NOTE

THEOPHANOUS AND *STEPHENS* REVISITED*

I. INTRODUCTION: JUSTICE DAWSON'S INTERVENTION

In the course of his much publicised intervention during the hearings in *Levy v Victoria*,[1] Dawson J asserted that "[i]t would seem there is now not a majority of the Court which support [the] propositions" that were established in *Theophanous v Herald and Weekly Times Ltd* and *Stephens v Western Australian Newspapers Ltd*.[2] This was later followed by the adjournment of the proceedings in the *Levy* case, and also the removal into the High Court of the proceedings in *Lange v Australian Broadcasting Commission*,[3] to enable the High Court to consider an application for leave to reopen and reconsider the correctness of the former cases.

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1 Transcript, 6 August 1996, p 40

2 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211.

3 Note 1 *supra*, pp 95-6. In the *Lange* case, the High Court granted an application to remove, from the New South Wales Supreme Court into the High Court, an action for defamation commenced by the former New Zealand Prime Minister. This will enable that case to be heard at the same time as the *Levy* case. Transcript 13 September 1996 at pp 1-11.

Even if the assertion was correct, its relevance to the proceedings in the *Levy* case seemed somewhat surprising. However, in my view, it seems less surprising once a careful examination is made of the later cases decided by the High Court, especially, *McGinty v Western Australia*.[4]

II. THE BASIS AND REACH OF *THEOPHANOUS* AND *STEPHENS*

The *Theophanous* and *Stephens* cases were, of course, founded on the doctrine of representative government which the High Court recognised in the two earlier landmark cases of *Australian Capital Television Pty Ltd v The Commonwealth* and *Nationwide News Pty Ltd v Wills*.[5] In essence that doctrine was implied from the structure of the Commonwealth Constitution, and in particular ss 7 and 24. The provisions of those sections require Senators and members of the House of Representatives to be chosen directly by the people of the States and the Commonwealth respectively. The guarantee of the freedom of communication about political matters was seen as an indispensable element of representative government; that is, government by the people through their representatives directly chosen by them. At this point in the development of the guarantee the implication was seen as restricting the scope of Commonwealth legislative power. In *ACTV* the legislation concerned the banning of political advertising during the course of Commonwealth and State elections, and in *Nationwide News* the legislation concerned the prohibition of criticism of members of the Australian Industrial Relations Commission.

As with all guarantees, the freedom guaranteed was not regarded as absolute, but was subject to reasonable regulation; that is, laws that are reasonably necessary to advance a legitimate and competing public interest. Examples of such laws included defamation laws and laws which prohibited conduct that was traditionally seen as criminal.[6] Nevertheless, the High Court went on to hold that the guarantee impliedly restricted and modified the application of State defamation laws in their application to the defamation of a federal parliamentarian (in the *Theophanous* case); and also, what was more surprising, their application to individuals who had no connection with federal organs or institutions of government (in the *Stephens* case).

Thus the guarantee was applied to limit the reach of State legislative power and laws that dealt with the rights and obligations of individuals; that is, private rights and obligations. Of course, the decisions of the Court in those cases were

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4 (1996) 70 ALJR 200.

5 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

6 *Nationwide News ibid* at 49-50, per Brennan CJ (defamation) and at 7, per Deane and Toohey JJ (criminal law) In *ACTV* note 5 *supra* at 217, Gaudron J cited as regulatory examples laws with respect to defamation, sedition, blasphemy, obscenity and offensive language.

arrived at by narrow majorities. Two members of those majorities are no longer on the Court while the three dissentients remain on the Court.[7]

One of the majority justices, Deane J, relied on Covering Clause A of the Commonwealth of Australia Constitution Act and also ss 106-108 of the Commonwealth Constitution (including especially s 106) as a reason for recognising that the guarantee had the effect of limiting the reach of State legislative power.[8] These provisions continued the operation of State Constitutions and State laws subject to the provisions of the Commonwealth Constitution. This reason would have appealed to the late Justice Lionel Murphy.[9] However, the reason relied on, by the other majority justices is the pragmatic consideration founded on the unreality of separating communications about Commonwealth and State political matters. Thus it was said:

> The inter-relationship of Commonwealth and State powers and the interaction between various tiers of government in Australia, the constant flow of political information, ideas and debate across the tiers of government and 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 make unrealistic any attempt to confine the freedom to matters relating to the Commonwealth government.[10]

A further and alternative ground relates to the entrenchment of certain provisions contained in the Western Australian Constitution which require members of both Houses of the Western Australian Parliament to be chosen directly by the people.[11] The latter provisions were treated as recognising the operation of representative government at the Western Australian State level of government.[12]

III. CURRENT ATTITUDES: THE VULNERABILITY OF *THEOPHANOUS* AND *STEPHENS* AND THE RELEVANCE OF THOSE ATTITUDES TO THE *LEVY* AND *LANGE* CASES

In *McGinty* at least four justices overwhelmingly rejected s 106 as a sufficient reason for subjecting State political institutions of government to the constitutional guarantees which govern the existence and functioning of the Commonwealth political institutions of governments.[13] The latter case involved

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7 The majority consisted of Mason CJ, Deane J (both since retired) and Toohey and Gaudron JJ. The minority consisted of Brennan, Dawson and McHugh JJ.

8 *Theophanous* note 2 *supra* at 164-6.

9 For example, *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1978) 139 CLR 54 at 88, and *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 582.

10 *Theophanous* note 2 *supra* at 122, per Mason CJ, Toohey and Gaudron JJ.

11 *Constitution Act* 1889 (WA), s 73(2)(c). Those provisions cannot be amended or repealed without the approval of a majority of electors of the State at a referendum.

12 *Stephens* note 2 *supra* at 232-4, per Mason CJ, Toohey and Gaudron JJ and at 236, per Brennan J.

13 Note 4 *supra* at 208, per Brennan J; at 216, per Dawson J as a result of his agreement with Brennan J; at 226-8, per Toohey J; at 223, per Gaudron J, although she thought that s 106 would still require "the States to be and remain essentially democratic"; and at 276, per Gummow J, although he couched his rejection in terms of indicating that he did not wish to express a view on what otherwise might be the scope of s 106 beyond concluding that there was nothing in the Commonwealth Constitution "to bind the States to

the dismissal of a challenge to the Western Australian electoral redistribution laws by reference to the principle of one vote one value.

In addition, the 'pragmatic' reason for applying the guarantee of the freedom of political communication to all such communications, regardless of their connection with the Commonwealth organs of government, can now be seen as resting on vulnerable foundations. In the first place, and in my view, there are now four justices on the Court who, for different reasons, are uneasy about using the freedom to invalidate laws which deal with private rights and obligations.[14]

The latter uneasiness has a direct impact on the need to reconsider the impact of the freedom on defamation laws in the *Lange* case. However, one aspect of that case may suggest that the latter case may not be an appropriate vehicle for testing the same impact. The case may involve the application of the freedom to communicate about the political affairs of another country, namely, New Zealand.

There are now also two, and possibly three, justices who have difficulty with the effect of the freedom limiting the reach of State legislative power generally, even where private rights and obligations are not involved.[15]

A fourth justice of the Court, namely the Chief Justice, would share those doubts in relation to matters which have no connection with Commonwealth matters. His Honour recognised that the guarantee was capable of limiting the exercise of the legislative powers of the Parliaments of the States. But it only effected a (qualified) freedom to discuss government, governmental institutions and political matters in order to protect the structure of the government of the Commonwealth. Thus, for the present Chief Justice, the publication complained of in *Stephens* was unaffected by the guarantee because it only touched the performance by State members of Parliament of their official functions as such members and was irrelevant to the government of the Commonwealth.[16]

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any particular subsequent stage of evolution in the system of representative government." Justice McHugh did not find it necessary to express a view on the point.

14 Justice Dawson can be included in this category because of his general opposition to the existence of the guarantee which dates back to his dissenting judgment in *ACTV*. Chief Justice Brennan, because, as was illustrated by the approach he adopted in the two defamation cases, the common law is seen by him to strike an appropriate balance between the guaranteed freedom and the legitimate competing public interests furthered by the common law (in effect he stresses the width of the regulatory exception) Justices McHugh and Gummow, because of their respective remarks in the *McGinty* case on this aspect of the guarantee. *ibid* at 240-2; 274-5. But Gummow J only went so far as to indicate that if it was sought to rely on the principle established in the two defamation cases it would be necessary to examine the principle further.

15 Those justices are: Dawson J because of his general opposition to the implied guarantee; and McHugh J given the remarks adverted to in the preceding note, especially when he referred to the guarantee established in *ACTV* as having taken on a dramatic new dimension because the Court in the two defamation cases held that the guarantee operated as a "restraint on federal *and State legislative power*": *ibid* at 241, emphasis added. The possible third justice is Gummow J, given his remarks adverted to in the preceding note, if he can be taken as having agreed with McHugh J by adopting the explanation given by the same justice for the process of constitutional interpretation used to establish the implied guarantee: *ibid* at 274-5. (I am indebted to Ms Megan Richardson, Lecturer in Law at the Melbourne University, for emphasising the significance for these purposes of His Honour's references to the judgment of McHugh J).

16 (1994) 182 CLR 211 at 235

The difficulty mentioned about the effect of the guarantee in limiting the scope of State legislative power has a direct bearing on the issue raised in the *Levy* case, despite its lack of any connection with the laws relating to defamation. The legislative power of the State involved here concerns Victorian laws which limit the ability of persons to protest against duck shooting by restricting access to hunting areas and prohibiting a person from approaching a hunter within a certain distance unless the person has a hunting licence. The law has been challenged on the ground that it violates the guarantee of the freedom to communicate about political matters. Such a law seems to have little, if any connection with the Commonwealth organs and institutions of government.

Even if the guarantee does not apply by reason of the Commonwealth Constitution, it will be recalled that the provisions of s 73(2)(c) of the *Constitution Act* 1889 (WA) provided a basis for arguing that the principle of representative government was entrenched at the State level of government under that Constitution. In *Muldowney v South Australia*[17] the High Court was content, for the purposes of argument, to act on the concession made by the South Australian Solicitor - General: that the South Australian Constitution contains a similar entrenchment for that State but the correctness of the concession was not in issue since the attempt to impugn the challenged law in that case on the ground that it breached a similar guarantee of the freedom to communicate about political matters failed in any event.[18]

The Victorian Constitution also contains provisions which could serve as a basis for arguing that the principle of representative government is recognised by that Constitution. Both the Legislative Assembly and the legislative Council are composed of members who represent, and are required to be elected by, the electors of electoral districts.[19] At most, however, and because of the flexible nature of the Victorian Constitution, the degree of entrenchment can only be described as weak. This is because the relevant provisions which recognise representative government can be amended or repealed if this is done with the support of absolute majorities of both Houses of the Victorian Parliament on the assumption that the entrenchment created by s 18(2)(a) applies to such measures.[20] Even the correctness of this assumption is open to doubt in the light of s 18(4)(a).[21]

In a recent article it has been argued that the *McGinty* case:

> ...indicates that the High Court will now adopt a more cautious approach to constitutional implications and will not imply freedoms unless they can be securely grounded in a narrower concept of representative government. This means that it will not be permissible to discover implications in any overarching or underlying

17 (1996) 70 ALJR 515.

18 *Ibid* at 518, 522, 524, 527, 530, cf 520.

19 *Constitution Act* 1975 (Vic), ss 26 and 34

20 The relevant provisions refer to "an alteration in the constitution of the Parliament, the Council or the Assembly".

21 Those provisions ensure that the entrenchment does not extend to legislation which purports to "alter the qualifications of electors and members of the Council or the Assembly."

concept such as representative democracy without founding, and thereby limiting, such a concept in the text and structure of the Constitution.[22]

This view is, if anything, more optimistic than I would be, about the future status of the kind of implied reasoning that had its origins in the first two landmark cases decided in 1992, at least where the concept of representative government (and democracy) is involved. There now appear to be four justices who are unhappy about using the concept as a free standing principle which operates independently of the express provisions of the Constitution; that is, as a reason for invalidating legislation which does not otherwise breach the express provisions of the Constitution.[23] One of those justices went as far as to describe the concept as "a category of indeterminate reference".[24]

IV. *STARE DECISIS*: FUTURE PROSPECTS - A PERSONAL VIEW

What follows is a brief attempt to assess the prospects of the *Theophanous* and *Stephens* cases being overruled in the current proceedings, on the assumption that those proceedings are thought to be an appropriate vehicle for reconsidering the correctness of the former cases.

The latter assumption may itself be open to question if, as seems possible, the law in the *Levy* case can easily be characterised as a reasonable regulation of the freedom of political communication, even if the guarantee of that freedom operates to restrict State legislative power.

It is also possible that the operation of the same guarantee in the *Lange* case could be avoided on the ground that even if it affects the laws in relation to defamation it should not operate to protect the freedom of political communications in relation to the political affairs of other countries which have no conceivable bearing on the political affairs of this country. However, the latter ground would be open to the same kind of 'pragmatic' reason for applying the guarantee to all political communications as was advanced in relation to communications about State political affairs. In addition there is the pre-eminent role played by the Commonwealth in the field of foreign relations.

If, notwithstanding the above considerations to the contrary, the current proceedings are an appropriate vehicle for reopening the correctness of *Theophanous* and *Stephens*, any attempt to do so on the ground that the guarantee should not limit State legislative power at all, is unlikely to succeed. It is difficult to see why the principle which invalidates any law which forbids criticism of a federal official should be confined to laws passed by the Federal Parliament - the problem faced by the Court in *Theophanous*. I suspect that even

22 G Williams, "Sounding the Core of Representative Democracy. Implied Freedoms and Electoral Reform" (1996) 20 *MULR* 848 at 849.

23 *McGinty* note 4 *supra* at 204-205, per Brennan J; at 212, per Dawson J; at 240-2, per McHugh J.

24 *Ibid* at 262, per Gummow J.

Dawson J would not go so far as to suggest the overruling of that case on that ground alone.[25]

It will be recalled that Brennan CJ thought that the guarantee does not limit State legislative power except in cases where the law of the State deals with a matter which has some connection with the organs of the Commonwealth government. The addition of this qualification should, in my view, fare little better. Even the example given by His Honour regarding irrelevance of the guarantee to criticism of the conduct of State Parliamentarians has a deceptive simplicity. The difficulty of applying the qualification is illustrated by the events which surrounded the Dr Lawrence affair last year. It will be recalled that a Royal Commission was held to inquire into the conduct of a former Premier of that State (and others) in circumstances which had an undoubted political significance to her role as a senior and popular federal Minister at the time the Commission was called. In short, and to repeat the rationale which underlies what I have described as the pragmatic reason used in the *Theophanous* case, such a qualification would prove to be unrealistic given indivisibility of speech in a federal system of government.

A more promising ground might be to attempt to limit the guarantee so that it did not impinge upon private rights and obligations, for example, in the area of defamation law. In that event, both the *Theophanous* and *Stephens* cases would be overruled to the extent that they decided that defamation laws were affected by the guarantee. In the result the law of defamation would, in its application to communications about political matters, return to the state it was thought to enjoy before those cases were decided. It is possible that such a course would appeal to at least Brennan CJ, Dawson and McHugh JJ if they were to adhere to the views they expressed in those cases. A fourth possible supporter might be Gummow J, but it is important to remember that, so far, he has only indicated the need for a further examination of the principle established in the two defamation cases if it was sought to rely on that principle.[26]

Such an approach would be consistent with the view of the Chief Justice that existing laws on defamation are likely to be consistent with the guaranteed freedom established in the *ACTV* and *Nationwide News* cases because of their (almost presumed) regulatory character.[27] It would also avoid the extension of the guarantee which, in its wider form, is now seen as treating representative

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25 As can be seen from His Honour's remarks in *Muldowney v South Australia* (1996) 70 ALJR 515 at 520. He indicated that in *McGinty* he had agreed with the reasons given by the Chief Justice for concluding that the Commonwealth Constitution provided only for Federal elections and its provisions in that regard, including any implications to be drawn from them, did not prescribe the mode of State elections. However "[t]hat does not, of course, mean that the Commonwealth provisions do not extend to the States, but they do so in relation to Federal elections and not State elections".

26 See note 14 *supra*.

27 For recent judicial developments in relation to the effect of the express guarantee of freedom of expression, contained in the interim constitution of South Africa, on the common law of defamation see: *Du Plessis v De Klerk* 1996 (3) SA 850 and also *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588. Both cases advert to the *Theophanous* case. I am indebted to Professor George Winterton of the University of New South Wales Law School for drawing my attention to the *Du Plessis* case and also, Mr Rupert Burns, Research Assistant to Professor Sally Walker, Melbourne University, for drawing the *Holomisa* case to my attention.

government as a free standing principle which operates independently of the text or structure of the Constitution. To contain the guarantee as originally established in those two earlier land mark cases would, in addition, be more in keeping with the historical assumption that the framers did not intend to incorporate a Bill of Rights.

But it is one thing for a judge to disagree with a previous case and quite another to refuse to act upon it because of the role of precedent, however reduced that role is in constitutional litigation.[28] This was well illustrated in *Western Australia v The Commonwealth*[29] and *Queensland v The Commonwealth*[30] - in particular, the refusal of two judges in the minority in the first case (Gibbs and Stephen JJ) to act on their own view in the second case. In the second case, and in the absence of any new arguments, the Court, by a majority, adhered to a view with which a majority disagreed by the time the second challenge was heard less than two years after the High Court had dismissed the first challenge to the legislation in question.[31]

A powerful factor which influenced Gibbs J was the importance of the Court not being seen to change its mind merely because of a result in a change in the composition of the Bench.[32] Presumably this is because of the need for the Court to retain the respect of the public. Further factors which influenced both Gibbs and Stephen JJ included the recency of the decision which it was sought to overrule and the absence of new argument; as well as whether the same decision had already been acted upon.[33] In the present case it would thus be important to know how many cases may have already been decided or settled on the basis of the law as established in the *Theophanous* and *Stephens* cases. (The latter consideration would not be so significant if the Court was prepared to either engage in prospective overruling or arrive at the same results by non-constitutional means such as through the interpretation of the defence of qualified privilege in the common law or the statutory provisions relevant to the law of defamation.)

Justice Dawson is likely to have had in mind the present Chief Justice, himself, McHugh J and Gummow J, as the four justices mentioned in the assertion referred to at the start of this paper. It would only take one of those justices to be influenced by the same factors for the attempt to overrule those cases to fail.

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28 For summaries of the factors taken into account by the High Court in the application of *stare decisis* in previous constitutional cases see L Zines, *The High Court and the Constitution*, Butterworths (3rd ed, 1992) pp 356-7 and RC Springall, "Stare Decisis as applied by the High Court to its previous decisions" (1978) 9 *Fed L Rev* 483 at 502-3 and see also at 488-494, 495-500.

29 (1975) 134 CLR 201 (the *First Territories Representation Case*).

30 (1977) 139 CLR 585 (the *Second Territories Representation Case*).

31 In the *First Territories Representation Case* note 29 *supra*, McTiernan, Mason, Jacobs and Murphy JJ upheld the validity of the challenged legislation and Barwick CJ, Gibbs and Stephen JJ dissented. In the *Second Territories Representation Case* note 30 *supra* Mason, Jacobs and Murphy JJ adhered to the view they took in the first case. Chief Justice Barwick and the new member of the Court, Aickin J, upheld the challenge to the legislation. However Gibbs and Stephens JJ decided to follow the first case despite their dissents in that case because of *stare decisis*.

32 *Second Territories Representation Case ibid* at 600.

33 *Ibid* at 595-6, per Gibbs J and at 603-4, per Stephen J.

On the other hand, even if one of those justices did refuse to overrule the cases in question, it is of course possible that the effect of this could be offset if the most recently appointed member of the Court, Kirby J, were to side with the dissentients in those cases. Furthermore, it could doubtless be argued that the earlier a constitutional error is rectified by the Court the better it would be to prevent its perpetuation in the future, given the difficulty of invoking the formal processes of amendment under s 128.[34]

Subject to one proviso, I would personally not favour the overruling of the *Theophanous* and *Stephens*. I believe that the plausibility of the connection between freedom of political speech and the way it can be effectively limited by defamation laws was sufficiently established in those cases so as to bring it well within the freedom established in the *ACTV* and *Nationwide News* cases.

The proviso is that the Court is not prepared to take the more fundamental step of overruling the *ACTV* and *Nationwide News* cases - a development which Dawson J could be expected to favour and one which would probably have my support.[35] But the leave of the Court has not been sought to have those cases reconsidered and this may well prove to be the ultimate weakness in Justice Dawson's assault on the 'new' constitutional law.

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34 This was the view advocated by Barwick CJ in *Second Territories Representation Case ibid* at 593-4. Ironically this view was shared by two of the justices in the majority in the latter case: L Zines note 28 *supra*, pp 354-6 who points out that four of the seven judges in that case would not have regarded the principle of *stare decisis* as being a decisive reason for the decision in that case (at 356). This does not detract from the view advanced in the text regarding the decisive effect which that principle could have even if only one of the justices, Dawson J is likely to have had in mind were to rely on it *and* only three justices were prepared to overrule the cases in question

35 My own disenchantment with those cases is sufficiently expressed in my contribution to G Lindell (ed), *Future Directions in Australian Constitutional Law* Federation Press(1994) pp 37-9 But, as indicated there, I do not believe those cases are likely to be reversed.