The High Court and Freedom of Speech

by

Dr. John Emmerson Q.C.

A paper delivered at a meeting of the Medico-Legal Society
held at the Australia Club on 27th March 1993.
The Chairman of the Meeting was the President
Mr. G. Gronow

I think I should start on a theme which was one of my interests which our President failed to mention, namely the English Civil War. During the English Civil War, the most famous royalist song was called 'To Althia from Prison' and the lyric was written by Richard Loveless. It is at first sight a surprising choice for a war-time song. There's no trace in it of military glory, no boasting or triumphs in the field. Instead, it's written from prison into which Loveless was cast in 1642 because he presented a petition to Parliament seeking a return to ancient laws. In 1642 you did not present petitions to Parliament in support of ancient laws. The theme of Loveless' poem is liberty and its contrast with his present imprisoned state. He finds liberty in his love for the Althia of the title, his delight in the company of his friends, his loyalty to the King and his freedom of spirit. Importantly, he sees the King as the fountainhead of liberty in contrast to the other temporal powers of the day, in particular Parliament. Loveless thought that one could look to the Monarch of the day to protect liberty of expression against the excesses of parliament and part of my theme this evening is whether there is any power in this land to which one can look these days for the same protection. Writing about two years later, but from the other side of the great political divide of the English Civil War, John Milton, in his paper entitled 'A Speech for the Liberty of Licensed Printing' to the Parliament of England, argued that freedom of political expression was the great safeguard against tyranny. He said that when complaints are freely heard, deeply considered and speedily reformed, then is obtained the utmost bound of civil liberty that wise men look for. He thought the truth which could not withstand argument was no truth at all and hence that the best way of arriving at the truth was by freedom of expression. Now I've started with the 1640s because the two justifications for freedom of speech that I've mentioned are, I think, still the central ones. First, freedom of speech is important because it is part of that freedom of spirit which is an essential part of civilised society. Secondly, freedom of speech is important as being an essential step in promoting the free debate that leads to the truth. Now it must be admitted, as anyone who recalls the recent election campaign will recognise, that the mere fact that one has freedom of debate does not necessarily mean that truth emerges at the end of the day, as John Milton hoped that it would. I think I would put the matter slightly more cautiously that

without freedom of debate the prospects for truth emerging are slim indeed. There's a third argument for freedom of speech, not recognised by either Loveless of Milton, and indeed rather lost sight of during the civil war. This is that less harm is likely to come from unwelcome ideas if they can be freely expressed rather than if they are driven underground to emerge later in even more unwelcome guise. Now, it's important in considering what the High Court has done with freedom of speech to recognise that freedom of speech necessarily must include freedom to say things which are offensive to some people. After all, freedom to say only what is inoffensive and bland is no freedom at all. Equally, freedom of speech must necessarily involve freedom to say things which are untrue or which at least some people will believe to be untrue. The notion that one should preserve freedom of speech assumes that society is sufficiently mature to cope with the offensive and the untrue. Now when I was a boy, I was brought up to believe that freedom of speech was an inherent part of our political system and that one of the great advantages we had over less satisfactory systems of earlier days was to be found in just this. I remember being told how Gallileo had been condemned by the Pope of the day for arguing that the earth goes around the sun, rather than vice versa. I must admit that I had, at the time, a rather sneaking sympathy for the Pope. Ordinary observations that I'd made up to then made me think that indeed the sun did move around the earth. However, the shocking thing about Gallileo's fate was not that the Pope held these views, but that he prevented Gallileo from arguing to the contrary. Similarly, we thought it odd and rather quaint that anyone could resort to burning books as a method of suppressing opinion. It was also odd and distinctly sinister that in eastern Europe people could be sent to re-education camps to have unpopular opinions crushed out of them. All of this, I believed, could never happen here. Now there's always been a cast of minds which assumes that it knows better than its fellows what they should be thinking and so seeks to suppress any unwelcome views. The puritans of the time that I was mentioning earlier so called because of their insistence of purity of doctrine rather than, as is sometimes supposed, any special purity of personal behaviour, are a fairly familiar example of that cast of mind. It has occurred again from time to time in the present century. The Fabian Society in London and its repellant co-founder, Beatrice Webb, in

Edwardian times are again, part of the cast of mind which assumes that it knows better than the rest. Similarly the drawing room Marxists of the 1930s fall into that unpleasant pattern. However, my belief when I was young was that these things simply couldn't happen to us. My first major indication that this optimistic view of western intellectual life might not be quite accurate, came in the 1960s during the student riots. Most of you will remember that these began with students quite properly seeking freedom of expression for their own ideas, but soon developed into a concerted effort by those same students to suppress any expression of rival ideas by other people. University lecturers with unpopular views were howled down or intimidated by even more unpleasant means. All this, I thought then, and think now, was totally at variance with what a university should stand for. Similarly at about this time a famous psychologist was unwise enough to publish the results of experiments which tended to suggest that certain negro races were less intelligent than some white races. Now for all I know, these experiments might have been deeply flawed. The alarming thing at the time was that the response was more to attack the man than to attack his methodology. Similarly during the 60s, in of all apparently peaceful places, the Departments of English Literature in various universities, the most frightful fighting broke out with various people not speaking to each other because one of the pair approved of certain authors which the other of the pair disapproved of. It was to all the world like a battle to the death in a pigeon loft. Even in our own more recent time, one distinguished historian was treated, I think, very badly by his colleagues in the University of Melbourne because his views were not fashionable on one particular issue. Now, all of these attacks on freedom of expression occurred before the modern phase of political correctness took hold and I will assume that no-one here in this audience needs convincing that that phase is one which is to be hoped will pass very quickly. The notion that ideas were not things that were safe to be left with children also started to permiate into the schools. Instead of being allowed to choose what they wanted to read, various books had to be removed from the library shelves. Bizarrely, books by the late Captain W.E. Johns figuring a character called Biggles were republished in an expurgated form with what were regarded as the offensive bits removed. Now the Biggles books which a number of us devoured with great

enjoyment in years after the second World War, were never great literature but they carried, at least in their original form, the authentic flavour of the time. Now even that is to be taken out of them and they are to be put out in a sanitised form so that they might well have been written yesterday by someone as dull as many of the other people writing yesterday for television serials or other potboilers. Even in the law, the notion that if one disagrees with an opinion, it is permissible to attack the person who delivers it rather than the opinion itself has become prevalent. One Judge in South Australia, many of you will have noticed, had the misfortune to deliver a judgment in a rape in marriage case shortly before the summer season when the newspapers had very little to write about. His direction to the jury might well have been right or it might have been wrong. From what I read of it in the press, I think it was right. I held the simple view that if he was right, then he had a duty to say what he said. If he was wrong, then he could be put right by a superior court. But, the response I am sorry to say in some sections of the press was that he should never have said what he said even if it was correct and I'm sorry to say that I've heard that sentiment expressed even by otherwise intelligent people. Where then are we to look for support for freedom of speech if indeed we think it is worthwhile preserving, not, I'm sorry to say, to the press which is active in upholding its own rights, but not the rights of the public at large, nor, I'm sorry to say, can we happily look to Parliament. Parliament itself has passed a number of laws which have to some extent served to curtail the freedom of expression. Some of the wilder shores of the antidiscrimination laws that bring to mind various government legislation concerned with matters of trade and commerce are, I think, in the same category. There is a lot to be said for the robust old days when the maxim was buyer beware and the law knew that buyers took advertisements with a pinch of salt. Now competitors scrutinise each other's advertisements to see whether they can rush into the Federal Court for an interlocutory injunction under the Trade Practices Act if they feel that it will serve their own commercial purposes. Similarly, under the Companies Act, it seems to me that a return to a more robust age would have its advantages. Now these days we have no Monarch or at least no Monarch that can stand up for the liberties of the people against encroachment by Parliament and other forces, and so the question arises whether

there is something within our Constitution that can provide such support. Now unlike the United States Constitution of course, we have no Bill of Rights built into it. Some say that we should have a Bill of Rights built into it. I found myself in the course of the checkered career that the President described earlier this evening, sitting at the feet of Gareth Evans who was in those days teaching Constitutional Law in the Melbourne University Law School. He and I used to have the most vigorous, although I hope even tempered, arguments about whether a Bill of Rights should be incorporated into the Constitution. He said it should. I had my doubts. I found it very difficult to see how one could get an advantage from the sort of absolute prohibitions which one finds in the United States Constitution. Take for example the one this evening. Freedom of speech is all very well, but there must necessarily be some limitation to it. There must be some rule which protects people against defamation for example. I remember putting that to my law school lecturer, and I said to him, 'What about that?' and his answer, (I hope I don't do him an injustice) was, 'Well we could build in a freedom from defamation provision into the Bill of Rights'. I said, 'Well how can you have both freedom of speech and freedom from defamation?' He said, 'Well we'll let the courts sort that one out'. Now indeed that is the position in which the courts have now found themselves. The question is can they sort out the question of whether there should or should not, or whether there is or is not some freedom of speech built into our Constitution. Now until the latter part of last year, most of us would have said clearly there's not, there's no Bill of Rights, and that's the end of it. So it naturally surprised a number of us to read in the newspapers that the High Court had found freedom of speech in the Constitution in a way that nobody had noticed it before. And that at least one Justice was said to believe that there was scope in the Constitution for an entire implied Bill of Rights. Now I want to talk to you a little bit about how the court reached this position, if indeed it did reach this position. For those of you who are not Constitutional lawyers, could I just explain that usually the question that arises under the Constitution, if one wants to know whether a particular law is or is not within power, depends on the structure of the Constitution which says that there are certain things that Parliament might do and also imposes certain prohibitions which says that there are certain things that it cannot do. Usually the

question that arises then is whether some specific head of Constitutional power allows the Parliament to pass the law that is in dispute or whether the law somehow offends some other prohibition. Now, none of this worked very well when Parliament passed something called the Political Broadcasts and Political Disclosures Act of 1991. This imposed severe restrictions on dissemination of political information during elections which was said to serve the useful purpose of reducing the cost of campaigns. A television station objected to this and sought to challenge its validity. Now the difficulty that arose was that the enactment appeared to be within the power of Parliament and it was not in principle contrary to any of the prohibitions in the Constitution, and the argument was that nevertheless there was an implied prohibition. Now the question is how can an implied prohibition turn up in the Constitution? There are two ways it can happen, one peculiar to this case, the other more general. One peculiar to this case is if it turns out that it can be said that the system of parliamentary democracy simply will not work or is not consistent with the law. The other is if there is some general guarantee in the Constitution that various freedoms are to be preserved. Now, as to the latter intruiging prospect that it is, there are rather considerable difficulties in the way our Constitution is constructed. I might say that political theory has always given difficulty to philosophers and one might take another little leap back to the 17th century and say that there were then about three major theories as to where policital power came from. One was that it came from God, and that was very convenient if you held the power and it carried relatively few limitations, at least on this earth. The second was that it came by inheritance if you lawfully inherited it from your father and that was absolutely fine except that it's very difficult to apply that to our own system of parliamentary democracy. The third, implausable though it may seem, was that there was some sort of implied social contract between the government and the governed whereby the governed had at some stage agreed to submit themselves to the powers of the government in return for some understanding that the government will be carried out properly. Now if one happens to hold by the third theory there is perhaps some room for saying that the powers given to Parliament must be limited according to some implied terms in such an implied contract. The practical difficulty in the case of our Constitution, however, is

that it does not arise in any sense as a result of some sort of implied contract. It simply arises by way of a statute and most of us would say that it should be interpreted in the way of that statute and this leaves very little scope for implied powers. Now, let me try to explain to you what the High Court said about all that having had the temerity to tell you in advance a little bit about what I think about it. The High Court, as many of you will know, consists of seven Justices and it is not in the habit of simply delivering a single judgment which tells you what the answer is to any question that came before it. It tends to deliver a number of judgments, in this case, six. And the six do not all say the same thing, which is one of the reasons why law schools are active and intellectually industrious places. All but one of the Justices of the court found that there was at least part of the Act before them that was invalid. The Chief Justice said that there was an implied guarantee of freedom of communication. He said that there were no general rights and freedoms but that in this particular case the prohibition that was imposed was so severe that the Act before him was unconstitutional. He said that the Act was not really consistent with the proper functioning of representative government. However, in the course of saying that, he emphasised that he did not find general guarantees or immunities in the Act, but simply that it would be difficult for Parliament to pass valid laws suppressing particular ideas or information although they might restrict the mode in which information was passed. Mr. Justice Dean and Mr. Justice Toohey thought that representative government implied freedom of communication about matters relating to government. They thought that this came from the underlying doctrine of the Constitution and thus that any law which restricted freedom of discussion may be justified in the public interest if it was subject to specific power. Now you will note if you have been with courtesy and loyalty following this rather complex argument, that none of those Justices really saw in the Constitution any general guarantee of freedom of speech. There were just certain specific interferences which they held were not open. Justice Gaudron, however, seemed to see the matter more generally. She thought that it was at least possible that Parliament provided for freedom of speech generally. She said this in one of those lines which tends to get quoted in the press, but she didn't go on to say how far that might exist or exactly where it came from because for her

purposes, it was necessary only to conclude that there was at least an implied guarantee of freedom of political discourse. She ended up concluding that the Constitution guaranteed freedom of discussion of matters of public importance because this was essential to maintain a free and democratic society. Now those of us with scientific backgrounds find it very difficult to grapple with sentences like that because we find it difficult to see in particular cases how one tells in advance whether any particular statute is essential for, or can violate, something which is essential for, the maintenance of a free and democratic society. Nevertheless, we are left with that formulation which seems to leave open the possibility that some sort of Constitutional guarantee of freedom may go still further. Mr. Justice Brennan again said that no law preventing freedom of discussion of political and economic matters could be allowed because such discussion was essential to representative government. However, he thought that part of the disputed parts of the Act before him was valid and part was invalid. Mr. Justice McHugh reached a similar view on rather narrower grounds. The final member of the Court, Justice Dawson, dissented and he took the view that the Constitution deriving as it does from the United Kingdom Parliament leaves no room for the sorts of implications which would be involved in finding fundamental guarantees and he thought that the interference with freedom of communication was something which was within the powers of Parliament to allow. Now it follows from all of this that the decision of the Court as it seems to me, far from upholding some very broad rights of freedom of speech was based on rather narrow grounds drawn from specific functions relating to political discussion. It seems to me that it provides very little foundation, notwithstanding what has been written about it since, for saying that the High Court will read into the Constitution some general Bill of Rights. I need hardly say, however, that the press had an enjoyable time when this decision was handed down. So did certain politicians. One politician, I was not altogether surprised to note, immediately sprang to his feet and said that if the High Court was going to hand down decisions like this, the High Court must be disciplined. An interesting example of how, if one seeks to uphold even to the relatively modest extent that the Court did in this case, some general right of freedom of speech, it is not long before some politician starts announcing that your own freedom

of speech ought to be curtailed. Where then does one get in considering the position in Australia? It seems to me that each of the sources from which one might have hoped to find some general support for freedom of speech has failed and one is driven back then to the poem with which I started this paper, Richard Loveless' To Althia from Prison was that one finds one's freedoms in freedom of spirit rather than necessarily in other forms. His poem concludes: 'Stone walls do not a prison make, nor iron bars a cage, minds innocent and quiet take . . . If I have freedom in my love and in my soul am free, angels alone that soar above enjoy such liberty'.