

Amended

Outline of Plaintiff's Submissions

(Supplementary material in response to Commonwealth in

paras 2A, 3A, 11A, 13A, 21A, 24A, 26A, 29A, 29B)

(A) Interference with State elections is a substantial interference with the functioning of constituent organs of the State and their structural integrity

1. Subsections (3) and (4) of s95D of the Broadcasting Act (as amended by the Political Broadcasts and Political Disclosures Act 1991) are invalid because:

- (a) they impede the capacity of the States to function and the processes by which their legislative and executive powers are exercised, thereby threatening their structural integrity: Melbourne Corporation v Commonwealth (1947) 74 CLR 31 at 66 (Rich J); Victoria v Commonwealth (1971) 122 CLR 353 at 411 (Walsh J); Koowarta v Bjelke-Petersen (1982) 153 CLR 168 at 216 (Stephen J); Tasmanian Dam (1983) 158 CLR 1 at 139-140 (Mason J), 214 (Brennan J), 280-1 (Deane J); Queensland Electricity Commission v Commonwealth (1985) 159 CLR 192 at 226 (Wilson J), 248 (Deane J); Richardson v Forestry Commission (1988) 164 CLR 261 at 304-5 (Wilson J); and
- (b) they contravene the protection of State Constitutions guaranteed by ss106 and 107 of the Constitution: Queensland Electricity Commission at 235 (Brennan J), 244-5 (Deane J); Re Tracey; Ex parte Ryan (1989) 166 CLR 518 at 547 (Mason CJ, Wilson and Dawson JJ), 575 (Brennan and Toohey JJ); Mabo v

Queensland (1988) 166 CLR 186 at 197 (Mason CJ), 203 (Wilson J), 243-4 (Dawson J); Gerhardy v Brown (1985) 159 CLR 70 at 81 (Gibbs CJ), 120 (Brennan J).

2. In New South Wales rights of universal suffrage are entrenched in the Constitution Act 1902 : see esp 11B, 22, 22A, 29. The process of election is fundamental to the organisation and structure of State governments because it determines the composition of the Legislature and the Executive. "Political advertising" by political parties and pressure groups is a well-established and legitimate means whereby relevant information is conveyed to electors and the Executive kept accountable: Whitney v California 274 US 357, 375-78 (1927) (Brandeis J, diss); Stromberg v California 283 US 359, 369 (1930) (per curiam); First National Bank of Boston v Bellotti 435 US 765, 776-7 (1978) (per curiam); Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39 at 52 (Mason J); Miller v TCN Channel Nine Pty Ltd (1986) 161 CLR 556 at 583-4 (Murphy J). Section 95D directly and substantially interferes with that process, although the validity of s95D(1) and (2) is not challenged by the plaintiff. The prohibition also inhibits criticism of present and past governments, which prohibition can descend fortuitously at any time there is a by-election within the service area: see Mr Jessop's affidavit. The interference is greater if the "free time" provisions are invalid.

2A. (a) The Commonwealth submissions (paras 54-57) treat elections as if they involved activities by electors and parties conducted in an information vacuum. An effective democracy requires information

to be freely circulated in the "marketplace of ideas" (Holmes J in Abrams v United States 250 US 616 at 630 (1919); see also J S Mill On Liberty p16 (attached)). Effective means of choice between alternative governments is fundamental.

(b) The Commonwealth submissions which attempt to minimise the impact of the Act's restrictions (eg paras 5, 22, 54) directly contradict a key assumption underlying its passage, ie that those seeking to influence the electoral process will make and have made very significant use of the electronic media.

(c) Paragraph 56 of the Commonwealth submissions confuses the plaintiff's standing and the interest it promotes in this branch of the argument. The remarks of Brennan J in Second Fringe Benefits (163 CLR at 362-3) support the plaintiff by affirming the role of the Ministry and the Parliament as "essential organs of government". Even a single by-election can be critical to the formation of each, yet for them the ban of access to the electronic media is unqualified: New South Wales v Commonwealth (1992) 66 ALJR 214 at 217-8. Even were the ban indiscriminate as the Commonwealth claims (para 57) that would only strengthen the plaintiff's case on this ground.

(B) Substantial interference with the State Executive's capacity to function

3. Sections 95B(3), 95C(4) and 95D(3) are invalid because of their substantial interference with the capacity of the Executive to

govern and to protect the efficacy of State laws and policies from affectation by laws and policies of the federal Parliament and Government: see cases cited in para 1 above.

3A. The Commonwealth claim (para 51) that the plaintiff has invoked principles rejected in the Engineers Case mistakes the point made by the plaintiff in para 3. It is because Commonwealth laws when made will have paramount force that the State Government needs the freedom (in appropriate cases) preemptively to enter the hustings which the Act denies generally to the State, but permits to others (to a degree).

4. The ban on "political advertisements" by State Governments and government authorities (without right of free time, and regardless of what is put against them by those whose advertisements promoting their opposite interests must or may be broadcast) goes far beyond the protection of any legitimate federal interest in relation to federal and Territorial elections (cf Davis v Commonwealth (1988) 166 CLR 79 at 99-100, 115-116) because of the capacity of elections and by-elections to occur indiscriminately and because of the width of the relevant prohibitions for the reasons which follow. The capacity of State Governments and their authorities to protect themselves and to communicate information vital to their interests and proper functioning is severely impaired.

5. So long as a "political advertisement" contains "prescribed material" it cannot be broadcast during an election period even if it does not contain matter intended or likely to affect voting: see definition of "political matter" in ss95B(6), 95C(7) and 95D(6).

6. Since elections include local government by-elections, which can occur frequently and fortuitously, the interference by s95D(3) is particularly severe. In New South Wales these by-elections must occur within 3 months of any extraordinary vacancy, except where the vacancy occurs during the last year of a council's four year term: Local Government Act 1919, ss30(2), 35, 38(4), 39(1)(d). In 1990 there were ³²~~approximately 25~~ by-elections in New South Wales.

7. "Prescribed material" encompasses material containing any "express or implicit reference to" any of the six groups of topics referred to in the definition of that term: ibid. An advertisement containing such material need not be directed at any election, nor at any issue in an election, except in topic (c).

8. Items (d), (e) and (f) of the definition of "prescribed material" (ibid) need have no relation to the election involved except that in the case of items (d) and (e) there is a reference to the polity (ie, Commonwealth, Territory or State) for which the election is taking place.

9. Because of the definition of "political matter" the provisions challenged on this ground (ie ss95B(3), 95C(4) and 95D(3)) operate to prohibit broadcasts on the electronic media of the following categories:

- (1) A broadcast on behalf of a State Government during a federal constitutional referendum in which there is a Commonwealth proposal to amend the Constitution by:

- (a) extending the Commonwealth Parliament's concurrent or exclusive powers;
- (b) abolishing the States; or
- (c) making applicable to the States a controversial bill of rights that could eg prevent access to medical services offered by the State.

(See s95B(3) and para (a) of the definition of "political matter".)

- (2) A broadcast on behalf of a State Government during a federal election in which there is an issue affecting the State's interest, eg endorsement in principle of a proposed constitutional amendment or reduction of the level of State grants, even where:-

- (a) persons or parties advocating the opposite position had used free time to do so; or
- (b) the State Government wished to respond to advertisements on behalf of a "charitable organisation" (cf s95A(3)).

(See s95B(3) and para (a) of the definition of "political matter".)

- (3) A broadcast on behalf of a State Government or "government authority" (as defined in s4 as amended) that promoted an issue (eg privatisation) for the commercial interests of the State concerned and even though the State's advertisement was not intended to or likely to affect voting in an election

within the broadcaster's coverage area. (See para (c) of the definition of "prescribed material".)

- (4) A broadcast on behalf of the State Police or the Independent Commission Against Corruption seeking information about the whereabouts of or information concerning an identified member of the Parliament of the Commonwealth or the legislature of a Territory or Parliament of a State in or into which the advertisement is broadcast. (See para (e) of definition of "prescribed material".)
- (5) A presumably non-controversial advertisement eg relating to the Olympic Games, which contained statements by or attributed to or referring to a person who was a member of Parliament if made during a relevant election. (See para (e) of the definition of "prescribed material".)
- (6) A broadcast on behalf of a State Government or government authority on any of the above topics if made during the currency of any type of by-election occurring within the broadcast area. (See s95D(3), (5) and (6).)
- (7) A broadcast on behalf of a State Government or a government authority on certain topics even if confined within that State if there happened to be a concurrent State or Territory general election elsewhere in the Commonwealth. (See ss95C(4) and 95D(3) and paras (c), (d) and (f) of the definition of "prescribed material" in ss95C(7) and 95D(6).)

(C) Imposition of special disability on States

10. Since State Governments may have legitimate interests in advertising even where this is intended to affect voting (para 4 above) the blanket prohibitions in ss95B(3), 95C(4) and possibly 95D(3) single out States and their authorities for discriminatory treatment, in the sense of special disabilities or burdens which cannot be justified, vis-a-vis:

- (a) those persons and bodies given the benefit of Divisions 3 (free time) and 4 (policy launches); and
- (b) "charitable organisations" given liberty under s95A(3), eg environmental groups or those promoting the interests of particular classes of "needy" persons.

11. The provisions referred to in para 10 are invalid because they single out the States and their authorities for discriminatory treatment affecting their legislative and executive functions and impose special disabilities on them which do not apply to other persons having an interest in disseminating "political information": Queensland Electricity Commission esp at 208-210, 217-219, 225-227, 233-236, 247-248, 262; State Chamber of Commerce and Industry v Commonwealth (1987) 163 CLR 329 at 335-336. The onus of justifying any such discrimination rests on the Commonwealth: Queensland Electricity Commission at 235, 240 (Brennan J).

11A. Running through the Commonwealth submissions on this topic are false assumptions that:

(a) a State Government and its agencies will never have a legitimate interest to broadcast a "political advertisement" on its own behalf as a government (Commonwealth para 45.1)

- but see plaintiff's submissions para 9

(b) the concerns of a State Government and its agencies will necessarily reflect and be subservient to those of the party or parties to which the Government members belong

- but . see Commonwealth para 26 re responsible government

. a Ministry may include independent members

(c) a State Government dominated by party X will necessarily wish to support the policies of the same party as a government or prospective government in a federal election or referendum

- but see L F Crisp Australian National Government
5th ed pp50-57

(d) since State Governments and their agencies are distinguishable from political parties (Commonwealth paras 44-45) this justifies the unqualified ban imposed on States by the Act;

(e) discrimination against the State Governments and their agencies is justifiable because of the need to control the activities of others

(f) State Governments and their agencies are not burdened vis-a-vis others, because they are merely denied access to free time additional to that made available to the governing party (Commonwealth para 45.2);

- but the "free-ness" is presently irrelevant: the true comparison is between the position before (universal access) and after (access only to some) the Act. In QEC it was no answer to Queensland to say that only a limited number of persons are employers with industrial problems. A black woman denied access to a maternity hospital on account of race could not be met with the argument that men would not wish to go there

(g) a minor discrimination will not lead to invalidity

- but see QEC at 208-9 (Gibbs CJ)

(h) a federal election campaign may never touch upon issues affecting the interests of a State government that are not covered by the policy launches of the parties involved in that election

- but . a contentious constitutional referendum may
itself be an election issue
. the State Government may have its
independent concerns

12. The discrimination becomes infinitely more burdensome if Division 3 (free time) is invalid and this leads to the invalidity of ss95B(4), 95C(5) and 95D(4). As to inseverability, see below (G).

(D) Freedom of interstate intercourse

13. Reference is made to New South Wales submissions in Nationwide News Pty Ltd v Wills: written submissions paras 2-3; oral submissions pp217-220, 227-232 of transcript of 5.12.91.

13A. The plaintiff's preferred position on s92 is that discrimination against interstate intercourse is essential to invalidity : see qualified adoption of para E7 of Commonwealth submissions in Nationwide News Pty Ltd v Wills in para 3 of New South Wales submissions in that case. If that is accepted by the Court it is conceded that the present Act does not discriminate against interstate intercourse and that s92 is irrelevant.

14. "Political advertising" falls outside "trade and commerce" and thus within the area of "intercourse" within s92 with its "absolute freedom" that is uninfluenced by protectionist concepts, but not infringed by reasonable and proportionate regulation.

15. "Intercourse" includes trans-border communication: Jones v Commonwealth (1936) 55 CLR 1 at 54 (PC); Australian National Airways Pty Ltd v Commonwealth (1945) 71 CLR 29 at 73 (Rich J); Hospital Provident Fund Pty Ltd v Victoria (1953) 87 CLR 1 at 14-15 (Dixon J); McGraw-Hinds (Aust) Pty Ltd v Smith (1979) 144 CLR 633 at

645, 647-648 (Gibbs J), 659 (Mason J), 671 (Aickin J). Legislative control of the airwaves is subject to s92: Miller v TCN Channel Nine Pty Ltd (1986) 161 CLR 556.

16. The challenged provisions do not satisfy the test of being a reasonable and proportionate regulation. The public interest requires the dissemination, not the suppression, of the information whose broadcasting is banned. The very grant of free time shows that the content of the material banned is not in issue. The fundamental importance of free speech in public matters (John Fairfax, Davis, para 2 above) is not outweighed by the concerns about corruption identified by Mr Beazley in his second reading speech: House of Representatives 9 May 1991 pp3477-3483. In any event the regulation is disproportionate for the reasons set out in Part (B) above: Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 426. The Act is also unfair in its allocation of free time in favour of existing parties which operates to entrench them and deter new entrants: cf Canadian Royal Commission on Electoral Reform, Communique No 41 (Commonwealth Materials, 24). It imposes burdens on innocent persons because of a perceived need to prevent the corruption of major political parties.

17. Because, however, s92 gives no protection to intrastate communications (New South Wales submissions in Nationwide para 5), the provisions will only be struck down in their application to broadcasters whose signal crosses a State boundary. Mere networking arrangements are not protected if they involve nothing more than transmission of a signal between capital cities for the purpose of

broadcasting wholly intrastate from the receiving network: see oral submissions in Nationwide at pp231-2.

(E) Implied guarantee of freedom of access to, and criticism of, federal institutions

18. Section 95B(3) and (4) and s95C(4) and (5) are invalid as contravening an implied constitutional right to freedom of communication with the central organs of federal government and in relation to federal electoral and judicial processes: R v Smithers; Ex parte Benson (1913) 16 CLR 99 at 108-111 (Griffith CJ and Barton J); Pioneer Express Pty Ltd v Hotchkiss (1958) 101 CLR 536 at 549-50 (Dixon CJ), 560 (Taylor J), 566 (Menzies J); Miller at 581-2 (Murphy J); OPSEU v Attorney General for Ontario (1988) 41 DLR 1 (4th) at 16; L Zines, Constitutional Change in the Commonwealth (1991) chapter 2.

19. Unlike s92, this right extends intrastate. Otherwise a petitioner or claimant might be denied access to the post to seek federal redress, or a plaintiff prevented access to a federal court to file process in person or by post or facsimile.

(F) Acquisition otherwise than on just terms

20. Before the Act a licensed commercial broadcaster had the right to allocate broadcasting time as it saw fit and for reward. Division 3 of Part IIID now authorises the Tribunal to "grant ... a period of free time" (s95M(1)) giving rise to an obligation in the

broadcaster to "make the unit or units [of free time] available for use in making one or more election broadcasts ... on behalf of the political party, person or group to whom the time is granted" (s95Q(1)). The broadcaster who is "required to make an election broadcast must do so free of charge" (s95Q(5)).

21. The rights conferred on third parties and obligations imposed on broadcasters under the Act do not depend on consent. The 1991 Act speaks in terms of creating rights and obligations. Their enforcement depends upon the power of prosecution (s132) and the administrative procedures available to the Tribunal, on application or its own motion, against a licensee who fails to comply with a licence condition (ss17A(2)(b), 17C(1), 88, 129). The rights will be enforceable by mandamus or mandatory injunction at the suit of interested parties: John Fairfax Ltd v Australian Postal Commission [1977] 1 NSWLR 124; John Fairfax & Sons Ltd v Australian Telecommunications Commission [1977] 1 NSWLR 400.

21A. Discretionary factors associated with these remedies do not preclude the application of the broad protection of s51(xxxi) (cf Commonwealth para 59.1.1) any more than the resumption of an equitable interest in land would go unprotected. Rights protected in equity such as confidential information have a sufficiently "proprietary" nature in this context: Smith Kline & French Laboratories (Aust) Ltd v Secretary (1990) 22 FCR 73 at 120-1 (Gummow J).

22. The relevant constitutional principles are:

- (a) Section 51(xxxi) is to be given a liberal construction appropriate to such a constitutional guarantee: Clunies-Ross v Commonwealth (1984) 155 CLR 193 at 201-2.
- (b) The guarantee extends to the taking of innominate and anomalous interests: Bank of NSW v Commonwealth (1948) 76 CLR 1 at 349; Tasmanian Dam (1983) 158 CLR 1 at 145 (Mason J), 246-7 (Brennan J), 282-3 (Deane J). "Where ... the effect of prohibition or regulation is to confer upon the Commonwealth or another an identifiable and measurable advantage or is akin to applying the property, either totally or partially, for a purpose of the Commonwealth, it is possible that an acquisition for the purposes of s51(xxxi) is involved": Tasmanian Dam at 283 (Deane J).
- (c) The acquisition need not be by the Commonwealth. It is sufficient that there is an acquisition "whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be": Tasmanian Dam at 145-6 (Mason J), 246-7 (Brennan J), 282-3 (Deane J). Contra Murphy J at 181.
- (d) The right acquired by the Commonwealth or its nominee need not be identified with something disposed of by the person from whom the acquisition is made: see passage in the judgment of Deane J quoted in (b) above; Peverill v Health

Insurance Commission (1991) 104 ALR 449 at 458-9 (Burchett J). This is illustrated by the creation and acquisition of an easement whereby the act of the resuming authority destroys a general pre-existing right in the landowner to exclude any entrant, by the very act of creating the different, limited and possibly temporary rights of the owner of the easement.

- (e) To be valid, an acquisition must be "for [a] purpose in respect of which the Parliament has power to make laws": Attorney General v Schmidt (1961) 105 CLR 361 at 372; Clunies-Ross at 200-1.

23. The Act impinges upon the commercial broadcaster's right to use its plant and equipment as it sees fit. That is a right inherent in the property interest itself, and is made all the more valuable by the relative exclusivity conferred by the licensing regime. The licensee's plant is a way for the passage of messages which the Act commandeers for the benefit of specified persons.

24. Quite separately, the Act also curtails the pre-existing right of the broadcaster under its licence to broadcast subject to all existing valid conditions.

24A. The right to use and dispose of property as the owner thinks fit is central to the concept of ownership: South Australia v Commonwealth (1992) High Court, unreported at p14, Deputy Commissioner of Taxation v State Bank of New South Wales (1992) High

Court, unreported at p6. This includes the right to exclude others: Milirrump v Nabalco Pty Ltd (1971) 17 FLR 141 at 272. Those who are granted free time are given an effective right of entry over the plant and the licence. Even if there were no notional entry that would not be fatal because various classes of negative easements conferring no right of entry are still interests in land: Butt Land Law 2d ed p305.

25. A broadcast licence is a form of property, as Kitto J recognised in Television Corporation Ltd v Commonwealth (1964) 109 CLR 59 at 70. It satisfies the test stated by Lord Wilberforce in National Provincial Bank Ltd v Ainsworth [1965] AC 1175 at 1247-8 which was approved by Mason J (Gibbs CJ and Brennan J conc) in R v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327 at 342:

"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."

See also Smith Kline (1990) 22 FCR 73 at 121 (Gummow J).

A commercial radio and television licence is:

- (1) transferable: s89A (although ABT approval is required, this is not critical: Banks v Transport Regulation Board (Vic) (1968) 119 CLR 222 at 229)
- (2) valuable, because it is a limited commodity: s6A(1) and Miller

- (3) revocable only for cause: s88
- (4) in force for a specified period with right of renewal save in specified circumstances: ss86, 86AA, 87(1)
- (5) capable of vesting copyright: Copyright Act 1968 ss87, 91, 99(b).

26. The rights conferred on those granted free time amount to an "identifiable and measurable advantage" and a "material benefit of a proprietary nature" (Tasmanian Dam at 283, 286 per Deane J). Past practice and the purposes identified in the second reading speech show the value of those rights to the broadcaster.

26A. The Commonwealth submission (para 59.1) that s51(xxxi) only protects traditional rights of property is contrary to authority: Minister of Army v Dalziel (1944) 68 CLR 261 esp at 284-6, 290, 295, 301-2. Whilst the public have no interest in a public highway (Municipal District of Concord v Coles (1905) 3 CLR 96) it is inconceivable that resumption for that purpose would be outside the placitum. The licence is the equivalent of a chose in action (cf Dalziel at 290 per Starke J).

27. It is no answer to point to s129 of the Broadcasting Act because:

- (a) A commercial broadcasting licensee is not to be taken to have invited and consented to the unspecified subsequent statutory diminution of its rights, including the acquisition of its plant and equipment otherwise than on just terms, whether or

not a provision such as s129 is in the Act. If such an approach were correct, the Commonwealth could now without impediment amend the Broadcasting Act to acquire compulsorily and without compensation all property of licensees used by them in connexion with their licences. The suggested distinction (Commonwealth para 58.1) between the basic and other rights of the licensee is only relevant as to the amount of compensation.

- (b) The passing of the 1991 Act is not the acceptance by the Commonwealth of any promissory offer by a licensee to amend the terms of its licence: see para 21 above.
- (c) Assuming that the reference to "the provisions of this Act" is to be read as referring to the Act as amended from time to time (cf Ocean Road Motel Pty Ltd v Pacific Acceptance Corporation Limited (1963) 109 CLR 276 at 280), this could only mean as validly amended from time to time. Consent in advance to an unconstitutional law is as irrelevant to its constitutionality as acting on it afterwards before challenging it. A benefit (eg a pension) cannot be granted upon a constitutionally repugnant condition (eg a particular religious observance). In any event, the licensee's consent is irrelevant to a constitutional challenge by New South Wales.
- (d) The reference to "those provisions" in s129 is to "the provisions of this Act ... so far as they are applicable to

the licence": as a matter of interpretation an invalid provision would be inapplicable to the licence.

27A. The Commonwealth submission (para 58.2) that s129 defines the licensee's rights at inception to include the rights as subsequently modified in any way is an attempt to rely on s129 to convert what would otherwise be a compulsory acquisition into a voluntary one. If s129 carried such a construction, it would be an invalid attempt to deem legislation withⁱⁿ power: see Mutual Pools & Staff Pty Ltd v Commissioner of Taxation (1992) per Dawson, Toohey and Gaudron JJ at p18.

28. There would still be an unlawful acquisition in relation to new applicants for commercial licences. If the purpose sought to be achieved by the imposition of a condition could also have been achieved by prohibiting the grant of the licence altogether there might not be an acquisition because the greater might include the lesser (cf Nollan v Cal Coastal Commission (1987) 483 US 825). But in this case prohibiting the grant of a licence would not have achieved the purpose of granting a free right of way over the licensee's property and licence to certain persons.

29. In view of the value to the commercial broadcaster of advertising time, the absence of any compensation is an acquisition otherwise than on just terms.

29A. Contrary to Commonwealth submissions (para 61.1.3), the conferral of a right to "such additional broadcasting time, for the

purpose of broadcasting other material, as is determined in accordance with the regulations" (s95Q(7)) is no substitute for the value of the lost revenue from "political advertising":

- (a) there is no existing limit on broadcasting time and in fact the metropolitan networks in Sydney broadcast all day every day;
- (b) there is no duty to make any regulation;
- (c) there is no duty to give licensees any right to be heard as to the content of any regulation (cf Johnston Fear & Kingham v Commonwealth (1943) 67 CLR 314 at 322-3 (Williams J); Tasmanian Dam at 290 (Deane J));
- (d) there is no duty as to the content of the regulation which would ensure an equivalence for the value of the lost advertising revenue.

29B. In its application to s95D(4), Division 3 is invalid because its purpose (Commonwealth para 19) is not a purpose in respect of which the Commonwealth Parliament has power to make laws in the context of State elections.

(G) Inseverability of invalid provisions

30. Like s6(a) of the Banking Act 1947, s95(2) does not appear to extend the well-established operation of s15A of the Acts

Interpretation Act 1901 (Cth): Bank of New South Wales v Commonwealth (1948) 76 CLR 1 at 371-2 (Dixon J).

31. If Division 3 is invalid, ss95B(4), 95C(5) and 95D(4) cannot stand because they would operate differently: cf Re Tracey; Ex parte Ryan (1989) 166 CLR 518 at 547-8, 577-8, 604; Re Nolan; Ex parte Young (1991) 172 CLR 460 at 485-6, 491. Division 3 is referred to expressly in those provisions and its importance is revealed by the legislative history which shows that, without it, the 1991 Act would not have been passed.

32. If ss95B(4), 95C(5) and 95D(4) are invalid, ss95B(3), 95C(4) and 95D(3) should also be struck down. To leave Governments bound when private advertisers are free would invert the operation of the legislative scheme. According to the second reading speech, the prohibitions extended to incumbent governments in order to deny them an advantage over their opponents.

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erally, it is not, in constitutional countries, to be apprehended, that the government, whether completely responsible to the people or not, will often attempt to control the expression of opinion, except when in doing so it makes itself the organ of the general intolerance of the public. Let us suppose, therefore, that the government is entirely at one with the people, and never thinks of exerting any power of coercion unless in agreement with what it conceives to be their voice. But I deny the right of the people to exercise such coercion, either by themselves or by their government. The power itself is illegitimate. The best government has no more title to it than the worst. It is as noxious, or more noxious, when exerted in accordance with public opinion, than when in opposition to it. If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

It is necessary to consider separately these two hypotheses, each of which has a distinct branch of the argument corresponding to it. We can never be sure that the opinion we are

by raising himself above the law, has placed himself beyond the reach of legal punishment or control, has been accounted by whole nations, and by some of the best and wisest of men, not a crime, but an act of exalted virtue; and that, right or wrong, it is not of the nature of assassination, but of civil war. As such, I hold that the instigation to it, in a specific case, may be a proper subject of punishment, but only if an overt act has followed, and at least a probable connection can be established between the act and the instigation. Even then, it is not a foreign government, but the very government assailed, which alone, in the exercise of self-defense, can legitimately punish attacks directed against its own existence.

endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still.

First: the opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility. Its condemnation may be allowed to rest on this common argument, not the worse for being common.

Unfortunately for the good sense of mankind, the fact of their fallibility is far from carrying the weight in their practical judgment, which is always allowed to it in theory; for while every one well knows himself to be fallible, few think it necessary to take any precautions against their own fallibility, or admit the supposition that any opinion, of which they feel very certain, may be one of the examples of the error to which they acknowledge themselves to be liable. Absolute princes, or others who are accustomed to unlimited deference, usually feel this complete confidence in their own opinions on nearly all subjects. People more happily situated, who sometimes hear their opinions disputed, and are not wholly unused to be set right when they are wrong, place the same unbounded reliance only on such of their opinions as are shared by all who surround them, or to whom they habitually defer: for in proportion to a man's want of confidence in his own solitary judgment, does he usually repose, with implicit trust, on the infallibility of "the world" in general. And the world, to each individual, means the part of it with which he comes in contact; his party, his sect, his church, his class of society: the man may be called, by comparison, almost liberal and large-minded to whom it means anything so comprehensive as his own country or his own age. Nor is his faith in this collective authority at all shaken by his being aware that other ages, countries, sects, churches, classes, and parties have thought, and even now think, the exact reverse. He devolves upon his own world the responsibility of being in the right against the