The State of Play in the Constitutionally Implied Freedom of Political Discussion and Bans on Electoral Canvassing in Australia

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The State of Play in the Constitutionally Implied Freedom of Political Discussion and Bans on Electoral Canvassing in Australia

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Major Issues Summary

In 1992 in *Australian Capital Television Pty Ltd v Commonwealth* the High Court struck down the *Political Broadcasts and Political Disclosures Act 1991* (Cth) which restricted political advertising on the electronic media during Federal, State, Territory and local elections. In doing so, it recognised that the Australian Constitution contains an implied freedom to discuss political matters. This freedom was primarily derived from sections 7 and 24 of the Constitution, which respectively provide that the members of the Senate and the House of Representatives 'shall be ... directly chosen by the people'. As federal laws passed under section 51 of the Constitution are passed 'subject to this Constitution', such laws are invalid if they infringe the implied freedom.

In the subsequent cases of *Theophanous v Herald & Weekly Times Ltd* and *Stephens v West Australian Newspapers Ltd* the constitutional freedom reached a high point when the Court created a new defence to defamation actions involving political figures and extended the protection offered by the implied freedom to the State laws and State political matters. Most recently in *McGinty v Western Australia* the Court seemingly halted the development of the freedom by finding that neither the Commonwealth nor the Western Australian Constitution embodies a guarantee of electoral equality or 'one vote - one value'. This shift of direction came as Chief Justice Mason retired and was replaced by Chief Justice Brennan and new Justices Gummow and Kirby joined the Court.

Today, the scope and impact of the implied freedom of political discussion is uncertain. In March of 1997 the High Court will hear argument on whether it should overrule its earlier decisions of *Theophanous* and *Stephens*. Although *Australian Capital Television* is not under threat, an overruling of *Theophanous* and *Stephens* would herald a restrictive approach to the freedom based more closely upon sections 7 and 24 of the Constitution.

As the origins of the implied freedom lie in provisions of the Constitution that set down guidelines for the Federal electoral process, a narrowed freedom could affect Federal, State and Territory electoral laws. One such area is those laws that ban or restrict electoral canvassing within a certain radius of the polling booth. The Commonwealth, each State (except New South Wales) and both the ACT and Northern Territory have passed such a law. These laws commonly ban the canvassing and soliciting of votes within 6 metres of the ballot box. However, the ACT and Tasmania provisions set a much greater radius of 100 metres, with the ACT law, section 303 of the *Electoral Act 1992* (ACT), not only
banning the canvassing and soliciting of votes but the doing of 'anything for the purpose of influencing the vote of an elector as the elector is approaching, or while the elector is at, the polling place'.

The ACT provision is strongly susceptible to challenge in the High Court for breaching the implied freedom of political discussion. Not only does the law prevent candidates and political parties from engaging in traditional means of communicating their policies and fitness for office to electors, but may make it an offence to engage in a private conversation with a family member or friend about the merits of particular candidates or policies while queuing to vote.

A likely consequence of the ACT law is that people or parties wishing to influence voters by handing out how-to-vote cards will be forced to use the postal system or larger numbers of volunteers to distribute such material. This has the potential to force candidates to adopt more expensive campaigning techniques or to seek a larger number of volunteers to hand out information around the 100 metre radius. To draw an analogy with the law held invalid in Australian Capital Television, the restrictions imposed by section 303 'directly exclude potential participants in the electoral process from access to an extremely important mode of communication with the electorate'. Moreover, as McHugh J stated in that case:

[H]aving regard to the conceptions of representative government, Parliament has no right to prefer one form of lawful electoral communication over another. It is for the electors and the candidates to choose which forms of otherwise lawful communication they prefer to use to disseminate political information, ideas and argument. Their choices are a matter of private, not public, interest. Their choices are outside the zone of governmental control.
Introduction

It is essential to Australian democracy that voters be able to freely discuss candidates’ policies and their fitness for office. Voters will only be able to make informed decisions about their representatives if they, and the media, possess a largely unrestricted ability to speak about political matters. This imperative is recognised in sections 7 and 24 of the Commonwealth Constitution, which respectively provide that the members of the Senate and the House of Representatives 'shall be ... directly chosen by the people'. In *Australian Capital Television Pty Ltd v Commonwealth*, the High Court took these words and forged them into a constitutionally guaranteed freedom of political discussion. Later cases have narrowed the protection offered, but have also made it clear that even at its narrowest the freedom encompasses political discussion during election periods.

Despite judicial moves to strengthen protection for political discussion in Australia, there have been countervailing political moves to restrict certain forms of political speech. This has frequently been driven by inquiries undertaken by parliamentary committees at both the State and Federal level. For example, at the State level the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament conducted an *Inquiry into Truth in Political Advertising*. In its Report the Committee recommended that 'truth in political advertising legislation be introduced in Queensland' to prevent 'inaccurate and misleading statements of fact'. At the Federal level, an *Inquiry into the Right to Legitimately Protest or Demonstrate on National Land and in the Parliamentary Zone in Particular* is being conducted by the Joint Standing Committee on the National Capital and External Territories. In 1995, the Joint Standing Committee on Electoral Matters of the Federal Parliament conducted an unresolved *Inquiry into Push Polling*.

Does this mean that Australian Parliaments and the High Court are on a collision course over free speech in the electoral process? The answer need not be yes. Although free speech is a paramount interest in the electoral process, it nevertheless is not an absolute interest. The High Court has clearly established that some restrictions of free speech are permissible and has devised a test of reasonable proportionality to govern such cases. According to Brennan J in *Australian Capital Television*:

> It is both simplistic and erroneous to regard any limitation on political advertising as offensive to the Constitution. If that were not so, there could be no blackout on advertising on polling day; indeed, even advertising in the polling booth would have to be allowed unless the demands of peace, order and decorum in the polling booth qualify...
the limitation. Though freedom of political communication is essential to the maintenance of a representative democracy, it is not so transcendent a value as to override all interests which the law would otherwise protect.5

Parliaments can therefore place some restrictions on political discussion, but in doing so must be aware of the need to achieve an appropriate balance between the restriction of political discussion and the promotion of the other goal they are seeking to achieve. This will require a cautious approach6 that does more than merely pay lip-service to the role of political discussion in Australian democracy.7 In some cases, this may require parliaments to examine existing laws to see if they are consistent with the High Court's interpretation of the Constitution.8

This paper also examines the regulation in Australia of canvassing near polling places. There are many other restrictions on electoral canvassing in place in Federal, State and Territory legislation,9 and so the analysis of this issue serves as a model for how the regulation of other electoral canvassing practices might be approached. The regulation of canvassing near polling places is examined in light of the implied freedom of political discussion. In the first part of this paper, the implied freedom is surveyed and outlined with a view to establishing its likely impact in the area of electoral speech generally.

The Implied Freedom of Political Discussion

Australian Capital Television - first recognition

In 1992 in Australian Capital Television10 six judges of the High Court derived a freedom to discuss political matters from the Commonwealth Constitution.11 According to these judges the system of representative government created by the Constitution, or at least the text of sections 7 and 24, necessarily requires for its efficacy that the Australian people are able to discuss freely matters relating to Australian government.12 As Federal laws passed under section 51 of the Constitution are passed ‘subject to this Constitution’, such laws are invalid if they infringe the constitutional freedom.

In Australian Capital Television, as well as in several of its successor cases, the principles of interpretation underlying the implied freedom were worked out in the context of electoral laws. A majority of the Court in Australian Capital Television applied the freedom to strike down much of the Political Broadcasts and Political Disclosures Act 1991 (Cth). That Act banned political advertising on the electronic media during Federal, State, Territory and local elections. Some free air time was to be provided to political parties and candidates seeking office, although 90% of this time was to be allocated to parties represented in the previous Parliament. The majority found that the ban infringed the
implied freedom of political discussion and was therefore invalid. Mason CJ argued that the Act would favour:

the established political parties and their candidates without securing compensating advantages or benefits for others who wish to participate in the electoral process or in the political debate which is an integral part of that process.\(^{13}\)

**Theophanous and Stephens - widening and extending the freedom**

The freedom of political discussion was subsequently applied and developed in three decisions handed down in October 1994: *Theophanous v Herald & Weekly Times Ltd*,\(^ {14}\) *Stephens v West Australian Newspapers Ltd*\(^ {15}\) and *Cunliffe v Commonwealth*.\(^ {16}\) Most controversially, the majority in *Theophanous* applied the freedom to 'constitutionalise' an aspect of the common law of defamation. Mason CJ, Deane, Toohey and Gaudron JJ created a new defence available to a person sued for defamation as a consequence of political discussion about a candidate for office. The joint judgment of Mason CJ, Toohey and Gaudron JJ held that such political discussion cannot be attacked by way of a defamation action where the publisher of the speech can establish that:

- it was unaware of the falsity of the material published;
- it did not publish the material recklessly, that is, not caring whether the material was true or false; and
- the publication was reasonable in the circumstances.

The effect of the majority approach in *Theophanous* is that where the common law impinges upon political discussion it may be reshaped (or 'constitutionalised') to better reflect the constitutional imperative of political discussion. *Theophanous* established that the constitutional freedom informs the content of the common law rather than vice versa.\(^ {17}\)

*Stephens* was an important case because it demonstrated that the implied freedom of political discussion could impact upon State political matters and State laws.\(^ {18}\) The case arose out of a defamation action brought by six members of the Legislative Council of Western Australia in relation to three articles published in the *West Australian* newspaper. The articles set out statements by another member of the Legislative Council of Western Australia alleging that an interstate and overseas trip undertaken by the plaintiffs was a 'junket of mammoth proportions'. A majority of the Court held that the implied freedom protected the political discussion at issue in that case by allowing the newspaper to plead the new *Theophanous* defence. The defence became available because of either or both of the following:
1. The implied freedom of political discussion derived from the Commonwealth Constitution extends to all political discussion, including discussion of political matters relating to government at State level. This conclusion was supported by dicta from Australian Capital Television, Nationwide News and Theophanous. For example, Deane and Toohey JJ stated in Nationwide News:

The implication of freedom of communication about the government of the Commonwealth most obviously applies in relation to Commonwealth, as distinct from State or other regional, governmental institutions. Under the Australian Federal system, however, it is unrealistic to see the three levels of government - Commonwealth, State and Local - as isolated from one another or as operating otherwise than in an overall national context. Indeed, the Constitution's doctrine of representative government is structured upon an assumption of representative government within the States and, to a limited extent, an assumption of the co-operation of the governments and Parliaments of the States in the electoral process itself. As a practical matter, taxes levied by the Executive of the Commonwealth under laws made by the Parliament are applied for public purposes through and at all levels of government. Political parties or associations are likely to exist in relation to more than one level of government and political ideas are unlikely to be confined within the sphere of one level of government only. Clearly enough, the relationship and interaction between the different levels of government are such that an implication of freedom of communication about matters relating to the government of the Commonwealth would be unrealistically confined if it applied only to communications in relation to Commonwealth governmental institutions.

Mason CJ and Gaudron J in Australian Capital Television argued similarly that the implied freedom extends to Territory matters.

2. A counterpart implication could be derived from the system of representative government created by the Western Australian Constitution. Section 73(2) of the Constitution Act 1889 (WA) entrenches Western Australian laws, including the Western Australian Constitution itself, against Bills of the several kinds specified in the provision. This includes, in section 73(2)(c), a Bill that 'expressly or impliedly provides that the Legislative Council or the Legislative Assembly shall be composed of members other than members chosen directly by the people'. In Stephens, Brennan CJ stated that section 73(2)(c):

entrenches in the Constitution Act the requirement that the Legislative Council and the Legislative Assembly be composed of members chosen directly by the people. This requirement is drawn in terms similar to those found in ss 7 and 24 of the Commonwealth Constitution from which the implication that effects a constitutional freedom to discuss government, governmental institutions and political matters is substantially derived. By parity of reasoning, a similar implication can be drawn from the Constitution Act with respect to the system of government of Western Australia therein prescribed.
The effect of *Stephens* was to establish that the laws of the States can be affected by the implied freedom of political discussion. In some cases, this will be due to the freedom derived from the Commonwealth Constitution flowing down. In others, the exclusive State nature of the relevant political discussion may mean that it can only be protected by an implication derived from the particular State Constitution. The question of which State Constitutions can support such an implication will however need to be determined on a case-by-case basis.

**The 1996 decisions - consolidation or cutback?**

The most recent decisions of the High Court on the implied freedom, *McGinty v Western Australia*,28 *Langer v Commonwealth*,29 and *Muldowney v South Australia*,30 were handed down in 1996. In *Muldowney* it was argued that, just as a counterpart implication could be derived from the Western Australian Constitution, so could one be derived from the South Australian Constitution. However, the Solicitor-General for South Australia conceded that the South Australian Constitution contains such an implication 'in like manner to the Commonwealth Constitution',31 meaning that the High Court did not need to decide the issue.32 The provision impugned in *Muldowney*, s126(1)(b) and (c) of the *Electoral Act 1985* (SA), which made it an offence to encourage voters to fill in or mark their ballot paper other than in accordance with the prescribed method, was held to be valid. Gaudron J stated that the implied freedom:

> does not operate to strike down a law which curtails freedom of communication in those limited circumstances where that curtailment is reasonably capable of being viewed as appropriate and adapted to furthering or enhancing the democratic processes of the States.33

In *Langer*, a majority of the Court found that section 329A of the *Commonwealth Electoral Act 1918* (Cth) was valid. Section 329A was a provision of similar effect to that considered in *Muldowney*. While the majority dealt briefly with the implied freedom of political discussion and narrowly construed the freedom in finding that it did not invalidate the provision, it was not strictly necessary for the Court to examine the issue as it was not argued by the plaintiff.34

*McGinty* was the most significant of the three cases decided in 1996. The plaintiffs in that case argued that just as sections 7 and 24 of the Constitution could support the implied freedom of political discussion, so could the sections support a guarantee of voter equality.35 They argued that this guarantee rendered invalid the electoral boundaries operating in Western Australian State elections.36 The argument failed. A majority of the Court held that no guarantee of voter equality could be discerned from either the Commonwealth or Western Australian Constitutions. *McGinty* was a significant decision in that it revealed much about how the current High Court views the implied freedom of...
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political discussion. In prior cases, the freedom was derived either from the system of representative government underlying the Constitution, as recognised by the text and structure of the Constitution, or from the text and structure alone. The distinction is an important one if only because it impacts upon the scope of the freedom. If the freedom is derived from the text and structure of the Constitution alone, this would enable the freedom to be narrowly construed as being primarily a freedom of discussion as regards electoral matters as sections 7 and 24 focus upon the electoral process. This narrow vision of the freedom was expressed by McHugh J in *Australian Capital Television* when he stated that 'the people have a constitutional right to convey and receive opinions, arguments and information concerning matter intended or likely to affect voting in an election for the Senate or the House of Representatives'. It was expressed even more narrowly by Dawson J in *Theophanous*, when he argued that sections 7 and 24 do no more than confer upon electors the ability to make 'a genuine, or informed, choice'. On the other hand, Deane and Toohey JJ viewed the freedom broadly as being based upon the system of representative government underlying the Constitution rather than merely upon the bare text of sections 7 and 24. As they stated in *Nationwide News*:

[T]he doctrine of representative government which the Constitution incorporates is not concerned merely with electoral processes. As has been said, the central thesis of the doctrine is that the powers of government belong to, and are derived from, the governed, that is to say, the people of the Commonwealth.

This broad view was criticised in *McGinty* on the basis that it involved drawing implications from implications, that is, that the implied freedom would be an implication from the system of representative government which is itself an implication from the Constitution, including sections 7 and 24. Equally, this criticism could be attacked for taking an unduly narrow and artificial view of constitutional interpretation, one that does not take account of the need of the interpreter to rely upon material other than the text, such as the existing structures created by the Constitution and the values underpinning it.

The majority in *McGinty*, Brennan CJ, Dawson, McHugh and Gummow JJ, established that the implied freedom should be seen as being derived from the text and structure of the Constitution alone. They argued that the freedom should not be seen as being shaped by any concept, such as representative democracy, that may underlie the Constitution. Rather, the freedom can be derived from the 'the text and structure of Pt I and III of Ch I of the Constitution and, in particular, from the provisions of ss 7 and 24'. According to Brennan CJ:

It is logically impermissible to treat 'representative democracy' as though it were contained in the Constitution, to attribute to the term a meaning or content derived from sources extrinsic to the Constitution and then to invalidate a law for inconsistency with the meaning or content so attributed.
This approach represented an important change from the approach of a differently constituted majority in earlier cases, particularly the majority of Mason CJ, Deane, Toohey and Gaudron JJ in *Theophanous*. It also indicated that the current High Court will take a restrictive approach to the implied freedom and can be expected to construe it narrowly, restricting it to the electoral context provided by sections 7 and 24 of the Constitution, as put forward by Dawson and McHugh JJ in earlier cases. The reasoning also casts some doubt upon the earlier decisions of *Theophanous* and *Stephens*. In *McGinty*, McHugh J, with some support from Gummow J, suggested that the use of the implied freedom in *Theophanous* to override the common law should be reconsidered. Dawson J invited counsel to take up this challenge in the hearing of *Levy v Victoria*. The invitation was accepted by the Solicitor-General for Victoria and the High Court will hear argument in March 1997 on whether *Theophanous* and *Stephens* should be overruled.

Even if the Court decides to overrule *Theophanous* and *Stephens*, its earlier decisions on the implied freedom are not under challenge. Some form of implied freedom of political discussion will continue to stand, even if its impact is narrowed by the Court or if the Court takes, as did Brennan J in *Australian Capital Television*, a robust attitude to the leeway to be granted to the Parliament. If it is narrowed to the electoral process to the exclusion of other forms of political discussion this may even mean a higher degree of scrutiny where electoral laws overstep the line. It is thus important to understand how the implied freedom operates and what approach the Court might adopt in setting the boundaries of legislative action to restrict speech in the electoral process.

**Applying the constitutional freedom - a 'how-to' guide**

For a law to be inconsistent with the implied freedom of political discussion it must first be shown that it impinges upon political discussion and secondly that it does not adequately serve, or is disproportionate in its impact upon political discussion in serving, some other legitimate purpose. It is obviously very difficult to determine exactly when speech falls within the ambit of political discussion. In *Theophanous* Mason CJ, Toohey and Gaudron JJ spoke of 'the absence of any limit capable of definition to the range of matters that may be relevant to debate in the Commonwealth Parliament and to its workings'\(^{45}\) and suggested that whether speech fell inside or outside the freedom should be determined on a case by case basis. However, they did state that:

> For present purposes, it is sufficient to say that 'political discussion' includes discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, eg, trade union leaders, Aboriginal political leaders, political and economic commentators.\(^{46}\)
The width of the freedom was further demonstrated by their adoption of Barendt’s statement that:

'political speech' refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.47

The potential width of the freedom was also demonstrated by the decision in Cunliffe. In that case, Mason CJ, Deane, Toohey and Gaudron JJ found that the implication protected the giving of immigration assistance and the making of immigration representations.48

Even given the narrowing effect of McGinty and the possible overturning of Theophanous and Stephens by the High Court, it is clear that the electoral process, and particularly public discussion of the performance, conduct and fitness for office of candidates for Parliament, will continue to be protected by the constitutional freedom. Bans on canvassing near polling places clearly lie at the core of what the freedom protects. They do so because they affect speech on the suitability of candidates for office and thus the choice to be made by electors under sections 7 and 24 of the Constitution.

Where a statute impinges upon political discussion, say, for example, by proscribing political advertising during election periods, the High Court will examine whether the law can nevertheless be justified. It determines this by applying a test of reasonable proportionality.49 This test was first applied to determine the scope of the Commonwealth’s external affairs power in section 51(xxix) of the Constitution,50 but has since been applied in other areas.51 Selway has summarised the operation of this test as follows:

Where there is a constitutional guarantee, immunity or limitation upon power and a balance needs to be struck to ascertain whether a relevant law falls within the guarantee, immunity or limitation or not, the test is whether the law is reasonably capable of being seen as appropriate and adapted to achieving a legitimate purpose and the impairment of the constitutional guarantee, immunity or limitation is merely incidental to that purpose. However, it may be that some judges would apply a broader test of whether the law is appropriate and adapted to a legitimate purpose.52

Deane J in Cunliffe stated that the outcome of the reasonable proportionality test 'will ultimately depend upon an assessment of the character (including purpose), operation and effect of the particular law'.53 In Australian Capital Television Mason CJ suggested that a restriction or prohibition that targets ideas or information will be more difficult to sustain than a restriction or prohibition that targets an activity or mode of communication by which ideas or information are transmitted. He stated that where a law targets ideas or information:

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 to justify the burden on communication. Generally speaking, it will be extremely difficult to justify restrictions imposed on free communication which operate by reference to the character of the ideas or information. 54

Where a statute does not meet the reasonable proportionality test, only Brennan J has been prepared to afford the Parliament a further 'margin of appreciation'. 55 This additional leeway was one factor that accounted for Brennan J's dissent in Australian Capital Television, where he was the only judge who recognised the implied freedom of political discussion but yet also found the relevant legislation to be valid.

Bans on Political Discussion at Polling Places

A common feature of electoral laws across Australia is a ban within a certain area of the ballot box on the influencing of electors through, for example, the handing out of how-to-vote cards, the placing of posters and discussions between voters and representatives of parties or candidates. Section 340(1) of the Commonwealth Electoral Act 1918 (Cth) provides:

The following acts are, on polling day, and on all days to which the polling is adjourned, prohibited at an entrance of or within a polling booth, or in any public or private place within 6 metres of an entrance of a polling booth, namely:

(a) canvassing for votes; or
(b) soliciting the vote of any elector; or
(c) inducing any elector not to vote for any particular candidate; or
(d) inducing any elector not to vote at the election; or
(e) exhibiting any notice or sign (other than an official notice) relating to the election.

Penalty: $500

The electoral legislation of every State, except New South Wales, contains an equivalent provision as to State elections 56 and local government elections. 57 There is also an equivalent provision in the electoral legislation of the Northern Territory 58 and the Australian Capital Territory. 59 There are additional restrictions in some States which require certain electoral material to be registered. For example, Victorian legislation bans the handing out of printed electoral material within 400 metres of the entrance to a polling booth except for registered how-to-vote cards, 60 and in New South Wales the distribution of electoral material in public places is banned unless such material has been registered. 61
There are important differences in the scope of these laws. The provisions in Queensland, South Australia, Victoria and Western Australia are clearly either modelled on or are similar in effect to section 340(1) of the Commonwealth legislation and proscribe campaigning within 6 metres of the entrance to the polling booth. Similarly, the equivalent provision in the Northern Territory sets a distance of 10 metres. On the other hand, the provisions in Tasmania and the Australian Capital Territory proscribe such activities within 100 metres of the booth. The most restrictive of these provisions is that in place in the Australian Capital Territory, which does not merely restrict the canvassing or soliciting or votes within the 100 metre radius, but operates much more widely.

The ACT provision

The *Electoral Act 1992* (ACT) was amended in 1995 to introduce a ban on canvassing within a 100 metre radius of polling booths during Australian Capital Territory elections. Section 303 of that Act now provides:

1. A person shall not, during polling hours within the defined polling area in relation to a polling place:
   a) do anything for the purpose of influencing the vote of an elector as the elector is approaching, or while the elector is at, the polling place;
   b) do anything for the purpose of inducing an elector not to vote as the elector is approaching, or while the elector is at, the polling place; or
   c) exhibit a notice containing electoral matter which is able to be clearly seen by electors approaching, or at, the polling place, other than a notice authorised by the [Australian Capital Territory Electoral] Commissioner for display there.

Penalty: 5 penalty units [$500].

2. If the building in which a polling place is located is situated on grounds within an enclosure, the Commissioner may, by notice published in the *Gazette*, specify the boundary of that enclosure for the purposes of paragraph (b) of the definition of 'defined polling area' in subsection (6).

6. In this section-

'defined polling area', in relation to a polling place, means the area-

a) within the building in which the polling place is located, and within 100 metres of the building; or
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b) if the Commissioner issues a notice under subsection (2) in relation to the polling place - within the boundary of the enclosure specified in the notice, and within 100 metres outside that boundary.

In presenting the amendments to the Australian Capital Territory Legislative Assembly, the Attorney-General, Mr Humphries, stated that the 100 metre canvassing prohibition was aimed at 'reducing the influence of party machines on election and referendum outcomes'. The provision was modelled on that operating in Tasmania, the jurisdiction from which the Australian Capital Territory derived its 'Hare-Clark' electoral system. However, while the provision may be modelled on that in Tasmania, it goes further than that provision. The Tasmanian provision restricts the canvassing and soliciting of votes while section 303 affects the doing of 'anything for the purpose of influencing the vote of an elector as the elector is approaching, or while the elector is at, the polling place'. The Attorney-General also referred to other benefits of the provision, which included 'a reduction in wastage of paper used in how-to-vote cards', 'removing the advantage currently enjoyed by those parties and candidates with the resources to print and distribute material widely on polling day' and 'removing a source of irritation to voters entering polling places'.

Paragraph 303(1)(a) was obviously intended to apply to overt 'canvassing' activities, such as the distribution of how-to-vote cards and candidates greeting and chatting with constituents as they arrive at the polling place. It thus outlaws within the 100 metre radius the setting up of a stall for the purpose of answering voters' questions on policy issues and the placement of posters with the picture of a candidate. The law prevents candidates and political parties from engaging in traditional means of communicating their policies and fitness for office to electors. However, the law potentially has an even greater effect. Section 303 is drawn in terms wide enough to encompass many others activities, including those that might be beyond the intended scope of the law. Strictly, the provision will apply to the private conduct of voters and passers-by, with the 100 metre radius perhaps even including persons approaching the polling booth in cars. The effect of sub section 303(6) may be to extend the radius to include private homes. This would mean that the law makes it an offence to engage in a private conversation with a family member or friend about the merits of particular candidates or policies while queuing to vote if the intention is to affect the vote of that other person.

The bans on canvassing in place across Australia, and those in the Australian Capital Territory and Tasmania in particular, obviously restrict freedom of political discussion. The laws restrict directly the ability of voters to discuss matters relating to the suitability for office of candidates and to ask questions of candidates or their representatives as to their policies or as to how best to cast a preferential vote. Moreover, the provisions arguably target ideas or information rather than being a manner and form limitation upon how political speech can be exercised.
The Australian Capital Territory provision is obviously in most danger of invalidity. It could be saved only if it satisfies the reasonable proportionality test. However, it is difficult to see how it could do so if the approach of the majority in *Australian Capital Television* were to be applied. Like the law found invalid in *Australian Capital Television*, the restriction on political discussion is not an incidental aspect of section 303, but is the very object of the law. Nor is section 303 closely tailored to restricting only certain forms of canvassing for votes. Instead, the law has a potentially draconian effect and is of wider scope than other comparable laws across Australia in the conduct affected and, apart from Tasmania, in the radius set down. If an objective of section 303 is to prevent the intimidation of electors, this aim might have been met with a more focussed law. For example, section 341 of the *Local Government Act 1993 (Qld)* states that: 'A person may not, by violence or intimidation, influence a person's vote at an election'.

Section 303 might also be viewed as having a discriminatory effect. It has the potential to make it harder for some interest groups, such as Friends of the ABC or Friends of Albert Langer or others, which have disseminated information at polling booths at Australian elections in the past, to have their voices heard at minimal cost. A likely consequence of the law is that people or parties wishing to influence voters by handing out a how-to-vote card will be forced to use the postal system or larger numbers of volunteers to distribute such material. This has the potential to force candidates to adopt more expensive campaigning techniques or to seek a larger number of volunteers to hand out information around the 100 metre radius. To draw an analogy with the law held invalid in *Australian Capital Television*, the restrictions imposed by section 303 'directly exclude potential participants in the electoral process from access to an extremely important mode of communication with the electorate'. Moreover, as McHugh J stated in *Australian Capital Television*:

[H]aving regard to the conceptions of representative government, Parliament has no right to prefer one form of lawful electoral communication over another. It is for the electors and the candidates to choose which forms of otherwise lawful communication they prefer to use to disseminate political information, ideas and argument. Their choices are a matter of private, not public, interest. Their choices are outside the zone of governmental control.

This statement might equally counter the argument that section 303 is valid because it leaves open other avenues for the distribution of campaign material.

It would seem that section 303 may be invalid. This result would, however, depend upon an implied freedom being found at the Territory level, either due to the Commonwealth Constitution flowing down or because a counterpart implication can be derived from the *Australian Capital Territory (Self-Government) Act 1988 (Cth)*. As section 303 has not been in operation during an election in the Australian Capital Territory it has yet to be challenged, in part because there is no person with sufficient standing to do so. This
conclusion does not mean that parliaments cannot place any restrictions upon canvassing or like activities near polling booths. Indeed, with the exception of the Tasmanian provision, which also sets a radius of 100 metres, it would seem likely that the provisions in the other States would be valid under the reasonable proportionality test.

United States authority

The United States Supreme Court has considered a wide variety of electoral laws through the lense of the First Amendment right to free speech in the United States Constitution.\textsuperscript{73} In the 1992 case of\textit{Burson v Freeman}\textsuperscript{74} the Supreme Court dealt with the validity of a Tennessee provision that restricted canvassing within 100 feet of a polling place. A 5:3 majority held that the restriction was not a violation of the First Amendment right to free speech.

The majority in\textit{Burson v Freeman} found the Tennessee provision to be a content-based restriction on speech, that is, one targeting ideas or information, as opposed to one directed merely toward the time, place and manner of communication. This meant that, to be valid, the law needed to survive the Court's 'exacting scrutiny' test, according to which a provision must serve a 'compelling state interest' and be drawn as narrowly as possible to achieve that end.\textsuperscript{75} Applying the test, the majority found that this was a 'rare case' where there was a compelling state interest in preventing voter intimidation and electoral fraud and that the Tennessee provision was suitably drawn to achieve that end.\textsuperscript{76} However, the leading judgment of Blackmun J also stated that: 'At some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden'.\textsuperscript{77} The implication of this was that if the law had set a distance substantially greater than 100 feet, the law would have been invalid.

One hundred metres, the distance specified in the Australian Capital Territory and Tasmanian provisions, is a little over three times 100 feet, the distance specified in the Tennessee provision. Were the United States Supreme Court to deal with something closer to the Australian Capital Territory and Tasmanian provisions it would be likely to find that the laws were invalid as placing too high a burden on free speech. Given the similarities between that Court's 'exacting scrutiny' test and the High Court's 'proportionality' requirement as applied to laws that target ideas or information, the High Court may well find\textit{Burson v Freeman} to be a persuasive authority.\textsuperscript{78}
20 Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106 at 142 per Mason CJ, 168-169 per Deane and Toohey JJ, 215-217 per Gaudron J.

21 Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 at 75-76 per Deane and Toohey JJ.

22 Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104 at 122 per Mason CJ, Toohey and Gaudron JJ, at 164 per Deane J.

23 Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 at 75.

24 Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106 at 142, 217. Cf ibid at 246 per McHugh J ('nothing in the Constitution suggests to my mind that there is any implied right of freedom of expression or communication within a Territory or any right in a Territory arising from the institutions of representative government and responsible government.')

25 Under section 73(2)(f) and (g), such bills must be passed by an absolute majority of both Houses of the Parliament and be approved by the electors of the State at a referendum.

26 Stephens v West Australian Newspapers Ltd (1994) 182 CLR 211 at 236.

27 See Brisbane TV Ltd v Criminal Justice Commission (unreported, 17 September 1996, Queensland Supreme Court, Court of Appeal); Cameron v Becker (1995) 64 SASR 238.


31 Muldowney v South Australia (1996) 136 ALR 18 at 23.

32 See Cameron v Becker (1995) 64 SASR 238 at 247, 253 where the Full Court of the Supreme Court of South Australia also did not need to decide the issue. Olsson J did, however, state in ibid at 247: 'I see no conceptual difference between the constitution of Western Australia discussed in Stephens and that of this State.'


34 Langer v Commonwealth (1996) 134 ALR 400 at 418 per Toohey and Gaudron JJ.

35 See Attorney-General (Cth); ex rel McKinlay v Commonwealth (1975) 135 CLR 1.

36 There were disparities of up to 291% between the number of voters in each seat in the lower house of the Western Australian Parliament. In the upper House, the difference was up to 376%. See McGinty v Western Australia (1996) 134 ALR 289 at 292-293.