REVIEW ARTICLE*

Freedom of Speech in the Constitution by N ARONEY (Australia: The Centre for Independent Studies, Policy Monograph 40, 1998), pp xiii + 201. Softcover recommended retail price $24.95 (ISBN 1 86432 032 X).

This book analyses the High Court decisions which established that the Commonwealth Constitution contains an implied freedom of political communication. After a dot point summary of key ideas, a Foreword (by Greg Lindsay), a Preface and an introductory chapter which summarises the principal rulings (Chapter 1: "The freedom of speech cases"), the main commentary is set out in two parts. Part I is headed "A Theory Of Judicial Review", with chapters on "Judicial review and the enforcement of the constitutional order" (Chapter 2) and "Canons of judicial review" (Chapter 3). Part II is headed "The Freedom of Speech Cases" with chapters on "The freedom of speech cases and their reasoning" (Chapter 4) and "Critique: A seductive plausibility" (Chapter 5). There is also a short Epilogue which emphasises what the author considers to be the "revolutionary" character of the constitutional efforts of the High Court and the historical roots of the issues by alluding to the English Civil War.

The overall theme of the book is that however engaging and appealing the idea of a constitutionally entrenched freedom of political communication might be, the process of implying that freedom through judicial interpretation of the Constitution is flawed. The flaw is a deep-rooted one going to the heart of what a society governed by law should expect judges to do under the guise of interpreting a written and rigid constitutional text. It is argued that the implication of freedom of political communication strays well beyond the limits of permissible interpretation producing a result "far removed from the Constitution".[1]

The nutshell account of the cases in Chapter 1 traverses the essential facts and weaves in some background material and references to contemporary reactions and comments. In twenty pages the reader is given an account of *Australian Capital Television v Commonwealth*,[2] *Nationwide News v Wills*,[3] *Stephens v*

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1 N Aroney, *Freedom of Speech in the Constitution*, The Centre for Independent Studies, Policy Monograph 40 1998, p ix.

2 (1992) 177 CLR 106.

3 (1992) 177 CLR 1.

West Australian Newspapers,[4] *Theophanous v Herald & Weekly Times,*[5] *Langer v Commonwealth,*[6] *Muldowney v South Australia,*[7] *McGinty v Western Australia,*[8] *Levy v Victoria,*[9] *Lange v Australian Broadcasting Corporation*[10] and *Kruger v Commonwealth.*[11]

The trip back into the origins of judicial review and constitutionalism may be somewhat heavygoing for readers with no previous knowledge or special interest in those topics. The idea is to place the entire argument in the context of a theory about the role of the judges in the interpretation of a written, rigid constitution. It is possible to make sense out of the later discussion without reading this background in detail, but the full force of the later material depends upon the foundational principles.

For the constitutional specialist the crucial analysis begins in Chapter 3 where, in the context of a general review of interpretive method, Aroney puts forward his theory about levels of implication. It is argued that in the Australian constitutional law cases, "necessary" implications from the text may be those which are logically required (first order implication), those which are practically necessary (second order implications) or third order implications which lead the interpreter into a slippery domain of taking account of values found outside the Constitution. First and second order implications are treated as permissible standard judicial fare, while third order implications are considered to be suspect, especially where implications are made on implications. In this typology, fourth or higher order implications are not really implications at all - beyond the third level, interpretation is purely by reference to extraneous, non-textual material. While the general themes and thoughts are not new, the specifics of the typology provide a useful tool for thinking about the distance between a given interpretation and the anchor text. The classification also serves to remind how loose use of terms by judges can obscure reasoning. It is not realistic to expect judgments meriting constitutional litigation in a superior court to be so straightforward that every idea can be grasped on a quick read. However, much of the content of traditional law reports remains obscure no matter how much effort is expended in attempting to understand it. The task of understanding is not assisted when expressions like "necessary implication" are overworked. For readers who may doubt the utility of Aroney's classification as a guide to legitimate modes of judicial interpretation, at the very least his ideas about the senses in which the constitutional case law has invoked notions of implication should prove stimulating.

Aroney contrasts the free speech cases with earlier cases in which implications have been drawn from and about federalism and the separation of

4 (1994) 182 CLR 211.
5 (1994) 182 CLR 104.
6 (1996) 186 CLR 302.
7 (1996) 186 CLR 352.
8 (1996) 186 CLR 140.
9 (1997) 189 CLR 579.
10 (1997) 189 CLR 520.
11 (1997) 146 ALR 126.

powers. The use of the process of implication in these reference point cases is not regarded as straying into the suspect aspect of third or higher order implications. For example, the process of implication in the cases which have held that the Commonwealth cannot discriminate against the States is described as being "tightly confined to the text of the Constitution"[12] and in a later passage[13] the key ruling in *Melbourne Corporation v Commonwealth*[14] is treated as involving only second order implications or, at most, only one instance of implication at the third level. While the material at this point in the book is provided for background contrast only, it perhaps merited a little more space in the discussion.

It is not difficult to argue that the Constitution should impliedly limit Commonwealth power in relation to the States. What is difficult is the justification of the precise form which the *Melbourne Corporation* principle takes. At present the principle is in two limbs. Under the first limb the Commonwealth is prohibited from discriminating against the States. By the second limb the Commonwealth cannot legislate to destroy or curtail the existence of a State or its capacity to function as a government. If the discrimination limb applies as an independent rule regardless of the materiality of the burden involved, then it is difficult to derive it from any premise about the federal structure. However, if discrimination is only problematic when there is a serious threat to the functioning of the State, then arguably the first limb is simply a particular case of the second limb. The application of the *Melbourne Corporation* principle to particular facts also demonstrates how readily an apparently sound idea may work only with the aid of ad hoc guidelines which undermine the legitimacy of the foundation interpretation.

Re Australian Education Union, Ex parte Victoria[15] illustrates the point. In that case the High Court accepted that the second limb of *Melbourne Corporation* restricts the ability of the Commonwealth to legislate on aspects of industrial relations concerning State government employees. The limits identified take the form of very detailed rules. While it is easy to see the connection between the rules specified and the starting premise, it is possible to say that of many such rules. The reasoning is at a level of generality which could justify a smaller or larger set of principles directed towards the same end. The particular choice made, while arguably wise in terms of experience, seems arbitrary for anyone concerned with the justification of limiting the power of a democratic parliament by invoking an implied constitutional limit. The distance between the constitutional text and the interpretation *Re Australian Education Union* applies to the second limb of the *Melbourne Corporation* principle, arguably rivals anything that has survived the re-working *Lange v Australian Broadcasting Corporation*[16] effects on freedom of political communication doctrine. A perception about the degree to which judges are straying from the

12 Note 1, *supra*, p 20.
13 Chapter 3, *ibid*, pp 104 - 5.
14 (1947) 74 CLR 31.
15 (1995) 184 CLR 188.
16 (1997) 189 CLR 520.

permissible interpretive path may be influenced by familiarity with and age of the case material - perhaps *Melbourne Corporation* seems less radical than the free speech cases because it is an older case which builds upon even earlier cases.

In Chapters 4 and 5 the author presents a rigorous analysis of the reasoning in the freedom of speech cases, concluding that these decisions have strayed beyond permissible interpretation as measured by his classification of the orders of implication. The main focus is on *Australian Capital Television v Commonwealth,*[17] *Nationwide News v Wills,*[18] *Stephens v West Australian Newspapers*[19] and *Theophanous v Herald & Weekly Times.*[20] The *Lange v Australian Broadcasting Corporation*[21] case is perceived to be less adventurous than some of the earlier decisions, but nonetheless fundamentally flawed, while *Levy v Victoria*[22] and *Kruger v Commonwealth*[23] are treated as muddying the waters of this body of doctrine. Hence, Aroney considers that a legitimate basis for a constitutional guarantee of freedom of political speech awaits a constitutional amendment.

The electorate's track record on changing the text of the Constitution is such that it is possible that the Constitution in its current form will have to serve as our instrument of government well into the forthcoming twenty-first century. The difficulty in adjusting the text to reflect the realities of contemporary governmental power suggest that the pursuit of democratic legitimacy must focus on the scrutiny of judicial review. A major problem, of course, is that although the primary material is now readily available through AustLII, Lawnet and ScalePlus and other websites on the Internet, it is still in a form that even lawyers often find difficult to digest.

Publication on the Internet presents special challenges. More thought needs to be given to the way to structure material for our times, particularly for the Web. The tendency thus far has been to use the Internet, especially the Web, to disseminate existing forms of data. But if Web publishing is thought of as a medium deserving its own format then one can structure material such that the medium enhances it. It helps if the starting point is to consider whether the Web should be used to publish something rather than to think in terms of making an existing style of publication available through the Web. The media-neutral case numbers and paragraph numbering the High Court introduced at the start of this year are an important step in the right direction. A judgment summary along the lines of the decision syllabus issued by the United States Supreme Court would be another. If the issues in the *Tasmanian Dam* case[24] can be reduced to a short, court authored statement[25] then any constitutional case can be summarised. This

17 (1992) 177 CLR 106.
18 (1992) 177 CLR 1.
19 (1994) 182 CLR 211.
20 (1994) 182 CLR 104.
21 (1997) 189 CLR 520.
22 (1997) 189 CLR 579.
23 (1997) 146 ALR 126.
24 (1983) 158 CLR 1.
25 See 158 CLR 1 at 58-59.

would benefit all readers, but it would be particularly useful for first level perusal of judgments on the Web.

In sum, the Aroney book is an interesting contribution to a complex area of law. It is hard to gauge how accessible parts of the discussion would be to anyone that had never read the primary case material, but the main message would certainly be clear. The book has an attractive design and has been delivered in a style and format that is easy to read. There is a table of the cases referred to in the text and a useful bibliography of monographs and articles. Greg Lindsay (Executive Director of The Centre For Independent Studies) comments that the "shallowness of much of our current debate suggests that a wider understanding and appreciation of constitutionalism is highly desirable".[26] The Aroney book is a significant contribution to that endeavour.

26 Note 1, *supra*, p xii.