STATUTORY POWERS AND CONSTITUTIONALLY PROTECTED FREEDOMS

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It is sometimes said that Australia's *Constitution* does not protect rights. While that may be an exaggeration,[1] it is certainly true that, unlike many other constitutions, it does not contain an express bill of rights. However, Australia's *Constitution* does protect freedom of political communication, which is an 'indispensable incident'[2] of the system of responsible and representative government established by the *Constitution*. Legislation that would 'unduly burden' the freedom, the High Court has said, is invalid; it does not matter whether that legislation is Commonwealth, state or territory legislation. What is known as the 'implied freedom of political communication' (or simply the 'implied freedom') is therefore a restriction on legislative power throughout the nation. Whether legislation unduly burdens the freedom and is invalid is determined by reference to the test set out in *Lange v Australian Broadcasting Corporation*[3] (*Lange*), as recently modified in *McCloy v New South Wales*[4] (*McCloy*).

This article discusses the implications of this restriction on legislative power for decision-makers exercising statutory discretions. In particular, what is a decision-maker to do if they propose to make a decision that might burden communication on government or political matters?

Several recent cases in lower courts suggest that the answer to this question is that decision-makers must 'have regard to' the implied freedom in making their decisions. That answer is unsatisfactory, for it is unclear what decision-makers are meant to do — in particular, it is unclear whether they should try to apply the *McCloy* test directly.

Yet that answer has been held to follow from the joint reasons of five members of the High Court in *Wotton v Attorney-General (Qld)*[5] (*Wotton*). In this article we argue that the joint reasons in *Wotton* should not be interpreted as leading to that conclusion. In our view, the joint reasons in *Wotton* are capable of supporting a more sensible approach, whereby decision-makers will often not be required to have regard to the implied freedom in making their decisions.

At least in our view, much of the difficulty in this area stems from the lack of clarity in *Wotton* and in the subsequent High Court decision in *Attorney-General (SA) v Adelaide City Corporation*[6] (*Adelaide City*). We will begin by considering these two judgments and how they fit into what we see as a better conceptual framework. We will then go on to discuss some of the more recent decisions in lower courts.

Before launching into the substance of our article, however, it is worthwhile to set out briefly the *Lange/McCloy* test against which the validity of legislation is determined.

The first question is, and has always been: does the law effectively burden the freedom in its terms, operation or effect? If there is no burden, no further questions arise and the law is valid. However, it seems to be very easy for the courts to find a burden: any law that has the effect of curtailing or prohibiting political communication will burden the freedom.[7]

Before *McCloy*, the second question was: does the law have a legitimate end, and is it reasonably appropriate and adapted to serve that end in a manner compatible with our system of representative and responsible government?[8] If so, the law would be valid despite burdening political communication. This form of the second question was applied in all but one of the cases we will discuss. It was the law until the decision in *McCloy* in October 2015.

After *McCloy*, the second question is, in substance, addressed to the same matters. However, it now has two main stages. The first requires working out whether the purpose of the law and the means it adopts to achieve those purposes are compatible with representative government. The second stage requires formal 'proportionality' testing — a multi-part test looking at whether the law is 'suitable', 'necessary' and 'adequate in its balance'. Put differently, under the second stage the law must have a rational connection to the purpose of the provision; there must be no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom; and the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom must be adequate.[9]

It is not necessary for the purposes of this article to examine in further detail the *McCloy* test. It is enough to notice that its application in any factual situation will not always be clear-cut and that the criterion of 'adequacy in its balance' in particular may produce differing assessments.

We turn now to the High Court cases.

The High Court cases

Wotton v Queensland

The facts in *Wotton* were these. Mr Wotton was an Aboriginal person who participated in a riot on Palm Island following the death, in police custody, of Mr Cameron Doomadgee. Mr Wotton was convicted of rioting and sentenced to six years' imprisonment with parole eligibility after two years. In February 2010, the Parole Board directed, pursuant to the *Corrective Services Act 2006* (Qld), that he be released on parole.

The Parole Board had power, under s 200(2) of the Act, to impose conditions on a prisoner's parole that it reasonably considered necessary to ensure the prisoner's good behaviour or stop the prisoner committing an offence. The board imposed conditions on Mr Wotton prohibiting him from:

- attending 'public meetings on Palm Island without the prior approval of a corrective services officer'; and
- receiving any 'direct or indirect payment or benefit' from the media.

These were called 'conditions (t) and (v)'.

Mr Wotton brought proceedings in the original jurisdiction of the High Court challenging the constitutional validity of s 200(2). He argued that, *to the extent it authorised conditions (t) and (v)*, s 200(2) impermissibly burdened the implied freedom of political communication. In the alternative, Mr Wotton also challenged the validity of conditions (t) and (v) as impermissibly burdening that freedom.

Mr Wotton also challenged the validity of s 132(1)(a) of the Corrective Services Act on the same ground. That section made it an offence for a person to 'interview a prisoner, or obtain a written or recorded statement from a prisoner'. Because of the aiding and abetting provision in the *Criminal Code*, it was also an offence for a prisoner to participate in an interview. However, s 132(1)(d) provided that a person did not commit an offence if they had the chief executive's written approval to carry out the activity. Both challenged provisions therefore involved statutory discretions. Both challenges failed.

The leading judgment was a joint judgment delivered by French CJ and Gummow, Hayne, Crennan and Bell JJ. Their Honours noted that, although the Corrective Services Act conferred discretionary powers in broad terms, those powers were constrained by the subject-matter, scope and purpose of the Act, and any applicable law. The applicable law would include the *Constitution*.[10] In this last respect, their Honours referred to what Brennan J had said in *Miller v TCN Channel Nine*[11] (*Miller*).[12] Justice Brennan had noted that a discretion granted in wide, general terms could not be exercised in a manner contrary to s 92 of the *Constitution* (which guarantees free trade between the states). His Honour quoted an earlier judgment of the Federal Court, in which he and St John J said:

> [W]here a discretion, *though granted in general terms*, can lawfully be exercised only if certain limits are observed, the grant of the discretionary power *is construed as confining the exercise of the discretion within those limits*. If the exercise of the discretion so qualified lies within the constitutional power and is judicially examinable, the provision conferring the discretion is valid.[13]

In other words, a statute which confers a general discretion must be construed in light of constitutional restrictions on legislative power, with the result that the power — irrespective of how broadly drafted — cannot be used in a way which would infringe such constitutional restrictions.

That concept — which is central to our discussion — is simple enough. It reflects not only longstanding principles of statutory interpretation but also provisions like s 9 of the *Acts Interpretation Act 1954* (Qld) (and its interstate equivalents). These provide that an Act is to be interpreted as operating 'to the full extent of, but not to exceed, Parliament's legislative power'.

The joint judgment then summarised and accepted submissions made by the Commonwealth Solicitor-General. The summary was to the following effect:

(1) Where a putative burden on political communication has its source in statute, the issue presented is one of a limitation upon legislative power.
(2) Whether a particular application of the statute is valid is not a question of constitutional law.
(3) Rather, the question is whether the repository of the power has complied with the statutory limits.[14]

These points may readily be accepted. The fourth point was this:

(4) If, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, any complaint respecting the exercise of that power *does not raise a constitutional question, as distinct from a question of the exercise of statutory power*.

The fourth point, however, did not explain what was involved in answering 'a question of the exercise of statutory power'. Does this phrase mean that, on a judicial review, only the traditional administrative law grounds need be considered and that the issues raised by the

Lange/McCloy test will be irrelevant? Or does it mean that the *McCloy* question must in substance be asked in relation to each exercise of power, but in form it is no longer a 'constitutional' question — it has become a 'question of the exercise of statutory power'? Both interpretations have been adopted by lower courts.[15]

In our view, the answer — and the conceptual framework which should govern this area — is this:

- Whether an exercise of statutory power is beyond power is *always* 'a question of the exercise of statutory power'. This follows from the principle explained by Brennan J in *Miller*.
- Where a statutory power does not need to be read down to ensure its validity as against the implied freedom, the statutory question will be answered by considering the traditional administrative law grounds and it will not be necessary to consider the constitutional issues. This is because a statutory power will only be valid without any need for reading down if it is otherwise *incapable* of authorising a decision which would infringe the implied freedom.
- Where a statutory power needs to be read down to ensure its validity, the question of whether a decision is within the statutory limits on the power may involve examining the issues raised by *Lange/McCloy*. That is because what is read out of the power is only that part of it which would otherwise authorise decisions which infringed the constitutional restriction. Working out whether the particular decision is inside or outside the power therefore inevitably involves considering whether the decision itself has unduly burdened free political communication.

The distinction between cases in which reading down is necessary and those in which it is not had been drawn by the Commonwealth Solicitor-General in his oral submissions (these submissions were, of course, adopted by the Court).[16] The distinction is alluded to in the joint judgment but not, we would respectfully suggest, with much clarity. Part of the confusion arises from the passage immediately following the fourth dot point mentioned above (which is expressly addressed to cases in which there is no need for reading down). It says:

> [If] the power or discretion be *susceptible* of exercise in accordance with the constitutional restriction upon legislative power, then the legislation conferring that power or discretion is effective in those terms. No question arises of severance or reading down of the legislation.[17]

With respect, however, these are exactly the circumstances in which a question of reading down arises. That is, where a power *can* be exercised in permissible ways but *can* also be exercised in impermissible ways then, in accordance with what Brennan J said in *Miller*, it should be read as effective to confer power to act only in a way that is constitutionally permissible. It is hard to see how this is anything but a process of 'reading down'. Further, if this process is not reading down then it is not clear what would constitute the 'reading down' referred to by the Court in the preceding paragraph.

More confusion on the topic of 'reading down' arises in *Wotton* because it is not clear whether their Honours thought it was necessary to read down the particular provisions in question.

Their joint judgment said, in relation to both provisions, that when exercising the relevant statutory powers the decision-makers would be bound to *have regard to* constitutional restraints upon legislative power, including the implied freedom of political communication, and that any decisions made would be subject to judicial review.[18]

It did not, however, explain *why* it would be necessary for those decision-makers to take into account the implied freedom. If it was because the provisions were in part invalid and needed to be read down, this was not explained. Indeed, the earlier part of the judgment seemed to suggest that no reading down was necessary.

In respect of s 200(2) (the power to impose conditions reasonably considered necessary to ensure good conduct and stop the parolee committing an offence), the explanation seemed to be that the words 'reasonably considers necessary', appearing in the subsection, imported an analysis 'akin' to that required by the second limb of the *Lange* test.[19] However, why this would require decision-makers to take into account the implied freedom, as distinct from requiring them merely to consider whether the conditions in question were necessary for the purposes of the power, was not made clear.

In respect of the discretion conferred by s 132(2)(d) (the power to approve a prisoner being interviewed), however, there were no express words which might have imported a proportionality analysis.[20] If it was necessary for a decision-maker to consider the implied freedom in the application of this section, it must, in our view, have been because it was necessary for the section to be read down to ensure its validity. However, nothing in the joint judgment makes that point, and some parts of it suggest the opposite.

The final point we would like to note about *Wotton* is this. One consequence of the principle discussed above was that the plaintiff's constitutional challenge could only properly be directed at legislation. The challenge to conditions (t) and (v) as impermissibly burdening the implied freedom failed: their Honours said that the conditions themselves could only be challenged by the commencement of proceedings under the *Judicial Review Act 1991* (Qld). Accordingly, the judges gave no consideration to whether those conditions infringed the freedom.

After *Wotton* it was clear that no statutory discretion could validly be exercised in a way that would exceed constitutional restrictions on legislative power. The consequences of that conclusion, however, remained in doubt.

Attorney-General (SA) v Adelaide City Corporation

Adelaide City involved a challenge to the validity of a by-law made by the City of Adelaide under the *Local Government Act 1999* (SA). The Act allowed by-laws to be made, amongst other things, 'for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants'. The relevant provisions of the by-law prohibited persons from 'preaching, canvassing or haranguing', or giving out material, on a road *without permission*.

The Corneloup brothers wished to preach in the Rundle Street Mall in Adelaide. They argued that the provisions of the by-law were:

(a) outside the by-law-making power; and

(b) an impermissible burden on free political communication.

The Full Court of the South Australian Supreme Court had held that, while the by-law was within the broad law-making power conferred on the City, it was nonetheless invalid because it infringed the implied freedom of political communication. Justice Kourakis (with whom other members of the Full Court agreed) stated:

> [T]he liberty to preach to fellow citizens in public places on political matters, as and when they arise, without seeking permission from an arm of government is fundamental to the maintenance of the constitutional system of responsible and democratic government.[21]

After *Wotton*, it seemed that the Full Court's conclusion could not have been right. The Solicitor-General for South Australia made submissions to that effect. He said:

> [T]he by-law-making power … does not authorise a by-law that impermissibly infringes the implied freedom. If a by-law does infringe the implied freedom it is, ultra vires, the by-law-making power. Further, where a by-law vests a discretion in a body or a person, the by-law does not authorise that person to exercise that power in a manner that would result in the infringement of the implied freedom.[22]

That submission seemed consistent with *Wotton*. It did not, however, address the question of whether or not the by-law itself, or the power pursuant to which it was made, needed to be read down before it could be held valid as against the implied freedom. Indeed, the South Australian submissions, in this respect closely based on *Wotton*, simply *assumed* that an exercise of the power to grant permission to preach would need to take into account the principle of free political communication.[23]

On the other hand, the Commonwealth's submissions put the question of 'reading down' at the beginning of the enquiry. Those submissions were to the effect that:

> A primary power to make delegated legislation may need to be read down so as not to authorise the enactment of delegated legislation that would infringe the constitutional limitation. This may result in the constitutional question coinciding with the statutory question. … On its proper construction, the by-law-making power does not need to be read down.[24]

The Commonwealth's written submissions made the point this way:

> The by-law-making power, on its proper construction, is sufficiently confined to comply with the constitutional limitation *without any need for reading down*. … A by-law that complies with the *statutory limits* [on the power] is therefore *necessarily reasonably appropriate and adapted to the attainment of constitutionally permissible ends*. No further constitutional question arises: a by-law meeting the statutory criteria for validity will be within the constitutionally permissible scope of the by-law-making power *even where the by-law operates to impose a burden upon communication about political or governmental matters*.[25]

But the Court did not approach the question of the by-law's validity in the way suggested by South Australia or the Commonwealth. Instead, the majority applied the constitutional test directly to the by-law.[26] It is not apparent from the majority's reasons why a *Wotton*-style approach was not taken.[27]

In applying the constitutional test directly to the by-law, however, their Honours encountered a second *Wotton*-style issue in the form of the discretion in the by-law to grant permission to preach et cetera. At least on one view (adopted in South Australia's submissions), the joint reasons in *Wotton* suggested that those exercising the discretionary power should 'take into account' the constitutional restriction. But no member of the Court reached that conclusion.

Instead, a majority of the Court construed the discretionary power in such a way that it would never be necessary for a decision-maker to consider the implied freedom. Although it is not entirely clear from their Honours' reasons, in our view this conclusion must have been reached because their Honours concluded that the by-law was valid without any need for reading down. For example, Hayne J said:

> It is necessary to construe the power to consent in a manner that gives due weight to the text, subject-matter and context of the whole provision in which it is found … [T]hose matters show unequivocally that the *only* purpose of the impugned provisions is to prevent obstruction of roads. It

> follows that the power to grant or withhold consent to engage in the prohibited activities *must be administered by reference to that consideration and none other*. On the proper construction of the impugned by-law, the concern of those who must decide whether to grant or withhold permission is confined to the practical question of whether the grant of permission will likely create an unacceptable obstruction of the road in question.
>
> Once that is understood, it is readily evident that the impugned provisions are reasonably appropriate and adapted to prevent obstruction of roads in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[28]

Likewise, Crennan and Kiefel JJ (with whom Bell J relevantly agreed[29]) said:

> Given that the discretion must be exercised conformably with the purposes of the by-law, it may be assumed that permission will be denied only where the activities in question cannot be accommodated having regard to the safety and convenience of road users.[30]

The corollary of the position taken in these passages is that it would not be necessary for decision-makers exercising the power to grant permission to take into account, or consider, the constitutional principle of the implied freedom. It would not be necessary because, once the power was properly construed and understood, any valid exercise of the power would properly accommodate the implied freedom. That would be so without undergoing any process of 'reading down'. In other words, while it was true that a decision to deny a permit might burden free political communication, the statute required that a permit could only be denied where doing so was necessary for the purpose of achieving a legitimate end. That is, a permit could only properly be denied where the activity in question would cause an 'unacceptable obstruction' of the road or could not be accommodated having regard to the safety and convenience of road users. A decision within the four corners of the statute would, therefore, be a decision that necessarily met the second limb of the *Lange* test.

In our view, the approach taken by the majority in *Adelaide City* to the power to grant permission to preach supports the conceptual framework we suggested earlier. Central to that framework is that one begins with the question of construing the primary statute and working out whether it is necessary to read it down to ensure its validity.

The judgment of Crennan and Kiefel JJ included some interesting observations about discretionary powers which expressly import 'proportionality' requirements. They said:

> [R]elevant to the legislation in *Wotton v Queensland* was what Brennan J had to say in *Miller v TCN Channel Nine Pty Ltd* respecting a discretionary power which, in its own terms, is so qualified as to confine the area for its exercise to constitutional requirements. In such a case, his Honour said, the power will be valid. In *Wotton v Queensland*, one of the statutory provisions conditioned the exercise of the discretion to what was reasonably necessary, thereby importing a requirement of proportionality into the exercise. This was considered to be an important factor in favour of validity.[31]

We can find nothing in Brennan J's judgment in *Miller* about discretionary powers qualified in their own terms to comply with constitutional requirements. Leaving that aside, what Crennan and Kiefel JJ seem to be suggesting is that, where a power contains words such as 'reasonably considers necessary' (like s 200(2) of the Corrective Services Act), this will import a proportionality test along the lines of that required by the second limb of the *Lange/McCloy* test. Therefore, they seem to suggest, such powers will comply with the constitutional test without being 'read down'.

Justices Crennan and Kiefel should not be read, in our view, as suggesting that such powers expressly require decision-makers to actually *apply* the second limb of the *Lange/McCloy* test. Rather, their point is that, assuming the purpose of such powers is legitimate, their proper exercise will necessarily result in a decision which is reasonably appropriate and

adapted (or proportionate) to a legitimate end. We will come back to this idea when we discuss some of the lower court decisions.

Finally, before leaving *Adelaide City*, it is worth noting briefly the completely different approach to the validity of the by-law taken by Heydon J in dissent. For his Honour, this case was all about the principle of legality. Justice Heydon described the principle of legality in these terms:

> [I]n the absence of clear words or necessary implication the courts will not interpret legislation as abrogating or contracting fundamental common law rights or freedoms. …[32]

The common law right of free speech was, his Honour said, a 'fundamental right or freedom falling within the scope of the principle of legality'.[33] His Honour acknowledged that this common law right was significantly wider than the constitutional principle of the implied freedom of political communication.

Applying that principle to the by-law-making power in the Local Government Act, Heydon J found the by-law to be outside the scope of the power. His Honour said that it could not be inferred from the form of the by-law-making power that the legislature appreciated the question of free speech or that it intended to permit by-laws of the kind challenged in the appeal. The words of the power were, he said, 'too general, ambiguous and uncertain to grant a power to make by-laws having the adverse effect on free speech of the challenged clauses'.[34]

Justice Heydon therefore 'read down' the by-law-making power in the Local Government Act but by reference to the principle of legality rather than the constitutional principle of the implied freedom of political communication.[35]

The only other judge to comment on the principle of legality in *Adelaide City* was French CJ. The Chief Justice agreed with Heydon J that the right to free speech is a common law value protected by the principle of legality.[36] However, his Honour concluded that, when *both* the by-law and the by-law making power were construed in accordance with the principle of legality, the by-law was within power.[37]

Subsequent decisions in lower courts

The issues canvassed in *Wotton* and *Adelaide City* have been encountered in lower courts numerous times since the judgments in those matters were delivered. These lower court cases demonstrate the surprisingly wide variety of contexts in which arguments about the implied freedom can arise; and the wide array of approaches to the question at hand. Today we will focus only on a few of the more interesting cases.

The New South Wales Court of Appeal handed down its decision in *The Age Co v Liu*[38] (*Liu*) six days prior to the decision in *Adelaide City.*

Ms Liu had commenced proceedings in defamation against three unknown defendants. She alleged that these persons had published material to *The Age* newspaper containing allegations that she had engaged in corrupt dealings with a federal politician. She sought orders pursuant to r 5.2 of the Uniform Civil Procedure Rules (NSW) for preliminary discovery from *The Age* and three journalists, to enable her to determine the identity of these persons. The trial judge made the order sought and the newspaper and the three journalists sought leave to appeal. The applicants argued, amongst other things, that *Lange* had the result that the discretion in r 5.2 could not validly be exercised to allow the discovery of a journalist's confidential sources of political information and that the order made by the trial

judge was beyond the power conferred by r 5.2 because 'it was not in conformity with the implied freedom of communication'.[39] This submission was rejected.

In a pellucid judgment, Bathurst CJ (with whom Beazley and McColl JJA agreed) began by construing r 5.2.[40] His Honour noted that there were preconditions on the exercise of the power[41] and that the information sought must be necessary for the purpose of commencing proceedings. Even where those matters were satisfied, however, the Court would exercise the power to make the order only when it is in the interests of justice to do so.[42]

With those matters in mind, Bathurst CJ easily came to the conclusion that, although the rule burdened the freedom, it was reasonably appropriate and adapted to serving a legitimate end (protecting persons from false and defamatory statements).[43] Because the rule was valid without any need for reading down,[44] there was no need for his Honour to consider whether the approach in *Wotton* would be applicable to a discretion conferred on a court.[45] That conclusion was sufficient for his Honour to dispose of the challenge to the validity of r 5.2 as well as the challenge to the trial judge's order.

In our opinion, the approach of Bathurst CJ supports the conceptual framework we have suggested above.

In *A v Independent Commission Against Corruption*[46] (*A v ICAC*) the applicant had been issued with a summons to produce documents under s 35 of the *Independent Commission Against Corruption Act 1988* (NSW). Amongst other things, the applicant argued that s 35 infringed the implied freedom of political communication insofar as it could be used to obtain access to a journalist's confidential sources.[47] That argument was rejected essentially on the basis that, although the section did burden the freedom, it was reasonably appropriate and adapted to the end of protecting, maintaining and strengthening the institutions of government itself.[48] The Court found that the provision was valid without being read down.[49]

Perhaps the more interesting aspect of this case is the judges' treatment of another submission put by the applicant. This was that the implied freedom operated as a 'mandatory consideration' to be taken into account by a commissioner in deciding whether to issue a summons under s 35. That submission would appear to draw support from the statements in *Wotton* that the decision-makers were to 'have regard to' the implied freedom. In *A v ICAC*, however, the Court rejected the submission as misconceived. Basten JA said:

> [T]here is an element of conceptual confusion in the suggestion that the constitutional limit on the scope of a power is a factor which must be taken into account by the authority in the course of exercising the power. The reason why the authority does not have the power cannot sensibly be described as a condition of its exercise.[50]

Similarly, Ward JA said:

> A limitation on the exercise of the discretion to issue a summons pursuant to s 35(1) derived from the implied constitutional freedom of communication on governmental and political matters would be a limitation on the statutory power conferred on ICAC, not a mandatory relevant consideration in the exercise of that discretionary power (see *Wotton* at [22]).[51]

Both judges relied on *Wotton* to reach this conclusion. As a matter of principle, it seems correct: if the *Constitution* does not permit impermissible burdens on freedom of political communication, it is difficult to see why it would reduce the freedom simply to a relevant, or mandatory, consideration.

The two New South Wales cases demonstrate, in our view, the correct approach to the problem. That is, first construe the statute. If it is valid without being read down, that is the end of the matter.[52]

However, because 'reading down' was not required in either of the New South Wales cases, neither case had to consider the consequences of reading down or what a ground of review based on the implied freedom would look like.

However, there have been a number of cases in which litigants have taken up what might have seemed an invitation, in *Wotton*, to challenge directly the exercise of a statutory power on the ground that it infringes the implied freedom.

For example, in *AA v BB*,[53] Bell J considered arguments that an intervention order made under the *Family Violence Protection Act 2008* (Vic) was invalid because:

(a) 'the magistrate's discretion to make the order was invalid by reason of the implied freedom of political communication'; or
(b) alternatively, 'the enabling provisions of the *Family Violence Protection Act* were invalid by reason of the implied freedom of political communication'.[54]

The facts of the case were unusual in that the person protected by the intervention order was a candidate for election to the federal Parliament, and the intervention order prevented their former spouse, the appellant, from publishing 'any material about the protected person'. The former spouse wanted to ventilate such information in the context of an election and more generally.

Justice Bell approached the questions of validity in the way suggested by the appellant's submissions, with the result that his Honour applied the *Lange* test directly to the intervention order and the statutory provisions simultaneously. Both, his Honour concluded, were valid.[55]

His Honour's interpretation of *Wotton* is strikingly different from that adopted in the New South Wales Court of Appeal in *Liu* and *A v ICAC*. For example, in reaching the conclusion that the statutory provisions were valid, his Honour said:

> Turning to the enabling provisions of the *Family Violence Protection Act*, the analysis of the High Court in *Wotton* is directly applicable. The operation of the provisions must therefore be approached on the basis that, when *exercising the discretion to make an order and impose conditions, the magistrate must 'have regard to what [is] constitutionally permissible'*.[56]

The discretion to make the order, his Honour said, was required to be exercised 'in a manner which is reasonably appropriate and adapted' to the end of providing due protection of persons against family violence.[57]

The consequence of such an approach is evident in the approach Bell J took to determining the validity of the protection order itself. His Honour analysed it in detail to determine whether the restrictions it imposed on the appellant were 'proportionate' to the burden it imposed on free political communication.[58] As his Honour put it:

> The magistrate was required to weigh competing considerations in the balance. On the side of the appellant, the protected person was a candidate for election to federal Parliament and the appellant wished to make public comment about the suitability of the protected person to be elected to that office. That was important in terms of the implied constitutional freedom to communicate about government and political matters. But, on the other side, it was equally important to consider the need of the protected person for protection from family violence. The protected person did not lose an entitlement to protection from family violence of the appellant by virtue of that candidature. Both

> matters had to be balanced when determining whether to make an order and what the scope of the order should be. It has not been shown that the magistrate erred in law or exceeded his jurisdiction in performing this function in the present case.[59]

In our opinion, the approach taken by Bell J in *AA v BB* is flawed. So much becomes evident when one considers the terms of the discretion exercised by the magistrate to make the intervention order. Such an order could be made under s 74(1) of the Family Violence Protection Act 'if the court is satisfied, on the balance of probabilities, that the respondent has committed family violence against the affected family member and is likely to continue to do so or do so again'.[60]

When determining what conditions should be included in the order, under s 80(a) and (b) the court was to 'give paramount consideration to the safety of … the affected family member … and … any children'.

In our view, it should not have been difficult for Bell J to reach the conclusion that such a power was valid as against the implied freedom without any need to be read down. It seems reasonably obvious that *any* proper exercise of this power is going to be reasonably appropriate and adapted to a legitimate end and therefore pass the *Lange* test. For that reason, there should simply have been no occasion to consider whether the particular intervention order passed the second limb of the *Lange* test. Further, it is in our view unhelpful to suggest that a magistrate exercising a power such as this must in some way 'take into account' the implied freedom. Indeed, it is difficult to see how doing so would be compatible with the express terms of the statute.

An approach similar to that in *AA v BB* was adopted in *Tonkin v Queensland Parole Board*[61] (*Tonkin*). This case is of particular interest because it involves a challenge to a condition imposed on the applicant's parole under s 200(2) of the *Corrective Services Act 2006* (Qld), which was one of the provisions challenged in *Wotton*.

The applicant in *Tonkin* was convicted of manslaughter in 1974 and sentenced to life imprisonment. She was granted parole in 1991. In September 2013, she asked for the approval of the Parole Board to write a book. The book was to be about the difficulties she had faced in her life, and her response to them, which ultimately led to prison; and the troubling conditions she had experienced there.[62] The board subsequently amended the conditions on the applicant's parole to include conditions that she not publish any document connected with, or which described, her offence.[63]

The applicant challenged the validity of the condition on the basis that it exceeded the statutory power in s 200(2). She submitted that the condition impermissibly burdened her freedom of communication on government or political matters and was therefore outside power.[64]

The board submitted, essentially, that it was unnecessary to consider whether the condition itself impermissibly burdened free political communication. It said that 'a condition which serves the legitimate end of ensuring a parolee's good conduct or stopping a parolee from committing an offence' was authorised to impose a burden on freedom of communication under s 200(2).[65]

Justice Lyons rejected the board's submissions. His Honour considered that they amounted to an assertion that, because s 200(2) had been found to be valid in *Wotton*, a decision which infringed the implied freedom would be within the scope of that provision. His Honour said that result 'seems unlikely'.[66]

Indeed, such a result would tell powerfully against any submission which led to it. But this is not, we would suggest, the result of the board's proposition. Instead, we read their submissions as indicating that any decision within the scope of s 200(2) will necessarily be one which does not infringe the implied freedom.

Justice Lyons referred to *Wotton* in some detail. His Honour read the joint judgment in that case as holding that:

> [Where] a statute confers a power in terms which, if read literally might authorise its exercise both in ways which would be consistent with a constitutional limitation, and in ways which would not be, then the grant is to be construed as limited to authorising the exercise of the power in ways consistent with the constitutional limitation.[67]

That, we would suggest, is a correct understanding of *Wotton*. It supports the proposition, however, that some statutes, 'if read literally', will only authorise the exercise of power in ways that are compliant with the constitutional restriction. Our argument is that, in such cases, no further consideration of the implied freedom is necessary. But Lyons J did not consider whether s 200(2) might fall within such a category. His Honour simply concluded:

> [I]t seems to follow that a statute would not authorise an exercise of a power which would give the statute a range of operation exceeding the limits identified by *Lange* … In this case, it would follow that the provisions of the CS Act do not authorise a decision which impermissibly burdens freedom of communication on government and political matters. The impermissibility would arise if the decision is not reasonably appropriate and adapted to serve a legitimate end, in a manner compatible with the maintenance of the constitutionally prescribed system of Government.[68]

In other words, his Honour's view was that, because of the constitutional limitation, each individual exercise of power would be reviewable against the implied freedom.

Our argument is not that this reading of *Wotton* is not open. Instead, our argument is that it is preferable to read *Wotton* as first requiring consideration of whether the statute can be held valid *without any need for reading down*; and that, where reading down is not necessary, no further consideration of the implied freedom is necessary.

The final decision we want to mention is *Gaynor v Chief of the Defence Force (No 3)*[69] (*Gaynor*).

Mr Gaynor was a member of the Army Reserve and had previously served in the regular Army in Iraq and Afghanistan. In 2013, he made a series of statements on Twitter, on his website and in press releases. Amongst other things, the statements criticised the Defence Force position on uniformed participation in the Sydney Mardi Gras, sex-change operations for members, women serving in front-line combat roles, and Islam. The statements identified Mr Gaynor as a member of the Army Reserve. On 10 December 2013, the Chief of the Defence Force terminated Mr Gaynor's commission with the Army Reserve.

The termination decision was made pursuant to r 85 of the *Defence (Personnel) Regulations 2002* (Cth). That regulation provided that an officer's service in the Defence Force could be terminated for various reasons, including that the chief of the officer's service was satisfied 'that the retention of the officer [was] not in the interests of the Defence Force'.

The reasons for the termination decision explained that the decision-maker had formed that view because, amongst other things, Mr Gaynor's statements were disrespectful of other members and inconsistent with Defence Force standards and policies.[70] Importantly, Mr Gaynor had also had failed to stop making such statements when directed to do so.

Mr Gaynor commenced judicial review proceedings to challenge the termination decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Each of his arguments about why the decision should be set aside was rejected, save for his submission that the decision infringed the implied freedom of political communication.

Justice Buchanan approached that question as requiring an examination of the decision to terminate, to determine whether it 'exceeded the statutory authority under reg 85(4) of the Personnel Regulations because it was, in its effect, not reasonably appropriate and adapted to the legitimate end served by reg 85'.[71] His Honour then applied the test as set out in *McCloy* directly to the exercise of power. His Honour said that he accepted that there was a need for discipline, obedience to orders and adherence to standards in the Defence Force by its members. He accepted that termination of a commission was a 'suitable' response to infringement of those requirements.[72] He also said that such a response was 'necessary', in the sense that he 'could not conceive of another obvious and compelling means of achieving the objective in the face of conduct such as that of the applicant, which was defiant and intractable'.[73] He concluded, however, that the termination decision was not 'adequate in its balance' having regard to the fact that the applicant's conduct involved the expression of a political opinion by a member of the Army Reserve who was not on duty.[74]

The Chief of the Defence Force appealed, and the appeal against Buchanan J's decision was allowed on 8 March 2017.[75] In a unanimous decision, the Full Court (Perram, Mortimer and Gleeson JJ) accepted the appellant's submission that Buchanan J had erred in the 'level' at which he applied the *Lange* test: that is, he applied it to the termination decision when he should have applied it to reg 85. That error led him to consider whether Mr Gaynor's 'right' to freedom of communication was impermissibly impaired by the termination decision.[76] As the Full Court explained, however, that approach was contrary to High Court authority that the implied freedom is not a personal right.[77]

The Full Court went on to hold that reg 85 did not itself infringe the freedom. Their Honours held that, although it imposed a burden,[78] it met the second part of the test.[79] Although the scope of the power in reg 85 was wide, it was 'sufficiently confined by the objects and purpose of the statutory scheme' to be proportionate to the burden it placed on the implied freedom.[80]

While that interpretation suggested clearly that reg 85 was valid without being read down, the decision leaves open the possibility that it might be legitimate, for administrative law purposes, 'to descend to examine a particular exercise of power by reference to the implied freedom'.[81] Their Honours said:

> [A]n exercise of power which had the effect of unduly, or disproportionately, impairing the freedom of the community (and therefore, its individual members) to give and receive information and opinions on political matters would be an exercise of power beyond the authority conferred by reg 85. Describing the implied freedom as a relevant consideration (as Kiefel J did in Wotton) is one way of characterising the nature of the excess of power, although not the only way.[82]

Unfortunately, the Full Court did not explain why it might be necessary to consider whether the exercise of the power in reg 85 unduly impaired the implied freedom when the provision itself was valid; nor did the Full Court address the point made in *A v ICAC* that to treat the implied freedom as a relevant consideration was conceptually confused.

Conclusion

Perhaps apart from the decision of the Full Court in *Gaynor*, the approach taken in the last few cases we have mentioned suggests that, *whenever* an administrative decision might have some impact on free political communication, the decision will be directly reviewable for

its compliance with the *Lange/McCloy* test. It would follow that the decision could be set aside on the basis that it imposed a burden on political communication but was not 'suitable', 'necessary' or 'adequate in its balance'.

We have argued that this approach is only necessary when the statutory power in question must be read down in order to comply with the implied freedom. In *AA v BB, Tonkin* and *Gaynor* (at least at first instance), however, the critical first step of construing the statutory power in question to determine if it needed to be read down was not undertaken. Yet, absent a reading-down requirement, it is difficult to explain why the exercise of a valid power should attract review for compliance with the *Lange/McCloy* test.[83]

Even on our approach, however, there may well be circumstances in which a decision must be reviewed against that test. This will throw up a range of issues which are not addressed on the current case law. For example, what does it mean to say that a *decision* has impacted impermissibly on the implied freedom given that the implied freedom is a limit on *legislative* power and (it has been repeatedly said[84]) does not provide individuals with rights? A related question is this: since the extent of the burden on political communication is relevant to answering whether the burden imposed is 'undue' or 'impermissible',[85] how is the extent of the burden to be factored in when assessing if a decision that impacts on one individual's ability to communicate is valid?

One benefit of our approach is that such questions, which do not admit of simple answers, can be left for another day.

Endnotes

1 See, for example, *Constitution* ss 116, 117.
2 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559.
3 (1997) 189 CLR 520.
4 (2015) 89 ALJR 857.
5 (2012) 246 CLR 1.
6 (2013) 249 CLR 1.
7 *Monis v The Queen* (2013) 249 CLR 92, [108] (Hayne J), [343] (Crennan, Kiefel and Bell JJ); *Tajjour v New South Wales* (2014) 254 CLR 508, [71] (Hayne J), [105]–[108] (Crennan, Kiefel and Bell JJ).
8 See, for example, *Hogan v Hinch* (2011) 243 CLR 506, 542 [47] (French CJ), 555–6 [94]–[97] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton v Attorney-General (Qld)* (2012) 246 CLR 1, [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
9 *McCloy v New South Wales* (2015) 89 ALJR 857, [2] (French CJ, Kiefel, Bell and Keane JJ).
10 (2012) 246 CLR 1, [9].
11 (1986) 161 CLR 556, 613–14.
12 (2012) 246 CLR 1, [10].
13 *Inglis v Moore (No 2)* (1979) 46 FLR 470, 476.
14 (2012) 246 CLR 1, [22].
15 Compare *Tonkin v Queensland Parole Board* [2015] QSC 334 and *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240.
16 (2012) 246 CLR 1, [22]–[23].
17 Ibid [23] (emphasis added).
18 Ibid [31], [32].
19 Ibid [32] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [91] (Kiefel J).
20 Ibid [31]; see also [88] (Kiefel J).
21 (2011) 110 SASR 334, [157].
22 [2012] HCATrans 233 (2 October 2012), 1313–7.
23 See Written Submissions of SA at [36]–[37].
24 Oral Outline on behalf of Cth A-G, [2], [3].
25 Written Submissions of Cth, [9] (emphasis added).
26 (2013) 249 CLR 1, [67]–[68] (French CJ), [137] (Hayne J), [209]–[216] (Crennan and Kiefel JJ), [224] (Bell J).
27 In *Muldoon v Melbourne City Council* [2013] FCA 994 at [133], North J suggested that the reasoning in *Wotton* was confined to administrative powers, whereas the implied freedom as a limit on legislative power applied to delegated and primary legislation. In our view, however, a distinction between administrative

powers and legislation is hard to maintain. A power to make delegated legislation, like a power to make an administrative decision, will be found in a statute which must be construed in accordance with constitutional restrictions on legislative power.

28 (2013) 249 CLR 1, [140] (emphasis added).
29 Ibid [224].
30 Ibid [219].
31 Ibid [215].
32 Ibid [148].
33 Ibid [151].
34 Ibid [158].
35 Ibid [160]–[161]. Justice Heydon's approach is similar to that adopted by the Full Federal Court in *Evans v New South Wales* (2008) 168 FCR 576. In that case, the Full Federal Court (French, Branson and Stone JJ) found that an Act, construed in accordance with the principle of legality, did not authorise a regulation which prohibited conduct which would 'cause annoyance' to participants in World Youth Day.
36 (2013) 249 CLR 1, [43]–[44].
37 Ibid [46].
38 (2013) 82 NSWLR 268.
39 Ibid [5].
40 Ibid [85].
41 The rule only applied if it appeared to the Court that the applicant, having made reasonable inquiries, was unable to ascertain the identity or whereabouts of a person ('the person concerned') for the purpose of commencing proceedings against the person, and some person other than the applicant might have information, or might have or have had possession of a document or thing, that tended to assist in ascertaining the identity or whereabouts of the person concerned.
42 (2013) 82 NSWLR 268, [89].
43 Ibid [99].
44 Ibid [100]: 'It follows from what I have said that there is no need to read down the rule or otherwise limit the discretion conferred on the Court to achieve its constitutional validity.'
45 Ibid [90].
46 (2014) 88 NSWLR 240.
47 Ibid [64].
48 Ibid [68]. His Honour noted, among other things, that s 35 did not impose a direct burden on political communication; that investigative powers such as s 35 were commonplace; and that there were protections on the use of the information obtained.
49 Ibid [70].
50 Ibid [56]–[57] (Basten JA), [149] (Ward JA); Bathurst CJ agreeing at [7].
51 Ibid [149].
52 For a case that is consistent with this approach, see *Hogan v Hinch* (2011) 243 CLR 506, [98] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) (accepting that the burden upon political communication in any particular case would vary and depend upon the scope of the orders which the court makes under s 42(1) of *Serious Sex Offenders Monitoring Act 2005* (Vic), but finding the section valid).
53 (2013) 296 ALR 353.
54 Ibid [9], [107].
55 Ibid [134]–[135].
56 Ibid [135] (emphasis added).
57 Ibid [135].
58 Ibid [135].
59 Ibid [130].
60 For the text, see ibid [85]–[86].
61 [2015] QSC 334.
62 Ibid [7].
63 Ibid [11].
64 Ibid [24].
65 Ibid [26].
66 Ibid [45].
67 Ibid [40]–[41].
68 Ibid [41].
69 [2015] FCA 1370.
70 Ibid [160].
71 Ibid [279].
72 Ibid [282].
73 Ibid [283].
74 Ibid [284], [287].
75 *Chief of the Defence Force v Gaynor* [2017] FCAFC 41.
76 Ibid [47].
77 Ibid [48], [63].

78 Ibid [105].
79 Ibid [107]–[111].
80 Ibid [112].
81 Ibid [80].
82 Ibid.
83 Any suggestion that focusing on the exercise of the power avoids the problem of trying to determine the validity of the legislation in a factual vacuum is, in our view, mistaken. The High Court has been able to determine whether a law impermissibly burdens the implied freedom even where the plaintiffs have not claimed that they intended to engage in political communication: see *Tajjour v New South Wales* (2014) 254 CLR 508.
84 *Unions NSW v New South Wales* (2013) 252 CLR 530, [30], [36] (French, Hayne, Crennan, Kiefel and Bell JJ), [109]–[111] (Keane J); *McCloy* (2015) 89 ALJR 857, [30] (French CJ, Kiefel, Bell and Keane JJ).
85 *Monis v The Queen* (2013) 249 CLR 92, [343] (Crennan, Kiefel and Bell JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530, [40] (French, Hayne, Crennan, Kiefel and Bell JJ); *McCloy* (2015) 89 ALJR 857, [86] (French CJ, Kiefel, Bell and Keane JJ).