##### Theophanous v. Herald & Weekly Times Ltd

(1994) 124 ALR 1 (High Court of Australia)

**Summary and Outcome**

The High Court of Australia inferred an implied right to freedom of political communication in the Australian Constitution, that could serve as a defence in defamation proceedings. Theophanous, a serving Member of the Australian Parliament (MP), sued the defendant newspaper for defamation after it published a letter by a co-defendant questioning his capacity as an MP shortly before a federal election. The High Court held that there was an implied right in the Constitution for a defendant to freely communicate and publish material discussing government and political matters, including the suitability and conduct of MPs such as Theophanous, based on the constitutionally enshrined principles of representative democracy and government. This implied constitutional right, the Court held, could be a satisfactory defence to the plaintiff’s claim of defamation provided the defendants could establish that they were unaware of any falsity of the material, that they were not reckless as to any truth or falsity, and that the publication of such material was reasonable in the circumstances.

**Facts**

The plaintiff, Dr Andrew Theophanous, was an MP in the Australian House of Representatives. He was known to contribute extensively to public discussion surrounding migration issues and, in 1992, was both the Chairperson of the Joint Parliamentary Standing Committee on Migration and the Chairperson of the Australian Labor Party’s Federal Caucus Immigration Committee. On 8 November 1992, the defendant, the Herald and Weekly Times, published a letter-to-the-editor written by the co-defendant which stated – among other things – that Theophanous was biased towards Greek migrants, stood “for most things Australians are against”, and displayed “idiot antics”. This article was published in the midst of public anticipation that an election would be called one month later.

On 11 February 1993, Theophanous commenced defamation proceedings against both the newspaper and the author of that article, Bruce Ruxton, in the County Court of Victoria for the publication of the letter shortly before an expected election. However, the defendants claimed protection under the Constitution and sought its interpretation. Thus, because state courts cannot hear constitutional matters, the case was referred to the High Court by an order per section 40 (1) of the[*Judiciary Act 1903* (Cth)](http://classic.austlii.edu.au/au/legis/cth/consol_act/ja1903112/s40.html).

**Decision Overview**

On October 12, 1994 the High Court handed down five separate judgments between the total of seven judges presiding over the case – each which were dissimilar in many different aspects of the case. Nevertheless, the four-judge majority was formed by a joint judgment written by Chief Justice Mason, Justice Toohey and Justice Gaudron, and a substantively similar judgment by Justice Deane.

The main issue before the Court was whether the Constitution guaranteed an implied freedom to discuss government and political matters concerning the duties and suitability for office of MPs in the Australian federal parliament, which could then provide a balanced defence to the common law doctrine of defamation.

The plaintiff relied on his initial defamation claim in common law, further arguing that the Australian defamation laws did not raise any constitutional issue.

The defendants pleaded a number of defences which each varied depending on the relevant State and Territory (defamation laws were not unified Australia-wide at the time) – namely truth in relation to a matter of public interest and fair comment on a matter of public interest. Most crucially, however, they accompanied these statutory defences with a claim of implied freedom under the Australian Constitution. Relying on the Court’s previous, precedential judgments in [Australian Capital Television Pty Ltd v The Commonwealth](http://eresources.hcourt.gov.au/showbyHandle/1/8968) [1992] HCA 45 (28/08/1992) and [Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 (30/09/1992),](https://staging.hcourt.gov.au/assets/publications/judgments/1992/036--NATIONWIDE_NEWS_PTY._LIMITED_v._WILLS--%281992%29_177_CLR_1.html) they argued that the Court had already recognised an implied right to freedom of political discussion in the Constitution. Consequently, the defendants sought to extend this implied freedom to the publication of the co-defendant’s letter, arguing that the application of defamation laws in this case may restrict scrutiny and discussion about government and political matters, and about the performance and suitability of elected MPs. The defendants further argued that their publication was without malice, reasonable within the wider context, and made with the honest belief that such words were true.

*The implied freedom of communication in relation to public affairs and political discussion*

Firstly, the Court reaffirmed its earlier rulings of [Australian Capital Television Pty Ltd v The Commonwealth](http://eresources.hcourt.gov.au/showbyHandle/1/8968) and [Nationwide News Pty Ltd v Wills](https://staging.hcourt.gov.au/assets/publications/judgments/1992/036--NATIONWIDE_NEWS_PTY._LIMITED_v._WILLS--%281992%29_177_CLR_1.html) to the effect that there was an implied constitutional freedom of communication, “at least in relation to public affairs and political discussion”. The Court explained that this freedom derived from a constitutionally enshrined principle of representative democracy that requires its people to participate in the electoral process. Without the requisite information enabling people to make a free and informed electoral choice and without the ability to express political views, representative democracy could not exist – which would be at odds with the structure of government for which the Constitution provided. This implied freedom extends to “all who participate in political discussion” (that is, members of society generally) “because the system of representative government depends for its efficacy on the free flow of information and ideas and of debate”.

When it came to the defendants’ publication of the letter, the Court considered whether the implied freedom of political discussion would extend to matters relating to Theophanous’ opinions, performance and fitness as a Commonwealth MP and chairperson of various federal committees, given the underlying purpose of the implied freedom to ensure the “Efficacious working of a representative democracy”. It non-exhaustively defined “political discussion” as including “discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office… [as well as] discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate” such as trade union leaders and political commentators.

It noted that the comments made about Theophanous were in relation to migration matters, which fall within the responsibilities of the Commonwealth per the Constitution ([section 51(xix), (xxvii](http://classic.austlii.edu.au/au/legis/cth/consol_act/coaca430/s51.html))) and were thus clearly “political discussion”. Referencing [Nationwide News Pty Ltd v Wills](https://staging.hcourt.gov.au/assets/publications/judgments/1992/036--NATIONWIDE_NEWS_PTY._LIMITED_v._WILLS--%281992%29_177_CLR_1.html), the Court further opined that the co-defendant’s criticism of “the views, performance and capacity of a member of Parliament and of the member’s fitness for public office, particularly when an election is in the offing, is at the very centre of the freedom of political discussion”. Further, whether a federal election is about to called is not a relevant consideration.

*Defamation in the common law versus a Constitutionally implied freedom*

The Court also held that this implied freedom “shapes and controls” the common law, even in the sphere of relations between individuals. Indeed, if any elements of the Constitution are at odds with a doctrine of common law such as defamation (either expressly or by implication), then the Court stipulated that “the latter must yield to the former” – even if it may be a difficult task to evaluate what exact elements are at odds with the necessary workings of the Constitution and its various principles.

In this case, the Court eventually decided that existing defamation laws were inconsistent with this implied freedom of free communication, and that they must conform to the latter, “even if conformity means that plaintiffs experience greater difficulty in protecting their reputations. The interests of the individual must give way to the requirements of the Constitution.” Although a number of defences to defamation have been developed by the courts over the years – including truth, fair comment and qualified privilege – the Court stipulated that they did not take into account the importance of freedom of communication: “[T]he common law defences which protect the reputation of persons who are the subject of defamatory publications do so at the price of significantly inhibiting free communication. To that extent, the balance is tilted too far against free communication…”. In particular, the Court drew attention to the common law’s qualified privilege defence, whereby a defamatory statement made in the performance of a legal, social or moral duty was accorded qualified privilege – but only if the person receiving that statement has a corresponding duty and interest to receive it. In light of this new constitutional freedom of political communication, the Court held that publishers should not need to prove a duty to publish that material to use the qualified privilege defence.

However, the Court was careful to note that this protection did not mean the protection of an individual reputation was completely subordinated – rather, the Court developed a new test for whether a defamatory statement could be non-actionable under defamation law due to this implied freedom. It rejected the approach developed by the United States Supreme Court in the case of *New York Times v. Sullivan* that, with regard to public figures, only false statements made with actual malice could be sanctioned, on the basis that it offered too little protection to reputation and that the “public figure” standard was unworkable. The Court specifically rejected the idea of shifting the onus of proof of truth to public officials, as this was an unreasonably heavy burden for them to bear. Instead, in relation to political communications, the Court held that defendants should meet the following test in order to successfully claim the defence : “[I]f a defendant publishes false and defamatory matter about a plaintiff, the defendant should be liable in damages unless it can establish that it was unaware of the falsity, that it did not publish recklessly (i.e. not caring whether the matter was true or false), and that the publication was reasonable in the sense described”. For example, in this context, reasonableness would mean taking steps to check the accuracy of the material or successfully justifying publication without taking those steps.

*The refusal to imply a general right to freedom of expression*

Importantly, the Court was careful not to imply a general protection of freedom of expression as a human right. Indeed, it made clear that the implied right operated more as a restriction on legislative and executive powers conferred under the Constitution and as an essential element in ensuring the efficient workings of representative democracy and government (the Court declined to decide, as irrelevant to the present case, whether it might also include positive rights). The majority judgment gave the example of a television entertainer who would be unlikely to attract constitutional protection for their defamatory comments (as their comments would not ordinarily constitute political discussion). Yet, if the entertainer made comments regarding the “legislative, executive or judicial process” which could be considered defamatory, those comments may indeed be protected by the Constitution as a form of political discussion. Additionally, if that entertainer then sought election or appointment as a MP, potentially defamatory comments regarding their policies and conduct would likely attract this constitutionally implied privilege if relevant to their fitness to hold public office – but any comments as to their ability as an entertainer would not.

*Dissenting opinions*

Justice Brennan, Justice Dawson and Justice McHugh each delivered separate judgments rejecting the application of this implied right to freedom of political discussion to the common law doctrine of defamation. Briefly, Justice Brennan stipulated that although the implication undoubtedly exists generally, it should only be confined to limiting legislative power. Justice Dawson rejected the implied freedom of political discussion in its totality, and Justice McHugh believed that the implication only existed in electoral matters (see [Twomey](http://classic.austlii.edu.au/au/journals/MelbULawRw/1994/28.pdf)).

**Conclusion**

The High Court majority established that there is an implied freedom in the Constitution to publish material that discusses government and political matters; concerns the performance of a member of federal parliament’s duties as an MP or member of parliamentary committees; and is in relation to their suitability for public office. With that in mind, the Court held that the defendants’ material would be protected from the plaintiff’s defamation claim so long as they could establish that it was unaware of any falsity of the published material; it had not published the material recklessly; and that the publication was reasonable in the circumstances.

**Decision Direction**

The decision of the Court’s majority significantly expanded the development of the right to freedom of expression in Australian constitutional law, but the practical implications of this decision were mixed. The importance of this case for freedom of expression is that the High Court established the fundamental importance of at least some form of free and informed political discussion to the nature of Australian democracy as established by the frameworks of the Constitution ([Twomey](http://classic.austlii.edu.au/au/journals/MelbULawRw/1994/28.pdf)). Moreover, the Court crucially altered the common law “qualified privilege” defence – that is, that the public at large had an interest in communicating and receiving information on political matters, and publishers thus had a duty to publish that material. In light of this new constitutional freedom of political communication, the Court held that publishers should not need to prove a duty to publish that material to use the common law “qualified privilege” defence. This was seen in many legal circles as hugely expanding freedom of political discussion in Australia under the common law (particularly to publishers publishing defamatory material to the wider public), as it had previously been seen to rarely protect public communications ([Walker](http://www5.austlii.edu.au/au/journals/MurUEJL/1998/3.html) and [Applegarth](http://classic.austlii.edu.au/au/journals/UQLawJl/2011/7.pdf)). However, the fact the Court instead decided to place the onus on the defendant to prove that their publication was not false, reckless or unreasonable in order to claim both a constitutional defence to defamation not only confirmed that there was no guaranteed right to freedom of political discussion, but also very much muddied the waters of Australian defamation law (which was not then unified between States and Territories) by “constitutionalising” it ([Applegarth](http://classic.austlii.edu.au/au/journals/UQLawJl/2011/7.pdf)). Thus, the Court’s decision in this case was unanimously reversed by the High Court three years later in [Lange v Australian Broadcasting Corporation](http://eresources.hcourt.gov.au/showbyHandle/1/11849) (1997) 189 CLR 520 (08/07/1997), which narrowed the defence and held that this implied freedom is a negative right operating chiefly as a restraint on executive and legislative power.

Theme: defamation

Sub-Issues: defamation defences, public figures

Test:

Penalty:

Decision: violation of freedom of expression (implied Constitutional right to freedom of political communication); four votes to three

Jurisdiction: Australia (High Court)