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The "Reasonably Appropriate and Adapted" Test and the Implied Freedom of Political Communication

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Introduction

It has been over a decade since the High Court established in *Nationwide News Pty v Wills*[1] ("*Nationwide*") and *Australian Capital Television Pty Ltd v Commonwealth*[2] ("*ACTV*") an implied freedom of political communication. The launch of that "judicial revolution" led to a tempestuous period in the court's history. The court came under intense scrutiny and attacks.[3] Its attempt to broaden the scope of operation of the implied freedom in *Theophanous v Herald & Weekly Times Ltd*[4] ("*Theophanous*") created complexities in the common law defamation principles. Eventually, the court consolidated its position in a unanimous decision in *Lange v Australian Broadcasting Corporation*[5] ("*Lange*"). The *Lange* decision which was commented upon by Professor Leslie Zines as "a major miracle explicable only by divine interference with the forces of nature"[6] led to the following formula being established to determine whether the implied freedom was infringed:

> When a law of a State or Federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined. Firstly, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

1 (1992) 177 CLR 1.

2 (1992) 177 CLR 106.

3 See HP Lee, "The Implied Freedom of Political Communication" in HP Lee and G Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 392.

4 (1994) 182 CLR 104.

5 (1997) 189 CLR 520.

6 L Zines, "Legalism, realism and judicial rhetoric in constitutional law" (2002) 5 *Constitutional Law and Policy Review* 21 at 25.