

# FINDING THE STREAMS' TRUE SOURCES: THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION AND EXECUTIVE POWER

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*In this article, we explore the implied freedom of political communication's ('implied freedom's') application to executive power at the Commonwealth, State and Territory levels. We propose that the proportionality test used by the plurality in McCloy v News South Wales<sup>1</sup> be adapted to executive actions affecting the implied freedom. We then illustrate our proposed approach by applying it to the case of Chief of the Defence Force v Gaynor.<sup>2</sup>*

## I INTRODUCTION

Over the past 25 years, the implied freedom of political communication ('implied freedom') has become an established part of Australia's constitutional landscape. It is well accepted that the implied freedom limits Commonwealth, State and Territory legislation. However, its effect on Commonwealth, State and Territory executive powers is somewhat less clear.

In this article, we examine the current approach to the implied freedom and executive power. We also propose an approach that, in our view, is more firmly grounded in the text and structure of the *Commonwealth Constitution*. We then apply our proposed approach to the topical case of *Chief of the Defence Force v Gaynor*.<sup>3</sup>

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<sup>1</sup> (2015) 237 CLR 178.

<sup>2</sup> [2017] FCAFC 41 (8 March 2017) (*'Gaynor'*).

<sup>3</sup> *Ibid.*

This article is split into the following parts. In Part II, we cover the current state of the law concerning the implied freedom, specifically the test provided by the plurality in *McCloy v New South Wales*.<sup>4</sup> In Part III, we note important points about the implied freedom. The implied freedom is not a right but a restriction on Commonwealth, State and Territory legislative and executive power. However, it is also a strong and wide-ranging freedom. Further, common law freedom of expression is itself of constitutional importance, and is relevant to assessing proportionality in the *McCloy* test.

In Part IV, we note the current approach to the implied freedom and executive power, specifically noting the approach in *Wotton v Queensland*.<sup>5</sup> In Part V, we propose another approach to the implied freedom and executive power. We model this approach on that of the plurality in *McCloy*. We note here that the sources of executive power differ between the Commonwealth on the one hand, and the States and Territories on the other. In Part VI, we consider some issues concerning our proposed approach. These issues include whether our proposed approach applies to State and Territory executive power, and to non-statutory executive power. That said, our focus in this article is on the implied freedom's effect on the execution of laws and not its effect on non-statutory executive power. In Part VII, we argue that the High Court's approach in *Wotton* does not bar adopting our proposed approach.

In Part VIII, we apply our proposed approach to *Gaynor*. We also explore issues arising from *Gaynor*, including accommodating the implied freedom in the Australian Defence Force ('ADF') and other government agencies.

## II THE *MCCLOY* TEST

In *McCloy*, the plurality adopted a proportionality test as a tool for determining whether or not legislation impermissibly infringed the implied freedom.<sup>6</sup> This test was modified in *Brown v Tasmania*,<sup>7</sup> and reads as follows:

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<sup>4</sup> (2015) 257 CLR 178 (*McCloy*). In this article, we refer to the test that the plurality used in *McCloy* as the '*McCloy* test'.

<sup>5</sup> (2012) 246 CLR 1 (*Wotton*).

<sup>6</sup> *McCloy* (2015) 257 CLR 178, 194-5 [2] (French CJ, Kiefel, Bell and Keane JJ).

<sup>7</sup> *Brown v Tasmania* [2017] HCA 43 (18 October 2017) [104] (Kiefel CJ, Bell and Keane JJ), [277] (Nettle J) (*Brown*) cf [155]-[156] (Gageler J). Because of her Honour's views about how to determine

1. Does the law effectively burden the implied freedom of political communication in its terms, operation or effect?
2. If 'yes' to the first question, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally-prescribed system of representative and responsible government?
3. If 'yes' to the second question, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally-prescribed system of representative and responsible government?

The third stage of the test requires what the plurality in *McCloy* termed 'proportionality testing'. A law justifies its burden on the implied freedom if it is:

- *Suitable* — there is a rational connection between the provision and its purpose.
- *Necessary* — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom.
- *Adequate in its balance* — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.<sup>8</sup>

It should be noted that other members of the High Court in *McCloy* did not share the plurality's approach to proportionality.<sup>9</sup> However, the plurality's approach is, for now, authoritative concerning whether or not a law is reasonably appropriate and adapted to its purpose.

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whether or not the implied freedom had been impermissibly infringed, Gordon J did not see the need to reconsider *McCloy*: see *ibid* [471]-[482]. In this article, when we mention the '*McCloy* test' it should be taken to mean 'the *McCloy* test as modified in *Brown*'.

<sup>8</sup> *McCloy* (2015) 257 CLR 178, 195 [2]. It appears that *Brown* did not alter these steps in 'proportionality testing'.

<sup>9</sup> See *ibid* 236-9 [145]-[152] (Gageler J), 269-70 [254]-[255] (Nettle J), 281-2 [309]-[311] (Gordon J). It should be noted that, in *Brown*, Nettle J appeared to support proportionality by adopting applying the *McCloy* test: see [2017] HCA 43 (18 October 2017) [236]. Gageler J furthered his Honour's criticism of the proportionality approach: *ibid* [158]-[165]. Gordon J applied the same approach her Honour had applied in *McCloy*, that is, one anchored in the *Lange* test: *ibid* [312]-[324].

### III IMPORTANT POINTS ABOUT THE IMPLIED FREEDOM

There are a number of important points to note about the implied freedom.

#### A *It Restricts Legislative and Executive Power; It Is Not a Right*

The implied freedom is sometimes referred to as the 'implied right of political communication'. This is not how the implied freedom works. Rather, the implied freedom is a restriction on legislative and executive powers. The implied freedom, in effect, creates a line that Commonwealth, State and Territory legislative and executive actions cannot cross. Any such action that crosses this line is invalid.

As the High Court noted in *Lange v Australian Broadcasting Corporation*:<sup>10</sup>

[The sections creating the implied freedom] do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative *or executive power*. As Deane J said in *Theophanous*, they are 'a limitation or confinement of laws *and powers* [which] gives rise to a pro tanto immunity on the part of the citizen from being adversely affected by those laws or by the exercise of *those powers* rather than to a 'right' in the strict sense'.<sup>11</sup>

#### B *It Is a Strong and Wide-Ranging Freedom*

We have mentioned that the implied freedom creates a line. To continue the metaphor, that line is not easily broken, and the area it surrounds is very large. Indeed, we daresay many in the legal establishment do not fully appreciate just how strong, and just how wide-ranging the implied freedom is.

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<sup>10</sup> (1997) 189 CLR 520 ('*Lange*').

<sup>11</sup> Ibid 560 (citations omitted) (emphasis added). See also, for example, *Brown* [2017] HCA 43 (18 October 2017) [90] (Kiefel CJ, Bell and Keane JJ), [185] (Gagerler J), [236] (Nettle J), [313], [465] (Gordon J), [559] (Edelman J); *McCloy* (2015) 257 CLR 178, 202-3 [30] (French CJ, Kiefel, Bell and Keane JJ); *Tajjour v New South Wales* (2014) 254 CLR 508, 569 [104] (Crennan, Kiefel and Bell JJ), 593-4 [198] (Keane J); *Unions NSW v New South Wales* (2013) 252 CLR 530, 551-2 [30], 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 574 [119] (Keane J) ('*Unions NSW*'); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 89 [220] (Crennan and Kiefel JJ) ('*Adelaide Preachers' Case*'); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 451 [381] (Hayne J).

In *Monis v The Queen*,<sup>12</sup> Hayne J observed that while implied freedom was not absolute, this did not mean ‘it must yield to accommodate the regulation of conduct which a majority of members of the Australian community may consider to be repugnant.’<sup>13</sup> Further, he observed that the freedom being implied rather than express did not:

...make it brittle or otherwise infirm, or make it some lesser or secondary form of principle. Rather, accepting that the freedom is not absolute recognises that it has boundaries. But within those boundaries the freedom limits legislative power.<sup>14</sup>

In *Coleman v Power*,<sup>15</sup> McHugh J observed:

In determining whether a law is invalid because it is inconsistent with freedom of political communication, it is not a question of giving special weight in particular circumstances to that freedom. Nor is it a question of balancing a legislative or executive end or purpose against that freedom. Freedom of communication always trumps federal, State and Territorial powers when they conflict with the freedom.<sup>16</sup>

But, how is the strength and width of the implied freedom determined? We have examined the effect of popular sovereignty and the plenary powers of Australian Parliaments on the implied freedom in our other work.<sup>17</sup> Implications from the *Commonwealth Constitution* must clearly arise from its text and structure.<sup>18</sup> Popular sovereignty and the plenary powers of Australian

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<sup>12</sup> *Monis v The Queen* (2013) 249 CLR 92 (*‘Monis’*).

<sup>13</sup> *Ibid* 141 [104] (Hayne J).

<sup>14</sup> *Ibid*.

<sup>15</sup> (2004) 220 CLR 1 (*‘Coleman’*).

<sup>16</sup> *Ibid* 49 [91] (McHugh J) (citations omitted); Gummow and Hayne JJ supported McHugh J’s comments in this regard: see *ibid* 77 [195] (Gummow and Hayne JJ).

<sup>17</sup> See Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C is Wrong* (Connor Court, 2016); Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, ‘An Opportunity Missed? A Constitutional Analysis of Proposed Reforms to Tasmania’s ‘Hate Speech’ Laws’ (2016) 7 *The Western Australian Jurist* 275 (*‘An Opportunity Missed?’*); Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, Submission No 181 to the Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia*, 23 December 2016; and Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, Submission No 179 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry Into the Status of the Human Right to Freedom of Religion or Belief*, 5 May 2017.

<sup>18</sup> *Lange* (1997) 189 CLR 520, 566-7. See also *McGinty v Western Australia* (1996) 186 CLR 140, 168 (Brennan CJ), 182-3 (Dawson J), 231 (McHugh J), 284-5 (Gummow J) (*‘McGinty’*).

Parliaments clearly arise from the *Commonwealth Constitution*. We have noted:<sup>19</sup>

Under the *Commonwealth Constitution*, the Australian people are sovereign. That is, it is they alone who have the power to change the *Commonwealth Constitution*. Further, it is the Australian people who elect representatives to the Commonwealth Parliament to legislate in their name. It is also the people of the various Australian States and Territories who elect representatives to their respective Parliaments to legislate in their name.<sup>20</sup>

In addition, Commonwealth,<sup>21</sup> State<sup>22</sup> and Territory<sup>23</sup> Parliaments each have the plenary power to make laws. The Commonwealth Parliament's legislative powers are limited to those matters specified in the *Commonwealth Constitution*. However, its scope to legislate with respect to such matters is very wide.<sup>24</sup> State and Territory Parliaments may legislate with respect to any matter, subject to the *Commonwealth Constitution* and any limitations in their respective constitutions.<sup>25</sup> The content of laws with respect to matters within the legislative scope of Commonwealth, State or Territory Parliaments may be *whatever the respective Parliament desires*. Further, in executing laws, the

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<sup>19</sup> Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, Submission No 179 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry Into the Status of the Human Right to Freedom of Religion or Belief*, 5 May 2017, 7-8.

<sup>20</sup> See Forrester, Finlay and Zimmermann, *No Offence Intended*, above n 17, 122-3; Forrester, Zimmermann Lorraine Finlay, 'An Opportunity Missed?', above n 17, 286-9. Authorities referring to popular sovereignty and representative and responsible government include *Brown* [2017] HCA 43 (18 October 2017) [88] (Kiefel CJ, Bell and Keane JJ), [236] (Nettle J); *Unions NSW* (2013) 252 CLR 530, 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy* (2015) 257 CLR 178, 207 [45] (French CJ, Kiefel, Bell and Keane JJ), 256 [215] (Nettle J), 283-4 [318] (Gordon J); *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 137-8 (Mason CJ) ('ACTV'); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 47 (Brennan J) ('Wills').

<sup>21</sup> *Commonwealth Constitution* s 51.

<sup>22</sup> *Constitution Act 1902* (NSW) s 5; *Constitution Act 1867* (Qld) s 2; *Constitution Act 1934* (SA) s 5; *Constitution Act 1975* (Vic) s 16; *Constitution Act 1889* (WA) s 2(1). The plenary power of the Tasmanian Parliament is found in the *Australian Constitutions Act 1850* (Imp) s 14, which provides that the Tasmanian Parliament has the authority 'to make laws for the peace, welfare and good government of Tasmania': see *Strachan v Graves* (1997) 141 FLR 283, 289. The constitution of each colony continued as a State constitution at the establishment of the Commonwealth of Australia: see *Commonwealth Constitution* s 106.

<sup>23</sup> *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 22(1); *Northern Territory (Self-Government) Act 1978* (Cth) s 6.

<sup>24</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 151 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>25</sup> *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ) ('*Union Steamship*').

respective Commonwealth, State or Territory executive may be given wide-ranging powers. Finally, members of Parliament have parliamentary privilege to discuss past or proposed legislative and executive action fully, frankly, and robustly.<sup>26</sup>

It follows that, as sovereign, the Australian people must *also* be able to discuss government and political matters fully, frankly and robustly.<sup>27</sup> As we have noted:<sup>28</sup>

Put another way, it borders on absurdity to say that, under the *Commonwealth Constitution*, Parliament may *pass* outrageous laws, the executive may *do* outrageous things, and members of Parliament may *say* outrageous things. However, the people from whom Parliament, members of Parliament and the executive derive their authority may *not* speak outrageously.<sup>29</sup> If anything, in a democracy, a sovereign people must be free to speak even the unspeakable.<sup>30</sup>

To be clear, there are limits to freedom of expression. However, these limits are themselves strictly limited.<sup>31</sup>

In our view, the plenary powers of Australian Parliaments, and the popular sovereignty of the Australian people, give the implied freedom both content and weight. The Australian people may speak about any matter, and any restriction on this freedom must clear a high bar.

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<sup>26</sup> See, for example, *Commonwealth Constitution* s 49; *Parliamentary Privileges Act 1987* (Cth) s 16; *Parliamentary Privileges Act 1891* (WA) s 1. Forrester, Finlay and Zimmermann, *No Offence Intended*, above n 17, 122-3; Forrester, Zimmermann and Finlay, 'An Opportunity Missed?' above n 17, 286-9.

<sup>27</sup> Forrester, Finlay and Zimmermann, *No Offence Intended*, above n 17, 123.

<sup>28</sup> Forrester, Zimmermann and Finlay, 'An Opportunity Missed?', above n 17, 288-9 (emphasis in original).

<sup>29</sup> Forrester, Finlay and Zimmermann, *No Offence Intended*, above n 17, 130.

<sup>30</sup> *Ibid.* See also Lorraine Finlay, Augusto Zimmermann and Joshua Forrester, '18C is too broad and too vague, and should be repealed', *The Conversation* (online), 31 August 2016 <<https://theconversation.com/section-18c-is-too-broad-and-too-vague-and-should-be-repealed-64482>>. Indeed, this must be so with respect to *any* idea that may influence, or be the subject of, legislative or executive action. This must also be so with respect to *any* person or group of people who may influence, or be the subject of, legislative or executive action.

<sup>31</sup> Forrester, Finlay and Zimmermann, *No Offence Intended*, above n 17, 130.

### C *Common Law Freedom of Expression Is of Constitutional Importance*

Common law freedom of expression is itself of constitutional importance. In *Minister for Immigration & Citizenship v Haneef*,<sup>32</sup> the Full Court of the Federal Court endorsed the following statement by Trevor Allan:

Liberty is not merely what remains when the meaning of statutes and the scope of executive powers have been settled authoritatively by the courts. The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction. The common law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal.<sup>33</sup>

Further, the extent to which a law infringes common law freedom of expression is a factor relevant when assessing its proportionality.<sup>34</sup> As argued below, the extent to which executive action affects an individual's common law freedom of expression is especially important when assessing its constitutional validity.

### IV THE CURRENT APPROACH TO THE IMPLIED FREEDOM AND EXECUTIVE POWER

Perhaps unsurprisingly, most High Court cases concern legislative and not executive power. *Wotton*<sup>35</sup> is the case that comes closest to a decision on the implied freedom's effect on executive power, in particular the execution of laws. That said, the High Court's comments in *Wotton* amount to obiter dicta, albeit authoritative obiter dicta.

*Gaynor*<sup>36</sup> is a recent decision of the Full Court of the Federal Court dealing with the implied freedom's effect on executive power. Under a section

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<sup>32</sup> (2007) 163 FCR 414 (*Haneef*).

<sup>33</sup> Ibid 444 [113]. See also *Evans v State of New South Wales* (2008) 168 FCR 576, 594 [72] (French, Branson and Stone JJ) (*Evans*); *Monis* (2013) 249 CLR 92, 128 [60] (French CJ); see also *Brown* [2017] HCA 43 (18 October 2017) [545] (Edelman J).

<sup>34</sup> *Wills* (1992) 177 CLR 1, 30-1 (Mason CJ); *Adelaide Preachers' Case* (2013) 249 CLR 1, 31-2 [43]-[44] (French CJ).

<sup>35</sup> (2012) 246 CLR 1.

<sup>36</sup> [2017] FCAFC 41 (8 March 2017).

titled ‘The implied freedom as a relevant consideration in the individual exercise of a statutory power conditioned by the freedom’ the Full Court stated:

We deal with this issue in this section of our reasons because of the overlap with what might be called the “purely” constitutional question. However, conceptually, this is a judicial review issue. There are dicta to the effect that the freedom may be seen as a relevant consideration, or as conditioning an individual exercise of statutory power in a way that requires a decision-maker to consider the effect of a particular exercise of power on the freedom.<sup>37</sup>

That is, to the Full Court, administrative law principles should be used to resolve the issues concerning the implied freedom and executive power. The implied freedom is, at the very least, a relevant consideration for decision-makers. However, the Full Court noted that the implied freedom may inform grounds of review other than just failure to consider a relevant consideration.<sup>38</sup> The Full Court did not specify these grounds. However, as an example, ‘reading down’ a statute’s scope to comply with the implied freedom<sup>39</sup> could render executive action taken pursuant to it beyond power.<sup>40</sup> This is because the executive action’s validity may have depended on the statute’s original scope.

To support their approach, the Full Court relied on certain statements in *Wotton*.<sup>41</sup> The Full Court quoted with approval<sup>42</sup> this statement by the majority in *Wotton*, which accepted a Commonwealth submission that:

(i) where a putative burden on political communication has its source in statute, the issue presented is one of a limitation upon legislative power; (ii) whether a particular application of the statute, by the exercise or refusal to exercise a power or discretion conferred by the statute, is valid is not a question of constitutional law; (iii) rather, the question is whether the repository of the power has complied with the statutory limits; (iv) 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

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<sup>37</sup> Ibid [73].

<sup>38</sup> Ibid [80].

<sup>39</sup> Interpreting a statute in such a way is permissible under the *Acts Interpretation Act 1901* (Cth) s 15A.

<sup>40</sup> See *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(d) (‘ADJR Act’).

<sup>41</sup> Including statements by Kiefel J: see *Gaynor* [2017] FCAFC 41 (8 March 2017) [74] (Perram, Mortimer and Gleeson JJ).

<sup>42</sup> Ibid [78].

power thereunder in a given case... does not raise a constitutional question, as distinct from a question of the exercise of statutory power.<sup>43</sup>

Hence, at the very least, it appears that the implied freedom is to be treated as a relevant consideration when exercising executive power. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,<sup>44</sup> Mason J provided an influential restatement of the principles relevant to this ground of review. To summarise these principles:

- A decision-maker must be bound to take into account the relevant consideration when making the decision.
- What a decision-maker is bound to consider is determined by the construction of the relevant statute.
- Failing to consider a relevant consideration does not automatically lead to setting aside a decision and ordering another be made accounting for the relevant consideration.
- The court does not substitute its judgment for the decision-maker's. This is because the legislature has vested the decision-maker with the discretion to make the decision. Generally, it is for the decision-maker, not the court, to give weight to the relevant consideration. However, when a decision-maker fails to consider a greatly important consideration, the preferred ground for review is that the decision is manifestly unreasonable.<sup>45</sup> The court's preference for a different result will not suffice.
- A Crown Minister can account for broader policy considerations that may be relevant to exercising their discretion when making decisions.<sup>46</sup>

For a practicing lawyer, the approach in *Gaynor* and *Wotton* – that is, failing to treat the implied freedom as a relevant consideration – is the 'safe bet'. The

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<sup>43</sup> *Wotton* (2012) 246 CLR 1, 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>44</sup> (1986) 162 CLR 24 ('*Peko-Wallsend*').

<sup>45</sup> Since *Peko-Wallsend*, serious irrationality or illogicality has been used as an alternative to manifest unreasonableness: see Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5<sup>th</sup> ed, 2013) 253-63 [4.690]-[4.760].

<sup>46</sup> *Peko-Wallsend* (1986) 162 CLR 24, 39-42 (Mason J).

approach is supported by the obiter dicta of five justices in *Wotton*, as well as Kiefel J (as she then was) in that case.<sup>47</sup>

Given that it is derived from the text and structure of the *Commonwealth Constitution* itself, the implied freedom should be regarded as a 'standing consideration'. Recalling *Peko-Wallsend*, a decision-maker must be bound to consider the relevant consideration. What a decision-maker is bound to consider is determined by the construction of the relevant statute. However, if a statute affects the implied freedom but says nothing about freedom of expression, then a decision-maker should nevertheless consider the implied freedom.

Further, a decision-maker should place significant weight on the implied freedom as a relevant consideration. As noted above, the implied freedom is a strong and wide-ranging freedom. In addition, common law freedom of expression is itself of constitutional importance.

This all said, treating the implied freedom as a relevant consideration arguably gives the decision-maker too much latitude to dismiss it. Again recalling *Peko-Wallsend*, it is for the decision-maker, not the court, to give weight to the relevant consideration. A decision-maker may perfunctorily mention that freedom of expression is important, thus indicating it has been considered, and then, in effect, ignore it. In such cases, a court will only interfere if the decision-maker's approach is manifestly unreasonable.<sup>48</sup> This is a very high threshold to meet for those seeking to challenge a decision. Even if this threshold is met, a court will be cautious about invalidating the decision.<sup>49</sup>

Ultimately, treating the implied freedom as a relevant consideration does not properly account for its importance in Australia's constitutional order. A more systematic approach is required, and one that accords significant weight to the implied freedom.

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<sup>47</sup> *Wotton* (2012) 246 CLR 1, 33 [88] (Kiefel J).

<sup>48</sup> Or, alternatively, seriously irrational or illogical: see Aronson and Groves, *Judicial Review of Administrative Action*, above n 45, 253-63 [4.690]-[4.760].

<sup>49</sup> *Peko-Wallsend* (1986) 162 CLR 24, 41-2 (Mason J).

V OUR PROPOSED APPROACH TO THE IMPLIED FREEDOM  
AND EXECUTIVE POWER

In our view, there is another, better, approach to the implied freedom and executive action. This approach is based on the comments of a unanimous High Court in *Lange*. It is more firmly grounded in the text and structure of the *Commonwealth Constitution*. This approach can also be more readily reconciled with the implied freedom's approach to legislation.

A *The Implied Freedom Limits Executive As Well As Legislative Power*

As noted above, implications from the *Commonwealth Constitution* must clearly arise from its text and structure.<sup>50</sup> In *Lange*, the High Court held that ss 7, 24, 64 and 128 of the *Commonwealth Constitution* implied a freedom to communicate about government and political matters.<sup>51</sup> Sections 7 and 24 provide for popular elections to the House of Representatives and the Senate, thereby implying representative government. Section 64 provides for Ministers of the Crown be drawn from Parliament, thereby implying responsible government. Section 128 provides for amending the *Commonwealth Constitution* by referendum, thereby implying (along with ss 7 and 24) the sovereignty of the Australian people.

In *Lange*, the High Court noted that:

The Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form "one system of jurisprudence". Covering cl 5 of the Constitution renders the Constitution "binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State". Within that single system of jurisprudence, the basic law of the Constitution provides the authority for the enactment of valid statute law and may have effect on the content of the common law.<sup>52</sup>

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<sup>50</sup> *Lange* (1997) 189 CLR 520, 566-7. See also *McGinty* (1996) 186 CLR 140, 168 (Brennan CJ), 182-3 (Dawson J), 231 (McHugh J), 284-5 (Gummow J).

<sup>51</sup> In *Lange*, the High Court noted that ss 1, 7, 8, 13, 25, 28, 30 also gave rise to implications concerning representative government: *Lange* (1997) 189 CLR 520, 557-8, 560. And further, that ss 6, 49, 62 and 83 also gave rise to implications concerning responsible government: *ibid* 558-9, 561. However, the High Court focused on the implications arising from ss 7, 24, 64 and 128.

<sup>52</sup> *Ibid* 564.

The implied freedom is an indispensable incident to the operation of representative and responsible government. The High Court noted the following with respect to the need for the implied freedom for the maintenance of responsible government:

[T]hose provisions which prescribe the system of responsible government necessarily imply a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal Parliament. Moreover, the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.<sup>53</sup>

On this point, we note the Chapters in the *Commonwealth Constitution* in which the sections giving rise to the implied freedom are found. Sections 7 and 24 are found in Chapter I, which concerns the Commonwealth's Parliament. Section 64 is found in Chapter II, which concerns the Commonwealth's executive government. Section 128 is found in Chapter VIII, which concerns altering the *Commonwealth Constitution*. That is, the freedom implied from sections found in different Chapters of the *Commonwealth Constitution* limits the legislative powers of Parliament found in Chapter I. These legislative powers include, notably, the plenary powers in s 51.

Given this, there is no reason in logic or principle why the implied freedom does not *also* limit the executive powers found in Chapter II. These powers include, of course, those found in s 61 of the *Commonwealth Constitution*, which we cover in more detail below.

So what is the effect of the implied freedom on Commonwealth, State and Territory executive power? It is said metaphorically in relation to such matters that 'a stream cannot rise higher than its source'.<sup>54</sup> But what is that source? In our view, in Australia there is not one but two streams, and not one but two sources. Each stream and each source must first be understood before examining the effect of the implied freedom on them.

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<sup>53</sup> Ibid 561.

<sup>54</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J).

B *The Streams' True Sources: A Tale Of Two Settlements*

Not surprisingly, English case law concerning the failure to consider a relevant consideration has greatly influenced Australian case law.<sup>55</sup> However, the source of the power of the Commonwealth to execute laws differs from that in the United Kingdom.

In the United Kingdom, the constitutional settlement following the Glorious Revolution resulted in the supremacy of the Westminster Parliament. That is, Parliament's laws are supreme, and the Crown is obliged to execute them. The source of the executive's power to execute laws is by Act of Parliament. To illustrate, the *Act of Settlement* provides:

And whereas the Laws of England are the Birthright of the People thereof and all the Kings and Queens who shall ascend the Throne of this Realm *ought to administer the Government of the same according to the said Laws and all their Officers and Ministers ought to serve them respectively according to the same.*<sup>56</sup>

This constitutional settlement carried over into the Australian colonies that were granted responsible government and later became States. It also applies to the grant of responsible government to the Territories. As was noted in *Union Steamship*, 'A power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself.'<sup>57</sup>

By contrast, the *Commonwealth Constitution* created a new constitutional settlement for Australia. The old English constitutional

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<sup>55</sup> An example of this is the significant number of English cases cited by Mason J in his summary of the principles concerning the failure to consider a relevant consideration in *Peko-Wallsend*: see *Peko-Wallsend* (1986) 162 CLR 24, 39-42 (Mason J).

<sup>56</sup> *Act of Settlement 1700*, 12 & 13 Will 3, c 2 s 4 (emphasis added) ('*Act of Settlement*'). The *Act of Settlement* was enacted in 1701, long after 'the dust had settled' from the Glorious Revolution. However, the *Act of Settlement* usefully restates the principles of the constitutional settlement that Parliament and the Crown had observed since the Glorious Revolution. It was also upon the terms of the *Act of Settlement* that the heirs of Princess Sophia of Hanover assumed the Crown.

<sup>57</sup> *Union Steamship* (1988) 166 CLR 1, 10 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). To be clear, the 'territory' referred to in *Union Steamship* means 'jurisdiction'. This quoted principle in *Union Steamship* is applicable to Australian States and Territories.

settlement survived, but subordinated to the *Commonwealth Constitution*, the supreme law.<sup>58</sup>

The *Commonwealth Constitution* created three distinct branches of government: the legislature, executive and the judiciary. The *Commonwealth Constitution* conferred upon the Commonwealth Parliament the power to make laws. However, unlike in the United Kingdom, the source of the Commonwealth executive's power to execute laws is *not* an Act of Parliament (specifically, the Commonwealth Parliament).<sup>59</sup> Rather, the source is the *Commonwealth Constitution* itself, s 61 of which provides:

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*.<sup>60</sup>

Under the *Commonwealth Constitution*, the executive is obliged to execute the laws of the legislature. However, *both* the legislature and the executive are themselves subject to the *Commonwealth Constitution*. Given this, there are in fact *two* ways that the implied freedom restricts executive power:

- By limiting the scope of *laws* passed by Parliament (under s 51 or other provisions) that the executive is obliged to execute.
- By limiting the scope of *executive action itself* under s 61.

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<sup>58</sup> The High Court in *Lange* noted that '[t]he Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature.' *Lange* (1997) 189 CLR 520, 564.

<sup>59</sup> The *Commonwealth Constitution* was an Act of the British Parliament, specifically the *Commonwealth of Australia Constitution Act 1900* (UK). However, as was recognised by Justice McHugh in *McGinty* (1996) 186 CLR 140 at 237 since the passage of the *Australia Act 1986* (UK) 'the sovereignty of the Australian nation has ceased to reside in the Imperial Parliament and has become embedded in the Australian people'. This reflects similar observations made by Mason CJ in *ACTV* (1992) 177 CLR 106 at 137-8.

<sup>60</sup> *Commonwealth Constitution* s 61 (emphasis added). Does the nature of executive power differ between the Commonwealth and the States (and, by extension, the Territories)? In *Williams v Commonwealth* (2012) 248 CLR 156, 203 [57] French CJ noted: 'Quick and Garran distinguished the "Federal Executive power" conferred by s 61 from "the Executive power reserved to the States." The executive power of the Commonwealth as a united political community was divided into two parts: "that portion which belongs to the Federal Government, in relation to Federal affairs ... and that portion which relates to matters reserved to the States". Nevertheless, federal executive power and State executive power were "of the same nature and quality" (citations omitted). Hence – and continuing our metaphor – while the water streams from two different sources, the quality of that water is the same.'

Hence, a law that does *not* impermissibly infringe the implied freedom could be executed in a way that *does* impermissibly infringe it. This result should not surprise. A law may not, on its face, infringe the implied freedom. However, that law may be executed in a wide variety of situations.<sup>61</sup> In certain situations, the law's execution may impermissibly infringe the implied freedom.

### C *What, Then, Is the Test?*

English and Australian case law concerning failure to consider a relevant consideration emerged in the context of Parliamentary supremacy. Parliaments could enact legislation affording great latitude to the executive. Failure to consider a relevant consideration remains applicable in situations where executive actions are taken pursuant to Commonwealth, State or Territory laws that are not subject to express or implied constitutional restrictions. That is, this ground of review remains applicable in a great many situations.

However, executive action affecting the implied freedom is *not* one of those situations. As noted above, relying on the failure to consider a relevant consideration affords the decision-maker too much latitude to disregard the implied freedom. With the implied freedom, the judiciary is not assessing whether a decision-maker has accounted for a consideration (albeit an important one). Rather, the judiciary is assessing whether the decision-maker has breached a strong and wide-ranging constitutional restriction – an important difference.

In our view, the test for whether legislation impermissibly infringes the implied freedom should be adapted, with the necessary changes, to executive power. This approach finds support in the judgment of the plurality in *McCloy*, who observed, relevantly:

The term 'proportionality' in Australian law describes a class of criteria which have been developed by this Court over many years to determine whether legislative *or administrative acts* are within the constitutional or legislative grant of power under which they purport to be done. [Such] criteria have been applied... *to powers exercised*

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<sup>61</sup> In *Commonwealth v Grunseit*, Latham CJ (with whom McTiernan J agreed) observed: '[t]he general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.' *Commonwealth v Grunseit* (1943) 67 CLR 58, 82 (Latham CJ), 94 (McTiernan J).

*for a purpose authorised by the Constitution or a statute, which may limit or restrict the enjoyment of a constitutional guarantee, immunity or freedom, including the implied freedom of political communication.*<sup>62</sup>

The *McCloy* test adapted to executive power (which we refer to as the ‘adapted *McCloy* test’) would be as follows:

1. Did the executive action effectively burden the implied freedom of political communication?
2. If ‘yes’ to the first question, was the purpose of the executive action legitimate, in the sense that it was compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If ‘yes’ to the second question, was the executive action reasonably appropriate and adapted to advance that legitimate object in a manner that was compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

There are five points to note here. First, unlike the test for legislation, the test for executive action is phrased in the past tense. This is because it is likely the test will be employed after executive action has taken place.<sup>63</sup> That said, there is no reason why the test cannot be employed to forestall proposed executive action (noting of course the jurisdictional limitations that prevent the consideration of purely hypothetical cases).

Second, the third stage of the test uses the three stages of ‘proportionality testing’ noted above (again, with the necessary changes). The tests for whether the executive action is necessary and adequate in its balance remain unchanged, except for being phrased in the past tense for the reasons noted above. However, the test for whether executive action is suitable becomes ‘there was a rational connection between the executive action and its purpose’.

Third, it is very important to note the importance of common law freedom of expression to executive action. This is because laws are usually of general application, being directed to groups of various sizes ranging up to the

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<sup>62</sup> (2015) 257 CLR 178, 195 [3] (French CJ, Kiefel, Bell and Keane JJ) (emphasis added).

<sup>63</sup> Unlike legislation, which is ‘always speaking’ and hence is in the present tense: see, eg, *Interpretation Act 1984* (WA) s 8.

entire population of a jurisdiction.<sup>64</sup> Executive action often concerns groups.<sup>65</sup> However, the executive *also enforces laws on individuals*. In such cases, an individual's common law freedom of expression is of especial significance when determining proportionality.

Fourth, and contrary to *Gaynor* and *Wotton*, the question is indeed constitutional and not administrative, and one resolved by applying constitutional principle. That said, remedies associated with administrative law apply. Executive actions that impermissibly infringe the implied freedom are ultra vires, and the remedies of prohibition, *mandamus*, and *certiorari* (amongst others) are available.

Fifth, the test adapted for executive action can be reconciled with the test for legislation. The test whether legislation impermissibly infringes the implied freedom assesses the 'terms, operation or effect' of the law. In practice, this means that judges make reasonable inferences from the statute itself and certain other materials about the law's terms, operation or effect.<sup>66</sup> This test may miss particular instances where the law's execution impermissibly infringes the implied freedom. Our proposed approach fills this gap.

## VI SOME ISSUES WITH THE PROPOSED APPROACH

The proposed approach for whether or not executive action impermissibly infringes the implied freedom raises a number of issues.

### A *State and Territory Executive Action*

As noted above, the Australian colonies adopted the English constitutional settlement concerning Parliamentary supremacy upon being granted responsible government. This constitutional settlement arguably also applies to the grant of responsible government to the Territories. Hence, State and Territory Parliaments can grant considerable latitude to the executive branch similar to the English Parliament. Added to this is the fact that state and territory constitutions, unlike the *Commonwealth Constitution*, do not formally split legislative and executive powers.

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<sup>64</sup> Forrester, Zimmermann and Finlay, 'An Opportunity Missed?', above n 17, 289-90.

<sup>65</sup> Ibid. See also Forrester, Finlay and Zimmermann, *No Offence Intended*, above n 17, 121.

<sup>66</sup> See, eg, the materials referred to in the *Acts Interpretation Act 1901* (Cth) s 15AB.

Can it be argued that the implied freedom affects s 61's conferral of executive power on the Commonwealth, but not State and Territory executive power? The better view is the implied freedom also affects State and Territory executive power. As noted above, the *Commonwealth Constitution*, Commonwealth, State and Territory laws, and the common law form 'one system of jurisprudence'.<sup>67</sup> The State and Territory laws referred to include their respective constitutions. As also noted above, *Lange* stated that the implied freedom affects executive as well as legislative power.<sup>68</sup>

B *Section 61, Unlike ss 51 and 106, is Not 'Subject to This Constitution'*

Section 51 confers plenary powers 'subject to this Constitution'. Likewise, s 106, which is to the effect that colonial constitutions continue as State constitutions, contains the same provision. Section 61 does not contain this provision. Could it be argued that the implied freedom cannot apply (at least) to the Commonwealth executive?

There are two replies here. First, the effect of s 106 had been considered in some judgments concerning the implied freedom.<sup>69</sup> However, *Lange* and *Unions NSW*<sup>70</sup> suggest that, as regards the implied freedom, the provision in s 106 is, in effect, irrelevant. This is because Australia's constitutional arrangements create not only one system of jurisprudence but also one *polity*. In *Lange*, the High Court noted:

Of course, the discussion of matters at State, Territory or local level might bear on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal Ministers and their departments. The existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social,

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<sup>67</sup> *Lange* (1997) 189 CLR 520, 564.

<sup>68</sup> *Ibid* 560.

<sup>69</sup> See, eg, *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 156 (Brennan J), 165 (Deane J).

<sup>70</sup> (2013) 252 CLR 530.

economic and political matters in Australia make this conclusion inevitable.<sup>71</sup>

In *Unions NSW*, a majority of the High Court noted:

The reality is that there is significant interaction between the different levels of government in Australia and this is reflected in communication between the people about them.<sup>72</sup>

They later noted:

The complex interrelationship between levels of government, issues common to State and federal government and the levels at which political parties operate necessitate that a wide view be taken of the operation of the freedom of political communication. As was observed in *Lange*, these factors render inevitable the conclusion that the discussion of matters at a State, Territory or local level might bear upon the choice that the people have to make in federal elections and in voting to amend the Constitution, and upon their evaluation of the performance of federal Ministers and departments.<sup>73</sup>

By the same measure, like State and Territory legislation, Commonwealth executive action may affect the implied freedom.

The second reply is related to the first: the implied freedom also applies to provisions of the *Commonwealth Constitution* that are not drafted 'subject to this constitution'. For example, s 30 of the *Commonwealth Constitution* provides, in effect, that Parliament may legislate concerning the qualifications of electors for the House of Representatives. However, s 30 is not drafted 'subject to this Constitution'. Despite this, the implied freedom would apply to it. Suppose legislation made pursuant to s 30 provided that, to be enrolled, electors must undertake in writing never to offend anyone in public debate.<sup>74</sup> Further, if an elector breached this undertaking, then the Commonwealth may bring proceedings in court to strike them from the electoral roll. Such legislation would undoubtedly impermissibly infringe the implied freedom.

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<sup>71</sup> *Lange* (1997) 189 CLR 520, 571-2.

<sup>72</sup> *Unions UNSW* (2013) 252 CLR 530, 549 [20] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>73</sup> *Ibid* 550 [25] (citations omitted).

<sup>74</sup> For the purposes of this example, we consider that the qualification of electors is a separate issue from whether there is an implied universal adult franchise: see *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1; *Murphy v Electoral Commissioner* [2016] HCA 36 (5 September 2016).

### C *Does the Implied Freedom Apply to Non-Statutory Executive Power?*

Section 61 not only obliges the executive to execute laws. It is also a source of the Crown's non-statutory executive powers, including the prerogative powers.<sup>75</sup> For the reasons noted above, the implied freedom applies to the entirety of s 61. Further, and also for the reasons noted above, the implied freedom extends to State and Territory non-statutory executive power. This means, for example, certain exercises of the prerogative power may impermissibly infringe the implied freedom. Unfortunately, space precludes us further exploring this intriguing aspect of the implied freedom and executive power.<sup>76</sup>

## VII BUT WHAT ABOUT *WOTTON*?

The case history in *Wotton* appears somewhat unusual, but makes it possible for a court not to follow it. In *Wotton*, the appellant appears to have initially raised the point concerning the implied freedom and the relevant executive action. However, the appellant did not proceed with this point.<sup>77</sup>

As noted above, the High Court majority accepted the Crown's submissions concerning the implied freedom and executive power. However,

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<sup>75</sup> *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 226 [86] (Gummow, Hayne, Crennan and Bell JJ).

<sup>76</sup> In the hearing for Special Leave in *Gaynor*, Nettle J asked whether a Commonwealth Minister could challenge his dismissal for comments disparaging government policy: see Transcript of Proceedings, *Gaynor v Chief of the Defence Force* [2017] HCA Trans 162 (18 August 2017). The answer to this question is 'yes', as the implied freedom affects all parts of the *Commonwealth Constitution*, including s 64. As we noted above, s 64 itself gives rise to the implied freedom, and the implied freedom affects Chapter II of the *Commonwealth Constitution* as it does Chapter I. However, it is unlikely a challenge would succeed. This is because the ability to dismiss Commonwealth Ministers is critical to executive accountability under the responsible government implied from the *Commonwealth Constitution*. We posit another intriguing situation. Suppose a Prime Minister made political comments that were racist or sexist. Suppose further that the Governor-General used their reserve powers to dismiss the Prime Minister for these comments. Could the Prime Minister challenge their dismissal under the implied freedom? The answer, again, is 'yes'. Once again, the implied freedom affects all parts of the *Commonwealth Constitution*. Here, the High Court could quash the dismissal. The situation is unlike that of dismissing the Minister, as the Governor-General is not acting on the advice of their Prime Minister. Thus, the argument on the basis of responsible government does not apply. Further, in the case of a Prime Minister, a good argument can be made that the Governor-General can only act if the House of Representatives votes that it has no confidence in the Prime Minister because of the racist or sexist comments. In the absence of such a vote in the House of Representatives, the Prime Minister should only be held accountable for their remarks at a regular election.

<sup>77</sup> *Wotton* (2012) 246 CLR 1, 13 [19] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

because the appellant did not proceed with their point, the Crown's submissions may not have been challenged in written or oral argument. That is, the High Court may have been deprived of the benefit of opposing argument.

As has been discussed, there are significant problems with treating a failure to consider the implied freedom as not considering a relevant consideration. The proposed approach is more firmly grounded in the text and structure of the *Commonwealth Constitution*, and supported by comments of a unanimous High Court in *Lange*.

*Wotton* was ultimately decided on whether or not the relevant law was unconstitutional.<sup>78</sup> The point concerning executive power was not in issue and therefore not decided upon. The words of a judgment must be read *secundum subjectum materiam*,<sup>79</sup> that is, in their context. It is therefore open for the High Court to consider our proposed approach to the implied freedom and executive power.

## VIII GAYNOR

*Gaynor* usefully illustrates our proposed approach, being a case that concerned the implied freedom and Commonwealth executive power. *Gaynor* also raises intriguing public policy issues, specifically the extent to which:

- Members of the ADF can speak about issues of public controversy;
- The Acts and legislative instruments<sup>80</sup> governing the ADF (which together we call the 'governing laws'), and ADF policies, should accommodate the implied freedom;
- The ADF can involve itself in matters of public controversy; and
- The findings in *Gaynor* can be applied to public agencies other than the ADF.<sup>81</sup>

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<sup>78</sup> Specifically the *Corrective Services Act 2006* (Qld) ss 132(1)(a), 132(1)(d) and 200(2): see *Wotton* (2012) 246 CLR 1, 16 [33] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 27 [66] (Heydon J), 34-5 [92] (Kiefel J).

<sup>79</sup> *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497, 637-8.

<sup>80</sup> As defined in the *Legislation Act 2003* (Cth) s 8.

<sup>81</sup> We note that many will find the comments for which Major Gaynor was dismissed objectionable. However, we regard ourselves as zealous advocates for freedom of expression. This means we will scrutinise legislative, executive or judicial actions that restrict this fundamental freedom.

As noted above, *Gaynor* is a decision of the Full Court of the Federal Court.<sup>82</sup> At first instance, Buchanan J in the Federal Court held that the Chief of the Defence Force ('CDF') had unlawfully terminated Major Bernard Gaynor's<sup>83</sup> commission as an officer in the Army Reserve.<sup>84</sup> This was because the CDF's decision dated 10 December 2013 terminating Major Gaynor's commission ('Termination Decision')<sup>85</sup> impermissibly infringed the implied freedom.<sup>86</sup>

The Full Court unanimously overturned Buchanan J's decision. The Full Court held that reg 85(1)(d)(ii) of the *Defence (Personnel) Regulations 2002* (Cth) ('Defence Personnel Regulations')<sup>87</sup> did not impermissibly infringe the implied freedom.<sup>88</sup> Consequently, the Termination Decision made pursuant to reg 85(1)(d)(ii) was valid.

The High Court refused Major Gaynor's application for special leave to appeal on the grounds that he had no reasonable prospects of success, and that his case was not an appropriate vehicle to explore the implied freedom.<sup>89</sup> Hence, the decision of the Full Court was not disturbed.

In our view, both the Federal Court and the Full Court were in error. As to the Federal Court, Buchanan J applied the *McCloy* test as if the Termination Decision was a law.<sup>90</sup> With respect, this was not the correct approach. Rather, Buchanan J needed to develop the *McCloy* test with respect to executive action

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<sup>82</sup> We refer to the Full Court of the Federal Court in *Gaynor* from this point onwards as the 'Full Court'.

<sup>83</sup> We use 'Major Gaynor' from this point onwards to distinguish the person from the case name.

<sup>84</sup> *Gaynor v Chief of the Defence Force (No 3)* [2015] FCA 1370 (4 December 2015) ('*Gaynor v CDF*'). We refer to the Federal Court in *Gaynor v CDF* as the 'Federal Court' from this point onwards.

<sup>85</sup> The Termination Decision can be found as Annexure C to *ibid*.

<sup>86</sup> *Ibid* [284]-[289] (Buchanan J).

<sup>87</sup> We refer to reg 85(1)(d)(ii) of the *Defence Personnel Regulations* as then enacted as 'reg 85(1)(d)(ii)' or 'regulation 85(1)(d)(ii)' as the case may be.

<sup>88</sup> *Gaynor* [2017] FCAFC 41 (8 March 2017) [112], [115] (Perram, Mortimer and Gleeson JJ). The Full Court held that reg 85(1)(d) generally did not impermissibly infringe the implied freedom. However, we focus on reg 85(1)(d)(ii) as it is the most appropriate to Major Gaynor's case. In the Termination Decision, the CDF concluded that Major Gaynor's continued service was not in the interests of the Australian Army: Termination Decision, [16]-[25]. Regulation 85(1)(d)(ii) provides for the termination of an officer if the chief officer of that officer's service is satisfied that retention of the officer is not in the interests of the Service (see below in Part VIII.B).

<sup>89</sup> Transcript of Proceedings, *Gaynor v Chief of the Defence Force* [2017] HCATrans 162 (18 August 2017).

<sup>90</sup> *Gaynor v CDF* [2015] FCA 1370 (4 December 2015) [280] (Buchanan J).

along the lines of our proposed approach, and then apply it to the Termination Decision.

As to the Full Court, its focus on the constitutional validity of reg 85(1)(d)(ii) was in error.<sup>91</sup> The correct level of analysis was the CDF's application of reg 85(1)(d)(ii) to Major Gaynor's case. Here, and as with the Federal Court, the Full Court needed to develop the *McCloy* test with respect to executive action along the lines of our proposed approach, and then apply it to the Termination Decision.

Our analysis principally focuses on the Termination Decision. Specifically, we focus on the CDF's reasoning and findings of fact in the Termination Decision. That said, we refer to other parts of the record<sup>92</sup> and the Federal Court, Full Court and High Court decisions as necessary.

By way of general background, at the time his commission was terminated Major Gaynor served in the Army Reserve as an Intelligence Officer. He had served in Iraq and Afghanistan, and was decorated with the United States Meritorious Service Award. At the relevant time, Major Gaynor was also politically active.<sup>93</sup>

The Termination Decision concerned certain remarks Major Gaynor had made on his personal website, in press releases, on Twitter and on Facebook (the 'Published Remarks').<sup>94</sup> The remarks mentioned in the

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<sup>91</sup> Our view is that reg 85(1)(d)(ii) did not impermissibly infringe the implied freedom, though not necessarily for the same reasons that the Full Court stated. However, the Full Court needed to consider whether the CDF's application of the law impermissibly infringed the implied freedom. *Gaynor* is a case where the *law itself* did not impermissibly infringe the implied freedom, but the *law's execution* did impermissibly infringe it.

<sup>92</sup> As that term is discussed in Aronson and Groves, *Judicial Review of Administrative Action*, above n 45, 225-31 [4.370]-[4.400].

<sup>93</sup> Major Gaynor was a member of Katter's Australia Party who had nominated to be endorsed as a Senate candidate. It should be noted that at the time, and now, ADF policy allows Defence members to join political parties, express views in their private capacities, and run for elected office: see Department of Defence, Defence Instruction (General) PERS 21-1 *Political activities of Defence personnel* ('The Political Activities Instruction'). At the time, Defence members were prohibited from attending events of a political nature in uniform. ADF Policy now allows the CDF to permit uniformed attendance at political events: Department of Defence, *Military Personnel Policy Manual*, Part 7-1 [1.9a].

<sup>94</sup> These were a website post dated 6 March 2013 and titled 'Domestic betrayal a waste of soldiers' sacrifices'; a press release dated 8 March 2013 and titled 'Defence shows hypocrisy with gay officer'; a website post dated 13 March 2013 and titled 'Defence's gender-bending preoccupation comes at the cost of a real equity issue: fair indexation'; a press release dated 22 April 2013 and titled 'Australian

Termination Decision appear to be part of a spiraling sequence of events. We identify the Published Remarks, and the apparent cause of the spiral in the footnotes.<sup>95</sup>

We note that the Published Remarks refer to material from the Chief of Army's Notice to Show Cause for Termination of Appointment as an Officer in the Australian Army dated 30 May 2013 ('Termination Notice').<sup>96</sup> However, the Termination Decision did not specify which particular remarks in the material referred to in the Termination Notice were of concern. This was a significant issue for the reasons we discuss below.

As we also discuss below, the CDF terminated Major Gaynor's commission because of his behaviour. However, before going further, it is useful to clarify what this case was *not* about.

#### A *What Gaynor Was Not About*

As the Termination Decision makes clear, and put broadly, Major Gaynor did *not* do the following:

1. Make public information sensitive to the ADF or national security;
2. Engage in workplace harassment;
3. Disobey lawful orders; or
4. Breach ADF defence instructions regarding social media.

We now examine each of these matters in turn.

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Defence Force disciplines Reserve Intelligence Officer for discussing Islam'; a website post dated 16 May 2013 and titled 'Malcolm can't be a Cate'; a press release dated 23 May 2013 titled 'Government and Defence blinded on Islam'; certain Twitter messages Major Gaynor made between 8 March 2013 and 6 May 2013; and certain Facebook posts Major Gaynor made between 8 March 2013 and 16 May 13; see Termination Decision, [22].

<sup>95</sup> Ibid. The 'spiral' appeared to commence in early January 2013, when Major Gaynor was counseled by his commanding officer for views that Major Gaynor made in relation to proposed changes to Commonwealth anti-discrimination laws: see *Gaynor v CDF* [2015] FCA 1370 (4 December 2015) [19]-[27] (Buchanan J). It appeared to escalate after the ADF hierarchy permitted uniformed Defence personnel to march in the 2013 Sydney Gay and Lesbian Mardi Gras: see *ibid* [28]-[33].

<sup>96</sup> The Termination Notice can be found as Annexure A to *Gaynor v CDF* [2015] FCA 1370 (4 December 2015).

1 *Gaynor Did Not Make Public Information Sensitive to the ADF or National Security*

In the Termination Decision, the CDF found that Major Gaynor had not disclosed 'official information' in contravention of extant Defence instructions.<sup>97</sup> 'Official information' is defined as:

[A]ny fact, document or image in electronic or other form, which comes to the knowledge of, or into the possession of Defence personnel, in the course of their duties and:

- which carry a security, privacy or handling caveat;
- which are likely to be sensitive to policy, strategic or operational security issues; or
- the disclosure of which may reasonably be foreseen to be prejudicial to:
  - the effective working of Government, including the formulation or implementation of policies or programs;
  - the security or the defence of Australia and its interests; or
  - Defence's reputation.<sup>98</sup>

To be clear, governing laws protecting information sensitive to ADF operations or national security would not impermissibly infringe the implied freedom in all but exceptional cases, and rightly so. The same applies to executive actions taken pursuant to such governing laws.

Had Major Gaynor disclosed 'official information', the CDF's case for terminating him would have been compelling. However, this is not what happened.

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<sup>97</sup> Termination Decision, [13e]. The relevant Defence instructions appear to be the Department of Defence, Defence (General) ADMIN 08-1 *Public comment and dissemination of official information by Defence personnel* ('Public Comment Instruction'); and Department of Defence, Defence Instruction (General) ADMIN 08-2 *Use of social media by Defence personnel*. ('Social Media Instruction').

<sup>98</sup> Social Media Instruction (definition of 'official information'). It continues: '[t]his definition in no way limits the provisions of relevant regulations, including the Crimes Act 1914, the [Defence Force Discipline Act 1982 (Cth)], the Public Service Act 1999 and the Public Service Regulations 1999.': *ibid.* We would also note the *Public Service Regulations 1999* (Cth) reg 2.1(3) prohibits an employee of the Australian Public Service ('APS') disclosing information generated during the course of their employment prejudicial to the effective operation of government or the formulation or implementation of its policies or programs. Regulation 2.1(4) prohibits an APS employee from disclosing confidential information obtained or generated during their employment.

## 2 *Major Gaynor Did Not Engage in Workplace Harassment*

In the Termination Decision, the CDF found that Major Gaynor:

- Had performed well on overseas deployments;<sup>99</sup>
- Was a competent officer in the Intelligence Corp and spoke Arabic;<sup>100</sup>
- Had reported well as an Intelligence Officer;<sup>101</sup>
- Had interacted with male and female Defence members in a cordial and respectful manner in the workplace;<sup>102</sup>
- Prior to the matters disclosed in the Termination Notice, had not been subject to an ‘equity and diversity complaint’ in the ADF;<sup>103</sup> and
- Had not breached Defence Instruction (General) PERS 35-3 *Reporting and Management of Unacceptable Behaviour* (the ‘Unacceptable Behaviour Instruction’).<sup>104</sup>

To all appearances, Major Gaynor conducted himself professionally in the workplace. Had Major Gaynor had engaged in bullying, harassment or abuse in the workplace, the CDF’s case would have been more compelling. However, the issue was only Major Gaynor’s comments outside the workplace.

## 3 *Major Gaynor Did Not Disobey Lawful Orders*

Here, we note a disparity between the findings in the Termination Decision on the one hand, and the Federal Court and the Full Court on the other. For the reasons that follow, our view is that:

1. The Termination Decision did not conclude that Major Gaynor disobeyed lawful orders; and
2. The Full Court and the Federal Court erred in concluding that Major Gaynor had disobeyed lawful orders.<sup>105</sup>

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<sup>99</sup> Termination Notice, [13].

<sup>100</sup> Ibid [13a].

<sup>101</sup> Ibid [13b].

<sup>102</sup> Ibid [13c].

<sup>103</sup> Ibid [13d].

<sup>104</sup> Ibid [13g]. Essentially, there was no finding that Major Gaynor had engaged in workplace harassment.

<sup>105</sup> The conclusion that Major Gaynor had been lawfully ordered forms part of the overall conclusions of both the Federal Court and the Full Court: *Gaynor v CDF* [2015] FCA 1370 (4 December 2015)

Our reasons are broken into the following sections:

1. The relevant actions;
2. The military justice system;
3. The CDF's findings in the Termination Decision; and
4. The Federal Court and the Full Court conclusions.

(a) *The Relevant Actions*

On 6 February 2013, Major Gaynor's commanding officer ('CO'), Lieutenant Colonel Christopher Buxton, advised him not to make any further inflammatory or intemperate remarks on social media (the 'CO Action'). On 22 March 2013, the Deputy Chief of Army ('DCA'), Major General Angus Campbell, directed Major Gaynor to remove material identifying him as an Army officer that could reasonably be expected to breach defence policy, contravene ADF values or not be in the Army's interests (the 'DCA Action').

Both the Federal Court and the Full Court held that both the CO Action and the DCA Action were lawful orders.<sup>106</sup> The High Court, in refusing the special leave application, did not disturb these findings.

(b) *The Military Justice System*

The military justice system has 'two distinct but interrelated branches: the *discipline system* and the *administrative system*'.<sup>107</sup> The discipline system includes offences for which there is no civilian counterpart, such as disobeying a command.<sup>108</sup> It is a separate and distinct justice system that enforces military discipline.<sup>109</sup>

As to the administrative system, the Senate inquiry into the effectiveness of Australia's military justice system noted that it 'is designed to encourage

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[112], [277], [287] (Buchanan J) and *Gaynor* [2017] FCAFC 41 (8 March 2017) [114], [154] (Perram, Mortimer and Gleeson JJ).

<sup>106</sup> *Gaynor v CDF* [2015] FCA 1370 (4 December 2015) [69]-[74], [111]-[115] (Buchanan J); *Gaynor* [2017] FCAFC 41 (8 March 2017) [114], [146]-[154] (Perram, Mortimer and Gleeson JJ).

<sup>107</sup> See, eg, Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The Effectiveness of Australia's Military Justice System* (2005) 7 [2.1] (emphasis added).

<sup>108</sup> *Ibid* [2.13].

<sup>109</sup> See *ibid* [2.12]. The tribunals, review processes, key agencies and offices in the discipline system are summarised in *ibid* [2.16]-[2.37].

[ADF] personnel to maintain high standards of professional judgment, command and leadership'.<sup>110</sup>

The Senate inquiry also noted:

It should be emphasised that the administrative system should not operate as a mechanism through which disciplinary offences committed by individuals are punished, nor should it be used to investigate whether ADF members have committed an offence against the [*Defence Force Discipline Act 1982* (Cth) ('DFDA')] or civilian criminal laws. The administrative system is primarily aimed at improving ADF processes – any adverse findings or recommendations concerning the conduct of members is incidental to this primary purpose.<sup>111</sup>

Adverse administrative action may be taken within the administrative system. It is 'taken... where conduct falls below the standards required by the ADF, but does not constitute criminal conduct or warrant the initiation of disciplinary proceedings under the DFDA'.<sup>112</sup> Adverse administrative action may result in an ADF member being discharged.<sup>113</sup>

It appears that action was taken under the discipline system and administrative system with respect to Major Gaynor. As to the discipline system, Major Gaynor's actions were referred to the Director of Military Prosecutions ('DMP') for prosecution. As to the administrative system, Major Gaynor was subject to a 'quick assessment',<sup>114</sup> investigation by an Inquiry Officer<sup>115</sup> and, ultimately, adverse administrative action leading to the Termination Decision. The distinction between the actions taken against Major Gaynor under the discipline system and the administrative system is important for the reasons given below.

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<sup>110</sup> Ibid [2.38].

<sup>111</sup> Ibid [2.40].

<sup>112</sup> Ibid [2.55] (citations omitted).

<sup>113</sup> Ibid [2.56].

<sup>114</sup> See *Gaynor v CDF* [2015] FCA 1370 (4 December 2015) [101]-[105] (Buchanan J).

<sup>115</sup> Termination Decision, [13g], [14]. Once again, it should be noted that the Inquiry Officer did not find that Major Gaynor had breached the Unacceptable Behaviour Instruction.

(c) *The CDF's Findings in the Termination Decision*

The CDF used the word 'order' only once in the Termination Decision. This use is in the context of setting out the particulars of the allegations that had been made against Major Gaynor. Specifically, the Termination Decision noted that the Termination Notice alleged that his conduct 'did not cease after being ordered to do so on the basis that your public comment was inconsistent with Defence Policies'.<sup>116</sup>

Significantly, however, in the Termination Decision, the CDF did not use the word 'order' when describing the CO Action or the DCA Action. Instead, the CDF stated as follows in the section 'Findings of material fact':

I note the appropriateness of the manner in which you had publicly expressed views was *brought to your attention* by your Commanding Officer in his conversation with you on 6 February 2013... I also note that the former Deputy Chief of Army *brought this standard and the responsibility of Officers to uphold Army values and ethos in their behaviour specifically to your attention* on 22 March 2013... I am satisfied that you did not subsequently modify your behaviour to reflect the standard of public behaviour expected of members of the Australian Army and especially of Officers, including by removing the online material as *directed* by the former Deputy Chief of Army.<sup>117</sup>

Hence, the CDF referred to the appropriateness of Major Gaynor's conduct 'being brought to his attention', and the DCA 'directing' and 'informing'<sup>118</sup> Major Gaynor. Using such equivocal language is curious, especially when using 'order' or 'command' would have been clearer and more forceful.

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<sup>116</sup> Ibid [3b].

<sup>117</sup> Termination Decision, [11] (emphasis added). The CDF later noted in the 'Reasons for decision' that Major Gaynor 'failed to modify [his] online behaviour when the inconsistency of your behaviour expressed in online postings with the standard expected of an Officer in the Australian Army was *brought specifically to your attention*: ibid [16c] (emphasis added). Further, the CDF noted that the persistence of Major Gaynor's conduct demonstrated that he did not understand or was unable to exercise his responsibilities as an officer notwithstanding 'the *bringing of expected standards of behaviour to your attention* by your chain of command on two separate occasions': ibid [16d] (emphasis added). Finally, the CDF noted '*Once informed* that the manner in which you had expressed your personal views did not accord with Army values, in particular *by the former Deputy Chief of Army*, you did not modify your behaviour.': ibid [17] (emphasis added).

<sup>118</sup> Ibid [17].

However, the context explains why the CDF used the language he did. In the Termination Decision, the CDF noted that the DMP discontinued disciplinary action<sup>119</sup> against Major Gaynor for the material contained in the Termination Notice.<sup>120</sup> This material included an allegation that the Deputy Chief of Army had ordered Major Gaynor.<sup>121</sup>

Had disciplinary proceedings continued, whether or not Major Gaynor had received lawful orders would have been an issue.<sup>122</sup> A court martial would have been the appropriate forum to resolve questions of fact and law concerning this issue. It is reasonable to infer that the DMP discontinued prosecution because of the difficulty in proving that the orders were lawful.<sup>123</sup> Consequently, there was no positive finding by the discipline system – a system purposely designed to assess such issues – that a lawful order had been breached.

Certain other statements suggest that the CDF did not base the Termination Decision on Major Gaynor's disobedience to lawful orders. The CDF noted:

...your duty status is significant for purposes such as consideration of proceedings under the *Defence Force Discipline Act 1982*... However, for the purposes of this decision pursuant to the *Defence (Personnel) Regulations 2002*, it is your *behaviour generally* which is at issue in deciding whether your retention is in the interests of the Australian Army.<sup>124</sup>

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<sup>119</sup> DFDA s 103(1)(a) provides that the DMP may direct that a charge not be proceeded with.

<sup>120</sup> Termination Decision, [13f].

<sup>121</sup> Termination Notice, [10].

<sup>122</sup> It is likely the charge would have been for breaching DFDA s 27(1), which makes it a crime to disobey a lawful command. It is clear from the record that Major Gaynor would have disputed that he had been lawfully ordered.

<sup>123</sup> There were a number of issues with proving that the relevant orders were lawful orders. First, under the Political Activities Instruction, ADF members are permitted personal political activity and comment. Second, whether Major Gaynor was 'on duty and in uniform' pursuant to DFDA s 3 (definition of 'defence member'). Third, there may have been difficulty proving that necessary intent to give an order, especially with the CO Action. We further consider this point below at Part VIII.A.3.(d).(iii). Fourth, there may also have been an issue concerning whether these orders impermissibly infringed the implied freedom. We further consider this point below at Part VIII.C.4.

<sup>124</sup> Termination Decision, [7] (emphasis added).

Further:

...the disciplinary proceedings were directed to your *alleged contravention* of the *Defence Force Discipline Act 1982* and the Inquiry Officer inquiry to your formal compliance with [the Unacceptable Behaviour Instruction] as a Defence member in the workplace.<sup>125</sup>

Finally:

*Both of these matters depended on your duty status at the time of your conduct. Neither was directed to the effect of your conduct holistically in terms of your obligations to serve and of the reputation of the Army and ADF. That, however, is the focus of the Termination Notice and the matter to which I directed your attention in my letter of 22 August. Therefore, I do not consider the outcomes of the disciplinary action or administrative inquiry relevant to my decision on your service.*<sup>126</sup>

That is, the CDF's focus was not on (amongst other things) disobeying lawful orders. Indeed, at the time of the Termination Decision, the CDF treats this as an *allegation*. Given that the allegation had not been proven in disciplinary proceedings, such language was appropriate. Instead, the CDF's focus was on a 'holistic' assessment of Major Gaynor's behaviour.<sup>127</sup>

We noted in the previous section that Major Gaynor was subject to the discipline system and the administrative system. The discipline system discontinued its action against Major Gaynor, while the administrative system continued to the Termination Decision. However, it was not the place of the CDF, in the administrative system, to conclude that Major Gaynor had disobeyed orders. This further explains the CDF's choice of language in the Termination Decision.

Before going further, we should note that the CO Action and DCA Action could be considered equivalent to employment directions to Major

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<sup>125</sup> Ibid [14] (emphasis added).

<sup>126</sup> Ibid (emphasis added).

<sup>127</sup> This conclusion is also supported by the CDF's Notice to Show Cause for Termination of Appointment dated 22 August 2013; found as Annexure B in *Gaynor v CDF* [2015] FCA 1370 (4 December 2015). In this document, the CDF stated that he intended to place greater weight, amongst other things, on Major Gaynor's public statements that are demeaning or intolerant of homosexuals, transgenders and women: *ibid* [7].

Gaynor.<sup>128</sup> Based on his statements in the Termination Decision, the CDF appeared to adopt this approach. Not following a direction may well have consequences in the administrative system, as they did for Major Gaynor in the Termination Decision.<sup>129</sup> Ultimately, however, not following a direction is a different matter to not following a lawful order. The latter has more serious consequences.<sup>130</sup> And both the Federal Court and the Full Court held that the CO Action and the DCA Action were lawful orders. We now turn to this issue.

(d) *The Federal Court and the Full Court Conclusions*

Given the foregoing, it was inappropriate for the Federal Court and the Full Court to conclude that the CO Action and the DCA Action were lawful orders. There are four reasons which, taken together or separately, explain why this is so. Specifically, the Federal Court and the Full Court:

1. Purported to review a finding of fact when judicially reviewing administrative action;
2. Acted outside their jurisdiction in concluding Major Gaynor had been lawfully ordered;
3. Did not accord procedural fairness to Major Gaynor when concluding he had been lawfully ordered; and
4. Failed to hold that, if the CO Action and DCA Action were orders, they impermissibly infringed the implied freedom and thus could not be lawful orders.

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<sup>128</sup> We say ‘equivalent to employment directions’ because ADF members are not employees and are not engaged under a contract of employment: see *C v Commonwealth of Australia* [2015] FCAFC 113 (21 August 2015) [1] (Tracey, Buchanan and Katzmann JJ); *Commonwealth v Welsh* (1947) 74 CLR 245, 268 (Dixon J). That said, ADF members may be directed like an employee.

<sup>129</sup> It should be noted, however, that the CO Action and the DCA Action may have impermissibly infringed the implied freedom even if they were directions and not orders. This is because, first, both the CO Action and the DCA Action were executive actions to which the implied freedom applies. Second, we note below why the CO Action and the DCA Action would impermissibly infringe the implied freedom if they were orders: see Part VIII.C.4 below. This reasoning applies analogously to directions. We emphasise that we mean ‘directions’ in the sense that they are executive actions, not ‘directions’ in the employment sense. As mentioned in the footnote immediately above, ADF members are not employees, and do not have contracts of employment. The extent to which the implied freedom applies to contracts of employment, and contracts generally, is an intriguing issue, and one that we hope to address in later work. However, it is an issue that is beyond the scope of this article.

<sup>130</sup> Namely, a criminal penalty under DFDA s 27(1).

We will examine the fourth reason after we have completed our analysis of the Termination Decision.<sup>131</sup> What follows is our examination of the first three reasons.

(i) *Purporting to Review a Finding of Fact in a Judicial Review of Administrative Action*

Both the Federal Court and Full Court held that Major Gaynor had disobeyed lawful orders. For the reasons that follow, considering whether or not a defence member has disobeyed lawful orders involves answering questions of fact and law. However, determining whether a defence member has disobeyed a lawful order is, ultimately, a finding of fact.<sup>132</sup>

Distinguishing questions of fact from those of law is notoriously difficult.<sup>133</sup> However, Francis H Bohlen provides a useful starting point:

The primary and popular meaning of the word 'fact' is something which has happened or existed, including not only the physical facts of the case but also more abstract matters, such as the state of mind of those individuals, whose state of mind may be of legal importance.

'Law' primarily means a body of principles and rules which are capable of being predicated in advance and which are so predicated, awaiting proof of the facts necessary for their application.<sup>134</sup>

As to whether an order has been given, the ADF's *Discipline Law Manual* notes:

Words alleged to constitute a command must always be examined in the light of the circumstances in which they were used and this examination may show clearly enough that the words used, although not otherwise supportable as a command, were intended by the speaker to be a command and were so understood by the person to

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<sup>131</sup> See Part VIII.C.4.

<sup>132</sup> That a court martial is a tribunal of fact ultimately determining whether or not someone is guilty of disobeying an order can be seen in *Re Manion's Appeal* (1962) 9 FLR 91, 104.

<sup>133</sup> In *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 394 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ), the High Court noted '[t]he distinction between questions of fact and questions of law is a vital distinction in many fields of law. Notwithstanding attempts by many distinguished judges and jurists to formulate tests for finding the line between the two questions, no satisfactory test of universal application has yet been formulated.'

<sup>134</sup> Francis H Bohlen, 'Mixed Questions of Law and Fact' (1924) (72)(2) *University of Pennsylvania Law Review* 111, 112.

whom they were spoken.<sup>135</sup>

It appears that whether or not an order has been given is a question of fact. This is because whether or not an order was given depends not only on the words used but their context.<sup>136</sup> Further, the state of mind of both the speaker and listener are also important.

Of course, whether or not an order was 'lawful' is a question of law. However, even here questions of fact are involved. For example, for a reserve ADF member, a lawful order from a superior officer must be given while the member is on duty and in uniform.<sup>137</sup> However, whether a member was on duty and in uniform at the relevant time is a question of fact.

As noted above, the CDF in his 'Findings of material fact' in the Termination Decision did not find that Major Gaynor had been lawfully ordered. One of the concerns with superior courts reviewing findings of fact is that it may not have all the materials available to the original decision-maker.<sup>138</sup> Further, in fact-finding, the decision-maker may have experience or a perspective a superior court lacks.<sup>139</sup> As also noted above, a court martial would have been the appropriate forum to resolve issues concerning whether Major Gaynor had been lawfully ordered. However, the DMP discontinued

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<sup>135</sup> Australian Defence Force, *Defence Force Discipline Manual* (Defence Publishing Service, 2<sup>nd</sup> ed, 2001) vol 1, 78.

<sup>136</sup> In *Re Schneider's Appeal* (1958) 8 FLR 314, 324 the Courts-Martial Appeal Tribunal noted '[w]e think that in any particular case words alleged to constitute a command must always be examined in light of the circumstances in which they are used, and that this examination may show clearly enough that a set of words not otherwise supportable as a command was intended by the speaker to be a command, and was so understood by a person to whom they were spoken.' See also *Re Manion's Appeal* (1962) 9 FLR 91, 96. The ADF and its governing laws uses the word 'order' as it is ordinarily used in the general sense, that is, 'an authoritative direction, injunction, command, or mandate': Susan Butler (ed), *Macquarie Concise Dictionary* (Macquarie Dictionary Publishers, 6<sup>th</sup> ed, 2013) 1035, or, at the very least, how it is ordinarily used in its military sense, that is 'a command or notice issued by a military commander to subordinate troops': *ibid.* And, it must be noted, there is an overlap between how 'order' is ordinarily used in the general and military sense, namely, and relevantly, a 'command'. Members of a court martial are all ADF members: DFDA s 116. They exercise a jury-like function: DFDA ss 133, 134. They will draw upon their military experience to determine whether or not, in the circumstances, the facts fall into the ordinary definition of an order. Hence, the determination of whether or not an order was given falls into that category of case described in *Collector of Customs v Pozzolanic* (1993) 43 FCR 280, 288. That is, 'when a statute uses words according to their ordinary meaning and the question is whether the facts as found fall within those words. Where it is reasonably open to hold that they do, then the question whether they do or not is one of fact'.

<sup>137</sup> DFDA s 3 (definition of 'defence member').

<sup>138</sup> Aronson and Groves, above n 45, 388-9 [4.20].

<sup>139</sup> *Ibid.*

disciplinary action. In light of the DMP discontinuing disciplinary proceedings, the CDF carefully avoided mentioning that the CO Action and DCA Action were lawful orders. Instead, the CDF appeared to treat them as equivalent to employment directions when 'holistically' assessing Major Gaynor's behaviour.

In the circumstances, it was inappropriate for the Federal Court and the Full Court to disturb this finding of fact.

(ii) *Acting Outside Jurisdiction*

The military justice system is designed to function independently, although there is some recourse to civilian courts. As to *Gaynor*, two things should be noted. First, in the discipline system, the Federal Court may only determine questions of law that the Defence Force Discipline Appeals Tribunal refers to it.<sup>140</sup> Second, in the administrative system, the Federal Court system may judicially review administrative actions.<sup>141</sup>

The issue here is that the Federal Court and the Full Court were engaged in a judicial review of administrative action. Given the structure of the military justice system, judicial review cannot determine whether Major Gaynor had been lawfully ordered, or whether he had disobeyed orders. Such determinations fall within the discipline system, not the administrative system.<sup>142</sup> If the Federal Court or the Full Court wanted clarification about whether Major Gaynor was lawfully ordered, the appropriate course was to refer this issue back to the CDF.<sup>143</sup> Of course, this would have resulted in the CDF referring the matter to the DMP – an action whose result was already known.

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<sup>140</sup> See *Defence Force Discipline Appeals Act 1955* (Cth) ss 51, 52.

<sup>141</sup> ADJR Act ss 3 (definition of 'enactment'), 4, 5.

<sup>142</sup> The Federal Court and the Full Court appear to have fallen into the type of jurisdictional error described in *Craig v South Australia* (1995) 184 CLR 163, 177: '[a]n inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist.' And further: '[j]urisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside its theoretical limits of its functions and powers.'

<sup>143</sup> ADJR Act s 16(1)(b).

Hence, in the circumstances, both the Federal Court and the Full Court should have only reviewed the legality of the CDF's 'holistic' assessment of Major Gaynor's behaviour.

*(iii) Not According Procedural Fairness to Major Gaynor*

Even if the Federal Court and the Full Court had jurisdiction to determine whether Major Gaynor had disobeyed lawful orders, neither accorded him procedural fairness. As noted above, determining whether and ADF member disobeyed lawful orders involve questions of fact and law. The questions of fact include determining whether words in their context convey an order, plus the state of mind of both the speaker and the listener. It is no answer to say, as the Federal Court and Full Court did, that ADF members superior in rank have the right to give lawful orders to a member inferior in rank, with the latter being obliged to obey.<sup>144</sup> This is because the factual and legal context is relevant to whether a purported order is a lawful order or, indeed, even an order.<sup>145</sup> The factual and legal contexts of the CO Action and the DCA Action were very much in issue in *Gaynor*.

From the facts of *Gaynor*, the DCA Action occurred while Major Gaynor was not on duty and not in uniform. Further, the DCA Action purported to extend to matters of public discussion that could not reasonably be considered official information. In these circumstances, both the DCA and Major Gaynor should have provided direct evidence concerning their understanding of the situation. The DCA may have been aware that, in the circumstances, his order may not have had legal force,<sup>146</sup> thus bringing into question his intent to give a lawful order. Major Gaynor may not have understood that he was being lawfully ordered, given that he was commenting about public matters, not on duty or in uniform, and thus not liable to military

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<sup>144</sup> *CDF v Gaynor* [2015] FCA 1370 (4 December 2015) [113] (Buchanan J); *Gaynor* [2017] FCAFC 41 (8 March 2017) [150]-[154] (Perram, Mortimer and Gleeson JJ).

<sup>145</sup> Australian Defence Force, *Defence Force Discipline Manual* (Defence Publishing Service, 2<sup>nd</sup> ed, 2001) vol 1, 78; *Re Schneider's Appeal* (1958) 8 FLR 314, 324 and *Re Manion's Appeal* (1962) 9 FLR 91, 96.

<sup>146</sup> In the sense that Major Gaynor could not be charged for failing to obey it. Further, the DCA was purporting to order a reserve officer who was not on duty to not speak about matters of public discussion outside the workplace. It should be noted that the CDF could have directed Major Gaynor to report for duty. That direction would have had added force given that failing to report for duty is a criminal offence: DFDA s 23(1). However, even then, the DCA Action still would have encountered the difficulties with being a lawful order that we note in Part VIII.C.4.

disciplinary action if he did not obey it. Our point is this: whether or not the DCA Action was a lawful order was clearly a controversial issue and, in these circumstances, procedural fairness required that the relevant witnesses be examined and cross-examined.

The CO Action occurred when Major Gaynor's CO, Lt Colonel Buxton, and Major Gaynor were on duty and in uniform. However, as a question of fact, it does not appear a lawful order was given. In a memorandum, Lt Colonel Buxton noted 'My *intent* is to formally *counsel* [Major Gaynor] concerning the inappropriateness of his actions while serving as an Army officer'.<sup>147</sup> Later, in the record of conversation between Lt Colonel Buxton and Major Gaynor, Lt Colonel Buxton recorded 'In concluding, LTCOL Buxton advised Major Gaynor that provided he complied with policy and acted professionally, he would consider the issue closed. MAJ Gaynor acknowledged this'.<sup>148</sup> Lt Colonel Buxton does not mention orders, only compliance with policy and acting professionally. Factually, the record of conversation appears to note a *caution*, not *orders*. Once again, procedural fairness demanded that Lt Colonel Buxton and Major Gaynor be examined and cross-examined concerning their understanding of the situation.

In addition, the political consequences to Major Gaynor were severe. His livelihood would suffer by being dismissed. Further, his reputation would suffer because he would be seen as an officer who disobeyed orders. In these circumstances, procedural fairness required that Major Gaynor be allowed to examine and cross-examine relevant witnesses.

Put another way, the Federal Court<sup>149</sup> or, failing that, the Full Court,<sup>150</sup> needed to address the issue of whether Major Gaynor had disobeyed orders in a manner similar to how a court martial would have. In addressing this issue, a court martial would have allowed the examination and cross-examination of relevant witnesses.<sup>151</sup> That neither the Federal Court nor the Full Court appreciated this is concerning.

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<sup>147</sup> *Gaynor v CDF* [2015] FCA 1370 (4 December 2015) [104] (Buchanan J) (emphasis added).

<sup>148</sup> *Ibid* [109] (Buchanan J) (capitalisation in original).

<sup>149</sup> *Federal Court of Australia Act 1976* (Cth) s 46.

<sup>150</sup> *Ibid* s 27(c).

<sup>151</sup> *Court Martial and Defence Magistrate Rules* (Cth) pt 3.

Given the foregoing, did the CDF also fail to accord procedural fairness to Major Gaynor by not allowing him to examine or cross-examine relevant witnesses? The CDF would have so failed except, once again, the CDF in the Termination Decision *did not find that Major Gaynor disobeyed orders*. Again, his review was confined to a ‘holistic’ assessment of Major Gaynor’s behaviour.

In summary, there appear to be serious issues concerning how the Federal Court and the Full Court addressed whether or not Major Gaynor had been lawfully ordered.<sup>152</sup> Given this, the High Court should have granted special leave. Such a failure of due process simply cannot happen again in Australia’s legal system.

#### 4 *Major Gaynor Did Not Breach Defence Instructions Regarding Social Media*

In the Termination Decision, the CDF did not find that Major Gaynor had breached the Social Media Instruction.<sup>153</sup> Further, and as noted in the previous section, the DMP discontinued disciplinary action based on the online material referred to in the Termination Notice.<sup>154</sup> The Social Media Instruction constitutes a general order<sup>155</sup> that, if breached, exposes a defence member to criminal liability.<sup>156</sup> In view of the DMP’s decision to discontinue disciplinary proceedings,<sup>157</sup> the CDF appeared to confine the Termination Decision to a ‘holistic’ assessment of Major Gaynor’s behaviour.

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<sup>152</sup> It is worth noting that neither the Federal Court nor the Full Court noted the distinction between the discipline system and the administrative system in Australia’s military justice system. Doing so may have avoided confusion about what they could and could not do with respect to the Termination Decision.

<sup>153</sup> The CDF stated ‘I accept you did not contravene *extant instructions* due to your duty status, but I have considered your submission *from the point of view of the standards of behaviour expected of Defence members generally*’: Termination Decision, [17] (emphasis added).

<sup>154</sup> *Ibid* [13f].

<sup>155</sup> DFDA s 3 (definition of ‘general order’); see also *Gaynor v CDF* [2015] FCA 1370 (4 December 2015) [68] (Buchanan J).

<sup>156</sup> DFDA s 29(1).

<sup>157</sup> DFDA s 29(1) did not apply to Major Gaynor because, at the relevant time, he was not on duty or in uniform. In any event, there is a significant issue concerning whether relevant parts of Social Media Instruction [19] impermissibly infringe the implied freedom, given our analysis of s 18C of the *Racial Discrimination Act 1975* (Cth) in Forrester, Finlay and Zimmermann, *No Offence Intended*, above n 17 and s 17(1) of the *Anti-Discrimination Act 1998* (Tas) in Forrester, Zimmermann and Finlay, ‘An Opportunity Missed?’, above n 17. Social Media Instruction [19] provides that ‘[d]efence personnel must not post material that is offensive towards any group or person based on any personal traits, attributes, beliefs or practices that exploit, objectify or are derogatory of gender, ethnicity or religion.’

Both the Federal Court and Full Court held that the Social Media Instruction applied to Major Gaynor.<sup>158</sup> Once again, this was inappropriate for substantially the same reasons we noted in the previous section.<sup>159</sup>

## B *What Gaynor Is About*

*Gaynor* concerns whether the CDF acted within power when he terminated Major Gaynor's commission due to his *behaviour*. At the time,<sup>160</sup> reg 85(1)(d)(ii) provided, relevantly:

(1) The service in the Defence Force of an officer may be terminated, in accordance with this regulation, for any of the following reasons:

...

(d) the Chief of the officer's Service is satisfied that the retention of the officer is not in the interest of:

...

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No defences are provided. This is a sweeping intrusion into the ability of Defence personnel to comment on any government or political matter on social media. 'Offensive' and 'derogatory' set a threshold for legal liability that is far too low. Further, they are terms that are too broad and too vague. We detail the concepts of overbreadth and vagueness further below.

<sup>158</sup> *Gaynor v CDF* [2015] FCA 1370 (4 December 2015) [86], [115], [197], [275] (Buchanan J); *Gaynor* [2017] FCAFC 41 (8 March 2017) [7] (Perram, Mortimer and Gleeson JJ).

<sup>159</sup> Again, the Federal Court and the Full Court appear to be making a finding of fact where the CDF was the appropriate person to make, and who did make, such a finding. The Federal Court and the Full Court also appear to be exercising jurisdiction that should be exercised through the military discipline system concerning questions of fact and law. On the procedural fairness point, if the Federal Court and the Full Court were considering finding that the Social Media Policy [19] applied to Major Gaynor, he should have been given the opportunity to make written and oral submissions concerning (at least) three matters. First, whether Major Gaynor could *in fact* be identified as an ADF member in certain communications: see Social Media Instruction [9]. It is not clear in some communications that Major Gaynor could be so identified: see *Gaynor v CDF* [2015] FCA 1370 (4 December 2015) [17], [22]-[25]. Even then, the test used to identify someone's ADF membership with a communication may itself be an issue. If so, Major Gaynor should also have been given the opportunity to make submissions in this regard. Second, whether relevant parts of Social Media Instruction [19] impermissibly infringed the implied freedom. Third, whether the comments complained about in fact breached Social Media Instruction [19]. In addition, an ordinary meaning would be given to 'offensive' and 'derogatory'. Hence, as noted above, it would be up to the members of the court martial to determine whether or not, as a matter of fact, the Published Remarks would fall within the ordinary definitions of 'offensive' and 'derogatory'.

<sup>160</sup> The Defence Personnel Regulations, which applied at the time when the events noted in *Gaynor* occurred, have now been replaced by the *Defence Regulations 2016* (Cth).

(ii) the Chief's Service;

Regulation 85(1A) of the Defence Personnel Regulations<sup>161</sup> was also relevant, and provided:

Without limiting paragraph (1)(d), the Chief of the officer's Service may be satisfied for that paragraph for reasons relating to the officer's:

- (a) performance; or
- (b) behaviour; or
- (c) conviction of an offence or a service offence.<sup>162</sup>

In the section titled 'Findings of material fact', the CDF stated that he informed Major Gaynor that his public comments:

...demonstrate attitudes that are *demeaning of, and demonstrate intolerance of, homosexual, transgender persons and women, and are contrary to the policies and cultural change currently being undertaken in the Australian Army and Australian Defence Force (ADF)*.<sup>163</sup>

The CDF noted that a significant amount of the relevant material from Major Gaynor's Published Remarks:

...is *critical of the ADF and government policy and decisions, particularly the support offered to homosexual and transgender members of the ADF and the decision to permit women to serve in combat roles*.<sup>164</sup>

Further, the CDF noted that Major Gaynor's publicly expressed disagreement was:

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<sup>161</sup> We refer to reg 85(1A) of the *Defence (Personnel) Regulations 2002* (Cth) as 'reg 85(1A)' or 'regulation 85(1A)' as the case requires.

<sup>162</sup> In 2013, DFDA reg 85 was amended. However, reg 85(1)(d)(ii) as amended and reg 85(1A) commenced on 5 March 2013; see DFDA Endnote 1. Hence, these provisions were in effect prior to the Termination Notice being issued.

<sup>163</sup> Termination Decision, [4] (emphasis added).

<sup>164</sup> Ibid [6] (emphasis added).

*...generally intemperate, disrespectful and does not accord with the standard of behaviour expected of any Defence member, and particularly an Officer of your rank and experience.*<sup>165</sup>

Before going further, we note that the CDF stated that Major Gaynor's religious convictions had no bearing in on the Termination Decision.<sup>166</sup> Hence, the CDF considered Major Gaynor's freedom to speak his religious views.

However, the CDF did not appear to satisfactorily consider Major Gaynor's freedom to communicate about government and political matters. The closest the CDF came were these statements:

I distinguish between your holding of a personal opinion, the mere fact of which I do not consider necessarily inconsistent with the standards required of Defence members, and your conduct in expressing personal opinions publicly in an inappropriate and disrespectful manner, in circumstances that identify you as a member of the Australian Army Reserve.<sup>167</sup>

And later:

Defence recognises that different views exist, but demands tolerance and respect in order to preserve ADF capability.<sup>168</sup>

As we will show below, as a matter of administrative law, the CDF failed consider a relevant consideration, specifically Major Gaynor's freedom to communicate about government and political matters.<sup>169</sup> However, it is the matter of constitutional law that concerns us – specifically, whether the Termination Decision impermissibly infringed the implied freedom. It is to this matter that we now turn.

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<sup>165</sup> Ibid (emphasis added).

<sup>166</sup> The CDF accepted Major Gaynor's statements were informed by his personal beliefs and faith, but did not accept that disciplining Major Gaynor 'shows intolerance of your opinions and demeans the right of ADF members to practice their faith because such action is directed to your behaviour and the manner in which you have publicly expressed your beliefs, rather than the beliefs themselves': ibid [9] The CDF also rejected Major Gaynor's submission that criticism of his conduct showed intolerance of his Catholic faith, stating: '... I do not consider this a question of faith. There is no evidence of direct or indirect discrimination against you on the basis of your religious beliefs': ibid [18].

<sup>167</sup> Ibid [9].

<sup>168</sup> Ibid [10].

<sup>169</sup> Part VIII.D.

### C *Applying the Adapted McCloy Test to Gaynor*

Applying the adapted *McCloy* test to the Termination Decision yields the following result.

#### 1 *Did the Termination Decision Burden the Implied Freedom?*

The Termination Decision terminated Major Gaynor's commission on the basis of comments that:

- Were critical of ADF and government policy; and
- Demonstrated intolerance of homosexuals, transgender people and women.

ADF and government policy are, of course, government and political matters. Further, the following matters upon which Major Gaynor commented are also government and political matters:

- Women in frontline combat roles;
- Whether or not transgender people should serve in the ADF and, if so, the degree to which accommodation and support should be provided to them;
- The government and the ADF's approach to Islam; and
- The ADF marching in the Sydney's annual Gay and Lesbian Mardi Gras.

Applying implied freedom cases concerning legislation by analogy, all that is needed at this stage is that the implied freedom be burdened. The extent to which it is burdened does not matter.<sup>170</sup>

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<sup>170</sup> We note, however, that in *McCloy*, Gageler J stated that judicial scrutiny of the relevant law should be 'calibrated to the degree of risk to the system of representative and responsible government established by the *Constitution* that arises from the nature and extent of the restriction on political communication that is identified at the first step in the analysis': *McCloy* (2015) 257 CLR 178, 238 [150] (Gageler J). Nettle J, at 269-70 [255], observed that 'a direct or severe burden on the implied freedom requires a strong justification'. Gordon J stated, at 288 [336], that whether a law impermissibly infringes the implied freedom of political communication 'is a question of judgment about the nature and extent of the effect of the impugned law on the maintenance of the constitutionally prescribed system of representative and responsible government'. See also *Brown* [2017] HCA 43 (18 October 2017) [90], [121], [128] (Kiefel CJ, Bell and Keane JJ), [164]-[165] (Gageler J), [237], [291] (Nettle J) and [325], [397] (Gordon J).

As noted above, executive action may concern not only groups but also individuals. Hence, the implied freedom may be burdened even if one individual is affected.

Terminating Major Gaynor's commission because of comments he made about certain government and political matters is a burden on the implied freedom.<sup>171</sup>

Hence, the Termination Decision burdened the implied freedom.

2 *Was the Termination Decision's Purpose Legitimate?*

As shown above, the decision was made pursuant to reg 85(1)(d)(ii). Regulation 85(1A)(b) allows the CDF consider behaviour. It is clear the Termination Decision was principally concerned with Major Gaynor's behaviour. Maintaining appropriate behaviour in the ADF is legitimate, as it is a purpose compatible with Australia's constitutionally prescribed system of representative and responsible government.

The real issue with the Termination Decision concerns whether the Termination Decision was a proportional response to Major Gaynor's comments.

3 *Was the Termination Decision Reasonably Appropriate and Adapted to Advance its Legitimate Object In a Manner Compatible With the Maintenance of the Constitutionally Prescribed System of Representative and Responsible Government?*

Here, we apply the steps of the proportionality test, as adapted to executive power.

(a) *Was the Termination Decision Suitable?*

On its face, there was a rational connection between the Termination Decision and its purpose, which is to discipline behaviour pursuant to regs 85(1)(d)(ii) and 85(1A).

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<sup>171</sup> See also *Gaynor v CDF* [2015] FCA 1370 (4 December 2015) [250] (Buchanan J).

(b) *Was the Termination Decision Necessary?*

This step raises an intriguing issue. There was, in fact, an alternative that was (and is) obvious and easily implemented. The alternative was for Major Gaynor to include in any statements where official information was not being disclosed but his ADF involvement may be an issue this disclaimer: ‘The views of Bernard Gaynor are his own and are not those of the ADF.’

The disclaimer ‘The views of [person X] are their own and not those of [organisation Y]’ is widespread in both the public and private sectors. The Commonwealth government, working with the ADF, could easily provide for disclaimers in the ADF’s governing laws. Further, the ADF itself could allow for using disclaimers when issuing orders.<sup>172</sup> Of course, tight restrictions on official information would – and should – remain. However, in matters of public debate where official information is not at risk of being disclosed, then such disclaimers should be used.

Further, and as discussed below, it appears that the governing laws and policies guiding the ADF have not paid due regard to the implied freedom. The use of disclaimers by ADF personnel would accommodate the strength and width of the implied freedom.

Hence, and in light of what this case *is* and *is not* about, the Termination Decision fails this step of ‘proportionality testing’.

(c) *Was the Termination Decision adequate in its Balance?*

In the Termination Decision, the CDF identified a number of bases for terminating Major Gaynor’s commission. These bases were:

1. Major Gaynor’s behaviour was ‘repeatedly inconsistent’ with Defence Instruction (General) PERS 50-1 *Equity and Diversity in the Australian Defence Force* (‘Equity and Diversity Instruction’) and the Diversity

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<sup>172</sup> Provided these orders otherwise meet the requirements for lawful orders. We note that the Australian Defence Force’s *Military Personnel Policy Manual*, Part 7-1 [1.6]-[1.7] requires that ADF members must take ‘all reasonable steps’ to avoid bringing the ADF or the Department of Defence’s neutrality into question, or giving the impression that the ADF member’s activity is being undertaken in other than a private capacity. The *Military Personnel Policy Manual*, the Public Comment Instruction and/or the Social Media Instruction could provide guidelines on the use of disclaimers.

and Inclusion statement dated 13 March 2013 ('Diversity and Inclusion Statement');<sup>173</sup> and

2. Certain considerations to which the CDF gave weight.

There are significant issues with these bases, which in turn inform whether the Termination Decision was adequate in its balance. We now examine these bases and, after this, consider other issues relevant to the adequacy of the Termination Decision.

(i) *The Equity and Diversity Instruction and the Diversity and Inclusion Statement*

Before going further, when assessing the proportionality of executive action, two fundamental principles should be kept in mind:

- In a common law legal system, 'everybody is free to do anything, subject only to the provisions of the law';<sup>174</sup> and
- As a corollary to the first principle, in a common law legal system, government cannot do anything unless authorised by law.<sup>175</sup>

Both principles apply to the ADF.

Both the Equity and Diversity Instruction and the Diversity and Inclusion Statement were unsound bases for the Termination Decision. As to the Equity and Diversity Instruction, it is clear that this document focuses on conduct in the workplace, not outside of it.<sup>176</sup> There are numerous references to

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<sup>173</sup> Termination Decision, [10], [16a].

<sup>174</sup> *Lange* (1997) 189 CLR 520, 564 (citations omitted).

<sup>175</sup> Charles Sampford, 'Law, Institutions and the Public/Private Divide' (1991) 20 *Federal Law Review* 185, 201: 'There are different 'closure rules' for public and private law. Such closure rules determine what should be done if there is no appropriate rule to cover a case. In public law the rule is 'what is not authorised is not permitted' and in private law it is that 'what is not prohibited is permitted.' Sir John Laws notes two first order constitutional principles 'The first is that for the individual citizen, everything which is not forbidden is allowed. The second is that for public bodies, and notably the government, everything that is not allowed is forbidden.' As to the latter, he notes 'the ideal of democratic government under the law, where there is no place for arbitrary or capricious conduct, dictates that every decision it takes must be authorised by the terms of the positive legal power conferred upon it, whose limits it must not transgress.': John Laws, 'The Rule of Reason – an International Heritage' in Mads Tønnesson Andenas, Gordon Slynn and Duncan Fairgrieve (eds), *Judicial Review in International Perspective* (Kluwer, 2000) 247, 256. We would include in the term 'law' here both statutory and non-statutory sources of authority, such as prerogative.

<sup>176</sup> In the Termination Decision, the CDF asserted that the Equity and Diversity Instruction applied irrespective of duty status: Termination Decision, [10]. Buchanan J made a similar assertion in

the ‘workplace’,<sup>177</sup> ‘workforce’,<sup>178</sup> ‘working conditions’,<sup>179</sup> ‘working environment’<sup>180</sup> and the ADF being an organisation that ‘works together’.<sup>181</sup> The document outlines implementation of equity and diversity principles through a Workplace Equity and Diversity Plan.<sup>182</sup> The equity and diversity legislation referred to in the annexure to the Equity and Diversity Instruction refers to legislation that, amongst other things, prohibits discrimination and harassment in the workplace.<sup>183</sup> Further, the *Public Service Act 1999* (Cth) (‘PSA’) provisions referred to in this annexure are directed to conduct in the workplace.<sup>184</sup>

As noted above, the CDF found that there was no issue with Major Gaynor’s conduct in the workplace. The CDF certainly found issues with Major Gaynor’s conduct outside the workplace. However, this conduct was simply beyond the scope of the Equity and Diversity Instruction. The CDF could not therefore rely on the Equity and Diversity Instruction to support his termination of Major Gaynor.

As to the Diversity and Inclusion Statement, this document does not carry the force of law in any description. Rather, it is a strategy document. The Diversity and Inclusion Statement may certainly form the basis for future governing laws and orders. However, it is not itself a governing law or an

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*Gaynor v CDF* [2015] FCA 1370 (4 December 2015) [197]. These assertions are untenable for the reasons we set out in the paragraph in which this footnote appears. Equity and Diversity Instruction [1] indeed states that ‘[a]ll personnel are to comply with the principles of equity and diversity’. However, repeated references to the workplace throughout the document make it clear that compliance relates to that environment only. Even if the Equity and Diversity Instruction could be construed as applying outside the workplace, those parts justifying action against Major Gaynor for comments outside the workplace would likely impermissibly infringe the implied freedom. For example, the Equity and Diversity Instruction instructs ADF personnel to treat others with respect: *ibid* [7a], [16], [17], [18c]. If applied outside the workplace, this is a sweeping intrusion into the implied freedom. In a liberal democracy, disrespectful language is used frequently in communication about government and political matters. Further, the term ‘respect’ is a too broad and too vague (we discuss overbreadth and vagueness below). Such an intrusion is not justified even its purpose is to achieve cultural reform in the ADF.

<sup>177</sup> *Ibid* [3], [4], [7e], [9], [18], [18a], [18b], [20a].

<sup>178</sup> *Ibid* [4].

<sup>179</sup> *Ibid* [8].

<sup>180</sup> *Ibid* [11], [13], [17].

<sup>181</sup> *Ibid* [16a].

<sup>182</sup> *Ibid* [12], [14], [18a], [20a], [21], [23].

<sup>183</sup> *Ibid* Annexure A [1]-[5].

<sup>184</sup> *Ibid* Annexure A [7a], [7c-e], [8].

order.<sup>185</sup> Even if the Diversity and Inclusion Statement did have legal force, its operation outside the workplace would, in relevant respects, impermissibly infringe the implied freedom.<sup>186</sup> The CDF could not therefore rely on the Diversity and Inclusion Statement to support his termination of Major Gaynor.<sup>187</sup>

To conclude, it does not appear that the Equity and Diversity Instruction, the Diversity and Inclusion Statement, or other relevant laws prohibited Major Gaynor's conduct.<sup>188</sup> This meant he was, in fact, *free* to engage in this conduct. We will return to this point in the next section.

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<sup>185</sup> The closest the Diversity and Inclusion Statement comes to an order are remarks the CDF makes jointly with the Defence Secretary in a 'message': Diversity and Inclusion Statement 3. However, it is virtually certain the 'message' would not be an order, given that it is jointly signed with the Defence Secretary, a civilian.

<sup>186</sup> For example, the Diversity and Inclusion Statement encourages ADF members to respect diverse backgrounds, experiences, knowledge and skills: *ibid* 3. If applied as a directive for conduct outside the workplace, this would impermissibly infringe the implied freedom. The reasoning we used above for the Equity and Diversity Instruction's promotion of respect outside the workplace would apply here. This reasoning would also apply were the Diversity and Inclusion Statement's expectation that ADF members champion diversity apply as a directive for conduct outside the workplace: *ibid* 3.

<sup>187</sup> It is also for these reasons that the Full Court was in error by placing reliance on it in their reasoning: see *Gaynor* [2017] FCAFC 41 (8 March 2017) [164]-[166] (Perram, Mortimer and Gleeson JJ).

<sup>188</sup> That said, the relevant considerations of a decision-maker are governed by the construction and purpose of the relevant statute: *Peko-Wallsend* (1986) 162 CLR 24, 39-40 (Mason J). In this case, the discretion conferred by reg 85(1)(d)(ii) is broad. Here, '[t]he general rule is that a discretion expressed without any qualification is unconfined except in so far as it is affected by limitations to be derived from the context and scope and purpose of the statute.': *R v Australian Broadcasting Tribunal; Ex Parte 2HD Pty Ltd* (1979) 144 CLR 45, 50. The Defence Personnel Regulations reg 7(1) prescribe certain considerations concerning termination as described in reg 7(2). But could it be argued that the Equity and Diversity Instruction and the Diversity and Inclusion Statement be taken into account as a consideration under reg 85(1)(d)(ii) for conduct outside the workplace? In this way, reg 85(1)(d)(ii) would 'authorise' using these documents. However, two problems arise. First, reg 85(1)(d)(ii) would then operate as a "catch all" provision for conduct that (in this case) the Chief of Army does not like. This creates the risk of capricious application. Second, and in any event, such a sweeping application of reg 85(1)(d)(ii) would likely impermissibly infringe the implied freedom for the reasons we noted above for the Equity and Diversity Instruction and Diversity and Inclusion Statement were they applied outside the workplace.

(ii) *Certain Considerations to Which the CDF Gave Weight*

As noted above, regs 85(1)(d)(ii) and 85(1A) provide that the CDF may terminate an officer's commission on the ground of behaviour. In justifying the Termination Decision, the CDF weighed certain considerations<sup>189</sup> as follows:

1. He gave weight to the standards of behaviour expected of ADF members generally. Further, that Major Gaynor had not modified his behaviour when the manner of his comments critical of Defence, government policy, support for homosexual and transgender ADF personnel and women serving in frontline combat roles had been brought to his attention.<sup>190</sup>
2. The manner and tone of Major Gaynor's comments had irreparably undermined the CDF's confidence in Major Gaynor's ability to uphold Army values and 'be a leader in an organisation in which everyone is expected to respect diversity and demonstrate tolerance and respect, notwithstanding [Major Gaynor's] personal beliefs.'<sup>191</sup>
3. The significant weight that the CDF placed on Major Gaynor's service history, his United States Meritorious Service Medal and his desire to continue service was 'outweighed by [Major Gaynor's] conduct in making repeated and intemperate comments critical of Defence and government policies and decisions, and individual Defence members, including after being instructed to of the standard of behaviour expected of [Major Gaynor] if [he] wished to continue as an Officer in the Army Reserve.'<sup>192</sup>
4. He gave considerable weight to the behaviour evidenced in Major Gaynor's Published Remarks being 'inconsistent with the standards of behaviour and conduct required for the proper performance of duty.'<sup>193</sup>
5. He gave medium weight to the consideration that Major Gaynor's online behaviour, which was 'divisive and disrespectful' regarding 'other serving members individually and as groups', had the capacity to affect

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<sup>189</sup> As noted in the previous footnote, the Defence Personnel Regulations obliges those required to make a termination decision to consider certain matters: Defence Personnel Regulations reg 7(1). These matters are described in *ibid* reg 7(2).

<sup>190</sup> Termination Decision, [17].

<sup>191</sup> *Ibid* [18].

<sup>192</sup> *Ibid* [19].

<sup>193</sup> *Ibid* [22].

recruitment and retention, and affect morale and discipline ('Organisation Considerations').<sup>194</sup>

We term the matters contained in points one to four the 'Comment Considerations'.

As to the Comment Considerations, we make four points. First, and generally speaking, restricting expression about government and political matters within the workplace is less likely to impermissibly infringe the implied freedom.<sup>195</sup> But that is not the type of restriction in issue here and, in any event, there was no issue with Major Gaynor's workplace conduct. Rather, the CDF purported to restrict, and then punish, Major Gaynor's freedom to communicate about government and political matters *outside the workplace*.

Our second point is related to the first. As noted above, the implied freedom is not a right. Hence, the Full Court properly corrected the Federal Court in this regard.<sup>196</sup> However, as also noted above, freedom of expression at common law is of constitutional importance. In determining whether that executive action was proportional, its effect on that individual's common law freedom to express themselves about government and political matters must be considered. The CDF's actions were a sweeping intrusion into Major Gaynor's freedom to communicate about government and political matters.

Third, in the Termination Decision, the CDF considered Major Gaynor's freedom to hold religious beliefs. However, the CDF's consideration of Major Gaynor's freedom to communicate about government and political matters was, to put it charitably, cursory. The closest the CDF came to it was to say 'Defence recognises that different views exist, but demands tolerance and respect in order to preserve ADF capability'.<sup>197</sup> He also distinguished between

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<sup>194</sup> Ibid [21].

<sup>195</sup> That said, workplace discussions may be one of the main ways many Australians talk about government and political matters. Hence, and as we have noted elsewhere, the implied freedom should restrict laws that unduly chill workplace 'water-cooler' discussions: Joshua Forrester, Augusto Zimmermann and Lorraine Finlay, Submission No 181 to the Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia*, 23 December 2016, 83.

<sup>196</sup> *Gaynor* [2017] FCAFC 41 (8 March 2017) [47], [63] (Perram, Mortimer and Gleeson JJ). For the Federal Court's reasoning regarding rights see *Gaynor v CDF* [2015] FCA 1370 (4 December 2015) [243]-[244] (Buchanan J).

<sup>197</sup> Termination Decision, [10].

Major Gaynor holding a personal opinion and expressing those opinions ‘publicly in an inappropriate and disrespectful manner’.<sup>198</sup>

The CDF appeared to fix upon the tone and content of Major Gaynor’s remarks, but does not consider whether Major Gaynor was, in fact, *free* to make these remarks. For the reasons we noted above, the implied freedom is a strong and wide-ranging freedom. Intemperate and disrespectful language falls well within its ambit. As Kirby J has noted:

From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas... By protecting from legislative burdens governmental and political communications in Australia, the Constitution addresses the nation’s representative government as it is practised. It does not protect only the whispered civilities of intellectual discourse...<sup>199</sup>

Hayne J has noted:

History, not only recent history, teaches that abuse and invective are an inevitable part of political discourse. Abuse and invective are designed to drive a point home by inflicting the pain of humiliation and insult. And the greater the humiliation, the greater the insult, the more effective the attack may be. The giving of really serious offence is neither incidental nor accidental.<sup>200</sup>

Fourth, the CDF appears to have insufficiently appreciated both *the workplace context* and *professionalism*. As to *the workplace context*, a person’s political opinion is usually irrelevant to whether they are effective *employees*.<sup>201</sup> In a workplace, employees can and do set aside personal differences to achieve employment goals. This is, at least in part, the reason why dismissal on the ground of political opinion is a ground for unlawful termination in most Australian jurisdictions.<sup>202</sup> Further, employees expressing political opinions

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<sup>198</sup> Ibid [9].

<sup>199</sup> *Coleman* (2004) 220 CLR 1, 91 [239] (Kirby J).

<sup>200</sup> *Monis* (2013) 249 CLR 92, 136 [85] (Hayne J).

<sup>201</sup> Of course, political parties should be free to not employ who are members of other political parties, or do not share that party’s political platform.

<sup>202</sup> *Anti-Discrimination Act 1991* (Qld) ss 7(j), 15; *Anti-Discrimination Act 1998* (Tas) ss 14, 15, 16(m), (n); *Equal Opportunity Act 2010* (Vic) ss 6(k), 18; *Equal Opportunity Act 1984* (WA) s 53; *Fair Work Act 2009* (Cth) 772(f).

outside the workplace should be expected, and indeed accommodated, in a liberal democracy like Australia's.

As to *professionalism*, the ADF is known as the 'Profession of Arms'.<sup>203</sup> The Equity and Diversity Instruction lists professionalism as the first of the ADF's values.<sup>204</sup> However, to say that higher standards of conduct are expected of professionals in expressing political views<sup>205</sup> is misconceived. Indeed, much is expected of professionals in their respective workplaces. However, in a liberal democracy, professionals can and do publicly participate in fierce and searching political debates. Our point here is that, outside the workplace, members of the same profession may bitterly disagree over any number of things, politics included. However, once in the workplace, their position is similar to employees, as noted above. That is, professionals should – and do – put aside such differences to work towards common goals.<sup>206</sup>

Recognising that political opinion is largely irrelevant to whether someone can be an effective employee or professional is critical to genuine workplace inclusivity and diversity. That is, including people not only from different backgrounds and possessing different attributes, but *holding different views*.

While we appear to be labouring the point, it bears repeating: there were no issues with Major Gaynor's conduct in the workplace. He clearly possessed very strong religious and political views. However, there were never any complaints about how he dealt with other ADF members in the workplace. Indeed, his conduct in the workplace appears to have been exemplary. Major Gaynor's conduct within the workplace appeared consistent with the professionalism that should be expected of ADF members in a liberal democracy.

It is true that the ADF regards itself as apolitical, and is cautious about its members appearing political. However, given the implied freedom's strength

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<sup>203</sup> Army, 'What defines the Profession of Arms?', *Army* (online) <<https://www.army.gov.au/our-future/blog/what-defines-the-profession-of-arms>>.

<sup>204</sup> Equity and Diversity Instruction [15a].

<sup>205</sup> The Full Court noted that the ADF 'insists on respect and tolerance, without which diversity cannot flourish': *Gaynor* [2017] FCAFC 41 (8 March 2017) [108] (Perram, Mortimer and Gleeson JJ).

<sup>206</sup> For example, lawyers in a litigation team may vehemently disagree on any numbers of matters, including political matters, outside the workplace. However, once in the workplace, they work with each other to represent their client.

and width, the ADF should reconsider how it and its members approach political matters. This is a point we further discuss below.

Before turning to other considerations, we note that our comments apply not only to reserve but full time ADF members. Full time ADF personnel remain citizens of the nation they defend. However, there is something to be said for affording reserve members even greater latitude to talk about government and political matters. This is because reserve members are civilians rendering part-time military service. Such reasoning finds support in the *Commonwealth Constitution* itself, s 44 of which provides for disqualifications for Senators and members of the House of Representatives. Section 44(iv) provides that among those disqualified are those who 'holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth'. However s 44 also provides, relevantly:

[S]ubsection (iv) does not apply... to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

That is, s 44 contemplates that ADF reserve members may be Senators or members of the House of Representatives. This necessarily presupposes that ADF reserve members will be *candidates* for such positions, and thus be involved in debates about government and political matters. However, it should not be thought that ADF reserve members need stand as candidates to be given latitude to talk about government or political matters. Given the principles of popular sovereignty noted above, the better view is that ADF reserve members have such latitude because they are part of a sovereign people.

As to the Organisation Consideration, it was speculative.<sup>207</sup> There was no indication in the record that ADF members had threatened to leave if Major Gaynor's commission was not terminated.

Further, the CDF considered the effect on ADF recruitment, retention, morale and discipline if Major Gaynor's commission *was not* terminated.

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<sup>207</sup> See *Gaynor v CDF* [2015] FCA 1370 (4 December 2015) [253]-[254] (Buchanan J). The Full Court did not appear to disturb this finding on appeal.

However, given this, the CDF should then have considered the effect on such matters if Major Gaynor was terminated.

As we detail in the next section, Major Gaynor's Published Remarks ranged from mild to coarse. However, the CDF took a 'broad brush' approach, describing the language in this material as intemperate, inappropriate, divisive and/or disrespectful. Put another way, the CDF did not indicate which, if any, of Major Gaynor's comments fell *outside* this description. However, taking such a broad approach would create a 'chilling effect'<sup>208</sup> for current and prospective ADF personnel. What, if anything, can ADF personnel say that won't get them into trouble on account of their 'behaviour'? This chilling effect, and its potential to affect recruitment, retention, morale and discipline, is something the CDF did not consider but, in the circumstances, should have.

(iii) *Other Considerations*

There are certain other considerations relevant to whether the Termination Decision was adequate in its balance.

The first consideration concerns the Termination Decision being too broad and too vague. From the face of the Termination Decision, the entirety of Major Gaynor's Published Remarks was of concern.<sup>209</sup> As such, the Termination Decision's scope was very broad. Major Gaynor's comments in his Published Remarks ranged from mild to coarse. The remarks ranged from this:

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<sup>208</sup> With respect, the approach that certain High Court members in *Brown* took to the phrase 'chilling effect' is somewhat curious: see *Brown* [2017] HCA 43 (18 October 2017) [262] (Nettle J), [457]-[470] (Gordon J). The phrase 'chilling effect' is hardly unknown in High Court jurisprudence. When it is used, it refers to how laws may unduly stifle freedom of expression; it does not refer to the US 'chilling effect' doctrine: see, eg, *Brown* [2017] HCA 43 (18 October 2017) [151] (Kiefel CJ, Bell and Keane JJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 131, 135 (Mason CJ, Toohey and Gaudron JJ), 155, 156-157 (Brennan J), 174, 185 (Deane J); *Roberts v Bass* (2002) 212 CLR 1, 40-41 [102] (Gaudron, McHugh and Gummow JJ). See also Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11, (1979) 22-3 [37]. Our use of 'chilling effect' is intended to refer to the stifling, or deterrent, effect of executive action. We gather that, along with the void-for-vagueness doctrine, the US 'chilling effect' doctrine was raised in *Brown*, thus requiring the High Court to address it.

<sup>209</sup> Termination Decision, [22].

[I]t would be useful for Defence hierarchy to publicly support efforts to fairly index military superannuation. It is an issue that not only affects retired soldiers but today's serving military personnel.<sup>210</sup>

To this:

No soldier wants to be led by a commander that has voluntarily decided to have his balls cut off. No amount of politically correct propaganda will change that fact.<sup>211</sup>

Major Gaynor's remarks also fell at points along this range, the following being some examples:

Defence's policy directions on sex-change operations, the Mardi Gras and women serving in front-line combat roles are wrong.<sup>212</sup>

[T]he decision to allow soldiers to march in the Mardi Gras was offensive to many Australians. If Defence is truly equitable, it will now allow members to wear their uniform to any activity that promotes natural marriage.<sup>213</sup>

Defence believes Islam is a religion of peace. That is why it has been more concerned about building schools in Afghanistan than trying to change what is taught inside them.<sup>214</sup>

Defence, struggling to deal with negative publicity surrounding years of alleged sexual assault has now opened the door for males to shower in the ladies bathroom – whether they like it or not.<sup>215</sup>

The supposedly apolitical Australian Defence Force is now marching to the beat of a very political tune, drummed up by those who demand gay marriage and take pleasure in ridiculing Christianity.<sup>216</sup>

The truth is that the Islamic religion was blooded in battle and grew strong on the spoils of war.<sup>217</sup>

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<sup>210</sup> *Gaynor v CDF* [2015] FCA 1370 (4 December 2015) [32] (Buchanan J).

<sup>211</sup> *Ibid* [31].

<sup>212</sup> *Ibid*.

<sup>213</sup> *Ibid*.

<sup>214</sup> *Ibid*.

<sup>215</sup> *Ibid* [32].

<sup>216</sup> *Ibid*.

<sup>217</sup> *Ibid* [117].

If Defence will allow one officer protection to comment on Defence policy because he is gay, then I should also be able to speak.<sup>218</sup>

As an Iraq vet & military officer that originally supported invasion, my views have changed. The war achieved very little.<sup>219</sup>

I fail to see how ADF participation in an offensive, sexually explicit parade sends msg that sexual harassment is wrong.<sup>220</sup>

He thinks that because he has had a nip here, a tuck there and popped a bunch of pills that he is now a woman. I don't like to speak on behalf of women, so I'll let them describe how they feel about his analysis that femininity consists of the sum result of a bunch of cosmetic surgery and hormones stuffed in a bottle.<sup>221</sup>

As mentioned above, the Termination Decision did not indicate which of Major Gaynor's Published Remarks were not intemperate, inappropriate, divisive and/or disrespectful.<sup>222</sup> The implication is that all the Public Remarks were one or more of these things.

In other work, we have argued that, as regards the implied freedom, laws can be too broad or too vague to be constitutional.<sup>223</sup> The same principles apply to executive action. This is because, first, certainty is critical to the rule of law:

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<sup>218</sup> Ibid [118].

<sup>219</sup> Termination Notice, [8e].

<sup>220</sup> Ibid [8h].

<sup>221</sup> *Gaynor v CDF* [2017] HCA 43 (18 October 2017) [127] (Buchanan J).

<sup>222</sup> It could be argued that the milder remarks we quotes were made worse by the context in which they were said. However, if context was relevant, *the onus was on the CDF to prove this*. In the absence of such a clarification, the implication is the CDF impugned all the Published Remarks as intemperate, inappropriate, divisive and/or disrespectful both in context and in isolation. Indeed, the fact that we have to speculate about context suggests the Termination Decision was too vague when characterising the Published Remarks.

<sup>223</sup> Forrester, Zimmermann and Finlay, 'An Opportunity Missed?', above n 17, 292-6; Forrester, Finlay and Zimmermann, *No Offence Intended*, above n 17, 192-7. In *No Offence Intended*, we concluded as follows (at 196-7): '[t]o be clear, we are not suggesting that US or Canadian principles concerning vagueness must be imported into the modified *Lange* test for s 18C and s 18D to be held unconstitutional. *Our view is that, quite apart from any principle of vagueness derived wholly or partly from US or Canadian constitutional law, s 18C and s 18D [of the Racial Discrimination Act 1975 (Cth)] are too complex to be reasonably appropriate and adapted to the end they serve.*' (emphasis added). Our view here is similar to that given in *Brown* [2017] HCA 43 (18 October 2017) [149] (Kiefel CJ, Bell and Keane JJ), [236] (Nettle J): '[u]nder Australian law a vague law is not invalid on that account alone, but laws which have that quality and which, in their practical operation and effect, burden the freedom must be justified according to the questions in *Lange* if they are to survive challenge.' That said, in our view, there is little stopping Australia adopting a void for vagueness

As a matter of due process, a law is void on its face if it is so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application'. Such vagueness occurs when a legislature states its proscriptions in terms so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork.<sup>224</sup>

The same principles apply by analogy to executive action. Executive government cannot enforce laws in such a fashion that it is difficult to determine how it will be enforced. As to overbreadth:

Statutes which open-endedly delegate to administering officials the power to decide how and when sanctions are applied or licenses issued are overbroad because they grant such officials the power to discriminate – to achieve indirectly through selective enforcement a censorship of communicative content that is clearly unconstitutional when achieved directly.<sup>225</sup>

Again, this principle applies by analogy to executive action. The factors that guide executive action cannot themselves be too broad.

Second, we have also noted that the concepts of vagueness and overbreadth create a 'buffer zone' around the implied freedom as they have around the First Amendment of the *United States Constitution*.<sup>226</sup> As we demonstrated above, the implied freedom is strong and wide-ranging.<sup>227</sup> The implied freedom is a restriction not only on legislative but executive action. Executive action whose scope is too broad or too vague should be restricted.

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doctrine similar to that used in the United States and Canada. Given the proximity of *Brown's* publication to that of this article, our remarks here cannot be extensive. We hope to provide detailed arguments in a later article. However, we will provide some brief commentary where appropriate in the footnotes of this section.

<sup>224</sup> *R v Keegstra* [1990] 3 SCR 697, 818 (McLachlin J) ('*Keegstra*') quoting Laurence Tribe, *American Constitutional Law* (Foundation Press, 2<sup>nd</sup> ed, 1988) 1033-4.

<sup>225</sup> *Keegstra* [1990] 3 SCR 697, 818 (McLachlin J) quoting Laurence Tribe, *American Constitutional Law* (Foundation Press, 2<sup>nd</sup> ed, 1988) 1056. It should be noted that *Keegstra* was a case decided by the Canadian Supreme Court. McLachlin J's remarks concerning vagueness and overbreadth in *Keegstra* spoke for the minority in a 4:3 judgment. That said, the related doctrine of overbreadth was applied by a unanimous Canadian Supreme Court decision of *Saskatchewan Human Rights Commission v Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 519-20 [107]-[111] (Rothstein J). It is curious that members of the High Court in *Brown* focused on the vagueness doctrine as applied in United States jurisprudence, but overlooked the use of it and related doctrines in Canadian jurisprudence.

<sup>226</sup> See Note, 'The Void for Vagueness Doctrine in the Supreme Court' (1960) *University of Pennsylvania Law Review* 67, 75.

<sup>227</sup> See Part III.B.

Third, like freedom of expression at common law,<sup>228</sup> the common law principle of due process is of constitutional importance.<sup>229</sup> Common law due process includes the principle of certainty in executive action. Given that the common law informs the *Commonwealth Constitution*,<sup>230</sup> common law due process should inform whether executive action impermissibly infringes the implied freedom.<sup>231</sup>

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<sup>228</sup> *Haneef* (2007) 163 FCR 414, 444 [113] (Black CJ, French and Weinberg JJ). See also *Evans* (2008) 168 FCR 576, 594 [72] (French, Branson and Stone JJ); *Monis* (2013) 249 CLR 92, 128 [60] (French CJ).

<sup>229</sup> Due process is one of the fundamental common law principles Australia has inherited. Its sources are not only *Magna Carta 1297*, 25 Edw 1, c 29 ('*Magna Carta*'), but also *Liberty of Subject 1354*, 28 Edw 3, c 3, and *Petition of Right 1627*, 3 Car 1, c 1. As with the *Magna Carta*, the latter statutes are either received law in certain Australian jurisdictions, or applied by Imperial Acts legislation in other Australian jurisdictions. In *Brown*, members of the High Court noted that Australia had no counterpart of the Fifth and Fourteenth Amendments of the *United States Constitution* and hence lacked the constitutional basis for a void for vagueness doctrines: *Brown* [2017] HCA 43 (18 October 2017) [148] (Kiefel CJ, Bell and Keane JJ), [236] (Nettle J), see also [446]-[456], [467] (Gordon J), [505]-[509] (Edelman J). With respect, due process remains a fundamental common law principle in Australia. The Fifth Amendment enshrines this fundamental common law principle as a right with respect to the US Federal government. The Fourteenth Amendment does the same but with respect to the States of the US. In Canada, s 7 of the *Canadian Charter of Rights and Freedoms* ('s 7') also enshrines this fundamental common law principle as a right. Hence, Australia *does* have a counterpart to the Fifth and Fourteenth Amendments (and, for that matter, s 7). However, it is found in the common law as a fundamental (indeed, constitutional) principle, and not in a Bill or Charter of Rights. In *Brown*, members of the High Court also noted that resolving issues concerning vagueness 'does not involve the importation of foreign constitutional doctrine': *Brown* [2017] HCA 43 (18 October 2017) [149] (Kiefel CJ, Bell and Keane JJ), [236] (Nettle J). With respect, the irony in this statement is hard to ignore. In *McCloy*, the plurality appeared to have little difficulty adapting an approach to assessing proportionality clearly based on that of the civil law legal tradition (namely Germany's): see *Brown* [2017] HCA 43 (18 October 2017) [160] (Gageler J). Yet, adapting a doctrine used by the US and Canada – two countries that, like Australia, are constitutional federations with common law legal traditions – is, somehow, beyond the pale. The irony is compounded because the *Lange* (and hence *McCloy*) test itself appears to be based on US jurisprudence: see *Coleman* [2004] HCA 25; (2004) 220 CLR 1, 91 [234] (Kirby J) quoting *McCulloch v Maryland* 17 US 159, 206 (Marshall CJ) (1819): '[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.' See also *Leask v Commonwealth* [1996] HCA 29; (1996) 187 CLR 579, 599 (Dawson J). To repeat, due process is a fundamental common law principle, and one of constitutional importance. That the US and Canada both enshrined this principle as a right is not, in the scheme of things, so giant a leap that Australia cannot adapt the void for vagueness doctrine to its own constitutional framework. After all, the principle of legality (that the law will not violate fundamental common law rights and freedoms without clear and unambiguous statutory language) has been fashioned from similar fundamental common law principles: see James Spigelman, 'Principle of legality and the clear statement principle' (2005) 79 ALJ 769, 774-6.

<sup>230</sup> *Lange* (1997) 189 CLR 520, 564.

<sup>231</sup> This appears to be another situation that Brennan J described in *Re Bolton*: '[m]any of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very

Under regs 85(1)(d)(ii) and 85(1A), the CDF is given broad authority to terminate commissions based on behaviour. Whether these regulations are too broad and too vague may itself be an issue. However, that is not our focus.

Rather, our focus is the *application* of these regulations on the basis that Major Gaynor's remarks are intemperate, inappropriate, divisive and/or disrespectful. As to vagueness, reasonable minds may differ whether certain remarks of Major Gaynor's are intemperate, inappropriate, divisive and/or disrespectful. This is so even if an objective, 'reasonable person' test is used. For example, take the remark 'I fail to see how ADF participation in an offensive, sexually explicit parade sends msg that sexual harassment is wrong'. Two reasonable minds, applying the same 'reasonable person' test, may reach very different conclusions concerning whether Major Gaynor's remarks were intemperate, inappropriate, divisive and/or disrespectful.<sup>232</sup> This result is unacceptable from a rule of law standpoint. Reasonable minds should, as far as possible, be reaching the same conclusions when applying the same objective tests to the same facts.<sup>233</sup>

As to overbreadth, the CDF's approach in the Termination Decision suggests that a very wide range of comments may be capable being considered intemperate, inappropriate, divisive and/or disrespectful, thereby risking an officer's commission being terminated on grounds of 'behaviour'. As noted above, Major Gaynor's comments ranged from mild to coarse. However, even comments on the milder end of the spectrum, like 'Defence's policy directions on sex-change operations, the Mardi Gras and women serving in front-line combat roles are wrong', were caught. Were this approach to such language enacted in a governing law, it would likely be found to impermissibly infringe

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existence, may be overlooked until a case arises which evokes their contemporary and undiminished force': see *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 520-1.

<sup>232</sup> For example, one person may conclude that the remark was inappropriate, while another may conclude the remark was only expressing a concern in a rhetorical way.

<sup>233</sup> It is true that, in cases like this one where the relevant statute has conferred broad discretion to dismiss a commissioned officer, the fact that another conclusion might reasonably be reached is not itself a ground for judicial review: see *Gaynor v CDF* [2015] FCA 1370 (4 December 2015) [54]-[60] (Buchanan J); *Gaynor* [2017] FCAFC 41 (8 March 2017) [103] (Perram, Mortimer and Gleeson JJ). However, and as we noted earlier, where the implied freedom is concerned a more systematic approach is required. Such an approach must aim to discourage and, where necessary, remedy, overbreadth and vagueness in executive decision-making affecting communication about government and political matters. This means that reasonable minds should, as far as possible, *not* be differing when they apply the same objective tests to the same facts.

the implied freedom. Hence, the CDF could not circumvent the implied freedom because he purported to enforce a regulation concerning behaviour.

A further consideration is that it appears that Major Gaynor spoke out at least partly because the ADF had itself engaged in political activity. Traditionally, the ADF is an apolitical organisation. This is a tradition that stems from the English Civil War and its aftermath.<sup>234</sup> The military should not concern itself in matters of politics. However, in 2013 the ADF participated formally in Sydney's Gay and Lesbian Mardi Gras.<sup>235</sup>

At this point, it is once again useful to distinguish between what goes on inside and outside the workplace. The ADF can and should make every effort to promote diversity and inclusiveness, and eliminate harassment and discrimination, within the workplace. However, given that the ADF is an apolitical organisation, it must be careful with its public associations, including with organisations promoting diversity and inclusion as part of a political agenda.

The Gay and Lesbian Mardi Gras in Sydney has become a significant annual cultural event. However, it is also, unquestionably, a political event. At about the time Major Gaynor wrote, the organising body for the Gay and Lesbian Mardi Gras stated that it provides 'resources and opportunities to our community for creative *and political expression*'.<sup>236</sup> And later:

Sydney Gay and Lesbian Mardi Gras organisation *will continue to advance gay and lesbian rights here and abroad* and to showcase our pride to be whoever we are or want to be.

But we also – because its the right thing to do and its in our constitution – *will advance the rights of bisexual, transgender, queer and intersex communities*.

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<sup>234</sup> Notably, the Army's involvement in Oliver Cromwell's usurpation of Parliament. The ADF's *Military Personnel Policy Manual*, Part 7 [1.1] states 'The Australian system of government has a constitutional convention of non-partisanship for members of the Australian Defence Force'.

<sup>235</sup> The ADF has also participated formally in the annual Sydney Gay and Lesbian Mardis Gras since 2013. We also note that ADF has changed its policy to allow the CDF to permit uniformed participation at political events: see the ADF's *Military Personnel Policy Manual*, Part 7 [1.9].

<sup>236</sup> New Mardi Gras Limited, *Sydney Gay and Lesbian Mardi Gras: Annual Report 2012* (July 2012) 2 (emphasis added).

We believe that Mardi Gras contains a powerful message for everyone in our community, Sydney and the rest of the world. It is not just freedom from discrimination but that all people should be free to celebrate the loving relationships they have formed. *Mardi Gras is strongest when it talks about both our rights and the world we want to live in.*

There is more work to be done.<sup>237</sup>

There is no doubt that the Gay and Lesbian Mardi Gras has been, and still is, very effective in promoting causes important to the LGBTQI community. However, it is for this very reason that the ADF, as an apolitical organisation, cannot participate in it.

Hence, the ADF, a formally apolitical organisation, was engaged in political activity. Importantly, this political activity did not involve creating official information, as would be case if the ADF was engaged in military operations prosecuting a war.<sup>238</sup> Rather, the activity involved matters not directly relevant to the defence of Australia. The ADF thereby played a role in prompting comments from Major Gaynor about government and political matters. The ADF then purported to discipline Major Gaynor for these comments while not accounting for its own actions. In our view, this is a factor in favour of finding that the Termination Decision impermissibly infringed the implied freedom.

*Gaynor* raises intriguing lines of inquiry with respect to the implied freedom. To what extent may government agencies restrict their employees' communications about government and political matters?<sup>239</sup> What happens

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<sup>237</sup> Ibid 3 (emphasis added).

<sup>238</sup> As Carl von Clausewitz observed '... War is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means': Carl von Clausewitz, *On War* (Kegan Paul, Trench, Trubner & Co, 1918) vol 1, 23. The statement commonly attributed to Clausewitz is 'war is politics by other means'.

<sup>239</sup> For example, PSA 13(11) provides that 'An APS employee must *at all times* behave in a way that upholds: (a) the APS Values and APS Employment Principles; and (b) the integrity and good reputation of the employee's Agency and the APS' (emphasis added). APS values include respecting all people, including their rights and their heritage: *ibid* 10(3); and being apolitical, providing the government with advice that is frank, honest, timely and based on the best available evidence: *ibid* 10(5). Can an APS employee be liable for statements they say outside of work? This issue has been of recent interest: Australian Broadcasting Corporation, 'Facebook liking anti-government posts banned under new public service policy', *ABC News* (online), 7 August 2017 <<http://www.abc.net.au/news/2017-08-07/facebook-liking-anti-government-posts-could-cost-public-service/8780660>>; Melissa Castan, 'Is liking something on Facebook 'protected political speech'? It depends' *The Conversation*

when a government agency restricts its employees' communications about government and political matters outside that agency's purpose, but then prompts these communications by acting outside its purpose?<sup>240</sup> Does disciplinary action against government whistleblowers impermissibly infringe the implied freedom?<sup>241</sup> While *Gaynor* did not concern whistleblowing, its implications extend beyond the ADF to other formally apolitical organisations, such as the Australian Public Service and the public services of the States and Territories.

To conclude, was the Termination Decision adequate in its balance? Ultimately, it was not. Once again, this case was not about Major Gaynor disclosing official information, engaging in workplace harassment or disobeying lawful orders. It would be a different matter if this case involved any of these matters, but it didn't. The Equity and Diversity Instruction and the Diversity and Inclusion Statement did not support holding Major Gaynor accountable for comments he made outside the workplace. Further, the CDF considered certain comments made by Major Gaynor intemperate, inappropriate, divisive and/or disrespectful when they could not reasonably be considered as such. In any event, the CDF failed to consider that the implied freedom extends to ADF personnel, especially when outside the workplace, and also extends to intemperate, inappropriate, divisive and/or disrespectful language. The Termination Decision was also a sweeping intrusion into Major Gaynor's common law freedom of expression outside the workplace. This common law freedom is of constitutional importance, and is relevant to proportionality testing. Finally, the CDF failed to consider the ADF's own role in prompting Major Gaynor's comments which, in the circumstances, he should have.

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(online), 14 August 2017 <<https://theconversation.com/is-liking-something-on-facebook-protected-political-speech-it-depends-82209>>. In case law, provisions that restrict a public servant's ability to speak about government and political matters have been found to impermissibly infringe the implied freedom: see *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 78 ALD 93, 109-17 [73]-[109] (Finn J) but see *R v Tjanara Goreng-Goreng* [2008] ACTSC 74 (18 August 2008) [18]-[38] (Refshauge J)). Such provisions have also been interpreted narrowly: see *Starr v Department of Human Services* [2016] FWC 1460 (29 March 2016) [71]-[75].

<sup>240</sup> For example, while one of the ADF's purposes is to promote inclusivity and diversity in its workplaces, this does not extend to promoting them outside its workplaces.

<sup>241</sup> A government agency may 'cross a line', thus prompting a whistleblower to speak out and inform the Australian people. Disciplinary action may impermissibly infringe the implied freedom by purporting to punish someone who transmitted information that Australian electors needed to know to better discharge their role in Australia's constitutionally prescribed system of representative and responsible government.

#### 4 *What if Major Gaynor Had Been Ordered?*

As noted above, the CDF found that the CO Action and the DCA Action were not in fact orders. However, even if Major Gaynor *had* been ordered on these occasions, the question remains whether they would have been lawful orders. Putting aside the issue of whether Major Gaynor was on duty and in uniform on both occasions, each order arguably impermissibly infringed the implied freedom. Our reasoning concerning whether the Termination Decision impermissibly infringed the implied freedom is applicable here. In particular:

- The CO Action and DCA Action purported to restrict Major Gaynor's communications about government and political matters outside the workplace.
- The CO Action and DCA Action purported to apply to communication that did not involve official information or national security matters.
- By reason of the first two points, the CO Action and DCA Action were a sweeping intrusion into Major Gaynor's common law freedom of expression.
- The scope of the CO Action and DCA Action was too broad and too vague. It was unclear what kind of comments would *not* subject Major Gaynor to disciplinary action.

#### D *Failure to Consider a Relevant Consideration*

Our analysis has focused on applying our proposed approach to executive action affecting the implied freedom. However, we will make a passing comment about the current approach as it would have applied to the facts of *Gaynor*.<sup>242</sup> As we noted above, the CDF's consideration of the implied freedom was cursory. Under the current approach, the implied freedom should be regarded as an important 'standing consideration' when enforcing laws affecting the freedom to communicate about government or political matters. While the CDF noted that differences of opinion existed, he appeared not to give the implied freedom adequate consideration.<sup>243</sup> Hence, the current

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<sup>242</sup> In *Gaynor*, the Full Court did not consider how the current approach applied to the Termination Decision. This is because Major Gaynor did not raise this specific point as a ground for judicial review: see *Gaynor* [2017] FCAFC 41 (8 March 2017) [81] (Perram, Mortimer and Gleeson JJ).

<sup>243</sup> For a discussion on the whether considering a relevant consideration is adequate, see Aronson and Groves, *Judicial Review of Administrative Action*, above n 45, 283-5 [5.140]-[5.150]. See also at 284-5 [5.150]: '[i]t remains true that it might not suffice for a reasons statement merely to advert or refer

approach could have supported setting aside the Termination Decision. That said, given the latitude courts typically allow executive decision-makers under the current approach, we cannot say this with certainty. Once again, our proposed approach properly accounts for the implied freedom's importance in a systematic way.

E *Policy Considerations Regarding the ADF and the Commonwealth Constitution*

Herein consists our distinguishing excellence, that in the hour of action we show the greatest courage, and yet debate beforehand the expediency of our measures. The courage of others is the result of ignorance; deliberation makes them cowards. And those undoubtedly must be owned to have the greatest souls, who, most acutely sensible to the miseries of war and the sweets of peace, are not hence in the least deterred from facing danger.<sup>244</sup>

Pericles's funeral oration to the Athenians is one of the earliest known recorded defences of democracy.<sup>245</sup> In it, he explains how the democratic spirit makes the martial spirit more powerful. Victor Davis Hanson has argued that democratic Thebes prevailed against oligarchic Sparta in 369-370BC in part because of its ability to mobilise and motivate its citizens. These citizens no longer needed a property qualification to vote, and thus felt they had a stake in Thebes.<sup>246</sup>

The strength of democracies is not confined to the ancients. The past century has shown that liberal democracies have prevailed in all global wars, be they hot or cold. Tyrannies, ancient and modern, have charged that democracies are decadent and soft. However, as we have noted elsewhere, citizens in any democracy must have a fair measure of maturity and resilience. By 'fair' we mean 'not insignificant', but also 'not unreasonable'.<sup>247</sup> In a democracy, a citizen must tolerate views that they vehemently disagree with,

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to a mandatory factor, but that is not because the factor might have been undervalued, but because such recitals sometimes fail to repel an inference that there was in fact *no* consideration of the mandatory factor' (citations omitted) (emphasis in original).

<sup>244</sup> Pericles, 'Funeral Oration to the Athenians' in *Great Speeches: Words That Made History* (Viking, 2005) 7.

<sup>245</sup> The funeral oration is found in the *History of the Peloponnesian War* by Thucydides: see Book II of Thucydides, *History of the Peloponnesian War* (William Heinemann, 1956).

<sup>246</sup> Victor Davis Hanson, *The Soul of Battle: From Ancient Times to the Present Day, How Three Great Liberators Vanquished Tyranny* (Anchor Books, 2001) 26-32.

<sup>247</sup> For further discussion see Forrester, Finlay and Zimmermann, *No Offence Intended*, above n 17, 139-41.

often stated in terms they find repugnant. Yet, even so, these citizens will work together to overcome common problems, and achieve common goals. Indeed, in our view and generally speaking, the maturity and resilience achieved by citizens of liberal democracies far exceed those in tyrannies.

The maturity and resilience of the citizenry of liberal democracies of course carry over into their militaries, which are comprised of citizen soldiers. As to the ADF, it must recognise that its soldiers remain citizens of the nation they defend. Further, it must accommodate as far as possible those freedoms 'hard-wired' into the *Commonwealth Constitution* that it defends.

However, in our view, the ADF has not sufficiently accommodated the implied freedom in its governing laws and policies.<sup>248</sup> It has no choice but to do so. In making this observation, we are *not* saying that bastardisation, harassment and abuse in the ADF aren't problems that must be addressed. They clearly are. But the ADF must not impermissibly infringe the implied freedom in its quest for reform.

How is this to be done? We suggest that the ADF would be aided in its quest by making two distinctions. The first distinction is that between what happens in the workplace and what happens outside it. Conduct occurring outside the workplace should not be a disciplinary concern unless it breaches the law, be that law civil or criminal. However, the standards of conduct expected within the workplace must be high. ADF personnel should be expected to act professionally in the workplace by putting aside whatever differences they may have outside it and working towards common goals.<sup>249</sup>

That said, it would be naïve to think that discussing government or political matters never arises in an ADF workplace. If such discussion does arise, then the professional expectation of ADF members should be to continue to work together towards common goals despite any differences. It is only when such differences lead to harassment or abuse should it become actionable under relevant ADF policies. Here, the standards of harassment or abuse must allow for the expression of even vehement political disagreement. Put another way,

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<sup>248</sup> For example, there are issues with parts of Social Media Instruction [19], as noted above in the footnotes.

<sup>249</sup> For example, someone with staunch left-wing views, while in the workplace, must put aside whatever differences they have with someone who publicly expresses staunchly right-wing views, and vice versa.

ADF members acting professionally must recognise that expressing even vehement political disagreement, without more, does not constitute harassment or abuse. Ultimately, it is one thing to generally criticise a view, belief, idea or practice, but singling out an ADF member for harassment or abuse is quite another.

The second distinction is that between the views of ADF members and the ADF as an organisation. ADF members should be able to express views about government and political matters provided the following is done:

1. They do not disclose official information, or information otherwise important to national security;
2. In doing so, they do not engage in harassment in the workplace or otherwise breach criminal or civil law; and
3. Where there may be confusion about the matter, they disclaim that the expressed views are their own and not those of the ADF.

As to the ADF as an organisation, it should promote workplace reform. However, it should take care to ensure that it is seen to be apolitical in its public pronouncements and involvement.<sup>250</sup>

We suggest that, in observing these distinctions, the ADF will better accommodate the implied freedom, and recognise the freedoms of its citizen soldiers, while undertaking necessary workplace reforms.

## IX CONCLUSION

In this article, we have explored the implied freedom's effect on executive power. As we have argued, the implied freedom affects executive power at the Commonwealth, State and Territory levels. Further, we have proposed that adapting the plurality's test in *McCloy* to executive power more systematically accounts for the implied freedom. We have applied our proposed approach to the topical case of *Gaynor*. It is hoped that, by applying the adapted *McCloy* test, the freedom of Australians to communicate about government and

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<sup>250</sup> On this point, the CDF may permit political activity in uniform: Military Personnel Policy Manual, Part 7-1 [1.9a]. This is a troubling provision, as it allows the CDF to, in effect, pick and choose which political activities are allowed. Given the seniority of the CDF, this provision risks the ADF being perceived by the public as endorsing certain views. This provision should be reformed.

political matters may be better protected. This protection extends beyond laws infringing the implied freedom to any executive action that may do so.