

## LOST IN TRANSLATION: FROM POLITICAL COMMUNICATION TO LEGAL COMMUNICATION?

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‘[I]t is a question of translating these principles to Chapter III ...’<sup>1</sup>

*APLA Limited v Legal Services Commissioner (NSW)*<sup>2</sup> (*‘APLA’*), decided in September this year, had the potential to be a landmark decision in the field of implied constitutional freedoms comparable to *Australian Capital Television Pty Ltd v Commonwealth*<sup>3</sup> (*‘ACTV’*) and *Nationwide News Pty Ltd v Wills*<sup>4</sup> (*‘Nationwide News’*). In the two latter cases the High Court concluded that the provision for a system of representative and responsible government in the *Australian Constitution* necessarily implied a constitutional right to freedom of communication in respect of government and political matters. In *APLA* it was argued that the *Constitution’s* provision for a system of federal courts exercising the judicial power of the Commonwealth necessarily implied a freedom of communication in respect of legal rights arising under federal law and rights to representation before courts exercising federal jurisdiction. However, by a majority of five to two, the High Court in *APLA* rejected the notion that Chapter III of the *Constitution* could somehow provide the foundation for an implied freedom analogous to the freedom derived from Chapters I and II.<sup>5</sup> The result in *APLA* thus raises a rather obvious question: why Chapters I and II and not Chapter III?<sup>6</sup>

It is important to appreciate that while the outcomes in *ACTV* and *Nationwide News* certainly stand, the reasoning used to support the implied freedom in those

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1 *APLA Ltd v Legal Services Commissioner of NSW* [2004] HCATrans 375 (6 October 2004), 31 (Gummow J).

2 (2005) 219 ALR 403. The case involved a challenge to Pt 14 of the *Legal Profession Regulation 2002*, which prohibited legal practitioners from publishing advertisements containing references to personal injuries or related legal services.

3 (1992) 177 CLR 106.

4 (1992) 177 CLR 1.

5 *APLA* (2005) 219 ALR 403 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; McHugh and Kirby JJ dissenting).

6 See *APLA* [2004] HCATrans 375, [73] (McHugh J), [342]–[344] (Kirby J), [383] (Hayne J).

cases has been significantly modified by subsequent decisions. The majority judges in *ACTV* and *Nationwide News* set out, in rather elaborate terms, a series of successive inferences,<sup>7</sup> based on substantive notions such as ‘popular sovereignty’<sup>8</sup> and ‘representative democracy’,<sup>9</sup> which ultimately led to the implied freedom. However, later cases, of which the unanimous judgment in *Lange v Australian Broadcasting Corporation*<sup>10</sup> (*‘Lange’*) was the climax, were critical of the way in which *ACTV* and *Nationwide News* seemed to rely on substantive theories of law and government which extended well beyond the ‘text and structure’ of the *Constitution*.<sup>11</sup> *Lange’s* reformulation of the implied freedom, and especially its emphasis on text and structure, for the moment at least seems well-entrenched,<sup>12</sup> so that in *APLA* it was incumbent upon the plaintiffs to show precisely how a constitutional right to a freedom of what might be called ‘legal communication’ could be derived from the text and structure of Chapter III of the *Constitution*. In the outcome, they failed. The question is, why?

The judgments in *APLA* are a disappointment. I do not say this because the Court declined to translate the freedom of political communication into a freedom of legal communication based in Chapter III, but rather because the judgments fail to adequately address the problem of the precise relationship between the reasoning in *ACTV*, *Lange* and *APLA*. *Lange* was not a revolutionary case whereas, read in isolation, *ACTV* was. For *APLA* to scale similar heights it was necessary for the judges to discard the strictures of *Lange* and to return to the outright abandon of *ACTV*. Justices McHugh and Kirby attempt to do just this, but their isolated judgments seem incomplete and unconvincing without the support of their fellow judges. Moreover, Justice McHugh’s agreement with Kirby J on this question is difficult to square with his rejection of ‘free-standing’ doctrines and over-extended implications.<sup>13</sup> On this point, the majority justices – Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ – are at least more consistent. The text and structure of Chapter III is not a secure foundation for an implied freedom of legal communication, and the majority make this clear.<sup>14</sup> Indeed, Callinan J repeats his suspicion of the implied freedom of political communication, particularly as it was applied to the law of defamation in

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7 See Nicholas Aroney, ‘A Seductive Plausibility: Freedom of Speech in the Constitution’ (1995) 18 *University of Queensland Law Journal* 249, 264–8.

8 *ACTV* (1992) 177 CLR 106, 137–8 (Mason CJ); cf *ACTV* (1992) 177 CLR 106, 210–11 (Gaudron J); *Nationwide News* (1992) 177 CLR 1, 47–8 (Brennan J), 70–1 (Deane and Toohey JJ).

9 See, eg, *ACTV* (1992) 177 CLR 106, 137–8 (Mason CJ), 149–50, 156–7 (Brennan J), 168, 174 (Deane and Toohey JJ), 184–5, 187–8 (Dawson J), 210–11 (Gaudron J), 229, 233, 238, 240 (McHugh J); *Nationwide News* (1992) 177 CLR 1, 47–8 (Brennan J), 70–2 (Deane and Toohey JJ).

10 (1997) 189 CLR 520.

11 *Ibid* 566–7. See also *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 108; *McGinty v Western Australia* (1996) 186 CLR 140.

12 See, eg, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; *Coleman v Power* (2004) 209 ALR 182.

13 *Theophanous v Herald & Weekly Times* (1994) 182 CLR 108, 195–6 (McHugh J); *McGinty v Western Australia* (1996) 186 CLR 140, 232 (McHugh J).

14 *APLA* (2005) 219 ALR 403, [35] (Gleeson CJ and Heydon J), [242]–[247] (Gummow J), [393] (Hayne J), [473] (Callinan J).

*Lange*.<sup>15</sup> And, yet, the ratchet effect continues to apply: conservative judges uphold the authority of precedent, and in this way support the achievements of their progressive colleagues, while progressive judges happily discard precedent when it stands in the way of what they regard as progress. *ACTV*, *Nationwide News* and their progeny are therefore secure, at least for the time being.

What, then, is the relationship between the reasoning in *ACTV*, *Lange* and *APLA*? *ACTV* openly appealed to large, value-laden ideas. Its merit was to lay out an explicit path of reasoning, extending back to the sovereignty of the people, reaching through the idea of representative democracy, and ending up at a judicially-enforced freedom of political communication that can only be interfered with by a law that is reasonably proportionate to achieving a legitimate objective. *Lange* sought to avoid this, limiting itself to the *Constitution*'s text (ss 7, 24, 64, 128) and structure (a 'system' of representative government defined by reference to what these provisions, read together, require). In this way the *Lange* Court came close to adopting Justice Dawson's 'genuine choice', discerned in the texts of ss 7 and 24,<sup>16</sup> and yet, by affirming the implied freedom in terms that went beyond the originally narrow formulations of Dawson and McHugh JJ,<sup>17</sup> together with the apparatus of 'proportionality', still appeared to invoke notions difficult to square with the text and structure of the *Constitution* alone.<sup>18</sup> In *Coleman v Power*, therefore, a majority of the Court explicitly rejected judicial 'balancing' and argued that this was in fact the position adopted in *Lange*, properly understood.<sup>19</sup>

In *APLA*, Kirby J returns to the value-laden methodology of *ACTV*. In addition to 'text and structure', he explicitly invokes 'implications' and 'purposes' of the *Constitution*.<sup>20</sup> He very clearly disagrees with the empirical and normative considerations that, according to submissions of the State of New South Wales, lay behind the legislation.<sup>21</sup> Under the guise of an assessment of whether the state law was inconsistent with federal law, Kirby J makes very clear where he believes the appropriate balance ought to be struck between the public interest in limiting vexatious claims and the public interest in promoting access to justice, particularly among the poor and disadvantaged.<sup>22</sup> The state law is a 'blunderbuss', he says, 'over-enthusiastic', 'extraordinarily crude' and 'undiscriminating'.<sup>23</sup>

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15 Ibid [446], [469]–[471] (Callinan J).

16 *ACTV* (1992) 177 CLR 106, 186–7 (Dawson J).

17 Ibid 228–33 (McHugh J).

18 This was clearly the case in *ACTV* and *Nationwide News*: see Aroney, above n 7, 263–4. It became doubly problematical, however, after *Lange* laid down the 'text and structure' rule: see Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 707–8, discussed by Callinan J in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 338.

19 *Coleman v Power* (2004) 209 ALR 182, [91]–[96] (McHugh J) (again discussing Stone, above n 18), [196] (Gummow and Hayne JJ), [211] (Kirby J); *APLA* (2005) 219 ALR 403, [213] (Gummow J).

20 *APLA* (2005) 219 ALR 403, [272], [344].

21 Ibid [267].

22 Ibid [314]–[317], [322].

23 Ibid [296]–[267], [322]–[323], [339].

As to the implication from Chapter III, Kirby J rejects a ‘bits and pieces’ approach, urging the Court to adhere to ‘consistent principles and established methodologies’.<sup>24</sup> However, the argument for the application of the implied freedom to Chapter III is not made out in the explicitly developed terms to be found in either *ACTV* or *Lange*. His Honour merely alludes to, but does not develop, the argument from the ‘effective operation’ of the system that was prominent in *ACTV*.<sup>25</sup> Rather, Kirby J relies on the shorthand description of the implied freedom as a right to communication about ‘political’ or ‘governmental’ matters and reasons that the courts are just as much a part of government, and thus political, as are the legislature and executive branches of government.<sup>26</sup> Elided is the fact that in *ACTV* and *Lange* the specifically representative and elective character of the Parliament was critical to the inference.<sup>27</sup> In *ACTV* and *Nationwide News*, extensively developed theories of representative democracy were invoked to support the necessity of a judicially-enforced immunity from laws which unduly interfere with freedom of political communication.<sup>28</sup> In *Lange*, the notion of a genuine choice or election of members of Parliament, as provided for in ss 7 and 24 of the *Constitution*, was at the foundation of the inference.<sup>29</sup> However, in *APLA* Kirby J cites neither political theory nor specific constitutional text to support the inference from Chapter III. ‘The same reasons’ which support the freedom of political communication apply, he says, to the implied freedom of legal communication, but he does not articulate what those reasons may be.<sup>30</sup> Rather, his Honour at this point expresses his agreement with, and appears to adopt, the reasoning of McHugh J.<sup>31</sup>

While McHugh J emphasises that the freedom of political communication in *Lange* derives from ‘specific provisions’ of the *Constitution*, rather than any free-standing conception of representative democracy or freedom of expression,<sup>32</sup> the same insistence on ‘text and structure’ is notably absent when it comes to the implied freedom of legal communication based on Chapter III. It is true that his Honour alludes to aspects of ss 71–77, especially to the many references to ‘matters’ that appear throughout Chapter III.<sup>33</sup> However, the weight of Justice

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24 Ibid [347].

25 Ibid [343]–[344]. However, departing from the distinction between implications and assumptions proposed by Mason CJ in *ACTV* (1992) 177 CLR 106, 135, Kirby J is even prepared to say that the *Constitution* is predicated on an assumption of a high level of unimpeded communication: *APLA* (2005) 219 ALR 403, [346].

26 *APLA* (2005) 219 ALR 403, [347].

27 Cf *ibid* [63]–[68] (McHugh J). The representative character of the legislature and the accountability of the executive are noted by Kirby J: *ibid* [350], but the nature of the link between a constitutionally mandated federal judiciary and communication about legal rights arising at federal law is not similarly articulated.

28 *ACTV* (1992) 177 CLR 106, 137–41 (Mason CJ), 209–14 (Gaudron J), 228–33 (McHugh J); *Nationwide News* (1992) 177 CLR 1, 45–52 (Brennan J), 70–5 (Deane and Toohey JJ).

29 *Lange* (1997) 189 CLR 520, 566–7.

30 *APLA* (2005) 219 ALR 403, [348]. Access to justice considerations canvassed earlier in the judgment in relation to the question of inconsistency under s 109 could possibly provide the necessary bridging reasons in a manner reminiscent of *ACTV*: see *APLA* (2005) 219 ALR 403, [314]–[317], [322].

31 *APLA* (2005) 219 ALR 403, [350] (Kirby J), citing [72]–[91] (McHugh J).

32 *Ibid* [56], [61].

33 *Ibid* [79], [82], [87]–[88].

McHugh's argument for the implied freedom of legal communication rests on the 'scheme of and the abstract principles that inhere in Ch III', rather than specific provisions.<sup>34</sup> Three 'subsidiary' principles, he says, are crucial.<sup>35</sup> First, federal legislation enacted pursuant to ss 75–77 is relevant in giving specific content to the abstract principles that underlie Chapter III.<sup>36</sup> Second, in determining whether legislation infringes a constitutional principle or prohibition, the courts must look to the practical operation of the law in terms of its social, economic and other effects. Third, state legislative power is merely the undefined residue that remains after full effect is given to the *Australian Constitution* in establishing the Commonwealth and its powers. This last consideration, however, is not pressed,<sup>37</sup> so that most of the weight is placed on the first and second subsidiary principles.

Chapter III is primarily concerned with federal judicial power, the establishment of federal courts and the investiture of federal jurisdiction. In order to show that Chapter III implies a freedom of legal communication about substantive legal rights, it is necessary to connect the concerns of Chapter III with those rights. However, substantive rights arising under federal law are generally enacted under ss 51–52 of the *Constitution*. The problem, therefore, is to show how there is a necessary relation between, for example, the investiture of federal jurisdiction under ss 75–77 and communications about federal powers created under ss 51–52. And this is where the first subsidiary principle comes into play. Justice McHugh's argument is that federal legislation, dealing with both curial jurisdiction and substantive rights, gives specific content to the abstract principles of Chapter III, and thus provides the necessary link between Chapter III and the implied freedom to communicate about substantive rights. The difficulty, however, is that while particular federal statutes do indeed deal with both rights and jurisdiction,<sup>38</sup> the source of the power to do so remains, distinctly, ss 51–52 and ss 75–77. Justice McHugh elides the difference by saying, indistinctly, that under ss 75–77 the Commonwealth has 'legislated for causes of action'.<sup>39</sup> However, the legislation actually passed pursuant to ss 75–77 (and thus *ex hypothesi* relevant to any implications that may be drawn from those provisions) only invests courts with jurisdiction, and in this respect has nothing directly to do with substantive rights.<sup>40</sup>

Indeed, the case *McHugh J* relies upon for the principle that federal legislation passed under Chapter III may assist in giving specific content to the general principles of Chapter III in fact only concerned federal laws regulating the jurisdiction of courts, and was not at all concerned with federal laws creating substantive rights. The case *Commonwealth v Queensland*<sup>41</sup> dealt with State

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34 Ibid [80].

35 Ibid.

36 Ibid [80]–[83].

37 Ibid [82]; see also *ibid* [238] (Gummow J), [395] (Hayne J).

38 Examples are given by *McHugh J* in *APLA* (2005) 219 ALR 403, [82].

39 *APLA* (2005) 219 ALR 403, [81].

40 Ibid [82].

41 (1975) 134 CLR 298.

legislation that was designed to enable questions to be referred to the Privy Council, contrary to the general tenor of a number of federal laws enacted under Chapter III. In that case, the High Court held that the state legislation was unconstitutional because it was contrary to an underlying principle of Chapter III, implemented by federal legislation enacted under Chapter III, that the determination of inter se questions should be under the control of the High Court.<sup>42</sup> *Commonwealth v Queensland* thus concerned the investing of jurisdiction in courts – the very subject matter of ss 75–77 – rather than the creation of substantive legal rights pursuant to ss 51–52. To refer indistinctly to the Commonwealth ‘legislating for’ causes of action under ss 75–77,<sup>43</sup> as McHugh J does, is to avoid the problem of showing specifically how a freedom of communication about substantive legal rights is a necessary implication of provisions which are solely concerned with the investiture of jurisdiction in courts.

The strongest textual basis for connecting Chapter III with communications about substantive rights is, rather, that the federal jurisdiction referred to in Chapter III is always in relation to ‘matters’, and a matter entails a contested proceeding in which litigants are seeking judicial vindication of their legal rights.<sup>44</sup> And it is here that the second subsidiary principle, the need to attend to the practical effect of the law, and not just its legal or formal operation, is relevant.

In assessing the practical effect of the restrictions on legal advertising, McHugh J argues that without such advertising, individuals may not become aware of their legal rights arising under federal law and therefore will not invoke the jurisdiction of federal courts.<sup>45</sup> However, it is important to note that the principle invoked is derived from cases dealing with express constitutional prohibitions concerning excise duties (s 90) and freedom of interstate trade (s 92).<sup>46</sup> It may be granted that a constitutional prohibition or immunity needs to be interpreted with an eye to the practical operation of the law being scrutinised. But this presupposes the existence of the prohibition. The principle is concerned with the practical operation of an existing prohibition and is not specifically relevant to the question of whether a prohibition exists in the first place.

Now, ss 75–77 effectively provide that federal jurisdiction can only be conferred upon courts in respect of ‘matters’. However, these provisions do not require that contested cases must be brought before courts exercising federal jurisdiction. That is a question for potential litigants to determine. The requirements of ss 75–77 can therefore fully be met without any cases coming before the courts at all. Accordingly, as with the judgment of Kirby J, the tacit premise in the reasoning has to do with how the federal judicial system *ought* to

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42 Ibid 314–16.

43 *APLA* (2005) 219 ALR 403, [81].

44 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265–7.

45 *APLA* (2005) 219 ALR 403, [84]–[87], [90].

46 Ibid [80], [85], citing *Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399, 432, 450–1, 492; *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559, 607, 622, 624.

operate in practice. We may possibly agree that in an ideal system individuals will be fully informed of their legal rights and make decisions to pursue those rights before the courts when it is in their best interests to do so. But the desirability of a system operating in this way does not make it a necessary implication of the text and structure of Chapter III of the *Constitution*. As a result, McHugh J effectively relies on a ‘free-standing’ conception of ‘access to justice’ (or something like it), more reminiscent of the majority in *ACTV* than the concern for text and structure so prominent in his judgments in *McGinty v Western Australia*<sup>47</sup> and *Theophanous v Herald & Weekly Times*,<sup>48</sup> as well as in the unanimous judgment in *Lange*.<sup>49</sup>

The majority of the Court, who reject the implied freedom of legal representation, are openly concerned to avoid relying on freestanding conceptions of this nature. Chief Justice Gleeson and Heydon J explicitly reject the idea that the Court’s role is to determine the ‘policy’ question of whether the NSW regulations inhibited ‘access to justice’.<sup>50</sup> Justice Hayne agrees that constitutional implications should not be founded upon some ‘a priori assumption of what would be a desirable state of affairs’.<sup>51</sup> The question before the Court, Gleeson CJ and Heydon J insist, is a ‘legal’ one, and the plaintiffs have failed to show with sufficiently ‘reasonable precision’ the nature of the implication and its relationship to the ‘text or structure’ of the *Constitution*.<sup>52</sup> Justices Gummow and Hayne are also emphatic that the implication must be founded upon text or structure.<sup>53</sup> Justice Hayne even says that structural conclusions must only be reached after first considering the relevant text,<sup>54</sup> and Callinan J, having reasserted his fundamental reservations about the reasoning in *Lange*, urges ‘especial caution and restraint’, insisting that implications must be ‘necessary’, and not just ‘reasonable’.<sup>55</sup> All of the majority judges thus conclude that the effective exercise of the judicial power of the Commonwealth does not require unrestricted communication about legal rights and legal representation.<sup>56</sup> The question, in other words, is about the exercise of judicial power, not the possible exercise of judicial power contingent upon the initiation of judicial proceedings by individuals.<sup>57</sup>

Why, then, a freedom of political communication under Chapter I, and not a corresponding freedom of legal communication under Chapter III? Both chapters of the *Constitution* establish governmental institutions and confer governmental

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47 (1996) 186 CLR 140, 232.

48 (1994) 182 CLR 108, 195–6.

49 *Lange* (1997) 189 CLR 520, 566–7.

50 *APLA* (2005) 219 ALR 403, [31].

51 *Ibid* [389].

52 *Ibid* [32] (Gleeson CJ and Heydon J); see also *ibid* [253] (Gummow J).

53 *Ibid* [240]–[241] (Gummow J), [384]–[389], [393], [396] (Hayne J). Justice Gummow in fact doubts whether there can be a strict dichotomy between the two sources of implications (ie, text *or* structure): *ibid* [241]; cf *ibid* [385] (Hayne J).

54 *Ibid* [387].

55 *Ibid* [446], [469]–[471] (Callinan J).

56 *Ibid* [35] (Gleeson CJ and Heydon J), [242]–[247] (Gummow J), [393] (Hayne J), [473] (Callinan J).

57 *Ibid* [390], [393] (Hayne J), [251] (Gummow J) referring to the ‘imponderables’ which ‘attend the formation by individuals of a wish to sue or make a claim before suit’.

power. In this respect, their main effect and central concern is not to create individual rights, but rather to establish and empower governmental institutions.<sup>58</sup> One critical difference, however, is that ss 7, 24 and 25 explicitly refer to representative institutions, and to choices made by electors, through votes cast in elections. It is certainly true that ss 73–80 likewise refer to appeals, matters and trials, and it is a legitimate and obvious inference that these will necessarily be proceedings initiated by legal persons in pursuit of their legal rights.

What is different is that an electoral choice made pursuant to ss 7, 24 and 25 is essential to the very composition and existence of the legislature, whereas the commencement of legal proceedings invoking the jurisdiction referred to in ss 73–77 is not similarly essential to the composition and existence of the courts. The initiation of legal proceedings is, rather, a merely contingent precondition to the exercise of judicial power, analogous to the introduction of a bill into Parliament as the means by which a potential exercise of legislative power is initiated.<sup>59</sup> Inferences regarding communications concerning electoral choices are, therefore, on a very different footing when compared to inferences relating to communications relevant to the institution of legal proceedings.

The decision in *Lange* asserted that an implied freedom of political communication could be linked directly to the text and structure of the *Constitution* without invoking the spectre of a ‘free-standing’ conception of representative democracy. Whether this claim is sustainable or not, it is certainly difficult to see how the proposed freedom of legal communication can be supported without invoking a similarly free-standing conception of ‘accessible justice’ or the like. The ‘distance’, as Hayne J put it, between the text and structure of the *Constitution* and the proposed implication is simply too great to be crossed without invoking a free-standing conception such as this.<sup>60</sup> In *ACTV* and *Nationwide News*, the role played by ideas such as popular sovereignty and representative democracy was at least made plain. *APLA* demonstrates the essential difficulty in devising multiple stage inferences of this kind while avoiding free-standing conceptions, as Callinan J noted in respect of the submissions of the plaintiffs,<sup>61</sup> and as seems to be the case in the judgments of both McHugh and Kirby JJ.

In this respect, the judgments of McHugh and Kirby JJ certainly appear to violate *Lange*’s insistence upon text and structure and its rejection of free-standing conceptions. At the same time, however, Kirby J just as clearly invokes *Lange*’s freedom of political communication and challenges the majority in *APLA* to explain why this same principle should not equally apply to Chapter III. The answer to this challenge, it is has been argued, lies in the fact that Chapter I, unlike Chapter III, explicitly refers to the establishment and composition of representative institutions through choices made by electors by means of votes cast in elections. In this respect, it is worth noting that in *ACTV*, Dawson J

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58 This is particularly the case with Chapter II. See *ibid* [391] (Hayne J), [469] (Callinan J).

59 Cf *ibid* [251] (Gummow J), [390]–[391], [393] (Hayne J).

60 *Ibid* [396].

61 *Ibid* [472].



dissented on the ground that the only relevant implication to be drawn from the *Constitution* concerned the necessity for a 'genuine' choice, mandated by the text of ss 7 and 24.<sup>62</sup> Justice McHugh, it is true, was prepared to speak of a right to communicate about political matters, but he likewise limited this to communications intended or likely to influence voting in an election.<sup>63</sup> In *Lange*, however, the Court asserted that a *general* freedom of communication in relation to governmental and political matters could be derived solely from the text and structure of the *Constitution*. And it is the generality of the political freedom established in *Lange* which forms the basis of Justice Kirby's argument in *APLA*. The problem for the majority in *APLA*, therefore, is not so much to explain 'if Chapter I, why not Chapter III?', but rather 'if not Chapter III, why Chapter I?'

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62 *ACTV* (1992) 177 CLR 106, 187.

63 *ACTV* (1992) 177 CLR 106, 232; *Theophanous v Herald & Weekly Times* (1994) 182 CLR 108, 206–7.