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**AUSTRALIAN CAPITAL TELEVISION PTY LIMITED & ORS**  
**v.**  
**COMMONWEALTH OF AUSTRALIA**

**STATE OF NEW SOUTH WALES**  
**v.**  
**COMMONWEALTH OF AUSTRALIA**

**OUTLINE OF COMMONWEALTH'S SUBMISSIONS**

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**9 March 1992**

## A. PLENARY POWERS

### A.(1) Plenary Power Over the Electronic Media

1. The plenary powers under section 51(v) of the Constitution over radio broadcasting and television broadcasting enable the Parliament to provide completely for the provision of broadcasting services or for their prohibition.

- King v. Brislani; Ex parte Williams (1935) 54 CLR 262, esp at 277 Latham CJ
- Jones v. Commonwealth (1965) 112 CLR 205, esp at 237 Windeyer J
- Herald and Weekly Times Limited v. Commonwealth (1966) 115 CLR 418

Generally -

- Bourke v. State Bank of New South Wales (1990) 170 CLR 276, 284
- Commonwealth v. Tasmania (the Tasmanian Dam Case) (1983) 158 CLR 1, 127-128 Mason J, 220-221 Brennan J, 254-255 Deane J

2. It is wrong to construe powers of the Parliament by reference to possible abuses of legislative power.

- Tasmanian Dam Case 158 CLR at 128
- Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd (the Engineers Case) (1920) 28 CLR 129, 151-152
- Bank of Toronto v. Lambe (1887) 12 App Cas 575, 587

3. The power is not confined to providing for the establishment, maintenance and operation of a broadcasting service, and extends to licensing broadcasting services and the terms and conditions of their provision. The broadcast of advertisements may be prohibited, or

permitted and regulated on such terms as are provided by the Parliament.

- Jones v. Commonwealth 112 CLR at 226 Kitto J (with whom Taylor J agreed). Also at 219 Barwick CJ, 222-223 McTiernan J, 230-231 Menzies J, 237 Windeyer J and 243-244 Owen J
- Herald and Weekly Times Limited v. Commonwealth 115 CLR at 438 Taylor J

#### **A.(2) Plenary Power Over Commonwealth Elections**

4. Parliament has plenary powers under sections 10, 29, 31, 51(xxxvi) and 51(xxxix) of the Constitution to make laws with respect to its own elections.

- Smith v. Oldham (1912) 15 CLR 355, 358 Griffith CJ, 360 Barton J, 363 Isaacs J
- R. v. The Licensing Court of Brisbane & Ors; Ex parte Daniell (1920) 28 CLR 23, 31 Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ, 32 Higgins J
- Fabre v. Ley (1972) 127 CLR 665, 669
- Attorney-General (Commonwealth); Ex rel McKinlay v. Commonwealth (1975) 135 CLR 1, 19 Barwick CJ, 46 Gibbs J, 57-58 Stephen J, 62 Mason J

5. It may make laws regulating the conduct of persons in regard to elections including laws for the protection of the integrity of the electoral process by the prevention of corruption and undue influence.

- Smith v. Oldham 15 CLR 355, 358 Griffith CJ, 362 Isaacs J (cf argument at 357)
- In the Matter of Jasper Yarborough (1884) 110 US 274, 277
- Attorney-General (Commonwealth); Ex rel McKinlay v. Commonwealth 135 CLR at 56-57 Stephen J

6. As the Constitution contains express restrictions upon the exercise of these legislative powers (sections 24, 29 and 41), there is limited scope for the implication of other restrictions.

- Fabre v. Ley 127 CLR at 669
- McKinlay v. Commonwealth 135 CLR at 18  
Barwick CJ, 46 Gibbs J, 62 Mason J

7. Of course, the Parliament in the exercise of its powers may not dispense with the essential requirements of representative democracy which the Constitution establishes as the mode of government for the nation, and, in particular, legislative powers cannot be exercised inconsistently with the requirement that the Parliament be directly chosen by the people.

- Constitution, sections 7 and 24
- McKinlay v. Commonwealth 135 CLR at 56-58  
Stephen J
- McKenzie v. Commonwealth (1984) 57 ALR 747,  
749 Gibbs CJ

## B. SECTION 92

### B.(1) Freedom of Interstate Trade and Commerce

8. A Commonwealth law will not contravene section 92 of the Constitution, insofar as it protects trade and commerce, unless the law is both discriminatory and protectionist.

- Cole v. Whitfield (1988) 165 CLR 360, 398-400, 407-408

8.1 A law is not discriminatory in a protectionist sense unless it imposes a burden on interstate trade and commerce which gives the intrastate trade in the relevant goods or services a competitive or market advantage.

- Castlemaine Tooheys Ltd v. South Australia (1990) 169 CLR 436, 467
- Barley Marketing Board (NSW) v. Norman (1990) 171 CLR 182, 202-204

8.2 A law may be discriminatory against interstate trade and commerce in effect, if not in form. However, a law of general application the effect of which is to impose particular burdens on interstate trade will not be protectionist if the object of the law is not protectionist and if the incidental burdens that it places upon interstate trade and commerce are “appropriate and adapted”, and “not disproportionate”, to the achievement of that object.

- Cole v. Whitfield 165 CLR at 408
- Castlemaine Tooheys 169 CLR at 472-474

9. If a Commonwealth law is not discriminatory, section 92, insofar as it protects interstate trade and commerce, has no application. There is no need to consider whether the law is appropriate and adapted and not disproportionate to the achievement of its object.

- Barley Marketing Board (NSW) v. Norman 171 CLR 182

The Political Broadcasts and Political Disclosures Act 1991 (“the Act”) does not discriminate, either in form or effect, against interstate trade or commerce in favour of intrastate trade or commerce.

## B.(2) Freedom of Interstate Intercourse

10. There may not be a strict correspondence between the freedom guaranteed to interstate trade and commerce under section 92 and that guaranteed to interstate intercourse.

- Cole v. Whitfield 165 CLR at 393-394

11. In section 92, the term “intercourse” comprehends some activities which are not “trade” or “commerce”. However, most activities constituting “trade” or “commerce” will also consist of or involve “intercourse”.

- R. v. Smithers, Ex parte Benson (1912) 16 CLR 99, 113 Isaacs J
- Duncan v. Queensland (1916) 22 CLR 556, 593 Barton J
- Australian National Airways Pty Ltd v. Commonwealth (1945) 71 CLR 29, 82 Dixon J
- Bank of New South Wales v. Commonwealth (1948) 76 CLR 1, 383 Dixon J
- Nationwide News v. Wills, Applicant’s submissions, para B.3; Commonwealth submissions, para E.1, Commonwealth argument, Transcript 132-137

12. Where an interstate movement or communication is both “trade and commerce” and “intercourse”, the only test for invalidity under section 92 is the test of discriminatory protectionism in Cole v. Whitfield and subsequent cases. This was necessarily implicit in Cole v. Whitfield and Barley Marketing Board (NSW) v. Norman. In both cases, having decided that the laws in question did not infringe section 92 as it relates to trade and commerce, the Court pronounced the laws valid

without considering whether there was an infringement of any wider freedom of intercourse.

- See Nationwide News v. Wills, Commonwealth submissions, paras E.3-E.4 (and Commonwealth argument, Transcript 135-138, 150-155)

13. Television broadcasting for profit will constitute:

- trade, commerce and intercourse by the television broadcaster;
  - Bank of New South Wales v. Commonwealth 76 CLR at 381-383 Dixon J
  - See also Miller v. TCN Channel Nine Pty Ltd (1986) 161 CLR 556, 565 Gibbs CJ, 571-572 Mason J, 609 Brennan J
- trade, commerce and intercourse by those advertising on television for trading or commercial purposes;
- intercourse by those advertising on television for other purposes, including political purposes.

14. Intercourse that is not trade or commerce is subject to a degree of regulation and is not totally immune from all legislative burdens, restrictions and controls. The contrary view is untenable. It would mean, for instance, that the Commonwealth had no power at all to prevent obscene matter or dangerous articles being sent by post, except where they are sent in the course of trade or commerce. In relation to interstate intercourse the freedom guaranteed by section 92 “prevails in a confined area only”, since otherwise it would “create a substantial lacuna in the legislative powers available to the national Parliament”.

- Cole v. Whitfield 165 CLR at 393, 406.
- cf the submissions of Australian Capital Television Pty Ltd and others (“Broadcasters’ submissions”) paras 4.9 and 4.10

15. Where a law burdens interstate intercourse that is not trade or commerce, it is not a requirement for invalidity under section 92 that the law be protectionist, in the sense that it confers a “competitive” or “market” advantage on intrastate intercourse. But the law must still discriminate against interstate intercourse, in the sense that it imposes on interstate intercourse burdens which are not imposed on intrastate intercourse of the same kind. The law may be discriminatory in form or in practical effect. A law of general application, the effect of which is to impose special burdens on interstate intercourse, will nonetheless be valid if its object is non-discriminatory and if the incidental burdens that it places upon interstate intercourse are “appropriate and adapted”, and “not disproportionate”, to the achievement of that object.
- By analogy with Castlemaine Tooheys 167 CLR at 472-474
  - See Nationwide News v. Wills, Commonwealth submissions, paras E.6-E.12, Commonwealth argument, Transcript 156-164
16. This requirement of discrimination for invalidity under section 92 even in the case of non-commercial intercourse is essential because:
- if discrimination were not necessary, interstate intercourse would enjoy a privileged status. The purpose of section 92 is to prevent the unity of Australia being broken by State boundaries. Section 92 will invalidate any Commonwealth or State law which has the effect of partitioning Australia into separate State markets or communities. This requires only that interstate and intrastate trade, commerce and intercourse be treated equally, and not that the former be given any preferential treatment.
- Bank of New South Wales v. Commonwealth 76 CLR at 380-81 Dixon J
  - Damjanovic & Sons Pty Ltd v. Commonwealth (1968) 117 CLR 390, 406 Windeyer J
  - Miller v. TCN Channel Nine Pty Ltd 161 CLR at 599 Brennan J
  - Cole v. Whitfield 165 CLR at 402-403



- If discrimination were not necessary, the result would be that every Commonwealth law of general application which in any way imposed any control, restriction or burden on interstate intercourse that is not trade or commerce would be invalid, unless the law satisfied the test of reasonable regulation. The freedom of interstate intercourse would thus destroy or erode substantially the rule in Cole v. Whitfield.

17. Both R v. Smithers; Ex parte Benson (1912) 16 CLR 99 and Gratwick v. Johnson (1945) 70 CLR 1 are consistent with the view that a Commonwealth law of general application which places identical restrictions or burdens on interstate and intrastate intercourse that is not trade or commerce will not infringe section 92. Both cases involved laws which expressly discriminated against interstate intercourse.

- R v. Smithers; Ex parte Benson 16 CLR at 113 Isaacs J (it is the right of “an Australian...to pass over this continent irrespective of any State border *as a reason in itself* for interference”), 117 Isaacs J (s 92 “is an absolute prohibition on the Commonwealth and States alike to regard State borders as *in themselves* possible barriers to intercourse between Australians”), 119 Higgins J (“as members of the same community, [we] must have the right to pass and repass through every part of it without interruption, as freely as *in our own States*” (quoting Crandall v. State of Nevada (1867) 73 US 35, 49)) [emphases added]
- Gratwick v. Johnson 70 CLR at 12 Latham CJ (the Commonwealth cannot impose “a barrier to such [inter-State] transit and access, as distinguished from other travelling, *because, and only because*, it is inter-State”), 16 Rich J (the law in this case was a “direct and immediate invasion” of the freedom of interstate intercourse), 17 Starke J (“legislation pointed directly at the passing of people to and fro among the States also contravenes the provisions of section 92”), 19 Dixon J (“It is simply based on the ‘inter-Stateness’ of the journeys it assumes to control”), 21 McTiernan J (“These provisions restrain travel...merely because the journey to be undertaken is across a State border”) [emphases added]
- See also Miller v. TCN Channel Nine Pty Ltd 161 CLR at 603-604 Brennan J

18. Because the Act does not discriminate against interstate intercourse, section 92 is not relevant.
19. Alternatively, if discrimination is not a requirement for invalidity under section 92, insofar as it relates to interstate intercourse, the Act satisfies the test of reasonable regulation. The Act addresses a number of problems identified by Parliament, namely:
- the risk that the burgeoning cost of campaign advertising will make parties increasingly vulnerable to attempts by substantial donors to corrupt or to exert undue influence over them and the political process;
  - that the exorbitant cost of broadcast advertising precludes the majority of the community and all but the major political parties and large corporate and other interests from paid access to the airwaves;
  - that political advertising in the electronic media depends largely on emotive manipulation, which does not enlighten or inform the electorate but rather leads to a degrading of the political process.

See:

- Commonwealth Parliamentary Debates, House of Representatives, 9 May 1991, pp 3477-3480
- Parliament of the Commonwealth of Australia, Political Broadcasts and Political Disclosures Bill 1991, Report by the Senate Select Committee on Political Broadcasts and Political Disclosures (The Senate, Canberra 1991) ("Senate Select Committee Report"), especially sections 2.1, 3.1-3.7 and 4.11
- Parliament of the Commonwealth of Australia, Who Pays the Piper Calls the Tune, Inquiry into the Conduct of the 1987 Federal Election and 1988 Referendums, Report No 4 of the Joint Standing Committee on Electoral Matters (AGPS, Canberra 1989) ("Who pays the Piper"), especially pages xi, 86-88

20. The Court has confirmed that it must accept that Parliament had reasonable grounds for apprehending the problems to which legislation is addressed, and that it cannot enquire whether the solution adopted was necessary or even desirable.

- Castlemaine Tooheys 169 CLR at 473

Nor can it impugn the bona fides of the judgment made by Parliament.

- Richardson v. Forestry Commission (1988) 164 CLR 261, 296 Mason CJ and Brennan J

21. For invalidity, it is not enough that the Court considers the law to be inexpedient or misguided. To be invalid, the law must be incapable of being reasonably considered to be appropriate and adapted to achieving its objective: ie, it must be so lacking in reasonable proportionality that it must be characterised as having no relationship to the object it is intended to achieve.

- Herald and Weekly Times Ltd v. Commonwealth (1966) 115 CLR 418, 437 Kitto J
- Commonwealth v. Tasmania (1983) 158 CLR 1, 130-131 Mason J, 172 Murphy J, 232-233 Brennan J, 259-261 and 278 Deane J
- Richardson v. Forestry Commission 164 CLR at 292 Mason CJ and Brennan J, 295-296, 303 Wilson J, 311-312 Deane J, 327 Dawson J, 336 Toohey J, 344-346 Gaudron J
- South Australia v. Tanner (1989) 166 CLR 161, 165-168 Wilson, Dawson, Toohey, Gaudron JJ, 178 Brennan J
- Castlemaine Tooheys 169 CLR at 473

22. The Act is not lacking in reasonable proportionality. It deals with only one method of political communication, and only to a limited extent. The only political advertisements that are prohibited are those on television and radio, and these are prohibited only during election periods. Parties and candidates for election have access to the free time provisions for the broadcast of advertisements. Newspaper and other forms of advertising are unaffected. Other methods of communication to the electorate - meetings, posters, signs, direct mail,

telephone, and other personal communications - are unaffected. Section 95A preserves the right of a broadcaster to broadcast an item of news or current affairs or a comment on any such item, or a talkback radio program.

23. In many democratic countries throughout the world restrictions exist on political advertising in the electronic media during election time (see paras 32-34 below).
24. The Act does not fall outside the limits within which a political assessment could reasonably be made that it is an appropriate and effective means for giving effect to its object.

- See Gerhardy v. Brown (1983) 159 CLR 70, 138-139 Brennan J

## C. CONSTITUTIONAL IMPLICATIONS

### C.(1) No General Guarantee of Freedom of Expression

25. A fundamental principle of the Westminster system of responsible government is the sovereignty of Parliament. The courts cannot review legislation on the grounds that it is contrary to the law of nature or natural justice, much less on the grounds that it constitutes an “unreasonable” or “disproportionate” interference with civil liberties. In the United Kingdom, there is no right of free speech that is immune from interference by legislation.

For example:

- Blackstone, Commentaries on the Laws of England (18th edn 1829), 160-162
  - A.V. Dicey, Introduction to the Study of the Law of the Constitution (10th edn 1965), Chapter 1
  - Cheney v. Conn [1968] 1 WLR 242, 247-248, [1968] 1 All ER 779, 782 (Chancery Division)
  - British Railways Board v. Pickin [1974] AC 765, 782, 789, 798
  - R v. Secretary of State for the Home Department; Ex parte Brind [1991] 1 AC 696
26. The principles of responsible government based upon the sovereignty of Parliament are also part of the Australian constitutional system. The Constitution imposes certain express or implied prohibitions on the exercise of legislative power by the Commonwealth Parliament. Subject to those prohibitions, within the limits of a grant of legislative power under the Constitution the power of the Commonwealth Parliament is as ample and plenary as the power possessed by the Imperial Parliament itself. The remedy against an erroneous exercise of legislative power lies in the ballot box and not in the courts.
- Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd (the Engineers Case) (1920) 28 CLR 129, 151-153 Knox CJ, Isaacs, Rich, Starke JJ

- Attorney-General (Commonwealth); Ex rel McKinlay v. Commonwealth (1975) 135 CLR 1, 24 Barwick CJ
- Union Steamship Co of Australia Pty Ltd v. King (1988) 166 CLR 1, 9-10

Also

- Bank of Toronto v. Lambe (1887) 12 App Cas 575, 586-587
- Attorney-General (Ontario) v. Attorney-General (Canada) [1912] AC 571, 583-584

27. The framers of the Australian Constitution chose not to follow the United States Constitution which contains a Bill of Rights and decided instead that “The legislative machine should be left free and unfettered to grapple with problems as they arise in the changing circumstances of the country”.

- Quick and Garran, The Annotated Constitution of the Australian Commonwealth (1901), 990

Also:

- W. Harrison Moore, The Commonwealth of Australia (2nd edn 1910), 614-616
- Dixon, Jesting Pilate (1965), 101-102
- J. A. La Nauze, The Making of the Australian Constitution (1972), 227-232
- Attorney-General (Commonwealth); Ex rel McKinlay v. Commonwealth 135 CLR at 24 Barwick CJ, 46 Gibbs J
- Nationwide News, Commonwealth argument, Transcript 166-175

27.1 This was also the position in Canada prior to the enactment of the Canadian Charter of Rights and Freedoms.

- Attorney-General (Ontario) v. Attorney-General (Canada) [1912] AC at 583-584
- Quebec Association of Protestant School Boards v. Attorney-General of Quebec (No 2) (1982) 140 DLR (3d) 33, 52

27.2 Individual rights under common law may be removed by Commonwealth legislation.

- Kempley v. R. [1944] ALR 249, per Latham CJ, Starke and Williams JJ
- Sorby v. Commonwealth (1983) 152 CLR 281, 298-299 Gibbs CJ, 308-309 Mason, Wilson, Dawson JJ

28. As the Constitution contains express restrictions on the exercise of legislative power by the Commonwealth which enure for the benefit of individuals (see sections 51 (xxxi), 80, 116 and 117), there is limited scope for the implication of other restrictions.

- See para-6 above

29. In any event, the Act would not violate rights to freedom of expression as those rights are commonly articulated. Freedom of expression is not expressed as an absolute right, but is subject to certain restrictions necessary in a democratic society, in particular for the protection of public order and the rights of others. In this context, “necessary” restrictions means restrictions which are proportionate to the attainment of a legitimate governmental objective.

- Universal Declaration of Human Rights, Articles 19, 29 (2)
- International Covenant on Civil and Political Rights, Articles 19 (2)-(3)
- European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10 (1)-(2)
- American Convention on Human Rights, Article 13 (1)-(2)
- Canadian Charter of Rights and Freedoms, sections 1 and 2 (b)
- Sieghart, The International Law of Human Rights (Oxford 1983), 94
- This is acknowledged in Broadcasters’ submissions, paras 5.13 and 6.6 and in NSW submissions, para 14

30. In international human rights practice, radio and television broadcasting have been seen as in a special category of media which may be licensed and in relation to which certain specified categories of advertising such as political advertising may be excluded.

- X and the Association of Z v. United Kingdom European Commission of Human Rights, Application 4515/70, Decision of 12 July 1971
- Sieghart, The International Law of Human Rights (1983), 336

31. The European Court of Human Rights has recognised that States have a certain “margin of appreciation” in assessing whether there is a social need requiring a restriction of free speech, and that the Court has to determine whether the interference complained of is “proportionate to the legitimate aim pursued” and whether the reasons for the restriction are “relevant and sufficient”.

- Observer and Guardian v. United Kingdom (the Spycatcher Case) European Court of Human Rights, 26 November 1991, para 59

The Act satisfies this requirement (see paras 19-24 above).

32. Unrestricted access by political parties and candidates to the electronic media for the broadcast of paid political advertising is not an essential requirement of democratic government. In many democratic countries throughout the world, paid political advertising in the electronic media is prohibited or restricted by various mechanisms, including Austria, Belgium, Denmark, Finland, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom.

- See Who Pays the Piper, Table 5.1, at p 40

In some countries, paid political advertising is prohibited or restricted by legislation (eg Canada, Ireland, Israel and the United Kingdom). In other countries, access to the electronic media for political advertising is prevented by the fact that broadcasting is a State monopoly (or near



monopoly) which permits little or no advertising (eg Norway, Sweden and the Netherlands). In some States, free time is required to be provided to political parties, sometimes calculated on the basis of their previous electoral success (eg France, Japan and New Zealand).

- Who Pays the Piper, Chapter 5
- Senate Select Committee Report, Appendix 5

33. These States (except Switzerland) are all parties to the International Covenant on Civil and Political Rights, and the European States referred to (except Finland) are also parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Additionally, Canada, Denmark, Ireland, Japan, the Netherlands, Norway and Sweden have express constitutional provisions guaranteeing the right to freedom of expression. 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.

34. A Canadian Royal Commission has recently recommended prohibiting political parties from purchasing more than 100 minutes of advertising time from any one broadcaster during an election period, imposing campaign spending limits on candidates, parties and all other groups and individuals, and requiring broadcasters to make free time available to parties during an election campaign. The Royal Commission did not consider that these proposals violated the Canadian Charter.

- See, Canadian Royal Commission on Electoral Reform and Party Financing, Communiqué Nos 33, 34 and 41 (13 February 1992)
- See also R. v. Blake (1988) 42 CCC (3d) 271

C.(2) **No Constitutional Right of Access To the Electronic Media for Political Campaigning**

35. Any implied constitutional right of access to or communication with the central organs of government, as mentioned in R v. Smithers; Ex parte

Benson (1913) 16 CLR 99, 108-10 and Pioneer Express Pty Ltd v. Hotchkiss (1958) 101 CLR 536, 549-50, 560, 566, is not relevant in this case. Neither of those cases supports any absolute right of candidates or parties or other individuals to have access at election time to a particular medium in order to communicate with the public at large. Such communication does not constitute access to, or communication with, the central organs of government.

36. No right of access to the electronic media for political communication can be inferred from the words “directly chosen by the people” in sections 7 and 24 of the Constitution. Those provisions require that the members of the Senate and the House of Representatives be chosen directly by popular vote, and not by some indirect means such as an electoral college, or by State legislatures and executives. They do not require, for instance, that all electorates contain exactly equal numbers of voters. They go no further than requiring that the legislative powers vested in the Parliament not be exercised inconsistently with the existence of representative democracy as the chosen mode of government.

- Attorney-General (Commonwealth); Ex rel McKinlay v. Commonwealth 135 CLR at 36-37 McTiernan and Jacobs JJ, 57-58 Stephen J, 61-62 Mason J
- Attorney-General (NSW); (Ex rel. MacKellar) v. Commonwealth (1977) 139 CLR 527, 540 Gibbs J, 566 Jacobs J

37. Representative democracy is descriptive of a wide spectrum of political institutions and processes, each different in countless respects yet answering to that generic description. Within the limits of that spectrum, it is for Parliament, not the courts, to determine the merits of any particular method of regulation of the electoral system.

- Attorney-General (Commonwealth); Ex rel McKinlay v. Commonwealth 135 CLR at 23-25 Barwick CJ, 46 Gibbs J, 56-57 Stephen J
- See also, McKenzie v. Commonwealth (1984) 57 ALR 747, 749 Gibbs CJ

38. The principles of representative democracy do not require there to be unregulated or uncontrolled political advertising in relation to elections. It is consistent with the principles of representative democracy for Parliament to regulate political advertising in relation to elections in order to preserve the integrity of the electoral process.

- Smith v. Oldham (1912) 15 CLR 355, noting the arguments at 357

This is the object of the Act (see para 19 above).

39. In furtherance of this object, the Act restricts political advertising by one means only (the electronic media) for limited periods of time, and compensates through provisions for the allocation of free time. The restrictions imposed by the Act cannot on any view be characterised as destroying or impairing substantially the character of the government which the Constitution contemplates, or as inconsistent with the existence of representative democracy as the chosen mode of government. If the financially powerful could dominate election discourse, the democratic character of Australian society would be diminished.

- Senate Select Committee Report, at p 5
- See also Canadian Royal Commission, Communiqué No 34, at p 3

40. The Parliament could reasonably make the political assessment that the Act is an appropriate and effective means for dealing with the problems caused by the burgeoning cost of using the electronic media for political campaigning at election time. It is not the function of the Court to decide, and there are no legal criteria available to decide, whether Parliament's assessment was correct. The Court should not sit in judgment upon the merits of the solution adopted by the Parliament.

- Gerhardy v. Brown 159 CLR at 138-139 Brennan J
- See also paras 19-22 above

D. **THE STATES**

D.(1) **No Discrimination**

41. Sections 95B(3), 95C(4) and 95D(3) of the Act comprise an integral part of the legislative scheme in Part IIID for dealing with political advertising during election periods.
- subject to Divisions 3 and 4 of Part IIID of the Act, sections 95B, 95C and 95D together erect a general prohibition upon a broadcaster from broadcasting a political advertisement (as defined) during an election period in relation to an election. The prohibition applies indiscriminately to elections of the Commonwealth Parliament, Territory legislatures, the Parliaments of the States and local government authorities;
  - Division 3 of Part IIID enables a political party, candidate or group seeking election to the Parliament of the Commonwealth, a Territory legislature or State Parliament to become entitled to the grant of a period of free time in respect of election broadcasts by television;
  - Division 4 provides for the broadcast of a policy launch for a political party seeking election to the Commonwealth Parliament, a Territory legislature or State Parliament.
42. The Act does not distinguish between Commonwealth, Territory and State elections save that, in the case of a Commonwealth or Territory election, the prohibition extends to the broadcast of any matter (other than exempt matter) for and on behalf of the government or government authority of the Commonwealth or the Territory (sections 95B(1) and 95C(1)).
43. States or State elections are not singled out by the Act for special and adverse treatment, but are affected as an integral part of the general

legislative scheme. No special burdens or disabilities are imposed upon the States, and the laws are not aimed or directed at the States. The States, and their elections, are treated equally with the Commonwealth and the Territories.

- cf Queensland Electricity Commission v. Commonwealth (1988) 159 CLR 192
- The Second Fringe Benefits Tax Case (1987) 163 CLR 329, 356

44. The fact that, by being denied access to free time, the Commonwealth and State governments are treated differently from political parties and other persons, is not discrimination within the relevant implied constitutional prohibition.

44.1 The essence of discrimination is that like things are treated differently or that unlike things are treated in the same way:

- Queensland Electricity Commission v. Commonwealth 159 CLR at 240 Brennan J
- Castlemaine Tooheys Limited v. South Australia 169 CLR at 480 Gaudron and McHugh JJ
- H L A Hart, The Concept of Law (1961) at 155-7

44.2 For the purposes of the Act, a government, and a party, candidate or group seeking election, are not relevantly alike. Parties in government are entitled, pursuant to Division 3 of Part IIID of the Act, to the benefit of the free time provisions. To allow the government, as such, a similar benefit would result in an obvious preference, to the disadvantage of non-governmental parties and candidates.

44.3 The Act has adopted a relevant and non-discriminatory criterion for distinguishing the position of Commonwealth, State and Territory governments from the position of candidates and parties seeking election to these governments.

45. Alternatively, if there is discrimination in the relevant sense, it is justified:

- Victoria v. Commonwealth (1957) 99 CLR 575, 638 Williams J
- Queensland Electricity Commission v. Commonwealth 159 CLR at 323-323 Brennan J

45.1 To permit a Commonwealth or State government access to free time would be to discriminate in favour of governing parties and against the interests of non-governmental parties or persons.

- cf Queensland Electricity Commission v. Commonwealth 159 CLR at 217 Mason J

45.2 The State government is not disadvantaged or burdened by the difference in treatment: it is merely denied an advantage not available to others, namely free time additional to that made available to the governing party.

- Queensland Electricity Commission v. Commonwealth 159 CLR at 226-227 Wilson J

46. For similar reasons, Division 4 of Part IIID of the Act is not discriminatory on the ground that a government is ineligible for the free broadcast of a policy launch. The governing party or parties are already eligible for this benefit.

47. The existence of a narrowly framed exception in section 95A(3) of the Act favouring a charitable organisation does not render the legislation discriminatory in breach of the implied constitutional prohibition.

- Victoria v. Commonwealth (1971) 122 CLR 353, 425-426 Gibbs J

D.(2) **No Impairment of the Capacity of the States**

48. The implied constitutional prohibition is against the impairment of the continued existence of the States or their capacity to function as governments, rather than against interference with, or impairment of, any function or activity which a State government undertakes.

- Victoria v. Commonwealth 122 CLR at 411, 413 Walsh J, 424 Gibbs J
- Queensland Electricity Commission v. Commonwealth 159 CLR at 216-217 Mason J
- Tasmanian Dam Case 158 CLR at 139-140 Mason J, 214-215 Brennan J, 280-281 Deane J
- Street v. Queensland Bar Association (1981) 168 CLR 461, 513 Brennan J
- Peters v. Attorney-General (1988) 84 ALR 319, 330 McHugh JA

49. States and their agencies are subject to Commonwealth laws of general application enacted pursuant to its plenary legislative powers.

- Engineers Case (1920) 28 CLR 132
- Stuart-Robertson v. Lloyd (1932) 47 CLR 482, 488 Gavan Duffy CJ and Dixon J, 490 Starke J, 491-492 Evatt J, 496 McTiernan J
- Melbourne Corporation v. Commonwealth (1947) 74 CLR 47, 78 Dixon J
- R. v. Commonwealth Conciliation and Arbitration Commission: Ex parte Professional Engineers' Association (1959) 107 CLR 208, 233 Dixon CJ
- Re Lee; Ex parte Harper (1986) 160 CLR 430, 442 Gibbs CJ, 453 Mason, Brennan and Deane JJ

50. Where a State wishes to avail itself of any part of the established organisation of the Australian community (including the broadcasting system), it must take it as it finds it.

- Melbourne Corporation v. Commonwealth 74 CLR at 84 Dixon J
- Victoria v. Commonwealth 122 CLR 353
- The Second Fringe Benefits Tax Case 163 CLR at 356

51. State laws and policies are subject to “affectation” by laws of the Parliament (cf NSW submissions, para 3, which are, in essence, a restatement of principles of the implied immunity of instrumentalities and implied prohibitions rejected in the Engineers Case). State governments as such are not immune from general Commonwealth laws otherwise within legislative power, and, in particular, they have no entrenched constitutional right of preferential access to the electronic media to broadcast advertisements.
  
52. The extent of prohibitions upon the broadcast of political advertisements is a matter for the Parliament. The political assessment could reasonably be made that the use of electronic media should not extend to the broadcasting during an election period of advertisements dealing with any of the topics within sub-paras (a)-(f) of the definitions of prescribed material in section 95B(6), 95C(7) and 95D(6) of the Act, and that the prohibition should extend uniformly to all elections including local government by-elections. Whether the Act could have been framed more narrowly, whether local government elections or by-elections should have been excluded, are not matters affecting its validity.
  - Miller v. Commonwealth (1946) 73 CLR 187, 203 Dixon J
  - See also paras 19-24 above
  
53. The Act is a law at the heart of the Commonwealth’s powers to legislate upon the subject of broadcasting and its elections. Davis v. Commonwealth (1988) 166 CLR 79 at 99-100, 115-116 (relied on in NSW submissions, para 4) relevantly decided only that particular provisions of the Australian Bicentennial Act 1988 could not be characterised as within the incidental power in section 51(xxxix), operating in conjunction with section 61 of the Constitution.



D.(3) **No Interference with State Elections**

54. Sections 95D(3) and (4) do not impermissibly interfere with the process of State elections provided for under the NSW Constitution and State laws.

54.1 The Act does not touch upon provisions made by the Constitution Act 1902 (NSW) for the conduct of elections, which deal with -

- who may vote at an election to the Legislative Assembly or the Legislative Council (sections 11B and 22 of the Constitution Act)
- the manner in which such elections shall be conducted, including how votes shall be cast or counted (sections 22A, 29 and the Sixth and Seventh Schedules of the Constitution Act)
- the manner in which local government bodies are to be constituted or elected (section 51 of the Constitution Act).

54.2 Nor does the Act touch upon any of the detailed provisions made by the Parliamentary Electorates and Elections Act 1912 for the conduct of elections required under the State Constitution, providing for the distribution of electorates, the qualification of electors, the registration of parties, the conduct of elections including the regulation of voting, the counting of votes, and the like. Nor does it touch upon electoral provisions in Part V of the Local Government Act 1919 (NSW) regulating the conduct of local government elections in NSW.

55. Dissemination of information relevant to State elections falls within the definition of “exempt matter” in section 4 of the Act and may be broadcast.
56. Candidates for State elections are not State governments, nor are they officers of the essential organs of State government.
  - cf The Second Fringe Benefits Tax Case 163 CLR at 362-3 Brennan J
57. A non-discriminatory prohibition upon the broadcast of political advertisements by a State, in common with others (including the Commonwealth government), does not constitute an interference with the State’s structural integrity or its capacity to govern.

E. **ACQUISITION OF PROPERTY**

58. There is no “acquisition of property” within section 51(xxxi) of the Constitution since, by virtue of section 129 of the Broadcasting Act 1942, every licence under that Act is subject to the provisions of that Act from time to time (Ocean Road Motel Pty Ltd v. Pacific Acceptance Corporation Ltd (1963) 109 CLR 276 at 280 Taylor J) and those provisions are deemed to be incorporated in the licence as terms and conditions of the licence.

58.1 Assuming that a licence under the Act is “property” (cf para 60.3.1 below), the legislation defining its content expressly makes it liable to be modified by later legislation. Such a modification, at least where it does not impose limitations incompatible with the exercise of the basic rights conferred by the licence, is not an “acquisition” of any part of the property - just as an exercise of a lessor’s rights, in accordance with the terms of the lease, to resume the whole or part of the land is not an “acquisition” of property.

58.2 The issue is not whether a licensee can consent to an unconstitutional statute (cf NSW submissions, para 27(c)). The point is that the legislation defining the licensee’s “property” rights at their inception (assuming a licence is “property”) allowed for modification of the rights that it would otherwise have comprised.

58.3 The NSW response (NSW submissions, para 27 (a)) is incorrect since section 129 does not, as a matter of construction, extend to amendments that “acquire compulsorily and without compensation all property of licensees used by them in connection with their licences”. Such an amendment would be incompatible with the basic rights conferred by the licences.

58.4 United States authorities on “takings” are irrelevant here (cf NSW submissions, para 28).

59. The free time requirements in section 95Q do not involve any “acquisition of property” by the *parties or candidates* entitled to free time.

59.1 Those persons do not obtain any right of “*property*”.

59.1.1 They do not obtain an enforceable right to have their material broadcast free of charge.

- The Act does not confer any right on parties or candidates to enforce the obligation of a broadcasting station to provide free time.
- Nor does the Act provide for the Tribunal to enforce obligations to provide free time (section 95U).
- The only legal course available for parties and candidates to pursue their right to free time is to seek mandamus against a broadcasting station. Mandamus is a discretionary remedy and the ability to seek mandamus does not amount to an enforceable right to obtain the result of its grant.

59.1.2 The fact that broadcasters must use their facilities in order to broadcast the material as required by section 95Q for parties and candidates does not give those persons any rights of “*property*” in the facilities (cf Broadcasters’ submissions, para 8.5; NSW submissions, para 23).

For example:

- a law compelling a doctor to provide medical services using his own instruments does not give the patient any right of property in those instruments;
- a law compelling persons to provide statistical information to the Commonwealth by the use of their own facilities does not involve any acquisition by the Commonwealth of any right of “property” in those facilities.

59.2 The rights to free time given to the parties and candidates are not rights “*acquired*” from the plaintiffs since they are not transferred from them.

- Commonwealth v. Tasmania (Tasmanian Dam Case) (1983) 158 CLR 1, at 145-146 Mason J, 181-182 Murphy J, 247-248 Brennan J. The wider concept enunciated by Deane J at 283-287 should not be adopted, because:

- (a) the principle that the protection afforded by section 51(xxxi) is to be interpreted broadly (NSW submissions, para 22(a)) should not be used to give section 51(xxxi) a meaning which its words cannot ordinarily bear - the deprivation of some incidents of property and a correlated acquisition of some benefit, not being a “property” interest, is not an “acquisition of property” in any ordinary sense and should not be regarded as being one in the constitutional sense; and

- (b) to apply section 51(xxxi) where a statutory abolition or diminution of a property right results in a “benefit” to the Commonwealth or another person would raise section 51(xxxi) as an issue in relation to all legislation removing or reducing statutory rights.

60. Nor does the Act involve any “acquisition of property” in favour of the *Commonwealth*.

60.1 The free time provisions of section 95Q do not involve any “*acquisition of property*” in favour of the Commonwealth since the Commonwealth does not obtain any right of “*property*”.

- Tasmanian Dam Case, passages cited at para 59.3 above. The approach by Deane J in that case should not be followed (see para 59.2 above).

60.2 The provisions prohibiting the broadcasting of political advertisements do not involve an “*acquisition*” by the Commonwealth. The mere removal by a Commonwealth Act of rights conferred by such an Act is not generally, without more, an “acquisition” and is not so here (cf Broadcasters’ submissions, paras 8.4, 8.8 and 8.9).

- Tasmanian Dam Case (passages cited at para 59.3 above)
- Werrin v. Commonwealth (1938) 59 CLR 150

60.2.1 Some statutory cancellations of property rights created by a Commonwealth statute might amount to “acquisitions” of *property* (in the absence of an express or implied provision to the same effect as section 129 - see para 58 above).

For example:

- a statutory cancellation of a fixed-term Commonwealth statutory lease: in that case the lessor, as a result of the cancellation, acquires “property” rights in and over the land for the cancelled period of the lease;
- a statutory extinguishment of a cause of action for the price of goods sold to the Commonwealth: that could be characterised as a law with respect to the acquisition of the goods.

60.2.2 However, these examples are distinguishable from the present case where the *mere termination* of the broadcasters’ rights during the relevant periods of free time cannot be described as an “acquisition” of anything, let alone as an acquisition of “property” (cf para 60.1 above). The Commonwealth does not “take back” anything in the sense of receiving anything back, just as a mere Commonwealth termination of a right to the payment of money is not an “acquisition” of anything.

60.2.3 Likewise there is no analogy here with the extinction of an easement (cf NSW submissions, para 22(d)) - in such a case the landowner obtains rights, in and over the land, that are rights of “property”.

60.2.4 The contrary view would mean that, whenever the Parliament wished to terminate a statutory or common law right against the Commonwealth or anyone else (whether under any kind of licence or otherwise), it would have to provide “just terms”. That would take section 51(xxxi) beyond its proper scope.

60.3. In so far as the legislation deprives the broadcasting stations of time otherwise available to them for their own purposes it does not deprive them of any rights of “*property*” (cf Broadcasters’ submissions, paras 8.4 to 8.9).

- R v. Ludeke; Ex parte Australian Building Construction Employees’ and Builders Labourers’ Federation (1983) 159 CLR 636

60.3.1 First, a licence under the Act is not a form of “property”. The substantial restrictions on transferability of a licence make a licence a personal one rather than a form of “property”. (See section 89A(8)(c)(i)(A) and (c)(ii) under which the Australian Broadcasting Tribunal must be satisfied that the transferee is a “fit and proper person to hold the licence”, and must take into account in certain circumstances the need to avoid a “undue concentration of influence” on the licensee.)

- Jack v. Smail (1905) 2 CLR 684, 705 Griffith CJ
- National Provincial Bank Ltd v. Ainsworth [1965] AC 1175, 1247-48 (referred to in NSW submissions, para 25) is not a complete statement of the characteristics of “property”, and is not used as such in R v. Toohey; Ex parte Meneling Station Pty Ltd



- (1952) 158 CLR 327 (referred to in the NSW submissions, para 25);
- Television Corporation Ltd v. Commonwealth (1964) 109 CLR 59, 70 Kitto J (referred to in NSW submissions, para 25) is merely a passing reference to broadcasting licences as “property”: the point was not in issue;
- Other cases concerning various kinds of licences are distinguishable.

For example:

- in Kelly v. Kelly (1990) 92 ALR 74, the licence to take abalone was analogous to a profit a prendre (cf Harper v. Minister for Sea Fisheries (1989) 168 CLR 314).

60.3.2 The “property” here is not the licences as such but the licensed broadcasting and television stations (Re Norris (1965) 6 FLR 375, concerning a licensed taxi-cab). Legislation removing some of the rights under a licence to use property (whether it be a taxi-cab or television station) does not involve any “acquisition” by the Commonwealth of any part of the property since the removal of the rights does not result in the Commonwealth obtaining any “property” interest.

61. The legislation does not fail to provide just terms.

61.1. As to the obligation to provide free time (section 95Q), the requirement is “fair and just” as between the broadcasting stations and the Commonwealth having regard to all the interests involved, including those of the public and the Commonwealth.

- Grace Brothers Pty Ltd v. Commonwealth (1946) 72 CLR 269, 280 Latham CJ, 285 Starke J, 290-291 Dixon J
- Nelungaloo Pty Ltd v. Commonwealth (1948) 75 CLR 495, 569 Dixon J

61.1.1 First, it is fair and just to require the holders of valuable privileges such as broadcasting and television licences to provide limited free services in the public interest.

- cf Broadcasting and Television Act 1942, sections 103 and 104

61.1.2 Secondly, if the provision of free time needs to be reflected in the financial position as between the broadcasters and the Commonwealth, this must be assessed, not on the basis of the Act in isolation, but on the basis of the entire set of licensing provisions. In particular, in fixing the levels of the licence fees (which are imposed “by way of tax” under the Television Licence Fees Act 1964 and the Radio Licence Fees Act 1964), Parliament must have taken into account the privileges and obligations of the licensees (including obligations under the legislation here in question and obligations under provisions such as those under sections 103 and 104 of the Broadcasting Act 1942 to broadcast, free of charge, religious or “national interest” matter as directed by the Tribunal or Minister respectively). In this context where Parliament can fix the fees at whatever levels it chooses (since they are imposed as taxes), it is inappropriate to regard the lack of provision for payment for the free time as being a lack of “just terms”. It has not been shown that this legislation, when considered as a whole, fails to provide “just terms” in respect of the “free time” obligations.