CASE NOTE: *LANGE, LEVY* AND THE DIRECTION OF THE FREEDOM OF POLITICAL COMMUNICATION UNDER THE AUSTRALIAN CONSTITUTION

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I. INTRODUCTION

In 1994, with the High Court's decisions in *Theophanous v Herald and Weekly Times*[1] and *Stephens v West Australian Newspapers,*[2] the freedom of political communication[3] reached what may turn out to have been its high watermark. The High Court, influenced by the United States Supreme Court's decision in *New York Times v Sullivan,*[4] held that the freedom of political communication limited the capacity of a public official or candidate for public office to bring an action for defamation. However, these cases were unusually short lived and although the freedom of political communication was not abandoned, the doctrine was considerably reformulated in *Lange v Australian Broadcasting Commission.*[5] The new approach to the freedom, formulated in

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1 (1994) 182 CLR 104. (Hereafter referred to as *Theophanous*).

2 (1994) 182 CLR 211. (Hereafter referred to as *Stephens*).

3 First recognised in *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106 and *Nationwide News v Wills* (1992) 177 CLR 1.

4 376 US 254 (1964).

5 (1997) 145 ALR 96.

Lange, was also applied in *Levy v The State of Victoria*,[6] a case argued at the same time as *Lange* but handed down some three weeks later. Together, these cases represent a new direction in the interpretation of the freedom of political communication and raise a number of complex issues which face the High Court as it develops constitutional freedom of expression. This note considers those cases and the state in which they leave the freedom of political communication.

II. *LANGE v AUSTRALIAN BROADCASTING CORPORATION*

A. Background - *Theophanous* and *Stephens*

In *Theophanous* and its companion case *Stephens*, the High Court held, by a majority, that the implied freedom of political communication had a similar effect to the rule in *New York Times v Sullivan*.[7] In that case, the Supreme Court of the United States held that the protection of freedom of speech under the First Amendment to the Constitution of the United States precluded a public official from making a claim for a false defamatory statement unless the plaintiff could show that the statement was made with "actual malice". This would require a demonstration that the defendant acted with knowledge that the statement was false, or with reckless disregard to its truth.[8]

Theophanous and *Stephens* marked a substantial adoption of this American approach. The High Court held that the freedom of political communication guaranteed by the Australian Constitution also limited the capacity of public officials to make a claim for defamation in response to a false defamatory statement. However, the adoption of the American position is not complete. In *Theophanous*, which contains the bulk of the High Court's discussion of the freedom of political communication,[9] the majority modified the *New York Times* rule in response to criticism of that rule.[10] The principal majority judgment consisted of the joint judgment of Mason CJ, Toohey and Gaudron JJ. The

6 (1997) 146 ALR 248.

7 Note 4 *supra*.

8 *Ibid* at 279-80.

9 In *Stephens*, the High Court addressed the additional question of how the freedom of political communication affected discussion of the political matters of a state, and whether a similar implication could be found in the Constitution of the State of Western Australia. Note 2 *supra* at 232-4 per Mason CJ, Toohey and Gaudron JJ; at 257 per Justice Deane.

10 For a summary of this criticism see, New South Wales Law Reform Commission, Discussion No 32, *Defamation*, 1993, [10.28]. Chief Justice Mason, Toohey and Gaudron JJ, modified the *New York Times* rule in two ways. First, they added a requirement that the publication be "reasonable in all the circumstances". Therefore, under the Australian rule, an action cannot be brought by a public official or candidate for public office for publication of false material if: (1) the defendant is unaware of the falsity and not reckless with regard to its truth (the *New York Times* standard) and (2) the publication was reasonable in all the circumstances; note 1 *supra* at 137. Second, they reversed the onus of proof. Under *New York Times*, the plaintiff must establish "actual malice" with "convincing clarity". Under *Theophanous*, the defendant must establish the requirements of the test; note 1 *supra* at 137.

fourth member of the majority, Deane J, formulated a slightly different rule,[11] but indicated his support of the result reached by the other members of the majority.[12]

Three judges, Brennan, Dawson and McHugh JJ, dissented on the basis that the freedom of political communication had no effect on the law of defamation. However, Brennan and McHugh JJ gave substantial attention to the common law of qualified privilege which had been advanced as an alternative ground by the defendants in each case. In its traditional form, the defence of qualified privilege had excluded publications to the world at large, such as those in newspapers or broadcasts.[13] This exclusion followed from the requirement that the defendant show that he or she had a duty to disclose the information and that the recipient had a corresponding interest in receiving it.[14] Under the traditional law, publication to the 'world at large' was excluded because it was considered that the general public did not have a legitimate interest in most information, even if it concerned a matter in which the public was interested.[15] A newspaper publication was therefore generally not privileged, because it would usually carry a communication beyond those who have a legitimate interest in it.[16]

Despite their reluctance to extend constitutional protection of political discussion, both Brennan and McHugh JJ extended the common law of qualified privilege to give greater protection to political discussion.[17] Although their judgments differ in detail, both recognised that the general public had an interest in the discussion of public matters which protected the publication of some defamatory matter.[18]

B. Facts and the Arguments

Soon after the decisions in *Theophanous* and *Stephens*, two members of the majority, Mason CJ and Deane J, retired. Moreover, one of the new appointees, Gummow J, appeared to support the view of the minority in those cases.

11 Justice Deane would have granted *absolute* protection from defamation action, at least in relation to statements about, or comment upon, those entrusted with the exercise of the power of government and those responsible for the conduct of the press and other media outlets; note 1 *supra* at 184, 188.

12 *Theophanous*, note 1 *supra* at 188; *Stephens*, note 2 *supra* at 257.

13 The classic statement of the defence of qualified privilege is that of Parke B in *Toogood v Spyring* (1834) 149 ER 1049 at 1050.

14 *Ibid; Adam v Ward* [1917] AC 309 at 334.

15 *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 502 at 513.

16 *Morosi v Mirror Newspapers* [1977] 2 NSWLR 749.

17 *Stephens*, note 2 *supra* at 251 per Brennan J; at 265 per Justice McHugh.

18 Justices Brennan and McHugh both envisage an extension of the traditional category of public interest to include matters relating to government and the conduct of public affairs: (1994) 182 CLR 211 at 251 (per Brennan J); at 265 (per McHugh J). Further, both Justices placed emphasis on the status of the maker of the communication. For Brennan J, the maker of the communication must have "particular knowledge" of the subject matter, though it will be sufficient if the publisher had a reasonable belief that person has such knowledge; see note 2 *supra* at 252. For McHugh J, the maker of the communication must have "special knowledge"; see note 2 *supra* at 265. The principal differences are that McHugh J extends the privilege to false statements of fact and comment based on them, though not to bare defamatory comment whereas Brennan J would require the statement to be "fair and accurate"; see note 2 *supra* at 267; and Brennan J would require that the subject of the communication have a reasonable opportunity for response; see note 2 *supra* at 252.

Majority support for *Theophanous* and *Stephens*, therefore, appeared to have been lost.[19] The opportunity to reconsider these controversial cases arose when David Lange, the former Prime Minister of New Zealand, brought an action for defamation against the Australian Broadcasting Corporation (ABC) in respect of reports in Australia regarding his Prime Ministership.[20] The ABC claimed that the publication was protected by the freedom guaranteed by the Commonwealth Constitution to publish material concerning government and political matters and, in particular, by the *Theophanous* rule.[21] The ABC also pleaded a defence of common law qualified privilege.[22] On behalf of Mr Lange, it was claimed that the publications were not protected by the freedom of political communication since they concerned discussion of New Zealand, rather than Australian, government and political matters. Further, it was argued that *Theophanous* and *Stephens* were wrongly decided and should be overruled.[23] The case was removed to the High Court and a case stated, raising the validity of the constitutional defence and the application of the law of qualified privilege to these facts.[24]

C. The Decision

The Court responded to these arguments with a rare unanimous judgment. It upheld the existence of a constitutional freedom of political communication and its operation on the law of defamation. It also effected an extension of the common law similar to that effected by Brennan and McHugh JJ in *Stephens*. However, it abandoned the majority's formulation of the constitutional test in *Theophanous*, holding that the constitutional defence, as pleaded by the ABC, was bad in law.

(i) Reconsidering a Previous Decision

As the Court was asked to overturn *Theophanous* and *Stephens*, its first task was to determine their status. The High Court has long recognised the power to overturn its previous decisions[25] and the High Court confirmed that position in this case. Indeed, it noted the particular importance of this power in the face of constitutional decisions which cannot be revised by the legislature.[26]

However, rather than exercising the power to overturn a previous decision, in this case, the High Court held that the particular rule enunciated in *Theophanous* and *Stephens* was not binding on the Court because of the division among the members of the majority. The Court held that: "*Theophanous* and *Stephens* do

19 See *McGinty v Western Australia* (1995) 186 CLR 140 at 235-6 per McHugh J; at 291 per Justice Gummow. Also see the comments of Dawson J during the hearings in *Levy v Victoria*: Transcript, 6 August 1996, p 40.

20 Note 5 *supra* at 99.

21 *Ibid.*

22 *Ibid.*

23 *Ibid* at 100.

24 *Ibid* at 98, 119-20.

25 See *Baker v Campbell* (1983) 153 CLR 52 at 102; *Damajonvic & Sons Pty Ltd v The Commonwealth*, (1968) 117 CLR 390 at 395-6; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 610.

26 Note 5 *supra* at 101-2.

not have the same authority which they would have if Deane J had agreed with the reasoning of Mason CJ, Toohey and Gaudron JJ in each case".[27] It therefore confined the authority of the case to two propositions: firstly, "that in Australia the common law rules of defamation must conform to the requirements of the Constitution". Secondly, that:

> ... at least by 1992, the constitutional implication precluded an unqualified application in Australia of the English common law in so far as it continued to provide no defence for the mistaken publication of defamatory matter concerning government and political matters to a wide audience.[28]

These basic propositions aside, the Court proceeded to consider the operation of the freedom of political communication and the law of defamation "as a matter of principle and not of authority".[29]

(ii) The Common Law and the Constitution

The first significant feature of *Lange* is that the High Court gave some detailed consideration to the relationship between the common law and the Constitution. In *Theophanous*, the principal majority judgment was rather brief on this point. Chief Justice Mason, Toohey and Gaudron JJ rejected the notion that, because it was a pre-existing system, the common law was unchanged by the Constitution and stated:

> It is ... clear that the implied freedom is one that shapes and controls the common law. At the very least, development in the common law must accord with its content. And though it may not have been apparent ... prior to the decisions in *Nationwide News* and *Australian Capital Television*, if the content of the freedom so required, the common law must be taken to have adapted to it.[30]

Justice Deane considered the matter in more detail. He argued that state laws were subject to the Constitution, relying on covering clause V which provides that the Constitution "shall be binding on the courts, judges and people of every State" and on ss 106 and 108 which provide for the continuation of state laws "subject to this Constitution".[31] He concluded that the implication of freedom of political communication applied to state laws "statutory or inherited", thus apparently including the common law.

In *Lange,* however, a different explanation emerged. First, the High Court took the view, as Brennan J had in his *Theophanous* dissent, that the Constitution was primarily addressed to legislative and executive action.[32] This would appear to preclude a rule of the kind enunciated in *Theophanous* which provided a constitutional defence to a common law claim. Despite this, the common law

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27 *Ibid* at 103.

28 *Ibid.*

29 *Ibid.*

30 Note 1 *supra* at 126.

31 *Ibid* at 164-5. His Honour notes also that to exclude the common law from constitutional scrutiny would allow courts to undermine the freedom of political communication through development of the common law. For example, it is conceivable that the common law could make actionable a statement which relates to the core of the constitutional freedom, such as a comment about the suitability for office of the Prime Minister. See, K Greenawalt, *Fighting Words* (1995), p 15. As Professor Greenawalt notes, this problem is mitigated if the common law is developed in accordance with constitutional values.

32 Note 5 *supra* at 107, 108. See also, *Theophanous*, note 1 *supra* at 153 (Brennan J dissenting).

does not escape constitutional scrutiny. The High Court held that "the Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form 'one system of jurisprudence'".[33] Further, it held that "[w]ithin that single system, the basic law of the Constitution provides the authority for the enactment of valid statute law and may have effect on the content of the common law."[34] Thus, despite its view that the Constitution was addressed to legislative and executive action, the Court held that the common law must conform to the Constitution. Consequently, although it departed from the constitutional defence enunciated in *Theophanous*, as we shall see, the Court altered the common law to conform to constitutional requirements.[35]

(iii) The Freedom of Political Communication

Despite preserving some parts of *Theophanous*, the High Court's approach to the constitutional basis and nature of the freedom of political communication in *Lange* signals a somewhat more conservative mood in the Court. It held, as some members of the Court had previously argued,[36] that the content of implication was to be construed only by reference to constitutional text and structure:

> [T]he Constitution gives effect to the institution of 'representative government' only to the extent that the text and structure of the Constitution establish it ... the relevant question is not, 'What is required by representative and responsible government?' It is, 'What do the terms and structure of the Constitution prohibit, authorise or require?'.[37]

The Court, therefore, began its consideration of the implied freedom of political communication with the text of the Constitution.[38] At the heart of the Court's analysis are ss 7 and 24 which require that the members of the Senate and the House of Representatives be "directly chosen by the people" of each State and of the Commonwealth respectively. The High Court held that the sections "read in context, require the members of the Senate and the House of Representatives to be directly chosen at periodic elections by the people"[39] and required that communication "which enables the people to exercise a free and informed choice as electors" cannot be restricted.[40] Other elements of representative government are found in the provisions that set out the

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33 Note 5 *supra* at 109.

34 *Ibid.*

35 See notes 55-66 *infra* and accompanying text.

36 This was the basis of Justice McHugh's dissent in *Theophanous;* note 1 *supra* at 199, 205. See also, *McGinty v Western Australian Newspapers*, note 19 *supra* at 169.

37 Note 5 *supra* at 112.

38 *Ibid* at 104.

39 *Ibid.* The High Court relied on s 1 (vesting the power of the Commonwealth in the Parliament); s 8 and s 30 (electors for the Senate and the House of Representatives to vote only once); s 25 (persons of any race disqualified from voting at elections not be counted in determining electorates under s 24); s 28 (duration of the House of Representatives); s 13 (six years to be the longest term served by a Senator) and s 28 (the House of Representatives to continue for no longer than three years).

40 *Ibid* at 106-7.

relationship between the Executive and the Parliament, in particular those which provide for a system of responsible ministerial government.[41] These:

> necessarily imply a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal Parliament.[42]

Finally, s 128, the provision for amendment by popular referendum requires the protection of information "that might be relevant to the vote [electors] pass in a referendum to amend the Constitution".[43]

(iv) The Test for Constitutionality

Perhaps most significantly for the future of the freedom of political communication, the Court also announced a test to govern its application. This was significant because, although the High Court had made it clear from the beginning that the freedom of political communication was not absolute,[44] several different approaches to determining the validity of regulation had been advanced.

According to one approach, the test for the validity of legislation varied according to the nature of the regulation. In *Australian Capital Television*, Mason CJ and McHugh J drew a distinction between "restrictions on communication which target ideas or information and those which restrict an activity or mode of communication by which ideas or information are transmitted".[45] In the first category, regulation would require a "compelling justification".[46] In the second category, that is the case of regulation directed only at the activity of communication, constitutionality would depend on whether the burden on free communication is disproportionate to the attainment of the competing public interest.[47] A similar 'two tiered' standard was articulated by Justices Deane and Toohey.[48]

In contrast to this approach, Brennan J articulated a single requirement which was similar to the lower of the two requirements enunciated by the other Justices. According to this, the validity of legislation is determined by the "proportionality between the restriction which the law imposes on the freedom and the legitimate interest which the law is intended to serve".[49] In addition, he stressed the "supervisory" role of the Court[50] and concluded that courts should

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41 *Ibid* at 105. The High Court relied on s 6 (requiring a session of Parliament at least once a year); s 83 (requiring that money be appropriated from the treasury by law); ss 62 (executive power of the Queen exercised on "initiative and advice" of ministers) s 64 (Ministers required to sit in Parliament); s 49 (adopting the "power privileges and immunities" of the House of the Parliament of the United Kingdom).

42 *Ibid* at 107.

43 *Ibid.*

44 *Nationwide*, note 3 supra at 51; *Australian Capital Television*, note 3 *supra* at 142-4; 159; 169; 217-18.

45 *Australian Capital Television*, note 3 *supra* at 143 per Chief Justice Mason. See also *ibid* at 234-35 per Justice McHugh.

46 *Ibid* at 143 per Chief Justice Mason. See also *ibid* at 235 per Justice McHugh.

47 *Ibid.*

48 *Nationwide News*, note 3 *supra* at 76-7. See also, *Australian Capital Television*, note 3 *supra* at 174.

49 *Ibid* at 157-8.

50 *Nationwide News*, note 3 *supra* at 52.

allow the Parliament a "margin of appreciation"[51] in assessing the need for regulation. Justice Gaudron took a similar approach, according to which regulation of speech is permissible only if it is directed to the achievement of a legitimate end and "is reasonably and appropriately adapted to that end".[52]

Without attempting to reconcile these differences,[53] the Court, in *Lange,* outlined a test which bears much similarity to that previously expressed by Justices Brennan and Gaudron. According to this test, the first question for a court is "does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?" If so, then the court must ask "is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government"? If the answer to the first question is 'yes' and the second is 'no', then the law is invalid.[54]

(v) Application to the Law of Defamation

Finally, the High Court turned to apply this test to the law in question, the defamation law of New South Wales. The High Court's conclusion was that the law of New South Wales did burden the freedom of communication, but it was valid because it was reasonably appropriate and adapted to a legitimate purpose. However, they only reached this conclusion after a review and extension of the common law of qualified privilege. In the form qualified privilege took before *Lange*, the Court held that the common law did unduly restrict freedom of political discussion.[55] Therefore, as a first step, the High Court extended the common law of qualified privilege to conform with the constitutional requirements.

In a manner similar to Justice McHugh's judgment in *Stephens*,[56] the Court held that the common law should recognise that each Australian has an interest in disseminating and receiving information concerning government and political matters that affect the people of Australia and duty to disseminate it as a corollary.[57] This recognition of a duty to disclose information to the public and a corresponding interest in its receipt satisfied the requirements of the defence of qualified privilege. Thus the Court overruled the traditional position that the

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51 *Australian Capital Television*, note 3 *supra* at 159 citing *The Observer and the Guardian v The United Kingdom* (1991) 14 EHRR 153 at 178.

52 *Nationwide News*, note 3 *supra* at 95. See also, *Australian Capital Television*, note 3 *supra* at 218. However, her Honour reached a different result from Brennan J, finding that the restrictions placed on political discourse "cannot be justified as reasonable and appropriate regulation in a context where candidates and political parties are allocated free time for their political advertisements". *Ibid* at 221. The seventh member of the Court, Dawson J dissented on the basis that the Constitution included no limitation on legislative power to protect freedom of political discourse. *Ibid* at 184.

53 Although the Court specifically found that there was no need to distinguish between the "reasonably appropriate and adapted to" test and the proportionality requirement. See, note 5 *supra* at 108.

54 *Ibid* at 112.

55 *Ibid* at 114.

56 Note 18 *supra.*

57 Note 5 *supra* at 115.

privilege was not available where a defamatory statement was made to the world at large.

This extension of the common law protects discussion covered by the freedom of political communication and may be even wider, covering "matters concerning the United Nations or other countries" and "discussion of government or politics at State or Territory level and even at local government level" whether or not such a discussion bears on matters related to the federal government.[58] In the light of this extension, the High Court then held that the common law of qualified privilege did not unduly burden political communication.[59]

The new defence of qualified privilege is, however, limited. First, the High Court preserved the "reasonableness" requirement which had been part of the *Theophanous* rule. The High Court found that the statutory defence of qualified privilege provided by s 22 of the *Defamation Act* 1974 (NSW), which covers publication to a wide audience so long as it is reasonable,[60] did not offend the freedom of political communication.[61] Further, the Court appears to have concluded that the reasonableness standard ought to be part of the common law test, regardless of the existence of s 22 or some equivalent. It did, however, limit this requirement, holding that "reasonableness of conduct is imported as an element only when the extended category of qualified privilege is invoked to protect a publication that would otherwise be held to have been made to too wide an audience".[62] This standard will generally require that the defendant: (1) "had reasonable grounds for believing that the imputation was true"; (2) "took proper steps, so far as they were reasonably open, to verify the accuracy of the material"; and (3)"did not believe the imputation to be untrue [and] sought a response from the person defamed and published the response made".[63]

By contrast, the Court did not preserve the other part of the *Theophanous* rule, the recklessness requirement. This was largely subsumed by the reasonableness standard since, "[i]n all but exceptional cases, the proof of reasonableness will fail as matter of fact unless the publisher establishes that it was unaware of the falsity of the matter and did not act recklessly".[64] Therefore, although a statute which imposed such a requirement might not offend the constitutional

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58 *Ibid* at 115-16. The Court also recognised that the discussion of matters concerning New Zealand, might be protected by the extended form of qualified privilege since it "may often affect or throw light on government or political matters in Australia". *Ibid* at 119. So, with further and better particulars therefore, the ABC might be able to bring the publication within the new common law defence.

59 *Ibid* at 119.

60 Section 22 provides:
(1) Where, in respect of matter published to any person:
(a) the recipient has an interest or apparent interest in having information on some subject;
(b) the matter is published to the recipient in the course of giving to him information on that subject; and
(c) the conduct of the publisher in publishing that matter is reasonable in the circumstances,
there is a defence of qualified privilege for that publication.

61 *Ibid* at 116.

62 *Ibid*.

63 *Ibid* at 118.

64 *Ibid* at 117.

requirement, it is not a requirement of the common law, nor does its absence from s 22 offend the constitutional requirement.[65]

Finally, like other categories of common law qualified privilege, the extended form of the privilege will be defeated if the plaintiff can show that the publication was actuated by malice, meaning that the publication was made not for the purpose of communicating government or political ideas, but for some improper purpose.[66]

D. Conclusion

Lange marked a turning point in the law of the freedom of political communication, signalling a new, more restrictive interpretive approach and clarifying the relevant standard of review. Its unanimity, moreover, makes it refreshingly free of the complexities which sometimes result when the High Court produces a majority through the combination of separate concurring judgments. However, this clarity was to some extent deceptive. As we shall see, some difficulties and differences of opinion emerged almost immediately in *Levy*.

III. *LEVY*

A. The Facts and Arguments

At issue in *Levy* were the *Wildlife (Game)(Hunting Season) Regulations* 1994 made pursuant to *Wildlife Act* 1975 (Vic) and the *Conservation, Forests and Lands Act* 1987 (Vic). These regulations limited access to duck hunting areas during the duck hunting season. Regulation 5 limited entry to a "permitted hunting area" to holders of a valid game licence from between 5 pm and 10 am on the first weekend of the duck hunting season, the period in which most recreational duck hunting occurs. Regulation 6 prevented a person, who did not hold such a license, coming within 5 meters of a licensed hunter within the permitted hunting area during this time.[67]

The plaintiff, an activist who sought the banning of recreational duck shooting, was charged with three offences in breach of regulation 5 for allegedly entering a permitted hunting area without an authority to do so.[68] Mr Levy commenced proceedings in the High Court seeking a declaration that the regulations were invalid.[69] He relied on the freedom of political communication which he argued was contained both in the Commonwealth Constitution and in the Constitution of Victoria. He argued that the regulations contravened the freedom by preventing the plaintiff from entering the permitted area for the purpose of protest, from speaking publicly "from an informed and persuasive

65 *Ibid.*
66 *Ibid* at 117-18.
67 Note 6 *supra* at 249, 260.
68 *Ibid* at 249.
69 *Ibid* at 250.

basis" about recreational duck shooting and from being seen, especially on television, protesting and rendering aid to, or collecting, killed or injured birds.[70]

The defendants (the state of Victoria and the two arresting police officers)[71] demurred to the claim. They argued that the freedom of political communication implied in the Commonwealth Constitution has no application to Victorian legislation and that, in any event, the hunting regulations do not unreasonably restrict any implied freedom contained in either the Commonwealth or the Victorian Constitution.

B. The Decision

In stark contrast to the unanimity achieved in *Lange*, the High Court produced six separate judgments in *Levy*. On one level, the decision is quite simple. All members of the Court found that the purpose of the regulations, the protection of the protesters, was legitimate and the regulations were reasonably appropriate and adapted to the fulfilment of that end. Consequently, they did not impermissibly burden the freedom of political communication implied in the Commonwealth Constitution[72] or, if there is any, an equivalent freedom required by the Constitution of Victoria.[73] Nonetheless, the judgments raise a number of important issues which merit separate attention.

(i) The Scope of the Freedom of Political Communication

The High Court found that the regulations placed a reasonable burden on political communication and, as a result, the regulations satisfied the second of the two parts of the *Lange* test.[74] Strictly, therefore, whether the regulation burdened the freedom of political communication according to the first part of the *Lange* test, need not have been decided. Nonetheless, the High Court did consider some issues related to this question.

Expressive conduct

The first of these is the application of the freedom of political communication to conduct. Mr Levy claimed protection for his activities - being present at the scene of hunting to protest, gathering of evidence of cruelty and killing of protected birds, and collecting of injured or killed birds. Part of his argument was that these activities enabled him to conduct an informed discussion of the duck hunting laws,[75] but Mr Levy also placed value on the communicative

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70 *Ibid.*

71 *Ibid* at 263.

72 *Ibid* at 255 per Brennan CJ; at 263 per Dawson J; at 267-8 per Toohey and Gummow JJ; at 271-2 per Gaudron J; at 277-8 per McHugh J; at 290-1 per Justice Kirby.

73 Each of the Justices found it unnecessary to decide whether the Victorian Constitution required freedom of political communication, because they found that any such freedom was not infringed by these regulations. *Ibid* at 255 per Brennan CJ; at 263 per Dawson J; at 264, 267-8 per Toohey and Gummow JJ; at 269 per Gaudron J; at 277 per McHugh J; at 290-1 per Justice Kirby.

74 See note 54 *supra* and accompanying text.

75 Note 5 *supra* at 250.

capacity of his actions. He stressed the importance of being seen, especially on television, carrying out his protesting activities.[76]

It is clear from *Levy* that the freedom of political communication protects communicative activity. Five Justices specifically included expressive conduct in the range of communication that could be protected by the freedom. Chief Justice Brennan pointed out that, unlike the United States where free speech law is governed by the text of the First Amendment,[77] in Australia there is no need to categorise communicative conduct as "speech" in order to attract the freedom. The only question is whether the relevant law restricts communication necessary to preserve the system of representative and responsible government that the Constitution prescribes.[78] Chief Justice Brennan then held that "televised protests by non verbal conduct are today a common-place of political expression" and consequently "[a] law which simply denied an opportunity to make such a protest about an issue relevant to the government or politics of the Commonwealth would be as offensive to the constitutionally implied freedom as a law which banned speech making on the issue".[79] Justice McHugh also expressly extended the protection of the freedom of political communication to "signs, symbols, gestures and images", finding that "in an appropriate context any form of expressive conduct is capable of communicating a political or government message to those who witness it".[80] Like the Chief Justice, moreover, his Honour was especially mindful of the power of television.[81] In addition, Toohey and Gummow JJ[82] and Kirby J[83] specifically include non verbal conduct within the protection of the freedom.[84]

Appeal to emotion

The High Court also made it clear that emotional appeals, as well as rational discussion, could attract the freedom of political communication. Part of Mr Levy's argument for the protection of his protesting activity pointed to its emotional appeal. As his counsel argued, "the impact of television depiction of actual perpetration of cruelty ... has a dramatic impact that is totally different

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76 *Ibid* at 250, 275.

77 This requires that "Congress shall make no law ... abridging the freedom of speech".

78 Note 6 *supra* at 251-2.

79 *Ibid.*

80 *Ibid* at 274.

81 *Ibid* at 275.

82 *Ibid* at 267.

83 *Ibid* at 286-9.

84 The remaining members of the Court, Dawson and Gaudron JJ, do not specifically address the communicative nature of activity. However both their views suggest that regulation of activity may be constrained by an implication drawn from representative government. Justice Dawson's view is that the freedom of communication constitutes a protection for free elections. *Ibid* at 261. This would suggest that any regulation that interferes with free elections, whether by regulation of speech or conduct, falls foul of the freedom. Justice Gaudron's view that the Constitution requires "freedom of movement as an aspect of the freedom to engage in political communication or as subsidiary to that freedom", also suggests that the freedom may cover conduct, if not for its communicative quality, for its capacity to enable effective communication. *Ibid* at 270.

[from] saying; 'this is not a good idea'".[85] Since political protest is frequently staged for dramatic or emotional effect,[86] the Court's acceptance of his argument for the protection of protest activity, may itself indicate that an emotional appeal is protected. In addition, Toohey and Gummow JJ and McHugh J specifically accepted that the freedom of political communication protected emotional appeals.[87]

The discussion of state political matters

Levy is less clear, however, when it comes to the application of the freedom to the discussion of state political matters. As we have seen, in *Lange*, the Court held that given the "increasing integration of social, economic and political matters in Australia",[88] the extended form of qualified privilege protected discussion of such matters "whether or not it bears on matters at the federal level".[89] However, because the common law of qualified privilege is governed by a general concept of duty and interest,[90] rather than the more specific constitutional provisions which govern the freedom of political communication,[91] this does not mean that the freedom of political communication has similar coverage.

Levy does not resolve this issue. Only Brennan CJ and McHugh J who rested their decisions on other grounds,[92] addressed the matter directly. In contrast to the Court's position in relation to the extended form of qualified privilege, both required that discussion protected by the freedom of political communication must bear on federal matters and both were sceptical that discussion of the Victorian duck hunting regulations could have federal significance.[93] As McHugh J expressed it:

> It is not easy to see a connection between the message that the protesters wished to send to the public of Victoria and the freedom of communication protected by the Constitution. It seems remote from choosing members of the Senate or House of Representatives or the conduct of the federal government.[94]

At least two Justices, therefore, appear to require a specific connection between the discussion of state matters and federal political matters.

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85 *Ibid* at 275.

86 For example, Kirby J specifically referred to the communicative capacity of "[l]ifting a flag in battle, raising a hand against advancing tanks, wearing symbols of dissent, participating in a silent vigil, public prayer and meditation" as among the conduct that may attract the protection of the freedom. Each of these relies, to some extent, on the emotional impact of the action. *Ibid* at 286.

87 *Ibid* at 266-7 per Toohey and Gummow JJ; at 274 per Justice McHugh.

88 Note 5 *supra* at 116.

89 *Ibid*.

90 *Ibid* at 114. See also, note 13 *supra* and accompanying text.

91 See notes 36-44 *supra* and accompanying text.

92 Note 6 *supra* at 252-3, 277.

93 *Ibid*.

94 *Ibid* at 277.

(ii) The Test of Constitutional Validity: The Reasonableness of the Regulation

Perhaps the most complex part of the judgment is the Court's application of the second part of the *Lange* test which, it will be recalled, asks whether the law in question is reasonably appropriate and adapted to serve a legitimate end.[95] Although all Justices found that the regulations were reasonable, and therefore valid, beneath the surface of this agreement lie significant differences in approach which suggest that some Justices do not consider this to be the exclusive test of validity.

The Lange Test: "Reasonably Appropriate and Adapted To"

This is not to say that *Lange* is disregarded by the Court. On the contrary, Brennan CJ, Toohey, Gaudron, McHugh, Gummow and Kirby JJ each use the "reasonably appropriate and adapted to" test or similar language, at least at some point in their determination of the validity of the legislation.[96] Further, although expressed differently, Justice Dawson's proposition that the freedom of political communication allows "reasonable regulation in the interests of an ordered society"[97] imposes substantially the same test. It also points to a countervailing interest, an ordered society, and questions the reasonableness of the regulation in achieving that interest.

Justice Brennan's Approach: Overbreadth or the Margin of Appreciation

The first point of departure from the approach formulated in *Lange* is found in the Chief Justice's judgment. Although his Honour uses the *Lange* test, he places an important limitation on it, which makes this approach more deferential to legislative and executive action.

One argument made on behalf of Mr Levy was that, even if some regulation of the protesters might be permitted, these regulations were invalid because the safety of the protesters could have been protected by more limited means that would still have enabled them to protest.[98] Chief Justice Brennan rejected this argument. In his view,"[u]nder our Constitution, the courts do not assume the power to determine that some more limited restriction than that imposed by an impugned law could suffice to achieve a legitimate purpose".[99] So, according to Brennan CJ, even if it could be shown that the regulations in question were unnecessarily restrictive, "it could not be said that an [executive] opinion ... that safety was to be secured by keeping unlicensed persons out of the duck shooting area could not properly have been formed".[100] Although Brennan CJ does not use the term, his deference to the legislature and executive here recalls his earlier

95 Note 5 *supra* at 112.

96 Note 6 *supra* at 255 per Brennan CJ; at 268 per Toohey and Gummow JJ; at 271-2 per Gaudron J; at 278 per McHugh J; at 292, 294 per Justice Kirby.

97 *Ibid* at 263.

98 *Ibid* at 254.

99 *Ibid* at 254-5. This is consistent with the view Brennan CJ expressed in *Australian Capital Television* that the Court ought to afford the Parliament a "margin of appreciation", note 3 *supra* at 159.

100 Note 6 *supra* at 255.

finding that the Court owes the Parliament a "margin of appreciation" in determining the validity of its acts.[101]

The argument made by the plaintiff, on the other hand, resembles the American doctrine of "overbreadth" under which pursuit of a legitimate governmental purpose "may not be achieved by means which sweep unnecessarily broadly".[102] In finding that overbreadth is not the courts' concern, Brennan CJ, thus, rejects this aspect of American constitutional law. Indeed, Brennan CJ specifically declined to adopt American authority which had invalidated restrictions placing unnecessarily wide limitations on protesters.[103]

The Chief Justice's view on this matter does not appear to have wide support in the Court. On the contrary, there is some indication that Levy's argument might succeed on the right facts. Although McHugh J held that the complete exclusion from the duck hunting area was justified in this case,[104] he conceded that the argument that the protesters could have been protected with less restrictive means "has much force",[105] suggesting that in other circumstances the argument might succeed. Moreover, the conclusion reached by Toohey and Gummow JJ that the regulations caused "no greater curtailment of the constitutional freedom than was reasonably necessary to serve the public interest in the personal safety of the citizens"[106] contains a similar suggestion, that is, that a regulation which *unnecessarily* infringed the freedom would be invalid. Finally, although Kirby J deliberately left open the question of the "margin of appreciation",[107] which may have inspired Justice Brennan's deference, he went on to consider, and reject, the argument that regulation 5 imposed unreasonably wide restrictions on access to hunting areas.[108]

A two tiered test?

In contrast to the Chief Justice's deference, the second notable feature of the Court's discussion of the standard of review is that some Justices envisaged that a higher standard of review might apply in some circumstances. Thus, we see the survival of the two tiered approach introduced in *Australian Capital Television*.[109] This is clearest in the judgments of Justices Gaudron and Kirby. Justice Gaudron enunciated a two tier test which varies according to the purpose of the regulation. Where the "direct purpose of the law is to restrict the freedom of political communication", then it can only be justified if it is necessary to

101 Note 51 *supra* and accompanying text.

102 *NAACP v Alabama* 377 US 288 (1964).

103 Note 6 *supra* at 254-5. The relevant United States decision was *Schenck v Pro-Choice Network of Western New York* 117 S Ct 855 (1997) in which the Supreme Court invalidated some restrictions on the movements of abortion protesters outside of an abortion clinic, on the basis that they placed a greater restriction than necessary to achieve their purpose.

104 Note 6 *supra* at 278.

105 *Ibid*.

106 *Ibid* at 267-8.

107 *Ibid* at 293-4.

108 *Ibid* at 294.

109 See notes 45-8 *supra* and accompanying text.

achieve some "overriding public purpose".[110] However, where regulation "only incidentally" restricts political communication, her Honour employed the more lenient and familiar standard that the regulation must be "reasonably appropriate and adapted to" that purpose.[111] The distinction was significant to Justice Gaudron's analysis because, although she applied the more deferential standard to regulation 6, she applied the higher standard to regulation 5. Her Honour considered that the regulations should be seen as restricting a constitutionally protected freedom of movement[112] and in her view "a direct purpose of reg 5 was to keep those who wished to protest against recreational duck shooting out of the permitted areas ... and, thus, to restrict their freedom of movement and perhaps their freedom of political communication".[113] Regulation 5 was thus subject to, and survived, the stricter form of constitutional scrutiny.[114] Justice Kirby also appeared to adopt a two tiered form of the test. However, his application of the test was rather different. Unlike Gaudron J, his Honour applied the lower standard to regulation 5. It was not, in his view, "a case where legislation has, by its terms, specifically targeted the idea or message so as to require a 'compelling justification'".[115] Regulation 5, moreover, was "'appropriate and adapted to' the fulfilment of the legitimate purpose of State law making, namely the protection of public safety".[116]

Finally, although they expressed the test rather differently, Toohey and Gummow JJ also appeared to be attracted to a two tiered test for validity. For them it was significant that "[t]he Regulations do not have, as their *direct operation*, the denial of the exercise of the constitutional freedom in a significant respect".[117] Indeed, according to their analysis, this feature distinguished these regulations from the legislation held invalid in *Australian Capital Television*, where Toohey J had enunciated a higher standard of review.[118] Thus, although they referred to the "direct operation" rather than the "purpose" of the law, there is a suggestion that they may vary the test according to the nature of the regulation.

The forum of communication

There is a final possible variation on the test of constitutionality which, although it is raised only by Kirby J, deserves a brief mention. Although his Honour's determination of validity did not seem to turn much on this fact,[119]

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110 Note 6 *supra* at 271.

111 *Ibid.*

112 *Ibid* at 272. The view that ss 7, 24, 64 and 128 require constitutional protection of movement was expressed by Gaudron J in *Kruger v The Commonwealth* (1997) 146 ALR 126, 195-201, 217.

113 By contrast, Gaudron J considered that regulation 6 had no purpose other than the protection of personal safety and therefore was subject only to the lower test. Note 6 *supra* at 271-2.

114 *Ibid* at 272.

115 *Ibid* at 294.

116 Justice Kirby did not consider the validity of regulation 6, relying on the plaintiff's acceptance of its validity. *Ibid* at 284.

117 *Ibid* at 267 (emphasis added).

118 See also note 48 *supra* and accompanying text.

119 Note 6 *supra* at 294.

Kirby J considered it significant that the area in which communication was restricted, in this case, was "no Hyde Park".[120] That is, it was not a traditionally public forum. In doing so, he was influenced by United States authority which is especially hostile to regulation that occurs in traditionally public fora and, to some extent, other public property.[121]

IV. CONCLUSION: THE DIRECTION OF THE FREEDOM OF POLITICAL COMMUNICATION

In some respects, then, *Lange* and *Levy* serve to confirm aspects of the law of the freedom of political communication. At a most fundamental level, it is now clear, if it were not before,[122] that the freedom of political communication is an established feature of Australian constitutional law. Further, it is now beyond doubt that the freedom of political communication affects the common law of defamation. Moreover, given the High Court's statement that the Constitution, federal, state and territorial laws, and the common law form "one system of jurisprudence"[123] in which the Constitution governs the other laws, it would seem that the common law generally must conform to constitutional requirements.

However, these decisions also mark a turning point. First, although the High Court maintained the position that the common law is subject to the Constitution, it approached the review of the common law quite differently. Rather than enunciating a new constitutional rule to replace the common law, as it did in *Theophanous*, the High Court proceeded by reforming the common law in accordance with the constitutional standard.[124] This introduced a new concept of constitutionally driven common law.

These decisions also mark the undoubted ascendancy of a restrictive interpretive approach that may have significance for constitutional law generally. In determining the scope of the freedom of political communication, it is now clear that the High Court will have regard to text and necessary structural implication, rather than a more generally defined concept of representative democracy.[125] More generally, this seems to indicate that, presumably with the exception of precedential argument, the High Court will be sceptical of constitutional argument not solidly grounded in textual or structural analysis.

This interpretive approach is likely to hold the key to the unsettled question of whether the freedom of political communication protects the discussion of state political matters. As is shown by the judgments of Brennan CJ and McHugh J, it would be consistent with the High Court's insistence that the freedom of

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120 *Ibid* at 289.

121 See, *ibid* at 287-9.

122 See *Langer v The Commonwealth* (1995) 186 CLR 302; *Muldowney v South Australia*, (1995) 186 CLR 352; *Cunliffe v The Commonwealth* (1993) 182 CLR 272.

123 Note 33 *supra* and accompanying text.

124 Notes 55-66 *supra* and accompanying text.

125 Notes 36-43 *supra* and accompanying text.

political communication is closely defined by the text, to require some connection between the discussion of state political matters and those features of representative government which the Constitution requires of the federal government.[126] It seems unlikely, therefore, that discussion of state political affairs will qualify for constitutional protection, as general matter, as it does under the common law of qualified privilege.

Levy also throws up some new constitutional uncertainty. In its wake, the most unsettled feature of the freedom of political communication is the nature of the test of constitutional validity. Although the "reasonably appropriate and adapted to" test seems to have general acceptance,[127] there are two important differences of approach within the Court. The first is Chief Justice Brennan's rather deferential view that the court will not inquire whether less restrictive means could achieve the same result. This is, however, unlikely to prevail as it is inconsistent with the approach of other members of the Court who considered, and dismissed on its merits, the argument that the regulations in this case were unnecessarily restrictive.[128] Moreover, four members of the Court, Toohey, Gaudron, Gummow and Kirby JJ seem, if anything, inclined to impose a stricter standard of review, at least in some circumstances.[129]

However, the more restrictive, two tiered approach raises the second uncertain feature of the standard of constitutional review. Although a majority of the Court seems to favour a stricter standard of review in some circumstances, there is much which is undecided about the standard. Apart from any other matter, there is no clear articulation of the circumstances in which the higher standard will be imposed. On the one hand, Gaudron and Kirby JJ, in the same terms as Mason CJ and McHugh J in *Australian Capital Television*,[130] refer to the "purpose" or "target" of the legislation.[131] On the other hand, Toohey and Gummow JJ seem concerned with the "operation" or effect of the law.[132] Moreover, Kirby J adds another wrinkle, by suggesting that the forum of the speech may be relevant to assessing its validity.[133]

In the final analysis, *Lange* and *Levy* both clarify and add complexity to our understanding of the freedom of political communication. Although the decisions mark the end of some debates - most notably the operation of freedom of political communication on the common law and the debate over interpretive approach - it seems that other aspects of the debate over constitutional protection of freedom of expression have only just begun.

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126 Notes 92-4 *supra* and accompanying text.
127 Notes 96-7 *supra* and accompanying text.
128 Notes 104-8 *supra* and accompanying text.
129 Notes 109-18 *supra* and accompanying text.
130 Notes 45-8 *supra* and accompanying text.
131 Notes 110-16 *supra* and accompanying text.
132 Note 117 *supra* and accompanying text.
133 Note 119-21 *supra* and accompanying text.