Defamation and Politicians: Fair game - or keeping the game fair?
Summary

The High Court's judgments in *Theophanous v Herald & Weekly Times Ltd* and *Stephens v West Australian Newspapers Ltd* apply the constitutional implication of freedom of political discussion which the Court had recognised in the earlier cases of *Australian Capital Television Pty Ltd v The Commonwealth* and *Nationwide News Pty Ltd v Wills*, to the laws of defamation.

The majority of the High Court have recognised that it is a defence in an action in defamation that the impugned material was protected by the constitutional implication of freedom of political discussion. In order to establish this defence, the defendant must show that he, she or it:

1. was not aware that the published material was false;

2. was not reckless as to whether the published material was true or false; and

3. acted reasonably in publishing the material.

The judgments are not directed at restricting the rights of certain categories of people to bring legal actions for defamation. They are directed at protecting freedom of political discussion. The question of what falls within the protected area of free political discussion is difficult to determine. It is clear that discussion and criticism of the actions and policies of members of the Commonwealth and State Parliaments falls within this category, as does discussion of their suitability for office. It is likely that 'political discussion' would also cover criticisms of the actions or suitability of judges and senior government officers. It may also extend to criticism of other participants in political debates such as trade union leaders, Aboriginal leaders, business leaders and lobbyists.

The fact that an otherwise defamatory statement relates to a member of Parliament does not necessarily mean that it will attract the protection of the constitutional implication. Statements about a member of Parliament that are unrelated to the members role as a parliamentarian or his or her suitability or capacity to fill that role, will not attract protection. A statement will only be protected if it is a part of the political discussion which is necessary to support our constitutional system of representative democracy. This also means that the defence will generally not apply to defamatory comments made about 'public figures', such as actors, singers, artists and footballers, because such comments would normally not form part of the political discussion essential to a representative democracy.
The ramifications of this decision may not be great. Even when the protection of the constitutional implication is attracted, it will still be the case that an action for defamation will lie if people publish statements that they know or suspect to be false, or where it is not 'reasonable' for them to do so.

Although the practical effects of this decision may not be as significant as some have suggested, its importance lies in the statements it makes about the fundamental basis of our political society, and the role and rights of the people in our Australian democracy.

Freedom of speech has been claimed as an absolute right by members of Parliament in Australia since the Parliaments were established. As long as a member makes his or her defamatory statement in the course of parliamentary proceedings, it receives absolute protection no matter how irrelevant it is to the proceedings of the Parliament and how damaging it is to the individual. In all this time, however, the only right to freedom of speech held by the citizens of Australia is a common law presumption which can be removed by legislation at the will of the Commonwealth or State Parliaments. The significance of the Theophanous and Stephens decisions is that finally the High Court has recognised that it is fundamental to the nature of our democracy, as established by the Constitution, that the people themselves have a limited right of freedom of speech, so that they too can exercise their important functions in the democratic process in a free and informed manner. Being a constitutional right, it cannot be removed by the Parliament.

As the ninety-two year old free speech advocate Alexander Meiklejohn said in relation to the United States Supreme Court's decision in New York Times Co. v Sullivan, 'it is an occasion for dancing in the streets'.

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1 Brennan, W., 'The Supreme Court and the Meiklejohn Interpretation of the First Amendment' (1965) 79 Harvard Law Review 1, 17.
Introduction

On 12 October 1994 the High Court handed down its judgments in the cases of Theophanous v Herald & Weekly Times Ltd\(^2\) and Stephens v West Australian Newspapers Ltd\(^3\). Both cases concerned defamation actions brought by members of Parliament. The Theophanous case was brought by a member of the Commonwealth Parliament, Dr Andrew Theophanous, in response to a letter to the editor published in a newspaper which alleged that he performed his duties in a biased manner. The Stephens case was brought by a number of members of the Western Australian Parliament, in response to several articles in a newspaper reporting the comments of another member of the Western Australian Parliament about overseas 'junkets'.

In each case the defendant newspapers argued that they had a right to publish this material because it formed an integral part of political discussion. The defendants relied on the judgments of the High Court in Australian Capital Television Pty Ltd v The Commonwealth\(^4\) and Nationwide News Pty Ltd v Wills\(^5\), in which a majority of the Court recognised a constitutional implication of freedom of political discussion, derived from the principle of representative democracy that forms part of the Commonwealth Constitution\(^6\).

The High Court based its judgments in Australian Capital Television and Nationwide News on the fact that the Constitution, by providing that members of Parliament be 'directly chosen by the people', establishes a form of representative democracy which requires the people to participate in government through the electoral process. There would be no representative democracy, however, if the people were denied the information necessary to make a free and informed choice of their representatives, or were denied the ability to make their views known to their representatives. The representatives of the people are only truly accountable to the people if the people are informed of how their representatives are fulfilling their role and whether they are fit to do so. In order for the principle of

\(^2\) Unreported, Case no. 94/041. All references are to the transcript of the Court's judgment.

\(^3\) Unreported, Case No. 94/040.

\(^4\) (1992) 177 CLR 106.

\(^5\) (1992) 177 CLR 1.

representative democracy to be effective, therefore, the people must have the freedom to communicate and discuss political matters.

In *Theophanous* and *Stephens*, the defendants sought to extend this principle to the application of defamation laws which may otherwise restrict the freedom of the people to criticise and scrutinise the conduct of their parliamentary representatives.

### Summary of the cases

Although both the *Theophanous* and *Stephens* decisions were handed down together, most of the Court's reasoning is contained in the *Theophanous* case, while the *Stephens* case only refers to the distinctive aspects of that case.

In *Theophanous*, the High Court split in several directions. The Chief Justice, Sir Anthony Mason, and Justices Toohey and Gaudron wrote a joint judgment which recognised a defence in defamation actions, that the material was protected by the constitutional implication of freedom of political discussion. Their Honours balanced the public interest in free political discussion with the interest in protecting the reputation of individuals, by placing the onus on the defendant in a defamation action to establish that he or she believed the material to be true and the publication was 'reasonable' in the circumstances.

Justice Deane wrote a separate judgment which also established a 'freedom of political discussion' defence to defamation actions, but did not place the same burdens on the defendant to show reasonableness and that the defendant was not reckless or aware that the material was false.

Together, these four judges make up the majority of the Court, and for the purposes of reaching a majority order, Justice Deane agreed with the orders proposed by the Chief Justice and Justices Toohey and Gaudron.

The minority of the Court was comprised of Justices Brennan, Dawson and McHugh. Each had different reasons for rejecting the application of freedom of political discussion to defamation laws. In brief, Justice Dawson did not accept that there is a constitutional implication of freedom of political discussion, Justice McHugh accepted that such an implication exists but considered it to be confined to matters concerning elections, and Justice Brennan accepted that the implication exists generally, but considered it to be confined to limiting the legislative powers of Parliaments, rather than giving personal rights or affecting the common law.
The following discussion concentrates on the joint judgment of the Chief Justice, Justice Toohey and Justice Gaudron, as well as the separate judgment of Justice Deane, because these judgments make up the majority, and are the best guide for the future application of the law.

The extent of freedom of political discussion

The joint judgment in Theophanous of the Chief Justice and Justices Toohey and Gaudron, commenced by reviewing the implication of freedom of communication which had been recognised by the High Court in Australian Capital Television Pty Ltd v The Commonwealth and Nationwide News Pty Ltd v Wills. Their Honours noted that the implication does not extend to freedom of speech generally, but is limited to 'political discussion' or 'political discourse'. Political discussion, however, is not limited to matters relating to the Government of the Commonwealth, but applies to political information, ideas and debate across the three tiers of government. Central to the concept of 'political discussion' is criticism of the views, performance and capacity of a member of Parliament and of the member's fitness for public office. In Theophanous the impugned statements concerned the fitness of a member of Parliament to hold office and his responsibilities as the chairperson of a Committee on Migration Regulations. Their Honours held that this was clearly within the concept of political discussion.

Although not necessary for this particular case, the joint judgment gave further guidance as to the extent of 'political discussion'. Their Honours stated:

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, e.g., trade union leaders, Aboriginal political leaders, political and economic commentators. Indeed, in our view, the concept is not exhausted by political publications and addresses which are calculated to influence choices.

7 Theophanous, at p. 5.
8 Theophanous, at p. 6.
9 Theophanous, at p. 7.
10 Theophanous, at p. 7.
11 Theophanous, at p. 8.
In order to attract the protection of the constitutional implication, the
discussion itself must relate to matters of political relevance, such as
the policies or the conduct or fitness for office of a political figure.
Their Honours gave the example of an actor seeking election to
Parliament. Criticism of the actor's policies or conduct would
constitute political discussion, whereas discussion of the person's acting
ability would not be considered political discussion.12

Their Honours also noted the difference between commercial speech
'where the speech is simply aimed at selling goods and services and
enhancing profit-making activities' and speech on matters of public
concern.13 Although not needing to decide the point, they indicated
the view that commercial speech is not protected by the implied
constitutional freedom of political discussion.

Justice Deane also considered that the extent of 'political discussion'
depends upon the extent to which it supports the constitutional
principle of representative government:

The freedom of the citizens of the Commonwealth to examine, discuss and
criticise the official conduct and consequent suitability for office of persons
entrusted with those powers of government such as parliamentarians, judges and
leading members of the Executive, is critical to the working of a democratic
system of representative government of the type which the Constitution
incorporates. As regards the official conduct or suitability of persons elected to
serve as members of the Parliament, that freedom of examination, discussion
and criticism is also essential to the proper working of the electoral processes
upon which that system of representative government is based.14

The constitutional implication of freedom of political discussion is not
confined to the Commonwealth sphere of government. In Stephens the
Chief Justice and Justices Toohey and Gaudron concluded that the
implication of freedom of political discussion may be derived from both
the Commonwealth Constitution and the Western Australian Constitution:

[T]here is an implied freedom of communication deriving both from the
Commonwealth Constitution and from the State Constitution which applies in
the present case. First, we consider that the freedom of communication implied
in the Commonwealth Constitution extends to public discussion of the
performance, conduct and fitness for office of members of a State legislature.15

12 Theophanous, at p. 7.
13 Theophanous, at p. 8. This comment will be of relevance to the action by the
tobacco companies challenging legislation restricting tobacco advertising.
14 Theophanous, pp. 63-64.
15 Stephens, at p. 6.
Their Honours then went on to address the nature of the Western Australian Constitution, concluding:

And, so long, at least, as the Western Australian Constitution continues to provide for a representative democracy in which the members of the legislature are "directly chosen by the people", a freedom of communication must necessarily be implied in that Constitution, just as it is implied in the Commonwealth Constitution, in order to protect the efficacious working of representative democracy and government.\(^{16}\)

Accordingly, freedom of political discussion is supported by both the Commonwealth Constitution and the Constitutions of the States.

**Who will be affected by the defence of freedom of discussion?**

The judgments in *Theophanous* and *Stephens* are not directed at restricting the rights of certain categories of people to bring legal actions for defamation. They are directed at protecting freedom of political discussion. Accordingly, they do not single out members of Parliament by restricting their rights to sue for defamation. A member of Parliament could still successfully sue for defamatory comments made about his or her private life or other matters unrelated to his or her conduct as a politician or suitability for office.\(^{17}\)

The real question is the extent to which the impugned statements are an important part of freedom of political discussion. Clearly, scrutiny of the actions, performance and character of members of Parliament will form an integral part of freedom of discussion. The Chief Justice and Justices Toohey and Gaudron noted:

> [C]riticism of the view, performance and capacity of a member of Parliament and of the member's fitness for public office, particularly when an election is in the offing, is at the very centre of the freedom of political discussion.\(^{18}\)

Their Honours, however, made it clear that 'political discussion' is not confined to discussion of the actions of members of Parliament, but may also concern other participants in the political debate such as

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16 *Stephens*, at p. 7.

17 *Theophanous*, per Mason C.J., Toohey and Gaudron JJ. at p. 7; per Deane J. at p. 63. Note: material about a member's private life might be relevant to political discussion to the extent that it reflects on his or her suitability for office.

18 *Theophanous*, at p. 7.
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trade unionists and Aboriginal leaders.\textsuperscript{19} Does this mean that a
defence of freedom of political discussion would apply if such people
brought defamation actions for comments made about their activities?

The answer depends on the extent to which the comments made about
the person are an integral part of political discussion. The more
removed the 'defamed' person is from the Parliament or government,
the more difficult it will be able to establish that the impugned
comments form part of 'political discussion'.

Although the notion of 'political discussion' is fairly wide, the majority
of the Court showed some reluctance to extend their judgments too
broadly. In discussing the American case of \textit{New York Times Co. v
Sullivan},\textsuperscript{20} which similarly held that politicians are limited in their
ability to sue for defamation, the joint judgment of the Chief Justice
and Justices Toohey and Gaudron noted that the test in that case has
been expanded over the years to cover candidates for public office,
government employees who are in a position to influence public issues
and 'public figures' who do not hold official or government positions.
Their Honours observed that although the case of \textit{Theophanous} did
not require the Court to address these issues, as Dr Theophanous is a
Member of Parliament, they had reached a 'preliminary view that these
extensions, other than the extension to cover candidates for public
office, should not form part of our law'.\textsuperscript{21}

The reason for this view appears to be that the criticisms of 'public
figures' outside the realms of Parliament and government are not likely
to be central to the notion of political discussion which the
Commonwealth Constitution seeks to protect. It must always be
remembered that the 'underlying purpose of the freedom is to ensure
the efficacious working of representative democracy'.\textsuperscript{22} In the United
States, in contrast, the Constitution provides a general right of
freedom of speech which is not restricted to political discussion, and
therefore may be extended to cover statements about other public
figures.

Justice Deane also referred to the principle of representative
democracy in determining who would be affected by the creation of this
defence. His Honour considered that it included discussion and
criticism of the official conduct and consequential suitability for office

\begin{itemize}
\item 19 \textit{Theophanous}, at p. 8.
\item 20 376 US 254 (1964).
\item 21 \textit{Theophanous}, p. 18.
\item 22 \textit{Theophanous}, at p. 7.
\end{itemize}
of 'parliamentarians and other holders of high public office, or candidates for such positions'. He noted that his use of the phrase 'holder of high public office' was intended to refer to people who 'have, or appear to the public to have substantial responsibility for or control over the conduct of governmental affairs'.

His Honour noted that it was unnecessary to consider whether this extends to political discussion about persons 'who "have thrust themselves to the forefront" of political contests or controversies in order to influence the outcome thereof'. Nevertheless, Justice Deane's reasoning gives some idea as to how he would approach this question.

Justice Deane seemed to recognise two elements in determining whether the defence of freedom of political discussion is to apply. The first is that it must relate to essentially political matters, such as the performance of a person's official duties or his or her suitability for official office. Statements about the private conduct or affairs of a member of Parliament fall into a different, and unprotected, category 'except to the extent that they bear upon the propriety, appropriateness or significance of official conduct'.

The second element involves a balancing of the interests of the 'legitimate claims of individuals to live peacefully and with dignity' in society and the public interest in effective political communication and discussion. Justice Deane noted that there may be some categories of political discussion, such as statements about the character or competence of junior government employees, where a person's privacy or reputation deserves greater protection than the political discussion generated. Where, however, the political discussion concerns 'parliamentarians, judges or other holders of high office' and relates to the performance of their official functions, then the public interest in the discussion may be greater than the interest in protecting the reputation of the individual.

In balancing the interest in protecting personal reputation against the interest in maintaining free political discussion, Justice Deane noted that there are several reasons why the balance should tip in favour of protecting political discussion when members of Parliament are


25 Theophanous, at p. 63.

26 Theophanous, at pp. 61-63.
involved. The first reason is that in taking up the position of a member of Parliament, the member makes herself or himself accountable to the people. Justice Deane observed:

As has been said, all powers of government ultimately belong to, and are derived from, the people. It is not unreasonable that those who undertake the exercise of those powers, ordinarily for remuneration from the public purse, should be required to bear the burden of whatever is necessary to ensure full accountability to, and open scrutiny by, those whom they represent and whose powers they exercise.27

Justice Deane noted that a second reason is that members of Parliament and other people in high office have access to the media and other forums to refute defamatory allegations, while ordinary people have no such access. He concluded:

There are, of course, weighty reasons which support the common law's protection of personal reputation by the imposition of liability to pay damages for defamation. Strong though they remain, however, those reasons are less powerful in the case of those who undertake the exercise of the powers of government in high public office in that the holders of such office, particularly parliamentarians entitled to be heard in the public and privileged forum of parliamentary proceedings, are likely to have greater access, by reason of their office, to the means of communication to refute or answer an untrue or unfair statement of fact or comment.28

A third reason noted by Justice Deane is that politicians and judges are protected by absolute privilege in parliamentary or court proceedings, even when their statements are unjustifiably and inexcusably defamatory. The reason for this privilege is 'to encourage the fearless, vigorous and effective exercise of public power for the general good.'29 His Honour considered that this principle applies to the other side of the coin: that citizens should have the right to fearlessly and vigorously discuss and criticise government and government policies.

Members of Australian Parliaments trace their absolute right to freedom of speech in parliamentary proceedings back to the Bill of Rights 1688. This right was confirmed in the Parliamentary Privileges Act 1987 (Cth). Although members of Parliament have given themselves a statutory right of freedom of speech, they have never given this right to the citizens of either the United Kingdom or Australia. The constitutional implication of freedom of public discussion returns to the people of Australia, to a far more limited

27 Theophanous, at p. 67.
28 Theophanous, at p. 65.
29 Theophanous, at p. 65.
extent, the right of freedom of political discussion which is so fundamental to their democracy.

In summary, it is clear that the defence of freedom of political discussion recognised in Theophanous and Stephens will apply to defamatory statements made about members of the Commonwealth and State Parliaments, where the impugned matter forms part of 'political discussion'. It is likely that the defence would also apply to defamatory statements about the conduct or suitability of federal and state judges.

The extent to which the defence would apply to defamatory statements made against statutory officers such as the Auditor-General or members of tribunals, commissions and boards, as well as senior public servants of defence officers, is less clear. Finally, it is unclear whether the defence may also apply to defamation actions brought by participants in political debates such as trade union leaders, Aboriginal and ethnic community leaders, business leaders and mining representatives, leaders of the environment movement or prominent participants in the republic debate. In any case the test will be the extent to which the statement is central to the type of 'political discussion' necessary in a representative democracy.

It is clear, however, that as freedom of political discussion is derived from the principle of representative democracy rather than a general right of freedom of speech, it will not provide a defence for defamatory statements made about other 'public figures' such as actors, singers, artists and footballers.

How will defamation law be affected?

The joint judgment of Mason C.J., Toohey and Gaudron JJ. rejected the notion that freedom of political discussion is absolute and that no action in defamation can be taken where it involves a matter of political discussion.30 Their Honours noted that the basis of the freedom is the 'efficacious working of representative democracy' and that this does not require the protection of people who deliberately make defamatory statements knowing them to be false, or being reckless as to whether they are true or false. Their Honours concluded that '[t]he public interest to be served does not warrant protecting statements made irresponsibly'.31

30 Theophanous, at p. 17.

31 Theophanous, at p. 17.
In adopting such a view, their Honours substantially followed the logic of the United States Supreme Court in New York Times Co. v Sullivan. However, their Honours did not accept the severity of the malice test set out in Sullivan, which requires that the plaintiff prove the falsity of the impugned statement as well as malice. Instead, the majority judgment placed the onus on the defendant to prove that he or she was unaware of the falsity of the statement, and did not publish it with reckless indifference as to whether it was true or false. Their Honours also added the extra burden of establishing that the defendant had acted 'reasonably' in publishing the impugned material. To show 'reasonableness', the defendant must establish that it either took steps to check the accuracy of the material or was otherwise justified in publishing it. Their Honours summed up the test as follows:

In other words, if a defendant publishes false and defamatory matter about a plaintiff, the defendant should be liable in damages unless it can establish that it was unaware of the falsity, that it did not publish recklessly (i.e., not caring whether the matter was true or false), and that the publication was reasonable in the sense described. These requirements will redress the balance and give the publisher protection, consistently with the implied freedom, whether or not the material is accurate.

Justice Deane, on the other hand, considered that the tests of unreasonableness and absence of recklessness or awareness of falsity are still too great a burden on freedom of political discussion. He noted how difficult it would be for a person to prove that he or she did not believe their statement to be false, or was not reckless as to whether it was true or false, and that the consequences of failing to establish this could be financial ruin. Accordingly, he concluded that the limitations on defamation law set out by Mason C.J., Toohey and Gaudron JJ. 'would do little to abate the chilling effect of a perceived risk or actual threat of defamation proceedings'.

Justice Deane preferred absolute protection for political discussion, concluding:

In the result, I would hold that the effect of the constitutional implication is to preclude completely the application of State defamation laws to impose liability in damages upon the citizen for the publication of statements about the official conduct or suitability of a member of the Parliament or other holder of high Commonwealth office.

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33 Theophanous, at p. 20.
34 Theophanous, at p. 68.
35 Theophanous, at p. 68.
His Honour also extended this to the media organisations which publish such discussion and criticism.

Although Justice Deane’s judgment extended beyond the joint judgment of the Chief Justice and Justices Toohey and Gaudron, he joined in their orders so that there would be a clear majority decision. Accordingly, he accepted the burdens that the majority placed on defamation defendants who seek to assert their constitutional freedom of political discussion.

The minority judgments

Justice Dawson followed the conclusion he had come to in the earlier cases of Australian Capital Television and Nationwide News, that the Constitution does not give rise to an implication of freedom of political discussion and therefore no question of balancing rights and interests arises.

Justice McHugh also followed his previous judgments in Australian Capital Television and Nationwide News where although he recognised that ‘representative government is an inherent part of the Constitution’ and ‘that freedom to discuss the government of the Commonwealth is an indispensable condition of representative government’, this freedom is to be confined to supporting sections 7 and 24 of the Constitution which deal with the election of the representatives of the people. His Honour did not consider that this freedom of communication could extend beyond assisting the interpretation of section 7 and 24 of the Constitution.

Justice Brennan, however, who fully accepted the existence of a constitutionally implied freedom of political discussion, rejected the application of this freedom as a personal right, rather than a limitation on legislative power. He considered that although freedom of political discussion may limit legislative power, as it did in Nationwide News and Australian Capital Television, it does not affect the common law of defamation. His Honour also considered that State legislation on defamation was unaffected by the constitutional implication of freedom of political discussion, because it was no more a burden on freedom of political discussion than the common law of defamation, and the Parliament has determined that these laws are appropriate and adapted to the legitimate end of protecting reputations.
Conclusion

Although the majority judgments of the High Court in these two cases amount to a significant development of the constitutional implication of freedom of speech, their practical consequences may not be so radical. The fact that the Court has placed the onus on the defendant to establish that he or she did not believe the impugned material to be false or was not reckless as to its truth or falsity, and that the publication is reasonable, means that the defendant still has a very heavy burden to bear before advantage can be taken of freedom of political speech.

What the Court has done in this case is give greater recognition to the importance of free political discussion in a democracy, while at the same time still giving protection from reckless or malicious statements, for those who participate in the political debate. As the right to freedom of political discussion is implied by the Commonwealth Constitution, it cannot be removed by the Parliament alone. Only a referendum approved by the people themselves could remove their right to participate in political discussion.