

The political advertising ban

Bill Childs and Ian McGill review the recent constitutional challenge to the Australian

Government's political advertising ban

The *Political Broadcasts and Political Disclosures Act 1992* amends the *Broadcasting Act* by imposing a ban on all forms of political advertising (as we know it) during elections. It also requires broadcasters to provide free time for parties to broadcast "talking head" style messages. On 19 March 1992, the Full Bench of the High Court reserved judgment on the challenge to the validity of this legislation mounted by the commercial television industry. Commercial television broadcasters sought the following orders from the High Court:

1. A declaration that Part IIIID of the *Broadcasting Act* is invalid.
2. Alternatively, a declaration that Sections 95B, 95C, 95D, 95R, 95Q and 95S of the *Broadcasting Act* in their application to a broadcasting licensee are invalid.

Election advertising ban

During an election period preceding Commonwealth, Territory, State and Local Government elections, or a referendum for the alteration of the Constitution, broadcasting of the following is prohibited:

- matter, other than exempt matter, for or on behalf of any government or government authority; and
- an advertisement that contains matter intended or likely to affect voting in the election (or referendum) or material containing an express or implied reference to, or comment on, the election or any candidate or issue in the election.

An election period commences on the earlier of the day on which an election is publicly announced, the day on which writs are issued or 33 days before the polling day and ends at the close of the polls.

"Exempt matter" includes advertisements for goods and services offered for sale by or on behalf of a government that do not contain political references, and advertisements related only to the machinery of conducting the election or referendum. Section 95A also provides that a broadcaster is not prevented from broadcasting an item of news or current affairs, a comment on any such item or a talkback radio program.

Sections 95F and 95R provide for the grant of "free time" on television and ABC radio. Section 95Q obliges a broadcaster to make election broadcasts free of charge during an election period for or on behalf of any political party, person or group to whom free time is granted by the Australian Broadcasting Tribunal in accordance with relevant electoral regulations. Section 95H requires that 90% of the total time in respect of an election be granted to political parties already represented in the relevant Parliament or legislature in proportion, so far as practicable, to their respective voting shares at the last election. Section 95S permits the broadcast of the policy launch of a political party once only and free of charge.

The broadcasters' case

Before the High Court the broadcasters argued that the history, structure and language of the Constitution embody the principles of representative and responsible government. It is a fundamental constitutional premise that the Australian people should have the continuous ability to make informed judgments of matters of political significance. Freedom of communication is the essence of responsible government.

It was argued that the ban effected by the Act is invalid as an interference with the implied constitutional free operation of institutions and processes created by the Constitution. The right to an informed vote predated but was assumed by the Constitution. Any power of the Commonwealth over broadcasting or elections cannot rise higher than that Constitutional source. The content of the implied Constitutional guarantee of freedom of speech in the present case is a guarantee of freedom of discussion of political issues relevant to the exercise of the right to vote.

Section 92 further provides that trade, commerce and intercourse shall be absolutely free. Some commercial television licensees send messages across state boundaries. The broadcasters argued that this is intercourse, protected by Section 92.

The broadcasters further argued that the Act destroys the right to broadcast political advertisements for money and

acquires the right to do so granted to commercial television licensees by their licence.

The statutory title to broadcast is property within the meaning of Section 51 (xxxii) of the Constitution, which provides that the Commonwealth may acquire property on just terms. Further, the free time provisions show that what had belonged to the licensee is given to the legislators.

Section 95Q(7) does not grant just terms. It is therefore contrary to section 51(xxxii) of the Constitution.

The Commonwealth's case

The Commonwealth argued that the Constitution does not guarantee individual rights except to the extent that such guarantees are expressly set out. It does not support the contention that the Constitution guarantees either a general freedom of expression or any right of access to the electronic media for the purposes of political campaigning. The Constitution is predicated upon the acceptance of parliamentary supremacy and parliamentary sovereignty.

It is for the Parliament to determine the method, mechanisms and controls of its electoral processes. The Commonwealth has plenary power over broadcasting and Commonwealth elections.

The Commonwealth further argued that section 92 will not be contravened unless the law is both discriminatory and protectionist. The Act does not discriminate, either in form or effect, against interstate trade, commerce or intercourse.

The Act is not lacking in reasonable proportionality. It deals with only one method of political communication and only to a limited extent.

The Commonwealth also argued that there is no acquisition of property within Section 51 (xxxii) of the Constitution since, by virtue of Section 129 of the *Broadcasting Act*, every licence under that Act is subject to the provisions of that Act from time to time.

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