A COMMENT ON HOW THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION RESTRICTS NON-STATUTORY EXECUTIVE POWER

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This comment argues that the decisions of the Executive at all levels of Australian government need to be consistent with the implied freedom of political communication. Hence the test so far propounded for an infringement of the implied freedom needs to be adjusted to refer not just to a 'law' but also to any exercise of non-statutory executive power whether an exercise of royal prerogative power or other non-statutory capacity of the executive. Although there are limited circumstances when such an exercise of executive power affects the legal rights and duties of citizens, when this occurs, the implied freedom offers protection.

I INTRODUCTION

One intriguing aspect of the implied freedom of political communication derived from the *Commonwealth Constitution* remains unresolved: how, if at all, does this constitutional implication apply to the exercise of executive power? The High Court has often described the implied freedom as a restriction on both legislative and executive power.[1] Yet its decisions have only concerned an exercise of legislative power. This may account for the fact that the Court's various tests for an infringement of the implied freedom only assess the validity of 'a law'.

This comment explores how the implied freedom might apply as a restriction on the executive power of the Commonwealth and of the States, in particular, its non-statutory scope. A complicating factor in this analysis is the High Court's insistence that the implied freedom operates only as a negative right and not as an individual or positive right. Nonetheless, the inclusion of executive power in the scope of the implied freedom is not mere rhetoric – it ensures that an actual exercise of executive power must be consistent with the

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[1] Some recognition also given to its application to judicial power: see, eg, Deane J in *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 164.

constitutional freedom to criticise and comment on the institutions of both federal and state governments.

II IMPLIED FREEDOM AS A RESTRICTION ON EXECUTIVE POWER

The first judicial recognition of the implied freedom as a restriction on both legislative and executive power seems to have been given by Brennan J in *Nationwide News Pty Ltd v Wills*:

> I would state the governing implication in these terms: the Constitution prohibits any legislative *or executive* infringement of the freedom to discuss governments and governmental institutions and political matter[2]

His Honour may have included executive power because of his earlier comment that the 'principles of [representative government] and the principle of responsible government are constitutional imperatives which are intended … to make both the legislative and executive branches of the government of the Commonwealth ultimately answerable to the Australian people.'[3]

The inclusion of executive power in this context is consistent with its inclusion in the scope of other constitutional restrictions which are referred to in *Nationwide News*. Brennan J referred to the freedom of interstate trade, commerce and intercourse under s 92, as redefined in *Cole v Whitfield*,[4] as preventing both 'legislative and executive interference'.[5] Deane and Toohey JJ also referred to this restriction as well as those under the *Melbourne Corporation*[6] principle and Chapter III as restrictions on both legislative and executive power. No express reference is made in *Australian Capital Television Pty Ltd v Commonwealth*[7] to the implied freedom of political communication as a restriction on executive power as such. Mason CJ merely refers to the

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[2] (1992) 177 CLR 1, 50-1 (emphasis added).
[3] Ibid 47.
[4] (1988) 165 CLR 360.
[5] (1992) 177 CLR 1, 54.
[6] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.
[7] (1992) 177 CLR 106.

Melbourne Corporation principle as a restriction on Commonwealth legislative and executive powers.[8]

The first time a High Court majority described the implied freedom as a restriction on executive power occurred in *Theophanous v Herald and Weekly Times Ltd.*[9] Mason CJ, Toohey and Gaudron JJ recognised that '[t]he decisions in *Nationwide News* and *Australian Capital Television* establish that the implied freedom is a restriction on legislative and executive power.'[10] Brennan J observed: '[l]ike s 92, the implication limits legislative and executive power.'[11] Deane J[12] suggested the scope of the restriction as 'arguably' wider by including judicial as well as executive power, and as a 'tentative view' that it restricts all the 'organs of government' of the two Territories.

Most significantly in *Lange v Australian Broadcasting Corporation*[13] a unanimous joint judgment of the High Court included Commonwealth executive power in this pivotal statement:

> [Sections] 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative *or executive power*.[14]

Consistently, in *Levy v Victoria*[15] Brennan CJ stated:

> The implication denies legislative *or executive power* to restrict the freedom of communication about the government or politics of the Commonwealth, whatever be the form of communication, unless the

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[8] Ibid 147. However, the Chief Justice did advert to the unrestricted Commonwealth Executive discretion under s 95J of the impugned legislation to make regulations to apply the pt IIID regime to a particular election. This executive discretion prevented the statutory regime from being a justified restriction on the implied freedom. This is of course a statutory delegation to the Executive, not an exercise of executive power as such.
[9] (1994) 182 CLR 104.
[10] Ibid 125.
[11] Ibid 149.
[12] Ibid 164.
[13] (1997) 189 CLR 520.
[14] Ibid 560 (emphasis added).
[15] (1997) 189 CLR 579.

> restriction is imposed to fulfil a legitimate purpose and the restriction is appropriate and adapted to the fulfilment of that purpose. In principle, therefore, non-verbal conduct which is capable of communicating an idea about the government or politics of the Commonwealth and which is intended to do so may be immune from legislative *or executive restriction* so far as that immunity is needed to preserve the system of representative and responsible government that the Constitution prescribes.[16]

In *McClure v Australian Electoral Commission*,[17] Hayne J referred to the implied freedom as 'a freedom from government action'.

The inclusion of executive power along with legislative power continued in *McCloy v New South Wales*[18], where the joint judgment of French CJ, Kiefel, Bell and Keane JJ[19] and that of Gordon J[20] restated the standard description that the implied freedom operates as a limitation on executive power. Gageler J, moreover, repeated it seven times as a limitation on 'executive power' or 'executive action'.[21]

No distinction is made in any of those judgments between federal and State executive power since the implied freedom operates as a restriction equally on both.[22] The same test applies whether it is an exercise of Commonwealth or State power. Yet throughout these decisions the evolving test to determine whether the implied freedom is infringed, by the Commonwealth or a State, has only ever referred to testing the validity of a 'law'. The test always begins with the question: '[d]oes the law effectively burden the freedom in its terms, operation or effect?'.[23]

Given that there is nothing in the test that precludes its requirements from being applied to an exercise of executive power, as distinct from legislative power, one cannot infer from the focus of the test on a 'law', that the High

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[16] Ibid 594 (emphases added).
[17] (1999) 163 ALR 734, 741.
[18] (2015) 257 CLR 178.
[19] Ibid 206 [42].
[20] Ibid 280 [303].
[21] Ibid 227 [114]-[115], 228 [117].
[22] *Unions of NSW v New South Wales* (2013) 252 CLR 530, 550 [25].
[23] See *McCloy v New South Wales* (2015) 257 CLR 178, 193-5 [2] (French CJ, Kiefel, Bell and Keane JJ).

Court intended to preclude an exercise of non-statutory executive power from the scope of the implied freedom. Accordingly, the central issue this comment explores is whether the description of the implied freedom as a restriction on 'executive power' or 'executive action', or as protecting against 'executive interference', has potential operative effect? Or was the Executive merely included out of an abundance of caution to prevent the Commonwealth or State Executives from thinking that they can interfere with the implied freedom with impunity? That is, to obviate the fear that executive power might be exercised to undermine the principle of representative democracy. To resolve this issue, the nature of executive power needs to be explored to assess if, and how, its exercise might burden the implied freedom.

III Executive Power

Despite the complex nature of federal and State executive power, it is useful to distinguish at the outset between powers recognised by the common law as still vested in the Executive branch, and the vast grant of statutory power to the Executive. The latter category of power easily attracts the implied freedom as a restriction on the exercise of delegated legislative power. But, the position in relation to non-statutory executive power is more complicated. Within that category, only some powers can be coercive, that is, capable of affecting legal rights and duties, while others require legislative backing to do so. Obviously, those in the former category are capable of imposing a burden on the implied freedom.

A *Non-Statutory Executive Power*

The Commonwealth Executive possesses a general grant of 'executive power' in s 61 of the Constitution:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Section 61 not only adopts the common law content of executive power as at 1 January 1901, but also 'extends' that content to include 'the execution and maintenance of this Constitution, and of the laws of the Commonwealth'.

Further, the High Court has derived from this extension and the position of the Commonwealth Executive as the national government, the 'implied nationhood power', which enables the Commonwealth Executive 'to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.'[24]

The common law content of Commonwealth and State 'executive power' comprises two distinct forms of powers: prerogative powers, privileges and immunities; and those powers referred to as the capacities of the Crown. Despite debate as to whether the latter capacities should be included in the prerogative powers, the distinction is maintained in this context because of its significance in determining how far executive power may be coercive. Also relevant is the redefinition of Commonwealth executive power in *Williams v Commonwealth (No 1)*,[25] in particular that the Commonwealth as a juristic entity comprises all three branches of government, not merely the Executive.[26] This reinforces the need to include the executive powers in the scope of the implied freedom.

Central to the issue being explored is to identify to what extent might an exercise of any of these components of non-statutory executive power restrict the freedom of political communication. A starting point is to identify how far an exercise of non-statutory executive power can be coercive in the sense of affecting legal rights and duties.

1 *Executive Power Cannot Change Statute Law or the Common Law*

The most fundamental proposition is clear: no non-statutory exercise of executive power can change the law - whether legislation or common law. As Isaacs J in *R v Kidman* stated: '[t]he Executive cannot change or add to the law; it can only execute it.'[27]

Hence, the Executive cannot create a new offence or modify an existing offence. For example, Brennan J observed in *Davis v Commonwealth*:

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[24] *Victoria v Commonwealth (AAP Case)* (1975) 134 CLR 338, 397 (Mason J).
[25] (2012) 248 CLR 156.
[26] Ibid 184 (French CJ).
[27] (1915) 20 CLR 425, 441 cited by French CJ in *Williams v Commonwealth (No 1)* (2012) 248 CLR 156, 187 [27].

> At least since the *Case of Proclamations*,[28] the exercise of prerogative power has not been capable of creating a new offence. Nor can the exercise by the Executive Government of a non-statutory capacity create an offence.[29]

Similarly, the Supreme Court of the United Kingdom in *R v Secretary of State for Exiting the European Union* (*Miller's Case*)[30] affirmed the incapacity of the Royal prerogative power in the United Kingdom to alter United Kingdom statute law or the common law.[31] This was established in the *Case of Proclamations* by Coke CJ: 'the King by his proclamation or other ways cannot change any part of the common law, statute law, or the customs of the realm.'[32]

It follows from this principle that no new prerogative powers are capable of being created by the courts, for this would effect a change in the common law. As Lord Diplock warned in *British Broadcasting Corporation v Johns*: 'It is 350 years and a civil war too late for the Queen's courts to broaden the prerogative.'[33]

2 *Executive Power Cannot Interfere With Legal Rights or Duties Unless Authorised By a Specific Prerogative or Statute*

Absent specific prerogative authority, the Executive needs statutory authority to act coercively. This fundamental principle was established in 1765 in *Entick v Carrington*[34] where the Court of Common Pleas held the King's Messengers liable in trespass for entering the plaintiff's property to seize his papers. Their actions were not authorised by any prerogative or statute. So their warrant, issued by the Secretary of State, was of no legal force. This principle was again articulated and applied by Lord Atkin in *Eshugbayi Eleko v Government of Nigeria*:

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[28] (1611) 12 Co Rep 74; 77 ER 1352.
[29] (1988) 166 CLR 79, 112. See also *Williams v Commonwealth (No 1)* (2012) 248 CLR 156, 232 [135] (Gummow and Bell JJ).
[30] [2017] UKSC 5 (24 January 2017).
[31] Ibid [50].
[32] Ibid [44].
[33] [1965] Ch 32, 79.
[34] (1765) 19 St Tr 1030 especially at 1064-6; *Joseph v Colonial Treasurer of NSW* (1918) 25 CLR 32, 52.

> In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice.[35]

This means that the Crown cannot use its capacities in a coercive way or otherwise interfere with the legal rights or duties of others. Its executive power can only be used coercively where a specific prerogative authorises such a legal effect. Reliance on the Crown's juristic capacity will be insufficient. Professor Zines explained this distinction:

> An important difference between prerogatives and capacities is that the former, such as the declaration of war and peace, the alteration of national boundaries, acts of state, the pardoning of offenders and the various Crown immunities and privileges, are capable of interfering with what would otherwise be the legal rights of others. In the case of capacities, their exercise cannot override legal rights and duties. [36]

Professor Lane[37] illustrated this lack of power, in the absence of prerogative or statutory authority, whenever the Federal Executive affects 'the subject coercively, in his life, liberty or property' with these examples[38]:

> Thus, lacking statutory authority, the Executive was not able to deport,[39] detain or extradite a fugitive,[40] arrest a person believed to have committed a felony abroad,[41] arbitrarily deny mail and telephone services,[42] compel attendance to give evidence or compel the production of documents in an inquiry,[43] prosecute the subject simply because he belonged to an association and not because he engaged in specific conduct made illegal by the law of the land.[44]

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[35] [1931] AC 662, 670 cited in B V Harris, 'The 'Third Source" of Authority for Government Action' (1992) 108 *Law Quarterly Review* 626, 631.
[36] See Leslie Zines, 'The inherent executive power of the Commonwealth' (2005) 16 *Public Law Review* 279.
[37] P H Lane, *Lane's Commentary on the Australian Constitution* (Law Book Company, 1986) 318-9.
[38] Ibid 319.
[39] *Ex parte Walsh and Johnson: Re Yates* (1925) 37 CLR 36, 53, 79, 132.
[40] *Barton v Commonwealth* (1974) 131 CLR 477, 483, 494.
[41] *Brown v Lizars* (1905) 2 CLR 837, 851, 860.
[42] *Bradley v Commonwealth* (1973) 128 CLR 557, 575, 580-1, 583.
[43] *McGuiness v Attorney-General (Vic)* (1940) 63 CLR 73, 83, 102.
[44] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

Most recently, Gageler J in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*[45] emphasised the lack of any non-statutory executive power to detain an individual without statutory authority since the *Habeas Corpus Act* 1640:[46]

> The inability of the Executive Government of the Commonwealth to authorise or enforce a deprivation of liberty is not simply the consequence of the absence of any prerogative power on the part of the Executive Government to dispense with the operation of the common law. It is the consequence of an inherent constitutional incapacity which is commensurate with the availability, long settled at the time of the establishment of the Commonwealth, of habeas corpus to compel release from any executive detention not affirmatively authorised by statute.[47]

On the other hand, certain prerogatives are potentially coercive and so capable of affecting legal rights and duties. The majority of the Supreme Court of the United Kingdom in *Miller's Case*[48] acknowledged that an exercise of the Royal prerogative could 'affect the legal rights and duties of others',[49] for example, in the exercise of the Crown's power to decide on the terms of service of its servants and to alter those rights, and the Crown's power to destroy property during wartime.[50]

In addition to the potential for particular prerogative powers to affect the legal rights and duties of others, there is, in the case of the Commonwealth Executive only, the possibility that legal rights might also be affected by the implied nationhood power and the express power in s 61 to maintain the *Commonwealth Constitution*.

A clear example is the exercise of coercive Commonwealth executive power in *Ruddock v Vadarlis*[51] to prevent entry of aliens into Australia. According to a majority of the Full Court of the Federal Court, this power authorised the boarding of a Norwegian ship, *MV Tampa*, by 45 Special Armed

[45] (2016) 257 CLR 42.
[46] 16 Car I c 10.
[47] (2016) 257 CLR 42, 105 [159].
[48] [2017] UKSC 5 (24 January 2017).
[49] Ibid [52].
[50] Ibid.
[51] (2001) 110 FCR 491.

Services (SAS) troops while the ship was within Australian waters four nautical miles from the coast of the Australian territory of Christmas Island. French J (with whom Beaumont J agreed) seemed to derive this power, not from the prerogative, but from s 61:

> In my opinion, the Executive power of the Commonwealth, absent statutory extinguishment or abridgement, would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion … The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the *Constitution*, the ability to prevent people not part of the Australia [sic] community, from entering.[52]

French J left open whether this Commonwealth executive power extended to the expulsion of non-citizens present in Australia.[53] In dissent, Black CJ found the 'preponderance of opinion by the text writers' was against any prerogative power to exclude aliens from entering Australia during peacetime.[54]

The express extension of s 61 executive power to 'the execution and maintenance of this Constitution, and of the laws of the Commonwealth' is another potential source of coercive Commonwealth executive power. As French CJ identified in *Williams v Commonwealth (No 1)*: 'the executive power of the Commonwealth extends to the doing of all things which are necessary or reasonably incidental to the execution and maintenance of a valid law of the Commonwealth once that law has taken effect', without any further Commonwealth statutory authorisation.[55]

3 *The Executive Can Act in a Non-Coercive Way Subject to Statute and the Common Law*

This Executive ability to act non-coercively derives from the juristic capacity of the Crown as the Executive branch. It has been described as 'the freedom which

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[52] Ibid 543 [193].
[53] Ibid.
[54] Ibid 500 [26].
[55] (2012) 248 CLR 156, 191 [34].

the government has to do anything that is not prohibited by law.'[56] Examples include the entering into contracts, the establishment of a business and other entities, and the distribution of information.[57]

Commentators have argued that the Crown should not necessarily be accorded the same capacities as an individual, given the much greater impact the Crown can have on individuals. For instance, Professor Zines opined:

> [C]ertain consequences of government action affecting the liberty of the individual should be recognized as primarily governmental and not comparable with private action. Unless such actions were authorised by the prerogative they should require statutory authority. They include official inquiries relating to private persons, surveillance of private persons and the preparation and supply of information regarding individuals which could, for example, affect where they work or reside.[58]

This view was effectively adopted in *Williams v Commonwealth (No 1)*[59] when it required statutory authority for Commonwealth contracts other than those entered into in the ordinary course of government administration (see further below). Hayne J emphasised that it is 'public money' which is being spent, not merely Commonwealth money.[60]

IV POTENTIAL EXECUTIVE NON-STATUTORY INFRINGEMENT OF THE IMPLIED FREEDOM

Given the possibility that an exercise of Commonwealth executive power through one of its prerogative powers or the express self-maintenance power might affect the legal rights and duties of individuals and entities, a critical issue arises: in what circumstances might such an exercise of executive power potentially burden the freedom of political communication? In this context, the Crown's capacities also need to be considered despite their lack of coercive force. It is important to keep in mind though that in those areas of executive power where the implied freedom might potentially be burdened, it is most

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[56] Harris, above n 35.
[57] Ibid 627.
[58] Leslie Zines, *The High Court and the Constitution* (The Federation Press, 5th ed, 2008) 357.
[59] (2012) 248 CLR 156.
[60] Ibid 241 [173].

likely they have been abrogated completely or substantially by statute. The survey below assumes, however, the absence of any such statutory encroachment.

The *external prerogatives*, exclusive to the Commonwealth, that may affect legal rights and duties include the disposition of the armed forces, the declaration and prosecution of war, and the security of the Commonwealth. The prosecution of a war or similar emergency is obviously an inherently coercive power, although its scope remains uncertain as Professor Zines[61] suggested:

> War and other emergencies provide clear exceptions to the principle that prerogatives are non-coercive. The general scope of the power in these circumstances is, however, uncertain. In wartime there seems to be a power to intern enemy aliens. Other powers are to requisition national ships required in time of war, to destroy property to avoid it falling into the control of an enemy, and to go on land to erect fortifications to repel an invasion (a right shared with citizens). In the case of the requisition, damaging or destruction of property compensation is payable.[62]

Internal security to keep the peace (absent war or similar emergency) has not been authoritatively established as a prerogative power due to the fact that legislation usually confers, on the Executive, statutory powers needed to respond.[63] But if it were included in the prerogative, this would be a fertile area for the implied freedom to be affected.

The *domestic prerogatives* that may affect legal rights and duties include the initiation and termination of criminal proceedings, granting pardons, creation of corporations by charter, *bona vacantia, waifs*, treasure trove, and copyright in public documents.[64] But the most obvious area in which the implied freedom might be affected is in the area of the Executive's relationship with its ministers, officers and employees. As recognised by the

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[61] Zines, 'Inherent', above n 36.
[62] Ibid 287.
[63] Zines argues against this being included in the prerogative: ibid 287.
[64] See Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 308.

Supreme Court of the United Kingdom in *Miller's Case*,[65] a specific direction or instruction falls within executive power.

An extreme example of a likely breach of the implied freedom is a gag order on ministers from talking to the media. Such a gag order has been imposed at the local government level. For instance, a resolution of the Council of the City of Perth prevented its councillors from speaking with the media on Council business for a decade until revoked in 2017. Recent statutory restrictions on federal[66] and State[67] public servants as to their use of social media need to be tested for validity against the implied freedom. The same test would have applied had they been imposed by a non-statutory exercise of exercise power.

Another potential area is that of Freedom of Information ('FOI') where an executive decision to refuse access to government information might interfere with the implied freedom, even in circumstances where FOI legislation exempts disclosure.[68] This, like 'official secrecy'[69] restrictions, involves an exercise of statutory executive power.

The regulation of the use of, or access to, government property could potentially burden the implied freedom. For instance, refusal to permit a meeting or a protest on government premises.[70] Whether such refusal is an exercise of prerogative power or of a mere capacity of proprietorship is unclear.[71]

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[65] [2017] UKSC 5 (24 January 2017) [52].

[66] See guidelines from the Australian Public Service Commission (7 August 2017): <http://www.apsc.gov.au/publications-and-media/current-publications/making-public-comment>.

[67] See, eg, guidelines from the New South Wales Department of Industry, Skills and Development: <https://www.industry.nsw.gov.au/policies/items/social-media-policy>.

[68] Richard Jolly, 'The Implied Freedom of Political Communication and Disclosure of Government Information' (2000) 28 *Federal Law Review* 41, 44.

[69] Finn J in *Bennett v President, Human Rights and Equal Opportunity* (2003) 134 FCR 334 held invalid reg 7(13) of the Public Service Regulations (Cth) for infringing the implied freedom of political communication.

[70] See eg *Cornelius v NAACP Legal Defense and Educational Fund Inc* (1985) 473 US 788 cited by Kirby J in *Levy v Victoria* (1997) 189 CLR 579, 639 where the Executive excluded certain charities from a fund-raising drive in federal workplaces.

[71] See Zines, *The High Court and the Constitution*, above n 58, 349 who agrees with Richardson's doubt over the assertion in *Johnson v Kent* (1975) 132 CLR 164 at 170 that this would be an exercise of the prerogative: J E Richardson 'The Executive Power of the Commonwealth' in Zines (ed), *Commentaries on the Australian Constitution* (Butterworths, 1977) 50. 57.

As for the Crown's *capacities*, while not coercive in terms of unilaterally imposing legal rights and duties, their exercise may affect the implied freedom, and thereby be subject to it. This is particularly so when the Executive enters into government contracts. The imposition of restrictions on communication in commercial agreements between the Executive and other parties might burden the implied freedom.[72] Hence, undertakings of confidentiality need to be tested as to their compatibility with the implied freedom.[73]

The need for statutory authorisation of Commonwealth contracts established in *Williams v Commonwealth (No 1)*[74] makes it more likely that the implied freedom can be invoked in respect of government contracts. It remains unclear to what extent the contractual details need to be authorised by the Commonwealth Parliament. However, in relation to Commonwealth contracts exempted from statutory authorisation by *Williams v Commonwealth (No 1)*, namely, contracts which relate to, or are incidental to, the ordinary, well-recognised functions of government, or, possibly[75] those authorised by the implied nationhood power, the application of the implied freedom as a restriction on executive power remains a distinct issue.

Williams v Commonwealth (No 1) raises the prospect that statutory authorisation might be required for other Crown capacities, such as the conduct of inquiries and the incorporation of a company. This possibility flows from the concerns of the judgments in *Williams v Commonwealth (No 1)* with the need for adequate Executive accountability, the federal balance, and the consequent refusal to equate the freedoms of individuals with those of the juristic Commonwealth.

The impact of *Williams v Commonwealth (No 1)* on the State Executives is not readily apparent from the judgments. However, the High Court's adoption of the ratio from *New South Wales v Bardolph*[76] that the NSW Executive had the executive power to enter into an advertising contract

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[72] See Zines, *The High Court and the Constitution*, above n 58, 358 and Lindell, below n 77 citing Tom Brennan, 'Undertakings of Confidence by the Commonwealth – Are There Limits?' (1998) No 18 *AIAL Forum* 8.
[73] Cf *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151.
[74] (2012) 248 CLR 156.
[75] Acknowledged by French CJ in *Williams v Commonwealth (No 1)* (2012) 248 CLR 156, 191 [34].
[76] (1934) 52 CLR 455.

because it was incidental to the ordinary, well-recognised functions of government, suggests that State Executives might be required to have statutory authorisation for any contracts outside that field.[77]

French CJ acknowledged in *Williams v Commonwealth (No 1)* that '[t]here are undoubtedly significant fields of executive action which do not require express statutory authority'.[78] One significant field conferred by s 61 which requires no further statutory authorisation is, as French CJ identified in *Williams v Commonwealth (No 1),* that 'the executive power of the Commonwealth extends to the doing of all things which are necessary or reasonably incidental to the execution and maintenance of a valid law of the Commonwealth once that law has taken effect.'[79]

The Chief Justice also identified two further fields of non-statutory executive action: 'the administration of departments of State under s 64 of the Constitution and those activities which may properly be characterised as deriving from the character and status of the Commonwealth as a national government.'[80]

V EXECUTIVE POWER FROM STATUTORY GRANT

How the implied freedom might restrict an exercise of discretionary administrative power conferred by statute or regulation was explored in *Wotton v Queensland*[81] where the plurality observed:

> [W]hile the exercise of [State] legislative power may involve the conferral of authority upon an administrative body such as the Parole Board, the conferral by statute of a power or discretion upon such a body will be constrained by the constitutional restrictions upon the legislative power, with the result that in this particular respect the administrative body must not act ultra vires.[82]

[77] Cf Geoffrey Lindell, 'The Changed Landscape of the Executive Power of the Commonwealth after the *Williams* Case' (2013) 39 Monash University Law Review 348, 384-5.
[78] *Williams v Commonwealth (No 1)* (2012) 248 CLR 156, 191 [34].
[79] Ibid.
[80] Ibid.
[81] (2012) 246 CLR 1.
[82] Ibid 13-4, [21].

That is, the validity of an exercise of a discretionary statutory power does not entail any constitutional issue of compliance with the implied freedom as such. Rather, compliance is effectively subsumed in deciding whether the decision is ultra vires the statutory grant.[83]

An instance of this approach is found in the decision of the Full Court of the Federal Court in *Chief of the Defence Force v Gaynor*[84] which overturned the decision of Buchanan J that the Chief of the Defence Force had infringed the implied freedom of political communication in terminating the plaintiff's commission with the Australian Defence Force Reserve. This was not an exercise of non-statutory executive power because the termination was made pursuant to Commonwealth regulations. However, *Gaynor* explores the nature of the implied freedom as a negative right with the Full Court finding that the primary judge had erred in using it as a positive right.

A Chief of the Defence Force v Gaynor

Gaynor, who had transferred from the Regular Army to the Army Reserve in 2011, and was promoted to Major in January 2013, had his commission terminated in 2014 by the Chief of the Defence Force pursuant to reg 85(1)(d) of the *Defence (Personnel) Regulations 2002* (Cth). That regulation authorised termination if the Chief of the Defence Force was satisfied that the officer's retention in the service was 'not in the interest' of the Army. That view was formed in this case essentially on two grounds: first, Gaynor had violated on many occasions an official instruction, entitled 'Use of social media by Defence Personnel' issued on 16 January 2013, by criticising Defence Force policies which promoted equality and diversity, particularly in relation to homosexuality and transgender behaviour; and secondly, he had refused to comply with a specific instruction, issued to him by the Deputy Chief of Army on 22 March 2013, to cease immediately from posting any further such criticisms in the public domain.

Gaynor challenged his termination by judicial review pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). Buchanan J rejected all the grounds of review relied upon except for the implied freedom of political

[83] Ibid 14, [22].
[84] (2017) 246 FCR 298.

communication. His Honour considered that Gaynor's right to make political comments in his personal capacity while in the Army Reserve was infringed and could not be justified within the *Lange* test. His Honour found that the termination of Gaynor's commission failed the third element of the test of proportionality enunciated in *McCloy* because termination was not '"adequate in its balance" having regard to the fact that the applicant's conduct involved the expression of political opinion, effectively as a private citizen.'[85]

On appeal the Full Court of the Federal Court[86] overturned this decision on the basis that the primary judge had erred in his application of the implied freedom by using it as a positive right to overturn the decision to terminate Gaynor's commission. The only legitimate issue in relation to the implied freedom was whether reg 85(1)(d) of the *Defence (Personnel) Regulations 2002* (Cth), which conferred the discretionary power to terminate, complied with the freedom. Deciding that this was so, the primary judge was not entitled to also review the actual decision made pursuant to that power. In doing so, the Full Court held the primary judge had gone too far – in effect, he had applied the implied freedom as 'an individual right'.

The Full Court[87] followed the High Court's consistent warning[88] that the implied freedom does not confer a personal right, as such, since the focus must be on how the exercise of power affects that freedom not the rights of the plaintiff. The Court found that the primary judge had repeatedly referred in his reasons to the burden on Gaynor's *right* to communicate on political matters.[89] He had looked 'through an incorrect prism':

> We have concluded the primary judge did err in the level at which he applied the *Lange* test, and this led his Honour to look at the constitutional argument through an incorrect prism – namely, whether the respondent's 'right' to freedom of political communication was impermissibly impaired by the termination decision. … In our opinion, the better view of his Honour's reasons is that the approach of seeing the freedom as an individual right is what

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[85] *Gaynor v Chief of the Defence Force (No 3)* (2015) 237 FCR 188, 255-6 [284].
[86] *Chief of the Defence Force v Gaynor* (2017) 246 FCR 298.
[87] Ibid 310-2 [48]-[52].
[88] See eg *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.
[89] *Chief of the Defence Force v Gaynor* (2017) 246 FCR 298, 312-4 [55]-[63]

> then led to the application of the *Lange* test at what the appellant describes as 'the wrong level'.[90]

Following *Wotten*, the Full Court only reviewed the validity of reg 85 in terms of the implied freedom. The Court accepted the appellant's concession that reg85(1)(d), in its operation and effect, burdened the implied freedom, but concluded that this burden was justified in accordance with the various requirements of the *McCloy* test.[91] The Full Court then refused to go one step further to review Gaynor's actual termination since no constitutional issue was involved: if that termination violated the implied freedom, that was an issue of ultra vires for judicial review – which was not part of the appeal to the Full Court in that case.

The Full Court briefly referred[92] to prior judicial comment that the implied freedom restricted executive power, as well as legislative power. But correctly noted that such comments 'tend to be general propositions, which have not yet been squarely confronted and teased out in a case where there was no statutory source for the impugned power.'[93] The Court seemed to acknowledge the difficulty with the *Lange* test, drafted in terms of testing only a law, yet noted 'the tantalising reference to executive power remains.'[94] Consequently, the Court left open the issue whether the implied freedom restricted an exercise of Commonwealth executive power sourced entirely in s 61 of the *Constitution* in the absence of any statutory authority.[95]

Gaynor raises a perplexing issue: how does the implied freedom apply only as a negative right in the exercise of executive power, particularly in the exercise of a non-statutory executive power?

In referring often to the impact of the termination on the 'rights' of Gaynor, the primary judge left himself exposed to being overturned for according a personal or individual right in that case. What difference would it have made if he had referred instead to the impact of the termination *on the*

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[90] Ibid 310 [47].
[91] Ibid 324 [112].
[92] Ibid 314-5 [67]-[72].
[93] Ibid 314-5 [68].
[94] Ibid 314-6 [68], 315 [70].
[95] Ibid 315 [71].

implied freedom to criticise the policies of the Defence Force? At such a level does the distinction between a negative or positive right make sense? Could it be that this distinction between positive and negative rights does not work in relation to executive power? If so, this adds to the criticism of the original derivation of that distinction in relation to the exercise of legislative power.[96]

A clear benefit of the extension of the implied freedom as a constitutional restriction on non-statutory executive power is that it overrides any potential non-justiciability of the exercise of prerogative power.[97] It fits neatly within the approach suggested by Professor Winterton:

> When the exercise of a prerogative power directly affects individual liberties, and raises questions with which the courts are familiar and which are capable of resolution by the application of 'judicially discoverable and manageable standards', there is no apparent reason why the courts should not review the manner of exercise of the power, and strong arguments in favour of their doing so, because 'unfettered executive discretion is a constitutional monstrosity'. Courts might, for example, review requests for extradition of fugitive offenders, decisions to construct public buildings capable of constituting a public nuisance, military action which damages or destroys property, and decisions relating to the award of government contracts, among others, to ascertain whether the prerogative power involved was exercised honestly, fairly, and without recourse to considerations, or for purposes, which appear to be irrelevant or improper having regard to the nature and function of the power.[98]

VI CONCLUSION

The extension of the implied freedom of political communication as a restriction on Commonwealth and State executive power should not be viewed as mere constitutional rhetoric. It is a necessary part of the protection which the implied freedom affords to Australia's representative and responsible government at both the federal and State level. While the implied freedom is

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[96] See Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374.
[97] See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 3rd ed, 2004) 140.
[98] George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 137 (citations omitted).

particularly important in relation to the exercise of executive power from statutory grant, it is also an important constitutional safeguard in relation to the exercise of non-statutory executive power — whether this involves prerogative power or an Executive capacity. Although the implied freedom is more likely to be invoked where there is a coercive exercise of power in the former case, a non-coercive use of the Executive's capacities to implement government policy, especially in a commercial context, may equally affect the implied freedom. It is necessary, however, to apply the implied freedom in such cases as a negative right, rather than as a positive right. Essentially, this means that any complainant needs to assert an *immunity* from the exercise of executive power, rather than any right as such.