Langer v The Commonwealth of Australia: The High Court's retreat on the implied guarantee on freedom of communication

Kate Eastman[1]

The *Langer* case[2] raises two interesting issues about the extent to which Australian law protects and respects freedom of expression. First, it raises questions in relation to participation in the political process, in particular as to whether discussion about voting methods, during the course of a federal election campaign, should be protected by the implied constitutional guarantee of freedom of political communication. Secondly, it raises questions in relation to the law of contempt — in particular whether an individual should be gaoled for advocating, what is in effect, her or his political opinion.

This note will address the High Court's decision handed down on 20 February 1996 which considered the scope of the implied constitutional guarantee of freedom of expression and participation in the political process. Albert Langer sought to challenge the constitutional validity of s 329A of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act"). This provision makes it an offence to encourage a voter to vote other than in accordance with the Act. He contended that he was constitutionally entitled to publish material which advocated optional preferential voting without the threat of being imprisoned if he did so.

Background

Following the announcement that a federal election would be held on 2 March 1996, Albert Langer contacted the Australian Electoral Commission ("AEC") and informed the AEC that he intended distributing leaflets advocating his method of optional preferential voting. Two days later he placed an advertisement in *The Australian* and spoke about his campaign on talk-back radio. Acting on this information, the AEC exercised its powers pursuant to s 383 of the Act seeking an injunction to restrain Langer's activities, which the AEC alleged would encourage people to vote in a manner which was contrary to s 240 of the Act.

Section 240 provides:

> In a House of Representatives election a person shall mark his or her vote on the ballot-paper by:

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1 BA LLB LLM; Senior Legal Officer, Human Rights and Equal Opportunity Commission. The views expressed in the article are personal.

2 *Langer* v *The Commonwealth of Australia* (1996) 134 ALR 400. Orders were handed down on 7 February 1996 and reasons were delivered on 20 February 1996.

(a) writing the number one in the square opposite the candidate for whom the person votes as his or her first preference; and

(b) writing the numbers 2,3,4 (and so on as the case requires) in the squares opposite the names of all the remaining candidates so as to indicate the order of the person's preference for them.

The AEC commenced proceedings in the Supreme Court of Victoria. Justice Beach agreed to issue an injunction to prevent Albert Langer distributing the leaflets.[3] Justice Beach found that Albert Langer had an intention to encourage voters to vote contrary to s 240 of the Act and in deciding to grant the injunction, noted:

> If the conduct engaged in by the person in question could be categorised as trivial and unlikely to be repeated a court may well decline to intervene. But that is not the situation in the present case. The defendant, who during the course of the hearing described himself as a revolutionary communist, is seeking by his actions to achieve the result that no candidate for the election will be returned with an absolute majority of votes as required by the Act, and that a supplementary election will need to be held. In that situation, I propose to grant the Commission the relief it seeks.[4]

Immediately after Beach J issued the injunction, Albert Langer held a press conference. At the conference he distributed the offending "How to Vote for Neither" leaflets to the journalists who were present.[5] As a result of these actions, Albert Langer was soon back before Beach J on a charge of contempt.[6] Justice Beach held Albert Langer's actions at the press conference in contempt of court and on 14 February 1996 Langer was sentenced to 10 weeks imprisonment.[7]

Langer was released on 7 March 1996 (after the election) following an appeal to the Full Federal Court.[8] His appeal was dismissed, but the Court varied the sentence imposed by Justice Beach.

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3 *Australian Electoral Commission* v *Albert Langer* (unreported, Supreme Court of Victoria, Proceedings No. 4287 of 1996, Beach J, 8 February 1996). The application was heard on 5-6 February 1996.

4 *Ibid* at 13.

5 A photograph of Albert Langer holding the leaflet and a short article appeared in *The Australian* the following day.

6 The AEC issued a summons on 12 February 1996 seeking a declaration that Albert Langer had breached Justice Beach's orders of 8 February 1996.

7 Unreported judgment of Beach J, 14 February 1996. The matter was heard on the same day.

8 The appeal was heard by the Full Federal Court constituted by Black CJ, Lockhart and Beaumont JJ. The appeal was heard over two days (28 February 1996 and 7 March 1996). The grounds of appeal were threefold; first, that Beach J misconstrued s 240 of the Act, secondly; Beach J erred in his discretion in issuing the injunction and finally an appeal against the order of contempt. The HREOC sought leave to intervene in the appeal and was granted leave by the Court to participate as *amicus curiae* in the proceedings.

The Constitutional challenge

Prior to these events, Albert Langer sought to challenge the constitutional validity of s 329A of the Act. The application was heard by the High Court on 4 October 1995 and its orders handed down on 7 February 1996 in the midst of Albert Langer's tangle with Justice Beach. The reasons for the judgment were not delivered until 20 February 1996.

Section 329A(l) of the Act states:

> (1) A person must not, during the relevant period in relation to a House of Representatives election under this Act, print, publish or distribute, or cause, permit or authorise to be printed, published or distributed, any matter or thing with the intention of encouraging persons voting at the election to fill in a ballot paper otherwise than in accordance with s 240.
>
> A penalty: Imprisonment for six months.
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> (2) In this section: "publish" includes publish by radio or television.

The relevant period is defined in the Act as being from the date upon which the writs are issued up to the close of polling.[9] While s 329A makes it an offence to have an intention to encourage voters to cast their votes in a particular way, it is not an offence for a voter to fill in a ballot paper in a manner which does not comply with s 240. A ballot paper which does not conform with s 240 will not be treated as invalid or informal because of two savings provisions in the Act, namely s 268 and s 270(2).

Albert Langer, who appeared for himself in the High Court proceedings, argued that s 329A was invalid on two grounds. First, that because s 24 of the Constitution requires the members of the House of Representative be chosen by the people, a voter must be free to indicate the candidates which he or she *does not* choose as well as the candidate or candidates which the voter does choose. He contended that a true choice could only be made if the voter was free to complete the ballot paper otherwise than in accordance with s 240. This argument was based on a construction of s 240 which required the voter to complete the ballot paper by filling out all squares starting with the number 1 and continuing to complete the paper using consecutive numbers not repeated — that is 1, 2, 3, 4, 5. Albert Langer advocated a voting method using repeated consecutive numbers thereby voting some of the candidates equal last — that is 1, 2, 3, 3, 3. He argued that s 240 was open to this construction.[10]

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9 Section 322 of the Act.

10 Interestingly, the scope of the injunction issued by Beach J was broader than the words of s 240 of the Act. The additional words were no doubt required to clarify what is not apparent on the face of s 240 of the Act — that is numbering of boxes on the ballot paper must be consecutive and not repeated. The order was in the following terms: *that until 6 pm on 2 March 1996, the defendant, Albert Langer, whether by himself, his servants or agents or howsoever otherwise, be restrained*

In response, the Commonwealth argued that ss 240 and 329A of the Act were valid. It contended that s 329A was a valid law of the Commonwealth pursuant to ss 31 and 51(xxxvi) of the Constitution which empowers the Commonwealth to make laws with respect to elections. It argued that s 240 did not permit optional preferential voting and Langer's construction of s 240 was incorrect.

The second ground of appeal was that s 329A infringed the implied freedom of communication about political matters.[11] Langer did not pursue this ground of appeal at the hearing. However, unlike Albert Langer, the Commonwealth argued the implied freedom of communication issue. It submitted that the implied freedom of communication did not apply to the circumstances presented to the Court or in the alternative that s 329A of the Act was a legitimate restriction to the freedom.

The Commonwealth contended that s 329A did not impose a restriction upon discussion generally nor did it prescribe matters to be discussed. The Commonwealth argued that s 329A was a law directed at the publication of material concerning the process or mechanisms by which voting occurs. In this context, it argued that the Parliament may prohibit conduct which is intended to undermine the operation of the electoral system and the efficacy of the electoral process. It said that the purpose of s 329A was to prohibit political communications which were antithetical to the proper operation of the electoral process.

In the alternative, the Commonwealth argued that if the freedom did apply, then the restriction was reasonable and in the public interest. It contended that because s 329A was geared only to intentional conduct, it was therefore narrowly adapted and appropriate to preserving the integrity of the electoral system.

While the Court considered it appropriate to address the Commonwealth's argument with respect to the implied freedom of communication, it did so without the benefit of full argument because Albert Langer did not pursue the point. It is unfortunate that the Court only had the benefit of the Commonwealth's submissions for the reasons articulated by the former Chief Justice, Sir Anthony Mason — that is:

> The Court should be astute not to accept at face value claims by the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the political process.[12]

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10 — *Continued*
from painting, publishing or distributing or causing to be printed published or distributed, any matter or thing whatsoever with the intention of encouraging persons to vote at the federal election for the House of Representatives on 2 March 1996 by filling a ballot paper otherwise than by: (a) writing the number 1 in the square opposite the name of the candidate for whom the person votes as his or her first preference; and (b) writing the numbers 2, 3, 4 (and so on as the case requires) consecutively without writing any particular number more than once in the squares opposite the names of all the remaining *candidates so as to indicate the orders of the person's preference for them.* (Emphasis added).

11 *Langer* v *The Commonwealth of Australia* (1996) 134 ALR 400 at 403.

12 *Australian Capital Television Pty Ltd* v *Commonwealth* (1992) 177 CLR 106 at 145.

While the appeal was framed as a challenge to the constitutional validity of s 329A not s 240, it became apparent during the course of the hearing that Albert Langer's real concern was with s 240. Accordingly, all the judgments consider the construction of s 240.

The High Court's decision

With the exception of Justice Dawson all the judges of the High Court upheld the validity of s 329A of the Act. On the issue of the implied freedom of political communication, the majority judgments are divided. Justices McHugh and Gummow were of the view that the implied freedom of communication did not apply to the circumstances presented to the Court. On the other hand, Chief Justice Brennan and Justices Toohey and Gaudron appear to accept that s 329A restricts the freedom to engage in political communication but in doing so, found that the restriction was reasonable and appropriate in the circumstances.

Chief Justice Brennan affirmed the Commonwealth's power to prescribe the method of voting House of Representatives as a valid law pursuant to ss 31 and 51(xxxvi) of the Constitution. He then briefly addressed the arguments with respect to the implied freedom of political discussion. He noted that the freedom is essential for the maintenance of the Commonwealth system of representative democracy.[13] Without expressly stating whether he finds that discussion about voting methods or encouraging voters to adopt optional preferential voting is protected by the implied Constitutional guarantee, he emphasised that the freedom was not absolute and may be restricted in certain circumstances. He said:

> . . . if the impedient of the freedom is reasonably capable of being regarded as appropriate and adapted to achieving a legitimate legislative purpose and impairment is merely incidental to the achievement to that purpose and the law is within power.[14]

He considered that s 329A was not an intentional restriction on freedom of political communication and noted that it did not prohibit a person from informing electors of the state of the law; discussing the operation or desirability of the method of voting prescribed by s 240; or discussing advocacy of its amendment or its appeal.[15] In Chief Justice Brennan's view, the purpose of s 329A was to protect the method which the Parliament had selected of the choosing of the members of the House of Representatives, it was therefore an acceptable restriction.

Like Brennan CJ, Justices Toohey and Gaudron concluded that s 329A was valid. With respect to the arguments concerning the implied guarantee of freedom of political expression, they also acknowledge that the freedom of political communi-

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13 *Langer* v *The Commonwealth of Australia* (1996) 134 ALR 400 at 405.
14 *Ibid* at 406.
15 *Ibid* at 406.

cation is an indispensable concomitant of representative democracy. They note that the freedom to communicate is not absolute. They refer to the earlier High Court free speech decisions and state:

> . . . there is nothing in those cases to warrant a conclusion that the freedom operates to strike down laws which curtail freedom of communication where that curtailment is reasonably capable for being viewed as appropriate and adapted to furthering or enhancing the democratic process. And the nature and the source of the freedom are such that, in our view, the freedom does not operate to strike down laws of that kind, although it will not often be the case that a law which curtails freedom of political discussion will be capable of being viewed as appropriate and adapted to furthering or enhancing the democratic system. Perhaps it could only be said *of* laws that regulate the conduct of person in connection with elections, as for example, laws that "prevent intimidation or undue influence".[16]

Their Honours state that s 329A was a law designed to enhance the democratic process and the ability of voters to participate, therefore it was an appropriate and adapted law to curtail political discussion. They concluded that s 329A was confined to conduct that was intended to encourage non compliance with s 240 and it was not concerned with conduct that is only intended to inform;[17] providing information as to the circumstances in which a ballot paper will be formal or the manner in which votes were to be counted; and informing voters of consequences of expressing a preference for each candidate.

Justice McHugh's view about the implied guarantee argument is clear. His judgment with respect to the free speech arguments is brief. He applauded Albert Langer for abandoning the argument.[18] He did not consider that s 329A breaches any right of freedom of discussion or communication. He stated:

> Section 329A prevents political discussion or advocacy only when it is done with the intention of encouraging voters to disregard lawful directions that are fundamental to a system of compulsory preferential voting.[19]

Justice McHugh asserted that there was a world of difference between prohibiting advocacy that is put forward with the intention of encouraging breaches of statutory directions and prohibition of advocacy that criticises or calls for its repeal.[20] In the same decision, Justice Dawson thought there was only a thin line between the two.[21]

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16 *Ibid* at 419.
17 *Ibid* at 415.
18 *Ibid* at 423.
19 *Ibid* at 423.
20 *Ibid* at 427.
21 *Ibid* at 420, Dawson J states: "If there is a line between imparting information with the intention to encourage and with an intention to inform it must be a thin one."

On the issue of the implied guarantee, Justice Gummow also concluded that the implied freedom did not apply to the situation presented to the Court. He did not think that s 329A imposed any restriction upon political discussion generally or upon discussion as to the suitability or disadvantages in the voting system.[22] Unlike either Justice McHugh who took the view that the freedom of political communication was not in issue, or the other judges who concluded that there was an acceptable restriction on the freedom, Justice Gummow seems to rely on a threshold test when assessing whether the implied freedom applies. He stated:

> The implied guarantee has been formulated in the authorities in aid of representative government. It does not facilitate or protect that which is intended to weaken or deplete an essential component of the system of representative government. It cannot be inimical to representative government to forbid intentional conduct comprising advocacy of the casting of a vote in such a way as may be an ineffective exercise of the franchishe.[23]

It could be said that on Justice Gummow's reasoning, political communication will only be protected if it advocates the *status quo*. Advocacy of radical political change will not be protected. Likewise, advocacy of peaceful and less radical methods which does not advocate the *status quo* — namely using a different method of voting which was not specifically unlawful under the present Act, may not be protected. It is difficult to see how his Honour could conclude that the proposed voting method advocated by Albert Langer would in fact weaken or deplete the present system when viewed in the context of the operation of the Act as a whole. A vote cast in the manner advocated by Langer would not be ineffective because of the specific savings provisions in the Act.

It is also clear from the Court's decision in *McGinty* v *The State of Western Australia*[24] that what constitutes representative democracy is an uncertain concept when viewed in the context of the Constitution. The Court's decision in *McGinty* was handed down on the same day as the *Langer* decision.

The only dissenting judgment was delivered by Justice Dawson. He reviewed the circumstances surrounding the enactment of s 329A and the Commonwealth's powers to legislate pursuant to ss 31 and 51 (xxxvi) of the Constitution. He concluded that s 329A of the Act was invalid because it was a provision "which is designed to keep from voters information which is required by them to enable them to exercise an informed choice."[25] He considers that s 329A was beyond the legislative power of the Commonwealth with regard to the demands of s 24 and the Commonwealth's power pursuant to ss 31 and 51(xxxvi).

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22 *Ibid* at 431.
23 *Ibid* at 431.
24 (1996) 134 CLR 289.
25 *Ibid* at 411.

The second ground of invalidity was that s 329A infringes the implied guarantee of political communication. While Justice Dawson says that he was able to reach his conclusion without reliance on the reasoning of the majority with a regard to freedom of communication in previous cases, he stated:

> With the greatest of respect, that reasoning does not, as I have indicated commend itself to me. But upon that reasoning the constitution guarantees freedom of political discussion. I must confess that I am unable to see how political discussion can be confined to the mere imparting of information and why its not extended to the furnishing of information with the intention that it should be used. Indeed exhortation or encouragement of electors to adopt a particular course in an election is of the very essence of political discussion and it would seem to be that upon the view adopted by the majority in earlier cases, s 329A must infringe the guarantee which they discern.[26]

How free is the implied freedom of communication?

The Court's judgment in the *Langer* case is a retreat from the earlier free speech cases,[27] even though their Honours reiterate the importance of the guarantee of political communication. As the former Chief Justice of the High Court, Sir Anthony Mason has stated:

> The raison d'être 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.[28]

Freedom of expression and participation in the democratic process are fundamental human rights, recognised in all the major international[29] and regional[30] human rights instruments. The importance of these rights has been affirmed in the decisions of the courts of many jurisdictions.[31] One of the major purposes of securing the right

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26 *Ibid* at 412.

27 *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1, *Australian Capital Television Pty Ltd* v *Commonwealth* (1992) 177 CLR 106, *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104, *Stephens* v *West Australian Newspaper Ltd* (1994) 182 CLR 211.

28 Mason CJ in *Australian Capital Television Pty Ltd* v *Commonwealth* (1992) 177 CLR 106 at 145.

29 *Universal Declaration of Human Rights* -articles 19 and 21, *International; Covenant on Civil and Political Rights* - articles 19 and 25, *Convention on the Elimination of All Forms of Racial Discrimination (CERD)* - articles 2(a) and 5(i)(a) (viii), *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* - articles 2, 3 and 7, *Convention on the Political Rights of Women*. See also, *United Nations Human Rights and Elections*, Centre for Human Rights, Geneva 1994.

30 *European Convention on Human Rights and Fundamental Freedoms* - Article 10, and Protocol 1, Article 3, *Inter-American Convention on Human Rights* -articles 13 and 23, *African Charter of Human and Peoples Rights* - article 13.

31 Many of these decisions are referred to in the judgment of Mason CJ in *Australian Capital*

of freedom of expression is to promote open discussion of political matters and governmental affairs.

Even though Australia is a party to these international instruments, the internationally recognised rights do not have direct effect in Australian law. Australia does not have a bill of rights and the common law is inadequate to ensure freedom of speech is protected. The only real protection is the implied constitutional freedom of political communication.[32] In this case, the Court rejected the proposition that a threat of being imprisoned for disseminating information about voting methods and encouraging people to vote in a particular manner was capable of protection. The Commonwealth law which restricted this type of political communication was a valid law.

What is most disappointing about the judgment is the Court's reasoning as to why s 329A is a permissible restriction to the implied guarantee and its failure to subject s 329A to the standards established in the earlier decisions.[33] In *Australian Capital Television*, Mason CJ suggested that the starting point for restricting communication should be to categorise the nature of the communication.[34] He drew a distinction between restrictions on communication which target ideas or information and those restrictions which restrict an activity or mode of communication by which ideas or information are transmitted.[35] He considered that measures restricting communications which convey ideas or information should be based only by compelling justifications. Further that the restriction must be no more than reasonably necessary. There must be a balance between the competing public interests with great

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Television Pty Ltd v *Commonwealth* (1992) 177 CLR 106 at 140. See Kentridge S "Freedom of Speech: Is it the Primary Right" (1996) 45 ICLQ 253 and Article 19 *The Article 19 Freedom of Expression Handbook*, Article 19, London 1993 for a comprehensive overview of the jurisprudence of national courts. Canadian decisions - *Re Alberta Legislation* [1938] 2 DLR 81 at 107-108, 119-210, *Switzman* v *Ebbing* (1957) 7 DLR (2d) 337 at 357-359, *Retail, Wholesale & Dept Store Union Loc 580* v *Dolphin Delivery Ltd* (1986) 33 DLR (4th) 174 at 183-187, the United States - *Palko* v *Connecticut* (1937) 302 US 319, *Whitney* v *California* (1927) 274 US 357, *Thornhill* v *Alabama* (1940) 310 US 88 *Mills v Alabama* (1966) 384 US 214 at 218, *Buckley* v *Valeo* (1975) 424 US 1 at 14-15, *First National Bank of Boston* v *Bellotti* (1977) 435 US 765 at 776-777, European Court of Human Rights - *Lingens* v *Austria* (1986) 8 EHRR 407, *Mathiue-Mohin and Cllerfayt* v *Belgium* (1985) Series A No. 113, *Lindsay* v *United Kingdom* (1979) 15 D&R 247 and *X* v *United Kingdom* (1977) 7 D&R 95, India - the Supreme Court of India - *Sakal Papers Ltd* v *Union of India* AIR [1962] SC 305, Israel - *Kol Ha'am Company & Al-Ittihad Newspaper* v *Minister for the Interior* High Court 73/53 in Selected Judgments of the Israeli Supreme Court Vol.1 (1948 - 53) at 90.

32 *Nationwide News Pty Ltd* v *Wills* (1992) 177 CLR 1, *Autralian Capital Television Pty Ltd* v *Commonwealth* (1992) 177 CLR 106, *Theophanous* v *Herald & Weekly Times Ltd* (1994) 182 CLR 104, *Stephens* v *West Australian Newspapers Ltd* (1994) 182 CLR 211.

33 *Nationwide News* v *Wills* (1992) 177 CLR 1 at 50-53 per Brennan J, Deane & Toohey JJ at 79 and Gaudron J at 94-95; *Australian Capital Television Pty Ltd* v *The Commonwealth* (1992) 177 CLR 106 per Mason CJ at 142-144; *Theophanous* v *Herald & Weekly Times* (1994) 182 CLR 104, *Cunliffe* v *The Commonwealth* (1994) 182 CLR 272.

34 *Australian Capital Television Pty Ltd* v *Commonwealth* (1992) 177 CLR 106 at 143.

35 *Ibid.*

weight accorded to the right of free communication.[36] With respect to restrictions which touch upon the manner in which ideas are to be communicated, Justice Mason thought that such restrictions which affect the mode or activity of communicating ideas do not require the same compelling justification. He said that the court must weigh competing public interests and assess what the restriction is designed to service and whether it is reasonably necessary to achieve the competing public interests.[37] The burden of the restriction must not be disproportionate to ends sought to be achieve.

If this reasoning is applied to the *Langer* case, then it is clear that s 329A is a provision which has the effect to restrict the communication of ideas and information. It falls within the first category. It is therefore a restriction which should only be permitted if there is a compelling justification. In neither the Commonwealth's submissions nor in the majority judgments is there any reference to s 329A being a provision which satisfies a compelling justification. There is no real consideration as to whether it is appropriate and reasonable to prescribe imprisonment as a punishment for breach of s 329A. The Court did not consider whether the same restriction could be achieved by imposing a less severe penalty such as a fine etc. Nor did the Court consider the operation of s 329A in the context of the AEC's powers generally and its particular powers to administer the Act during the time of an election. As Albert Langer was to later find, s 383 of the Act was, and perhaps is, a more effective means to restricting political communication than s 329A.

In determining whether the restriction is based upon a compelling justification, the breath of the restriction is a relevant consideration.[38] If one looks to the international human rights instruments for guidance as to how and when a restriction can be convincingly established, the authorities suggest that any restriction on the exercise of fundamental human rights must be interpreted narrowly[39] and in a manner which is consistent with respect for other fundamental human rights, such as the right to participate in public affairs.[40] Using the international standards, to be a "necessary" restriction, it must be more than merely reasonable or desirable.[41]

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36 *Ibid.*

37 *Ibid.*

38 The issue of determining the scope of a restriction is a matter which the commissions and court administering the international instruments devote condiderable attention. See for example *Observer and the Guardian* v *United Kingdom* (1991) 14 EHRR 153 at para 59(c) and see also *Bond* v *Floyd* 394 US 705 (1969).

39 *Handyside* v *United Kingdom* 1 EHRR 737, *Sunday Times* v *United Kingdom* 2 EHRR 245, *Lingens* v *Austria* (1986) 8 EHRR 103, *Home Office* v *Harman* [1983] AC 280, 312 or [1982] 1 All ER 532.

40 *Hector* v *Attorney-General of Antigua and Barbuda* [1990] 12 AC 312 at 315 (PC).

41 *Commonwealth* v *John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52 per Mason J, see also *Gouriet* v *Union of Post Office Workers* [1978] AC 435 and *Home Office* v *Harman* [1983] AC 280, 312 or [1982] 1 All ER 532, *Handyside* v *United Kingdom* 1 EHRR 153, *Sunday Times* v *United Kingdom* 2 EHRR 245, *Observer and the Guardian* v *United Kingdom* (1991) 14 EHRR153, *Open Door Counselling and Dublin Well Woman* v *Ireland* (1993) 15 EHRR 244, *Castells* v *Spain* (1992) 14 EHRR 445 Article 19(3) of the ICCPR - states: The exercise of the rights provided for in paragraph 2 of this article carried with it special duties and responsibilities. It may therefore be subject to certain

In the *Langer* case, the Commonwealth did not demonstrate a compelling — that is a pressing social need — to restrain political communications pursuant to s 329A. It is not enough to assert that communications which are antithetical to the present system should be suppressed. Whether or not ideas or conduct is "antithetical" is not enough. Even in earlier cases where the Court considered the extent to which the Commonwealth could regulate conduct in an election campaign, the test was whether the conduct constituted intimidation or undue influence.[42] It was not the content of the communication or the intended actions that were restrained; rather such conduct would only be curtailed if it posed a threat to another.

Not all political communication will be protected

Another consequence of the *Langer* decision is that not all political communications will be protected. While the Court was initially cautious about declaring or implying a guarantee, once found, the Court was unequivocal about the importance of freedom of communication as a means of preserving an effective representative democracy. The Court declared that the range of matters which constituted matters for political discussion were broad and not subject to subdivision.[43] Where once Justice Brennan stated:

> "it is of the essence of a free and mature nation that minorities are entitled to equality in the enjoyment of human rights. Minorities are thus entitled to freedom in the peaceful expression of dissenting views . . ."[44]

it now seems that the matters which may be protected are limited to those which advocate the maintenance of the *status quo*. Dissenting views are vulnerable. As PP McGuiness commented in an article published after the High Court's decision was handed down, "advocates of anarchism, communism and abolitionist monarchism will no longer gain protection from the implied guarantee."[45] The application of Justice Gummow's reasoning suggests that the range of matters which may be protected are capable to sub-division. That sub-division is not based on whether the political views are to be communicated through peaceful or violent means, but whether or not the communication has the intention of weakening the existing system. Political communications which advocate radical political change would not protected.

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restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public (ordre public), or of public health or morals.

42 *Smith* v *Oldham* (1912) 15 CLR 355 at 358-359, also referred to in the judgment of Mason CJ in *Australian Capital Television Pty Ltd* v *Commonwealth* (1992) 177 CLR at 142.

43 *Australian Capital Television Pty Ltd* v *Commonwealth* (1992) 177 CLR 106.

44 *Davis* v *Commonwealth* (1988) 63 ALJR 35.

45 McGuiness PP, "Perfectly free to keep our mouths shut" *The Age* 21 February 1996.

The events concerning Albert Langer in February this year illustrate the dangers of using this approach to determine whether the implied constitutional freedom will apply. It is clear from the judgment of Justice Beach that Langer's description of himself as a revolutionary communist weighed as a factor in deciding to curtail Albert Langer's political activities. There was no issue that Langer's campaign would be violent or that he would exert undue influence or intimidate voters. For Justice Beach it was Langer's political convictions together with the intended effect of his actions, rather than his actual conduct which justified a restriction of his right to express his political views.

How relevant is the intention of the Legislature?

It seems that the Commonwealth was successful in the *Langer* case because it persuaded the Court that it was not the Parliament's intention to restrict political communications when enacting s 329A. The Court seemed to accept the Commonwealth's submission as to the intention of Parliament as a complete answer. It did not subject the Commonwealth's submissions to the scrutiny which Chief Justice Mason recommended in the earlier cases.[46]

The intention of the Parliament is a one relevant factor in assessing whether the enactment is within power. It is only the first step in the process and the purpose of examining the Parliament's intention is to determine whether the law has the objective of enhancing the democratic process. On the reasoning of the earlier decisions, if a law which impairs political communication is not intended to enhance the democratic process, it is not a law within power and should be declared invalid. The Court would not need to proceed to assess whether it is appropriately adapted or reasonable.

If it is accepted that the objective of the legislation is to enhance the democratic purpose, the next step must be whether the law has that effect. In the *Langer* case, the Court's focus is narrow and it only examined the Commonwealth's purpose in enacting s 329A. The majority judgments do not consider the wider effect or s 329A and its likely practical operation, not only for the individual threatened with imprisonment but also voters seeking information. In concluding that s 329A is a legitimate restriction, their Honours list a series of activities which they say s 329A is not intended to affect. However, they do not seem to consider in a practical sense whether s 329A would have the effect of impairing these activities. As Justice Dawson noted there is a fine line between encouraging and informing voters. This is particularly so in the context of an election campaign.[47] This approach is in contrast to the approach adopted by the Court in the *Australian Capital Television* case where

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46 *Australian Capital Television Pty Ltd* v *Commonwealth* (1992) 177 CLR 106 at 144.

47 In the earlier decisions, Gaudron J stressed the importance of freedom of communication during an election campaign - *Australian Capital Television Pty Ltd* v *Commonwealth* 177 CLR 212. As s 329A only has operative effect during the course of an election, it is arguable that it is all the more important to assess whether s 329A was appropriate and in the public interest.

there was consideration of the effects and broader ramifications of the law which would prohibit political advertising.[48]

The future for freedom of political communication

The Court's retreat from the standards established in the earlier free speech cases may open the door to those standards being bypassed in other cases — either because the Commonwealth will argue that the conduct sought to be prohibited is antithetical to the operation of representative government or because the Commonwealth did not have an intention to restrict freedom of communication. If this is so, then the implied constitutional guarantee of political communication will have limited effect and be a somewhat hollow protection.

In the absence of a bill of rights, the right of freedom of expression in Australia is not secure. The *Langer* decision does not provide any comfort that the implied constitutional guarantee is the comprehensive protection for political communications which Australians had hoped. As far as individual redress for breach of these rights, it can be said that there are no effective remedies in Australian law. It therefore remains open to Albert Langer to consider seeking redress in an international forum. He could petition the United Nations Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights. He has exhausted all available local remedies and if minded could ask the Human Rights Committee to determine whether the actions to prevent him distributing leaflets are contrary to articles 19 and 25 of the *International Convention on Civil and Political Rights*.

Perhaps the irony of the *Langer* case and his imprisonment is that his ideas received more attention and his message was more widely spread by the litigation, than Albert Langer would have ever achieved by walking the streets of Melbourne handing out pamphlets. It was estimated that 45,000 voters elected to vote using an optional preferential voting method at the last election.[49]

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48 *Australian Capital Television Pty Ltd* v *Commonwealth* (1992) 177 CLR 106 at 130, 132 per Mason CJ, at 160 per Brennan J and at 174 per Deane and Toohey JJ.

49 Comment made by Albert Langer during the course of the appeal before the Full Federal Court on 7 March 1996.