those which restrict an activity or mode of communication by which ideas or information are transmitted. In the first class of case, only a compelling justification will warrant the imposition of a burden on free communication by way of restriction and the restriction must be no more than is reasonably necessary to achieve the protection of the competing public interest which is invoked to justify the burden on communication. Generally speaking, it will be extremely difficult to justify restrictions imposed on free communication which operate by reference to the character of the ideas or information. But, even in these cases, it will be necessary to weigh the competing public interests, though ordinarily paramount weight would be given to the public interest in freedom of communication ((96) Cox Broadcasting Corp. v. Cohn [1975] USSC 44; (1975) 420 US 469, at p 491 et seq.). So, in the area of public affairs and political discussion, restrictions of the relevant kind will ordinarily amount to an unacceptable form of political censorship.

47. On the other hand, restrictions imposed on an activity oR mode of communication by which ideas or information are transmitted are more susceptible of justification. The regulation of radio and television broadcasting in the public interest generally involves some restrictions on the flow and dissemination of ideas and information. Whether those restrictions are justified calls for a balancing of the public interest in free communication against the competing public interest which the restriction is designed to serve, and for a determination whether the restriction is reasonably necessary to achieve the competing public interest ((97) "(G)eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First ... Amendment forbade ... Whenever, in such a context,

these constitutional protections are asserted against the exercise of valid government powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved": Konigsberg v. State Bar of California [1961] USSC 73; (1961) 366 US 36, per Harlan J. at pp 50-51; Tribe, American Constitutional Law, 2nd ed. (1988), pp 790-791. (98) See, in a different context, Castlemaine Tooheys Ltd. v. South Australia [1990] HCA 1; (1990) 169 CLR 436, at pp 471-472.). If the restriction imposes a burden on free communication that is disproportionate to the attainment of the competing public interest, then the existence of the disproportionate burden indicates that the purpose and effect of the restriction is in fact to impair freedom of communication (98).

48. In weighing the respective interests involved and in assessing the necessity for the restriction imposed, the Court will give weight to the legislative judgment on these issues. But, in the ultimate analysis, it is for the Court to determine whether the constitutional guarantee has been infringed in a given case. And the Court must scrutinize with scrupulous care restrictions affecting free communication in the conduct of elections foR political office for it is in that area that the guarantee fulfils its primary purpose ((99) "(T)he constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office": Monitor Patriot Co. v. Roy [1971] USSC 32; (1971) 401 US 265, per curiam, at p 272; Buckley v. Valeo [1976] USSC 24; (1976) 424 US 1, at p 15. The Court was there speaking of the First Amendment which is broader in scope than the implied guarantee in the Australian Constitution but the comment applies to our situation.). Is Part IIID valid?

49. The restrictions imposed in the present case are expressed so as to appear to fall into the second, rather than the first, class of case discussed above. The restrictions are imposed upon television and radio broadcasting. But the law which imposes the restrictions is not one of general application; the law is specifically directed at, and prohibits, the broadcasting, in connection with the electoral process, of matters relating to public affairs and political discussion, including political advertisements. So, in conformity with what I have already said, notwithstanding the legislative judgment that the restrictions are necessary for achieving the ends identified earlier in these reasons, the Court must scrutinize the validity of Pt IIID with scrupulous care.

50. In approaching the respective interests in this case, I am prepared to assume that the purpose of Pt IIID is to safeguard the integrity of the political process by reducing pressure on parties and candidates to raise substantial sums of money, thus lessening the risk of corruption and undue influence. I am prepared also to assume that other purposes of Pt IIID are to terminate (a) the advantage enjoyed by wealthy persons and groups in gaining access to use of the airwaves; and (b) the "trivialising" of political debate resulting from very brief political advertisements. Moreover, I am prepared to accept that the need to raise substantial funds in order to conduct a campaign for election to political office does generate a risk of corruption and undue influence, that in such a campaign the rich have an advantage over the poor and that brief political advertisements may "trivialise" political debate.

51. Given the existence of these shortcomings or possible shortcomings in the political process, it may well be that some restrictions on the broadcasting of political advertisements and messages could be justified, notwithstanding that the impact of the restrictions would be to impair freedom of communication to some extent. In other words, a comparison or balancing of the public interest in freedom of communication and the public interest in the integrity of the political process might well justify some burdens on freedom of communication. But it is essential that the competition between the two interests be seen in perspective. The raison d'_tre of freedom of communication in relation to public affairs and political discussion is to enhance the political process (which embraces the electoral process and the workings of Parliament), thus making representative government efficacious.

52. The enhancement of the political process and the integrity of that process are by no means opposing or conflicting interests and that is one reason why the Court should scrutinize very carefully any claim that freedom of communication must be restricted in order to protect the integrity of the political process. Experience has demonstrated on so many occasions in the past that, although freedom of communication may have some detrimental consequences for society, the manifest benefits it brings to an open society generally outweigh the detriments. All too often attempts to restrict the freedom in the name of some imagined necessity have tended to stifle public discussion and criticism of government. The Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the political process.

53. As I pointed out earlier, Pt IIID severely restricts freedom of communication in relation to the political process, particularly the electoral process, in such a way as to discriminate against potential participants in that process. The sweeping prohibitions against broadcasting directly exclude potential participants in the electoral process from access to an extremely important mode of communication with the electorate. Actual and potential participants include not only the candidates and established political parties but also the electors, individuals, groups and bodies who wish to present their views to the community. In the case of referenda, oR at least some of them, the States would have important interests at stake and would be participants in the process.

54. It is said that the restrictions leave unimpaired the access of potential participants during an election period to other modes of communication with the electorate. The statement serves only to underscore the magnitude of the deprivation inflicted on those who are excluded from access to the electronic media. They must make do with other modes of communication which do not have the same striking impact in the short span of an election campaign when the electors are consciously making their judgments as to how they will vote.

55. It is also said that the protection given by s.95A to items of news, current affairs and comments on such items, and talkback radio programmes will preserve communication on the electronic media about public and political affairs during election periods. But access on the part of those excluded is not preserved, except possibly at the invitation of the powerful interests which control and conduct the electronic media. Those who are excluded are exposed to the risk that the protection given by s.95A may result in the broadcasting of material damaging to the cause or causes they support without their being afforded an opportunity to reply.

56. The replacement regime, which rests substantially on the provisions relating to the grant of free time, is weighted in favour of the established political parties represented in the legislature immediately before the election and the candidates of those parties; it discriminates against new and independent candidates. By limiting their access to a maximum of 10 peR 0011 cent of the free time available for allocation, Pt IIID denies them meaningful access on a non-discriminatory basis. As for persons, bodies and groups who are not candidates, they are excluded from radio and television broadcasting during election periods. The consequence is that the severe restriction of freedom of communication plainly fails to preserve or enhance fair access to the mode of communication which is the subject of the restriction. The replacement regime, though it reduces the expenses of political campaigning and the risks of trivialisation of political debate, does not introduce a "level playing field". It is discriminatory in the respects already mentioned. In this respect I do not accept that, because absolute equality in the sharing of free time is unattainable, the inequalities inherent in the regime introduced by Pt IIID are justified oR legitimate.

57. On this score alone, Pt IIID is invalid, apart from the prohibitions on broadcasting matter for or on behalf of the government, or a government authority, of the Commonwealth during the various election periods((100) ss.95B(1), 95C(3), 95D(1)). But it can scarcely be thought, s.95(2) notwithstanding, that those prohibitions were intended to operate alone in respect of each election

period. Part IIID is therefore invalid in its entirety. Moreover, I regard the presence of s.95J as an obstacle to the validity of the Part. In my view, it is impossible to justify the validity of a regime which restricts freedom of communication in relation to the electoral process when the operation of the regime depends upon the making of regulations at the discretion of the Executive government according to unspecified criteria. The existence of the discretion leaves the Executive government at any given time with the option of invoking the Pt IIID regime or discarding it; in other words, the government of the day can decide which course suits it best. It is difficult to conceive of a compelling, even of a reasonable, justification for a regime restricting feedom of communication which confers such an advantage on the Executive government.

58. There being no reasonable justification for the restrictions on freedom of communication imposed by Pt IIID, the Part is invalid. In the light of my conclusion as to the indivisibility of freedom of communication in relation to public affairs and political discussion, the prohibitions in connection with all forms of election and referenda must fail. Despite the express intention in s.95 (2) that the several provisions of the Part should operate to the extent to which they are capable of operating, severance is impossible. The free time provisions in Div.3 and the policy launch provisions in Div.4 cannot operate in isolation from the prohibitions and, in any event, it is the discriminatory effect of the free time provisions that is the principal reason for the invalidity of the regulatory scheme. No attempt was made in argument to sustain the validity of the prohibitions in Div.2 dissociated from the operation of the free time provisions. Nor, foR that matter, was any attempt made to support an independent valid operation for the provisions relating to Territory elections.

59. It is for the foregoing reasons that I participated in the making of the orders announced on 28 August 1992. They were:
Matter No. S5 of 1992

60. Demurrer overruled with costs.
Matter No. S6 of 1992

61. First paragraph of the demurrer of the first defendant overruled with costs.

BRENNAN J. Pt IIID of the Broadcasting Act 1942 (Cth) ("the Act") was introduced into the Act by the Political Broadcasts and Political Disclosures Act 1991 (Cth) ("the amending Act"). In substance, Pt IIID bans political advertising during election periods, whether the election be a Commonwealth, State, Territory or Local Authority election and during prescribed periods prior to voting on Commonwealth referenda.

2. The Bill for the amending Act was passed after reports by two Parliamentary Committees. The first report, entitled "Who pays the piper calls the tune", was prepared by the Parliamentary Joint Standing Committee on Electoral Matters in June 1989; the second report was a report on the Bill then before the Senate and it was prepared by the Senate Select Committee on Political Broadcasts and Political Disclosures in November 1991 ("the Senate Report"). The problem addressed by the first Report was summarized in its preface:

> "The rising cost of television advertising time has
> coincided with the growing use of that medium for political advertising.
> This has greatly increased the reliance of parties on corporate

sponsorship.

> The Committee is concerned that heavy reliance by parties on such
> sponsorship risks the distortion of our open democratic system.

> The electoral system should ensure that large financial sponsors, having paid the piper, do not also call the tune. The wider membership of

political

> parties should not lose its influence within the respective parties."

The Report contained statistics of expenditure on political advertising showing, inter alia:

> Expenditure on - Public Funding
> Broadcasters Publishers
> 1984 election: $4,437,374 $2,672,707 $7,806,777
> 1987 election: $9,172,815 $5,726,824 $10,298,657

In 1984, the last year in which printers' returns were available, expenditure on printing was of a much loweR order than expenditure on broadcasters and publishers. The Minister's second reading speech on the Bill for the amending Act in the House showed that expenditure by majoR political parties on broadcasting in the 1990 federal election rose to more than $15 million((101) House of Representatives, Parliamentary Debates (Hansard), 9 May 1991, p 3480.).

3. The amending Act bans not only advertising by political parties but also political advertising by charitable organizations. That ban was supported by the Minister in his second reading speech as a remedy for inequality in the financial strength of proponents and opponents concerned with particulaR issues. The Minister gave an example drawn from the 1990 elections. During that election period, expenditure on political broadcasting advertisements by persons other than political parties was $1.7 million. "Of that figure," said the Minister, "over $1.1m was expended by the logging industry, while the Australian Conservation Foundation spent just over $25,000 on broadcasting activity"((102) ibid). The view taken by the Government was put thus: "The reality is that only the rich can get their message across by ... means (of electronic advertising)"((103) ibid).

4. Of course, the political motivation for legislation is in itself immaterial to its constitutional validity. Nor is it necessary to resort to the legislative history of the amending Act in order to cast light on its interpretation. But the matters to which I have referred identify the perceived mischiefs at which Pt IIID was aimed. If Pt IIID is appropriate and adapted to the remedying of those perceived mischiefs, the legal question is whether the remedying of those mischiefs is a subject within the legislative power of the Parliament. Pt IIID is valid if it be a law for the elimination or reduction of factors that distort the system of representative democracy prescribed by the Constitution and does not stifle political discussion. Its validity is impugned on the ground that it offends a constitutional guarantee of freedom of communication to and among the Australian people.

A guarantee of freedom of communication

5. The first issue is whether there is any guarantee of freedom of communication implied in the Constitution. FoR reasons which I give in Nationwide News Ltd. v. Wills((104) unreported, published concurrently with this judgment on 30 September 1992), I would hold that the legislative powers of the Parliament are so limited by implication as to preclude the making of a law trenching upon that freedom of discussion of political and economic matters which is essential to sustain the system of representative government prescribed by the Constitution. To hold that the Constitution contains such an implication is not to state any very precise criterion for determining the validity of impugned legislation. The law under review in Nationwide News purported to suppress any comment calculated to bring the Australian Industrial Relations Commission into disrepute when the Commission had important governmental functions entrusted to it. The suppression was so broad that the overreaching of the limitation on legislative power was manifest. In this case, however, there is only a partial and temporary restriction on political

advertising. The challenge to the validity of Pt IIID therefore calls for a closer analysis of the implied limitation placed on legislative power by the freedom of discussion needed to sustain the system of representative government. That freedom includes, but is not confined to, a freedom to communicate information and ideas.

6. It is convenient in the context of Pt IIID to speak of the implied limitation as a freedom of communication, for the terms are reciprocal: the extent of any relevant limitation of legislative power is the scope of the relevant freedom. But, unlike freedoms conferred by a **Bill of Rights** in the American model, the freedom cannot be understood as a personal right the scope of which must be ascertained in order to discover what is left foR legislative regulation; rather, it is a freedom of the kind for which s.92 of the Constitution provides: an immunity consequent on a limitation of legislative power. The power cannot be exercised to impair unduly the freedom of informed political discussion which is essential to the maintenance of a system of representative government. Whether that freedom is regarded as an incident of the individual right to vote((105) See Ashby v. White [1790] EngR 55; (1703) 2 Ld Raym 938 (92 ER 126); Judd v. McKeon [1926] HCA 33; (1926) 38 CLR 380, at p 385) or as inherent in the system of representative and responsible government prescribed by ChI of the Constitution, it limits the legislative powers otherwise conferred on the Parliament. The freedom begins at a boundary varying with the subject matter of each law. In an extreme case - for example, a law imposing wartime censorship - the freedom to discuss matters of defence may be virtually eliminated. The variable boundary of the freedom follows from the consideration that, in order that a law may validly restrict a freedom of communication about political or economic matters, the restriction must serve some other legitimate interest and it must be proportionate to the interest to be served. Thus, a law which (being otherwise within power) forbids the publication of fraudulent or obscene material, or of seditious utterances or of defamatory matter without justification or excuse, or of advertisements for dangerous or prohibited drugs, is a law which trespasses upon absolute freedom to communicate, but it is a valid law provided the restrictions imposed by the law are proportionate to the interest which the law is calculated to serve. The proportionality of the restriction to the interest served is incapable of a priori definition: in the case of each law, it is necessary to ascertain the extent of the restriction, the nature of the interest served and the proportionality of the restriction to the interest served.

The extent of the restriction

7. Restrictions on political advertising are imposed by ss.95B, 95C and 95D of the Act. Each of those provisions is subject to s.95A which provides:

> " (1) Nothing in this Part prevents a broadcaster from broadcasting:
> (a) an item of news or current affairs, or a comment on any such item; or
> (b) a talkback radio program.
> (2) Nothing in this Part prevents the holder of a public radio licence who provides a service for visually handicapped persons from broadcasting any material that he or she is permitted to broadcast under section

119AB.

> (3) Nothing in this Part prevents a broadcaster from broadcasting an advertisement for, or on behalf of, a charitable organisation if:
> (a) the advertisement is aimed at promoting the objects of the organisation; and
> (b) the advertisement does not explicitly advocate voting for or against a candidate in an election or a political party.

(4) Nothing in this Part prevents a broadcaster from broadcasting public health matter, whether by way of advertisement or otherwise.
(5) In this section:
'charitable organisation' means a public organisation whose objects are to benefit the public through the relief of poverty, or the advancement

of

education, religion, public health or science;
'public health matter' means any matter relating to public health, other than matter that:
(a) directly or indirectly promotes or criticises a particular public health system; or
(b) explicitly advocates voting for or against a candidate in an election or a political party."

The term "broadcaster" is defined to mean((106) By s.4 of the Act, amended by s.5 of the amending Act.) the Australian Broadcasting Corporation, the Special Broadcasting Service Corporation or a television or radio licensee. The effect of s.95A is to leave the electronic media unaffected during an election period((107) As defined by s.4 of the Act, amended by s.5 of the amending Act.) in the broadcasting of news and current affairs programmes, commentaries on items in those programmes, talk-back programmes, public health broadcasts and broadcasts for charities (provided, in the last two instances, the broadcasts are not political in the sense of being directed to the formation of voters' opinions in an election). Broadcasters are free to broadcast "exempt matter" as defined in s.4. That definition covers the kind of advertising that flows from the performance of the ordinary functions of government having no political reference.

8. Sections 95B, 95C and 95D then impose restrictions on political advertising by means of the electronic media during election periods. These sections call for separate consideration for they purport to suppress political advertising during different election periods: s.95B relates to elections to the Parliament of the Commonwealth and Commonwealth referenda, s.95C relates to elections to the legislature or to a local government authority of a Territory and s.95D relates to elections to the Parliament or to a local government authority of a State. Each of these sections is said to be supported by the Parliament's power over broadcasting (s.51(v) of the Constitution), but other and differing considerations affect the validity of each section. Section 95B is said to be supported by the Parliament's poweR 0013 over Commonwealth elections (ss.10, 29, 31, 51 (xxxvi) and (xxxix) of the Constitution). Section 95C also attracts the Territories power: s.122. Section 95D is attacked on the grounds that it interferes with the organs of the States and impairs the capacity of the Executive Governments of the States to function. A further argument on behalf of the States is that the ban on political advertising by States, which is imposed by each of ss.95B (3), 95C(4) and 95D(3), singles out the States and their authorities for discriminatory treatment. It is convenient to consider the validity of ss.95B, 95C and 95D in turn, and then to mention briefly the ban on political advertising by States. The first subject for examination is whether s.95B, which imposes restrictions on political advertising by means of the electronic media during election periods relating to elections to the Commonwealth Parliament and Commonwealth referenda, is a valid law of the Commonwealth. That section provides:

" (1) A broadcaster must not, during the election period in relation to an election or a referendum, broadcast any matter (other

than

exempt matter) for or on behalf of the government, or a government authority, of the Commonwealth.

(2) A broadcaster must not, during the election period in relation to an election or a referendum, broadcast a political advertisement for or on behalf of a government, or a government authority, of a Territory.
(3) A broadcaster must not, during the election period in relation to an election or a referendum, broadcast a political advertisement for or on behalf of a government, or a government authority, of a State.
(4) Subject to Divisions 3 and 4, a broadcaster must not, during the election period in relation to an election or a referendum, broadcast a political advertisement:
(a) for or on behalf of a person other than a government or government authority; or
(b) on his or her own behalf.
(5) Where the election concerned is a by-election, this section is taken to apply only to broadcasting:
(a) in the case of a broadcast made as part of a broadcasting service without a service area - to the area in which the relevant electoral district, or any part of it, overlaps with the area in which the broadcasting service is normally received; and
(b) in the case of a broadcast made as part of a broadcasting service with a service area - to the area in which the

relevant

electoral district, or any part of it, overlaps with the service area.
(6) In this section:
'election' means an election to the Parliament of the Commonwealth;
'political advertisement' means an advertisement that contains political matter;
'political matter' means:
(a) matter intended or likely to affect voting in the election or referendum concerned; or
(b) matter containing prescribed material;
but does not include exempt matter;
'prescribed material' means material containing an express or implicit reference to, or comment on, any of the following:
(a) the election or referendum concerned;
(b) a candidate or group of candidates in that election;
(c) an issue submitted or otherwise before electors in that election;
(d) the government, the opposition, or a previous government or opposition, of the Commonwealth;
(e) a member of the Parliament of the Commonwealth;
(f) a political party, or a branch or division of a political party."

During an election period, no government or government authority of the Commonwealth, of a State or of a Territory and no other person is permitted to broadcast or to authorize the broadcast of a political advertisement. That is a direct restriction on communications of a political kind at a time when discussion of politics is of great importance to an electorate which is shortly to go to the polls. As Windeyer J. remarked in Australian Consolidated Press Ltd. v. Uren((108) [1966] HCA 37; (1966) 117 CLR 185, at p 210):

> "Freedom at election time to praise the merits and policies of some candidates and to dispute and decry those of others is an essential of parliamentary democracy."

However, s.95B does not affect the print media nor - by reason of s.95A - does it inhibit the dissemination of news, news commentary or any material other than political advertising by the electronic media.

The interest to be served by the restriction

9. By eliminating the opportunity, s.95B eliminates the practical need to engage in the most expensive form of media advertising available to influence voter opinion in an election campaign. The restriction on political advertising as a means of reducing the expenditure on election campaigns is not a novel experiment unique to Australia. The Senate examined the position in otheR liberal democracies and found that the position was "complex", being affected by the regime governing broadcasting in each country. In some countries, no advertising is permitted; in others no political advertising is permitted, or none during specified periods. It appears that, for one reason or another, paid political advertising is not permitted during election times in the United Kingdom, Ireland, France, Norway, Sweden, Denmark, Austria, The Netherlands, Israel oR Japan. Paid political advertising is permitted during election periods in Germany, Canada (for 28 days only), the United States and New Zealand. It is also permitted in Switzerland but "there is little advertising by political parties on the electronic media due to the high costs involved"((109) Senate Report, p 123). Many of the countries which ban paid political advertising during election times have constitutions guaranteeing the right to freedom of expression((110) Denmark, Ireland, Japan, The Netherlands, Norway and Sweden.). Although Art.10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees a freedom to "impart information and ideas", a challenge to the ban on political advertising on British television failed ((111) X and the Association of Z v. United Kingdom (European Commission of Human Rights, 12 July 1971)). The European Commission of Human Rights held it to be evident that the freedom guaranteed by Art.10 "cannot be taken to include a general and unfettered right for any private citizen or organisation to have access to broadcasting time on radio and television in order to forward its opinion"((112) ibid., at p 88). It held that the recognition of a State's power to license broadcasting and television permitted the granting of licences which excluded political advertising.

10. 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. In the United Kingdom, the need to control electoral expenses of candidates has long been recognized. The objects of control, says Professor Birch((113) The British System of Government, 7th ed. (1986), p 84.), were "preventing corruption and keeping wealthy candidates oR parties from having an untoward advantage over others". He notes that central expenses of political parties are not controlled -

> "but they are minimal compared with the equivalent expenditures in the United States and Canada. One reason for this is the shortness of the campaign period - normally between three and four weeks. The other main reason is that the parties cannot buy advertising time on television or radio. They get a certain number of free broadcasts each and a great deal of free news coverage, which has to be balanced and impartial between the main parties."((114) ibid)

11. In the United Kingdom's response to the challenge to the ban on political advertising on television, the Minister advised the European Commission of Human Rights that the ban -

> "served 'to prevent the exponents of political views with the longest purse - whoever these may be - from having an advantage in terms of buying time on television to promote their cause'. If the clause did not exist, less well endowed parties or movements would have great difficulty in maintaining their point of view in the face of massive purchase of advertising time by their opponents."((115) X and the Association of Z v. United Kingdom (European Commission of Human Rights, 12 July 1971), p 87.)

12. Of course, a prohibition on political advertising by means of the electronic media is not the only way of minimizing the risk of corruption or of reducing the untoward advantage of wealth on the formation of political opinion. A more direct way of achieving that result is to limit the expenditure which an individual or an organization is permitted to make on political advertising. Until 1980, Pt XVI of the Commonwealth Electoral Act 1918 had limited the electoral expenditure of candidates, but the provisions of Pt XVI "proved to be unworkable"((116) House of Representatives, Parliamentary Debates (Hansard), 15 May 1980, p 2848.). 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 minimizing the risk of corruption oR 0015 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 Courts 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.

13. The minimizing of the risk of corruption of the Parliament and the reduction of an untoward advantage of wealth in the formation of political opinion are important objects to be advanced, if there be power to do so, by the laws of the Commonwealth. The powers available for the support of s.95B are the Parliament's powers over broadcasting and Commonwealth elections. The power conferred by s.51(v) of the Constitution extends to the control of radio and television services ((117) Jones v. The Commonwealth (No.2) [1965] HCA 6; (1965) 112 CLR 206) and of the conditions on which a licence to broadcast radio or television programmes may be granted or exercised((118) Herald and Weekly Times Ltd. v. The Commonwealth [1966] HCA 78; (1966) 115 CLR 418, at pp 433-434, 439-440.). A law prohibiting the broadcasting of some political advertisements is clearly a law falling within the power.

14. Section 95B is also a law with respect to Commonwealth elections. In Smith v. Oldham((119) [1912] HCA 61; (1912) 15 CLR 355, at p 357) it was argued that "(l)egislation which goes beyond securing the complete free collection of the opinions of the people and which seeks to limit the materials from which those opinions are derived is not legislation as to elections". Isaacs J. rejected the argument, saying((120) ibid., at p 362; see also per Griffith C.J. at pp 358-359):

> "(T)o confine the power of the Parliament to a supervision
> of the mechanism (of voting) is to neglect the vital principle behind it.
> The vote of every elector is a matter of concern to the whole

Commonwealth,

> and all are interested in endeavouring to secure not merely that the vote
> shall be formally recorded in accordance with the opinion which the voter
> actually holds, free from intimidation, coercion and bribery, but that

the
voter shall not be led by misrepresentation or concealment of any material
circumstance into forming and consequently registering a political judgment
different from that which he would have formed and registered had he known

> the real circumstances."

In Evans v. Crichton-Browne((121) [1981] HCA 14; (1981) 147 CLR 169, at p 206) the Court said that this statement "is no doubt true as a statement of general principle", though the Court construed s.161(e) of the Commonwealth Electoral Act 1918 to refer merely to the recording of an elector's political judgment((122) ibid., at pp 207-208). The legislative power of the Parliament over elections thus extends to the making of laws governing the publication of material calculated to affect the voters' electoral judgments, even to the extent of prohibiting the publication of misleading information((123) per Gibbs C.J. in Reg. v. Gray; Ex parte Marsh [1985] HCA 67; (1985) 157 CLR 351, at p 370). It is precisely because the power is so broad that it is necessary to imply some limitations which preclude its exercise to destroy or substantially to impair the system of representative democracy which the power is created to serve. The freedom of communication which is essential to the maintenance of a representative democracy must be respected, especially during an election campaign. Although s.95B bears the character of a law with respect to broadcasting and Commonwealth elections, it restricts the freedom of communication and such a restriction is valid only if it be proportionate to the legitimate ends which it is appropriate and adapted to serve.

Proportionality

15. To determine the validity of a law which purports to limit political advertising, it is necessary to consider the proportionality between the restriction which a law imposes on the freedom of communication and the legitimate interest which the law is intended to serve. If the prohibition on political advertising by means of the electronic media during election periods imposed by s.95B is not disproportionate to the objects of minimizing the risk of political corruption and reducing the untoward advantage of wealth in the formation of political opinion, s.95B is a valid law even though it restricts to some extent the freedom of political discussion((124) See Castlemaine Tooheys Ltd. v. South Australia [1990] HCA 1; (1990) 169 CLR 436, at p 473.). Proportionality is, of course, a matter of degree. When the boundary of permissible restriction on freedom of speech is passed, the law imposing the restriction loses the constitutional support of the power which would otherwise be available to support it((125) The Commonwealth v. Tasmania. The Tasmanian Dam Case [1983] HCA 21; (1983) 158 CLR 1, at p 278; South Australia v. Tanner [1989] HCA 3; (1989) 166 CLR 161, at p 178.). Thus, in Davis v. The Commonwealth((126) [1988] HCA 63; (1988) 166 CLR 79, at p 100.) Mason C.J., Deane and Gaudron JJ. said that the statute there under consideration -

> "reaches far beyond the legitimate objects sought to be
> achieved and impinges on freedom of expression by enabling the Authority

to
regulate the use of common expression ... and by making unauthorized use a

> criminal offence. Although the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too

far.

> This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits

of

> constitutional power."

In the same case, I placed some emphasis on the nature of the law to indicate the variable range of permissible restriction, saying((127) ibid., at p 116):

> "Freedom of speech may sometimes be a casualty of a law of the Commonwealth made under a specific head of legislative power - e.g., wartime censorship - or of a law designed to protect the nation - e.g., a law against seditious utterances - but freedom of speech can hardly be an incidental casualty of an activity undertaken by the Executive Government

to

> advance a nation which boasts of its freedom."

16. The Constitution does not operate in a political vacuum. It operates in and upon contemporary conditions. Some parts of the Constitution, notably Pts II, III and IV of Ch I, govern the political branches of government. It follows that when an implication, drawn from these provisions, of a freedom of political communication is relied on to invalidate a law, the implied freedom must be considered in the context of the contemporary and relevant political conditions in which the impugned law operates. If the content of the implied freedom of political discussion were ascertainable by reference solely to the constitutional text, and without reference to the political conditions in which the impugned law operates, the scope of the freedom would have to be expressed as a mere matter of form, not as a matter of substance. If it were to be expressed as a mere matter of form, the Court would be the only forum competent to express it definitively but the Court could hardly evaluate with any pretence to accuracy the substantive effect of a freedom thus expressed on the political milieu in which the law is to operate. It follows that the Court must allow the Parliament what the European Court of Human Rights calls a "margin of appreciation"((128) The Observer and the Guardian v. United Kingdom (1991) 14 EHRR153, at p 178.).

17. It is both simplistic and erroneous to regard any limitation on political advertising as offensive to the Constitution. If that were not so, there could be no blackout on advertising on polling day ((129) See s.116 of the Act and cf. Mills v. Alabama [1966] USSC 96; (1966) 384 US 214.); indeed, even advertising in the polling booth would have to be allowed unless the demands of peace, order and decorum in the polling booth qualify the limitation((130) ibid., at p 218). Though freedom of political communication is essential to the maintenance of a representative democracy, it is not so transcendent a value as to override all interests which the law would otherwise protect. For example, it is a substantial restriction on freedom of political communication to make the publication of matter defamatory of a public figure unlawful unless the defamer can plead and prove justification or a defence of qualified privilege. Yet our law has not exposed public figures

to the risk of defamation to the same extent as the **Bill of Rights** has been thought to expose them in the United States((131) See New York Times Co. v. Sullivan [1964] USSC 40; (1964) 376 US 254.).

18. Freedom of political discussion is essential to the democratic process, chiefly for two reasons: it is a stimulus to performance in public office and it is conducive to the flow of information needed or desired foR the formation of political opinions. But the salutary effect of freedom of political discussion on performance in public office can be neutralized by covert influences, particularly by the obligations which flow from financial dependence. The financial dependence of a political party on those whose interests can be served by the favours of government could cynically turn public debate into a cloak for bartering away the public interest. If Pt IIID tangibly minimizes the risk of political corruption, the restrictions it imposes on political advertising are clearly proportionate to that object of the law. WhetheR Pt IIID would tangibly minimize the risk of corruption was a political assessment. It was for the Parliament to make that assessment; it is for the Court to say whether the assessment could be reasonably made((132) Gerhardy v. Brown [1985] HCA 11; (1985) 159 CLR 70, at pp 138-139; Richardson v. Forestry Commission [1988] HCA 10; (1988) 164 CLR 261, at p 296; South Australia v. Tanner (1989) 166 CLR , at pp 167-168, 179-180.).

19. In reviewing the assessment made by the Parliament, it is necessary to form some estimate of the effect of the restrictions imposed by Pt IIID on the flow of information needed or desired by electors to form their political judgments. If those restrictions effectively deny electors the opportunity to form political judgments or substantially impair their ability to do so, the restrictions are invalid. There would be no proportionality between restrictions having so stifling an effect on political discussion on the one hand and the apprehended risk of corruption or the untoward advantages flowing from wealth on the other. But the restrictions do not block the flow of information. All news, current affairs and talk-back programmes are unaffected by the restrictions. The print media are unaffected. The otheR methods of disseminating political views such as public meetings, dooR knocks and the distribution of handbills are unaffected.

20. The principal advertisements affected by Pt IIID are television advertisements. It is not necessary to determine finally the contribution made by television advertising to the mass of information needed or desired by electors to form their political judgments, but it is impossible to conclude that the Parliament could not reasonably make an adverse assessment of the information value of television advertising. Television advertising is brief; its brevity tends to trivialize the subject; it cannot deal in any depth with the complex issues of government. Its appeal is therefore directed more to the emotions than to the intellect. The Senate Report cited the conclusion of two political scientists, Dr Ward and Dr Cook, that -

> "restriction of television advertising would not adversely affect any elements of the right to freedom of speech ... On the

contrary,

> they argued that banning televised advertising by political parties and pressure groups 'might well safeguard aspects of Australian democracy

which

> televised political advertising itself has put at risk'".((133) Senate Report, p 28, par.4.6.5)

Reciting the opinion of persons experienced in political advertising by television, the Committee expressed its view((134) ibid., p 34 par.4.11.7):

" The weight of this evidence confirmed for the Committee
the debased nature of most political advertising, its alienating effects

and

its universal failure to convey information about policies to the voters.
The Committee does not dismiss lightly the opposition to the bill on the
grounds that it would restrict freedom of speech, but it sees merit in

the
arguments put forward by Drs Ward and Cook, and others, that the advertising

industry's loss might be democracy's gain."

The Committee's view accords with the view of some observers in the United States who contend that political advertising "at best lacks substance and at worst obscures and distorts crucial issues"((135) Moran, "Format Restrictions on Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech" (1992) 67 Indiana Law Journal 663, at p 663.). Indeed, the Senate Committee was warned of the dangers of following the American example((136) Senate Report, p 17, par.3.6.5). The advertising techniques adopted in the United States are familiar to Australian television audiences. They include the promotion of stylized images ("more powerful than words and words cannot rebut images"((137) Moran, op cit, at pp 668-669)), the creation of misleading 0 non-verbal impressions, the association of candidates with something universally approved or, conversely, universally condemned, the reinforcing of viewers' prejudices, fears and uncertainties and the repetition of catchwords until they attain truth by familiarity.

21. No doubt it is true to say that the formation of political judgment is not solely an intellectual exercise. Aspirations and ideals are the stuff of statesmanship. But the articulation of aspirations and ideals and the conveying of information can be distinguished from many forms of political advertising. 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 has demonstrated, that representative government can survive and flourish without paid political advertising on the electronic media during election periods. The restrictions imposed by s.95B are comfortably proportionate to the important objects which it seeks to obtain. The obtaining of those objects would go far to ensuring an open and equal democracy. The openness of political discussion and the equality of the participants in the democratic process makes governments responsive to the popular will. The restrictions on advertising do little to inhibit the democratic process. In my view, the implied limitation on the legislative powers supporting s.95B is not trespassed upon by the restrictions which it imposes.

22. Although the restrictions imposed by s.95B preclude electronic advertising by individuals or interest groups who are unrepresented in the Parliament, individuals or interest groups are otherwise free to propose or oppose any lawful political policy. They have no personal right to advertise by the electronic media and, if the restriction on such advertising is justifiable in order to achieve the objects of Pt IIID, the incidental consequence that that avenue of advertising is closed to individuals or interest groups does not entail invalidation. Putting to one side for the moment the effect of s.95B on the States, I would hold the section to be valid.
Section 95C

23. Section 95C is supported not only by s.51(v) but also by s.122 of the Constitution as a law "for the government" of a territory. Putting to one side for the moment its effect on the States, I would hold s.95C to be valid. Even if the implied constitutional freedom of political communication

places a limitation on the legislative power conferred by s.122 (a question which I do not and need not decide), the limitation is infringed neither by s.95B nor by s.95C. However, the effect of Pt IIID on the States requires separate consideration.

Section 95D and the prohibitions in ss.95B and 95C on State advertising

24. Section 95D prohibits the broadcasting of political advertisements during election periods in relation to elections to the Parliament or local authorities of a State. Sub-sections (1) and (2), which prohibit political advertising((138) Section 95D differs in form from ss.95B and 95C in that it does not include a general prohibition on the broadcasting of any matter otheR than exempt matter on behalf of the government or government authority specified in sub-s.(1) of those respective sections.) by or on behalf of the governments or government authorities of the Commonwealth and the Territories, regulate, or are a means of regulating, the conduct of the Executive Governments of the Commonwealth and the Territories and are a constitutionally valid exercise of the Parliament's power over those Executive Governments. The only legislative power available to support sub-ss. (3) and (4) of s.95D is s.51(v) of the Constitution. The limitation on that power which guarantees a freedom of political communication in relation to the government of the Commonwealth and its territories certainly precludes an exercise of the broadcasting power that would substantially impair the freedom of political discussion essential to maintain the representative governments of the several States. The Constitution is constructed on the footing that each State has a Parliament((139) see ss.10, 29, 30, 31, 107, 108 and 111 of the Constitution.) and an Executive Council to advise the Governor((140) see s.15 of the Constitution). The Constitutions of the respective States are continued as they were "as at the establishment of the Commonwealth"((141) s.106 of the Constitution). Representative government in the States is a characteristic of theiR respective Constitutions, and the legislative power of the Commonwealth cannot be exercised substantially to impair the freedom of discussion needed to maintain representative government. However, for reasons stated above in relation to s.95B, I would not regard s.95D as trespassing on the freedom of political discussion essential to the preservation of the representative governments of the States. However, another implication drawn from what Dixon J. in Melbourne Corporation v. The Commonwealth((142) [1947] HCA 26; (1947) 74 CLR 31, at p 83) called "the very frame of the Constitution" bears upon the validity of s.95D.

25. As the Constitution predicates the continuing existence of the States as independent entities ((143) ibid., at p 82), the Constitution implies that -

> "the Commonwealth will not in the exercise of its powers discriminate against or 'single out' the States so as to impose some special burden or disability upon them, unless the nature of a specific power otherwise indicates, and will not inhibit or impair the continued existence of the States or their capacity to function."((144) Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation (1982) 152 CLR25, per Mason J. at p 93.)

Although the laws of the Commonwealth can validly facilitate the functioning of the States - for example, by providing for communication facilities oR facilities for the interstate execution of State process - a law which purports to control, for good or ill, political discussion relating to State elections purports to burden the functioning of the States with the constraints it imposes. The functions of a State include both the machinery which leads to the exercise of the State's powers and privileges and the machinery by which those powers and privileges are exercised. Some functions are performed by the electors, some by officials of the State. Among the functions of the State I would include the discussion of political matters by electors, the formation of political judgments and the casting of votes for the election of a parliament or local authority. Laws which affect the freedom of political discussion in matters relating to the government of a State, whether

by enhancement or restriction of the freedom, are laws which burden the functioning of the political branches of the government of the State with statutory constraints and restrictions. Section 95D(3) and (4) is such a law. Section 95D is expressed to apply during election periods in relation to elections to State Parliaments and local authorities, and to the broadcasting of advertisements containing "political matter", which is defined in terms that limit, or very nearly limit, the restrictions imposed by that section to the broadcasting of advertisements relating to State political matter. Although s.95D(3) and (4) is a law with respect to broadcasting, it is offensive to the implication which protects the functioning of the States from the burden of control by Commonwealth law. It is invalid on that account.

26. The Solicitor-General for New South Wales also submitted that the prohibitions against political advertising by or on behalf of States contained in s.95B(3), s.95C(4) and s.95D(3) invalidly interfere with the capacity of the Executive government of the State to govern and to protect the efficacy of State laws and policies from affectation by Commonwealth laws and policies. It is unnecessary to deal with s.95D(3) which I have already held to be invalid. If the general prohibitions on political advertising contained in ss.95B and 95C are laws with respect to heads of Commonwealth legislative power, their effect on the freedom of the Executive Government of a State to engage in electronic political advertising during Commonwealth or Territory election periods does not deprive those sections of constitutional support. I refer to, without repeating, what I said in The Tasmanian Dam Case((145) (1983) 158 CLR, at pp 215-216) about the liability of State executive power to be affected by a law of the Commonwealth.

27. The only ground on which the States might claim exemption from the operation of ss.95B(3) and 95C(4) is that those provisions single out the States oR affect their functioning. Clearly those provisions do not single out the States: rather they ensure that the position of the States is the same as the position of all other governments and persons. Nor do those provisions affect the functioning of the States: they leave the States free to exercise such powers and privileges as are lawfully vested in and available foR exercise by the States. This challenge to the validity of s.95B (3) and s.95C(4) fails.

Free time

28. Sections 95H to 95R provide for the allocation of "free time" for the broadcasting of "election broadcasts" as defined by s.95G. Section 95G seeks to ensure that election broadcasts avoid some of the undesirable features of political advertising: election broadcasts by television must last for 2 minutes and show the head and shoulders of a person speaking, unaccompanied by moving images or other vocal sounds; election broadcasts by radio must last for 1 minute without vocal sounds other than the speaker's voice. Where units of free time are "allocated" by the Australian Broadcasting Tribunal ("the Tribunal") to a broadcaster under s.95P, the broadcaster is required to "make the unit or units available for use in making ... election broadcasts ... on behalf of the political party, person or group to whom the time is granted" and the broadcaster "must do so free of charge": s.95Q(1) and (5). The free time requirement was said to amount to an acquisition of property otherwise than on just terms and to be invalid for breach of the requirements of s.51 (xxxi) of the Constitution.

29. In The Tasmanian Dam Case((146) ibid., at p 247) I pointed out that there is no acquisition on which s.51(xxxi) may fasten unless the Commonwealth oR some other person acquires a proprietary right under the impugned law. In the same case, Mason J. said((147) ibid., at p 145):

> " The emphasis in s.51(xxxi) is not on a 'taking' of private property but on the acquisition of property for purposes of the Commonwealth. To bring the constitutional provision into play it is not enough that legislation adversely affects or terminates a pre-existing

right

> that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be."

In Reg. v. Toohey; Ex parte Meneling Station Pty. Ltd.((148) [1982] HCA 69; (1982) 158 CLR 327, at p 342), Mason J. cited with approval the definition of property given by Lord Wilberforce in National Provincial Bank Ltd. v. Ainsworth((149) [1965] UKHL 1; (1965) AC 1175, at pp 1247-1248):

> "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."

His Honour added((150) (1982) 158 CLR, at pp 342-343):

> " Assignability is not in all circumstances an essential characteristic of a right of property. By statute some forms of property

are
expressed to be inalienable. Nonetheless, it is generally correct to say, as

> Lord Wilberforce said, that a proprietary right must be 'capable in its nature of assumption by third parties'".

Although property is generally assignable, that is not universally so for, as Isaacs J. said in Commissioner of Stamp Duties (N.S.W.) v. Yeend, "(a)ssignability is a consequence, not a test" of a proprietary right((151) [1929] HCA 39; (1929) 43 CLR 235, at p 245(152) which is a form of property: Television Corporation Ltd. v. The Commonwealth [1963] HCA 30; (1963) 109 CLR 59, at p 70; 2 Day FM Australia Pty. Ltd. v. Commissioner of Stamp Duties (N.S.W.) (1989) 89 ATC 4840, at pp 4,844-4,845; 20 ATR 1131, at pp 1135-1136. See also Banks v. Transport Regulation Board (Vic.) [1968] HCA 23; (1968) 119 CLR 222, at pp 230-232). Assignability may therefore be denied to what is, by other tests, properly found to be property. Nonetheless, the want of assignability of a right is a factoR tending against the characterization of a right as property. Part IIID creates no assignable rights. Under Div.3 of Pt IIID, broadcasters are statutorily bound to provide free broadcasting time to the political parties and other groups and persons to whom free time units are allocated. It is immaterial to the validity of Pt IIID that broadcasters are denied the right to broadcast what they wish during free time, or that broadcasters must use their property to provide election broadcasts during free time, for neitheR 0019 of these effects creates, extinguishes or transfers property. It is immaterial that Pt IIID reduces the value of a broadcaster's licence(152) for the beneficiaries of the free time provisions acquire none of the rights or privileges conferred by a broadcaster's licence. The beneficiaries acquire a statutory right to have their election broadcasts transmitted free of charge. That is a right to the services of the broadcaster; it is not a proprietary right. As neither the Commonwealth nor the beneficiaries acquire rights that are "property" within the meaning of the term in s.51(xxxi), the challenge to the free time provisions on the ground that they effect an acquisition of property otherwise than on just terms fails.

30. The validity of the provisions which deal with the allocation of free time is more open to question. Political parties represented in the previous Parliament or a retiring Senator seeking re-election are entitled to the allocation of free time, but other political parties, candidates, groups oR

0019 individuals seeking to participate in the election or the election debate will be allocated free time only in the discretion of the Broadcasting Tribunal((153) s.95K of the Act). These provisions and the provisions of s.95A place in the hands of the Tribunal and of the broadcasters discretionary powers which could be exercised to unbalance political discussion and to deny publicity to candidates or causes of whom or of which the electorate ought to be informed. By minimizing the risk of corruption and eliminating the untoward political advantages of wealth, the Parliament has enhanced the influence of broadcasters and has created a discretionary power that could operate to impair balanced political discussion. That is a political consideration relevant to the wisdom of Pt IIID, but it does not deny the law such constitutional support as it otherwise commands. The law does not, on that account, trespass upon that freedom of political communication which is beyond the reach of Commonwealth law.

31. The States are given no right to free time nor any right to apply for free time. They are thus denied an opportunity to make an "election broadcast". In this respect, however, the States and State Government authorities are in no different position from all other Governments and Government authorities. They are not "singled out" for adverse treatment. A State is not impermissibly "singled out" by being denied a statutory right or benefit that is given to individuals or groups but denied to all governments and government authorities.

32. In my opinion, the several provisions of Pt IIID are laws with respect to one or more of the heads of Commonwealth legislative power. However, s.95D(3) and (4) is a law infringing that implied limitation on Commonwealth legislative power which precludes the making of laws which burden the functioning of the States. The free time provisions do not provide for the acquisition of property so as to attract the operation of s.51(xxxi) of the Constitution. I would therefore hold Pt IIID of the Broadcasting Act 1942 (Cth) other than s.95D(3) and (4) to be valid. In the action Australian Capital Television Pty. Limited and Ors v. The Commonwealth of Australia (No.2), I would allow the demurrer except in relation to s.95D(3) and (4). I would make a similar order as to the first paragraph in the demurrer in The State of New South Wales v. The Commonwealth of Australia and Anor (No.2).

DEANE AND TOOHEY JJ. The background of these demurrers and the relevant statutory provisions are set out in the other judgments. We refrain from unnecessary restatement of them. In issue is the validity of the provisions of Pt 2 of the Political Broadcasts and Political Disclosures Act 1991 (Cth) ("the Amending Act"), which purported to insert Pt IIID into the Broadcasting Act 1942 (Cth) ("the Act"). It is convenient, for the purposes of discussion, to treat that issue as if it related directly to the validity of the provisions of Pt IIID of the Act rather than to the validity of the relevant provisions of the Amending Act.

2. In Nationwide News Pty. Ltd. v. Wills((154) Unreported, High Court of Australia, 30 September 1992.), we explained in some detail our reasons foR 0020 concluding that it is an implication of the doctrine of representative government embodied in the Commonwealth Constitution that there shall be freedom within the Commonwealth of communication about matters relating to the government of the Commonwealth. The grants of legislative poweR contained in s.51 of the Constitution, which are all expressly made "subject to" the Constitution, must be construed in the context of that implication and as prima facie confined by its content. The fact that the implication is drawn from an underlying doctrine of the Constitution rather than from any express term means, however, that the implication will itself be overridden to the extent that either the nature of a particular legislative poweR contained in s.51 or the words in which it is conferred manifest an intention to that effect.

3. The impugned law in Nationwide News was a law prohibiting oral or written communications which were calculated to bring a particular Commonwealth governmental institution into disrepute. Accordingly, it was unnecessary for the purposes of that case to determine whether the

Constitution's implication of freedom of communication was confined to communications in relation to the Commonwealth government and governmental instrumentalities and institutions, as distinct from State or other regional governments and governmental instrumentalities and institutions. While not expressing a firm view in relation to that question, we identified the considerations favouring the view that the implication extended to all levels of public government within the Commonwealth((155) ibid., at pp 55-56(156) See, e.g., Constitution, ss.10, 30 and 31.): "Under the Australian federal system, however, it is unrealistic to see the three levels of government - Commonwealth, State and Local - as isolated

> from one another or as operating otherwise than in an overall national context. Indeed, the Constitution's doctrine of representative government

is

> structured upon an assumption of representative government within the States(156) and, to a limited extent, an assumption of the co-operation

of

> the governments and Parliaments of the States in the electoral process itself((157) See, e.g., ss.12, 15 and 29.). As a practical matter, taxes levied by the Executive of the Commonwealth under laws made by the Parliament are applied for public purposes through and at all levels of government. Political parties or associations are likely to exist in relation to more than one level of government and political ideas are unlikely to be confined within the sphere of one level of government

only.

> Clearly enough, the relationship and interaction between the different levels of government are such that an implication of freedom of communication about matters relating to the government of the

Commonwealth

> would be unrealistically confined if it applied only to communications in relation to Commonwealth governmental institutions."

It is necessary, for the purposes of the present case, to reach a firm view on the question whether the Constitution's implication of freedom of communication extends to all political matters, including matters relating to other levels of government, within the national system which exists under the Constitution. In our view, for the reasons given in the above passage and by Gaudron J. in her judgment in the present case, it does.

4. The implication of freedom of communication about the government of the Commonwealth is not an implication of an absolute and uncontrolled licence((158) See Nationwide News, unreported, at p 57.). It is an implication of freedom under the law of an ordered and democratic society. In determining whether a purported law conflicts with the implication, regard must be had to the characteR of the impugned law. In particular, a law whose characteR is that of a law with respect to the prohibition oR restriction of communications about government oR governmental instrumentalities or institutions ("political communications") will be much more difficult to justify as consistent with the implication than will a law whose character is that of a law with respect to some otheR subject and whose effect on such communications is unrelated to their nature as political communications. A law prohibiting or restricting political communications by reference

to their character as such will be consistent with the prima facie scope of the implication only if, viewed in the context of the standards of our society, it is justified as being in the public interest for the reason that the prohibitions and restrictions on political communications which it imposes are either conducive to the overall availability of the effective means of such communications ((159) See, e.g., Miller v. TCN Channel Nine Pty. Ltd. [1986] HCA 60; (1986) 161 CLR 556, at pp 567, 591, 597-598, 629-630; Red Lion Broadcasting Co. v. F.C.C. [1969] USSC 141; (1969) 395 US 367, at pp 375-377.) or do not go beyond what is reasonably necessary for the preservation of an ordered and democratic society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity within such a society.

5. It was submitted on behalf of the Commonwealth that the provisions of Pt IIID are within the scope of the legislative powers conferred by s.51(v) of the Constitution with respect to the electronic media ("otheR like services")((160) See, generally, R. v. Brislan; Ex parte Williams [1935] HCA 78; (1935) 54 CLR 262, at p 277; Jones v. The Commonwealth (No. 2) [1965] HCA 6; (1965) 112 CLR 206, at p 237; and, generally, Herald and Weekly Times Ltd. v. The Commonwealth [1966] HCA 78; (1966) 115 CLR 418.) and, in so far as the provisions of Pt IIID relate to the prohibition or restriction of political communications during the "election period" preceding an election to the Commonwealth Parliament, within the legislative powers conferred by ss.10, 29, 31 and 51(xxxvi) and (xxxix) of the Constitution with respect to such an election ((161) See, e.g., Smith v. Oldham [1912] HCA 61; (1912) 15 CLR 355, at pp 358, 360, 363; R. v. Brisbane Licensing Court; Ex parte Daniell [1920] HCA 24; (1920) 28 CLR 23, at pp 31, 32; Fabre v. Ley [1972] HCA 65; (1972) 127 CLR 665, at p 669; Attorney-General (Cth); Ex rel. McKinlay v. The Commonwealth [1975] HCA 53; (1975) 135 CLR 1, at pp 19, 46, 56-58, 61-62. And note, as to a constitutional referendum, the legislative powers conferred by ss.128 and 51 (xxxix) of the Constitution.(162) Unreported, esp at p 57.). Clearly, 0 if all of those provisions of the Constitution were to be construed without regard to the context of the Constitution as a whole or the express oR implied guarantees and implications which it contains, that submission advanced on behalf of the Commonwealth would be irresistible. Equally clearly, however, none of the provisions can be so construed.

6. There is nothing in the words or content of any of the provisions conferring legislative power upon which the Commonwealth relies which manifests an intention to derogate from, or to authorize the making of laws derogating from, the Constitution's implication of freedom of political communication. That being so, those provisions must be construed as confined by that implication. It was submitted on behalf of the Commonwealth that no valid objection could be taken to a prohibition of political advertisements on television and radio since a general prohibition of all advertisements on television and radio would be within Commonwealth legislative power. Even if it be assumed that that would be so, however, the assumption says no more to the question of the consistency of the provisions of Pt IIID with the Constitution's implication of freedom of political communication than would an assumption that a State Parliament had legislative power to ban all newspaper advertising within the State say to the question whether a specific and protectionist ban on any newspaper advertising by out-of-State traders was consistent with s.92's guarantee of freedom of inter-State trade and commerce. The ban on political communication through the medium of advertising on television or radio must be assessed in the context in which it operates, namely, a context where advertising in general is permitted on commercial radio and television stations. It is in that context that the ban must be seen as a legislative prohibition not of advertising as such but of political communication to and by the people of the Commonwealth through two of the methods by which such communications could otherwise be lawfully made. It follows from what was said in our judgment in Nationwide News(162) that the legislative provisions imposing the prohibitions infringe the Constitution's implication of freedom of communication and are beyond the scope of the relevant grants of legislative power unless they are justified in the public interest in the limited sense which we have explained above. We turn to a consideration of the question whether they are so justified.

7. There are three aspects of the regime which Pt IIID imposes which are of particular importance for present purposes. The first has been partly identified in what has been said above. It is that the basis of the regime is a series of prohibitions of any "political advertisement" on television and radio((163) Local television and radio in the case of a by-election: see the Act, ss.95B(5), 95C(6), 95D(5).) during the "election period" relating to a constitutional referendum or a Commonwealth, State, Territory or Local Government election or by-election. The word "advertisement" in Pt IIID was deliberately left undefined((164) See Report by the Senate Select Committee on Political Broadcasts and Political Disclosures, November 1991, pars 4.7.2. and 4.7.3.). It would seem to be used in a broad general sense which would encompass any broadcast oR telecast of material "designed or calculated to draw public attention" to something((165) See Director of Public Prosecutions v. United Telecasters Sydney Ltd. [1990] HCA 5; (1990) 168 CLR 594, at p 600.) regardless of whether the broadcast or telecast "serves a purpose other than that of advertising"((166) ibid., at p 605). The definitions of "political advertisement", "political matter" and "prescribed material" for the purposes of the prohibition are very wide. Subject to the exemption in respect of items of news or current affairs and talk-back radio((167) See s.95A(1).) and certain special qualifications oR exemptions((168) See, in particular, s.95A(2),(3) and (4)), the overall effect of the prohibitions is to preclude a person not entitled to "free time" from any participation in the electoral process by political communication on television or radio during an "election period".

8. The second aspect is the extent to which the system of entitlement to free political advertising which Pt IIID introduces in relation to an election to the Parliament of the Commonwealth or a State or the legislature of a Territory favours those already represented in the relevant Parliament or legislature and the political parties to which they belong. The grant of entitlement to free time is placed in the hands of the Australian Broadcasting Tribunal which is required to grant ninety per cent of the total free time in respect of a particulaR election to political parties which were represented in the relevant Parliament or legislature at the end of the last pre-election sittings and which are "contesting the election with at least the prescribed number of candidates"((169) s.95H (1)). The ninety per cent free time to be so allocated to political parties must, so far as practicable, be distributed so as to "give effect to the principle that the amount of free time granted to each party should bear the same proportion to the total free time period (i.e. the ninety per cent of all free time) ... as the number of formal first preference votes obtained by that party or its candidates at the last election to the relevant Parliament or legislature bears to the total number of such votes" obtained by all the relevant political parties or their candidates((170) s.95H(3)). When one turns to examine the difficult provisions of the Act dealing with the allocation of the remaining ten per cent of free time, it is apparent they are heavily weighted in favour of any other political parties ((171) See ss.95K, 95M and 95N) or existing independent senators((172) See s.95L). It is at least possible that an independent candidate who was not a member of the previous Parliament or legislature would be unsuccessful in any application for free time((173) See, e.g., Political Broadcasts (State and Territory Elections) Regulations 1992 (Cth), reg.10(2) and (3).).

9. The third aspect is the most important for present purposes. It is that the overall effect of the provisions of Pt IIID is that all individual members of the community who are not "a candidate ... in the election"((174) See ss.95L(1)(a) and 95M(2)) and all groups and organizations which are not "a political party (which) ... has endorsed one or more candidates"((175) See s.95M(1)) are excluded altogether from the allocation of free time. FoR practical purposes, that means that, putting to one side news and current affairs items and "talkback radio" programs and subject to some qualifications and exemptions which it is unnecessary to detail((176) See, in particular, s.95A(1),(2),(3) and (4)), the only persons or organizations permitted to engage in political communication by advertising on the electronic media during an election period are candidates for election and the political parties to which they belong or by which they have been endorsed. Otherwise, the people of the Commonwealth are effectively excluded from participation in the electoral process by political communication through the electronic media. That exclusion from

access to the electronic media extends, during an "election period", to the communication of any "material containing an express or implicit reference to, or comment on": the election (or referendum) concerned; a candidate or group of candidates in that election; any issue before electors in that election; the government, the opposition, or a previous government or opposition of the relevant polity; any member of the relevant Parliament or legislature; any political party or branch or division of a political party((177) ss.95B(6), 95C(7), 95D(6)).

10. It is true that the prohibitions of Pt IIID apply only in respect of television and radio and only during an "election period" in relation to an election to which Pt IIID applies. Nonetheless, the interference with the freedom of political communication of the people of the Commonwealth is a very substantial one. The material before the Court indicates that political communication by television advertising is seen by many, and possibly all, persons experienced in political matters as the most effective, if not the most informative or intelligent, means of political communication during an election period((178) See, e.g., Report by the Senate Select Committee on Political Broadcasts and Political Disclosures, op cit, par.4.4.1.). Material placed 0 before the Court by the plaintiff State of New South Wales illustrates that, in a closely settled metropolitan area such as Sydney, the periods in which freedom of political communication would be affected by the provisions of Pt IIID would be likely to be very frequent indeed. In any event, the period preceding an election is obviously the time at which political communications by persons who are not candidates or political parties are likely to be most important and effective. It is also true that the provisions of Pt IIID are only applicable in relation to an election to the Parliament of the Commonwealth or a State or the legislature of a Territory if regulations in respect of the grant of free time have been made with respect to that election((179) s.95J). For the purposes of examining the validity of the legislation, however, it must be assumed that the power to make such regulations will be exercised and that the regulations, once made, will not be disallowed. In any event, the fact that the Commonwealth government is effectively empowered, by making or declining to make regulations, to determine on an ad hoc basis whether the prohibitions imposed by Pt IIID are not or (subject to disallowance) are applicable to a particular Commonwealth, State or Territory election scarcely serves to make the relevant legislative provisions more compatible with the standard of a democratic society.

11. It is in the context provided by the abovementioned aspects of Pt IIID that one must answer the question whether the purported interference with the freedom of political communication can be justified as being in the public interest for the reason that it is either conducive to the overall availability of the effective means of such communications or does not go beyond what is reasonably necessary for the preservation of an ordered and democratic society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity within such a society. When considered in that context, that question must be answered in the negative. Freedom of political communication is implicit in, and of fundamental importance to, the effective working of the doctrine of representative government which is embodied in our Constitution. That freedom of communication extends not only to communications by representatives and potential representatives to the people whom they represent. It extends also to communications from the represented to the representatives and between the represented. In effectively prohibiting all political communications by advertisement on the electronic media other than those by actual or potential representatives and their political parties, Pt IIID of the Act distorts the freedom of political communication which underlies representative government and denies to the represented the opportunity of participating in the political debate by way of what is commonly seen as the most effective means of political communication.

12. It was not submitted that the prohibitions imposed by Pt IIID could be justified on the ground that they were conducive to the overall availability of the effective means of political communication in a democratic society. In a context where, subject to the abovementioned limited exceptions and qualifications, Pt IIID effectively excludes everyone during an "election period"

from political communication through the medium of commercial radio and everyone except political parties and candidates from political communication through the medium of television, it is not surprising that no such submission was made. As we followed the argument, the main basis on which it was sought to justify the prohibitions and restrictions was that they reduced the pressures for massive spending by political parties and thereby reduced the incentives for corruption among those involved in political processes. The elimination of corruption in the political processes is, of course, of great importance in the public interest. The argument that to achieve the postulated objectives it is necessary effectively to exclude the people of the Commonwealth, including legitimate special interest groups, from political communication on the electronic media during an election period unless they be political parties oR candidates seems to us, however, quite unconvincing. Nor, in our view, is it to the point to say that the cost of time, at least on television, is so high that private individuals would not seek to communicate by political advertisement on that medium in any event. For one thing, the cost of radio time, especially country radio, is not nearly so high. For another, individuals may legitimately come together, in employee, industry or otheR special interest groups, to procure political communication by way of advertisement on television and radio. In any event, the fact that the number of groups or individuals who might wish to express their political views in a particular way is limited, does not suffice to justify a law suppressing the freedom of communication in that particular way. There is, perhaps, greater force in an argument that the high cost of television and radio advertisements is such that the prohibition of political advertisements is necessary to create a "level playing field" or to ensure some balance in the presentation of different points of view. That argument may support some form of control of spending on, or some degree of regulation of the use of, political communication. It may, for example, arguably support a total blackout of political advertisements in or on the media on election day. It does not, however, suffice to establish the justification of what is, from the point of view of those excluded from the free time system, an effective ban on political communication through two of the most effective means of such communication during the times when such communication is likely to be most significant and effective. In that regard, it must be remembered that a prohibition is no less antagonistic to and inconsistent with the freedom of political communication which is implicit in the Constitution's doctrine of representative government simply because the Parliament or those in government genuinely apprehend that some persons or groups may make more, or the more effective, use of the freedom than others involved in political processes.

13. It follows that the regime of prohibitions contained in Pt IIID of the Act is one which it is beyond the legislative powers of the Commonwealth Parliament to impose. Notwithstanding the express provision of s.95(2) of the Act that "the several provisions of (Pt IIID) should operate to the extent to which they are capable of validly operating", it is impossible to sever the provisions of Pt IIID providing for the availability of free time (including free time for policy launches) from those imposing the prohibitions upon political advertising in relation to those elections since it is clear that it was the legislative intent that the scheme for free time would operate only in the context of the prohibitions. Nor is it possible to save the validity of the provisions of Pt IIID dealing with political advertisements on behalf of a government or governmental authority by any process of severance or reading down since it is plain that those provisions constitute part of, and were intended only to operate in, the wider regime of a general ban on political advertisements. Accordingly, the whole of Pt IIID of the Act is invalid. It is unnecessary to consider the plaintiffs' submissions based on s.92 of the Constitution and the requirement, in s.51(xxxi) of the Constitution, of "just terms". Nor is it necessary to consider the submission that, in their purported application to State and Local Government elections and authorities, the provisions of Pt IIID are inconsistent with the federal system of the Constitution in that they single out the States, their instrumentalities and agencies for discriminatory burdens and impermissibly interfere with their functioning.

14. It should be mentioned that it was not submitted, on behalf of the Commonwealth, that the provisions of Pt IIID, to the extent that they related to a Territory election, were within the legislative power conferred by s.122 of the Constitution. Presumably, the reason for that was that, in a context where both of the internal Territories have been granted self-government, it is unlikely that the provisions of Pt IIID of the Act were, in so far as they purportedly apply to a Territory election, enacted as a law for the government of a Territory pursuant to s.122. In any event, we are not presently persuaded that s.122's power to make laws "for the government of any territory surrendered by any State" is immune from the implications to be discerned in the Constitution as a whole, including the implication of freedom of political communication. Certainly, the reasoning which led the Court in Teori Tau v. The Commonwealth((180) [1969] HCA 62; (1969) 119 CLR 564, at p 570) to hold that s.122 was not confined by the implication that the "federal" legislative powers conferred by s.51 do not include a power to make laws for the acquisition of property without just terms, is inapplicable in relation to an implication drawn from the Constitution as a whole. That question was not, however, explored in the course of the argument in the present case and it is unnecessary to reach any firm conclusion in relation to it.

15. In the first matter, the demurrer should be overruled. In the second matter, the first paragraph of the demurrer of the Commonwealth should be overruled.

DAWSON J. In these two sets of proceedings, which come before the Court upon demurrer to the plaintiffs' statements of claim, the plaintiffs seek to establish that certain sections of the Broadcasting Act 1942 (Cth) ("the Act"), which were introduced by the Political Broadcasts and Political Disclosures Act 1991 (Cth), are invalid.

2. The sections are contained in Pt IIID of the Act which is headed "Political Broadcasts". Division 2 of Pt IIID (ss.95A to 95E) prohibits the broadcasting by radio or television of certain types of matter during an election period in relation to a referendum or an election period in relation to an election to the Commonwealth Parliament, a State Parliament, the legislature of a Territory or a local government authority. An election period is defined in s.4(1) of the Act so as to commence, generally speaking, on the day on which the polling day for an election is announced or the day on which writs for the election are issued, whichever happens first, and to end at the close of the poll. An election period is also fixed in relation to a referendum for the alteration of the Constitution.

3. Section 95B prohibits a broadcaster during an election period in relation to an election to the Commonwealth Parliament or a referendum from broadcasting (i) any matter (other than exempt matter) for or on behalf of the government, or a government authority, of the Commonwealth, (ii) a political advertisement for or on behalf of a government, or a government authority, of a State or Territory, or (iii) subject to Divs 3 and 4, a political advertisement for or on behalf of a person other than a government oR government authority or on the broadcaster's own behalf. "Political advertisement" is defined as meaning an advertisement that contains political matter. "Political matter" is defined to mean matter intended oR likely to affect voting in the election or referendum concerned or matteR containing prescribed material. "Prescribed material" is defined to mean material containing an express or implicit reference to, or comment on, any of the following: (i) the election or referendum concerned, (ii) a candidate or group of candidates in that election, (iii) an issue submitted oR otherwise before electors in that election, (iv) the government, the opposition, or a previous government or opposition, of the Commonwealth, (v) a member of the Parliament of the Commonwealth, (vi) a political party, or a branch or division of a political party. Sections 95C and 95D make similaR provision in relation to State, Territory and local government elections. "Exempt matter" is defined in s.4(1) to include such things as matteR directly relating to warnings of impending natural disasters, matteR relating to the machinery of an election, and advertisements of goods and services offered for sale by or on behalf of a government or a government authority provided that such advertisements do not contain a political reference.

"Political reference" is defined in terms which broadly correspond with the definition of prescribed material.

4. Section 95A provides that nothing in Pt IIID prevents a broadcaster from broadcasting certain matters, including an item of news or current affairs, a comment on any such item and a talkback radio program.

5. Division 3 of Pt IIID (ss.95F to 95R) provides for the grant of free time in respect of elections other than by-elections and elections to local government authorities on a radio broadcast by the Australian Broadcasting Corporation or on a television broadcast. In particular s.95Q obliges a broadcaster to make election broadcasts free of charge during an election period for or on behalf of any political party, person or group to whom free time is granted by the Australian Broadcasting Tribunal in accordance with regulations made in respect of the election.

6. Under s.95G, a broadcast made on behalf of a political party, a candidate or a group in relation to an election is taken to be an election broadcast only if it is by a candidate and conforms to certain conditions which include the absence of dramatic enactment or impersonation and a maximum length of two minutes in the case of a television broadcast and one minute in the case of a radio broadcast.

7. The total free time available in respect of an election is to be worked out in accordance with regulations made under the Act. Under s.95H, the Broadcasting Tribunal must grant ninety per cent of the total free time available in respect of an election to those political parties that were represented by one or more members in the relevant Parliament or legislature before the election and that are contesting the election with at least the prescribed number of candidates. This amount of free time is to be apportioned by the Broadcasting Tribunal among the political parties that meet these criteria in accordance with the regulations. The regulations must, so far as is practicable, give effect to the principle that the amount of free time granted to each party should bear the same proportion to the ninety per cent of the total free time as the number of formal first preference votes obtained by that party or its candidates at the last election to the relevant Parliament or legislature bears to the total number of such votes obtained by all of the political parties qualified to receive a grant of free time or their candidates at that last election.

8. A political party, other than a political party to which s.95H applies, may apply for a grant of free time in relation to an election and, if the Broadcasting Tribunal is satisfied that the party has endorsed one or more candidates to contest the election, it may, subject to the regulations, grant the party a period of free time determined in accordance with the regulations: ss.95K, 95M(1). A person or a group of persons may also apply for a grant of free time in relation to an election and, if the Broadcasting Tribunal is satisfied that the person, or each of the persons, is a candidate in the election, it may grant the person or group a period of free time in accordance with the regulations: ss.95K, 95M(2).

9. Special provision is made for the grant of free time in relation to Senate elections by s.95L. If, on receipt of an application by a person for a grant of free time in relation to a Senate election, the Broadcasting Tribunal is satisfied that the person is a candidate in the election, was a member of the Senate immediately before the end of the last sittings of the Senate held before the election and is not a member of a political party to whom a grant of free time has been made under s.95H, then the Broadcasting Tribunal must grant the person a period of free time. The period to be granted undeR 0025 s.95L is a period determined by the Broadcasting Tribunal in accordance with the regulations, being a period equal to not less than five per cent of the total free time available in respect of the election nor more than ten peR cent of that total free time. If the Broadcasting Tribunal is required under s.95L to grant a period of free time to two or more persons, it must divide the period between them in accordance with the regulations.

10. Under s.95P, the Broadcasting Tribunal must, in accordance with the regulations, divide each period of free time granted by it into units of free time and allocate those units of free time to broadcasters. UndeR s.95Q, the broadcaster to whom such units of free time are allocated must make those units available for use in making one or more election broadcasts during the election period for the election on behalf of the political party, person or group to whom the time is granted. These units of time must be used in accordance with the provisions of s.95Q, the regulations and any guidelines determined by the Broadcasting Tribunal. There is an appeal to the Federal Court from the refusal of an application for the grant of free time to a political party, person or group of persons: s.95R.

11. The Act contemplates that regulations made for the purposes of Pt IIID in relation to the calculation of the total free time available in respect of an election and the allocation of that time will be made from time to time with respect to particular elections: s.95J.

12. Division 4 of Pt IIID, which consists of s.95S, provides that a broadcaster may broadcast the policy launch of a political party that meets certain criteria once during the election period in relation to an election to the Commonwealth or a State Parliament or the legislature of a Territory. If the policy launch of one political party is broadcast, the broadcaster must give a reasonable opportunity to every other political party that meets those criteria for the broadcast of their policy launches. The broadcast of a policy launch under s.95S must be made free of charge and must not last longer than thirty minutes. Section 95S does not prevent the broadcasting of an excerpt of reasonable length from a political party's policy launch as part of a news report or current affairs program even if the policy launch has been previously broadcast under that section.

13. In the first of the two actions each of the plaintiffs is the holder of a commercial television licence pursuant to the provisions of the Act and engages in commercial television broadcasting within the service area of its licence. Two of the plaintiffs have licence service areas which extend oveR 0025 State borders and three of the plaintiffs have licence service areas which encompass the Australian Capital Territory and part of southern New South Wales. The plaintiffs contend that certain provisions of Pt IIID of the Act are invalid by reason of the contravention of three guarantees to be found in the Constitution. The first is the express guarantee of freedom of intercourse in s.92. The second is said to be implied and to guarantee freedom of access to, participation in and criticism of, federal and State institutions amounting to a freedom of communication in relation to the political and electoral processes. The third is also said to be implied and to guarantee freedom of communication arising from the common citizenship of the Australian people.

14. It is convenient to turn first to those guarantees which are said to arise by implication. Whenever the question of implication is raised in relation to the Constitution it is as well to bear in mind the nature of the instrument and the source from which it derives its authority. The Constitution is contained in an Act of the Imperial Parliament: the Commonwealth of Australia Constitution Act (63 and 64 Vict. c.12). Notwithstanding that this Act was preceded by the agreement of the people of New South Wales, Victoria, South Australia, Queensland and Tasmania "to unite in one indissoluble Federal Commonwealth", the legal foundation of the Constitution is the Act itself which was passed and came into force in accordance with antecedent law. And the Constitution is itself a law declared by the Imperial Parliament to be "binding on the courts, judges, and people of every State and of every part of the Commonwealth"((181) Covering cl.5 to the Constitution). It does not purport to obtain its force from any power residing in the people to constitute a government, nor does it involve any notion of the delegation of power by the people such as forms part of American constitutional doctrine. The words in the United States Constitution "We the People of the United States ... do ordain and establish this Constitution for the United States of America" find no counterpart in the Australian Constitution; indeed, such words would entirely belie the manner of its foundation. No doubt it may be said as an abstract

proposition of political theory that the Constitution ultimately depends for its continuing validity upon the acceptance of the people, but the same may be said of any form of government which is not arbitrary. The legal foundation of the Australian Constitution is an exercise of sovereign power by the Imperial Parliament. The significance of this in the interpretation of the Constitution is that the Constitution is to be construed as a law passed pursuant to the legislative power to do so. If implications are to be drawn, they must appear from the terms of the instrument itself and not from extrinsic circumstances. Thus in Queensland Electricity Commission v. The Commonwealth Brennan J. observed((182) [1985] HCa 56; (1985) 159 CLR 192, at p 231):

> "The Constitution summoned the Federation into existence and maintains it in being. Any implication affecting the specific powers granted by the Constitution must be drawn from the Constitution itself. It is

impermissible
to construe the terms of the Constitution by importing an implication from

> extrinsic sources when there is no federation save that created by the express terms of the Constitution itself."

That passage reflects what was said earlier by the majority in the Engineers' Case in rejecting a mode of interpretation said to be adopted in previous cases((183) Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. [1920] HCA 54; (1920) 28 CLR 129, at p 145.):

> "It is an interpretation of the Constitution depending on an implication which is formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to

be
quoted, nor referable to any recognized principle of the common law of the

> Constitution, and which, when stated, is rebuttable by an intention of exclusion equally not referable to any language of the instrument or acknowledged common law constitutional principle, but arrived at by the Court on the opinions of Judges as to hopes and expectations respecting vague external conditions."

15. I have previously observed((184) Brown v. The Queen [1986] HCA 11; (1986) 160 CLR 171, at p 214.) that the Australian Constitution, with few exceptions and in contrast with its American model, does not seek to establish personal liberty by constitutional restrictions upon the exercise of governmental power. The choice was deliberate and based upon a faith in the democratic process to protect Australian citizens against unwarranted incursions upon the freedoms which they enjoy((185) See, e.g., the debate resulting in the rejection of an amendment to insert a due process clause: Official Record of the Debates of the Australasian Federal Convention, (Melbourne, 8 February 1898), esp. pp 688-690. 690. See also Attorney-General (Cth); Ex rel. McKinlay v. The Commonwealth [1975] HCA 53; (1975) 135 CLR 1, at p 24.). This was recognized by the majority in the Engineers' Case in the following passage((186) (1920) 28 CLR , at pp 151-152.):

> "(T)he extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies

and

> not by the Courts. When the people of Australia, to use the words of the Constitution itself, 'united in a Federal Commonwealth,' they took power

to

> control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers. If it be conceivable that the representatives of the people of Australia as a whole would ever proceed

to

> use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such

a

> case is necessary or proper."

16. Thus the Australian Constitution, unlike the Constitution of the United States, does little to confer upon individuals by way of positive rights those basic freedoms which exist in a free and democratic society. They exist, not because they are provided for, but in the absence of any curtailment of them. Freedom of speech, for example, which is guaranteed in the United States by the First Amendment to the Constitution, is a concept which finds no expression in our Constitution, notwithstanding that it is as much the foundation of a free society here as it is there. The right to freedom of speech exists here because there is nothing to prevent its exercise and because governments recognize that if they attempt to limit it, save in accepted areas such as defamation or sedition, they must do so at their peril. Not only that, but courts recognize the importance of the basic immunities and require the clearest expression of intention before construing legislation in such a way as to interfere with them((187) See, e.g., Re Bolton; Ex parte Beane [1987] HCA 12; (1987) 162 CLR 514, at p 523.). The fact, however, remains that 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.

17. As I have said, the interpretation of the Australian Constitution is the interpretation of a statute of the Imperial Parliament. But, as Windeyer J. pointed out in the Payroll Tax Case((188) Victoria v. The Commonwealth [1971] HCA 16; (1971) 122 CLR 353, at pp 394-395.), that does not mean that it is not a statute of a special kind. Windeyer J. quoted the words of Higgins J. in the Brewery Labels Case((189) Attorney-General foR N.S.W. v. Brewery Employes Union of N.S.W. [1908] HCA 94; (1908) 6 CLR 469, at pp 611-612; see also Bank of N.S.W. v. The Commonwealth [1948] HCA 7; (1948) 76 CLR 1, at p 332.) - words whose vitality he regarded as not diminished by their having been said in the course of a dissenting judgment:

> "although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature

and

> scope of the Act that we are interpreting - to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be".

18. The Commonwealth, as defendant, seeks to support the impugned legislation by reference both to the power under s.51(v) of the Constitution to make laws with respect to postal, telegraphic, telephonic, and other like services and to the power to make laws with respect to Commonwealth elections undeR ss.10, 29, 31, 51(xxxvi) and 51(xxxix) of the Constitution. Sections 10, 29 and 31 are sections making provision in relation to elections "until the Parliament otherwise provides". The actual legislative power in relation to the matters referred to in those sections is found in s.51 (xxxvi) undeR which the Parliament has power to make laws with respect to matters in respect of which the Constitution makes provision until the Parliament otherwise provides. Section 51 (xxxix) includes, of course, the power to make laws with respect to matters incidental to the execution of any power vested by the Constitution in the Parliament. Thus, whether the subject matter be broadcasting or elections, one is drawn back to s.51.

19. It will be apparent from what I have already said that, in my view, there is no warrant in the Constitution for the implication of any guarantee of freedom of communication which operates to confer rights upon individuals or to limit the legislative power of the Commonwealth. It may be remarked in passing that even if a guarantee limiting Commonwealth legislative power were to exist by implication, it could have only a limited effect upon States in the exercise of their concurrent legislative powers. In expressing the view which I do, I do not mean to suggest that the legislative powers of the Commonwealth under s.51 may not be limited by implications drawn from other provisions of the Constitution or from the terms of the Constitution as a whole. The powers conferred by s.51 are expressed to be "subject to this Constitution" and that expression encompasses implied limitations as well as those which are express. There is, for example, the implication drawn from the federal structure of the Constitution that prevents the Commonwealth from legislating in a way that discriminates against the States by imposing special burdens or disabilities upon them oR in a way which curtails their capacity to exercise foR themselves their constitutional functions((190) See Queensland Electricity Commission v. The Commonwealth [1985] HCa 56; (1985) 159 CLR 192.).

20. Section 1 of the Constitution provides that the legislative power of the Commonwealth shall be vested in a Federal Parliament consisting 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 that the number of such members shall be, as nearly as practicable, twice the number of the senators. There is to be seen in these provisions the principle of representative democracy in a form involving direct populaR election(191) See Attorney-General (Cth); Ex rel. McKinlay v. The Commonwealth (1975) 135 CLR , esp. at p 56. In addition to 0 representative democracy there is also written into the Constitution the principle of responsible government(192) See ss.62, 64. It is true that no attempt was made to spell out what responsible government entails - that was felt to be an impossible task - but there is sufficient to make it readily apparent that the system adopted was that of responsible government, that is, the system by which the executive is responsible to the legislature and, through it, to the electorate. That has never been doubted. In the Engineers' Case(193) (1920) 28 CLR, at p 146 the principle of responsible government was described as pervading the Constitution(194) See also The Commonwealth v. Kreglinger and Fernau Ltd. and Bardsley [1926] HCA 8; (1926) 37 CLR 393, at pp 411 et seq; Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan [1931] HCA 34; (1931) 46 CLR 73, at p 114; New South Wales v. The Commonwealth [1975] HCA 58; (1975) 135 CLR 337, at pp 364-365. And in the Boilermakers' Case(195) Reg. v. Kirby; Ex parte Boilermakers' Society of Australia [1956] HCA 10; (1956) 94 CLR 254, at p 275 it was referred to as "the central feature of the Australian constitutional system".

21. But much is left to the Parliament concerning the details of the electoral system to be employed in achieving representative democracy. For example, the Constitution does not

guarantee universal adult suffrage(196) See ss.8, 30. And, subject to the Constitution, the method of electing members of Parliament and the determination of electoral divisions also rest with the Parliament(197) See ss.10, 29, 31.

22. In Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth(198) [1977] HCA 71; (1977) 139 CLR 54, at p 88; see also Buck v. Bavone [1976] HCA 24; (1976) 135 CLR 110, at p 137 Murphy J. expressed the view that the provisions in the Constitution for the election of the Parliament require freedom of movement, speech and otheR communication, not only between the States, but in and between every part of the Commonwealth. He said that the proper operation of the system of representative government required the same freedoms between elections. These freedoms he described as "not absolute, but nearly so", so that they may not be restricted by the Parliament or State Parliaments except for compelling reasons. He repeated these views subsequently(199) See McGraw-Hinds (Aust.) Pty. Ltd. v. Smith [1979] HCA 19; (1979) 144 CLR 633, at p 670; Uebergang v. Australian Wheat Board [1980] HCA 40; (1980) 145 CLR 266, at p 312. In Miller v. TCN Channel Nine Pty. Ltd. he said(200) [1986] HCA 60; (1986) 161 CLR 556, at pp 581-582:

> "The Constitution also contains implied guarantees of freedom of speech and other communications and freedom of movement not only between the States and the States and the Territories but in and between every part of the Commonwealth. Such freedoms are fundamental to a democratic society. They are necessary for the proper operation of the system of representative government at the federal level."

The implication of a guarantee of freedom of communication which Murphy J. asserted was rejected by other members of this Court in Miller v. TCN Channel Nine Pty. Ltd. It was, they held, inconsistent with the express guarantee of freedom of intercourse given by s.92, upon the view that the express guarantee extends beyond discriminatory fiscal burdens. Gibbs C.J. said (201) ibid., at p 569: "Section 92 leaves no room for an implication of the kind suggested." Mason J. said(202) ibid., at p 579: "It is sufficient to say that I cannot find any basis for implying a new s.92A into the Constitution." Brennan J. said(203) ibid., at p 615: "The freedom of interstate communication rests not upon an implied guarantee but upon the express terms of s.92". And I said(204) ibid., at p 636: "There can, of course, be no room for (such an) implication in the face of express provision (i.e. s.92)."

23. But it is clear that Murphy J. based the implication which he asserted, not upon the text of the Constitution, but upon "the nature of our society"(205) See McGraw-Hinds (Aust.) Pty. Ltd. v. Smith (1979) 144 CLR , at p 670. In doing so, he failed, in my view, to recognize the true character of the Australian Constitution which, as I have endeavoured to explain, limits the implications which can be drawn to those which appear from the terms of the instrument itself. Indeed, those responsible for the drafting of the Constitution saw constitutional guarantees 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. Not only that, but the heresy of importing into the Constitution, by way of implication, preconceptions having their origin outside the Constitution has been exposed and decisively rejected in the Engineers' Case. The nature of the society or, more precisely and accurately, the nature of the federation which the Constitution established, is to be found within its four corners and not elsewhere. To say as much is not for one moment to express disagreement with the view expressed by Murphy J. that freedom of movement and freedom of communication are indispensable to any free society. It is merely to differ as to the institutions in which the founding fathers placed their faith for the protection of those freedoms.

24. Having said that, it must nevertheless be recognized that the Constitution provides for a Parliament the members of which are to be directly chosen by the people - in the case of the Senate by the people of the respective States and in the case of the House of Representatives by the people of the Commonwealth. Thus the Constitution provides for a choice and that must mean a true choice. It may be said - at all events in the context of an election - that a choice is not a true choice when it is made without an appreciation of the available alternatives or, at least, without an opportunity to gain an appreciation of the available alternatives. As Windeyer J. observed in Australian Consolidated Press Ltd. v. Uren(206) [1966] HCA 37; (1966) 117 CLR 185, at p 210: "(f)reedom at election time to praise the merits and policies of some candidates and to dispute and decry those of others is an essential of parliamentary democracy". Perhaps the freedom is one which must extend beyond the election time to the period between elections, but that is something which it is unnecessary to consider in this case. It is enough to recognize, as this Court did in Evans v. Crichton-Browne(207) [1981] HCA 14; (1981) 147 CLR 169, at p 206, the importance of ensuring that freedom of speech is not unduly restricted during an election period. 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.

25. As I have said, the legislative powers conferred on the Parliament by s.51 are conferred "subject to this Constitution". The legislation in question in this case is reliant upon s.51, whether it be viewed as legislation with respect to postal, telegraphic, telephonic, and otheR like services (par.(v)) or as legislation with respect to electoral matters in respect of which the Constitution makes provision for the Parliament to provide otherwise (par.(xxxvi)).

26. The question, therefore, is whether the provisions of the Act which were introduced by the Political Broadcasts and Political Disclosures Act are incompatible with those sections of the Constitution which provide for the direct choice of members of the Parliament. The question is not whether the legislation ought be regarded as desirable or undesirable in the interests of free speech or even of representative democracy. As Stephen J. pointed out in Attorney-General (Cth); Ex rel. McKinlay v. The Commonwealth(208) (1975) 135 CLR , at p 56:

> "The principle of representative democracy does indeed predicate the enfranchisement of electors, the existence of an electoral system capable of giving effect to their selection of representatives and the bestowal of legislative functions upon the representatives thus selected. However the particular quality and character of the content of each one of these three ingredients of representative democracy, and there may well be others, is not fixed and precise."

And it is for Parliament, within the limits prescribed by the Constitution, to provide the form of representative democracy which we are to have and in so doing it may adopt measures about which there may be a considerable variation of opinion. For example, the qualifications of electors are to be provided for by the Parliament under ss.8 and 30 and may amount to something less than universal adult suffrage(209) cf. Attorney-General (Cth); Ex rel. McKinlay v. The Commonwealth (1975) 135 CLR , per McTiernan and Jacobs JJ. at p 36. See, however, Constitution, s.41. Today anything less than universal adult suffrage would be politically unacceptable, but at federation it was clearly envisaged. Indeed, until Parliament otherwise provided, the position was to be as it was in the States and, at federation, only South Australia had universal adult suffrage.

27. Broadly speaking, the legislation in question does two things: first, it prohibits the broadcasting by radio or television during an election period of advertisements containing political

matter and, secondly, it requires the provision of free time on radio oR television for the use of certain political parties and candidates.

28. The second reading speech of the Minister introducing the Political Broadcasts and Political Disclosures Bill in the House of Representatives(210) Parliamentary Debates (Hansard), 9 May 1991, HR pp 3477-3481 (a bill that did not, at that stage, include the free time provisions that are now part of the Act) indicates that the object of the legislation in prohibiting political advertisements was not to withhold information or to stifle discussion, but to reduce the burden otherwise imposed upon political parties of raising large sums of money in order to wage their election campaigns by use of the electronic media. The Minister pointed out that the prohibition was directed at the single greatest factor in campaign costs which was the cost of buying time on radio and television - particularly television. He expressed the view that the exorbitant cost of broadcast advertising precluded most of the community and all but the majoR political parties and large corporate interests from paid access to the airwaves. He referred to the fact that the mounting costs of campaign advertising made political parties increasingly vulnerable to attempts by substantial donors to exert influence. He emphasized a duty on the part of the representatives of the people in a democratic society to ensure that they serve all members of that society equally, free of corruption and undue influence.

29. It is apparent that the matters about which the Minister expressed concern are not confined to this country. A report by the Senate Select Committee on Political Broadcasts and Political Disclosures dated November 1991 reveals that a significant number of democratic countries impose restrictions upon political advertising in the electronic media and provide for the allocation of free time to political parties(211) See Appendix 5 of the Report.

30. The object of the prohibition of political advertising was, therefore, to enhance rather than impair the democratic process. In any event, it must be remembered, as is noted in the second reading speech, that television advertising (which is of far greateR significance than radio advertising) leads to the packaging of information into thirty or even fifteen second messages concerned with image rather than content(212) Parliamentary Debates (Hansard), 9 May 1991, HR p 3480. Of course, upon the assumption that political advertising imparts information which is capable of assisting in the making of an informed choice in an election, the prohibition clearly denies some information to electors. But the provision of information in the press and by other means is unimpeded. Even the electronic media have an undiminished capacity to present news reports, current affairs programs, editorial comment and talkback radio programs all relating to political issues. Moreover, the legislation does not prevent the broadcasting of the policy launch of a political party during an election period. And the prohibition of political advertising is, of course, only during an election period.

31. 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(213) See Burton v. Honan [1952] HCA 30; (1952) 86 CLR 169, at p 179.

32. Turning to those sections which govern the grant of free election broadcasting time, it may be observed at once that the provision of free time aids rather than hinders those to whom it is granted in the imparting of information. Any complaint necessarily concerns the manner in which the total free time required to be made available in relation to an election is divided amongst the existing major parties, the smaller parties, groups and individual candidates.

33. In those countries which provide for compulsory free broadcasting time, it has become apparent that anything more than a relative equality in the allocation of that free time is unattainable. And the relativities to be taken into account in the process are far from fixed or certain. Moreover, the means which may be adopted are various, including legislation, arrangements made through a parliamentary committee and the exercise of authority by a broadcasting tribunal (either with or without the agreement of the political parties). In the end, there will be a necessary compromise of some kind. And most countries which allocate broadcasting time have adopted a system which gives a clear advantage to the parties represented in the outgoing parliament(214) See "Agudat Derekh Eretz" v. Broadcasting Authority (1981) 8 Selected Judgments of the Supreme Court of Israel 21, at pp 45-47.

34. Obviously it would be possible to contend that those parties oR candidates who are new to the political process require more, not less, time in which to put their policies. But the practicalities are such that the real contest in an election organized upon party lines is ordinarily between the major established parties and, given that it is not possible to allocate equal free time to all candidates, the concentration of time must be in favour of those parties. To require some free time to be granted to new parties or to independent candidates, whatever the proportion, represents an advance upon a system in which no free time is allocated at all and in which, practically speaking, only the major parties can afford to purchase broadcasting time. New parties and independent candidates have always had available to them the means, other than broadcasting, of advancing their policies. These are the means which they have hitherto used and they remain available.

35. Admittedly, with the prohibition of political advertising and the restriction of election broadcasts to those made pursuant to a grant of free time to political parties or candidates, there is no room foR other persons to broadcast their views during an election period. But the restriction is limited to an election period and the alternative of allowing other persons or organizations to purchase broadcasting time for political advertisements or election broadcasts may be to divert the expenditure of large sums by political parties oR candidates to those persons or organizations and so subvert the object of the legislation. As I have said, there are alternative means available to those who are not political parties or candidates that receive a grant of free time to advance their causes during an election period.

36. Where legislation can do no more than adopt a relative approach, it is inevitable that it will not be beyond criticism. It is, foR example, not immediately apparent why independent sitting candidates for the Senate should be eligible for a grant of up to the whole of the remaining free time after ninety per cent of the total free time has been granted to the political parties that qualify under s.95H. But there is a discretion reposed in the Broadcasting Tribunal, an independent body, in this, as in other respects, and the time actually granted might only be five per cent of the remaining free time leaving the balance to be granted under s.95M to political parties that do not qualify for a grant of free time under s.95H and to other persons oR groups of persons who are candidates in the relevant election.

37. In my view, it cannot be said that those sections of the Act which provide for the grant of free election broadcasting time are inconsistent with the requirement of the Constitution that there be a direct choice of members of Parliament by the people. Serious difficulties have been experienced in the provision of broadcasting time in accordance with capacity to pay. Free access to the airwaves by all who wish to put a point of view during an election period is an impracticality and, if there is to be free time, there must be some method by which it is to be granted. The method adopted by the Act is, I think, supportable as a means of allocating available free time in order to assist in informing electors about election issues. WhetheR or not it be regarded as ideal, it is within the ambit of parliamentary power to determine the circumstances in which the electoral choice is to be made.

38. In placing reliance upon s.92 the plaintiffs contend that the intercourse, which the section requires to be "absolutely free", embraces all forms of movement and communication and includes radio and television broadcasting. There is no real contest about that. As Dixon J. observed in Bank of N.S.W. v. The Commonwealth of the composite expression "trade commerce and intercourse"(215) (1948) 76 CLR , at p 381:

> "It covers intangibles as well as the movement of goods and persons. The supply of gas and the transmission of electric current may be considered only an obvious extension of the movement of physical goods. But it covers communication. The telegraph, the telephone, the wireless may be the means employed. It includes broadcasting and, no doubt, it will take in television. In principle there is no reason to exclude visual signals."

39. Intercourse may, of course, be at one and the same time trade and commerce. I should have thought it clear that commercial broadcasting constitutes trade or commerce as well as intercourse. But intercourse extends beyond trade and commerce(216) Cole v. Whitfield [1988] HCA 18; (1988) 165 CLR 360, at p 387 and so requires a separate consideration of the freedom which is accorded to it. Thus it was said in Cole v. Whitfield(217) ibid., at p 394 that "there is no reason in logic oR commonsense for insisting on a strict correspondence between the freedom guaranteed to interstate trade and commerce and that guaranteed to interstate intercourse".

40. In Cole v. Whitfield the focus of attention was upon the freedom which s.92 guarantees interstate trade and commerce. It was recognized in that case that the words "absolutely free" cannot be read literally because, if that were to be done, the section would constitute a guarantee of anarchy. Once any notion of absolute freedom in a literal sense is rejected it is necessary to ask the further question: absolutely free from what? And the answer was given in Cole v. Whitfield that, in relation to interstate trade and commerce, "absolutely free" means free from discriminatory burdens of a protectionist kind.

41. That answer does not greatly assist in identifying the freedom which s.92 guarantees to intercourse. Nevertheless the same approach can and should be adopted. The intercourse with which the section is concerned is confined to intercourse among the States. That is to say, it is confined to movement or activity across State borders. As Isaacs J. said of s.92 in R. v. Smithers; Ex parte Benson(218) [1912] HCA 92; (1912) 16 CLR 99, at p 117, "it is an absolute prohibition on the Commonwealth and States alike to regard State borders as in themselves possible barriers to intercourse between Australians". In so far as it includes the passage of persons and things, tangible or intangible, to and fro across State borders, intercourse obviously extends beyond the realm of protectionism. Nevertheless, it is still necessary, as with freedom of trade and commerce, to ask in relation to freedom of intercourse: free from what? From the beginning it has been recognized that, as with the freedom of trade and commerce, the freedom of intercourse guaranteed by s.92 is not freedom from all restriction; it is not a prescription for anarchy. Thus in Cole v. Whitfield this Court denied that "every form of intercourse must be left without any restriction or regulation in order to satisfy the guarantee of freedom"(219) (1988) 165 CLR, at p 393. The Court went on to give the following example(220) ibid:

> "although personal movement across a border cannot, generally speaking, be impeded, it is legitimate to restrict a pedestrian's use of a highway for the purpose of his crossing or to authorize the arrest of a fugitive offender from one State at the moment of his departure into another State".

42. In The Commonwealth v. Bank of N.S.W.(221) [1949] HCA 47; (1949) 79 CLR 497, at p 641 the Privy Council saw no impairment of the freedom of intercourse guaranteed by s.92 in "excluding from passage across the frontier of a State creatures or things calculated to injure its citizens". Ex parte Nelson (No.1)(222) (1928) 42 CLR 209 is an example. That case was concerned with a prohibition, contained in s.154 of the Stock Act 1901 (N.S.W.), against the importation oR introduction of any stock into New South Wales from any other State oR place in which there was reason to believe that any infectious oR contagious disease in stock existed. It was held by Knox C.J., Gavan Duffy and Starke JJ. (Isaacs, Higgins and Powers JJ. dissenting) that the prohibition did not violate s.92. They said(223) ibid., at p 218 that it would be a strange result if s.92 "stripped the States of power to protect their citizens from the dangers of infectious and contagious diseases, however such dangers may arise". By way of contrast, in Tasmania v. Victoria(224) [1935] HCA 4; (1935) 52 CLR 157 the Court was concerned with the validity of a proclamation which recited the opinion of the Governor in Council that the introduction of potatoes from Tasmania into Victoria was likely to introduce disease into Victoria and thereupon prohibited the importation into Victoria of Tasmanian potatoes. The proclamation was held to offend s.92. Gavan Duffy C.J., Evatt and McTiernan JJ. said((225) ibid., at pp 168-169):

> "The effect of the proclamation is nothing less than to terminate for an indefinite period that species of trade among the States which consists in the marketing by Tasmanians of their potatoes within the State of Victoria. Further, such marketing is absolutely prohibited, however free from disease particular consignments or all consignments of potatoes may be and however the marketing operations are conducted. The sole justification for this absolute prohibition is the opinion of the Executive Council that 'potatoes from Tasmania' are likely to introduce a disease. In the present case it is neither necessary nor desirable to mark out the precise degree to which a State may lawfully protect its citizens against the introduction of disease, but, certainly, the relation between the introduction of potatoes from Tasmania into the State of Victoria and the spread of any disease in the latter is, on the face of the Act and the proclamation, far too remote and attenuated to warrant the absolute prohibition imposed."

See also R. v. Connare; Ex parte Wawn(226) [1939] HCA 18; (1939) 61 CLR 596; Chapman v. Suttie(227) [1963] HCA 9; (1963) 110 CLR 321; Mansell v. Beck(228) [1956] HCA 70; (1956) 95 CLR 550.

43. The permissible restrictions upon intercourse were, before Cole v. Whitfield, regarded as exceptions to the absolute freedom guaranteed by s.92. But since that decision it may more accurately be said that the freedom of intercourse guaranteed by s.92 does not extend to freedom from those restrictions.

44. That still leaves the question of the extent of the freedom of intercourse under s.92. The answer, I think, is not to be found so much in the history and context of s.92, as is the case with freedom of interstate trade and commerce, but in the terms of s.92 itself. The freedom of intercourse guaranteed is, as I have said, freedom of intercourse among the States, that is, freedom of movement across the borders. As Isaacs J. said in the passage which I have quoted from R. v. Smithers; Ex parte Benson, under s.92 State borders are not of themselves to be barriers to movement within Australia. That does not, of course, mean that movement across State borders is immune from regulation. To adopt the mode of reasoning in Cole v. Whitfield, laws which have the object of restricting movement across State borders will offend s.92. The laws in question in Gratwick v. Johnson(229) [1945] HCA 7; (1945) 70 CLR 1. and R. v. Smithers; Ex parte Benson were laws of that kind. Dixon J. said of the Order considered in Gratwick v. Johnson, which

forbade interstate travel by rail or commercial passenger vehicle without a permit, that((230) ibid., at p 19):

> "The Order is directed to the intending passenger. It does not profess to be concerned with priorities of travel upon transport facilities under excessive demand and it is certainly not confined to that matter. It does not, at all events so far as appears from its text or by evidence, depend in any degree for its practical operation or administration upon the movement of troops, munitions, war supplies, or any like considerations. It is simply based on the 'inter-Stateness' of the journeys it assumes to control".

And the Influx of Criminals Prevention Act 1903 (N.S.W.) considered in R. v. Smithers; Ex parte Benson simply prohibited certain persons who could not be categorized in any relevant way from crossing the bordeR into New South Wales.

45. But if the real object of a law is not the restriction of movement across State borders, the fact that such restriction occurs incidentally will not offend s.92, provided that the means adopted to achieve the object are neither inappropriate nor disproportionate. I have elsewhere expressed the view that, where the validity of a law depends upon its connection with a particular subject-matter, the test of reasonable proportionality by itself may be misleading(231) Nationwide News Pty. Ltd. v. Wills, unreported, High Court of Australia, 30 September 1992, at pp 69-70. But that is not so where, as is the case with s.92, the purpose or object of the law is not merely a relevant factor but the crucial determinant of validity. Tasmania v. Victoria was a case in which the real object of the legislation may have been, not to restrict the movement of potatoes across the State border, but to prevent the introduction of diseased potatoes into Victoria. Even upon that basis the law was invalid as offending s.92 because it restricted the movement of all potatoes, both diseased and sound, across the border with the result that the means adopted to stop the spread of disease in potatoes were disproportionate or inappropriate to achieve its real object. Thus it may be seen that there are laws which regulate activities on eitheR side of a State border or even the act of crossing the border (e.g. traffic regulations) which may be said to impede interstate intercourse, but which do not deny the freedom guaranteed by s.92. This is because that freedom is freedom from laws the object of which is the restriction of movement across State borders or, in cases where the means adopted are inappropriate or disproportionate to achieve a legitimate object, freedom from laws which have the effect of restricting movement across State borders.

46. Although Ex parte Nelson (No.1) was decided long before Cole v. Whitfield, the judgment of Knox C.J., Gavan Duffy and Starke JJ. displays a degree of prescience, having regard to the approach now warranted by the later authority. Their Honours said, after the passage which I have already quoted((232) (1928) 42 CLR, at pp 218-219):

> "In a measure it must be conceded that the Stock Act of New South Wales does regulate the free flow of inter-State trade and commerce in stock. If there is reason to believe that any infectious or contagious disease in stock exists, the stock may be stopped at the borders of New South Wales, and if it enters it may in some cases be destroyed. The seeming conflict may be resolved, in our opinion, by considering the true nature and character of the legislation in the particular instance under discussion. The grounds and design of the legislation, and the primary matter dealt with, its object and scope, must always be determined in order to ascertain the class of subject to which it really belongs; and any merely incidental effect it may have over other matters does not alter the character of the law ... In truth,

> the object and scope of the provisions (of the Stock Act) are to protect the large flocks and herds of New South Wales against contagious and infectious diseases, such as tick and Texas fever: looked at in their true light, they are aids to and not restrictions upon the freedom of inter-State commerce."

47. In one sense, the legislation in question in this case does not restrict the movement of persons or things, tangible or intangible, across State borders. The sending of the signals which constitute the act of broadcasting - the means of communication - across State borders remains unimpeded. The situation may be contrasted with that which arose in Miller v. TCN Channel Nine Pty. Ltd. ((233) [1986] HCA 60; (1986) 161 CLR 556) where the question was whether the prohibition went to the transmitting or receiving of messages by wireless telegraphy across the State border. But even if the restriction of the subject-matteR which may be broadcast is to be seen as constituting a restriction upon the signals which may be transmitted interstate - a prohibition upon the sending of signals conveying the offending subject-matter - then nevertheless I do not think that Pt IIID of the Act denies the freedom of intercourse which is guaranteed by s.92. The object of the legislation is clearly not to restrict broadcasting across State borders. The legislation does not erect State borders as barriers in themselves to the broadcasting of the material which is forbidden. The object of the legislation is to reduce the expenditure of funds upon the electronic media during election campaigns or campaigns foR referendums. It is merely coincidental that, because of the prohibition of the broadcasting of certain material, those licensees who are otherwise able to do so are prohibited from broadcasting the material across State borders. And it was not suggested, nor in my view could it be, that the means adopted to achieve the object of the legislation are disproportionate or inappropriate. They are in fact a conventional means of doing what the legislation sets out to do.

48. The plaintiffs also submit that the prohibition against broadcasting certain matter during an election period contained in ss.95B, 95C and 95D and the obligation imposed upon a broadcaster by s.95Q to provide free time constitute the acquisition of property otherwise than on just terms contrary to s.51(xxxi) of the Constitution. Section 51(xxxi) provides that the Parliament may make laws with respect to "(t)he acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws". It is established that s.51 (xxxi) must be treated "as abstracting from other heads of power (including the incidental power) all content which would otherwise have enabled the compulsory acquisition of property, and as subjecting the power with respect to the acquisition to an obligation to provide just terms"(234) Trade Practices Commission v. Tooth and Co. Ltd. [1979] HCA 47; (1979) 142 CLR 397, at p 445. See also Johnston Fear and Kingham and The Offset Printing Co. Pty. Ltd. v. The Commonwealth [1943] HCA 18; (1943) 67 CLR 314, at pp 317-318, 325, 331; Minister of State for the Army v. Dalziel [1944] HCA 4; (1944) 68 CLR 261, at p 294; Teori Tau v. The Commonwealth [1969] HCA 62; [1969] HCA 62; (1969) 119 CLR 564, at p 570. Thus the paragraph ensures that whenever property is compulsorily acquired pursuant to a law of the Commonwealth just terms must be provided(235) Trade Practices Commission v. Tooth and Co. Ltd. (1979) 142 CLR , at p 445. Further, s.51(xxxi) extends to laws foR the acquisition of property by persons other than the Commonwealth oR an agency of the Commonwealth(236) Jenkins v. The Commonwealth [1947] HCA 41; (1947) 74 CLR 400, at p 406; McClintock v. The Commonwealth [1947] HCA 39; (1947) 75 CLR 1, at pp 23, 36; PJ. Magennis Pty. Ltd. v. The Commonwealth [1949] HCA 66; (1949) 80 CLR 382, at pp 401-402, 411, 423; Trade Practices Commission v. Tooth and Co. Ltd. (1979) 142 CLR , at pp 427, 451-452.

49. The term "property" in s.51(xxxi) is not to be narrowly construed(237) See, e.g., Minister of State for the Army v. Dalziel (1944) 68 CLR , per Rich J. at p 285, McTiernan J. at p 295; The Commonwealth v. New South Wales [1923] HCA 34; (1923) 33 CLR 1, per Knox C.J. and Starke J. at pp 20-21. As Dixon J. said in Bank of N.S.W. v. The Commonwealth(238) (1948) 76 CLR ,

at p 349; see also per Starke J. at p 299. And see Clunies-Ross v. The Commonwealth [1984] HCA 65; (1984) 155 CLR 193, at pp 201-202:

> "I take Minister of State for the Army v. Dalziel to mean that s.51(xxxi.) is not to be confined pedantically to the taking of title by the Commonwealth to some specific estate or interest in land recognized at law or in equity and to some specific form of property in a chattel or chose in action similarly recognized, but that it extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property. Section 51(xxxi.) serves a double purpose. It provides the Commonwealth Parliament with a legislative power of acquiring property: at the same time as a condition upon the exercise of the power it provides the individual or the State affected with a protection against governmental interferences with his proprietary rights without just recompense. In both aspects consistency with the principles upon which constitutional provisions are interpreted and applied demands that the paragraph should be given as full and flexible an operation as will cover the objects it was designed to effect."

But there must nevertheless be the acquisition of something of a proprietary nature before s.51 (xxxi) can have any application.

50. Section 6A(1) of the Act prohibits, without reasonable excuse, the operation of a radiocommunication transmitter for the purpose of transmission to the general public of radio programs or television programs except as authorized by or under the Act. The relevant licensing provisions are contained in Pt IIIB of the Act. Under s.81 the Broadcasting Tribunal may grant or renew a licence upon such conditions as it determines and, in determining those conditions, the Broadcasting Tribunal is required to have regard to the need for the commercial viability of the broadcasting services provided in the area served or to be served under the licence. Under s.83(1)(a) an applicant for the grant of a licence is required to give a written undertaking to the Broadcasting Tribunal that the applicant will, if granted the licence, comply with the conditions of the licence. UndeR s.88 the Broadcasting Tribunal may suspend or revoke a licence where it appears to the Broadcasting Tribunal that it is advisable in the public interest to do so having regard to certain specified matters, one of which is failure to comply with a condition of the licence. Under s.89A the holder of a licence may transfer the licence to another person, but only with the consent of the Broadcasting Tribunal. And s.129(1) provides that a licence is subject to the provisions of the Act and that those provisions are deemed to be incorporated in the licence as terms and conditions of the licence.

51. It may, I think, be assumed that a licence such as is held by each of the plaintiffs under the Act confers upon the holder a right in the nature of property((239) Cf. 2 Day FM Australia Pty. Ltd. v. Commissioner of Stamp Duties (N.S.W.) (1989) 89 ATC 4840). But that does not carry the plaintiffs far enough to sustain them in theiR argument. While the licence may be in the nature of property, what is done under the licence is not. What the holder of a licence does undeR his licence is to broadcast and, in my view, it cannot be said that by requiring a licence holder to cease broadcasting certain material oR to broadcast certain material free of charge there is an acquisition of property on the part of any person. The licence which may be regarded as property remains. All that occurs is that certain services which the licence holder is able to provide for reward cannot be provided or must be provided without reward. The plaintiffs stress that by being able to broadcast advertisements they are able to earn substantial sums of money. No doubt that is reflected in the

value of the licence. But the service which a licence holder provides in the form of the broadcasting of advertisements cannot, in my view, be regarded as property however valuable the reward for that service. Conversely a broadcaster does not surrender anything in the nature of property (although he does lose revenue that would otherwise be earned on the provision of the service) when he is compelled to broadcast material free of charge. Broadcasting is the provision of a service, not property. Even if the purchase of the service can be regarded as the purchase of broadcasting time, that involves no acquisition of property of any kind. Nor does it carry the matter any further to regard s.95Q as conferring a right upon those who may take advantage of the free time which the section requires a licence holder to make available in an election period. If it be a right, it is personal rather than proprietary because it is of a temporary nature and may not be assigned(240) See National Provincial Bank Ltd. v. Ainsworth [1965] UKHL 1; (1965) AC 1175, at pp 1247-1248; Reg. v. Toohey; Ex parte Meneling Station Pty. Ltd. [1982] HCA 69; (1982) 158 CLR 327, at p 342.

52. The plaintiff in the second action also submits that ss.95B(3), 95C(4) and 95D(3) of the Act are invalid because they single out the States and their authorities for discriminatory treatment in that they prohibit a broadcaster from broadcasting a political advertisement foR or on behalf of the government, or a government authority, of a State during the election periods specified in those sections. As I have indicated, it is established that a Commonwealth law will be invalid where it singles out or discriminates against the States in the sense that it imposes a special burden or disability upon them(241) Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation [1982] HCA 31; (1982) 152 CLR 25, per Mason J. at p 93, quoted with approval by Brennan J. in The Commonwealth v. Tasmania (The Tasmanian Dam Case) [1983] HCA 21; (1983) 158 CLR 1, at pp 215-216. See also The Tasmanian Dam Case (1983) 158 CLR , per Mason J. at p 139, Deane J. at p 281; Queensland Electricity Commission v. The Commonwealth (1985) 159 CLR , per Gibbs C.J. at p 206, Mason J. at p 217, Brennan J. at p 231, Deane J. at p 247. An exception to this principle is where the power pursuant to which the law is passed is one which, having regard to its content, context and subject-matter, can be said to be a poweR that is intended to be exercised in such a discriminatory way(242) See Melbourne Corporation v. The Commonwealth [1947] HCA 26[1947] HCA 26; ; (1947) 74 CLR 31, peR Dixon J. at pp 81 and 83, referred to in Queensland Electricity Commission v. The Commonwealth (1985) 159 CLR , per Gibbs C.J. at p 208, Mason J. at p 219, Brennan J. at p 233, Deane J. at p 250. Neither the power to make laws with respect to broadcasting conferred by s.51 (v) of the Constitution nor the power to make laws in relation to elections conferred by ss.10, 29, 31, 51(xxxvi) and 51(xxxix) of the Constitution is a power of this kind. As Gibbs C.J. pointed out in Queensland Electricity Commission v. The Commonwealth(243) (1985) 159 CLR , at p 207:

> "The laws forbidden by this principle are those which discriminate against all the States or any one of them by subjecting them or it to a burden or disability which is not imposed on persons generally, a law whose very object is to restrict, burden or control an activity of the States or of one of them."

Thus, for a Commonwealth law to be invalid under this principle, the law must isolate the States from the general law applicable to others(244) Queensland Electricity Commission v. The Commonwealth (1985) 159 CLR , per Mason J. at p 217; see also Bank of N.S.W. v. The Commonwealth (1948) 76 CLR , per Dixon J. at p 337. What is prohibited is "an adverse discriminatory operation of a law, not an adverse operation of a general law"(245) Queensland Electricity Commission v. The Commonwealth (1985) 159 CLR , per Brennan J. at p 234.

53. In my view, the sections which are attacked by the plaintiff in the second action do not have this discriminatory effect. The prohibition on broadcasts of political advertisements during an election period applies generally and not only to broadcasts for or on behalf of the government, or

a government authority, of a State. Indeed, ss.95B(4), 95C(5) and 95D(4) expressly prohibit broadcasts of political advertisements for or on behalf of a person other than a government oR government authority and broadcasts of political advertisements on the broadcaster's own behalf. The exception to this latter prohibition on broadcasting is where a broadcast is an election broadcast that is made on behalf of an organization or person who is granted a period of free time pursuant to the provisions of Div.3 or a policy launch that is broadcast pursuant to the provisions of Div.4. The only organizations or persons who can be granted a period of free time pursuant to the provisions of Div.3 are political parties and candidates, or groups of candidates, in the relevant election(246) See ss.95H(1), 95L(1), 95M(1), 95M(2). And the only policy launches that may be broadcast pursuant to the provisions of Div.4 are the policy launches of political parties that meet certain criteria(247) See s.95S(1)-(3). The States are not singled out by the prohibition which is imposed on the broadcast of political advertisements because the prohibition extends to organizations or bodies that are not political parties or candidates, or groups of candidates, in an election that meet the conditions specified in Divs 3 and 4. And the definition of "political advertisement" is not such as to confine the prohibition to advertisements that might be expected to be broadcast for or on behalf of a State as opposed to advertisements that might be expected to be broadcast for or on behalf of other persons or bodies that have an interest in influencing voters or in commenting upon issues in an election. Moreover, a prohibition similar to that imposed in relation to the broadcast of political advertisements for or on behalf of a government, or government authority, of a State is also imposed in relation to the broadcast of political advertisements for or on behalf of a government, or government authority, of a Territory or for or on behalf of the government, or a government authority, of the Commonwealth(248) See ss.95B (2), 95C(2), 95C(3), 95D(1), 95D(2); see also ss.95B(1), 95C(1). Of course, the very nature of the States is such that they cannot be political parties or candidates in an election and this explains why ss.95B(3), 95C(4) and 95D(3) are not expressed to be "(s)ubject to Divisions 3 and 4" whereas ss.95B(4), 95C(5) and 95D(4) are so expressed.

54. A further exception to the prohibition on the broadcasting of political advertisements during election periods is contained in s.95A(3) of the Act which provides that nothing in Pt IIID:

> "prevents a broadcaster from broadcasting an advertisement for, or on behalf of, a charitable organisation if:
> (a) the advertisement is aimed at promoting the objects of the organisation; and
> (b) the advertisement does not explicitly advocate voting for or against a candidate in an election or a political party".

But, again, the fact that political advertisements may be broadcast for or on behalf of charitable organizations does not mean that Pt IIID or any of its provisions discriminate against the States in such a way as to render Pt IIID or any of those provisions invalid. The exception in relation to charitable organizations is limited and its effect is not to result in the States being singled out as the only entities prohibited from broadcasting political advertisements during an election period.

55. The plaintiff in the second action also argues that s.95D(3) and (4) are invalid because they impede the capacity of the States to function and the processes by which the legislative and executive powers of the States are exercised, thereby threatening the structural integrity of the States. Even conceding the undoubted importance of the electoral process in the government of the States, s.95D(3) and (4) cannot be said to interfere with this process in such a way as to "threaten oR endanger the continued functioning of the (States) as ... essential constituent (elements) in the federal system"(249) The Tasmanian Dam Case (1983) 158 CLR, per Mason J. at p 139 or to "unduly impair the capacity of (the States) to perform (their) constitutional functions"(250) State Chamber of Commerce and Industry v. The Commonwealth (The Second

Fringe Benefits Tax Case) [1987] HCA 38; (1987) 163 CLR 329, per Brennan J. at p 358. As I have said, the general prohibition on broadcasting political advertisements which is imposed by the provisions of Div.2 is limited in duration (namely, to election periods); does not prevent the broadcasting of news reports, current affairs programs, editorial comment and talkback radio programs relating to political issues; and leaves other media available for the dissemination of information that would otherwise be contained in political advertisements. Further, political parties, candidates and groups of candidates are able to have election broadcasts broadcast for them or on their behalf during election periods provided that they are granted periods of free time pursuant to Div.3 and political parties may have their policy launches broadcast during these periods pursuant to Div.4.

56. For similar reasons the argument of the plaintiff in the second action that ss.95B(3), 95C(4) and 95D(3) are invalid because they substantially interfere with the capacity of State governments and their authorities to protect themselves and to communicate information vital to their interests and proper functioning must be rejected. It may be that the scope of the definitions of "political advertisement", "political matter" and "prescribed material" results in the prohibition on broadcasting political advertisements having a broad application. It may also be that the effect of the legislation is that the prohibition applies for a considerable part of any given year. But to say as much is not to show that the relevant sections infringe any express or implied limitation contained in the Constitution. Nor, in my view, do s.95D(3) and (4) infringe either s.106 or s.107 of the Constitution. State Constitutions are unimpaired by the legislation and the powers of the State Parliaments continue subject only to the fact that the provisions in question prevail under s.109 over any inconsistent State legislation.

57. For these reasons I would uphold the whole of the demurrer in the first matter and the first paragraph of the demurrer in the second matter.

GAUDRON J. The issue raised by these matters is whether Pt IIID of the Broadcasting Act 1942 (Cth) ("the Act") is invalid by reason that it infringes one or more constitutional prohibitions. Part IIID of the Act purports to limit and regulate political advertisements on radio and television. It will later be necessary to refer to its provisions in some detail but, for the moment, it is sufficient to say that Pt IIID of the Act operates in relation to Commonwealth elections (s.95B), Territory elections (s.95C), and State and local government elections (S.95D). The constitutional prohibitions which it is said to infringe are implied prohibitions deriving from the democratic and federal nature of the Commonwealth, that contained in s.92 and that implicit in s.51(xxxi) which authorizes laws for the "acquisition of property on just terms".
The proceedings before the Court

2. The first matter before the Court is an action by Australian Capital Television Pty. Limited and certain other television broadcasters licensed under the Act ("the licensed television broadcasters") against the Commonwealth of Australia seeking a declaration that Pt IIID is invalid, alternatively, a declaration that particulaR provisions of Pt IIID are invalid in their application to licensed broadcasters. The second is an action by the State of New South Wales against the Commonwealth and the Australian Broadcasting Tribunal ("the defendants") seeking a declaration that Pt IIID is invalid, alternatively, a declaration that it does not apply to parliamentary by-elections. The Commonwealth demurred to the whole of the statement of claim filed on behalf of the licensed television broadcasters. The Commonwealth demurred to the whole of the statement of claim filed on behalf of the State of New South Wales and, additionally, to the claim that Pt IIID of the Act does not apply to parliamentary by-elections. The demurrers were heard together.
The operation of Pt IIID of the Act

3. In general terms, Pt IIID of the Act operates to oblige certain broadcasters to provide free election broadcasting time but, otherwise, to ban the broadcasting of political advertisements during elections. It is convenient first to consider the nature and scope of the ban.

4. The ban is effected by a series of discrete bans with respect to Commonwealth, Territory and State and local government elections imposed by s.95B, s.95C and s.95D of the Act respectively. The bans direct that "(a) broadcaster must not" during the relevant election period broadcast "any matter (other than exempt matter)" for or on behalf of the government or a government authority of the Commonwealth or a Territory (in the case of a Commonwealth election or an election for that Territory)(251) s.95B(1), s.95C(1), and must not "broadcast a political advertisement" for or on behalf the government of a State holding an election(252) Section 95D(3) has this operation although, in terms, it refers to the "government ... of a State", for or on behalf of a government or a government authority of any otheR Australian political entity(253) s.95B(2), (3), s.95C(2), (3), (4), s.95D(1), (2), (3), for or on behalf of any person other than a government or government authority(254) s.95B(4)(a), s.95C(5)(a), s.95D(4)(a), or on the broadcaster's own behalf(255) s.95B(4)(b), s.95C(5)(b), s.95D(4)(b). By reason of the definition of "broadcaster"(256) "Broadcaster" is defined to mean "the Corporation, the Service or a licensee". "The Corporation" is the Australian Broadcasting Corporation, "the Service" is the Special Broadcasting Service and a "licensee" is an entity holding a licence under the Act and "broadcast"((257) "Broadcast" is defined to mean "broadcast by radio or televise") in s.4(1) of the Act, the ban extends to all radio and television broadcasters and broadcasts. And by reason of the definition of "election period" in the same sub-section((258) "Election period" is defined to mean:

> "(a) in relation to an election to the Legislative Council of the State of Tasmania, or an ordinary election to the Legislative Assembly for the Australian Capital Territory - the

period

> that starts 33 days before the polling day for the election and ends at the close of the poll on that day; and
> (b) in relation to any other election to a Parliament - the period that starts on:
> (i) the day on which the proposed polling day for the election is publicly announced; or
> (ii) the day on which the writs for the election are issued;
> whichever happens first, and ends at the close of the poll on the polling day for the election; and
> (c) in relation to an election to a local government authority - the period that starts 33 days before the polling day

for

> the election and ends at the close of the poll on that day; and
> (d) in relation to a referendum whose voting day is the same as the polling day for an election to the Parliament of the Commonwealth - the period that is the same as the election period in relation to that election; and
> (e) in relation to any other referendum - the period that starts 33 days before the voting day for the referendum and

ends

at the close of voting on that day".,)

the ban applies for the whole of the period of the election concerned, being, in effect, from the calling of the election or, in the case of the Legislative Council of Tasmania or the Legislative Assembly of the Australian Capital Territory, local government elections and some referenda, from thirty-three days prior to polling day until the close of the poll.

5. The ban is chiefly directed to the broadcasting of political advertisements. Definitions in ss.95B, 95C and 95D reveal what is meant by a "political advertisement". It is convenient to proceed by reference to the definitions in s.95B concerning Commonwealth elections, for they differ from those in ss.95C and 95D only to the extent that they deal expressly with a referendum and that they proceed by reference to the political organs of the Commonwealth rather than those of a State or Territory.

6. "Political advertisement" is defined in s.95B to mean "an advertisement that contains political matter". "Political matter" is, in turn, defined to mean:

> "(a) matter intended or likely to affect voting in the election or referendum concerned; or
> (b) matter containing prescribed material;
> but does not include exempt matter".

"Prescribed material" is defined to mean:

> "material containing an express or implicit reference to, or comment on, any of the following:
> (a) the election or referendum concerned;
> (b) a candidate or group of candidates in that election;
> (c) an issue submitted or otherwise before electors in that election;
> (d) the government, the opposition, or a previous government or opposition, of the Commonwealth;
> (e) a member of the Parliament of the Commonwealth;
> (f) a political party, or a branch or division of a political party."

"Exempt matter" referred to in the definition of "political matter" in s.95B((259) See also ss.95C and 95D and note ss.95B(1) and 95C(1)) is defined in s.4(1) to include, inter alia, warnings of natural disasters, material relating to procedures and polling times foR elections, some advertisements for positions, tenders, goods and services and certain types of announcements. Additionally, s.95A relevantly provides that:

> "(1) Nothing in this Part prevents a broadcaster from broadcasting:
> (a) an item of news or current affairs, or a comment on any such item; or
> (b) a talkback radio program.
> (2) Nothing in this Part prevents the holder of a public radio licence who provides a service for visually handicapped persons from broadcasting any material that he or she is permitted to broadcast under section 119AB((260) Section 119AB permits the broadcasting of, inter alia, community information, community promotional material, material promoting the service and sponsorship announcements.).
> (3) Nothing in this Part prevents a broadcaster from broadcasting an advertisement for, or on behalf of, a charitable organisation if:

(a) the advertisement is aimed at promoting the objects of the organisation; and
(b) the advertisement does not explicitly advocate voting for or against a candidate in an election or a political party.

(4) Nothing in this Part prevents a broadcaster from broadcasting public health matter, whether by way of advertisement or otherwise."

"Exempt matter" under s.4(1) and the broadcasts excepted from the operation of Pt IIID under s.95A are together referred to as "exempt material".

7. Special provision is made in the case of by-elections, limiting the ban to an area which covers or overlaps the area in which the by-election is to be held((261) s.95B(5), s.95C(6), s.95D(5)). So faR as ss.95B(1) and 95C(1) relate to "any matter (other than exempt matter) (to be broadcast) ... for or on behalf of the government, or a government authority" of the Commonwealth or a Territory in relation to a Commonwealth election or an election for that Territory respectively, those sub-sections appear to affect a wider range of subject-matter than those dealing with political advertisements. But putting these matters aside, the ban imposed by ss.95B, 95C and 95D is a blanket ban on the broadcasting of election material, other than exempt material, in relation to all elections for all governments in Australia during the period of the election concerned which, leaving aside those elections for which the election period is specified as thirty-three days, extends from the announcement of the election or, if it be earlier, the issue of the writs until the close of the poll((262) See definition of election period in s.4(1) of the Act, supra, fn.(258)).

8. The effect of the ban imposed by ss.95B, 95C and 95D is, to some extent, mitigated by the provisions of Divs 3 and 4 of Pt IIID of the Act. By ss.95H, 95L and 95M, which are in Div.3, the Australian Broadcasting Tribunal ("the Tribunal") is obliged and empowered, subject to the making of regulations in the case of Commonwealth, State and Territory elections((263) s.95J), to grant "free time" in relation to an election.

9. The effect of s.95H is that 90% of the total free time in relation to an election is to be divided amongst political parties represented in the parliament or legislature immediately before the election and contesting the election with at least the prescribed((264) The numbeR of candidates prescribed under the Political Broadcasts (State and Territory Elections) Regulations is 10 in the case of elections to State Parliaments and 6 in the case of elections to Territory legislatures.) number of candidates. The free time is to be divided according to the proportion of first preference votes cast for the candidates of the respective political parties at the last election. It would seem that, in practical terms, 90% of the available time is to be allocated to the major political parties. And subject to special provision in s.95L with respect to sitting independent senators((265) Section 95L provides that the Tribunal must, if an application is made, grant free time in relation to a Senate election to a sitting independent senator who is a candidate and provides, in s.95L(2) and (3), that:
"(2) The period to be granted to a person under this section is a period determined by the Tribunal in accordance with the regulations, being a period equal to not less than 5% of the total time in respect of the election nor more than 10% of that total time.
(3) If the Tribunal is required under this section to grant a period of free time to 2 or more persons, the Tribunal must divide the period determined under subsection (2) between them in accordance with the regulations."), the remaining 10% is to be granted to other political parties and independent candidates.

10. By s.95P of the Act the Tribunal must divide the free time granted to political parties and independent candidates into "units of free time" and allocate them to broadcasters in accordance

with the regulations. Seemingly, the allocation must also be made on the basis that s.95F provides, in sub-s.(1), that nothing in Div.3 is to be treated as requiring or permitting the Special Broadcasting Service oR licensees to broadcast an election broadcast by radio and, in sub-s.(2), that the obligation of the Australian Broadcasting Corporation with respect to radio broadcasts is limited to broadcasts on its metropolitan and regional AM networks.

11. Upon the allocation of "units of free time", s.95Q obliges a broadcaster to make election broadcasts free of charge. Section 95G defines "election broadcast" so as to limit what may be broadcast to advertisements consisting of words spoken by a single speaker who is either a candidate for election or a member of a parliament or of a legislature, accompanied, in the case of television broadcasts, by an image consisting of the speaker's head and shoulders. The definition also limits the duration of advertisements to 2 minutes in the case of television and 1 minute in the case of radio broadcasts. And, as previously noted, the obligation to broadcast an election broadcast by radio is limited by s.95F(1) and (2) to broadcasts by the Australian Broadcasting Corporation on its metropolitan and regional AM networks.

12. The political discussion contemplated by the "free time" provisions of Div.3 is further extended by Div.4 of Pt IIID of the Act. By s.95S(1) and (2) in Div.4, a broadcaster may, in relation to Commonwealth, State and Territory elections, "broadcast (the) policy launch" of a political party that was represented in the last Parliament or legislature and that has endorsed one or more candidates for the election concerned. The launch may be broadcast once and once only ((266) s.95S(5) and (6). See also s.95S(7) which provides: "This section does not prevent the broadcasting of an excerpt of reasonable length from a political party's policy launch as part of a news report or current affairs program even if the policy launch has been previously broadcast under this section.") during the election period. The broadcast must not last more than thirty minutes and must be free of charge((267) s.95S(4)). If a broadcasteR broadcasts the launch of one political party, a reasonable opportunity must be given to other political parties satisfying the requirements of s.95S(3)(a) and (b)((268) The relevant requirements are that the other political party:
"(a) has endorsed one or more candidates for the purposes of the election; and
(b) is represented by one or more members of the relevant Parliament, or was so represented during the last sittings of the Parliament held before the election") for the broadcasting of their launches.

13. The operation of Div.3 with respect to free time must depend, to some extent, on regulations made from time to time under s.95J. The only regulations which are presently relevant are those made with respect to elections to State Parliaments and elections to Territory legislatures((269) Political Broadcasts (State and Territory Elections) Regulations.). However, it is clear that no matter how Div.3 operates and with what effect, only political parties and independent candidates will benefit from its provisions. And what may be broadcast on their behalf is circumscribed as to form and duration. It is also clear that only political parties and candidates endorsed by them can benefit from the broadcasting of a policy launch undeR Div.4. It is equally clear that, save for exempt material, a broadcaster cannot, during the period of an election, broadcast political matter on behalf of a person or organization that is not respectively a candidate or a political party with endorsed candidates standing in that election.
Political discourse - an implied freedom

14. The Constitution cannot be construed in a vacuum((270) See In re Foreman and Sons Pty. Ltd.; Uther v. Federal Commissioner of Taxation [1947] HCA 45; (1947) 74 CLR 508, per Latham C.J. at p 521, where it was said: "The Commonwealth of Australia was not born into a vacuum. It came into existence within a system of law already established."). As SiR Owen Dixon pointed out in Jesting Pilate, it is the general law which is "the source of the legal conceptions that govern us in determining the effect of the written instrument"((271) Sir Owen Dixon, Jesting

Pilate, (1965), p 205) and, in consequence, "constitutional questions should be considered and resolved in the context of the whole law, of which the common law ... forms not the least essential part."((272) ibid., pp 212-213) And, of course, the common law embraces those constitutional principles which have guided the development of democracy and responsible government in the United Kingdom.

15. The Constitution provides for an elected Parliament of the Commonwealth, brought together either as the result of a general election((273) Constitution, s.5) or as the result of separate Senate and House of Representative elections, with the "senators for each State (being) directly chosen by the people of the State"((274) Constitution, s.7. See also ss.8 and 9) and members of the House of Representatives being "directly chosen by the people of the Commonwealth"((275) Constitution, s.24). Moreover, the Constitution postulates regular elections and provides that "senators shall be chosen for a term of six years"((276) Constitution, s.7) and that "(e)very House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooneR dissolved by the Governor-General."((277) Constitution, s.28.) And the franchise for elections for the Senate and the House of Representatives must extend to every "adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State"((278) Constitution, s.41).

16. Fundamental constitutional doctrines are not always the subject of exhaustive constitutional provision, either because they are assumed in the Constitution((279) See Australian Communist Party v. The Commonwealth [1951] HCA 5; (1951) 83 CLR 1, per Dixon J. at p 193) or because what they entail is taken to be so obvious that detailed specification is unnecessary. Thus, for example, the separation of the judicial arm of government from the legislative and executive arms is a matteR which is taken for granted by the Constitution, albeit that it is revealed, to some extent, by s.71 which provides for the vesting of the judicial power of the Commonwealth in the courts therein named oR designated. This fundamental constitutional doctrine informs ouR understanding of Ch III and provides, in part, the foundation foR implications as to the powers that Parliament may or may not confer on courts((280) Reg. v. Kirby; Ex parte Boilermakers' Society of Australia ("the Boilermakers' Case") [1956] HCA 10; (1956) 94 CLR 254, per Dixon C.J., McTiernan, Fullaghar and Kitto JJ. at p 289; Attorney-General of the Commonwealth of Australia v. The Queen ("the Boilermakers' Case Privy Council") [1957] HCA 12; (1957) 95 CLR 529, at p 544; (1957) AC 288, at p 319; Harris v. Caladine [1991] HCA 9; (1991) 172 CLR 84, per Mason C.J. and Deane J. at pp 93-94, per Dawson J. at pp 115-122, per Gaudron J. at pp 146-149.). So too, not every consequence of the federal compact is spelt out in the Constitution, but it follows from the very notion of federalism that the Commonwealth may not legislate so as to strike at the continued existence of a State or to impair its capacity to function as such((281) Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31, per Rich J. at p 66, per Starke J. at p 70. See also Victoria v. The Commonwealth ("the Payroll Tax Case") [1971] HCA 16; (1971) 122 CLR 353, peR Barwick C.J. at p 372, per Gibbs J. at p 424; Queensland Electricity Commission v. The Commonwealth [1985] HCA 56; (1985) 159 CLR 192, per Gibbs C.J. at p 206, per Mason J. at p 217, per Deane J. at p 247.).

17. The provisions of the Constitution directing elections for the Houses of Parliament, directing regular elections and requiring that Senators be "directly chosen by the people of the State" and that members of the House of Representatives be "directly chosen by the people of the Commonwealth" in elections in which the franchise extends to adult persons who have the right to vote "for the more numerous House of the Parliament of a State" predicate and, in turn, are predicated upon a free society governed in accordance with the principles of representative parliamentary democracy. The Constitution does not proclaim it in terms but, as was said by Isaacs J. in Federal Commissioner of Taxation v. Munro((282) [1926] HCA 58; (1926) 38 CLR 153, at p 178. See also Western Australia v. The Commonwealth [1975] HCA 46; (1975) 134 CLR 201, per Murphy J. at p 283; Attorney-General (Cth); Ex rel. McKinley v. The

Commonwealth [1975] HCA 53; (1975) 135 CLR 1, per Stephen J. at p 56, per Mason J. at p 62, per Murphy J. at pp 68-72; Attorney-General (N.S.W.); Ex rel. McKellar v. The Commonwealth (1977) 139 CLR 527, per Gibbs J. at p 540.), the Constitution is one "for the advancement of representative government, and contains no word to alter the fundamental features of that institution".

18. Representative parliamentary democracy is a fundamental part of the Constitution - as fundamental as federalism and as fundamental as the vesting of judicial power in an independent federal judiciary separate from the other arms of government. Its acceptance as such is dictated by the election and franchise provisions to which I have referred. It is reinforced by the opening words of the Constitution, reciting the agreement of the people to unite in an "indissoluble Federal Commonwealth ... under the Constitution", and by its final provision, s.128, which acknowledges that the Constitution may and may only be altered by vote of "the electors in each State and Territory qualified to vote for the election of the House of Representatives" who, as already mentioned, must include all those who are eligible to vote foR the more numerous House of the Parliament of the State. Indeed, as Barwick C.J. said of the federal nature of the Commonwealth, representative parliamentary democracy "is manifest throughout the Constitution"((283) Western Australia v. The Commonwealth (1975) 134 CLR , at p 227.).

19. Like the essential federal nature of the Commonwealth and the separation of the judicial power from other arms of government, representative parliamentary democracy informs our understanding of the specific provisions of the Constitution and it entails consequences, some of which may be obvious and some of which may be revealed by the general law, including the common law.

20. The general law acknowledges that freedom of discussion of matters of public importance is essential to the maintenance of a free and democratic society. Blackstone went so far as to assert that the liberty of the press is essential to a free state((284) Blackstone, Commentaries, 17th ed (1830), vol.iv., chapter xi: "Of Offences against the Public Peace", p 151). The cruciality of the free discussion of matters of public importance has been recognized in recent times, both in this Court((285) See, for example, The Commonwealth of Australia v. John Fairfax and Sons Ltd. [1980] HCA 44; (1980) 147 CLR 39, per Mason J. at p 52; John Fairfax and Sons Ltd. v. Cojuangco [1988] HCA 54; (1988) 165 CLR 346, per Mason C.J., Wilson, Deane, Toohey and Gaudron JJ. at p 353; Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation [1982] HCA 31; (1982) 152 CLR 25, per Gibbs C.J. at p 56, per Stephen J. at pp 74-75, 76-77, per Mason J. at pp 95, 98, per Wilson J. at pp 133-134, per Brennan J. at p 175; Hinch v. Attorney-General (Vict.) [1987] HCA 56; (1987) 164 CLR 15, per Mason C.J. at pp 18-19, per Wilson J. at p 41, peR Deane J. at pp 46, 57, per Gaudron J. at pp 82-83, 85.) and in the courts of other great democratic societies((286) See, for example, Wheeler v. Leicester City Council [1985] UKHL 6; (1985) AC 1054, per Browne-Wilkinson L.J. at p 1065; Derbyshire County Council v. Times Newspapers Ltd. (1992) 3 WLR 28, per Balcombe L.J. at p 46, peR Butler-Sloss L.J. at p 62; Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd. (1986) 33 DLR (4th) 174, peR McIntyre J. at p 183; First National Bank of Boston v. Bellotti [1978] USSC 138; (1978) 435 US 765, at pp 776-777. For decisions of courts exercising international jurisdiction see, for example, The Sunday Times v. The United Kingdom [1979] ECHR 1; (1970) 2 EHRR 245, at p 280; The Observer and the Guardian v. United Kingdom [1991] ECHR 49; (1992) 14 EHRR 153, at p 178.). It is sufficient to refer to what was said by Lord Simon of Glaisdale in Attorney-General v. Times Newspapers Ltd.((287) (1974) AC 273, at p 315):

> "People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and

> argumentation necessarily has to be conducted vicariously, the public press being a principal instrument."

His Lordship was speaking generally, but what he said is especially true in relation to elections held to determine the composition of the parliaments and the legislatures and, ultimately, the government of the political entity concerned. The cruciality of discussion in relation to elections was made plain by Windeyer J. in Australian Consolidated Press Ltd. v. Uren((288) [1966] HCA 37; (1966) 117 CLR 185, at p 210. See also Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth [1977] HCA 71; (1977) 139 CLR 54, per Murphy J. at p 88; First National Bank of Boston v. Bellotti (1978) 435 US, at p 777; National Citizens' Coalition Inc. v. Attorney-General for Canada (1984) 11 DLR (4th) 481, at p 492.), his Honour stating that "(f)reedom at election time to praise the merits and policies of some candidates and to dispute and decry those of others is an essential of parliamentary democracy."

21. The notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, freedom of association((289) See McGraw-Hinds (Aust.) Pty. Ltd. v. Smith [1979] HCA 19; (1979) 144 CLR 633, per Murphy J. at p 670; Miller v. TCN Channel Nine Pty. Ltd. [1986] HCA 60; (1986) 161 CLR 556, per Murphy J. at p 581. In these cases Murphy J. regarded the prohibition on slavery and serfdom, the rule of law, the prohibition on cruel and unusual punishments, freedom of movement and freedom of communication as flowing from a democratic society.) and, perhaps, freedom of speech generally ((290) See Miller v. TCN Channel Nine Pty. Ltd. (1986) 161 CLR , per Murphy J. at pp 581-582; Gallagher v. Durack [1983] HCA 2; (1983) 152 CLR 238, per Murphy J. at p 246; Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth (1977) 139 CLR , per Murphy J. at p 88. See also Attorney-General v. Times Newspapers Ltd. (1974) AC, per Lord Simon at p 315; Attorney-General v. Guardian Newspapers Ltd. [1987] UKHL 13; (1987) 1 WLR 1248, per Lord Bridge of Harwich at p 1286, per Lord Oliver of Aylmerton at p 1320; Re Alberta Legislation (1938) 2 DLR 81, per Cannon J. at p 119; Switzman v. Elbling (1957) 7 DLR (2d) 337, per Rand J. at p 358, per Abbott J. at p 369 and Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd. (1986) 33 DLR (4th), per McIntyre J. at p 183 where it was held that freedom of expression was not a "creature of the Charter" but was a "fundamental concept" upon which "representative democracy, as we know it today" is based.). But, so far as free elections are an indispensible feature of a society of that kind, it necessarily entails, at the very least, 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.

22. The argument on behalf of the Commonwealth in the first matter and the defendants in the second matter, conceded that some limited freedom of communication is necessarily to be implied in the Constitution, including a freedom to communicate with elected representatives and the central organs of government. And, according to the argument, there is also to be implied a freedom of communication between electors and candidates for election to the Parliament of the Commonwealth, at least in relation to an election that has been announced. However, it was argued that s.92, in providing for freedom of interstate intercourse, prevents the implication of any further freedom for the members of society to communicate with each other, whether generally or in relation to Commonwealth elections.

23. The rule of construction which is expressed in the maxim expressum facit cessare tacitum and which precludes an implication being made on a topic with respect to which provision has been made is closely related to the expressio unius rule. Like that rule, it is one that must be applied with caution((291) Ainsworth v. Criminal Justice Commission [1992] HCA 10; (1992) 106 ALR 11, per Mason C.J., Dawson, Toohey and Gaudron JJ. at pp 16-17, [1992] HCA 10; 66 ALJR 271, at p 275). And like that rule, it can only be applied if it is clear that the provision in question was intended to make exhaustive provision with respect to the topic concerned((292) See the strict

approach of Gibbs C.J. in State Bank of New South Wales v. Commonwealth Savings Bank of Australia [1984] HCA 41; (1984) 53 ALR 625, at p 627; [1984] HCA 41; 58 ALJR 394, at pp 395-396; cf. R. v. Wallis [1949] HCA 30; (1949) 78 CLR 529, per Dixon J. at p 550). Because the concession made on behalf of the Commonwealth in the first action, and the defendants in the second action, allows that s.92 is not exhaustive with respect to communication generally, it is destructive of the argument that s.92 precludes any implication as to the right of the members of society to communicate with each other.

24. The fact that s.92 does not provide exhaustively with respect to freedom of communication was acknowledged in R. v. Smithers; Ex parte Benson((293) [1912] HCA 92; (1912) 16 CLR 99, per Griffith C.J. at p 108, peR Barton J. at p 109. See also Pioneer Express Pty. Ltd. v. Hotchkiss [1958] HCA 45; (1958) 101 CLR 536, per Dixon C.J. at pp 549-550, per Taylor J at p 560, peR Menzies J. at p 566; Miller v. TCN Channel Nine Pty. Ltd. (1986) 161 CLR , per Murphy J. at pp 581-585). In that case, Griffith C.J. adopted as appropriate to our Commonwealth the remarks of Miller J. in Crandall v. State of Nevada((294) [1867] USSC 15; (1867) 73 US 35, at p 44 as approved in the Slaughter-House Cases [1872] USSC 142; (1872) 83 US 36, at p 79) as to the rights of the citizens of the United States of America to communicate with the various organs of government((295) The specific rights identified in Crandall v. State of Nevada were:
"the right (of the citizen) to come to the seat of government to assert any claim he may have upon (the) government, oR to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions ... (and) ... a right to free access to its seaports, ... to the sub-treasuries, the land offices, the revenue offices, and the Courts of justice in the several States".) and concluded that s.92 was not the only constitutional prohibition bearing on the movement of individuals between the States, his Honour holding that "the former power of the States to exclude any persons whom they might think undesirable inhabitants is cut down to some extent by the mere fact of federation, entirely irrespective of the provisions of secs.92 and 117"((296) R. v. Smithers; Ex parte Benson (1912) 16 CLR , at p 109).

25. And there are indications in s.92 itself that it was not intended to be exhaustive as to the rights of Australians to communicate with each other. In the first place and so far as presently relevant, it deals with "intercourse among the States" which is a discrete topic and one which has its own special importance in the federal arrangements effected by the Constitution. Another matter which tells against the exhaustive nature of s.92 is that the freedom it confers is expressed to come into existence only with "the imposition of uniform duties of customs". And, of course, s.92 appears in Ch IV of the Constitution, the provisions of which focus on finance and trade. It is hardly to be expected that, in that context, s.92 was intended to deal exhaustively with the right of Australians to communicate with each other. Accordingly and notwithstanding some comments to the contrary in Miller v. TCN Channel Nine Pty. Ltd.((297) (1986) 161 CLR , peR Gibbs C.J. at p 569, per Mason J. at p 579, per Dawson J. at pp 636-637, per Wilson J. (agreeing with Dawson J.) at p 592), s.92 does not, in my view, preclude the implication of a freedom of political discourse - a freedom which is required by the nature of the Constitution as one for a free society governed in accordance with the principles of representative parliamentary democracy.
The operation of the implied freedom of political discourse

26. It is uncontroversial that the federal nature of the Commonwealth and the separation of the federal judiciary from the other arms of government provide the basis for important constitutional implications((298) See, supra, fns (280) and (281)). The nature and scope of those implications have not been fully determined((299) See, with respect to the implications to be drawn from federalism, State Chamber of Commerce and Industry v. The Commonwealth (The Second Fringe Benefits Tax Case) [1987] HCA 38; (1987) 163 CLR 329, peR Brennan J. at p 358). However, it is settled that a limitation is not to be implied in the grant of constitutional power if the words of the grant can be construed without it((300) See Amalgamated Society of Engineers' v. Adelaide Steamship Co. Ltd. [1920] HCA 54; [1920] HCA 54; (1920) 28 CLR 129, peR Knox C.J., Isaacs,

Rich and Starke JJ. at p 154, per Higgins J. at p 162). Thus, but as specified in s.51, "subject to (the) Constitution", the legislative powers conferred by that section must be given their full meaning and operation.

27. The federal nature of the Constitution and the separation of the federal judiciary from the other arms of government are part of the Constitution, even though the Constitution does not contain prescriptive provision with respect to either matter. So too, the detailed provisions with respect to elections reveal that the Constitution is for a Commonwealth which is a free society governed in accordance with the principles of representative parliamentary democracy even though that is not stated in terms. Because s.51 confers power "subject to (the) Constitution", the legislative poweR conferred by that section is confined by that consideration as well as by the federal nature of the Constitution and the separation of the federal judiciary from the other arms of government. So far as is presently relevant, s.51 does not authorize laws which are inconsistent with the free and democratic nature of the Commonwealth. Thus, but subject to what is said as to regulation, the poweR conferred by s.51 does not extend to the making of laws that impaiR the free flow of information and ideas on matters falling within the area of political discourse.

The subject matter of the freedom of political discourse

28. Obviously, the Constitution does not postulate a society that is free and democratic only at election time. Nor, but perhaps not so obviously, does it postulate a society that is free and democratic only with respect to matters which the Constitution entrusts to the Commonwealth. Of course, that much is necessarily contemplated and, as the matters entrusted to the Commonwealth include the power conferred by s.122 to make laws for the government of its Territories, the freedom of political discourse necessarily extends to every aspect of Territory government, including Territory elections. However, there is a discrete question whether the power conferred by s.122, which is not expressed to be subject to the Constitution, may be exercised free of the prohibition deriving from the implied freedom of political discourse((301) See, with respect to constitutional guarantees and prohibitions and their relationship with s.122, Buchanan v. The Commonwealth [1913] HCA 29; (1913) 16 CLR 315; R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629; Lamshed v. Lake [1958] HCA 14; (1958) 99 CLR 132; Spratt v. Hermes [1965] HCA 66; (1965) 114 CLR 226; Capital T.V. and Appliances Pty. Ltd. v. Falconer [1971] HCA 10; (1971) 125 CLR 591; Attorney-General (Vict.); Ex rel. Black v. The Commonwealth [1981] HCA 2; (1981) 146 CLR 559.). That is not a question that need be answered in this case.

29. There are three matters which dictate that freedom of political discourse extends beyond Commonwealth and Territory affairs. The first is that the distribution of powers and functions between the Commonwealth and the States is not immutable. Section 51(xxxvii) of the Constitution expressly contemplates that matters which the Constitution leaves with the States may be referred to the Parliament of the Commonwealth and may, when referred, be the subject of Commonwealth legislative power. Moreover and more importantly, s.128 recognizes that the Constitution and, hence, the federal arrangements depend on the will of the people and may be altered by the people in accordance with the procedures there laid down. The power of the States to refer matters to the Commonwealth and the power of the people to change the Constitution require that freedom of political discourse extend to every aspect of the federal arrangements, including the powers of the States and the manner of their exercise.

30. The second matter requiring that the freedom of political discourse should extend to State matters is the nature of the federal compact. That compact is such that the exercise of power by the Commonwealth will, in very many cases, impact upon the States, either because of the economic relationship between them and the Commonwealth or because of the operation of s.109 of the Constitution. Equally, although perhaps not so often, the exercise or non-exercise by a State of its powers may be a factor influencing decisions as to the exercise of Commonwealth power.

31. The third and final matter which requires that the freedom of political discourse should extend to the affairs of the States is that the Constitution expressly recognizes their Constitutions((302) Constitution, s.106), their Parliaments((303) Constitution, ss.107, 108. Sections 111, 123, 124 recognize State Parliaments insofar as their consent is required for, respectively, the surrender of State territory, the alteration of State limits and the formation of new States.) and their electoral processes((304) Constitution, ss.9, 10, 15, 25, 29, 30, 31, 41, 123, 128) and, in so doing, necessarily recognizes their democratic nature.

32. Given the inter-relationship of State and Commonwealth powers and the recognition in the Constitution of the States' democratic processes, the freedom of political discourse must be seen as extending to matters within the province of the States. The freedom thus involves, at the very least, the free flow of information and ideas bearing on Commonwealth, State and Territory government, government arrangements and institutions, matters within the province of Commonwealth, State and Territory governments, their agencies and institutions, those persons who are or would be members of theiR Parliaments and other institutions of government and such political parties or organizations that exist to promote their cause. Certainly the matters defined as "political matter" in ss.95B, 95C and 95D of the Act and to which the ban effected by those sections is directed lie at the heart of that discourse which the Constitution protects.
Regulation of political discourse

33. Recourse to the general law reveals that freedom of speech (which, of course, is wider than freedom of political discourse) is not absolute, but may be regulated and, in certain circumstances, may be severely restricted. As the implied freedom is one that depends substantially on the general law, its limits are also marked out by the general law. Thus, 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. It is not presently necessary to consider whetheR the implied freedom of political discourse affects the powers of the States and, if so, to what extent. But, assuming that it does, the laws which indicate the kind of regulation that is consistent with freedom of political discourse will also indicate the area in which, subject to s.109 of the Constitution, State laws may nonetheless operate. And, as the freedom of political discourse is concerned with the free flow of information and ideas, it neither involves the right to disseminate false or misleading material nor limits any power that authorizes laws with respect to material answering that description.

34. The Commonwealth has power to regulate political discourse only in accordance with and by reference to the specific powers which the Constitution entrusts to it. Given that the powers conferred by s.51 are conferred "subject to the Constitution" and, hence, subject to the implied freedom of political discourse, that means that a power so conferred may only be used to regulate political discourse to the extent that that regulation is, in terms used in Davis v. The Commonwealth((305) (1988) 166 CLR 79, per Mason C.J., Deane and Gaudron JJ. at p 100), "reasonably and appropriately adapted" to achieve some end within the limits of that power. And, of course, 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. Thus, so far as the Commonwealth in the first matter and the defendants in the second matter rely on s.51, the question is not, as argued on their behalf, whether Pt IIID can be characterised as a law with respect to a subject matter therein specified, but whether it is reasonably and appropriately adapted to some end that lies within the scope of the power conferred with respect to that subject matter.
Section 51(v) of the Constitution and reasonable and appropriate regulation

35. It was argued on behalf of the Commonwealth in the first matter and the defendants in the second matter, that Pt IIID of the Act was valid in its entirety as a law with respect to "(p)ostal, telegraphic, telephonic and other like services" under s.51(v) of the Constitution. That argument

was put on the basis, which must be rejected, that the power was not relevantly affected by any of the constitutional prohibitions asserted by the plaintiffs in the two matters before the Court.

36. It was not argued that the ban effected by ss.95B, 95C and 95D, when read in conjunction with the provisions of Divs 3 and 4 of Pt IIID of the Act, was valid as a measure reasonably and appropriately adapted to the regulation of television and radio broadcasting. Indeed, it could not be so regarded. Part IIID of the Act does not deal with broadcasting generally, nor does it deal with radio and television advertising generally. Instead, it selects from the whole range of broadcasting and from the whole range of radio and television advertising that one aspect that involves election advertising. So faR as the ban operates with respect to elections, it strikes at a time when the freedom of political discourse is essential. And the ban seeks to control that discourse, not by reference to any of the criteria to be found in the general law relating to the spoken oR written word, but simply because it is election advertising. The ban effected by ss.95B, 95C and 95D of the Act cannot be regarded as a measure reasonably and appropriately adapted to the regulation of radio and television broadcasting.

37. It is common ground that there is no head of power, other than that conferred by s.51(v), capable of supporting the ban in s.95D with respect to State and local government elections. As the ban cannot be regarded as a measure reasonably and appropriately adapted to the regulation of radio and television broadcasting, s.95D is invalid. The provisions of Divs 3 and 4 in their operation with respect to State elections cannot be severed so as to have a valid operation independently of s.95D. An operation of that kind would be quite different from that intended by the Parliament((306) See R. v. Poole; Ex parte Henry (No.2) [1939] HCA 19; (1939) 61 CLR 634, peR Dixon J. at p 652; Bank of N.S.W. v. The Commonwealth ("the Bank Nationalisation Case") [1948] HCA 7; (1948) 76 CLR 1, per Dixon J. at p 371; Re Tracey; Ex parte Ryan (1989) [1989] HCA 12; 166 CLR 518, per Brennan and Toohey JJ. at p 577, per Gaudron J. at p 604.). So far as they bear on State elections, those provisions are also invalid.

Reasonable and appropriate regulation of Commonwealth elections

38. It was argued on behalf of the Commonwealth in the first matter and the defendants in the second matter, that s.95B and the otheR provisions of Pt IIID of the Act as they bear on Commonwealth elections are valid because the power with respect to Commonwealth elections is plenary, alternatively, because, in their operation with respect to Commonwealth elections, the provisions are reasonably and appropriately adapted to the regulation of those elections.

39. Power is conferred on the Parliament of the Commonwealth with respect to specific matters relating to Commonwealth elections by various provisions in Ch I of the Constitution. For example, s.9 confers power to "make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States" and s.27 confers power, subject to the Constitution, to "make laws foR increasing or diminishing the number of the members of the House of Representatives"((307) See also ss.7, 8, 14). Provision is also made in Ch I as to what should happen in relation to certain other aspects of elections "until the Parliament of the Commonwealth otherwise provides". Thus, for example, ss.10 and 31 provide, subject to the Constitution, that the laws of the States with respect to elections for the more numerous House of the Parliament of the State shall apply to elections for senators and members of the House of Representatives respectively "(u)ntil the Parliament otherwise provides"((308) See also ss.7, 29, 30, 34, 47). Power to legislate with respect to "(m)atters in respect of which (the) Constitution makes provision until the Parliament otherwise provides" is conferred by s.51(xxxvi). And, of course, s.51(xxxix) confers power to legislate with respect to "the execution of any power vested by (the) Constitution in the Parliament" and the other organs of government therein specified((309) These organs are: either house of the Parliament, the Commonwealth Government, the federal judicature and any department or officer of the Commonwealth.).

40. It is doubtless correct to say that, by virtue of the combined operation of the provisions in Ch I conferring legislative power and s.51(xxxvi) and (xxxix), the Commonwealth has plenary power with respect to Commonwealth elections((310) Smith v. Oldham [1912] HCA 61; (1912) 15 CLR 355, per Isaacs J. at pp 362-363; R. v. Brisbane Licensing Court; Ex parte Daniell [1920] HCA 24; (1920) 28 CLR 23, per Knox C.J., Isaacs, Gavan Duffy, Powers, Rich and Starke JJ. at p 31, per Higgins J. at p 32; Fabre v. Ley [1972] HCA 65; (1972) 127 CLR 665, at p 669; Attorney-General (Cth); Ex rel. McKinlay v. The Commonwealth (1975) 135 CLR , per Stephen J. at pp 57-58). HoweveR and leaving aside s.14((311) Section 14 provides that the Parliament may make such laws for the vacating of senate places "as it deems necessary to maintain regularity in the rotation".), the powers conferred by Ch I are either circumscribed by the terms of grant((312) Section 7 allows the Parliament to make laws increasing oR diminishing the number of senators but only to the extent that the equal representation of the original States is maintained; s.8 allows the Parliament to prescribe the qualification of electors for Senate elections but provides that "each elector shall vote only once"; s.9 allows the Parliament to make laws prescribing the method of choosing senators if such method is uniform for all States.) or expressly conferred "(s)ubject to (the) Constitution"((313) As in s.27 which provides that "(s)ubject to this Constitution, the Parliament may make laws for increasing or diminishing the number of members of the House of Representatives."). And, of course, Ch I confers power only with respect to particular aspects of the election process: it does not confer power with respect to elections generally, or with respect to election advertising or campaigning. Power to regulate election advertising or election campaigning must be found in s.51 and that power is "subject to (the) Constitution" and, hence, subject to the implied freedom of political discourse.

41. Viewing Pt IIID of the Act only in its operation with respect to Commonwealth elections, it may be possible - and I express no opinion on the matter - to view its operation with respect to candidates and political parties as reasonable and appropriate regulation of theiR use of radio and television for election advertising. But the ban effected by s.95B extends beyond candidates and political parties. It prohibits all use of radio and television for the dissemination of information and ideas on the issues involved in an election (unless it is exempt material). Its effect on candidates and political parties is mitigated by the provisions of Divs 3 and 4, but not at all with respect to other individuals and organizations.

42. Even allowing that the persons who, save for exempt material, are shut out from radio and television broadcasts may avail themselves of the print media for the dissemination of information and ideas to the public or to some section of it, the ban in s.95B is a serious curtailment of their freedom of political discourse. That curtailment cannot be viewed as reasonable and appropriate regulation in a context where candidates and political parties are allocated free time foR their political advertisements. Moreover, as with s.95D, the prohibition operates not on account of any criteria by reference to which the spoken or written word has been traditionally regulated, but because the persons concerned wish to make use of radio and television for the broadcasting of political material during an election period - a period when freedom of political discourse is of the greatest importance.

43. So far as it operates with respect to persons who are not candidates and organizations that are not political parties with endorsed candidates in an election, the ban in s.95B cannot be viewed as reasonably and appropriately adapted to the regulation of Commonwealth elections. It is not possible to treat s.95B as having a valid operation with respect only to candidates and political parties foR that would involve rewriting s.95B(4)((314) See Victorian Chamber of Manufactures v. The Commonwealth (Industrial Lighting Regulations) [1943] HCA 22; (1943) 67 CLR 413, per Latham C.J. at p 419; Bank Nationalisation Case (1948) 76 CLR , per Dixon J. at p 372; Pidoto v. Victoria [1943] HCA 37; (1943) 68 CLR 87, per Latham C.J. at pp 109-111, per Williams J. at p 132; Strickland v. Rocla Concrete Pipes Ltd. (1971) 124 CLR 468, per Barwick C.J. at p 493, per Gibbs J. at pp 526-527; Re F; Ex parte F [1986] HCA 41; (1986) 161 CLR 376, per Gibbs C.J. at

pp 384-385.). As with s.95D and for the same reasons, the provisions of Divs 3 and 4 of Pt IIID of the Act, as they operate with respect to Commonwealth elections, cannot be given valid operation independently of s.95B.
Section 122 of the Constitution

44. It was not argued that s.95C and the other provisions of Pt IIID of the Act in their operation with respect to Territory elections could be supported by s.122 if they were not otherwise supported by s.51(v) of the Constitution. And, of couse, the general rule is that a law which is "intended to be one of general application throughout the whole of the Commonwealth and its territories" but which is "beyond s.51" will fail completely "in the absence of a clear indication that it should nevertheless apply in the territories"((315) Spratt v. Hermes (1965) 114 CLR , per Windeyer J. at p 278). However, given that s.95(2) of the Act expresses the intention of Parliament that "the several provisions of (Pt IIID of the Act) should operate to the extent to which they are capable of validly operating", it is appropriate to consider whether s.122 supports Pt IIID in its operation with respect to Territory elections.

45. So far as is presently relevant, s.122 empowers Parliament to "make laws for the government of (a) Territory surrendered by (a) State and accepted by the Commonwealth". It has been said that s.122 gives "a complete and, as opposed to those given by s.51, a different power"((316) ibid., per Barwick C.J. at p 246. See also R. v. Bernasconi (1915) 19 CLR , per Griffith C.J. at p 635; Teori Tau v. The Commonwealth [1969] HCA 62; (1969) 119 CLR 564, at p 570; Capital T.V. and Appliances Pty. Ltd. v. Falconer (1971) 125 CLR , per Barwick C.J. at p 599.) and that it makes provision "which is appropriately free from all concern with problems of federalism"((317) Spratt v. Hermes (1965) 114 CLR , per Kitto J. at p 251. See also Buchanan v. The Commonwealth (1913) 16 CLR , per Barton A.C.J. at p 330; Boilermakers' Case Privy Council (1957) 95 CLR , at p 545; (1957) A.C., at p 320.).

46. The consequences of the different nature of the power conferred by s.122 were considered in relation to ss.72, 73 and 80 of the Consitution in Spratt v. Hermes, in Capital T.V. and Appliances Pty. Ltd. v. Falconer and in R. v. Bernasconi respectively. The effect of the decisions in Spratt v. Hermes and R. v. Bernasconi is that the power conferred by s.122 is not confined by the terms of ss.72 and 80((318) See also Buchanan v. The Commonwealth (with respect to s.55); Teori Tau v. The Commonwealth (with respect to s.51(xxxi)). For a discussion of the relationship between s.122 and s.116, see Attorney-General (Vict.); Ex rel. Black v. The Commonwealth (1981) 146 CLR , per Gibbs J. at pp 593-594.). However, it does not follow from those or any of the other cases decided with respect to s.122 that it stands apart from other provisions of the Constitution with its meaning and operation uninfluenced by them. As was said by Barwick C.J. in Spratt v. Hermes((319) (1965) 114 CLR , at p 242. See also Lamshed v. Lake (1958) 99 CLR , per Kitto J. at p 154), questions as to its construction must be "resolved upon a consideration of the text and of the purpose of the Constitution as a whole".

47. The power conferred by s.122 was described by Dixon C.J., with the approval of the majority of the Court, in Lamshed v. Lake((320) (1958) 99 CLR , at p 141; see also per Kitto J. at p 153) as a power "to make laws 'for', that is to say 'with respect to', the government of the Territory". His Honour added that "(t)he words 'the government of any territory' of course describe the subject matter of the power."((321) ibid., at p 154. The whole passage was cited with approval by Menzies J. in Capital T.V. and Appliances Pty. Ltd. v. Falconer (1971) 125 CLR , at p 605) That it is a power with respect to a subject matter, as distinct from a power to make laws for peace, order and good government, is revealed by a comparison of its terms with those found in s.51 which confers power "to make laws for the peace, order and good goverment of the Commonwealth with respect to" the subject matters there specified.

48. It may be that a slightly different view from that in Lamshed v. Lake was expressed by Barwick C.J. in Spratt v. Hermes. In that case, his Honour said that the power conferred by s.122 "is a complete poweR to make laws for the peace, order and good government of the territory - an expression condensed in s.122 to 'for the goverment of the Territory'"((322) (1965) 114 CLR, at p 242). Later, in Capital T.V. and Appliances Pty. Ltd. v. Falconer((323) (1971) 125 CLR , at p 599), his Honour described the power as of a "different order" from those derived from ss.51 and 52 "because it is not referable to a specified subject matter". And in Teori Tau v. The Commonwealth((324) (1969) 119 CLR , per Barwick C.J., McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ. at p 570) the power was said to be "plenary in quality and unlimited and unqualified in point of subject matter", a description which was cited with approval in Northern Land Council v. The Commonwealth((325) [1986] HCA 18; (1986) 161 CLR 1, per Gibbs C.J., Mason, Wilson, Brennan, Deane and Dawson JJ. at p 6.).

49. There is no doubt either as to the amplitude of the power conferred by s.122 or as to its qualitative difference from that conferred by s.51. It seems to me that the statements to which reference has been made were directed to emphasising those features and not to asserting that a law which applies in a Territory is, to that extent, a law authorised by s.122. Such a view would be inconsistent with what was said in Lamshed v. Lake and with the accepted approach to characterization which treats a law of general application that is not supported by s.51 as invalid in its application to the Territories unless there is some indication that it should nevertheless apply in them. The true position, in my opinion, is that a law is authorized by s.122 if, in words used in Attorney-General (W.A) v. Australian National Airlines Commission((326) [1976] HCA 66; (1976) 138 CLR 492, per Mason J. at p 526 and per Murphy J. at p 531 respectively; see also Berwick Ltd. v. Gray [1976] HCA 12; (1976) 133 CLR 603, per Mason J. at p 607.), it has "a sufficient connexion or nexus with the good government of the Territory" or "a rational connexion with the government of the Territories".

50. Given that the Commonwealth has enacted legislation with respect to the Australian Capital Territory((327) Australian Capital Territory (Self-Government) Act 1988 (Cth).) and the Northern Territory((328) Northern Territory (Self-Government) Act 1978 (Cth)), in each case establishing a separate body politic, conferring a significant measure of self-government and establishing representative and democratically elected legislatures, Pt IIID of the Act cannot be viewed as having sufficient connection with their government to make it a law for the government of the Territories. Thus, s.95C of the Act is invalid. And as with ss.95B and 95D and for the same reasons, the other provisions of Pt IIID of the Act in their operation with respect to Territory elections are also invalid.

Conclusion

51. The conclusion that ss.95B, 95C and 95D are invalid and that the provisions of Divs 3 and 4 as they relate to Commonwealth, Territory and State elections cannot validly be severed has the result that the operative provisions of Pt IIID of the Act are invalid in theiR entirety. That conclusion makes it unnecessary to consider whether Pt IIID infringes s.92 of the Constitution, whether its provisions in relation to State and local government elections and with respect to broadcasts for or on behalf of State governments infringe any prohibition deriving from the federal nature of the Constitution and whether its "free time" provisions involve the acquisition of property other than on just terms. It is also unnecessary to decide the separate question whether s.95D applies in relation to State by-elections.

52. In the first matter the demurrer should be overruled. In the second matter the first paragraph of the Commonwealth's demurrer should be overruled.

McHUGH J. These demurrers to statements of claim which challenge the constitutionality of Pt IIID of the Broadcasting Act 1942 (Cth) ("the Act") raise four issues: Is Pt IIID invalid because it, or some of its provisions:

1. contravene an implied constitutional guarantee of freedom of discussion concerning matters arising out of or in the course of elections for the Parliaments of the Commonwealth, the States and the Territories and for local government authorities?
2. constitute an interference with the functioning and integrity of the States?
3. contravene the guarantee of freedom of intercourse given by s.92 of the Constitution?
4. constitute a taking of property otherwise than on just terms?

2. The object of Pt IIID of the Act is to prohibit political advertising by means of radio and television. The scheme of the legislation is to prohibit the publishing of advertisements of political matter (which is defined widely) and the publishing of matter on behalf of a government or government authority during an election period in relation to a federal election or referendum (s.95B), a Territory election (s.95C) or a State or local government election (s.95D). The effect of these prohibitions is partially relaxed by s.95A which permits the broadcast of items of news oR current affairs, comment on any such items, talkback radio programs, public health advertisements, some advertisements on behalf of charitable organisations and some material which is broadcast for the benefit of the visually handicapped, notwithstanding that these broadcasts contain matter which would otherwise be prohibited by ss.95B-95D((329) The material defined as "exempt matter" by s.4 of the Act may also be broadcast by virtue of ss.95B(6), 95C(7) and 95D(6)). The effect of the prohibitions is also partially ameliorated by the provisions of Div.3 which contains complex provisions relating to the allocation of free time for election broadcasts and by the provisions of Div.4 which permits political parties represented in Parliament who have endorsed candidates for an election to broadcast a "policy launch once during the election period". Except to the extent necessary to explain my reasons, it is unnecessary to refer to the detail of the legislation.

The contentions of the parties

3. The Commonwealth contends that the provisions of Pt IIID were validly made pursuant to the power conferred by s.51(v) of the Constitution and the combination of powers conferred by ss.10, 29, 31, 51(xxxvi) and 51(xxxix) of the Constitution. The latter group of powers enables the Commonwealth, subject to the Constitution, to make laws with respect to elections for the Senate and the House of Representatives. Subject to any express or implied prohibitions in the Constitution, the powers conferred by ss.10, 29, 31, 51(xxxvi) and 51(xxxix) of the Constitution are wide enough to authorise the provisions of Pt IIID so far as they apply to elections held by the Commonwealth((330) Smith v. Oldham [1912] HCA 61; (1912) 15 CLR 355, at pp 358, 360, 363; R. v. Brisbane Licensing Court; Ex parte Daniell [1920] HCA 24; (1920) 28 CLR 23, at pp 31, 32; Fabre v. Ley [1972] HCA 65; (1972) 127 CLR 665, at p 669). However, the provisions of Pt IIID apply to State, Territory and local government elections as well as Commonwealth elections. Because the provisions of ss.10, 29, 31, 51(xxxvi) and 51(xxxix) of the Constitution do not authorise the provisions of Pt IIID in so faR as those provisions apply to State, Territory and local government elections, the Commonwealth found it necessary to rely on the poweR conferred by s.51(v) to make laws with respect to "Postal, telegraphic, telephonic, and other like services" to support the validity of Pt IIID so far as it applied to such elections.

4. It is established that the power to make laws with respect to "otheR like services" extends to making laws with respect to broadcasting and television((331) R. v. Brislan; Ex parte Williams [1935] HCA 78; (1935) 54 CLR 262, at p 277; Jones v. The Commonwealth (No.2) [1965] HCA

6; (1965) 112 CLR 206, at pp 219, 226-227, 237; Herald and Weekly Times Ltd. v. The Commonwealth [1966] HCA 78; (1966) 115 CLR 418). It is also established that this power extends to making laws for prohibiting or regulating the broadcasting or televising of programs ((332) Jones (No.2) (1965) 112 CLR, at pp 222-223, 226, 237). Consequently, the Commonwealth submitted that, in so far as Pt IIID prohibited and regulated the broadcasting and televising of political matter, it was validly enacted pursuant to the power conferred by s.51(v) of the Constitution.

5. The arguments for the plaintiffs did not dispute that the terms of the various powers to which I have referred were sufficiently broad to authorise legislation such as Pt IIID. But they pointed out that the powers conferred by ss.51(v), (xxxvi) and (xxxix) are conferred "subject to this Constitution". The plaintiffs in the first action argued that the power to regulate or prohibit political advertising by means of broadcasting or televising is subject to:

> (1) an implied constitutional guarantee of freedom of communication in relation to the political and electoral processes;
> (2) an implied guarantee of freedom of communication arising from the common citizenship of the Australian people; and
> (3) the express guarantee of freedom of intercourse in s.92 of the Constitution.

6. The State of New South Wales, the plaintiff in the second action, argued that s.95D(3) and (4) are invalid because they interfere with State elections and that ss.95B(3), 95C(4) and 95D(3) are invalid because they impose a special disability on the States. The State of New South Wales also argued that s.95B(3) and (4) and 95C(4) and (5) are invalid because they contravene an implied constitutional right of freedom of communication with the central organs of federal government and with respect to federal electoral and judicial processes.

7. The plaintiffs in both actions also argued that the "free time" provisions of Pt IIID are invalid because, contrary to s.51(xxxi) of the Constitution, they constitute an acquisition of property otherwise than on just terms.

Does the Constitution guarantee freedom of communication for the purpose of elections?

8. When the Constitution is read as a whole and in the light of the history of constitutional government in Great Britain and the Australian colonies before federation, the proper conclusion to be drawn from the terms of ss.7 and 24 of the Constitution is that the people of Australia have constitutional rights of freedom of participation, association and communication in relation to federal elections.

9. Section 7 of the Constitution 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". Although s.24 does not mention voting, it is plain from the terms of ss.25 and 30 that the members of the House of Representatives are to be chosen by votes taken at an election. OtheR provisions of the Constitution require periodic elections for the Senate and House of Representatives((333) ss.13 and 28 respectively). Sections 7 and 24, therefore, confer rights on the people of Australia to choose "directly" the members of both Houses of Parliament by means of votes taken at periodic elections.

10. Parliament cannot legislate under s.51 so as to derogate from these rights because the powers conferred by s.51 are conferred "subject to this Constitution". Thus, Parliament could not legislate for election to the Senate or the House of Representatives by means of an electoral college. Legislation of that character would contravene the constitutional requirement that the Senate and

the House of Representatives should be "directly" chosen. Nor could the Parliament legislate so as to prevent members of lawful political parties from being elected to Parliament. Legislation of that character would contravene the right of the people to choose the members of the Senate and the House of Representatives from those candidates not disqualified by s.44 of the Constitution from "being chosen or ... sitting as a senator or a member of the House of Representatives".

11. However, the present case is removed from the blatant infringements of ss.7 and 24 of the Constitution involved in those two examples. It raises the different questions of whether the right of the people of the Commonwealth to choose the members of the Senate and the House of Representatives carries with it the right to convey and receive information, opinions and arguments concerning such elections and the candidates who are involved in them and whether the right is contravened by a law which, subject to exceptions, prevents candidates and electors from communicating political matter to each other through an otherwise lawful medium. The first question turns on the meaning of the expression "directly chosen by the people of the State" in s.7 of the Constitution and the expression "directly chosen by the people of the Commonwealth" in s.24 of the Constitution. The second question turns on the extent to which the Parliament of the Commonwealth can regulate the rights which ss.7 and 24 confer on the people of the Commonwealth.

Representative government and responsible government

12. The purpose of the Constitution was to further the institutions of representative and responsible government. That was made explicit at the second National Australasian Convention held in Adelaide in 1897. On the motion of Sir Edmund Barton, the Convention resolved that the purpose of the Constitution was "to enlarge the powers of self-government of the people of Australia"((334) Official Report of the National Australasian Convention Debates, Adelaide, (1897), p 17). The object of this resolution was:

> "to direct the attention of opponents and lukewarm supporters to the fact that, though federation involved the surrender by the Governments of the several colonies of certain rights and powers, yet as regards each individual citizen there was no surrender, but only a transfer of those rights and powers to a plane on which they could be more effectively exercised"((335) The Cambridge History of the British Empire, (1933), vol.VII, Pt.1, at p 445).

13. Although the makers of the Constitution were much influenced by the terms and structure of the Constitution of the United States and "felt the full fascination of its plan"((336) Dixon, Jesting Pilate, (1965), p 113), they rejected the United States example of a **Bill of Rights** to protect the people of the Commonwealth against the abuse of governmental power. They did so because they believed in the efficacy of the two institutions which formed the basis of the Constitutions of Great Britain and the Australian colonies - representative government and responsible government - and because they believed that the interests of people of the States would be protected by the Senate as the States' House. The result, as Professor Harrison Moore pointed out in The Constitution of The Commonwealth of Australia((337) 2nd ed., (1910), p 78) was that:

> "Fervid declarations of individual right, and the protection of liberty and property against the government, are conspicuously absent from the Constitution; the individual is deemed sufficiently protected by that share in the government which the constitution ensures him."

The share in the government which the Constitution ensured was the right to determine who should be the representatives of the people in the Houses of Parliament.

14. By vesting the legislative power of the Commonwealth in a Parliament "which shall consist of the Queen, a Senate, and a House of Representatives"((338) Constitution, s.1.) and by giving the people of the Commonwealth, through ss.7, 24, 30, and 41, control over the composition of Parliament, the Constitution gives effect to a system of representative democracy. That has long been recognised((339) See for example, Harrison Moore, The Constitution of the Commonwealth of Australia, 1st ed., (1902), at p 327; Attorney-General (Cth); Ex rel. McKinlay v. The Commonwealth [1975] HCA 53; (1975) 135 CLR 1, at p 56.). In Federal Commissioner of Taxation v. Munro((340) [1926] HCA 58; (1926) 38 CLR 153, at p 178), Isaacs J. said that "the Constitution is for the advancement of representative government, and contains no word to alter the fundamental features of that institution".

15. By vesting the executive power of the Commonwealth in the Queen to be exercisable by the Governor-General((341) Constitution, s.61) and by providing for advice to the Governor-General by a Federal Executive Council((342) Constitution, s.62), whose members are Ministers of State unable to hold office for a longer period than three months unless they are or become senators or members of the House of Representatives((343) Constitution, s.64).), the Constitution also gives effect to a system of responsible government((344) Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. [1920] HCA 54; (1920) 28 CLR 129, at p 147; The Commonwealth v. Colonial Combing, Spinning and Weaving Co. Ltd. [1922] HCA 62; (1922) 31 CLR 421, at pp 446-447; The Commonwealth v. Kreglinger and Fernau Ltd. and Bardsley [1926] HCA 8; (1926) 37 CLR 393, at p 413)

16. The words "directly chosen by the people" in ss.7 and 24 of the Constitution have to be interpreted against the background of the institutions of representative government and responsible government to which the Constitution gives effect but does not specifically mention. The words of ss.7 and 24 must be construed by reference to the conceptions of representative government and responsible government as understood by informed people in Australia at the time of federation. In The Commonwealth v. Kreglinger and Fernau Ltd. and Bardsley((345) ibid., at pp 411-412., Isaacs J. said:

> "it is the duty of this Court, as the chief judicial organ of the Commonwealth, to take judicial notice, in interpreting the Australian Constitution, of every fundamental constitutional doctrine existing and fully recognised at the time the Constitution was passed, and therefore to be taken as influencing the meaning in which its words were used by the Imperial Legislature".

His Honour went on to say((346) ibid., at p 413) in that case that the principle of responsible government is "part of the fabric on which the written words of the Constitution are superimposed".

17. Representative government involves the conception of a legislative chamber whose members are elected by the people. But, as Birch points out((347) Representative and Responsible Government, (1964), p 17), to have a full understanding of the concept of representative government, "we need to add that the chamber must occupy a powerful position in the political system and that the elections to it must be free, with all that this implies in the way of freedom of speech and political organization". Furthermore, responsible government involves the conception of a legislative chamber where the Ministers of State are answerable ultimately to the electorate for their policies. As SiR Samuel Griffith pointed out in his Notes on Australian Federation((348) (1896), p 17), the effect of responsible government "is that the actual government of the State is conducted by officers who enjoy the confidence of the people".

18. It is not to be supposed, therefore, that, in conferring the right to choose their representatives by voting at periodic elections, the Constitution intended to confer on the people of Australia no more than the right to mark a ballot paper with a number, a cross or a tick, as the case may be. The "share in the government which the Constitution ensures" would be but a pious aspiration unless ss.7 and 24 carried with them more than the right to cast a vote. The guarantees embodied in ss.7 and 24 could not be satisfied by the Parliament requiring the people to select their representatives from a list of names drawn up by government officers.

19. If the institutions of representative and responsible government are to operate effectively and as the Constitution intended, the business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box. The electors must be able to ascertain and examine the performances of their elected representatives and the capabilities and policies of all candidates for election. Before they can cast an effective vote at election time, they must have access to the information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation. As the Supreme Court of the United States pointed out in Buckley v. Valeo((349) [1976] USSC 24; (1976) 424 US 1, at pp 14-15), the ability of the people to make informed choices among candidates for political office is fundamental because the identity of those who are elected will shape the nation's destiny.

20. It follows that the electors must be able to communicate with the candidates for election concerning election issues and must be able to communicate their own arguments and opinions to other members of the community concerning those issues. Only by the spread of information, opinions and arguments can electors make an effective and responsible choice in determining whether or not they should vote for a particulaR candidate or the party which that person represents. Few voters have the time or the capacity to make their own examination of the raw material concerning the business of government, the policies of candidates or the issues in elections even if they have access to that material. As Lord Simon of Glaisdale pointed out in Attorney-General v. Times Newspapers((350) (1974) AC 273, at p 315):

> "People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument."

21. The words "directly chosen by the people" in ss.7 and 24, interpreted against the background of the institutions of representative government and responsible government, are to be read, therefore, as referring to a process - the process which commences when an election is called and ends with the declaration of the poll. The process includes all those steps which are directed to the people electing their representatives - nominating, campaigning, advertising, debating, criticising and voting. In respect of such steps, the people possess the right to participate, the right to associate and the right to communicate. That means that, subject to necessary exceptions, the people have a constitutional right to convey and receive opinions, arguments and information concerning matter intended or likely to affect voting((351) See the definition of "political matter" in ss.95B, 95C and 95D of the Act.) in an election for the Senate or the House of Representatives. Moreover, that right must extend to the use of all forms and methods of communication which are lawfully available for general use in the community. To fail to give effect to the rights of participation, association and communication identifiable in ss.7 and 24 would be to sap and undermine the foundations of the Constitution.

22. It may be that the rights to convey and receive opinions, arguments and information conferred by ss.7 and 24 are not confined to the period of an election for the Senate and House of

Representatives. It may be that the rights inherent in those sections are simply part of a general right of freedom of communication in respect of the business of government of the Commonwealth. In that connection it is significant that it was recognised early on that, by necessary implication, the Constitution gave rights of access to federal officials and records. In The Annotated Constitution of the Australian Commonwealth, published in 1901, Quick and Garran pointed out((352) p 958):

> "To be allowed to visit the seat of Government, to gain access to Federal territories, to petition the Federal authorities, to examine the public records of the Federal Courts and institutions, are rights which, if not expressly granted, may be inferred from the Constitution, and which could not be taken away or abridged by the States any more than those directly and clearly conveyed."

Similarly, members of this Court have recognised that the people of the Commonwealth have an implied right of access through the States for federal purposes which the States cannot impede except on grounds of necessity((353) R. v. Smithers; Ex parte Benson [1912] HCA 92; (1912) 16 CLR 99, at pp 108, 109-110; and see Crandall v. State of Nevada [1867] USSC 15; (1868) 73 US 35, at p 44.).

23. Furthermore, 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. For the purpose of the present case, it is enough to hold that legislation such as that embodied in Pt IIID of the Act contravenes the right of the people to participate in the federal election process unless some compelling justification for its enactment can be established.

24. The Commonwealth contended that ss.7 and 24 of the Constitution go no further than requiring that the legislative powers vested in Parliament not be exercised inconsistently with the existence of representative government. It was then contended that representative democracy is descriptive of a wide spectrum of political institutions and processes, each different in countless respects yet answering to that generic description. Accordingly, so the Commonwealth contended, as long as the Parliament kept within the limits of that spectrum, it was for the Parliament and not the Courts to determine the merits of any particular method of regulating the electoral system. Invoking the rhetoric of the Engineers' Case((354) (1920) 28 CLR, at pp 151-152), the Commonwealth contended that the remedy against an erroneous exercise of legislative power lies in the ballot box and not in the Courts.

25. The short answer to the Commonwealth's contentions is that the powers conferred on the Commonwealth by s.51 of the Constitution are conferred "subject to this Constitution" and that the Constitution embodies a system of representative government which involves the conceptions of freedom of participation, association and communication in respect of the election of the representatives of the people. UndeR the Constitution of the Commonwealth of Australia, those freedoms have been elevated to the status of constitutional rights. The powers conferred by s.51 of the Constitution give the Commonwealth no absolute power to exclude electors, candidates, or information from the federal electoral process.

Compelling justification

26. The constitutional rights identifiable in ss.7 and 24 of the Constitution - freedom of participation, association and communication - exist so that the people of the Commonwealth can make reasoned and informed choices in respect of the candidates who offer themselves foR election. Laws which interfere with the flow of political information or a category of political information simply because it is political information are an interference with the constitutional rights conferred by those sections. However, the rights identifiable in ss.7 and 24 are not absolute rights. They are rights conferred for the purpose of enabling the electors to make a true choice in a free and democratic society. They may be regulated by other laws which seek to achieve an honest and fair election process. Thus, the power conferred by ss.10, 29, 31 and 51(xxxvi) and (xxxix) of the Constitution to make laws with respect to the federal electoral process may be used to prevent fraud, intimidation, corruption and misleading information in an election without infringing the rights conferred by ss.7 and 24. In Smith v. Oldham, this Court held that the powers conferred by ss.51(xxxvi) and (xxxix) authorised a law requiring any written matteR commenting upon any candidate or political party or the issues arising in an election to be signed by the author together with his or heR true name and address. All members of the Court accepted that these powers gave the Commonwealth legislative authority to make laws foR the purpose of protecting elections for the Parliament of the Commonwealth against bribery, intimidation and fraud((355) (1912) 15 CLR, at pp 358, 360, 362, 363). However, no reason exists foR confining the Commonwealth's regulatory power over federal elections to the prevention of dishonesty.

27. Nevertheless, I am unable to accept the dictum of this Court in Fabre v. Ley((356) (1972) 127 CLR , at p 669) when it said that "the legislative power of the Parliament (in respect of an election) is not subject to any restriction other than that which flows from s.41 of the Constitution". No reference was made in that case to the provisions of ss.7 and 24. It was not concerned with any question of freedom of communication but with the validity of a law requiring a candidate for the House of Representatives to deposit "One hundred dollars, in legal tender or in a banker's cheque".

28. In considering the scope of the Commonwealth's regulatory power oveR elections, a distinction must be drawn between laws which restrict the freedom of electoral communications by prohibiting or regulating theiR contents and laws which incidentally limit that freedom by regulating the time, place or manner of communication. "(R)easonable time, place, and manner regulations, which do not discriminate among speakers oR ideas"((357) Buckley (1976) 424 US, at p 18) are not inconsistent with the conceptions of representative government if those regulations are designed to protect some competing aspect of the public interest and the restraint on freedom of communication is not disproportionate to the end sought to be achieved. But laws which seek to prohibit oR regulate the content of electoral communications are in a different category. While the rights which ss.7 and 24 confer are not absolute, they are so fundamental to the achievement of a true choice by the electorate that a law enacted pursuant to the powers conferred by s.51 which seeks to prohibit or regulate the content of electoral communications can only be upheld on grounds of compelling justification.

Section 95B

29. Subject to s.95A and the free time provisions of the legislation, s.95B of the Act prevents the broadcasting or televising of any information concerning political matters from those standing foR election at a federal election or from those persons, groups, organisations and corporations who, although not standing foR election, wish to exercise their democratic right to influence the outcome of the election. Political matter is defined to mean "matteR intended or likely to affect voting in the election or referendum concerned" or "matter containing prescribed material" other than exempt matter. "Exempt matter" is defined in s.4 of the Act. Prescribed material is defined to mean:

"material containing an express or implicit reference to, or
comment on, any of the following:
(a) the election or referendum concerned;
(b) a candidate or group of candidates in that election;
(c) an issue submitted or otherwise before electors in that election;
(d) the government, the opposition, or a previous
government or opposition, of the Commonwealth;
(e) a member of the Parliament of the Commonwealth;
(f) a political party, or a branch or division of a
political party."

30. Consequently, s.95B prevents the electors from receiving political information, comment and argument which is, or at least could be, vital to the choosing of the members of the House of Representatives and the Senate. It precludes access to two of Australia's most frequently used mediums of communication and thereby significantly hampers the ability of candidates and other interested parties from effectively communicating information, opinions and arguments to the electorate. Indeed, according to the Report by the Senate Select Committee on Political Broadcasts and Political Disclosures((358) Political Broadcasts and Political Disclosures Bill 1991, (NovembeR 1991), p 25), "there was broad agreement" that, although television was the most expensive advertising medium, it was also the most effective.

31. It is not to the point, as the Commonwealth argued, that Pt IIID 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. The effect of Pt IIID is to prevent the participants in the election from putting the content of electoral communications to the electorate by means of advertisements on radio and television - a means of communication widely used in the Australian community for the dissemination of information, ideas, arguments and opinions. Parliament may regulate the time, place or manner of electoral communications. It may even prohibit the content of an electoral communication if compelling justification exists. Defamatory, seditious and treasonable statements provide examples of communications which may be prohibited. But having regard to the conceptions of representative government, Parliament has no right to prefer one form of lawful electoral communication oveR another. It is for the electors and the candidates to choose which forms of otherwise lawful communication they prefer to use to disseminate political information, ideas and argument. Their choices are a matter of private, not public, interest. Their choices are outside the zone of governmental control.

32. Nor is it to the point that s.95A permits the broadcasting and televising in some circumstances of matter which would otherwise be prohibited by Pt IIID. Section 95A provides that nothing in Pt IIID prevents a broadcaster from broadcasting a talkback radio program oR an item of news or current affairs or a comment on any such item. But this is a matter of no relevance. Leaving aside the difficulty of interpreting the phrase "an item of news or current affairs" in the context of this legislation, s.95A restores only part of the freedom of expression and communication which other sections in Pt IIID take away. Worse still, it permits discrimination among those who are prohibited by Pt IIID from putting their views to the electorate through political advertisements on radio and television. While the effect of the section is that some members of the electorate will be able to get their ideas, policies, arguments and comments before radio and television audiences, it does not follow that those wishing to put the opposite point of view will necessarily be able to do so. WhetheR or not they are able to do so in time provided by the licensees of radio and television stations will depend entirely upon the decisions of the licensees and those who control the content of the relevant programs.

The free time and policy launch provisions

33. The free time provisions of Pt IIID grant political parties with representatives in Parliament and political parties contesting the election with at least a prescribed number of candidates the right to make "an advertisement that consists of words spoken by a single speaker (without dramatic enactment or impersonation) accompanied, where the advertisement is televised, by a transmitted image that consists of the head and shoulders of the speaker"((359) s.95G(a)). The legislation also gives other political parties, groups and candidates the right to apply to the Australian Broadcasting Tribunal for the grant of free time to make such an advertisement. However, the free time rights are restricted: they do not apply to an election until regulations are made working out, among other things, the total free time for that election; they are heavily weighted in favour of the political parties already represented in Parliament - 90 per cent of the time being allocated to these parties; and they are only conferred on candidates and their parties or groups. State and Territory governments, employer and employee associations, business, manufacturing and rural interest groups and public interest organisations as well as the general public are excluded from the use of the free time allocations. When the Bill which became the present Act was introduced into the Parliament, it contained no free time provisions. Significantly, in the course of the Second Reading Speech, the Minister said((360) Commonwealth Parliamentary Debates, House of Representatives, 9 May 1991, p 3478):

> "The Government has rejected the proposal because it believes that the allocation of time to parties would be inequitable and administratively impracticable. Free time would unfairly advantage the major political and incumbent parties."

34. The comments which I have made about the free time provisions of Pt IIID are equally applicable to Div.4 of the Act which deals with policy launches.

Validity

35. Consequently, even when s.95A and the free time and policy launch provisions are taken into account, s.95B represents a constitutionally unacceptable interference with the rights of the electors to be informed of the policies and issues involved in a federal election and the merits and demerits of those policies and issues. As Windeyer J. pointed out in Australian Consolidated Press Ltd. v. Uren((361) [1966] HCA 37; (1966) 117 CLR 185, at p 210):

> "Freedom at election time to praise the merits and policies of some candidates and to dispute and decry those of others is an essential of parliamentary democracy."

The contentions of the Commonwealth

36. In supporting the validity of Pt IIID, the Commonwealth contended that the Parliament could reasonably make the political assessment that the legislation is an appropriate and effective means of dealing with the burgeoning cost of using the electronic media for political campaigning at election time. In moving that the Bill be read a second time, the Minister said((362) Commonwealth Parliamentary Debates, House of Representatives, 9 May 1991, p 3479:):

> "The prohibition of 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 and do not constitute a breach of our international obligations."

However, the potential for or even the existence of corruption and undue influence in the political process does not amount to compelling justification for the infringements of the constitutional

rights of the electors brought about by Pt IIID. If the electoral process has been, or is likely to be, corrupted by the cost of television and radio advertising, means less drastic than the provisions of Pt IIID are available to eradicate the evil. Unconvincing is the claim that, subject to s.95A and the free time and policy launch provisions of Pt IIID, a blanket ban on electronic political advertising is needed, oR for that matter would be effective, to prevent wealthy contributors from corrupting the electoral process.

37. If the Australian political process can be corrupted by the cost of political advertising, those bent on corrupting that process will not lack opportunities to achieve their ends even if electronic political advertising is prohibited during an election period. As the Supreme Court of the United States pointed out in Buckley((363) (1976) 424 U.S., at p 19), "virtually every means of communicating ideas in today's mass society requires the expenditure of money". Moreover, on this aspect of the justification of the legislation, it needs to be kept in mind that it is not the content of the publications which is the perceived evil; the perceived evil is the conduct of contributors and political officials in colluding to give political preference oR favour in return for campaign contributions. The creation of special offences, disclosure of contributions by donors as well as political parties, public funding, and limitations on contributions are but some of the remedies available to overcome the evil which arises not from the giving of information to the electorate or its content but from the conduct of contributors and political officials.

38. In supporting the validity of the legislation, the Commonwealth also relied on the statement of the Minister that the "exorbitant cost of broadcast advertising precludes the majority of the community and all but the major political parties and large corporate interests from paid access to the airwaves"((364) Commonwealth Parliamentary Debates, House of Representatives, 9 May 1991, p 3479). But, accepting that this is so, the need for a "level playing field" cannot justify legislation which bans all political advertising on radio and television whether paid for or not. Still less can it justify legislation which not only bans all political advertisements but through the free time provisions of Pt IIID favours the sitting members and their political parties at the expense of the views of those who do not hold political power.

39. Moreover, before legislation such as Pt IIID could be upheld on the "level playing field" theory, it would need to be demonstrated by acceptable evidence, and not merely asserted, that, by reason of theiR practical control of the electronic media, some individuals and groups so dominate public discussion and debate that it threatens the ability of the electors to make reasoned and informed choices in electing their parliamentary representatives. By itself, domination of the electronic media is not a constitutionally compelling justification for banning the broadcasting of political matter at federal elections any more than a major newspaper accepting advertisements from only one political party would justify banning the publication of political advertisements in that newspaper during the election period.

40. The Commonwealth also contended that because restrictions on political advertising were not seen as inconsistent with parliamentary democracy in many of the recognised democracies, the provisions of s.95B were not inconsistent with the representative democracy which the Constitution embodies. Paid political advertising in the electronic media is prohibited or restricted by various mechanisms in a number of democracies including, for example, Austria, Belgium, Denmark, Finland, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom. In some democracies including Canada, Ireland, Israel and the United Kingdom, legislation prohibits or restricts paid political advertising. The argument on behalf of the Commonwealth pointed out that all the foregoing countries except Switzerland are parties to the International Covenant on Civil and Political Rights; that the European countries with the exception of Finland are also parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms; and that Canada, Denmark, Ireland, Japan, the Netherlands, Norway and Sweden have express constitutional provisions guaranteeing the right to

freedom of expression. Moreover, the Commonwealth stated that it "does not appear that the practice of these States has been criticised before the Human Rights Committee established under the Covenant, nor successfully challenged before the European Court of Human Rights". How then, it was asked, could the provisions of Pt IIID be seen as inconsistent with the concept of a representative democracy?

41. The answer to that rhetorical question lies in the different contexts in which the guarantees of freedom of expression operate in those countries and in Australia. The right to freedom of expression in the instruments to which the Commonwealth drew attention is a general right not limited to any particular subject matter. Moreover, it is a right which is expressed to be subject to the right of the legislature to pass laws for various specified purposes. The right of freedom of communication derived from ss.7 and 24 of the Commonwealth Constitution, on the other hand, is a paramount right given for the limited purpose of enabling the people of the Commonwealth to choose their representatives in the Federal Parliament. Such power as the Commonwealth has is subject to and not superior to the right of freedom of communication which ss.7 and 24 confer. No valid analogy exists between the instruments to which the Commonwealth referred and the Commonwealth Constitution.

42. A more valid analogy would be an instrument on which the Commonwealth placed no reliance - the Constitution of the United States of America. It is a more valid analogy because, like ouR Constitution, the legislative power of the central government to control elections is subject to the First Amendment guarantee of freedom of speech. In Mills v. Alabama((365) [1966] USSC 96; (1966) 384 US 214, at p 219), the Supreme Court said of a law that made it an offence foR the editor of a paper to publish an editorial on election day urging people to vote a certain way that it would be "difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press". In Buckley, the Supreme Court held unconstitutional laws imposing restrictions on campaign expenditures by various people notwithstanding that the object of the laws was to prevent the rich from corrupting the political process.

43. Accordingly, s.95B(4) is invalid. Notwithstanding s.95(2) which states that it is "the intention of the Parliament that the several provisions of this Part should operate to the extent to which they are capable of validly operating", it must follow that sub-ss.(1), (2) and (3) of s.95B fall with sub-s.(4). If ss.95B(1)-(3) were to stand although ss.95B(4) was invalid, the Commonwealth, the States, the Territories and their authorities would be precluded from publishing the various classes of matter specified in those sub-sections although the rest of the community would be free to publish political matter on radio and television. It cannot be accepted that the Parliament intended the section to have a different practical operation upon those governments and their authorities from that which it would have had if the whole section was valid((366) See Strickland v. Rocla Concrete Pipes Ltd. (1971) 124 CLR 468, at p 493). Nor can it be accepted that it was the purpose of s.95(2) that a provision of Pt IIID should stand although it would have a different practical operation after the invalidation of another provision of that Part.
Does Pt IIID represent a substantial interference with the functioning of the States?

44. In my opinion, the provisions of s.95D(3) and (4) are invalid in so far as they operate to prohibit the advertising of political matter in an election to a State Parliament or to a local government authority of a State. They are invalid because their immediate object is to control the States and their people in the exercise of theiR constitutional functions.

45. At federation, each of the colonies had its own legislature and executive, governed and controlled by a Constitution, based on the institutions of representative government and responsible government. The terms of ss.106 and 107 of the Constitution necessarily give rise to the inference that, subject to the alteration of the Constitution under s.128, the States are to

continue as independent bodies politic with their own Constitutions and representative legislatures. Section 106 provides:

> "The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State."

Section 107 provides:

> "Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

46. To be consistent with the constitutional premise of the States continuing as independent bodies politic with their own Constitutions and representative legislatures, a power conferred by s.51 of the Constitution should not be construed as authorising the Commonwealth to make a law whose immediate object is to interfere with the electoral processes authorised by those Constitutions unless the contrary intention is plainly evident in the section. The powers conferred by s.51 are conferred "subject to this Constitution". The inference to be drawn from the continuance of the States as independent bodies politic with their own Constitutions and representative legislatures is that, subject to a plain intention to the contrary, the powers of the Commonwealth do not extend to interfering in the constitutional and electoral processes of the States. It is for the people of the State, and not for the people of the Commonwealth, to determine what modifications, if any, should be made to the Constitution of the State and to the electoral processes which determine what government the State is to have. The use of a Commonwealth power to make a law which "discloses an immediate object of controlling" the processes by which the people of the States elect their governments in accordance with their Constitutions should be seen as not "within the true ambit of the Commonwealth legislative power"((367) Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31, at p 79).

47. In Melbourne Corporation v. The Commonwealth, the Court held that the power conferred by s.51(xiii) to make laws with respect to banking did not authorise a law which provided that except with the consent in writing of the Treasurer "a bank shall not conduct any banking business for a State or for any authority of a State, including a local government authority". Dixon J. said((368) ibid., at p 81) that the "federal system itself is the foundation of the restraint upon the use of the power to control the States". His Honour went on to say((369) ibid., at p 83) that:

> "the considerations upon which the States' title to protection from Commonwealth control depends arise not from the character of the powers retained by the States but from their position as separate governments in the system exercising independent functions. But, to my mind, the efficacy of the system logically demands that, unless a given legislative power appears from its content, context or subject matter so to intend, it should not be understood as authorizing the Commonwealth to make a law aimed at the restriction or control of a State in the exercise of its executive authority. In whatever way it may be expressed an intention of this sort is, in my opinion, to be plainly seen in the very frame of the Constitution."((370) See also

ibid., at pp 55, 70, 99; Victoria v. The Commonwealth [1971] HCA 16; (1971) 122 CLR 353, at pp 411, 424; The Commonwealth v. Tasmania (The Tasmanian Dam Case) [1983] HCA 21; (1983) 158 CLR 1, at pp 139-140, 214, 280-281)

48. Similarly, in Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation((371) [1982] HCA 31; (1982) 152 CLR 25, at p 93), Mason J. said that unless the nature of a specific poweR otherwise indicates, a Commonwealth power should be construed so as not to "inhibit or impair the continued existence of the States oR their capacity to function".

49. If the use of a Commonwealth power was valid although its immediate object was to control some aspect of the electoral processes of the State, the functioning of the States as independent bodies politic with their own Constitutions and representative legislatures would be threatened. To use the powers of the Commonwealth to substantially control the electoral processes of the States requires no ingenuity. The postal, telephonic, corporation and interstate commerce powers, as well as the broadcasting and television powers, alone, or in combination, enable the Commonwealth to prevent or regulate the dissemination of political and electoral information to such an extent that the Commonwealth, and not the States, could substantially control the input of information into the State electoral processes. The possibility that a power may be abused is ordinarily no ground foR reading down the subject-matter of a Commonwealth power. But it is not irrelevant when the question is whether a Commonwealth power should be construed in a way which affects or interferes with the States in their "position as separate governments in the system exercising independent functions"((372) Melbourne Corporation (1947) 74 CLR, at p 83).

50. In accordance with these principles, s.51(v) of the Constitution should not be read as authorising a law whose immediate object is to control the electors of the States in performing functions which are assigned to them by the Constitutions of the States. Even though the law may be a law with respect to a subject-matter described in that paragraph, laws made under s.51(v) are made "subject to this Constitution" and cannot operate in respect of areas which the Constitution withdraws from the operation of Commonwealth legislative power.

51. Section 95D(3) and (4) are laws aimed at controlling the States and their people in the performance of their functions under the Constitutions of the States. Those sub-sections prohibit State governments, candidates for office in State elections and other interested parties in State elections from using an otherwise lawful medium to put to the electorate information, ideas, argument and comment "intended or likely to affect voting in the election concerned". For the reasons which I gave in discussing the operation of s.95B, s.95D(3) and s.95D(4) constitute an unacceptable interference with the functions and responsibilities of the people and officials of the States under their Constitutions.

52. Section 95D(4) is invalid, therefore, in so far as it applies to elections for the Parliaments of the State. Section 95D(3) is also invalid. In so far as it applies to the State holding the election in question, it is "a law aimed at the restriction or control of a State in the exercise of its executive authority"((373) ibid). It constitutes an interference with the functions of the State as an independent body politic. Moreover, since local government authorities are authorities of the States to which the States have delegated the authority to govern in respect of particular areas of the States, s.95D cannot validly apply to their elections. It follows that s.95D(3), in so far as it applies to the State holding an election, and s.95D(4) are invalid and not authorised by s.51(v) of the Constitution.

53. However, although there is nothing to stop the Parliament from forbidding a broadcaster from broadcasting matter on behalf of the government, or a government authority, of the Commonwealth during a State or local government election, it is difficult to accept that the

Parliament intended to bind the Commonwealth if s.95D(3) and (4) could not validly apply to State elections. Accordingly, s.95D(1) cannot be severed from sub-ss.(3) and (4) and is also invalid. Likewise, it is difficult to accept that the Parliament intended to prevent broadcasters from broadcasting political advertisements during a State election period on behalf of the governments or government authorities of the Territories and other States if s.95D(3) and (4) could not validly apply to State elections. Consequently, ss.95D(2) and 95D(3) are also wholly invalid.

The free time and policy launch provisions

54. It is a necessary consequence of the invalidity of ss.95B and 95D that the free time and policy launch provisions of Pt IIID are also invalid in so far as they apply to referendums and federal, State and local government elections. Notwithstanding s.95(2) of the Act, the provisions of Divs 3 and 4 concerning free time and policy launches cannot be severed from ss.95B and 95D in their application to federal elections and referendums and State and local government elections. It is manifest that the free time and policy launch provisions were intended to ameliorate the general prohibition on political advertising enacted by ss.95B-95D. They were not intended to operate independently of the prohibition on political advertising.

55. Because the free time and policy launch provisions fall with ss.95B and 95D, it is strictly unnecessary on this branch of the case to decide whether the free time and policy launch provisions constitute an acquisition of property otherwise than on just terms contrary to s.51(xxxi) of the Constitution. But since it is necessary for me to do so on the question whether the free time and policy launch provisions are valid in their application to the Territories, I should indicate that those provisions do not contravene s.51(xxxi) of the Constitution. In reaching that conclusion, I have had the advantage of reading the judgment of Brennan J. I agree with his Honour's reasons on the point.

The Territories

56. To support the validity of s.95C, the Commonwealth did not seek to rely on the power conferred by s.122 of the Constitution to "make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth". No doubt, the reason that the Commonwealth did not rely on s.122 was that both internal territories have been granted self-government. In support of the validity of s.95C, the Commonwealth was content to rely on its powers undeR s.51(v) with respect to radio and television. If the Commonwealth had relied on s.122, I could see no ground for supposing that s.95C was invalid. There is nothing in s.122 or anywhere else in the Constitution which suggests that laws made by the Commonwealth for the government of a territory are subject to prohibitions or limitations arising from the concepts of representative government, responsible government or freedom of communication. Moreover, the decision of this Court in Teori Tau v. The Commonwealth((374) [1969] HCA 62; (1969) 119 CLR 564) establishes that the provisions of s.51(xxxi) do not control the operation of s.122 when it is used to acquire property in a territory.

57. Nevertheless, the power conferred on the Commonwealth by s.51(v) is sufficient to authorise the provisions of s.95C unless that power in its application to the Territories is the subject of some prohibition or limitation in the Constitution. Certainly, there is no express prohibition or limitation. Nor can I see any implied prohibition oR limitation. Having regard to the existence and terms of s.122 of the Constitution, it is impossible to suggest that the Constitution impliedly forbids the powers conferred on the Commonwealth, including s.51 powers, from being used in a way which would interfere with the functioning of Territorial governments. Furthermore, the prohibitions in ss.7 and 24 are not applicable because they apply only to federal elections. Finally, nothing in the Constitution suggests to my mind that there is any implied right of freedom of expression oR communication within a Territory or any right in a Territory arising from the

institutions of representative government and responsible government. Accordingly, s.95C is a valid law of the Commonwealth.

58. I have already expressed the view that the free time and policy launch provisions of Pt IIID do not contravene s.51(xxxi) of the Constitution. It follows that Pt IIID is valid in its application to the Territories. There is no difficulty in severing the invalid provisions of Pt IIID from the provisions of the Part in so far as it applies to the Territories.

Orders

59. In Matter No. S5 of 1992, I would overrule the demurrer except in relation to the application of Pt IIID to the Territories. In MatteR No. S6 of 1992, I would make the same order in respect of the first paragraph of the demurrer.

ORDER

Matter No. S5 of 1992

> Demurrer overruled with costs. Matter No. S6 of 1992
> First paragraph of the demurrer of the first defendant overruled with costs.
