High Court of Australia

Levy v The State of Victoria & Ors
HIGH COURT OF AUSTRALIA

BRENNAN CJ,

DAWSON, TOOHEY, GAUDRON, McHUGH, GUMMOW AND KIRBY JJ

LAURENCE NATHAN LEVY PLAINTIFF

AND

THE STATE OF VICTORIA & ORS DEFENDANTS

ORDER

1. Defendants' demurrer allowed.

2. The plaintiff pay the defendants' costs limited to one day of the hearing.

3. The Commonwealth, New South Wales, Queensland, South Australia and Western Australia pay to the plaintiff and to the defendants a proportion of the costs incurred by each of them to be taxed as between party and party in relation to the proceedings in the High Court, the proportion to be determined by the taxing officer by reference to the time by which the hearing of the matter before the Full Court was extended by submissions made on behalf of those interveners.

4. The corporations described as "the Fairfax interests", Nationwide News Pty Ltd, the Herald and Weekly Times Ltd, and the Seven Network Ltd pay to the plaintiff and to the defendants a proportion of the costs incurred by each of them to be taxed as between party and party in relation to the proceedings in the High Court, the proportion to be determined by the taxing officer byreference to the time by which the hearing of the matter before the Full Court was extended by submissions made on behalf of those interveners.

31 July 1997

FC 97/024

M 42/95

Representation:

A R Castan QC with B A Keon-Cohen QC, G J McEwen and K M Pettigrew for the plaintiff (instructed by Garland Hawthorn Brahe)

D Graham QC with B J Shaw QC and D G Collins for the defendants (instructed by Victorian Government Solicitor)

Interveners:

G Griffith QC with S G E McLeish and G R Kennett intervening on behalf of the Attorney-General for the Commonwealth (instructed by the Australian Government Solicitor)

P A Keane QC with R W Campbell intervening on behalf of the Attorney-General for the State of Queensland (instructed by the Crown Solicitor for Queensland)

R J Meadows QC with P D Quinlan intervening on behalf of the Attorney-General for the State of Western Australia (instructed by the Crown Solicitor for Western Australia and on behalf of the Attorney-General for the Northern Territory instructed by the Solicitor for the Northern Territory)

B M Selway QC with J Gill intervening on behalf of the Attorney-General for the State of South Australia (instructed by the Crown Solicitor for South Australia)

L S Katz SC with C J Birch intervening on behalf of the Attorney-General for the State of New South Wales (instructed by the Crown Solicitor for New South Wales)

D F Jackson QC with M A Dreyfus intervening on behalf of John Fairfax Publications Pty Limited, David Syme & Co Limited, Illawarra Newspapers Holdings Pty Limited, Newcastle Newspapers Pty Limited, Fairfax Community Newspapers Pty Limited and West Australian Newspapers Limited (instructed by Freehill Hollingdale & Page)

W H Nicholas QC intervening on behalf of Nationwide News Pty Ltd (instructed by Gallagher de Reszke)

R A Finkelstein QC intervening on behalf of The Herald and Weekly Times Limited (instructed by Arthur Robinson & Hedderwicks)

J T Gleeson intervening on behalf of the Seven Network Limited (instructed by Clayton Utz)

Amici Curiae:

D K Catterns QC with G J Williams amicus curiae on behalf of the Media, Entertainment and Arts Alliance (instructed by the Public Interest Advocacy Centre)

D E Flint amicus curiae on behalf of the Australian Press Council (instructed by the Australian Press Council)

CATCHWORDS

Laurence Nathan Levy v The State of Victoria & Ors

Constitutional law - Implied freedom of communication on government and political matters - Victorian regulations regulating conduct in duck hunting areas during open season - Range of communications protected by implied freedom - Discussion of State issues of government and politics - Test for determining whether law infringes implication - Validity of regulations.

High Court - Practice and Procedure - Leave to intervene - *Amicus curiae*.

Constitution of the Commonwealth.

Constitution Act 1975 (Vic).

Wildlife (Game) (Hunting Season) Regulations 1994 (Vic).

BRENNAN CJ. On 7 June 1994 the two personal defendants laid informations charging the plaintiff with summary offences pursuant to the Wildlife (Game) (Hunting Season) Regulations 1994 (Vic)[1] ("the Hunting Season Regulations"). Summonses issued on the informations were returnable before the St Arnaud's Magistrates' Court, Victoria. The plaintiff was charged with three offences of "enter[ing] into or upon a permitted hunting area during prohibited times without holding an authority to do so, in breach of Regulation 5(1)(a) of SR 27 of 1994". The offences allegedly occurred at Donald in the State of Victoria, on 19 and 20 March 1994. Regulation 5 of the Hunting Season Regulations read as follows:

" ***Entry to permitted hunting area prohibited to certain persons***

(1) A person must not enter into or upon any permitted hunting area at any time between the hours of -

(*a*) 5 pm on Friday, 18 March 1994 and 10.00 am on Saturday, 19 March 1994; or

(*b*) 5 pm on Saturday, 19 March 1994 and 10.00 am on Sunday, 20 March 1994.

Penalty: 10 penalty units.

(2) Sub-regulation (1) does not apply to a person who is the holder of a valid game licence authorised for the hunting or taking of game birds (including duck)."

Regulation 2 stated that the Hunting Season Regulations were made under s 87 of the *Wildlife Act* 1975 (Vic) and ss 91 and 99 of the *Conservation, Forests and Lands Act* 1987 (Vic).

During the prescribed periods and on the occasions charged in the informations, the plaintiff, who was not the holder of a valid game licence, entered upon a permitted hunting area in and around Lake Buloke near the town of Donald where he was intercepted by the personal defendants, interviewed and removed against his will from that area.

The plaintiff commenced proceedings in this Court claiming, inter alia, a declaration that the Hunting Season Regulations were "invalid and inoperative as beyond the powers of the Parliament of the State of Victoria". By his further amended statement of claim, the plaintiff pleaded that he entered the permitted hunting area for the purpose of protesting against the laws of the Victorian Parliament which authorised the holders of valid game licences to shoot game birds, including ducks, and against the illegal shooting of protected species. He further pleaded that his purposes included speaking publicly and protesting about these issues "from an informed and persuasive basis" and being publicly seen, especially on television, to be protesting on these issues and to be rendering aid to and collecting injured game birds or killed or injured birds of protected species. The plaintiff also pleaded that he had the further purpose of ensuring that the people of Victoria should be able to "form or exercise informed political judgments about the stance of the Victorian Government in continuing to support or permit duck

shooting". Under the purported authority of the Hunting Season Regulations, the defendants had prevented the plaintiff from pursuing the purposes for which he entered the hunting area during the prescribed periods. The further amended statement of claim pleaded these facts and claimed the protection of implied constitutional freedoms to pursue his purposes. The implied constitutional freedoms were said to be contained in the Constitution of the Commonwealth and in the *Constitution Act* 1975 (Vic) (the Victorian Constitution).

The defendants demurred to the whole of the further amended statement of claim on the grounds that:

"(a) the provisions of the Wildlife Act 1975 (Vic) pursuant to which the Hunting Season Regulations were made are within the legislative powers of the Victorian Parliament;

(b) the Hunting Season Regulations are within the legislative powers of the Victorian Parliament;

(c) the limitations upon the legislative powers of the Commonwealth Parliament arising by implication from the Commonwealth Constitution have no application to the legislative powers of the Victorian Parliament;

(ca) the Hunting Season Regulations are not invalid by reason of any implied freedom contained in the Commonwealth Constitution or in the Constitution Act 1975 (Vic);

(d) the Hunting Season Regulations do not unreasonably have the purpose or effect of restricting any implied freedom contained in the Commonwealth Constitution or in Constitution Act 1975 (Vic)."

The plaintiff submitted that the constitutionally implied freedom on which he seeks to rely is established by the reasons for judgment in the first two of what have been called "The Free Speech cases": *Nationwide News Pty Ltd v Wills*[2] and *Australian Capital Television Pty Ltd v The Commonwealth*[3]. These cases were followed by *Theophanous v Herald & Weekly Times Ltd*[4] and *Stephens v West Australian Newspapers Ltd*[5]. In the course of argument on the demurrer on 6 August 1996, the Solicitor-General for Victoria sought leave to reopen these last two cases (which relate to the law of defamation) for further consideration. The matter was then adjourned. The matter was listed for further argument together with *Lange v Australian Broadcasting Corporation* on 3 March 1997. On the resumed hearing, the plaintiff in the last-mentioned action also sought leave to reopen the decisions in *Theophanous* and *Stephens.* The Attorneys-General of the Commonwealth, the States and Territories (other than Tasmania and the Australian Capital Territory) intervened and a number of other interested persons then sought leave to intervene in both proceedings. Leave to intervene subject to conditions was given to all who applied except the Media, Entertainment and Arts Alliance. The Alliance was given leave to appear *amicus curiae*. Leave was also given to the Australian Press Council as an *amicus* to file written submissions.

Below I state my reasons for joining in the decision to grant conditional leave to intervene and to admit the written submissions of the *amicus.* Suffice for the moment that the submissions of the interveners who were granted leave and the written argument of

the *amicus* favoured the notion of a constitutionally protected freedom of speech which would afford a constitutional defence to actions for defamation in matter published in the course of political discussion. However, the present case was not concerned with the law of defamation. It raised for determination other issues arising under either the Constitution of the Commonwealth or the Constitution of Victoria. It is convenient first to consider the issues arising under the Constitution of the Commonwealth.

A. Issues under the Commonwealth Constitution

The first issue was the range of conduct that might be protected by the freedom to discuss government and politics which, in one form or another, the several judgments in *Nationwide News* and *ACTV* hold to be implied in the Constitution. The second was whether the freedom extended to the discussion of State issues of government and politics. And the third was the test for determining the validity of a law which affected the freedom but which also served another and legitimate purpose.

1. The conduct protected by the implied freedom

Speech is the chief vehicle by which ideas about government and politics are communicated. Hence it is natural to regard the freedom of communication about government and politics implied in the Constitution as a freedom of speech. But actions as well as words can communicate ideas. In the United States where "freedom of speech" is protected by the First Amendment of the Constitution, non-verbal activity which expresses ideas may be protected as a form of speech[6]. Thus a "protest by silent and reproachful presence"[7] or by a burning of the flag of the United States[8] have been held to be protected by the First Amendment.

However, American decisions on the protection of "expressive activity" under the First Amendment must be viewed with caution in the context of our Constitution[9]. The freedom of discussion implied in the Constitution of the Commonwealth, unlike the subject of protection under the First Amendment of the United States Constitution, does not require consideration of the connotation of "speech" or of the conduct which might be thought to constitute a form of "speech". The implication denies legislative or executive power to restrict the freedom of communication about the government or politics of the Commonwealth, whatever be the form of communication, unless the restriction is imposed to fulfil a legitimate purpose and the restriction is appropriate and adapted to the fulfilment of that purpose[10]. In principle, therefore, non-verbal conduct which is capable of communicating an idea about the government or politics of the Commonwealth and which is intended to do so may be immune from legislative or executive restriction so far as that immunity is needed to preserve the system of representative and responsible government that the Constitution prescribes.

Televised protests by non-verbal conduct are today a commonplace of political expression. 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 political speech-making on that issue. However, while the speaking of words is not inherently dangerous or productive of a tangible effect that might warrant prohibition or control in the public interest, non-verbal conduct may, according to its nature and effect, demand legislative or executive prohibition or control even though it conveys a political message. Bonfires may have to be banned to prevent the outbreak of bushfires, and the lighting of a bonfire does not escape such a ban by the hoisting of a political effigy as its centrepiece. A law which prohibits non-verbal conduct for a

legitimate purpose other than the suppressing of its political message is unaffected by the implied freedom if the prohibition is appropriate and adapted to the fulfilment of that purpose. Such a law prohibiting or controlling the non-verbal conduct, if it be reasonable in extent, does not offend the constitutional implication.

In the present case, the plaintiff entered upon the proclaimed area and, had he not been removed, he would have stayed there to make a dramatic and televised protest against duck shooting and the laws and policies which permitted or encouraged the practice. He was prohibited from being able lawfully to make that protest and he was removed from the proclaimed area in exercise of an authority arising from the provisions of the Hunting Season Regulations[11]. The conduct in which the plaintiff desired to engage and which was proscribed by the Hunting Season Regulations was calculated to express and was capable of expressing a political message. It was therefore conduct of the kind which, if the criteria presently to be mentioned existed, would be immune from legislative prohibition.

2. The discussion of State issues of government and politics

In *Stephens*[12], I expressed the opinion that defamatory matter relating to the conduct of members of the Legislative Council was irrelevant to the government of the Commonwealth and, on that account, the lawfulness of its publication was unaffected by the implied freedom. However, a majority of the Court[13] held that the implication protects political discussion in relation to all levels of government including State government. In *Lange*[14] the joint reasons for judgment extend the defence of qualified privilege to the publication of defamatory matter relating to government and politics at all levels. The factors which have led to that conclusion include the "increasing integration of social, economic and

political matters in Australia"[15]. Taking this approach, it is arguable that permitting the shooting of ducks and any inaction with respect to the shooting of protected species affects some international obligation binding on Australia relating to the protection of fauna[16] and thus relates directly to a matter within the legislative competence of the Commonwealth. I would not accept this approach. The plaintiff's intended protest related to the discrete State issue of the appropriateness of the relevant Victorian laws, especially the Hunting Season Regulations. However, I have come to the conclusion that the demurrer must be allowed for a reason which I mention next and I prefer to rest my conclusion on that reason.

3. The test of validity and the facts to be accepted for the purposes of the demurrer

Regulation 5 of the Hunting Season Regulations was made under s 87 of the *Wildlife Act* 1975 (Vic) which authorises the making of Regulations by the Governor in Council. In making the regulations the provisions of the *Subordinate Legislation Act* 1962 (Vic) were to be observed. Guideline 6(b) of the Guidelines issued pursuant to s 11 of the *Subordinate Legislation Act* provided that "[a] statutory rule ... must clearly set out as part of its text ... the objectives of the rule". In conformity with this guideline, reg 1 of the Hunting Season Regulations stated the objectives of the Regulations are to -

"(*a*) ensure a greater degree of safety of persons in hunting areas during the open season for duck in 1994; and

(*b*) make amendments concerning the times and dates for the open and close seasons for game duck; and

(*c*) add further offences to the Schedule of offences in the Conservation, Forests and Lands (Infringement Notice) Regulations 1992."

The provisions of reg 5 of the Hunting Season Regulations were consistent with the objective stated in reg 1(a).

If the prohibition or regulation is reasonably appropriate and adapted to the protection of life or limb there can be no doubt as to its validity. A law which is appropriate and adapted to the fulfilment of that legitimate purpose is not invalidated by limitations of legislative power implied from the terms and structure of the Constitution merely because an opportunity to discuss matters of government or politics is thereby precluded[17].

The permitted hunting areas during the times prescribed by the Hunting Season Regulations were the areas on which duck shooters would be engaged in shooting ducks at the opening of the season. Paragraph 7 of the further amended statement of claim alleged, inter alia, that

"many persons holding a valid game licence entered the proclaimed area during the proclaimed period for the purpose of shooting game birds; did shoot, injure or kill many hundreds of such birds; did illegally fail to immediately kill all injured game birds; did fail to render aid to protected birds which were injured;

and further shot injured or killed illegally a number of protected species of birds, being birds protected at all material times".

The statement of claim also alleges that some of the purposes for which the plaintiff entered the prescribed area during the proclaimed period were to protest against the relevant laws by physical presence, to gather information about the activities of duck shooters within that area during that period, to collect injured game birds which shooters had failed to despatch quickly or at all, to collect illegally killed or injured game birds and to prevent or attempt to prevent breaches of the law, being the illegal shooting of protected birds. The risk to life and limb in engaging in those activities in confrontation with the duck shooters seems to demand prohibition or regulation of the activities of shooters or those who would protest against the shooting or both. The pleading of the facts recited in this paragraph is merely evidentiary and must be discarded in deciding the demurrer[18] but they cast no doubt on the assertion in reg 1(a) that the Hunting Season Regulations are a measure calculated to "ensure a greater degree of safety" for persons in the prescribed area.

To repel this view of the operation and effect of the Hunting Season Regulations, the plaintiff points to reg 6 which provides:

" ***Proximity of persons to hunters restricted in***

permitted hunting areas

(1) A person must not, at any time during the open season for duck in 1994, approach within a distance of less than 5 metres, any person who is the holder of a valid game licence authorised for the

hunting or taking of game birds (including duck) who is hunting or taking game birds, in any permitted hunting area.

Penalty: 10 penalty units.

(2) Sub-regulation (1) does not apply to a person who is the holder of a valid game licence authorised for the hunting or taking of game birds (including duck) who is hunting or taking game birds from the same boat or from the same hide as another person."

This regulation, it is said, indicates the radius of the buffer zone which is necessary for securing the safety of persons who are in the proclaimed area while shooting is taking place. It is submitted that the prohibition on entry into any part of the proclaimed area is unreasonably wide or, at least, may be shown by evidence at the trial to be unreasonably wide. Therefore, so the argument runs, it is impossible to say on demurrer that the wider prohibition contained in reg 5 is appropriate and adapted to the securing of personal safety.

Some analogy is seen in the decision of the Supreme Court of the United States in *Schenck v Pro Choice Network of Western New York*[19] in which that Court determined the extent of a buffer zone that ought to be maintained between persons entering an abortion clinicand those who picket the clinic in protest. The analogy is attractive unless the different criterion of validity under our Constitution is steadily kept in mind. Under 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. The courts acknowledge the law-maker's power to determine the sufficiency of the means of

achieving the legitimate purpose, reserving only a jurisdiction to determine whether the means adopted could reasonably be considered to be appropriate and adapted to the fulfilment of the purpose[20]. Although it is possible that the validity of a law with respect to a subject within legislative power could depend upon some factual matter touching the freedom of discussion of government or politics, questions of fact seldom have to be resolved. Only in rare instances would it be impossible to determine the validity of such a law on demurrer. In such a case, the constitutional facts could first be ascertained by the stating of a case, by resort to informationpublicly available or, possibly, by the tendering of evidence. But constitutional facts are not to be regarded for the purposes of a demurrer as though they are facts in issue in civil litigation between parties. In the latter case, the facts expressly or impliedly alleged in the pleading demurred to must be taken as established for the purposes of the demurrer[21]. But facts which are relevant to the existence of, or restriction on, power to enact an impugned law stand in a different category[22]. The litigation of constitutional facts is not left in the hands of private litigants[23]. The plaintiff in the present case submitted that evidence at the trial would show, inter alia, that there was no risk to life or limb by entry upon a proclaimed area while duck shooting was proceeding since the shooting of ducks occurs when they are on the wing and the gun is lifted above the level of any human intruder. Even if those facts were established it could not be said that an opinion by the Governor in Council that safety was to be secured by keeping unlicensed persons out of the duck shooting area could not properly have been formed so as to warrant the insertion of the objective stated in reg 1(a) and the making of reg 5.

The further amended statement of claim contains no ground for challenging the truthfulness of the declaration in reg 1(a) that the objective of the Hunting Season Regulations was the ensuring of a greater degree of safety of persons in hunting areas during the

1994 open season. Accepting that objective[24], reg 5 contains provisions that were appropriate and adapted to its fulfilment. It follows that, even if reg 5 had had the effect of impairing a freedom to discuss government or politics implied in the Constitution of the Commonwealth, it was not invalidated by the implication.

B. The Constitution of Victoria

It is unnecessary in the light of the conclusion just stated to consider whether a freedom to discuss government or politics is to be implied in the Victorian Constitution similar to the freedom of that kind implied in the Constitution of the Commonwealth. Even if a freedom of that kind were implied, and even if such a freedom were entrenched, so that it would be beyond the power of the Parliament of Victoria to enact a law or to authorise the making of a regulation inconsistently with it, the impugned regulation in the present case cannot be held invalid on that account. It is not suggested that there can be found in the Victorian Constitution an implication of immunity from legislative or executive action wider than the immunity implied in the Constitution of the Commonwealth. As reg 5 can be supported as reasonably appropriate and adapted to the fulfilment of the legitimate objective stated in reg 1(a), any challenge to its validity based on an implication of a freedom to be found in the Victorian Constitution must fail.

It follows that the demurrer must be allowed.

Intervention

I add my reasons for granting leave to various persons to intervene and for admitting the submissions of *amici* in this matter and in *Lange v Australian Broadcasting Corporation*. Applications for leave to intervene were lodged after the respondent State sought leave to reopen the decisions in *Theophanous* and *Stephens*. When an order for removal into this Court of *Lange v Australian Broadcasting Corporation* - then pending in the Supreme Court of New South Wales - was made and the plaintiff in those proceedings also sought leave to reopen the decisions in *Theophanous* and *Stephens*, the hearing of that matter and the adjourned hearing of the present case were listed together. Media proprietors and an industrial association which includes journalists among its members lodged written submissions and delivered oral argument in support of their applications for leave to intervene.

The media proprietors and the journalists' association claimed that, in the period since the judgments in *Theophanous* and *Stephens* were published, those decisions were relied on in publishing material which, they aver, would not otherwise have been published for fear of incurring a liability in damages for defamation. If leave to reopen *Theophanous* and *Stephens* were given and the holdings of the respective Justices in the majority in those cases were overruled, a ground of defence in some of the pending actions for defamation would be taken away. The immunity from successful suit with which the Constitution as interpreted in *Theophanous* and *Stephens* clothed the publication of defamatory matter in the circumstances and subject to the conditions stated in those cases was of especial value to media proprietors and journalists whose business it is to publish material relating to political matters. This factor, together with the role played by the media in political discussion and in the dissemination of political information, was relied on to

demonstrate the particular interest of the applicants in the issues for determination on which they sought leave to intervene.

The jurisdiction to allow non-party intervention in these proceedings was not challenged. Nevertheless, the source of the jurisdiction should be identified to ensure that mere convenience or utility does not lead to a wrongful assumption of jurisdiction to allow a non-party to intervene in a matter before the Court. In *Earl Cowley v Countess Cowley*[25] the Earl of Halsbury LC observed:

"what a curious thing it would be in our jurisprudence if because a thing might be considered convenient, and, I will assume for the sake of argument, desirable, therefore you could invent a new jurisdiction and apply it to a matter with which that Court has no concern whatever."

None of the constitutional or statutory provisions which confers jurisdiction on this Court contains an express grant of jurisdiction to allow non-party intervention save s 78A of the *Judiciary Act* 1903 (Cth). If there be jurisdiction apart from s 78A to allow non-party intervention, it must be an incident of the jurisdiction to hear and determine the matters prescribed by the several constitutional and statutory provisions which confer this Court's jurisdiction. It is of the nature of that jurisdiction that it should be exercised in accordance with the rules of natural justice[26]. Accordingly, its exercise should not affect the legal interests[27] of persons who have not had an opportunity to be heard[28]. Therefore, a non-party whose interests would be affected directly by a decision in the proceeding - that is, one who would be bound by the decision albeit not a party - must be entitled to intervene to protect the interest liable to be affected. This, indeed, is the explanation of many of the cases in which intervention has been allowed in

probate[29] and admiralty[30] cases and in other cases where an intervener and a party are privies in estate or interest[31].

But the legal interests of a person may be affected in more indirect ways than by being bound by a decision. They may be affected by operation of precedent - especially a precedent of this Court - or by the doctrine of stare decisis. Apart from the obsolete exception contained in s 74 of the Constitution, an exercise of the jurisdiction conferred on this Court is not subject to appeal nor to review by any other court. As this Court's appellate jurisdiction extends to appeals, whether directly or indirectly, from all Australian courts, a decision by this Court in any case determines the law to be applied by those courts in cases that are not distinguishable. A declaration of a legal principle or rule by this Court will govern proceedings that are pending or threatened in any other Australian court to which an applicant to intervene is or may become a party. Even more indirectly, such a declaration may affect the interests of an applicant either by its extra-curial operation or in future litigation. Ordinarily, such an indirect and contingent affection of legal interests would not support an application for leave to intervene. But where a substantial affection of a person's legal interests is demonstrable (as in the case of a party to pending litigation) or likely, a precondition for the grant of leave to intervene is satisfied[32]. Nothing short of such an affection of legal interests will suffice. This accords with the view of Dixon J in *Australian Railways Union v Victorian Railways Commissioners*[33], expressed before s 78A was inserted into the *Judiciary Act* 1903 (Cth)[34]:

"I think we should be careful to allow arguments only in support of some right, authority or other legal title set up by the party intervening. Normally parties, and parties alone, appear in litigation. But, by a very special practice, the intervention of the

States and the Commonwealth as persons interested has been permitted by the discretion of the Court in matters which arise under the Constitution. The discretion to permit appearances by counsel is a very wide one; but I think we would be wise to exercise it by allowing only those to be heard who wish to maintain some particular right, power or immunity in which they are concerned, and not merely to intervene to contend for what they consider to be a desirable state of the general law under the Constitution without regard to the diminution or enlargement of the powers which as States or as Commonwealth they may exercise."

In *R v Anderson; Ex parte Ipec-Air Pty Ltd*[35] Kitto J said that a State or the Commonwealth seeking leave to intervene had to show that "the decision of the Court can have a bearing, or may have a bearing, upon the legislative or executive powers or other direct interests ... of the State or Commonwealth, as the case may be".

The Court's practice before the enactment of s 78A of allowing intervention by the Commonwealth or the States in constitutional cases was explained by Hutley JA in *Corporate Affairs Commission v Bradley*[36]:

"[The] constitutional practice is based upon the concept of legislative trespass and the right of the Attorney-General of a State in the case oflegislative trespass by the Commonwealth to protect its citizens from such trespass. ... By giving to the Attorneys-General of the States authority to intervene a result is achieved analogous to the results reached in probate by denying to those who can, but do not, intervene the power to bring separate proceedings."

In other words, the Commonwealth and States were seen to have an interest in constitutional cases that satisfied a condition imposed on the grant of leave to intervene. Jurisdiction to grant leave to intervene to persons whose legal interests are likely to be substantially affected by a judgment exists in order to avoid a judicial affection of such a person's legal interests without that person being given an opportunity to be heard[37].

Nevertheless, an indirect affection of legal interests enlivens no absolute right to intervene. The assumption is that the Court will determine the law correctly, so that the indirect affection of an applicant's legal interest is simply the inevitable consequence of the exercise by this Court of its jurisdiction as the final Court in the Australian hierarchy. On that assumption, no undue prejudice is suffered by a person whose interests will be affected by the decision. The exercise of this Court's jurisdiction to determine controversies between parties is not, and could not be, conditioned on allowing intervention by all those whose interests are susceptible to affection by the Court's judgments[38]. Such a condition would virtually paralyse the exercise of that jurisdiction. The principles of natural justice which control the exercise of curial power must take account of the nature of the jurisdiction to be exercised[39].

However, where a person having the necessary legal interest to apply for leave to intervene can show that the parties to the particular proceeding may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene. The grant may be limited, if appropriate, to particular issues and subject to such conditions, as to costs or otherwise, as will do justice as between all parties. In that situation, intervention may prevent an error that

would affect the interests of the intervener. Of course, if the intervener's submission is merely repetitive of the submission of one or other of the parties, efficiency would require that intervention be denied[40].

In *Australian Railways Union v Victorian Railways Commissioners*[41], Victoria and South Australia were refused leave to intervene in a matter in which the question at issue was the power of the Commonwealth Court of Conciliation and Arbitration to make an industrial award affecting State railways. A factor which influenced Gavan Duffy, Rich and Starke JJ to refuse leave to intervene was that counsel for the parties would put the argument that the States wished to put[42].

The hearing of an *amicus curiae* is entirely in the Court's discretion. That discretion is exercised on a different basis from that which governs the allowance of intervention. The footing on which an *amicus curiae* is heard is that that person is willing to offer the Court a submission on law[43] or relevant fact[44] which will assist the Court in a way in which the Court would not otherwise have been assisted[45]. In *Kruger v The Commonwealth*[46], speaking for the Court, I said in refusing counsel's application to appear for a person as *amicus curiae*:

"As to his application to be heard as amicus curiae, he fails to show that the parties whose cause he would support are unable or unwilling adequately to protect their own interests or to assist the Court in arriving at the correct determination of the case. The Court must be cautious in considering applications to be heard by persons who would be amicus curiae lest the efficient operation of the Court be prejudiced. Where the Court has parties before it who

are willing and able to provide adequate assistance to the Court it is inappropriate to grant the application."

It is not possible to identify in advance the situations in which the Court will be assisted by submissions that will not or may not be presented by one of the parties nor to identify the requisite capacities of an *amicus* who is willing to offer assistance. All that can be said is that an *amicus* will be heard when the Court is of the opinion that it will be significantly assisted thereby, provided that any cost to the parties or any delay consequent on agreeing to hear the *amicus* is not disproportionate to the assistance that is expected.

In this case, the media proprietors were able to show that their interests were likely to be substantially affected by the judgment in either this matter or in *Lange v Australian Broadcasting Corporation*. The Media, Entertainment and Arts Alliance was not able to establish that condition on an application for leave to intervene. On the facts pleaded in the present case, it was far from evident that the arguments relevant to important questions of defamation law, involving a reconsideration of *Theophanous* and *Stephens*, would necessarily arise or be adequately put. For these reasons, I favoured the grant of conditional leave to intervene to the media proprietors[47], the refusal of leave to the industrial association and the receipt of written submissions by the *amici*.

DAWSON J. Under Victorian law, a person with a valid game licence could hunt ducks in permitted hunting areas in that State during the 1994 open season, which ran from late March to early June. A person who did not hold a valid game licence was prohibited by regulation from approaching within a distance of less than five metres on any permitted hunting area during the 1994

open season any person who did hold such a licence[48]. However, most recreational duck shooting occurs in the first weekend of the open season and under the regulations a person not holding a valid game licence was also prohibited from entering any permitted hunting area from before dusk until after dawn the following morning on the first Friday and Saturday of the 1994 open season[49]. To do so was a summary offence and the plaintiff was charged with having done so on three occasions over the course of the weekend.

The plaintiff has for a number of years campaigned against duck shooting in Victoria and he claims to have entered the permitted hunting area in question during the weekend for a number of purposes: to gather evidence of the cruelty associated with duck shooting and of the killing of protected birds by duck shooters; to draw public attention by television coverage and other means to duck shooting; to debate and criticise those policies of the Victorian Government and laws of the Victorian Parliament which permit duck shooting; to be seen rendering aid to and collecting injured birds; to prevent the shooting of protected birds; to protest in general about duck shooting; and to ensure that the people of Victoria could form and exercise informed political judgments about the stance of the Victorian Government in relation to duck shooting.

The plaintiff claims that the regulation under which he was charged prevented him from pursuing these purposes, at least in the way in which he wished to do so, and was invalid because it contravened an implied freedom of communication said to be conferred by the Commonwealth Constitution and the *Constitution Act* 1975 (Vic). The defendants demurred to the plaintiff's claim and said that the regulation, which fell within the expressed object of ensuring a greater degree of safety of persons in hunting areas

during the 1994 open season[50], was within the legislative power of the Victorian Parliament.

The freedom of communication which the plaintiff seeks to establish is said by him to be a requirement of "the concept of representative government which is enshrined in the Constitution"[51]. But it is now clear[52] that the Constitution does not incorporate any concept of representative government other than can be identified in the provisions of the document itself. It is not helpful to ask what is required by representative government. The relevant question must always be what form of government does the Constitution require and that inquiry leads to those provisions which provide for a parliament comprised of elected representatives directly chosen by the people, namely, ss 1, 7 and 24. It is then possible to discern the manner in which and the extent to which the Constitution affords protection to freedom of communication. Thus, in *Lange v Australian Broadcasting Corporation*[53] it was said that:

"ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors."

Sections 7 and 24, together with ss 1, 8, 13, 16, 25, 28 and 30, provide the minimum requirements of a system of representative government but do not purport to go significantly further. Those minimum requirements were identified by Stephen J in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*[54] as being "the enfranchisement of electors, the existence of an electoral system capable of giving effect to their selection of representatives and the bestowal of legislative functions upon the representatives thus selected". However, ss 7 and 24 provide that

members of the Commonwealth Parliament be directly chosen by the people, in the case of the Senate by the people of each State and in the case of the House of Representatives by the people of the Commonwealth. The choice required by ss 7 and 24 is to be made at periodic elections[55] and the choice of which those sections speak is necessarily a true or genuine choice with "an opportunity to gain an appreciation of the available alternatives"[56]. It follows that in speaking of elections, the Constitution is speaking of free elections which can only occur where there is freedom of communication about those matters which may properly influence the outcome of the elections[57]. The required freedom of communication is not confined to election periods and extends to all matters of government and politics.

The freedom is often said to be implied in the Constitution but I do not think that it really is. The Constitution speaks in terms of representatives being directly chosen by the people at periodic elections, and to say that those words require free elections is to construe them in context. Admittedly, the line between construing the text and making implications from it is not always easy to draw. But, in any event, the freedom of communication which is protected by the Constitution is that which everyone has in the absence of laws which curtail it and that freedom does not find its origins in the Constitution at all, either expressly or by implication. Even if the inhibition against laws preventing free elections is to be seen as arising by implication, that implication is of a negative nature and the freedom involved is a residualfreedom owing its existence to a restriction upon legislative power. What is clear is that the freedom does not rest upon an implication drawn from any underlying or overarching concept of representative government.

It should be added that s 128 of the Constitution, in prescribing a procedure by way of referendum for submitting a proposed

constitutional amendment to the electors for their approval or disapproval, precludes laws which would prevent that choice being free and informed.

The Constitution does not erect a guarantee of freedom of communication in the same way as it erects a guarantee of freedom of interstate trade under s 92. There the freedom is expressed to be absolute and, faced with the impossibility of absolute freedom in that context, the Court is required to balance that freedom against those other interests in an ordered society which must be recognised by the law. Sections 7 and 24 and related sections require free elections and the question for the Court in a case such as this is whether the impugned law precludes the holding of elections of that character.

It is, of course, possible to approach the matter in more than one way. In *Lange v Australian Broadcasting Corporation*[58] it was suggested that two questions must be answered:

"First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, 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 and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people ... If the first question is answered 'yes' and the second is answered 'no', the law is invalid."

There can be no objection to approaching the matter in this way, provided that it is borne in mind that, putting to one side the

situation under s 128, the ultimate question is whether the law is compatible with the elections which the Constitution requires. It is in those elections that the representative government and, ultimately, the responsible government for which the Constitution provides find their source. As I have said, the circumstances of those elections must be such as to enable the people to make a free and informed choice. In other words, they must be free elections.

Free elections do not require the absence of regulation. Indeed, regulation of the electoral process is necessary in order that it may operate effectively or at all. Not only that, but some limitations upon freedom of communication are necessary to ensure the proper working of any electoral system[59]. Apart from regulation of the electoral process itself, elections must take place within the framework of an ordered society and regulation which is directed at producing and maintaining such a framework will not be inconsistent with the free elections contemplated by the Constitution notwithstanding that it may incidentally affect freedom of communication. In other words, the freedom of communication which the Constitution protects against laws which would inhibit it is a freedom which is commensurate with reasonable regulation in the interests of an ordered society.

The regulation of which the plaintiff complains may on its face be regarded as reasonable in the interests of an ordered society in that, considered in the light of its objective of achieving a greater degree of safety of persons in hunting areas during the open season for duck in 1994, it is clearly concerned with the maintenance of order in a situation where the interests of duck shooters and others who would be present in hunting areas (and they would most likely be protesters) may conflict. Whilst the plaintiff may have been prevented from making his protest in a manner which would have achieved maximum publicity and to that extent the regulation in

question may have curtailed freedom of communication to a degree, it was to a degree which was reasonable in an orderly society and hence consistent with the free elections which the Constitution requires.

Adopting the test which was posited in *Lange v Australian Broadcasting Corporation*[60], it may be assumed that the regulation burdened freedom of communication, but it was appropriate and adapted to serve the legitimate end of ensuring the safety of persons with conflicting aims who would be likely to be present in the vicinity of duck shooting at the opening of the 1994 season.

Notwithstanding that the regulation of which the plaintiff complains was a Victorian regulation, he chose to base his argument principally upon the freedom of communication which is protected by the Commonwealth Constitution, being content to say that the *Constitution Act* 1975 (Vic) affords freedom of communication of the same kind and to the same extent. That being so, it is unnecessary to enter upon any examination of the provisions of the *Constitution Act*, for the result which they produce could, upon the plaintiff's argument, be no different from the result under the Commonwealth Constitution.

For these reasons, I would allow the demurrer.

TOOHEY AND GUMMOW JJ. This is a demurrer to a further amended statement of claim in which the plaintiff seeks in this Court a declaration of the invalidity of certain regulations made under legislation of the State of Victoria. The regulations create summary offences. The plaintiff has been charged by summons

issued out of a magistrates court with offences allegedly committed on 19 and 20 March 1994. In this Court, the State is the first defendant and the second and third defendants are police officers who were the informants in respect of the charges.

The plaintiff contends that the regulations in question are invalid, being beyond the powers of the Parliament of the State "by reason of implied freedoms contained in the Commonwealth Constitution and in the *Constitution Act* 1975 (Vic)" ("the State Constitution Act"). The original jurisdiction of this Court is attracted by s 30(a) of the *Judiciary Act* 1903 (Cth), the action being a matter arising under the Constitution or involving its interpretation.

The plaintiff relies upon propositions which he submits may be derived from the decisions of this Court in *Nationwide News Pty Ltd v Wills*[61], *Australian Capital Television Pty Ltd v The Commonwealth* ("*ACTV*")[62], *Theophanous v Herald & Weekly Times Ltd*[63] and *Stephens v West Australian Newspapers Ltd*[64].

The defendants delivered a defence and demurrer[65]. The defendants support the demurrer on various grounds. It will be necessary to deal only with the first of these. This is that, on any view of the scope of the authorities upon which the plaintiff relies, the regulations and the legislation pursuant to which they were made are not rendered invalid. The legislation in question is the *Wildlife Act* 1975 (Vic) ("the Wildlife Act"). In his further submissions on the nature of the demurrer, the plaintiff says that he makes "no allegation against the provisions of the Wildlife Act". His attack is confined to particular regulations made thereunder.

For the purpose of argument in this case, the defendants assume that the power of the Victorian legislature to enact laws which impede freedom of discussion or communication[66] of matters of public concern at the State level is subject to the limitations propounded in the authorities and that those limitations arise from either or both the Constitution or the State Constitution Act. However, the defendants correctly submit that what was classified in the authorities as the constitutional freedom has not been treated as conferring an absolute or uncontrolled licence[67]. The defendants further submit that the regulatory regime of which the plaintiff complains involves no significant curtailment of the constitutional freedom and strikes a reasonable balance with the public interest in personal safety[68].

In this way, the defendants assume on their demurrer the burden of making good the proposition that, even if the regulations would otherwise fall foul of the constitutional limitations with respect to freedom of discussion or communication, the reasonable balance which they strike saves them from invalidity. The test for invalidity in these circumstances was stated in *Lange v Australian Broadcasting Corporation*[69] in the following terms:

"When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication ... two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?[70] Second, if the law effectively burdens that freedom, 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 first question is answered 'yes' and the second is answered 'no', the law is invalid."

The plaintiff was charged with offences against pars (a) and (b) of reg 5(1) of the Wildlife (Game) (Hunting Season) Regulations 1994 (Vic)[71] ("the Regulations"). Regulation 1 is an important provision. It states the objectives of the Regulations. The purpose, as well as the operation and effect, of the particular law have been treated as elements in the assessment of whether a law curtails freedom of political communication or discussion in a manner and to an extent which is consistent with the constitutional implication[72]. That assessment is relevant in answering the second question posed in *Lange*.

Among the objectives of the Regulations set out in reg 1 are the ensuring of "a greater degree of safety of persons in hunting areas during the open season for duck in 1994" and the making of "amendments concerning the times and dates for the open and close seasons for game duck".

Regulation 2 identifies provisions under which the Regulations were made. One is s 87 of the Wildlife Act. Section 87 empowers the Governor in Council to make regulations for various purposes including "for preserving good order among hunters of wildlife". Any such regulation may be general in application or may be restricted by reference to such matters as a kind or species of wildlife, time, place, persons, equipment, hunting guns or circumstances, whether determined or ascertainable before or after the making of the regulation (s 87(2)).

Regulation 5 states:

"(1) A person must not enter into or upon any permitted hunting area at any time between the hours of -

(a) 5 pm on Friday, 18 March 1994 and 10.00 am on Saturday, 19 March 1994; or

(b) 5 pm on Saturday, 19 March 1994 and 10.00 am on Sunday, 20 March 1994.

Penalty: 10 penalty units

(2) Sub-regulation (1) does not apply to a person who is the holder of a valid game licence authorised for the hunting or taking of game birds (including duck)."

The phrase "permitted hunting area" is so defined in reg 4 as to refer to the waters of certain areas. The meaning given to the phrase is as follows:

"(a) the waters of any State Game Reserve established under the **Wildlife Act 1975**, and the land within 5 metres of the water shoreline of those waters; and

(b) the waters of the hunting areas described in the Schedule and the land within 5 metres of the water shoreline of those waters".

Sections 14 and 15 of the Wildlife Act provide for the Director-General[73] to have the management and control of certain lands of the Crown which are to be known as State Wildlife Reserves. Section 15(2) provides for a further classification of State Wildlife Reserves to include State Game Reserves. The hunting areas referred to in par (b) of the definition of "permitted hunting area" include that of Lake Buloke in the Shire of Donald. The offences for which the plaintiff has been charged were allegedly committed there.

Regulation 5(2) lifts what otherwise would be the prohibition imposed by reg 5(1). It does so in respect of holders of "a valid game licence authorised for the hunting or taking of game birds (including duck)". What is a "game licence"?

Section 22A of the Wildlife Act creates an offence for the hunting, taking or destroying of any game without a game licence issued under the section. In s 3(1), "game licence" is defined as meaning a game licence issued under s 22A. That definition is carried into reg 5(2) of the Regulations by s 23 of the *Interpretation of Legislation Act* 1984 (Vic)[74].

To appreciate the significance of the particular periods referred to in reg 5(1), it is necessary to consider provisions made in respect of the "Open Season" by the Wildlife (Game) Regulations 1990 (Vic)[75]. In the Regulations these are identified as "the Principal Regulations". These also are expressed as being made under powers conferred by the Wildlife Act. The terms "close season" and "open season" are used in the Wildlife Act respectively to identify the period or periods in each year during which a particular species of game may or may not be taken or hunted. Regulation 9 of the Regulations redefined the open season so that it commenced in the early daylight hours of the third Saturday in

March, which in 1994 was Saturday, 19 March. Thus, the temporal operation of the prohibitions imposed by reg 5 was directed to the first two days of the open season. The effect of reg 5 was to limit the class of entrants into or upon the waters of any permitted hunting area to the holders of a valid game licence authorised for the hunting or taking of game birds, including duck.

The plaintiff complains that the prohibitions imposed by reg 5 upon him and others who did not hold the requisite game licence inhibited their ability to pursue, or prevented or rendered unlawful their pursuit of, the purposes detailed in par 5(d) of the further amended statement of claim. These include their protesting various matters "by their physical presence, by the use of leaflets, posters, placards and the like, by [oral] statements, by attracting media attention, especially television coverage, of actual events occurring within the proclaimed area during the proclaimed period". The objects of protest were the Regulations, "the underlying policies of the Victorian Government related thereto", the activities and practices of game shooting generally, and the illegal shooting of protected species by game shooters. These were identified by the plaintiff as "the duck shooting issues" and we will use that term.

Other purposes specified in par 5(d) include the gathering of information and materials about the activities of duck shooters "within the proclaimed area during the proclaimed period" in order to speak publicly and protest about the duck shooting issues "from an informed and persuasive basis, and in order to ensure that the people of Victoria can form or exercise informed political judgments about the stance of the Victorian Government in continuing to support or permit duck shooting". The reference to television coverage of actual events occurring within the proclaimed area during the proclaimed period was expanded by the plaintiff's reference in par 5(d) to the ability to gainassistance in

speaking and protesting about the duck shooting issues by being seen publicly rendering aid to or collecting injured game birds and protected species which shooters had shot illegally or "failed to despatch quickly or at all". Regulation 26 of the Principal Regulations requires a person who takes game which is alive when recovered to kill that game immediately.

It may be conceded that television coverage of actual events occurring within the permitted hunting areas during the periods specified in reg 5(1) would attract public attention to those protesting the duck shooting issues, even if it would portray or stimulate appeals to emotion rather than to reason. The appeal to reason cannot be said to be, or ever to have been, an essential ingredient of political communication or discussion. It must also be accepted that the constitutional freedom is not confined to verbal activity. We recognise that it may extend to conduct where that conduct is a means of communicating a message within the scope of the freedom.

The apprehended presence of persons hunting or taking game birds in the waters of the same permitted hunting area as those protesting that activity, by conduct seeking to attract television coverage, suggests the need for measures designed to provide a degree of safety to all persons in that area. That was a stated objective of the Regulations. One measure taken in the Regulations was to forbid a person at any time in the open season for duck in 1994 to approach, within a distance of less than five metres, a licence holder who was hunting or taking game birds in a permitted hunting area (reg 6). Another measure, directed specifically to the commencement of the open season, was reg 5. The prohibitions imposed by the Regulations were accompanied by criminal sanctions.

The Regulations exemplify a law which has the effect, if not the purpose, of curtailing to some degree the constitutional freedom. The attachment of a penalty is a significant matter in the assessment of the validity of such a law. But it is not necessarily fatal.

The Regulations do not have, as their direct operation, the denial of the exercise of the constitutional freedom in a significant respect. They may be contrasted with the legislation held invalid in *ACTV*[76]. This forbade the broadcasting during an election period of certain political advertisements or political information.

Nor is the legislation here of the same nature as the electoral laws considered in *Langer v The Commonwealth*[77] and *Muldowney v South Australia*[78]. There, the very curtailment of the constitutional freedom itself was supported as "reasonably capable of being viewed as appropriate and adapted to furthering the democratic process"[79].

On the other hand, the Regulations imposed no general prohibition or regulation of communication or discussion. Nor is there a likelihood that the prohibitions they did impose involved a significant curtailment of the constitutional freedom of political communication and discussion[80]. In particular, reg 5, under which the plaintiff has been prosecuted, imposed prohibitions which were strictly limited in place and time. The operation of reg 5 is long since spent. The purpose of reg 5 was to ensure a greater degree of safety of all persons in the waters of permitted hunting areas at the commencement of open season in 1994. Any impairment of the constitutional freedom was incidental to the achievement of that purpose.

In the present case, there was no greater curtailment of the constitutional freedom than was reasonably necessary to serve the public interest in the personal safety of citizens whilst they were in the waters of permitted hunting areas and the curtailment was reasonably capable of being seen as appropriate and adapted to the aim pursued in the Regulations. That aim itself was plainly within the regulation-making power conferred upon the Executive Government by the legislature in s 87 of the Wildlife Act.

The defendants succeed for these reasons and it is unnecessary to consider the additional grounds upon which they supported the demurrer.

The demurrer should be allowed. The hearing of the demurrer was significantly extended by submissions by the defendants, and interveners, upon those additional grounds. Leave to intervene was granted to certain media proprietors on the condition that each intervener bear the costs of the parties occasioned by its intervention on a party and party basis. In all the circumstances, this should be supplemented by an order that the plaintiff bear the defendants' costs of the demurrer, but limited to one day of the hearing.

GAUDRON J. The plaintiff, Laurence Nathan Levy, is actively involved in a campaign to stop recreational duck shooting. In particular, he is concerned to stop recreational duck shooting in Victoria. It is permissible to hunt ducks in that State in accordance with a game licence during open season[81]. In general terms, open season extends from the third Saturday of March until the end of May, or, sometimes, early June[82]. Apparently, most

recreational duck shooting is done on the opening weekend of the season[83].

On 8 March 1994, the Wildlife (Game) (Hunting Season) Regulations 1994 ("the 1994 Regulations") were made pursuant to s 87 of the *Wildlife Act* 1975 (Vic) ("the Wildlife Act") and ss 91 and 99 of the *Conservation, Forests and Lands Act* 1987 (Vic) ("the Conservation Act")[84]. By reg 1, it was stated that the objectives of the Regulations were to:

"(a) ensure a greater degree of safety of persons in hunting areas during the open season for duck in 1994; and

(b) make amendments concerning the times and dates for the open and close seasons for game duck; and

(c) add further offences to the Schedule of offences in the Conservation, Forests and Lands (Infringement Notice) Regulations 1992."

The 1994 Regulations declared open season from approximately sunrise on the third Saturday in March until sunset on the second Monday in June in each year. They also proclaimed various waters, including the waters of Lake Buloke, and land within 5 metres of their shorelines as "permitted hunting area[s]". Regulation 5 relevantly provided that a person who was not the holder of a valid game licence:

"must not enter into or upon any permitted hunting area at any time between the hours of-

(a) 5 pm on Friday, 18 March 1994 and 10.00 am on Saturday, 19 March 1994; or

(b) 5 pm on Saturday, 19 March 1994 and 10.00 am on Sunday, 20 March 1994."

And by reg 6 it was relevantly provided that:

"(1) A person must not, at any time during the open season for duck in 1994, approach within a distance of less than 5 metres, any person who is the holder of a valid game licence authorised for the hunting or taking of game birds (including duck) who is hunting or taking game birds, in any permitted hunting area.

...

(2) Sub-regulation (1) does not apply to a person who is the holder of a valid game licence authorised for the hunting or taking of game birds (including duck) who is hunting or taking game birds from the same boat or from the same hide as another person."

By reg 10, offences against regs 5 and 6 were made offences for which an infringement notice might be issued under the Conservation, Forests and Lands (Infringement Notice) Regulations 1992.

On Friday 18 March and on the weekend of 19-20 March 1994, the first weekend of the 1994 open season for duck, the plaintiff and various other persons, none of whom held a game licence, entered the Lake Buloke hunting area within the times proscribed by reg 5 of the 1994 Regulations. Their intention, it is said, was to "gather evidence of the cruelty associated with [duck] shooting, to gather evidence of the killing of protected birds by duck shooters, to draw the public's attention to these issues, to debate and critici[z]e the Victorian Government's policies and laws which permit [duck] shooting, and to protest about the recreational shooting of ducks generally." They were intercepted, removed from the area and issued with infringement notices. They objected to the notices and were later charged with offences under the 1994 Regulations.

The plaintiff brings this action against the State of Victoria and two other persons, who are the informants in the charges brought against him, seeking, amongst other relief, a declaration that the 1994 Regulations were invalid by reason that they impermissibly restricted freedom of political communication. He relies on the implied freedom of political communication required by the Constitution of the Commonwealth and identified in *Nationwide News Pty Ltd v Wills*[85] and *Australian Capital Television Pty Ltd v The Commonwealth*[86]. In the alternative, he relies on an equivalent freedom which, it is said, is to be discerned in the *Constitution Act* 1975 (Vic).

The defendants have filed a defence and demurrer to the plaintiff's Statement of Claim. They support their demurrer on various grounds, including that the 1994 Regulations did not "unreasonably have the purpose or effect of restricting any implied freedoms contained in the Commonwealth Constitution or in the Constitution Act 1975 (Vic)". I am of the view that the demurrer

must be upheld on that ground and it is, thus, unnecessary to refer to the other grounds advanced in its support.

It may be taken that the 1994 Regulations effected some restriction on the plaintiff's ability to publicise his cause and, in that sense, restricted his freedom to engage in political communication. However, it is perhaps more accurate to say that they restricted his freedom of movement and, consequentially, restricted his ability to publicise his cause. I mention this matter because I am of the view that ss 7 and 24 of the Constitution which, respectively, require that the Senate and House of Representatives be directly chosen by "the people of [each] State" and by "the people of the Commonwealth", s 64, which requires that Ministers of State be or become Senators or Members of the House of Representatives, and s 128, which provides for the alteration of the Constitution by referendum, depend for their efficacy on and, thus, impliedly require freedom of political communication and also require freedom of movement as an aspect of freedom to engage in political communication or as subsidiary to that freedom. My views in this regard have been stated elsewhere and need not be repeated[87].

It is well settled that the Constitutional provisions to which I have referred do not require absolute freedom of political communication[88]. It will later be necessary to refer to the various tests which have been advanced as determinative of the question whether a law infringes that freedom. For the moment, it is sufficient to note that because freedom of movement is an aspect of or subsidiary to freedom of politicalcommunication, the same test must determine whether a law impermissibly restricts freedom of movement. As I point out in *Kruger v The Commonwealth*[89], however, the test may direct consideration of different matters,

depending on whether the law in question operates to restrict movement or to restrict political communication.

In *Nationwide News*, I expressed the view that a law enacted by the Parliament of the Commonwealth will not impermissibly restrict political communication "if its purpose is not to impair [that communication], but to secure some end within power in a manner which, having regard to the general law as it has developed in relation to the written and spoken word, is reasonably and appropriately adapted to that end."[90] A less stringent test and one that is sometimes employed to ascertain the character or purpose of a law[91] was advanced by Brennan CJ in *Langer v The Commonwealth*[92]. In that case, his Honour said that "if the impairment of the freedom [of political communication] is reasonably capable of being regarded as appropriate and adapted to the achieving of a legitimate legislative purpose and the impairment is merely incidental to the achievement of that purpose, the law is within power."

In *Australian Capital Television*, a distinction was drawn in some judgments between laws directed to political communications or the content of them and laws which only incidentally affect those communications, for example, by regulating the time, place or mode of communication or affecting communication in the course of or as an aspect of the regulation of some other activity[93]. Thus, for example, Mason CJ expressed the view that "only a compelling justification will warrant the imposition of a burden on free communication by way of restriction and the restriction must be no more than is reasonably necessary to achieve the protection of the competing public interest which is invoked" but allowed that, in the case of a restriction on a mode of communication, it need only be "reasonably necessary to achieve the competing public interest"[94]. Similarly, Deane and Toohey JJ expressed the

view that "a law whose character is that of a law with respect to the prohibition or restriction of [political] communications ... will be much more difficult to justify ... than will a law whose character is that of a law with respect to some other subject and whose effect on such communications is unrelated to their nature as political communications."[95]

In *Kruger*, I referred to the various tests propounded in the decided cases as determinative of the question whether a law infringes the freedom of political communication which the Constitution requires and concluded that the test varies according to the purpose of the law in question. If the direct purpose of the law is to restrict political communication, it is valid only if necessary for the attainment of some overriding public purpose. If, on the other hand, it has some other purpose, connected with a subject-matter within power and only incidentally restricts political communication, it is valid if it is reasonably appropriate and adapted to that other purpose[96]. And, as I explained in *Kruger*, the same tests apply where the law in question is said to impermissibly restrict movement in society[97]. Although those tests were formulated in connection with Commonwealth laws, there is no reason in principle or in logic why they should not be applied where, as here, it is said that the freedom is infringed by a State law. Nor, if there is an equivalent freedom to be discerned in the *Constitution Act* 1975 (Vic), is there any reason why they should not be applied in determining whether or not it has been infringed.

So far as concerns reg 6, which applied to all persons in a permitted hunting area during open season, there is no reason to think it had any purpose other than that stated in reg 1(a), namely, to ensure a greater degree of safety of persons in hunting areas during the season. That is a purpose within the legislative power of

the State of Victoria. And given the use of firearms, the requirement that persons go no closer than 5 metres to a licensed duck hunter is reasonably appropriate and adapted to that purpose. Indeed, I should think it is properly to be regarded as necessary for the attainment of it. Whether the restriction effected by reg 6 be regarded as necessary or merely as appropriate and adapted to ensuring human safety, it does not impermissibly infringe freedom of political communication or freedom of movement as required by the Constitution. Nor, if equivalent freedoms are to be discerned in the *Constitution Act* 1975 (Vic), are they infringed by the restriction.

The position with respect to reg 5 of the 1994 Regulations is a little different from that with respect to reg 6. It can, I think, be taken that a direct purpose of reg 5 was to keep those who wished to protest against recreational duck shooting out of permitted hunting areas for the opening weekend of the 1994 season and, thus, to restrict their freedom of movement and, perhaps, their freedom of political communication. In this regard, it is sufficient to observe that it seems unlikely that persons other than protesters and licensed duck shooters would wish to be in those areas at the times specified in the regulation. However, the purpose of keeping protesters out of hunting areas at those times is not inconsistent with the purpose of ensuring a greater degree of human safety.

Given the use of firearms and the likely enthusiasm on the opening weekend on the part of duck shooters and protesters alike, the purpose of ensuring human safety is properly to be seen as an overriding public purpose in relation to the restriction on movement and political communication effected by reg 5. And the same considerations direct the conclusion that the requirement that protesters and other persons not licensed to engage in duck shooting remain 5 metres distant from the waters in which ducks

are hunted is properly to be regarded as necessary for the attainment of that safety. Accordingly, reg 5 does not impermissibly infringe the freedom of political communication or the freedom of movement which the Constitution requires. Nor does it infringe any equivalent freedom or freedoms, if there be any, deriving from the *Constitution Act* 1975 (Vic).

The demurrer should be allowed with costs.

McHUGH J. The question raised by this demurrer to a statement of claim[98] filed in the original jurisdiction of the Court is whether the Wildlife (Game) (Hunting Season) Regulations 1994 (Vic)[99] ("the Regulations") were[100] invalid. The plaintiff alleges that the Regulations were invalid because they infringed the freedom of communication protected by the *Commonwealth of Australia Constitution Act* 1900 (Imp) ("the Constitution") and the *Constitution Act* 1975 (Vic) ("the Victorian Constitution").

The plaintiff has properly invoked the original jurisdiction of the Court because his claim arises under the Constitution or involves its interpretation[101]. He also has standing to challenge the validity of the Regulations because in June 1994 he was charged with offences as the result of alleged breaches of reg 5 of the Regulations. In my opinion, however, his statement of claim is demurrable. The Regulations were valid.

The Regulations were enacted pursuant to s 87 of the *Wildlife Act* 1975 (Vic) and ss 91 and 99 of the *Conservation, Forests and Lands Act* 1987 (Vic). Regulation 5 provided that a person who was not the holder of a valid game licence authorised for the hunting or taking of game birds (including duck):

"must not enter into or upon any permitted hunting area at any time between the hours of -

(a) 5 pm on Friday, 18 March 1994 and 10.00 am on Saturday, 19 March 1994; or

(b) 5 pm on Saturday, 19 March 1994 and 10.00 am on Sunday, 20 March 1994."

Regulation 4 defined "permitted hunting area" to mean the waters of any State Game Reserve or the waters of the hunting areas described in the Schedule to the Regulations together with the land within 5 metres of the water shoreline of any of those waters.

Regulation 6(1) provided that a person must not "at any time during the open season for duck in 1994, approach within a distance of less than 5 metres, any person who is the holder of a valid game licence ... who is hunting or taking game birds, in any permitted hunting area". Regulation 9 had the effect that the open season commenced on Saturday, 19 March 1994.

Regulation 10 had the effect that breaches of regs 5 and 6 gave rise to offences for which an Infringement Notice might be issued under the Conservation, Forests and Lands (Infringement Notice) Regulations 1992 (Vic)[102].

By reason of the Regulations and the Wildlife (Game) Regulations 1990 (Vic)[103], the area around Lake Buloke in the Victorian Shire of Donald was proclaimed a "permitted hunting area" for a period commencing in March 1994 and ending in June 1994. Consequently, persons holding valid game licences were authorised to shoot game birds (including ducks) in this area during this period. However, reg 5 prevented persons who did not hold such a licence from entering the permitted area on 18, 19 and 20 March 1994. Reg 6 prevented such persons from approaching within a certain distance of licence-holders.

The statement of claim alleges that the prohibitions contained in regs 5 and 6 prevented persons who did not hold licences - such as the plaintiff - from protesting against the policies of the Victorian government relating to duck shooting. It also alleges that the two regulations prevented them protesting "against the activities and practices of game shooting generally, and against actual and anticipated breaches of the laws by such game shooters". In addition, the statement of claim alleges that the regulations prevented unlicensed persons from protesting "by their physical presence, by the use of leaflets posters placards and the like, by verbal statements, [and] by attracting media attention, especially television coverage, of actual events occurring within the proclaimed area".

The constitutional implication of freedom of communication

It is not open to doubt[104] that the Constitution protects the freedom of "the people of the Commonwealth" ("the members of the Australian community") to communicate with each other concerning those political and government matters that are relevant to the system of representative and responsible government

provided for by the Constitution[105]. By a necessary implication drawn from ss 7, 24, 64 and supporting sections, the Constitution strikes down laws burdening freedom of communication on these matters[106]. The implication is necessary because, without it, people of different backgrounds or with different perspectives or information could be legally prevented from exchanging views[107] on matters relevant to choosing their representatives at federal elections and on matters relating to the performance of federal Ministers. Consequently, no Commonwealth or State law can validly impair the freedom of communication that the Constitution protects and, as the decision in *Lange* demonstrates, the common law cannot be at odds with the Constitution. The freedom protected by the Constitution is not, however, a freedom *to* communicate. It is a freedom *from* laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution. Unlike the Constitution of the United States, our Constitution does not create rights of communication. It gives immunity from the operation of laws that inhibit a right or privilege to communicate political and government matters. But, as *Lange* shows, that right or privilege must exist under the general law.

For the purpose of the Constitution, freedom of communication is not limited to verbal utterances. Signs, symbols, gestures and images are perceived by all and used by many to communicate information, ideas and opinions. Indeed, in an appropriate context any form of expressive conduct is capable of communicating a political or government message to those who witness it. Thus, in *Brown vLouisiana*[108], the United States Supreme Court held that a silent demonstration on the premises of a public library was constitutionally protected speech for the purpose of the First Amendment. Similarly, that Court has held that peaceful picketing

to publicise a labour dispute was constitutionally protected speech[109].

Moreover, the constitutional implication does more than protect rational argument and peaceful conduct that conveys political or government messages. It also protects false, unreasoned and emotional communications as well as true, reasoned and detached communications. To many people, appeals to emotions in political and government matters are deplorable or worse. That people should take this view is understandable, for history, ancient and modern, is full of examples of the use of appeals to the emotions to achieve evil ends. However, the use of such appeals to achieve political and government goals has been so widespread for so long in Western history that such appeals cannot be outside the protection of the constitutional implication. In *Cohen v California*[110], Harlan J, delivering the opinion of the United States Supreme Court, said that the notion of freedom of expression "conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well".

Furthermore, the constitutional implication that protects the freedom is not confined to invalidating laws that prohibit or regulate communications. In appropriate situations, the implication will invalidate laws that effectively burden communications by denying the members of the Australian community the opportunity to communicate with each other on political and government matters relating to the Commonwealth. Thus, a law that prevents citizens from having access to the media may infringe the constitutional zone of freedom[111]. The use of the print and electronic media to publicise political and government matters is so widespread in Australia and other Western countries that today it must be regarded as indispensable to freedom of

communication[112]. That is particularly true of television which is probably the most effective medium in the modern world for communicating with large masses of people.

In arguing that the constitutional implication will invalidate laws that prevent access to the television media, Mr Castan QC, who appeared for the plaintiff, pointed out that:

"The impact of television depiction of the actual perpetration of cruelty, whether to humans or to other living creatures, has a dramatic impact that is totally different [from] saying, 'This is not a good idea'."

Not much experience of television is needed to accept the truth of this observation. No one could fail to understand the impact of the war in Vietnam on the civilian population after seeing the picture of a terror-stricken, naked child running away from her burning village. Such an image probably had more to do with influencing United States public opinion against the war in Vietnam than any editorial of *The New York Times* or *Washington Post*. It can send a more persuasive message to the public than any reasoned argument. Without the opportunity to use the medium of television, the citizen cannot make use of its unique communicative powers. Because that is so, the constitutional implication protecting freedom of communication also protects *the opportunity* to make use of the medium of television.

However, the freedom from laws that would burden constitutionally protected communications or the opportunity to make or send them is not absolute[113]. The freedom is limited to what is necessary to the effective working of the Constitution's

system of representative and responsible government. Consequently, a law that is reasonably appropriate and adapted to serving an end that is compatible with the maintenance of the constitutionally prescribed system of government will not infringe the constitutional implication[114].

So two questions arise in the present case. First, did the Regulations by preventing unlicensed persons from entering a permitted hunting area to protest against duck shooting, effectively impair the capacity of those persons to communicate with other members of the Australian community on relevant political and government matters? Second, if they did, were the Regulations reasonably appropriate and adapted to achieving an end that was compatible with the constitutionally prescribed system of government?

Did the Regulations burden freedom of communication?

The facts alleged in the statement of claim show that the plaintiff and others sought to enter hunting areas for the purpose of marshalling public opinion against the practice of duck shooting and the laws and policies of the Victorian government that permitted it. They sought to influence public opinion:

. by obtaining publicity for their protests;

. by providing information and materials to the public and the Victorian government concerning the activities of duck shooters "including injured or deceased birds, photographs, names and numbers of shooters, and the identification of unlawfully shot protected species"; and

. by being seen publicly rendering aid to or collecting illegally killed or injured game birds.

Plainly, the plaintiff and other protesters did not seek to influence public and government opinion merely by their own spoken utterances, placards and posters. The argument for the plaintiff made clear, as his statement of claim indicates, that the protesters also sought to enter the permitted hunting area because their activities in that area would attract television coverage which would maximise their opportunity to influence public opinion. Mr Castan QC said:

"We are dealing with a political process here and television is the means by which one influences politicians and influences public opinion and in the case of this particular exercise, if you want to influence people to have a different view about killing these particular animals, you would have to do it in a dramatic way and highlight the issues and if that is emotional or unreasoned, so be it."

No doubt the protesters believed that televised images of the bloodied bodies of dead and wounded ducks and of angry confrontations between the shooters and the protesters were more likely to attract public attention to their cause than a placard-carrying demonstration outside the Parliament of Victoria.

For the reasons that I have given, the constitutional implication extends to protecting political messages of the kind involved here and also the opportunity to send those messages. By prohibiting

protesters like the plaintiff and any accompanying media representatives from entering the permitted hunting area at Lake Buloke, the Regulations effectively prevented the protesters from putting the kind of political message to the people and government of Victoria that they wished to put to them. It is beside the point that their arguments against the alleged cruelty of duck shooting could have been put by other means during the periods when the Regulations operated. What the Regulations did was to prevent them from putting their message in a way that they believed would have the greatest impact on public opinion and which they hoped would eventually bring about the end of the shooting of game birds. That being so, and subject to one qualification, the Regulations effectively burdened their freedom to communicate with other members of the Australian community on a political matter.

The qualification is whether, in the absence of the Regulations, the protesters and the media had the right to be present in the permitted hunting area. The constitutional implication does not create rights. It merely invalidates laws that improperly impair a person's freedom to communicate political and government matters relating to the Commonwealth to other members of the Australian community. It gave the protesters no right to enter the hunting area. That means that, unless the common law or Victorian statute law gave them a right to enter that area, it was the lack of that right, and not the Regulations, that destroyed their opportunity to make their political protest. The argument for both parties assumed, however, that, in the absence of the Regulations, the plaintiff and others were entitled to enter the *permitted hunting area* to make their protests. Because of this assumption, the proper course is to proceed on the basis that the Regulations and not the proprietary rights of the Crown or the operation of the general law prevented access to the hunting area.

For the plaintiff to establish that the Regulations infringed the constitutional implication, however, it is not enough that he has shown that they prevented him and others from communicating with the public on a political matter. He must also show:

(i) that that political matter related to the operation of the system of representative and responsible government provided for in the Constitution; and

(ii) that the Regulations were not reasonably appropriate and adapted to a legitimate end that was compatible with the freedom of communication concerning that system of government.

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. But the plaintiff seeks to meet an adverse conclusion on this point by contending that the Victorian Constitution contains an implication that protects freedom of communication on political and government matters concerning the State of Victoria. If this contention is correct, then it would not matter that the Regulations do not infringe the implication of freedom of communication arising from the text and structure of the Constitution. In that case, the only issue left in the demurrer would be whether the Regulations were reasonably appropriate and adapted to serving a legitimate end compatible with the maintenance of the system of government prescribed by the Victorian Constitution. I am of the view that the Regulations were reasonably appropriate and adapted to serving an end that was compatible with freedom of communication concerning the

system of government prescribed by the Constitution or, if it is relevant, the Victorian Constitution. It is therefore unnecessary to determine whether the Victorian Constitution contains an implication identical or similar to that contained in the Constitution. It is equally unnecessary to determine whether the intended protests of the plaintiff and others related to matters concerning federal political or government matters.

Were the Regulations compatible with the freedom of communication concerning the constitutionally prescribed system of government?

In accordance with Guideline 6(b)(i) of the Guidelines issued pursuant to the *Subordinate Legislation Act* 1962 (Vic)[115], reg 1 declared the objectives of the Regulations. Paragraph 1(*a*) stated that one of the objectives was to "ensure a greater degree of safety of persons in hunting areas during the open season for duck in 1994". On their face, regs 5 and 6 give effect to this objective. According to the statement of claim, the plaintiff "has on his own behalf and with other persons for several years publicly expressed concern about, and actively protested about, the laws policies and practices in Victoria which enable the practice of duck-shooting to be pursued in the State of Victoria". Confrontations between protesters such as the plaintiff and shooters were therefore a likely, almost inevitable, outcome of the decision to declare an open season for duck shooting in 1994. In a context where it was likely that protesters would seek to rescue injured birds, gather information about the number of birds shot and injured, and photograph and identify shooters and unlawfully shot species, the Executive government of Victoria was entitled to regard the prospect of injury to life and limb from confrontations as far from fanciful. Furthermore, the regulation of duck shooting and the areas where it takes place and the maintenance of public safety are

all ends that are compatible with freedom of communication concerning the system of government prescribed by the Constitution and the Victorian Constitution. That being so, the Regulations were designed to achieve ends that were compatible with that freedom. But were they reasonably appropriate and adapted to achieving such ends?

In my view, reg 6 was reasonably appropriate and adapted to achieving the safety of persons in hunting areas. It prevented any person other than the holder of a valid game licence from approaching "within a distance of less than 5 metres, any person who [was] the holder of a valid game licence". Such a direction plainly reduced the chance of physical confrontations between protesters and shooters and thereby promoted the safety of persons in hunting areas.

The validity of reg 5 is not so clear. The plaintiff did not impute lack of *bona fides* to the Victorian government in promulgating that regulation. Instead, he contended that, rather than a blanket prohibition on entry, the Regulations should have used such means as would promote safety but at the same time leave unlicensed persons free to protest. This contention has much force although, apart from pointing to the terms of reg 6, the plaintiff did not identify what these means might be. I think, however, that it was open to the Executive government to take the view that, the issue of duck shooting being highly emotional and human nature being what it is, once the protesters were allowed into the hunting area, no measure could reasonably be taken to prevent angry and probably violent confrontations between them and the shooters. Once that conclusion was reached, the blanket prohibition was a measure reasonably calculated to provide safety for the shooters and those who wished to protest against the shooting of ducks. That being so, reg 5 was valid.

Order

The demurrer to the statement of claim should be allowed.

The hearing of the demurrer was lengthened by the intervention of numerous interveners. It was a condition of intervention for some of them that the intervener bear the costs of the parties occasioned by the intervention. In those circumstances, the appropriate order is that the plaintiff should pay the defendant's costs of the demurrer limited to one day's hearing.

KIRBY J. Mr Laurence Levy ("the plaintiff") seeks a declaration that reg 5 of the Wildlife (Game) (Hunting Season) Regulations 1994 (Vic) ("the regulations") made pursuant to legislation enacted by the Victorian Parliament[116] is invalid. He seeks a consequential declaration that criminal charges laid against him under reg 5 are unlawful. An injunction to restrain the defendants from proceeding to prosecution of those charges is also sought. The defendants have responded with a demurrer to the plaintiff's Further Amended Statement of Claim ("the statement of claim").

By this means, a number of questions have been presented to this Court concerning the implied freedom of political communication said to be derived both from the federal and State Constitutions and from the rights of the people upheld by the common law. By their demurrer, the defendants seek to stop the plaintiff's proceedings[117].

Overcoming initial reluctance, the defendants made an application to challenge the holdings of this Court in *Theophanous v Herald & Weekly Times Ltd*[118] and *Stephens v West Australian Newspapers Ltd*[119]. Their application occasioned the adjournment of the proceedings, the provision of notices under the *Judiciary Act* 1903 (Cth) and the participation in the resumed hearing of a large number of governments, other interveners and *amici curiae*. In the event, although the participation of these interests was relevant to the decision of the Court in proceedings heard concurrently[120], it proved unnecessary for this case to reopen those decisions. The demurrer may be dealt with upon the narrower basis which both the plaintiff and the defendants were first inclined to present.

The plaintiff's statement of claim

Upon demurrer, the facts pleaded in the statement of claim are accepted for the purpose of considering the legal sufficiency of those facts to support the remedy asserted.

According to the statement of claim, the plaintiff, pursuant to regs 5(1)(a) and 5(1)(b) of the regulations, was charged on 7 June 1994 with summary offences. The particulars of the charges stated that the plaintiff, on 19 and 20 March 1994, entered a permitted hunting area during prohibited times without holding an authority to do so[121]. The plaintiff pleads that he did not hold a "valid game licence authorised for the hunting or taking of game birds (including duck)" (a "valid game licence")[122]. He states that, with other persons, he has for several years "publicly expressed concern ... and actively protested about, the laws policies and practices in Victoria which enable the practice of duck-shooting". The statement of claim goes on to assert that proclamations made under the regulations[123] declared an area in and around Lake

Buloke in Victoria a "permitted hunting area"; prohibited the plaintiff from entering the area between stipulated hours on 18, 19 and 20 March 1994 unless holding a valid game licence; and authorised there, during the specified period, the shooting by persons holding a valid game licence of game birds, including duck.

The statement of claim goes on to identify what are called "the plaintiff's purposes"[124]. The plaintiff pleads that such purposes were "inhibited, prevented, or rendered unlawful" by the regulations. He avers that, during the proclaimed period and within the proclaimed area, many persons holding valid game licences shot, injured or killed hundreds of birds, failed immediately to kill injured birds, failed to render aid to protected birds and shot protected species. He pleads that he entered the area during the prohibited period for his stated purposes and was intercepted by police officers who removed him against his will and thereby prevented him from pursuing such purposes.

On the basis of the foregoing facts, the plaintiff pleads that he had been "unreasonably inhibited from, or substantially or wholly prevented from, pursuing his said purposes, save by exposing himself to being charged, tried and convicted of the offences" under the regulations. He then pleads that, by virtue of the Australian Constitution and the provisions of the *Constitution Act* 1975 (Vic) (the "Victorian Constitution") implied constitutional freedoms limited the powers of the Parliament of Victoria. The regulations were invalid being beyond power. They prevented the plaintiff from pursuing his "freedom or positive right" to speak publicly or to protest by physical activity about the regulations and the "policies underlying" them and the practices and activities of authorised game shooters. They also prevented him from upholding the law. They "unnecessarily restrict[ed] the ability of the people of Victoria ... forming or exercising informed political

judgments about the stance of the Victorian Government in continuing to support or permit duck shooting".

Whilst conceding that reasonable limits might be prescribed by law to the extent that they were "reasonably and appropriately adapted to achieve a purpose otherwise lawfully within the scope of State legislative power", the statement of claim ends with an assertion that each of the regulations was:

"not a law within such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society; or alternatively ... not a law which is reasonably and appropriately adapted to achieve a purpose otherwise lawfully within the scope of State legislative power".

The plaintiff accordingly pleads that the regulations are ultra vires; that he has committed no offence; and that the charges brought against him are invalid and ineffective and should be enjoined.

The defendants' demurrer

The defendants are the State of Victoria and the two police officers involved in the plaintiff's apprehension. They have pleaded to the statement of claim and demurred. At common law this course was not permitted. However, it became possible by statute, if leave were granted[125]. Under the Rules of this Court it may be done without leave[126].

The defendants demurred to the whole of the amended statement of claim. The grounds of demurrer are set out in the reasons of Brennan CJ. I will not repeat them.

At the hearing, the plaintiff mounted a strong attack on the adequacy of the original grounds of demurrer, conceding the admissibility and relevance only of the third [par (c)]. In the result the defendants sought, and were granted, leave to amend the demurrer to add a reference to the Victorian Constitution [par (d)] and to add a new ground designed to present directly the substance of the legal flaw said to be fatal to the plaintiff's claim. The additional ground [par (ca)], which is crucial, reads:

"[T]he [regulations] are not invalid by reason of any implied freedom contained in the Commonwealth Constitution or in the *Constitution Act* 1975 (Vic)".

The plaintiff's case

The plaintiff's case was addressed primarily to the substance of his legal dispute with the defendants. It concerned secondarily, a pleading issue arising from the terms of the demurrer.

As to the substance, the plaintiff asked this Court to extend its recent holdings on freedom of political communication so as to strike down reg 5. For that purpose he proposed the development of a body of jurisprudence akin to that fashioned in the United States of America out of the First Amendment to that country's constitution. There, the marches and bus rides for racial desegregation[127] or the protests against involvement in the war

in Vietnam[128] were typically conducted in public places. They were upheld by the courts, notwithstanding the fact that they often presented challenges to the safety and tranquillity of the participants, onlookers and the general public. Such challenges had to be accepted as an inescapable feature of constitutionally protected communication[129]. The plaintiff argued that the same freedom of political communication existed in Australia. By analogy, it protected his endeavour to persuade the people of Victoria and, through them, their representatives in Parliament, to change the law of Victoria to prohibit duck shooting. Legislative changes had been enacted in other Australian States[130]. According to the plaintiff, only by political communication would similar changes be secured in Victoria.

The plaintiff submitted that political communication in Australia today necessarily engages the mass media of communication. The political debates in Canada concerning prohibition of the slaughter of cub seals was given great impetus by the confrontational conduct of protesters and the presence of media pictures showing the act of clubbing and seal blood on the ice. Similarly, Australian (and specifically Victorian) political communication about duck shooting required the facility of observation and confrontation by protesters and the presence of the mass media bringing their statements and other actions to the attention of fellow citizens.

These being the plaintiff's objectives and basic arguments, he urged this Court to uphold his statement of claim. He disclaimed any suggested reliance upon a "free-standing" constitutional right to free expression[131]. In this sense, he sought to circumvent the debates[132] which had followed the decisions of this Court in *Theophanous*[133] and *Stephens*[134]. As far as he was concerned, his appeal was to the earlier holdings in *Australian Capital Television Pty Ltd v The Commonwealth*[135] and *Nationwide*

News Pty Ltd v Wills[136]. His was not a claim of a disembodied right personal to him. It was one for relief from a law of the State of Victoria said to be invalid because it was in conflict with the constitutionally protected freedom of communication upon political and governmental matters.

Bases for the asserted freedom of communication

To invalidate the regulation in question, the plaintiff relied upon three legal foundations for the asserted freedom. These were, in summary:

1. *The Australian Constitution*: The Australian Constitution was invoked in two ways. The first argument derived from the integrated federal polity established by the Constitution; the numerous references in it to the Parliaments of the States[137]; the implication inherent in the very word "Parliament", being an elected body "working under the influence of public opinion"[138]; and the consequent inference that the same controls over impermissible restrictions upon the freedom of political communication would flow from the Constitution to limit what a State Parliament could enact or authorise[139].

An alternative foundation was advanced. This was that the freedom of political communication which limited the lawmaking powers of the Federal Parliament necessarily affected a State Parliament's legislative powers as well, in so far as such exercise purported to affect political discussion about State matters. At least in a country such as Australia, political communication was said to be "indivisible"[140]. Each lobbying group might target federal and State politicians and political parties seen as aligned to causes antagonistic to theirs. No State Parliament could enact or authorise

a law which impermissibly curtailed or restricted political communication because this was protected from inhibiting legislation: federal and State alike.

2. *The Victorian Constitution*: The plaintiff next argued that the Victorian Constitution established a parallel system of representative government which required that the members of the Legislative Assembly "shall be representatives of and be elected by the electors of the respective districts"[141]. This provision was entrenched in the Victorian Constitution, requiring that a special procedure be followed for any alteration or modification[142]. That procedure had not been followed in the making of reg 5. Accordingly, the foundation for the implied freedom of communication upon political and governmental matters applied equally to the Victorian Constitution. It did so for the same fundamental reasons. A representative democracy of the kind established by such a constitution necessitated robust public debate. It implied the capacity of individuals to arouse public opinion in a way that could influence the election of the representatives by the people and, once elected, their conduct in office. From the specific provisions of the Victorian Constitution and from the creation of a "Parliament" for Victoria reflecting the characteristics of representative government, it could be inferred that limits were placed upon the extent to which such a Parliament could make or authorise laws. Any such laws could not diminish the fundamental freedom of citizens ("electors") to express and agitate their views in the democratic ways which the Victorian Constitution both contemplated and required.

3. *Rights of the "sovereign people"*: A third foundation for the plaintiff's attack on the validity of reg 5 was an appeal to the sovereignty of the people of Victoria. It was argued that there was an ultimate common law restraint upon the exercise of power by

the Parliament of Victoria in so far as it purported to enact or authorise a law diminishing the capacity of the people to enjoy their democratic rights or to express and agitate their views in a manner appropriate to a society where the people are the ultimate sovereign. The notion that the ultimate foundation for constitutional norms is the common law is not a new one[143]. However, it remains controversial[144]. With the passage of time since federation in Australia and changing notions of Australian nationhood, the perception that the Australian Constitution is binding because of its imperial provenance has given way (at least since the *Australia Acts* 1986) to an often expressed opinion that the people of Australia are the ultimate repository of sovereignty[145]. That view is not without conceptual and historical difficulties[146]. However, relying upon these opinions, the plaintiff submitted that no Australian Parliament, federal or State could deprive the "sovereign people" of their fundamental democratic rights. These, it was suggested, included freedom of political communication essential to the very operation of a Parliament representative of the electors. To the extent that the Victorian Parliament attempted to make, or authorise, a law which usurped the people's rights or interfered in their exercise, such a Parliament went beyond its lawful powers[147].

The plaintiff relied upon separate arguments addressed to the demurrer. He did so in the hope of persuading this Court that his claim, as pleaded, should be sent for trial to permit an exploration of the evidence. He argued that such evidence would throw light upon the evaluation inherent in deciding whether the regulations permissibly or impermissibly diminished the constitutional freedom of political communication upon which he relied to invalidate reg 5.

Matters in common

The plaintiff's claims, and the foundations upon which he rested them, were contested by the defendants. However, certain matters were not disputed. It is useful to collect these:

1. Although the first declaration sought was that the regulations in their entirety were invalid and inoperative, the plaintiff confined his argument, as presented, to an attack on reg 5. It was ultimately accepted that reg 6, applicable during the whole of the open season for duck, fixing a distance[148] within which a person might not approach a holder of a valid game licence, was within the permissible exceptions to the asserted freedom of communication. Regulation 6 could arguably be justified by reference to the protection of public safety. Confining the plaintiff's argument to reg 5 permitted him to concentrate upon the contention that a blanket prohibition upon entry to a permitted hunting area in the two days specified[149] was so excessive and disproportionate to the asserted protection of safety as to fall outside the permissible burdens upon the constitutional freedom. The only exemptions recognised by reg 5 were for persons holding a valid game licence[150] or designated officers of the Department of Wildlife[151].

2. The plaintiff did not challenge the validity of reg 5 as an exercise of the regulation-making power except upon constitutional grounds. Earlier, he had made a challenge to the validity of the regulation as being outside the regulation-making power. That challenge was dismissed by the Supreme Court of Victoria. The arguments were not repeated in this Court.

3. Nor did the plaintiff contest the assertion[152] that one objective of reg 5 was to "ensure a greater degree of safety of persons in hunting areas during the open season for duck". He did not challenge the bona fides of this statement contained in the regulations. There was no submission, in the statement of claim or otherwise, that the objective of protecting safety was false or a pretence in a regulation which was, in truth, made in order to stifle public debate. The plaintiff eschewed the assertion of an ulterior purpose. His concern was about the *effect* of the regulation, not the *purpose* or *motive* of the rule-maker in making it.

4. As a general proposition, it may be accepted that, in Australia, a law for the safety of members of the public is (save for those few matters expressly reserved to the exclusive legislative power of the Federal Parliament) prima facie a permissible subject matter of State legislation and regulations validly made by the Executive thereunder. It may also be accepted that such legislation or regulations may incidentally have an impact on communication generally and political communication in particular. Where a constitutional freedom is established, the question becomes whether the impact is permissible or impermissible. Both sides agreed that this was the ultimate issue for the demurrer.

5. There was a dispute about the background materials with which this Court should consider the demurrer. Initially, in addition to the pleading, legislation and regulations relied upon the defendants included, in materials placed before the Court, a Regulatory Impact Statement made in relation to the Wildlife (Game) (Human Safety) Regulations 1996[153]. This document deals with regulations made after reg 5. However, it analyses the assessed costs and suggested benefits of regulation. It contains an evaluation of alternative means which could be adopted instead of the total exclusion of non-authorised persons during the opening

weekend of the open season. It gives reasons why these were not practicable. The plaintiff contested the document. For his part, he sought to place before the Court a large bundle of news clippings and related material designed, presumably, to show the political controversy of duck shooting, the open season, shooting generally and wildlife conservation. In the end, the defendants did not press the Impact Statement. The plaintiff confined himself to the submission that, in a general way, the Court could take judicial notice (as I believe it can) of the controversy about the subject matters referred to in the statement of claim. Both parties ultimately accepted the obligation to defend their respective positions within the four corners of the pleadings filed, as amended and clarified during argument.

6. It was common ground that the regulations applied to "permitted hunting area[s][154]" being Crown land comprising designated State Game Reserves including the one at which the plaintiff was arrested. The case proceeded on the footing that, but for reg 5, the plaintiff and his supporters and the media were entitled to enter the designated hunting area and engage there in or in connection with the plaintiff's stated purposes.

7. The respondents accepted that the special provisions for the amendment of "entrenched" sections of the Victorian Constitution[155] were not complied with either in the enactment of the regulation-making power under the applicable Victorian statutes[156] or in the making of reg 5 itself. The plaintiff accepted, as applicable legislation requires,[157] that the regulation was to be construed, so far as possible, so as not to exceed the legislative powers of the Victorian Parliament.

8. The plaintiff also accepted that neither in its terms nor in its effect did reg 5 prevent all communication, by him or others, espousing their political opinions. However, he contended that the inhibitions imposed by the regulation were expressed in terms which were impermissibly broad and constitutionally invalid.

Activity as political communication

A threshold question arises as to whether, upon any view, conduct of the kind pleaded by the plaintiff could amount to constitutionally protected communication. Was it the kind of activity which this Court has held to be necessarily implicit in the text and structure of the Australian Constitution? Could conduct, as distinct from words, ever amount to the kind of "communication" which an implied restriction on law-making would protect?

The plaintiff relied upon the inhibition which the regulation placed upon his *words*, namely dialogue with opponents, supporters, the media and, through them, the members of Parliament and electors of Victoria. But beyond that he relied on the limitations which the regulation imposed on his *actions*. These were not only limitations upon his movement within the Commonwealth. They also extended to limitations upon protest, assembly, demonstration, agitation and the other activities which exclusion from the proclaimed area would totally prevent in the critical first days of the open season for duck shooting.

The conceptual foundation for the constitutional freedom of communication in Australia is different from that derived from the First Amendment to the United States Constitution, as it has been interpreted. Nevertheless, both sides and the interveners took this

Court to United States authority. It was suggested by the plaintiff that this would establish that communication on political and governmental matters included non-verbal communication of the kind relied on by him. United States authority was also propounded to support the proposition that legislative derogations from such a constitutional freedom must be proportional to, or otherwise permissible for, the purposes of the derogation taking into account the importance of upholding the freedom of political communication by limiting the power of a Parliament to make laws inconsistent with it.

A rudimentary knowledge of human behaviour teaches that people communicate ideas and opinions by means other than words spoken or written. Lifting a flag in battle, raising a hand against advancing tanks, wearing symbols of dissent, participating in a silent vigil, public prayer and meditation, turning away from a speaker, or even boycotting a big public event clearly constitutes political communication although not a single word is uttered. The constitutionally protected freedom of communication in Australia must therefore go beyond words. But where may the boundary be set to put limits so that the constitutional protection is not debased by extending it to every activity of ordinary life? This is an issue which has been examined by the Supreme Court of the United States in a number of cases concerned with the First and Fourteenth Amendments to the United States Constitution. It is useful to observe the way in which the problem has been addressed, whilst keeping in mind the different constitutional foundations of the United States jurisprudence[158].

The United States approach

In *Perry Education Association v Perry Local Educators' Association*[159] the Supreme Court of the United States rejected an argument that differential access provided to rival trade unions in an inter-school mail system constituted an impermissible content discrimination or a fundamental burden on the right of the dissidents to communicate with teachers[160]. The opinion of the Court evaluated the legislation and conduct said to conflict with the constitutional right by reference to the nature of the public property in question, to which individuals were barred entry although they wished to engage there in expressive activity. Such property was divided into three categories[161].

The first category was the "quintessential public forums". To enforce a content based exclusion in such a place, the State "must show that itsregulation is necessary to serve a compelling [S]tate interest and that it is narrowly drawn to achieve that end"[162]. The State might enforce regulations "of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication"[163].

The second category was public property which the State has opened for use by the public as a place of expressive activity. There, "[a]lthough a State is not required to indefinitely retain the open character ... as long as it does so it is bound by the same standards as apply in a traditional public forum"[164].

The third category was other public property. Such a place was held to be governed "by different standards"[165]. There[166]:

"[T]he State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. As we have stated on several occasions [t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated'"

In *Cornelius v NAACP Legal Defense and Educational Fund, Inc*[167], the *Perry* classification was applied in proceedings in which free speech rights were invoked to challenge a decision of the Executive to exclude certain charities from a fund-raising drive aimed at federal employees in their work places. As in *Perry*, there were sharp divisions in the Supreme Court[168]. The government property to which the charity drive was directed was classified as a non-public forum. In such a place, the Court said, control over access was permissible if reasonable for the purposes of the place and "viewpoint neutral" The Court considered that excluding the respondents from government property was within the entitlement of the Executive, as a means of ensuring peace in the federal workplace to exclude those who might reasonably be considered as endangering the peace[169]. In dissent, Blackmun J (with whom Brennan J concurred) accepted the classification in *Perry*. However, he suggested that the line between public and non-public forums "may blur at the edges"[170]. Blackmun J was not convinced that the need to avoid controversy was a compelling State interest in that case justifying the exclusion of the respondents from public property during the charity drive. His Honour said[171]:

"The managers of the theatre in *Southeastern Promotions* no doubt thought that the exclusion of the rock musical Hair was necessary to avoid controversy[172]; and the school officials in *Tinker*

thought their exclusion of students protesting the activities of the United States in Vietnam was necessary to avoid controversy[173]. Yet in those cases, both of which involved limited public forums, the Court did not accept the mere avoidance of controversy as a compelling governmental interest".

Several other decisions in this United States series were called to this Court's attention. They range from a case challenging a municipal ordinance prohibiting the posting of political campaign signs on public property[174], to another involving access to federal airports for the purpose of soliciting money[175]. The latest decision is *Schenck v Pro Choice Network of Western New York*[176]. In that case, a group of medical practitioners offering abortion services sought to enjoin protesters from engaging in blockades and other disruptive conduct outside their clinics. The protesters' conduct included marching, kneeling, standing or lying in driveways, doorways and elsewhere to prevent employees and patients entering the clinics. A temporary restraining order was challenged as violating the protesters' First Amendment rights to free speech. This argument was rejected in the District Court and on appeal by the Court of Appeals. The case illustrates the difficulties which courts face in separating permissible from impermissible conduct by reference to constitutional freedoms expressed in very general terms.

In *Schenck*, the Supreme Court of the United States upheld "fixed buffer zones". However, a "floating buffer zone" was struck down because it burdened free speech more than was necessary to serve the relevant governmental interests[177]. Scalia J (with whom Kennedy and Thomas JJ concurred) dissented, citing *Boos v Barry*[178]:

"[A]s a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment".

However, the majority considered that the defined buffer zones could be upheld by reliance "on the significant governmental interest in public safety"[179]. This interest was "reasonable" and properly to be taken into account in assessing the protesters' constitutional arguments. Scalia J rejected the reliance on "public safety" largely because of the way in which the case had been argued. However, he specifically acknowledged[180]:

"We have in our state and federal systems a specific entity charged with responsibility for initiating action to guard the public safety. It is called the Executive Branch. When the public safety is threatened, that Branch is empowered, by invoking judicial action and by other means, to provide protection".

I have mentioned these cases from the United States, although the constitutional setting is different, to illustrate a number of points. The decisions recognise that political communication may be (and often is) expressed in non-verbal ways. Political protest as well as the more general communication of facts and opinions may occur otherwise than by words. This is as true in Australia as in the United States. Therefore, the constitutionally protected freedom of communication on political and governmental matters in Australia extends to non-verbal conduct as well as to things said and written. Nevertheless, even in jurisdictions where there is a well-established, individually enforceable "right" to free expression, exceptions and limitations have been accepted. One ground of exception has been a protection of public safety. The drawing of

lines is difficult. However it is necessary, as *Schenck* illustrates. It would be surprising if the legal protection to protesters' communication were larger in Australia than it has been held to be in the United States where the constitutional foundation is a personal right enforceable by the individual affected.

In determining the scope of the constitutionally protected freedom of communication in Australia, it seems reasonable to take into consideration at least some of the matters mentioned in the United States decisions. Relevantly, the place affected by the impugned law in the present case was not a traditional, or designated, forum for public communication[181]. It was no "Hyde Park". The impugned regulation had an accepted purpose of protecting the public's safety. Its bona fides was conceded. It was not suggested that the regulation was a deliberate "effort to suppress expression"[182]. However, the question remains whether the regulation was such a burden on the constitutionally protected freedom as arguably to entitle the plaintiff to relief so that his action is legally viable and should be permitted to go ahead.

The integration of social, economic and political matters

So far I have stated the bases upon which the plaintiff sought to argue his claim. The defendants submitted that the limitations on legislative power implied by the Australian Constitution had no application to the Victorian Parliament. Such a flow-on of legislative inhibition could not be derived either from the specific references to State Parliaments in the Australian Constitution[183] alone or from the suggested indivisibility of political discussion, federal and State, in contemporary Australia[184].

As far as the Victorian Constitution was concerned, the defendants pointed to the large grant of legislative power appearing in that instrument. In fact, it could hardly have been expressed in more general terms[185]:

"The Parliament shall have power to make laws in and for Victoria in all cases whatsoever."

Such a grant has been held to be plenary[186]. The Victorian Constitution is not the kind of rigid document controlling, as the Australian Constitution does, all laws made by or under the authority of the Parliament established by it. The suggested "entrenchment" of the elected character of the Parliament of Victoria was also contested[187]. However, it was not disputed by the defendants that the Victorian Parliament, either as originally established[188] or pursuant to the Victorian Constitution, was one envisaging a system of representative government. It was submitted that this broad requirement was fulfilled by Parliament when it had enacted the legislation under which reg 5 was made. At least in a case such as the present, no implied restraint on legislative power applied to invalidate a law so remote from the suggested purposes of the restraint[189].

The defendants also contested the plaintiff's appeal to the sovereignty of the people as a limitation on the legislative power of the Victorian Parliament. They pointed out that, under the Victorian Constitution (unlike its federal counterpart) any provision of the Constitution could be amended without the direct involvement of the people. They argued that this fact made it impossible to apply to Victoria the suggested limitations said to be derived from popular sovereignty. Whatever may be the case elsewhere (and there are many problems)[190] the concept of

fundamental rights of the people which lie so deep that a Parliament cannot remove them, seems specially inapplicable to a constitution such as the Victorian Constitution and a parliament such as the Victorian Parliament.

For the purposes of the demurrer, it is possible to put these and other difficulties to one side. The defendants were content to assume, that the powers of the Victorian Parliament to enact laws which impeded freedom of discussion of matters of political or governmental concern in the State were subject to some constitutional limitations[191]. In *Lange v Australian Broadcasting Corporation*[192], this Court referred to the increasing integration of social, economic and political matters in Australia. Because of such integration, the implication, derived from the Australian Constitution, may also protect political discussion in relation to all levels of government, including State Government. For the purposes of the demurrer, I am prepared to assume that the powers of the Victorian Parliament to enact laws which impede freedom of discussion on matters of political and governmental concern in the State are subject to the same limitations as apply to the laws of the Federal Parliament. Such an assumption is neither fanciful nor unreasonable. However, the defendants submitted that even if such a limitation were established, reg 5 was nonetheless valid.

Applicable principles

A number of general propositions may be derived from this Court's authority concerning the approach to be taken to a suggested conflict between a constitutional freedom and a law which is alleged to be an impermissible burden on the exercise of that freedom.

1. The purpose of the freedom must be kept in mind. It is to contribute to protecting and reinforcing the system of representative government for which the text and structure of the Constitution provide[193]. The restriction upon the making of laws has a consequence protective of individual freedom of political and governmental communication. It is easy to slip from this fact into the language of individual rights. However, it is safer to reflect the advantages which accrue to individuals out of the restriction on law-making by describing them as "freedoms". They are freedoms from the operation of laws which would otherwise prevent or control communications on political and governmental matters in a manner inconsistent with the maintenance of the representative government which the Constitution establishes[194].

2. No one suggests that such freedoms are absolute[195]. Even in terms of individual human rights, freedom of expression, however important, is not absolute. International statements of human rights themselves acknowledge other rights or considerations which may conflict with free expression and which should also be respected and upheld[196]. Whenever possible, Australian law on such subjects should be developed in harmony with such universal international principles to which Australia has given its concurrence.

3. A distinction has been drawn between laws which incidentally affect constitutionally protected freedom of communication and laws which specifically target communication on political and governmental matters as such. In *Australian Capital Television Pty Ltd v The Commonwealth*[197] Mason CJ made this point. The influence of United States jurisprudence upon

his Honour's observations was obvious and was acknowledged[198].

4. In other cases where a law has been said to impinge upon the constitutionally protected freedom of communication, various tests have been proposed for differentiating between inhibitions which are legally permissible and those which are not. Thus, it has been suggested that a law that is "appropriate and adapted" to the fulfilment of a "legitimate purpose"[199] or "reasonably and appropriately adapted" to "secure some end within power"[200] will survive a challenge although the freedom of communication on political and governmental matters is affected. Alternatively, the concept of proportionality[201] has been invoked by the suggestion that the impugned law must not be "disproportionate" to the attainment of the competing public interest or that there must be a "proportionality between the restriction which the law imposes on the freedom of communication and the legitimate interest which the law is intended to serve"[202]. The concept of proportionality as a guide to the limits of powers not themselves expressed in purposive terms has been criticised[203]. Nevertheless, in my view it is a useful concept, including in the context of burdens upon constitutional freedoms, so long as it is realised that it describes a process of reasoning and does not provide a sure answer to its outcome[204]. It is a concept of growing influence upon our law[205]. It is no more question-begging than the phrase "appropriate and adapted". It springs from a richer jurisprudential source. It is certainly less ungainly.

5. In a number of cases, it has been suggested[206] that a law-maker will be accorded a "margin of appreciation" in the making of a law designed to achieve a governmental interest which has the effect of inhibiting to some degree communication concerning political and governmental matters[207]. A contrary view had been

expressed that, if the minimal requirements of the constitutional protection are attracted, any law which impedes freedom of such communication is necessarily inconsistent with the Constitution. No occasion then arises to undertake a balancing process, a measurement of proportionality or an assessment of the suggested margin of appreciation[208]. These differences of approach may represent nothing more than the outcome of different views about the availability or utility of the foregoing notions in identifying the outer boundary of the constitutionally protected freedom. As the review of United States authority demonstrates, the courts of that country have had similar difficulties in explaining where the line is to be drawn. Sometimes they have done so by reference to the reasonableness of the law impugned[209]. Or by reference to an assessment of whether it "significantly compromises" protected expression[210]. A universally accepted criterion is elusive. In Australia, without the express conferral of rights which individuals may enforce, it is necessary to come back to the rather more restricted question. This is: does the law which is impugned have the effect of preventing or controlling communication upon political and governmental matters in a manner which is inconsistent with the system of representative government for which the Constitution provides? Such cases do exist[211]. But in the nature of their source in Australian constitutional law they will be fewer than the multitude of First Amendment cases which have engaged the attention of the courts of the United States.

6. Whilst bearing in mind the foregoing discussion, the test to be applied is that recently stated in the unanimous opinion of the Court in *Lange v Australian Broadcasting Corporation*[212]:

"First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, 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 and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed consent of the people ... If the first question is answered 'yes' and the second is answered 'no', the law is invalid."

Application of the principles

When the facts pleaded by the plaintiff in his statement of claim are measured against the foregoing principles the relief sought from the operation of reg 5 cannot be sustained.

It may be conceded that the effect of reg 5 is to inhibit political communication to some degree. However, it cannot be argued that it does so in a way inconsistent with the freedom of communication implicit in the system of representative government for which the Australian Constitution and the Victorian Constitution provide.

There is a plainly legitimate interest of the Victorian Parliament, and laws made by or under its authority, in the protection of the safety of the public. That interest is expressly invoked to support the law challenged here. Commonsense suggests that safety of human beings could indeed be put at risk by confrontation between angry protesters and other persons armed with and using guns.

Nor is this a case where the legislation has, by its terms, specifically targeted the idea or message so as to require a

"compelling justification"[213]. Even assuming that the impugned law was inconsistent with the maintenance and operation of the representative government provided by the Constitution, it cannot be concluded that it is not "appropriate and adapted" to the fulfilment of the legitimate purpose of State law-making, namely the protection of public safety. Neither is it disproportionate to the achievement of that object. Nor is it outside a margin of appreciation (assuming that such exists) reserved to the law-maker to balance the protection of public safety within a constitutional environment which also upholds freedom of communication upon governmental and political matters.

The plaintiff asserted that reg 5 was disproportionate. Instead of improving safety in a way which would preserve the freedom of political protest, it imposed a blanket prohibition. To that prohibition, it attached criminal sanctions. The consequence was inevitably, and predictably, an effective exclusion of first-hand observers and media coverage to communicate, in the most persuasive way, the political message of the plaintiff and his supporters. This argument is unconvincing. No prohibition was imposed upon the plaintiff or those of like minds during the time specified in reg 5, or at any other time, to engage in protest so long as it was outside the area designated. Photographs, posters and television film from earlier years would be readily available to illustrate their protests. The places and times specified in the regulation were appropriate to the peak period of danger to public safety, namely the opening days of the duck shooting season. The duration of the prohibition was relatively short. The places were confined to those at maximum risk. Other places, including those at or near private property, were not restricted. True, some of the effectiveness of the protest would be lost by reason of the prohibition. But upon no view of the facts pleaded would the inhibition upon the freedom of communication upon political and governmentalmatters be such as to render reg 5 invalid.

Therefore, the challenged law does not impermissibly restrict the constitutionally protected freedom. The regulation is valid. Prima facie the demurrer must succeed.

Demurrer objections and resolution

The plaintiff, alternatively, argued a pleading point. He submitted a number of criticisms of the original grounds of demurrer. These submissions had merit. The first and second grounds of demurrer did not respond to the statement of claim in such a way as to provide a legal answer to it. Nor did the original language of the fourth ground meet the ways in which the plaintiff put his assertion concerning the implied constitutional freedoms which he invoked. There is no point now (save possibly for costs) in exploring these objections. The defendants, without resistance, were permitted to amend their demurrer. The added ground clearly tenders for decision the defendants' essential point.

The plaintiff alternatively submitted that a demurrer was the wrong remedy. He argued that, in the nature of any dispute which involved the evaluative exercise of judging whether or not an impugned law permissibly or impermissibly infringed the constitutionally protected freedom, evidence would need to be considered. It would be relevant in judging the appropriateness of the law, the proportionality of the inhibition, or whether the impugned law fell within a "margin of appreciation" which would be accorded by the Court to a Parliament, representative of the people, acting as such.

The jurisprudence on demurrers is covered with cobwebs. After the narrative form of pleading was adopted by Australian courts following the abolition of common law pleading it has been a subject but rarely considered by the courts. In *South Australia v The Commonwealth*[214] Dixon CJ explained, in relation to a demurrer in this Court, that it presented certain difficulties because of the adoption by the Court of the narrative and not the common law system of pleading.

I mean no disrespect to the pleader of Mr Levy's statement of claim when I say, adapting Dixon CJ, that it does not "contain and contain only a statement of the material facts on which the party pleading relies for his claim ... and not the evidence by which they are to be proved"[215]. The pleading is discursive, as has become a common modern practice. Nevertheless, in the context of the Rules of this Court and its practice, the pleading objection should not succeed.

Although to one brought up in the old system of pleading it seems a "strange way to determine a demurrer"[216], nevertheless in the manner in which these proceedings have been conducted, the statement of claim pleaded and the demurrer successively amended, I believethat the Court should respond to the substance of the issue tendered. In determining constitutional challenges the procedure of demurrer has been found useful to this Court since its earliest days[217]. It is now too late to revive the rigidities of demurrer practice at common law.

The statement of claim, enhanced by the terms of the legislation and regulations referred to, discarding irrelevant adornment but adding judicial notice of matters within common knowledge, presents a perfectly adequate foundation for deciding whether the regulation attacked by the plaintiff is, or is not, invalid by reason of

the constitutionally protected freedom. No further elaboration by evidence could improve the plaintiff's case. Addressing the facts essential to the plaintiff's claims I consider that the Court can both safely and fairly determine the demurrer. The pleading point should therefore be rejected.

Refusal of leave to intervene to an industrial organisation

During the adjourned hearing, the Court accepted the interventions of the States and the Northern Territory pursuant to s 78A of the *Judiciary Act* 1903 (Cth). It also allowed a large number of media interests conditional leave to intervene, although their concerns were to defend the holdings in *Theophanous* and *Stephens* and although Mr Levy's case was not a defamation action at all. The Media, Entertainment and Arts Alliance, an industrial organisation representing journalists, sought to intervene by senior and junior counsel, but this application was denied. The Court did, however, receive written submissions from that body as *amicus curiae.* It also received a written submission from the Australian Press Council, which sought to be heard only as *amicus curiae*.

My own view was that the Media, Entertainment and Arts Alliance should have had the same limited rights allowed to the other interveners and on the same conditions, which it was willing to accept. It was not clear to me why media proprietors should have been heard as interveners but submissions on behalf of a body representing practising journalists should not. Journalists are sometimes sued in relation to the exercise of the constitutionally protected freedom in issue. Their professional and personal reputations may be at stake, as might their liberty if they decline to name sources notwithstanding court orders to do so. They have

practical experience in the operation of the law of defamation. They have a real stake in its content, not wholly intellectual.

Financial and other property interests are not, or should not be, the only interests to which this Court pays heed when determining the existence and scope of a constitutional freedom of communication. For my own part, I would have permitted the intervention of the Media, Entertainment and Arts Alliance. I would have allowed it upon the same conditions as were imposed upon the media proprietors. I would have confined its counsel to precisely the same time limit in oral submissions - no more, no less.

Interventions and *amici curiae*

As a result of the non governmental applications to intervene, these proceedings occasioned argument over the role of interveners and *amici curiae* in this Court. I will not extend these reasons with a detailed elaboration of my opinion on these questions. However, in light of the foregoing difference of approach I will express my opinion briefly.

For good reason, this Court should maintain a tight rein on interventions. Where they are allowed, the Court should impose terms which protect the parties from the costs and other burdens which interventions may occasion. However, some of the rigidities of earlier procedural restrictions are not now appropriate. This is especially so because of this Court's function of finally declaring the law of Australia in a *particular* case for application to *all* such cases. The acknowledgment of the fact that courts, especially this Court, have unavoidable choices to make in finding and declaring the law, makes it appropriate, in some cases at least, to hear from a

broader range of interveners and *amici curiae* than would have appeared proper when the declaratory theory of the judicial function was unquestioningly accepted. The opinion of Dixon J, a committed proponent of that theory, was stated in *Australian Railways Union v Victoria Railways Commissioners*[218]. It is cited by Brennan CJ in this case. However, since those words were written, this Court has become the final court of appeal for Australia. There has also developed a growing appreciation that finding the law in a particular case is far from a mechanical task. It often involves the elucidation of complex questions of legal principle and legal policy as well as of decided authority[219]. This appreciation has inevitable consequences for the methodology of the Court. Those consequences remain to be fully worked out.

In the United States of America and Canada, the practice of hearing submissions from interveners and *amici curiae* is well established. Such practice is particularly common where matters of general public interest are being heard in the higher appellate courts[220]. In recent years, some Australian courts have also favoured a more liberal approach to permitting interveners and *amici*[221]. So far, that course has not recommended itself to this Court.

There is no need for undue concern about adopting a broader approach. The Court itself retains full control over its procedures. It will always protect and respect the primacy of the parties. Costs and other inhibitions and risks will, almost always, discourage officious busybodies. Those who persist can usually be recognised and easily rebuffed. The submissions of interveners and *amici curiae* will typically be conveyed, for the most part, in writing. But sometimes oral argument by them will be useful to the Court. Such interests may occasionally have perspectives which help the Court to see a problem in a context larger than that which the parties are

willing, or able, to offer. That wider context is particularly appropriate to an ultimate national appellate court. It is especially relevant to a constitutional case.

Nothing in the Australian Constitution prevents such a procedural course. Conforming to the Constitution, this Court should adapt its procedures, particularly in constitutional cases or where large issues of legal principle and legal policy are at stake, to ensure that its eventual opinions on contested legal questions are informed by relevant submissions and enlivened by appropriate materials.

In the present matter, I would have allowed the Council for Civil Liberties and other relevant bodies, had they applied, to make brief submissions on the constitutional controversy. Such submissions would have been subject to the same strict conditions as applied to other interveners and *amici*. If necessary, the relevant bodies could have been restricted to written submissions. But I would have allowed them a voice.

Orders

The demurrer should be allowed. The plaintiff should pay the defendants' costs of one day of the hearing.

[1] Statutory Rule No 27 of 1994.

[2] (1992) 177 CLR 1.

[3] (1992) 177 CLR 106.

[4] (1994) 182 CLR 104.

[5] (1994) 182 CLR 211.

[6] *Spence v Washington* 418 US 405 at 409-410, 416 (1974).

[7] *Brown v Louisiana* 383 US 131 at 142 (1966).

[8] *Texas v Johnson* 491 US 397 (1989); *United States v Eichman* 496 US 310 (1990).

[9] *Theophanous* (1994) 182 CLR 104 at 125.

[10] *Davis v The Commonwealth* (1988) 166 CLR 79 at 100; *Nationwide News* (1992) 177 CLR 1 at 50-51, 76-77, 94-95; *ACTV* (1992) 177 CLR 106 at 143-144, 150-151, 157-158, 169, 217-218; *Theophanous* (1994) 182 CLR 104 at 150, 151; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300, 323-325, 339, 377-378, 387-388; *Langer v The Commonwealth* (1996) 186 CLR 302 at 318, 334.

[11] It does not appear whether he was a trespasser on the proclaimed area. However, neither the application nor the validity of the Hunting Season Regulations depends upon the locus where a protest might have been made; validity depends on the operation and effect of the Regulations irrespective of the possession or ownership of or right of entry upon the proclaimed areas to which the Regulations applied.

[12] (1994) 182 CLR 211 at 235.

[13] (1994) 182 CLR 211 at 232 per Mason CJ, Toohey and Gaudron JJ, at 257 per Deane J.

[14] Unreported, High Court of Australia, 8 July 1997.

[15] *Lange v Australian Broadcasting Corporation*, unreported, 8 July 1997 at 29.

[16] It might be argued that some obligation of that kind arises under the *Convention on Biological Diversity* done at Rio de Janiero on 5 June 1992.

[17] See the cases referred to in fn 10.

[18] *South Australia v The Commonwealth* (1962) 108 CLR 130 at 142.

[19] 65 LW 4109 (1997).

[20] *Gerhardy v Brown* (1985) 159 CLR 70 at 138-139, 143, 149, 153; *ACTV* (1992) 177 CLR 106 at 159; *Theophanous* (1994) 182 CLR 104 at 156, 162-163; *Cunliffe* (1994) 182 CLR 272 at 325, 357.

[21] *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 135.

[22] *Breen v Sneddon* (1961) 106 CLR 406 at 411; *Queensland v The Commonwealth* (1989) 167 CLR 232 at 239.

[23] *South Australia v Tanner* (1989) 166 CLR 161 at 179; *Gerhardy v Brown* (1985) 159 CLR 70 at 142-143.

[24] See *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 295-296; *South Australia v Tanner* (1989) 166 CLR 161 at 179-180.

[25] [1901] AC 450 at 454.

[26] *The Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-396.

[27] *R v Ludeke; Ex parte Customs Officers' Association of Australia* (1985) 155 CLR 513 at 522-523. The prerogatives or statutory powers of the Crown in relation to foreign States are legal interests that may be protected by intervention: *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 at 400-401 and cases there cited. The interests of the repository of statutory powers in the scope or manner of exercise of those powers may suffice (*Sym Choon & Co Ltd v Gordon Choon Nuts Ltd* (1949) 80 CLR 65 at 77), but not those interests which would be insufficient to give that person a title to sue or to be joined as a party to the proceedings: for example, not interests of the kind which the Federal Council of the British Medical Association in Australia claimed to have in *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 257. Query whether commercial interests could suffice: see *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1990) 64 ALJR 530 at 531; 94 ALR 641 at 644, and cases there cited.

[28] *The Mardina Merchant* [1975] 1 WLR 147 at 149; [1974] 3 All ER 749 at 750; *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 538-539.

[29] *Young v Holloway* [1895] P 87 at 89-90; *Osborne v Smith* (1960) 105 CLR 153 at 158-159.

[30] *The "Dowthorpe"* (1843) 2 W Rob 73 at 77 [166 ER 682 at 684].

[31] Spencer Bower, *The Doctrine of Res Judicata*, 2nd ed (1969) at 209-211.

[32] For example, the Anangu Pitjantjatjaraku in *Gerhardy v Brown* (1985) 159 CLR 70 had legal interests in the management of Pitjantjatjara land which distinguished that body from the general public.

[33] (1930) 44 CLR 319 at 331.

[34] Section 78A of the *Judiciary Act* now gives the Attorneys-General of the Commonwealth, States and internal Territories a statutory right to intervene in matters arising under the Constitution or involving its interpretation.

[35] (1965) 113 CLR 177 at 182.

[36] [1974] 1 NSWLR 391 at 399-400.

[37] *R v Ludeke; Ex parte Customs Officers' Association of Australia* (1985) 155 CLR 513 at 530; *J v Lieschke* (1987) 162 CLR 447 at 462.

[38] *R v Ludeke; Ex parte Customs Officers' Association of Australia* (1985) 155 CLR 513 at 520, 530.

[39] *J v Lieschke* (1987) 162 CLR 447 at 456.

[40] *The "Killarney"* (1862) Lush 427 at 435 [167 ER 188 at 193].

[41] (1930) 44 CLR 319.

[42] (1930) 44 CLR 319 at 330-331; but cf *Bonser v La Macchia* (1969) 122 CLR 177 at 182.

[43] See, for example, *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 where the Australian

Securities Commission appeared as *amicus curiae* in a case involving the interpretation of sections of the Corporations Law.

[44] For example, a matter of fact relevant to a question of constitutional validity: see *South Australia v Tanner* (1989) 166 CLR 161 at 179-180.

[45] For example, where the parties or one of them declines to address the issue for determination as in *R v Tomkins* [1985] 2 NZLR 253 at 254; *Highland Council* (*formerly Ross and Cromarty District Council) v Patience,* Times Law Reports, 9 January 1997.

[46] Transcript of 12 February 1996 at 12.

[47] The conditions were directed to the confining of the issues for determination and to the incidence of costs. The latter condition was as follows:

"1. That each intervener bears the costs of the parties occasioned by its intervention on a party and party basis."

[48] See reg 6, Wildlife (Game) (Hunting Season) Regulations 1994 (Vic).

[49] See reg 5, Wildlife (Game) (Hunting Season) Regulations 1994 (Vic).

[50] See reg 1, Wildlife (Game) (Hunting Season) Regulations 1994 (Vic).

[51] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 121.

[52] See *Lange v Australian Broadcasting Corporation*, unreported, High Court of Australia, 8 July 1997 at 23.

[53] Unreported, High Court of Australia, 8 July 1997 at 14.

[54] (1975) 135 CLR 1 at 56.

[55] See ss 7, 9, 12, 13, 28, 32.

[56] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 187; *Lange v Australian Broadcasting Corporation*, unreported, High Court of Australia, 8 July 1997 at 14.

[57] See *Lange v Australian Broadcasting Corporation*, unreported, High Court of Australia, 8 July 1997 at 14.

[58] Unreported, High Court of Australia, 8 July 1997 at 24 (footnotes omitted).

[59] See, for example, *Commonwealth Electoral Act* 1918 (Cth), ss 325, 325A, 328, 329, 330, 340.

[60] Unreported, High Court of Australia, 8 July 1997 at 24.

[61] (1992) 177 CLR 1.

[62] (1992) 177 CLR 106.

[63] (1994) 182 CLR 104.

[64] (1994) 182 CLR 211.

[65] The High Court Rules provide that a party may plead and demur to the same matter without leave (O 26 r 5(1)) and that where a party desires both to demur and to plead, the demurrer and other pleading are to be combined (O 26 r 4).

[66] The nature of this freedom is variously described in *Nationwide News* and *ACTV*. The formulations are collected by Brennan J in *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 326.

[67] *Nationwide News* (1992) 177 CLR 1 at 50-51, 76-77, 94-95; *ACTV* (1992) 177 CLR 106 at 142-143, 169, 217-218; *Theophanous* (1994) 182 CLR 104 at 133-134, 150-152, 178-179; *Cunliffe* (1994) 182 CLR 272 at 300-301, 323-326, 336-338, 387-388.

[68] *Cunliffe* (1994) 182 CLR 272 at 384.

[69] Unreported, High Court of Australia, 8 July 1997 at 24.

[70] cf *Cunliffe* (1994) 182 CLR 272 at 337.

[71] SR No 27/1994.

[72] *Cunliffe* (1994) 182 CLR 272 at 337.

[73] A body corporate established by s 6 of the *Conservation, Forests and Lands Act* 1987 (Vic); see the definition in s 3(1) of the Wildlife Act.

[74] Section 23 thereof states:

"Where an Act confers power to make a subordinate instrument, expressions used in a subordinate instrument made in the exercise of that power shall, unless the contrary intention appears, have the same respective meanings as they have in the Act conferring the power as amended and in force for the time being."

[75] SR No 254/1990, as amended by SR Nos 32/1991, 34/1991, 9/1992, and 56/1992.

[76] (1992) 177 CLR 106.

[77] (1996) 186 CLR 302.

[78] (1996) 186 CLR 352.

[79] *Langer v The Commonwealth* (1996) 186 CLR 302 at 334; see also at 318, 340, 351; and see *Muldowney v South Australia* (1996) 186 CLR 352 at 366-367, 374-375, 375-376, 386-387.

[80] *Cunliffe* (1994) 182 CLR 272 at 339.

[81] See *Wildlife Act* 1975 (Vic), ss 22A, 43(1) and 44(1)(a).

[82] See Wildlife (Game) Regulations 1990, Third Sched; Wildlife (Game) (Hunting) Regulations 1991, r 5; Wildlife (Game) (Hunting Season) Regulations 1994, r 9.

[83] The November 1995 Regulatory Impact Statement on the Wildlife (Game) (Human Safety) Regulations 1996 stated at p 8 that the "peak times of [duck] hunting [were] over the opening weekend of duck seasons."

[84] Note that the 1994 Regulations were repealed by the Wildlife (Game) (Human Safety) Regulations 1996.

[85] (1992) 177 CLR 1 at 46-51 per Brennan J, 69-77 per Deane and Toohey JJ.

[86] (1992) 177 CLR 106 at 137-141 per Mason CJ, 149 per Brennan J, 168-169 per Deane and Toohey JJ, 210-214 per Gaudron J.

[87] See *Kruger v The Commonwealth* unreported, High Court of Australia, 31 July 1997 at 96-99, 111.

[88] See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 50-51 per Brennan J, 76-77 per Deane and Toohey JJ, 94-95 per Gaudron J; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169 per Deane and Toohey JJ, 217-218 per Gaudron J, 234 per McHugh J. See also *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 126 per Mason CJ, Toohey and Gaudron JJ, 146 per Brennan J, 178-179 per Deane J; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 299 per Mason CJ, 336-337 per Deane J, 387 per Gaudron J; *Lange v Australian Broadcasting Corporation* unreported, High Court of Australia, 8 July 1997 at 16.

[89] *Kruger v The Commonwealth* unreported, High Court of Australia, 31 July 1997 at 111-114.

[90] (1992) 177 CLR 1 at 95. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 157 per Brennan J; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 151 per Brennan J; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 324 per Brennan J.

[91] See *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300 per Mason CJ, 388 per Gaudron J. See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 30-31 per Mason CJ.

[92] (1996) 186 CLR 302 at 318.

[93] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143 per Mason CJ, 169 per Deane and Toohey JJ, 234-235 per McHugh J. See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 76-77 per Deane and Toohey JJ;

Cunliffe v The Commonwealth (1994) 182 CLR 272 at 299-300 per Mason CJ, 337-339 per Deane J, 388 per Gaudron J.

[94] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143. See also at 234-235 per McHugh J.

[95] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169.

[96] See *Kruger v The Commonwealth* unreported, High Court of Australia, 31 July 1997 at 111-113.

[97] *Kruger v The Commonwealth* unreported, High Court of Australia, 31 July 1997 at 114

[98] The statement of claim has been amended at least twice.

[99] SR No 27/1994.

[100] The Regulations were revoked by reg 4 of the Wildlife (Game) (Human Safety) Regulations 1996, SR No 15/1996.

[101] *Judiciary Act* 1903 (Cth), s 30(a).

[102] SR No 164/1992.

[103] SR No 254/1990.

[104] *Lange v Australian Broadcasting Corporation*, unreported, High Court of Australia, 8 July 1997.

[105] This case was argued with *Lange* and on the assumption that the freedom of communication protected by the Constitution was that formulated in *Australian Capital Television Pty Ltd v The Commonwealth ("ACTV")* (1992) 177 CLR 106 and *Theophanous*

v Herald & Weekly Times Ltd (1994) 182 CLR 104. However, as the decision in *Lange* shows, the scope of that freedom is at least as great as that recognised in the two earlier cases.

[106] The freedom also extends to those matters that are relevant to the amendment of the Constitution under s 128.

[107] cf Sunstein, "Foreword: Leaving Things Undecided", (1996) 110 *Harvard Law Review* 6 at 37.

[108] 383 US 131 (1966).

[109] *Thornhill v Alabama* 310 US 88 (1940).

[110] 403 US 15 at 26 (1971).

[111] *ACTV* (1992) 177 CLR 106.

[112] *ACTV* (1992) 177 CLR 106 at 146, 174, 236.

[113] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 51, 76-77, 94-95; *ACTV* (1992) 177 CLR 106 at 142-144, 159, 169, 217-218; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 126; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 235; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 336-337, 387; *Langer v The Commonwealth* (1996) 186 CLR 302 at 333-334; *Lange*, unreported, High Court of Australia, 8 July 1997 at 16.

[114] *Lange*, unreported, High Court of Australia, 8 July 1997 at 24.

[115] Section 11.

[116] *Wildlife Act* 1975 (Vic), s 87 and *Conservation, Forests and Lands Act* 1987 (Vic), ss 91 and 99.

[117] On the procedure of demurrer in this Court, see *South Australia v The Commonwealth* (1962) 108 CLR 130 at 142.

[118] (1994) 182 CLR 104.

[119] (1994) 182 CLR 211.

[120] *Lange v Australian Broadcasting Corporation* unreported, High Court of Australia, 8 July 1997.

[121] Reg s 5(1)(a) and 5(1)(b).

[122] See reg 5(2).

[123] And the Wildlife (Game) Regulations 1990 (Vic) as amended.

[124] Par 5(d) of the statement of claim. These include to protest; to attract media, especially television, coverage; to speak out and gather information to influence public opinion in Victoria; to be seen publicly collecting injured birds and rendering aid to them; and to prevent breaches of the law involving illegal shooting.

[125] *Common Law Procedure Act* 1852 (UK), s 80. See Chitty's *Archbold's Practice of the Court of Queen's Bench* 12th ed (1866), vol II at 926.

[126] O 26 r 5(1).

[127] *Edwards v South Carolina* 372 US 229 (1963); *Cox v Louisiana* 379 US 536 (1965).

[128] *Tinker v Des Moines Independent Community School District* 393 US 503 (1969); cf *Brown v Louisiana* 383 US 131 (1966); *Hague v CIO* 307 US 496 (1939).

[129] The cases are most recently reviewed in *Schenck v Pro-Choice Network of Western New York* 137 L Ed 2d 1 (1997).

[130] See *Acts Amendment (Game Birds Protection) Act* 1992 (WA); *National Parks and Wildlife Amendment (Game Birds Protection) Act* 1995 (NSW).

[131] See *McGinty v Western Australia* (1996) 186 CLR 140 at 169-170, 232-235.

[132] See for example Aroney, "The Gestative Propensity of Constitutional Implications" [Autumn 1997] *Policy* at 26; Cassimatis, *"Theophanous* - A Review of Recent Defamation Decisions" (1997) 5 *Torts Law Journal* 102; Twomey, "Dead Ducks and Endangered Political Communication - *Levy v State of Victoria* and *Lange v Australian Broadcasting Corporation*" (1997) 19 *Sydney Law Review* 76; Comment on *Theophanous*" in Huscroft, "David Lange and the Law of Defamation" [1997] *New Zealand Law Journal* 112; Williams, "Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform" (1996) 20 *Melbourne University Law Review* 848; Donaghue, "The Clamour of Silent Constitutional Principles" (1996) 24 *Federal Law Review* 133; Miller, "The End of Freedom, Method in *Theophanous* (1996) 1 *Newcastle Law Review* 39; Bronitt and Williams, "Political Freedom as an Outlaw: Republican Theory and Political Protest" (1996) 18 *Adelaide Law Review* 289; Bailey, "'Righting' the Constitution Without a Bill of Rights" (1995) 23 *Federal Law Review* 1; Doyle, "Common Law Rights and Democratic Rights" in Finn (ed) *Essays on Law and Government* (1995) vol 1 at 144. Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Sydney Law Review* 166; Campbell,

"Democracy, Human Rights and Positive Law" (1994) 16 *Sydney Law Review* 195; Richardson, "Constitutional Freedom of Political Speech in Defamation Law: Some Insights from a Utilitarian-Economic Perspective" (1994) 4 *Torts Law Journal* 242; Galligan, "Parliamentary Responsible Government and the Protection of Rights" (1993) 4 *Public Law Review* 100.

[133] (1994) 182 CLR 104.

[134] (1994) 182 CLR 211.

[135] (1992) 177 CLR 106.

[136] (1992) 177 CLR 1.

[137] Australian Constitution, ss 7, 9, 10, 15, 25, 29, 30, 31, 41, 51(xxxvii), 51(xxxviii), 95, 107, 108, 111, 123 and 124; cf Zines, *The High Court and the Constitution*, 4th ed (1997) at 390.

[138] *Re Alberta Legislation* [1938] 2 DLR 81 at 107 per Duff CJC and Davis J.

[139] cf *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

[140] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 142; see also at 168, 217; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 122; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 232, 257.

[141] Victorian Constitution, s 34. Like provision is made in s 26 in relation to the Legislative Council. See also *McGinty v Western Australia* (1996) 186 CLR 140 at 278-279, 284-285.

[142] Victorian Constitution, ss 16, 18.

[143] See for example Dixon, "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 *Australian Law Journal* 240.

[144] Wade, "The Basis of Legal Sovereignty" [1955] *Cambridge Law Journal* 172 at 188; Wade, "Sovereignty - Revolution or Evolution?" (1996) 112 *Law Quarterly Review* 568 esp at 574-575; Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55 *Cambridge Law Journal* 122 at 138-139; Winterton, "Extra-Constitutional Notions in Australian Constitutional Law" (1986) 16 *Federal Law Review* 223 at 239; Laws, "Law and Democracy" [1995] *Public Law* 72 at 79; Allan, "The Limits of Parliamentary Sovereignty" [1985] *Public Law* 614 at 635; Ross, "Diluting Dicey" (1989) 6 *Auckland University Law Journal* 176 at 195.

[145] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 47; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 172-173; *McGinty v Western Australia* (1996) 186 CLR 140 at 201.

[146] See for example *McGinty v Western Australia* (1996) 186 CLR 140 at 237 per McHugh J; at 274-275 per Gummow J; Zines, *The High Court and the Constitution*, 4th ed (1997) at 395-396; Aroney, "The Gestative Propensity of Constitutional Implications" [Autumn 1997] *Policy* 26 at 28 points out that at the time when the Australian Constitution was drafted, most women and Aboriginals were denied the right to vote in national elections.

[147] See *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 9-10.

[148] 5 metres.

[149] Regulation 5 prohibited people without a licence from entering into the specified hunting areas between 5 p.m. on Friday 18 March 1994 and 10 a.m. on Saturday 19 March 1994 and between 5 p.m. on Saturday 19 March 1994 and 10 a.m. on Sunday 20 March 1994.

[150] Reg 5(2).

[151] Reg 7.

[152] Contained in reg 1(a). At the time of the making of the regulations, guideline 6 of the Guidelines issued under s 11 of the *Subordinate Legislation Act* 1962 (Vic) relevantly provided that a statutory rule, such as the regulations, "must clearly set out as part of the text ... the objectives of the rule". This explains the inclusion of the purposes in reg 1.

[153] Victoria, Department of Conservation and Natural Resources, *Regulatory Impact Statement - Wildlife (Game) (Human Safety) Regulations* 1996 (November 1995).

[154] Reg 4.

[155] s 18(2).

[156] *Wildlife Act* 1975 (Vic); *Conservation, Forests and Lands Act* 1987 (Vic).

[157] *Interpretation of Legislation Act* 1984 (Vic), s 22.

[158] Contrast also the position in Canada where the Canadian Charter of Rights and Freedoms explicitly introduced rights different from the pre-existing common law. *Manning v Hill*

(1995) 126 DLR (4th) 129 at 156 per Cory J for the Court; cf *Switzman v Elbling* (1957) 7 DLR (2d) 337; *Re Alberta Legislation* [1938] 2 DLR 81; *Retail, Wholesale & Department Store Union v Dolphin Delivery Ltd* (1986) 33 DLR (4th) 174 at 184-185.

[159] 460 US 37; 74 L Ed 2d 794 (1983).

[160] White J (Burger CJ, Blackmun, Rehnquist and O'Connor JJ concurring); Brennan J (Marshall, Powell and Stevens JJ concurring) in dissent.

[161] There has been some criticism of the "public forum" analysis as stultifying the venues for free speech; see *International Society for Krishna Consciousness Inc v Lee* 505 US 672 at 710 (1992) per Souter J (Blackmun and Stevens JJ concurring) in dissent.

[162] 460 US 37 at 45 (1983), citing *Carey v Brown* 447 US 455 at 461 (1980).

[163] 460 US 37 at 45 (1983).

[164] 460 US 37 at 46 (1983).

[165] 460 US 37 at 46 (1983).

[166] 460 US 37 at 46 (1983) (citations deleted) referring to *United States Postal Service v Council of Greenburgh Civic Associations* 453 US 114 at 129-130 (1981); *Greer v Spock* 424 US 828 at 836 (1976); *Adderley v Florida* 385 US 39 at 47 (1966).

[167] 473 US 788 (1985).

[168] The opinion of the Court was given by O'Connor J (Burger CJ, White and Rehnquist JJ concurring). Dissenting opinions were written by Blackmun J (joined by Brennan J) and by Stevens J.

[169] 473 US 788 at 810 (1985).

[170] 473 US 788 at 819 (1985).

[171] 473 US 788 at 829 (1985) (citations deleted).

[172] 420 US 546 at 563-564 (1975).

[173] 393 US 503 at 509-510 (1969).

[174] *Members of the City Council of the City of Los Angeles v Taxpayers for Vincent* 466 US 789 (1984).

[175] *International Society for Krishna Consciousness Inc v Lee* 505 US 672 (1992).

[176] 137 L Ed 2d 1 (1997).

[177] cf *Madsen v Women's Health Center Inc* 512 US 753 (1994).

[178] 485 US 312 at 322 (1988), quoted in 137 L Ed 2d 1 at 26-27 (1997) (internal quotation marks omitted); see also *Madsen v Women's Health Center Inc* 512 US 753 at 765 (1994).

[179] 137 L Ed 2d 1 at 20-21 (1997) per Rehnquist CJ for the Court.

[180] 137 L Ed 2d 1 at 31 (1997) per Scalia J (Kennedy and Thomas JJ concurring).

[181] *Hague v CIO* 307 US 496 (1939); *Collin v Smith* 578 F 2d 1197 (1978); *Feiner v New York* 340 US 315 (1951); *United States v Rainbow Family* 695 F Supp 294 (1988); cf *International Society for Krishna Consciousness Inc v Lee* 505 US 672 at 693-695

(1992) per Kennedy J (Blackmun, Stevens and Souter JJ concurring).

[182] cf *Perry Education Association v Perry Local Educators' Association* 460 US 37 at 46 (1983).

[183] Australian Constitution ss 7, 9, 10, 15, 25, 29, 30, 31, 41, 51(xxxvii), 51(xxxviii), 95, 107, 108, 111, 123 and 124; Twomey, "Dead Ducks and Endangered Political Communication - *Levy v State of Victoria* and *Lange v Australian Broadcasting Corporation*" (1997) 19 *Sydney Law Review* 76 at 82-83.

[184] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 122; but see now *Lange v Australian Broadcasting Corporation* unreported, High Court of Australia, 8 July 1997 at 22-23.

[185] Victorian Constitution, s 16.

[186] *R v Burah* (1878) 3 App Cas 889 at 904; *McCawley v R* [1920] AC 691; *Union Steamship Co of Australia v King* (1988) 166 CLR 1 at 9; cf *ICAC v Cornwall* (1993) 38 NSWLR 207 at 253.

[187] The entrenchment may be open to question in light of s 18(4)(a) of the Victorian Constitution.

[188] 18 & 19 Vict, c 55, 1855 (Imp).

[189] The implied restraints upon State Parliaments have been considered in *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 233, 236, 257; see also *Muldowney v South Australia* (1996) 186 CLR 352 at 367, 373-374; *McGinty v Western Australia* (1996) 186 CLR 140 at 176-177, 298-299;

Lange v Australian Broadcasting Corporation unreported, High Court of Australia, 8 July 1997.

[190] See discussion in *Kable v DPP (NSW)* (1996) 70 ALJR 814 at 821-824; 138 ALR 577 at 587-590; *BLF v Minister Industrial Relations* (1986) 7 NSWLR 372 at 402-405; *British Railways Board v Pickin* [1974] AC 765 at 782. But cf *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 at 390.

[191] Defendants' written submissions dated 18 July 1996 at A.2.

[192] Unreported, High Court of Australia, 8 July 1997 at 28, quoting McHugh J in *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 264.

[193] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* unreported, High Court of Australia, 8 July 1997 at 23.

[194] The suggested constitutional freedom, in the Australian sense, is better described as "an immunity consequent on a limitation of legislative power": *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 150 per Brennan J. See *Lange v Australian Broadcasting Corporation* unreported, High Court of Australia, 8 July 1997 at 14-15.

[195] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 51, 76-77, 94-95; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 142-144, 159, 169, 217-218, 235; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 299-300, 324-325, 336-337, 387; *Langer v The Commonwealth*

(1997) 186 CLR 302 at 334; *Muldowney v South Australia* (1996) 186 CLR 352 at 366, 374, 375-376; *Lange v Australian Broadcasting Corporation* unreported, High Court of Australia, 8 July 1997 at 16, 24.

[196] *International Covenant on Civil and Political Rights*, Arts 17 and 19 (protection of privacy, reputation and freedom of expression); cf Bollinger, *Images of a Free Press* (1991) at 34-35.

[197] (1992) 177 CLR 106 at 143.

[198] By reference to *Cox Broadcasting Corp v Cohn* 420 US 469 at 491 (1975).

[199] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 50 per Brennan J. As Dawson J explained in *Leask v The Commonwealth* (1996) 70 ALJR 995 at 1003; 140 ALR 1 at 13, the words "appropriate" and "adapted" appear to have their origin in the opinion of Marshall CJ in *McCulloch v Maryland* 17 US 159 at 206 (1819).

[200] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 95 per Gaudron J.

[201] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143-144 per Mason CJ; see also at 169 per Deane and Toohey JJ and *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 299-300 per Mason CJ.

[202] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 157 per Brennan J.

[203] *Leask v The Commonwealth* (1996) 70 ALJR 995 at 1003-1007; 140 ALR 1 at 13-18 per Dawson J and cases there cited.

[204] Lee, "Proportionality in Australian Constitutional Adjudication" in Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) at 126. See also *State of NSW v Macquarie Bank Ltd* (1992) 30 NSWLR 307 at 321-324.

[205] *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 260; *Richardson v Forestry Commission* (1988) 164 CLR 261 at 311-312; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 28-29; but cf at 88; *Leask v The Commonwealth* (1996) 70 ALJR 995 at 1000-1001, 1006-1007, 1011-1013, 1018, 1024; 140 ALR 1 at 8-9, 16-17, 24-26, 33, 41.

[206] Borrowing notions developed by the European Court of Human Rights; see for example *The Observer and the Guardian v United Kingdom* (1991) 14 EHRR 153 at 178, cited by Brennan J in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 159.

[207] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 156; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 325; *Leask v The Commonwealth* (1996) 70 ALJR 995 at 1001; 140 ALR 1 at 10.

[208] cf *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 191 per Dawson J; see also *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 363.

[209] *International Society for Krishna Consciousness Inc v Lee* 505 US 672 (1992).

[210] *Members of the City Council of the City of Los Angeles v Taxpayers for Vincent* 466 US 789 (1984).

[211] As *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 demonstrate.

[212] Unreported, High Court of Australia, 8 July 1997 at 24. Note that at 16-17 the Court acknowledged the different formulae which had been adopted within the Court in relation to the second step but, without resolving the differences, used the "appropriate and adapted" formula.

[213] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143 per Mason CJ.

[214] (1962) 108 CLR 130 at 142.

[215] (1962) 108 CLR 130 at 142.

[216] (1962) 108 CLR 130 at 152 per Windeyer J.

[217] *Bond v The Commonwealth* (1903) 1 CLR 13.

[218] (1930) 44 CLR 319 at 331.

[219] *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 252.

[220] See *Breen v Williams* (1994) 35 NSWLR 522 at 532-533.

[221] See for example *National Australia Bank v Hokit* (1996) 39 NSWLR 377 at 380-382; see also *Re Boulton; Ex parte State of Victoria* (1994) 126 ALR 620 at 626-628.