Warwick Ambrose*

WOTTON V QUEENSLAND (2012) 285 ALR 1

I INTRODUCTION

In *Wotton v Queensland*[1] the High Court ('Court') considered whether restrictions on a parolee's ability to attend public meetings and engage with the media breached the implied freedom of political communication. This case note will examine whether the Court's approach in *Wotton* was consistent with the underlying basis of the implied freedom by examining its application to executive bodies, the requirement that the law burden political communication and the treatment of state based political communication.

II THE IMPLIED FREEDOM

The foundation of the implied freedom was articulated in *Lange v Australian Broadcasting Corporation*.[2] The Court established that freedom of political communication was an 'indispensible incident'[3] of the constitutionally prescribed system of government, requiring that the receipt of information by voters[4] be protected so that the Parliament can be properly chosen by the people.[5] As the freedom flows from the text and structure of the *Constitution*[6] the implication extends only so far as is necessary to protect representative government.[7] It does not apply to communications generally.[8] A law will breach the implied freedom when it imposes an effective burden on political communication ('the first limb

---

* LLB student, Adelaide Law School, The University of Adelaide, 2012.

1 (2012) 285 ALR 1 ('*Wotton*').

2 (1997) 189 CLR 520 ('*Lange*').

3 Ibid 559.

4 See, eg, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 51 (Brennan J); Michael Wait, 'Representative Government under the South Australian Constitution and the Fragile Freedom of Communication of State Political Affairs' (2008) 29 *Adelaide Law Review* 247, 248.

5 *Lange* (1997) 189 CLR 520, 559; *Constitution* ss 7, 24.

6 *Lange* (1997) 189 CLR 520, 559, 566–7; Nicholas Aroney 'Lost in Translation: From Political Communication to Legal Communication?'(2005) 28(3) *University of New South Wales Law Journal* 1, 2.

7 *McGinty v Western Australia* (1996) 186 CLR 140, 231–2 (McHugh J) ('*McGinty*'); *Lange* (1997) 189 CLR 520, 566–7; *Coleman v Power* (2004) 220 CLR 1, 48 [88] (McHugh J), 78 (Gummow and Hayne JJ), 82 (Kirby J) ('*Coleman*').

8 *McGinty* (1996) 186 CLR 140, 231–2 (McHugh J); *Lange* (1997) 189 CLR 520, 566–7; *Coleman* (2004) 220 CLR 1, 48 [88] (McHugh J), 78 (Gummow and Hayne JJ), 82 (Kirby J).

of the *Lange* test') which is not appropriate and adapted to a legitimate end ('the second limb of the *Lange* test').[9]

III BACKGROUND

A *Facts*

The appellant, Lex Wotton, was an indigenous man from Palm Island, Queensland. Following an indigenous death in custody he participated in a protest, causing property damage.[10] Mr Wotton was convicted of rioting causing destruction[11] and sentenced to six years imprisonment with a two year non-parole period.[12]

The parole conditions imposed on the appellant were the subject of the appeal. The relevant parole board, pursuant to s 200(2) of the *Corrective Services Act*,[13] required that the appellant not attend public meetings on Palm Island without a corrective service officer's approval and that he not interact with the media.[14] A further control was placed on the appellant as under s 132(1) of the *Corrective Services Act* no person was able to interview or obtain documents from him without the approval of the chief executive of Queensland Corrective Services.[15] If a journalist did seek to engage with the appellant the appellant would have been guilty of aiding and abetting a breach of s 132(1) and therefore violate the parole requirement that he not commit an offence.[16]

B *The Decision*

Three separate judgments were delivered. The plurality of French CJ, Gummow, Hayne, Crennan and Bell JJ held that political communication was burdened but that the burdens imposed by ss 200(2) and 132(1) were appropriate and adapted to the legitimate ends of community safety[17] and ensuring the good conduct of parolees.[18] Justice Kiefel concurred with the plurality.[19] Whilst Heydon J also held that the laws were valid his Honour's conclusion was on the basis that the laws did not 'realistically threaten' free speech and therefore did not constitute a burden which offended the first limb of the *Lange* test.[20]

---

9 *Lange* (1997) 189 CLR 520, 567.

10 *Wotton* (2012) 285 ALR 1, 19–20 [68]–[69] (Kiefel J).

11 *Criminal Code 1899* (Qld) ss 61, 65.

12 *Wotton* (2012) 285 ALR 1, 3 [4] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

13 *2006* (Qld).

14 *Wotton* (2012) 285 ALR 1, 6 [15]–[16] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

15 Ibid 6–7 [17] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Corrective Services Act 2006* (Qld) s 132(2)(d).

16 *Wotton* (2012) 285 ALR 1, 6–7 [17] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Criminal Code 1899* (Qld) s 7.

17 *Wotton* (2012) 285 ALR 1, 10 [31].

18 Ibid 10 [32].

19 Ibid 24–5 [88]–[91].

20 Ibid 17 [58].

IV Executive Decision Making

Wotton confirms that the implied freedom only restricts legislative power as the Court will examine the conferral of authority on an executive body, not the exercise of that authority.[21] This technical point has substantial implications given the wide range of executive discretionary powers.[22] The plurality and Kiefel J held that the conditions imposed under s 200(2) were irrelevant.[23] Rather the question was whether the empowering section, which required that conditions imposed by the parole board be impositions the parole board reasonably considered necessary to ensure good conduct and to stop offences occurring, breached the implied freedom.[24] The plurality and Kiefel J held that review of the actual conditions was a matter for judicial review.[25] Justice Heydon however followed a different approach and focussed on the validity of the conditions.[26] As the implied freedom operates as a limitation on legislative power, rather than conferring individual rights,[27] the plurality and Kiefel J's approach is preferable. Allowing people who are dissatisfied with executive decisions to challenge them because the decision breaches the *Lange* test would transform the implied freedom into an individual right. Applicants in judicial review proceedings could argue that a decision, which only applies to their case, breaches the freedom rather than seeking to establish a general constraint on executive or legislative power. To ensure consistency with the freedom's rationale the appropriate role of judicial review is to determine whether the decision maker acted outside their power.[28] The question of the implied freedom should be resolved by review of the empowering legislation.

V Burden

Referring to the principles underpinning *Lange* may assist to better determine when a burden exists. Justice Heydon stated that a burden is too often 'conceded or assumed'.[29] The plurality and Kiefel J arguably perpetrated this criticism. The plurality stated that the s 132(1) burden was the requirement to seek permission from the chief executive and the s 200(2) burden the 'observance of conditions the parole board reasonably considers necessary'.[30] Justice Kiefel did not explicitly explain why there was a burden, rather her Honour focused on the interaction

21 Ibid 8 [21]–[22] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 21 [74] (Kiefel J).

22 See Transcript of Proceedings, *A-G (SA) v Corporation of the City of Adelaide* [2012] HCATrans 107 (11 May 2012) 60 (M G Hinton QC).

23 *Wotton* (2012) 285 ALR 1, 8 [24] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 21 [74] (Kiefel J).

24 Ibid 9 [28] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 21 [74] (Kiefel J).

25 Ibid 10 [33] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 21 [74] (Kiefel J).

26 Ibid 16–17 [56]–[57].

27 See, eg, *Coleman* (2004) 220 CLR 1, 51 [95] (McHugh J).

28 See generally *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 613–14 (Brennan J); *Shrimpton v Commonwealth* (1945) 69 CLR 613, 629–30 (Dixon J).

29 *Wotton* (2012) 285 ALR 1, 12 [41].

30 Ibid 9 [28].

between the Commonwealth and the states.[31] These approaches suggest that the first limb of the *Lange* test no longer requires an effective burden[32] but rather any factor that restricts communication.

The approach of Heydon J to the first limb should be preferred as it is more consistent with the implied freedom's foundation. Requiring a realistic threat to the freedom to communicate[33] ensures that the restriction on legislative power is no more than what is necessary to ensure that the *Constitution* functions.[34] A burden should present a realistic threat[35] as only substantial burdens will impact on the electorate's free choice.[36] This focuses the inquiry on what burdens will affect voters rather than general concepts of free speech. Holding that any impact on political communication is a burden suggests that the Court is thinking in absolute terms rather than focussing on what is necessary to protect the *Constitution*.

VI Application to State Political Communication

In *Wotton* the distinction between state and Commonwealth communication was further reduced. Since *Lange* the implied freedom has operated on state legislative power where the relevant communication has a federal connection.[37] Whilst it has traditionally been the case that the federal connection need not be strong[38] *Wotton* further lowers the threshold. The plurality determined that a sufficient connection existed as both the Commonwealth and state executives comprise indigenous affairs ministers[39] and due to the integration of federal and state policing.[40] Justice Kiefel merely stated that indigenous affairs 'concern'[41] both levels of government whilst Heydon J did not consider the issue. If a federal connection exists when there are ministerial responsibilities at both levels of government then establishing a Commonwealth connection is not difficult. There are very few, if any, policy areas which are not overseen by both a state and federal minister.[42] Equally the plurality did not elaborate on what was a sufficient level of police integration to enliven the limitation. Given the extensive cross-government cooperation between

31 Ibid 22 [79]–[80].

32 *Lange* (1997) 189 CLR 520, 567.

33 *Wotton* (2012) 285 ALR 1, 17 [58] (Heydon J).

34 See generally Nicholas Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28 *Sydney Law Review* 505.

35 *Wotton* (2012) 285 ALR 1, 17 [58] (Heydon J).

36 *Lange* (1997) 189 CLR 520, 560.

37 Ibid 561; *Levy v Victoria* (1997) 189 CLR 579, 626 (McHugh J); Wait, above n 4, 250.

38 Wait, above n 4, 256.

39 *Wotton* (2012) 285 ALR 1, 9 [26].

40 Ibid 9 [27].

41 Ibid 22 [79].

42 See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 8 May 2012, 4 (Julia Gillard, Prime Minister); Queensland, *Queensland Government Gazette*, No 77, 3 April 2012, 850; South Australia, *Extraordinary Gazette*, No 19, 25 March 2010, 1151.

the states and the Commonwealth[43] it is possible to find some level of integration in most policy areas. Furthermore Kiefel J's statement that the matter need only 'concern'[44] both state and federal governments is unclear as her Honour did not quantify what was a sufficient concern. Requiring only a minimal Commonwealth connection is consistent with French CJ's statement in *Hogan v Hinch*[45] that due to the 'significant interaction' between the levels of government the limitation of the freedom to Commonwealth communication 'is not of great practical significance'.[46] It is now questionable whether any real distinction is drawn between Commonwealth and state communication. If the distinction still exists its theoretical underpinnings are unclear.

Applying the implied freedom merely when there is some connection with federal affairs is arguably inconsistent with the basis of the freedom. If a low threshold exists then potentially the freedom is not limited to what is necessary for the effective operation of the *Constitution*.[47] Where there is only a limited or remote connection the issue is unlikely to be of sufficient significance to actually impact on the election of the Parliament. Similar to Heydon J's argument that a burden should not be readily 'conceded or assumed'[48] the question of a Commonwealth connection could also benefit from greater factual analysis. This inquiry could focus on whether the integration between the state and federal issues is such that the burdened communication will actually influence the electors' decision. In *Wotton* the prominence of indigenous issues in the national debate and the overt role that the Commonwealth plays in indigenous affairs suggests that the communication would influence federal voters. Whilst this results in the same conclusion as arrived at by the Court greater focus on the impact on voters guards against departure from the *Constitution's* structure[49] through ill-defined and unlimited notions of integration.

VII Conclusion

Wotton suggests that the Court may be according insufficient factual analysis to what constitutes a burden on Commonwealth political communication. Further, exploring the implications of impugned legislation would ensure that the operative question remains what will impact on the election of the Commonwealth Parliament so that the Court does no more than what is necessary to protect the *Constitution*. The plurality's and Kiefel J's refusal to review the actions of the parole board affirms that the implied freedom only operates as a restriction on state and federal legislatures.

---

43 See Attorney-General (Cth), 'Submissions of the Attorney-General of the Commonwealth (Intervening)', Submission in *Wotton v Queensland*, No S314 of 2010, 5 [18].

44 *Wotton* (2012) 285 ALR 1, 22 [79].

45 (2011) 243 CLR 506.

46 *Hogan v Hinch* (2011) 243 CLR 506, 543.

47 *Lange* (1997) 189 CLR 520, 561.

48 *Wotton* (2012) 285 ALR 1, 12 [41].

49 Wait, above n 4, 254.