

FEDERAL COURT OF AUSTRALIA

Chief of the Defence Force v Gaynor [2017] FCAFC 41

Appeal from: *Gaynor v Chief of the Defence Force (No 3)* [2015] FCA 1370; 237 FCR 188

File number: NSD 1685 of 2015

Judges: **PERRAM, MORTIMER AND GLEESON JJ**

Date of judgment: 8 March 2017

Catchwords: **CONSTITUTIONAL LAW** – implied freedom of political communication – termination of respondent’s commission in Australian Defence Force – regulation 85 of the *Defence Force (Personnel) Regulations 2002* (Cth) – primary judge set aside termination because respondent’s political comments protected by implied freedom of political communication – appeal allowed – primary judge erred in applying *Lange* test at wrong level – *McCloy v State of New South Wales* (2015) 89 ALJR 857 applied

CONSTITUTIONAL LAW - s 116 of the *Constitution* – s 116 not engaged

ADMINISTRATIVE LAW – primary judge found no administrative grounds made out – respondent contended primary judge erred in applying ss 5(1)(b), (f), (h), 5(2)(a), (b), (c) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) – primary judge correct to reject administrative law challenges

Legislation: *Constitution*, ss 61, 68, 116
Administrative Decisions (Judicial Review) Act 1977 (Cth), ss 5(1), (2), 16)
Defence Act 1903 (Cth), ss 8, 9(1), (2), (5), 9A(1), (2), 16, 30, 31, 50(1)(b) 124
Defence Force Discipline Act 1982 (Cth), ss 3, 27
Defence Legislation Amendment (First Principles) Act 2015 (Cth)
Defence (Personnel) Regulations 2002 (Cth), regs 6(1)(g), 7(2), (3), 85(1), (1A), (2), (4), (5), (6), 119
Defence Regulations 2016 (Cth), reg 24

Cases cited: *AMS v AIF* [1999] HCA 26; 199 CLR 160
Attorney-General (NSW) v Quin [1990] HCA 21; 170 CLR

Attorney-General (SA) v Adelaide City Corporation [2013] HCA 3; 249 CLR 1

Australian Capital Television Pty Ltd v The Commonwealth [1992] HCA 45; 177 CLR 106

Avon Downs Pty Ltd v Federal Commissioner of Taxation [1949] HCA 26; 78 CLR 353

Bateson v Chief of Army [2012] ADFDAT 3; 263 FLR 409

Church of the New Faith v Commissioner of Pay-roll Tax (Vic) [1983] HCA 40; 154 CLR 120

Coleman v Power [2004] HCA 39; 220 CLR 1

Commonwealth v Quince [1944] HCA 1; 68 CLR 227

Corporation of the City of Enfield v Development Assessment Commission [2000] HCA 5; 199 CLR 135

Cunliffe v Commonwealth [1994] HCA 44; 182 CLR 272

Graham v Deputy Chief of Air Force [2004] FCA 1377

Groves v Commonwealth [1982] HCA 21; 150 CLR 113

Haskins v Commonwealth [2011] HCA 28; 244 CLR 22

Hogan v Hinch [2011] HCA 4; 243 CLR 506

King v Chief of Army [2012] ADFDAT 4; (2012) 269 FLR 452

Kruger v Commonwealth [1997] HCA 27; 190 CLR 1

Lange v Australian Broadcasting Corporation [1997] HCA 25; 189 CLR 520

Levy v Victoria [1997] HCA 31; 189 CLR 579

McCloy v State of New South Wales [2015] HCA 34; 89 ALJR 857

McGinty v Western Australia [1996] HCA 48; 186 CLR 140

Millar v Bornholt [2009] FCA 637; 177 FCR 67

Miller v TCN Channel Nine Pty Ltd [1986] HCA 60; 161 CLR 556

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; 162 CLR 24

Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; 240 CLR 611

Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; 185 CLR 259

Minister for Immigration and Multicultural Affairs v Eshetu [1999] HCA 21; 197 CLR 611

Monis v The Queen [2013] HCA 4; 249 CLR 92

Murphy v Electoral Commissioner [2016] HCA 36; 90 ALJR 1027

Shand v Chief of the Army [1998] FCA 265

Theophanous v Herald & Weekly Times Ltd [1994] HCA 46; 182 CLR 104

Unions NSW v State of New South Wales [2013] HCA 58; 252 CLR 530

White v Director of Military Prosecutions [2007] HCA 29; 231 CLR 570

Wotton v State of Queensland [2012] HCA 2; 246 CLR 1

Date of hearing: 5 and 6 May 2016

Registry: New South Wales

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Category: Catchwords

Number of paragraphs: 168

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Solicitor for the Appellant: Australian Government Solicitor

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Solicitor for the Respondent: Robert Balzola & Associates

ORDERS

NSD 1685 of 2015

BETWEEN: **CHIEF OF THE DEFENCE FORCE**
Appellant

AND: **BERNARD GAYNOR**
Respondent

JUDGES: **PERRAM, MORTIMER AND GLEESON JJ**

DATE OF ORDER: **8 MARCH 2017**

THE COURT ORDERS THAT:

1. The appeal be allowed, with costs.
2. Set aside the orders of the Court made on 4 December 2015 and 18 December 2015, and in lieu thereof order that the application for judicial review be dismissed, with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1 This appeal, brought by the Chief of the Defence Force (CDF), raises the question whether the decision by the appellant to terminate the respondent's service as an officer in the Australian Defence Force (ADF or Defence Force) pursuant to reg 85(1)(d) of the *Defence (Personnel) Regulations 2002* (Cth) was invalid by reason of the implied constitutional freedom of communication on political and governmental matters. Before the primary judge, the respondent also raised administrative law challenges to the appellant's decision, some of which he raises on the appeal by way of a notice of contention.

2 By orders made on 4 December 2015 the primary judge upheld the respondent's constitutional challenge and set aside the appellant's decision to terminate the respondent's service as an officer in the ADF on the basis that the decision infringed the implied freedom: *Gaynor v Chief of the Defence Force (No 3)* [2015] FCA 1370; 237 FCR 188.

3 For the reasons that follow, the appeal against the primary judge's orders should be allowed. The notice of contention should be dismissed.

BACKGROUND

4 The factual background to the matter was described in detail in the primary decision and will only be summarised in short compass here.

5 The appellant's written submissions, which we accept, summarised how the ADF had, over recent years, engaged in a "process of cultural change towards greater diversity and gender equality". These changes were manifested, for example, in documents such as a Defence Instruction (General) issued in October 2001, entitled "Equity and Diversity in the Australian Defence Force". That instruction was directed at Commanders, who were to take action such as ensuring "that all personnel and prospective personnel are valued and treated fairly, on individual merit and with respect and dignity" (at [18(c)]) and preventing and/or eliminating "unacceptable behaviour" (at [18(e)]). Commanders were instructed to demonstrate through their own behaviour "commitment to the principles of equity and diversity" (at [18(l)]).

6 Other public manifestations of the ADF's attempts to change its culture were decisions such as granting permission to ADF members to march in uniform in the 2013 Sydney Mardi Gras, in July 2012 publishing strategic documents directed towards moving women into combat

roles, and a number of publications, including from the office of the appellant, about the need to encourage and respect diversity within Australia's armed forces. The issues on which all these policies and directives were focused included the role and treatment of women in the ADF, and the reported intolerance and treatment of ADF members with a sexual orientation that was not heterosexual, who were transgender, or who held non-Christian religious beliefs. It is also fair to say, in our opinion, that the ADF was attempting to encourage tolerance and acceptance of diversity at a broader level, both within the ADF and in terms of the publicly expressed attitudes and conduct of ADF members.

7 Part of the enforcement of discipline within the command structure (a feature of the ADF) is the enactment of instructions and policies concerning public commentary by ADF members, including the way ADF members might use social media. The relevant instructions and policies were made pursuant to s 9A(2) of the *Defence Act 1903* (Cth), which we reproduce at [35] below. In particular, there was an instruction entitled "Use of social media by Defence Personnel", which was issued on 16 January 2013. This policy (which relevantly extended to Army Reserve members not on duty), among other things, instructed ADF members at [19] that:

...Defence 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. Such behaviour involving social media may amount to conduct that could constitute an offence against provisions of the DFDA, the *Public Service Act 1999* or amount to a breach of the APS Code of Conduct.

(Emphasis in original.)

8 The primary judge described (at [84] of his Honour's reasons) the intended effect of the April 2012 "Pathway to Change" policy and strategy document jointly published by the appellant and the Secretary to the Department of Defence in the following terms:

There seems little doubt that the authors of the document ... were striving for a paradigm shift in attitudes. This was a clear example of a deliberate policy initiative which had moved beyond any question of debate about its essential premises and had entered an implementation stage.

9 The respondent has been a member of the ADF for some time, commencing with the Army Reserve, in which he enlisted in June 1997. He moved to the Regular Army in January 1999, graduating from the Royal Military College of Australia in December 2002 and actively serving in the Army at officer level until July 2011, when he transferred to the Army Reserve.

He received formal recognition of distinguished service during this period. He was promoted to the rank of Major in January 2013 while he was a member of the Army Reserve.

- 10 The primary judge set out at [11] of his Honour's reasons, in a passage we respectfully adopt, a summary of the respondent's opinions on various matters touching on the ADF's increased engagement with diversity:

The applicant has strong views that he attributes to the teachings and doctrines of the Roman Catholic Church. As they relate to the events which led to the termination of his commission, those views were expressed as an antipathy to overt tolerance or support of homosexuality or transgender behaviour as well as statements critical of adherents of Islam. There were three issues in particular, with respect to the first aspect of his personal views, which provoked public statements by the applicant which ultimately led to the termination of his commission.

- 11 From 23 January 2013 (on the evidence, the date of first publication by the respondent), the respondent made a series of public comments in a blog published on his personal web page. He made the same comments through his Twitter account and through his Facebook page. This included an exchange on social media between the respondent and a transgender officer on the staff of the Chief of Army, which the primary judge described at [35] as "intemperate, vitriolic and personally offensive [which] ... did not do credit to either of the participants".
- 12 The respondent also issued press releases. Although the respondent subsequently denied that he made any statement in these publications "in his capacity" as a member of the ADF or the Army Reserve, it was not (and could not be) in dispute on the evidence that the respondent either identified himself, or could readily be identified by a reader, as an officer in the ADF in these public statements. The respondent's statements covered a number of topics, including expressing views that he would not let homosexual people teach his children; that it was wrong for the appellant to have granted permission for members of the ADF to march in uniform at the Sydney Mardi Gras; and a number of criticisms of the ADF's support of transgender ADF members. The respondent also expressed views critical of government and ADF policy about the conflict in Afghanistan, linking the practice of Islam, historically and currently, with a culture of violence, which the respondent asserted posed a threat to Australia. Many of the actual statements, and descriptions of others, can be found in the reasons of the primary judge at [21]-[36].
- 13 Although Lt Col Buxton had spoken to the respondent on 6 February 2013 instructing him not to make any further comments of the kind he had made, the first formal, written response from the ADF to the respondent's statements came by way of a letter dated 22 March 2013,

when the Deputy Chief of Army (Major General Angus Campbell) wrote to the respondent. In this letter the respondent was given the following instruction:

Effective immediately, you are to cease posting material in the public domain that identifies you as an Army Officer and which directly seeks to, or can be reasonably expected to, breach Defence policy, contravene ADF values, or which is otherwise not in the interests of Army. Further, you are to remove any such material from your website and social media sites insofar as it can be linked, in any way, to your military service.

14 The respondent was not deterred. He did not remove any of the material and he continued to publish press releases which incorporated material from his website. He engaged with the direction he had been given, rather than complying with it. Indeed, as the primary judge relates at [34] of his Honour's reasons, the respondent himself began a series of internal complaints and reviews concerning the ADF's decisions that he opposed.

15 The primary judge described (at [37]) the course of events thereafter:

The formal process of termination was commenced by a Notice to Show Cause issued by the Chief of Army on 30 May 2013 and concluded with the Termination Decision issued by CDF on 10 December 2013. The applicant invoked a "Redress of Grievance" ("ROG") procedure (the nature of which I shall discuss further) against the decision of 10 December 2013. That ROG commenced with the applicant's Commanding Officer and, at the applicant's request, was progressively referred up the Army and ADF hierarchy as it was successively unsuccessful to, finally, CDF himself. CDF dismissed that ROG (there were many others which need no detailed discussion) by the Redress Decision on 30 June 2014.

16 In terminating the service of the respondent, the appellant exercised a power conferred by reg 85 of the *Defence (Personnel) Regulations*: set out at [37] below. Reasons for the respondent's termination of service were given in writing by the appellant on 10 December 2013 and, not surprisingly, became the focus for some of the respondent's challenges to that termination. On 11 July 2014, the respondent's service as an officer in the ADF ceased.

THE COURSE OF PROCEEDINGS IN THIS COURT

17 The respondent commenced proceedings in the Federal Court on 8 August 2014. He sought judicial review of three decisions relating to his termination under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR) Act). Those three decisions were the decision to terminate his service in the ADF, the rejection of his Redress of Grievance applications, and what is called in the evidence a "Quick Assessment" decision made by Lieutenant Colonel Christopher Buxton in January 2013, before the termination of service decision. There were 17 administrative law grounds set out in the originating application. Separately from those grounds, the respondent also claimed that the three decisions (or,

perhaps, only the termination decision, depending on how the ground is understood) were in conflict with the “fourth clause” of s 116 of the *Constitution* because a religious test had been imposed on the respondent. Finally, and of most significance on this appeal, the respondent claimed each of the three decisions “restricted or was in conflict with the implied freedom of the [respondent] to communicate with respect to public affairs and political discussion and was accordingly void and of no effect”.

18 The primary judge rejected all of the respondent’s grounds of review (including his argument based on s 116 of the *Constitution*), except his argument concerning the implied freedom of political communication. It was on this argument that the respondent succeeded before the primary judge.

19 After examining *Lange v Australian Broadcasting Corporation* [1997] HCA 25; 189 CLR 520 (*Lange*), *Australian Capital Television Pty Ltd v Commonwealth* [1992] HCA 45; 177 CLR 106 (*Australian Capital Television*), *Wotton v Queensland* [2012] HCA 2; 246 CLR 1 (*Wotton*), *Unions NSW v New South Wales* [2013] HCA 58; 252 CLR 530 (*Unions NSW*) and *McCloy v New South Wales* [2015] HCA 34; 89 ALJR 857 (*McCloy*), his Honour found that reg 85 did not directly contravene the implied freedom.

20 His Honour concluded (at [208]) that “[t]he applicant’s proposition must, therefore, be that the exercise of the statutory discretion in each case was in excess of a statutory grant of power properly construed as not authorising infringement of constitutional requirements or boundaries.”

21 In dealing with that issue, his Honour set out the *Lange* test in full. At [234], his Honour cited the High Court in *Lange* at 567-568:

When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively “the system of government prescribed by the Constitution”). If the first question is answered “yes” and the second is answered “no”, the law is invalid. ...

(Footnotes omitted.)

22 His Honour went on to consider the articulation of the *Lange* test in *Unions NSW* and the approach of the High Court in *McCloy*.

23 Applying the *Lange* test, as clarified and elaborated by *Unions NSW* and *McCloy*, his Honour then said (at [243]-[244]):

Accordingly, in the present case, the question for examination is whether the authority exercised by CDF to terminate the applicant's commission was limited so as to avoid the instructions, policies and orders upon which CDF relied burdening the right of the applicant to communicate on political matters. The related question is whether any propensity to burden that right was reasonably appropriate and adapted to serve a legitimate end. In the present case that can be tested by examining the effect or outcomes of the exercise of power, namely, by considering whether termination of the applicant's commission gave effect to a legitimate end of the relevant kind.

In particular, it now needs to be considered whether the exercise of power gave effect to a legitimate end in the sense that the legitimate end was suitable, necessary and adequate in its balance.

24 At [277]-[279], the primary judge then expressed his conclusions about the reasons for the termination of the respondent's commission, and the relationship of those reasons to the limits his Honour saw as imposed by the implied freedom:

In my view, the applicant's commission was, in substance, terminated for two reasons. The first was that he made public comments critical of the ADF while a member of the ADF. Those comments were in contravention of Defence instructions but much more important to their assessment was their tone and content, which was viewed within the ADF, and by CDF, as wholly unacceptable. The second reason was the applicant's defiance of direct orders by his superiors, a circumstance which is anathema in military service.

I am not to be taken as indicating any criticism of either of those judgements, the persons who made them, the persons who share them or the military standards which sustain them.

However, in my view the circumstance that the comments were made in a personal capacity, unconnected with the ADF except by the ongoing formal circumstance of ADF membership, and that the comments were made in the form of communications about political matters which satisfy the first limb of the *Lange* test, raises for resolution whether the decision to terminate the applicant's commission exceeded the statutory authority under reg 85(4) of the Personnel Regulations because it was, in its effect, not reasonably appropriate and adapted to the legitimate end served by reg 85.

25 His Honour expressed his reasoning for concluding against the CDF's contentions on those issues in the following way (at [280] to [287]):

Consideration of that issue, against the facts which I have discussed, requires attention to the explanation given in *McCloy* of the stages of consideration of proportionality. I regard it as appropriate to ask whether a regulation (or other legislation or legislative instrument), which directly prohibited the applicant's conduct, would be valid if it was based on the same matters as the findings of CDF in

the Termination Decision. In my view it would not.

That conclusion turns on the third element of the test distilled in *McCloy*.

I accept that there is a need for discipline, obedience to orders and adherence to standards in the ADF by its members. A restriction on public comment of the kind I am considering (i.e. termination of a commission) was a “suitable” response to infringement of those requirements.

I cannot conceive of another obvious and compelling means of achieving the objective in the face of conduct such as that of the applicant, which was defiant and intractable. I will accept that the response was therefore “necessary” in that sense.

However, in my view the response did not meet the third element of the test of proportionality stated in *McCloy*. It was not “adequate in its balance” having regard to the fact that the applicant’s conduct involved the expression of political opinion, effectively as a private citizen. A contrary view would accept that ADF members have lost that freedom of political expression, even when not serving in any active capacity, nor likely to do so again.

In my view, the burden on the exercise by the applicant of his freedom of political communication was considerable by reason of its consequence, whatever might be said against the manner of its expression or its content. I cannot accept that the right to exercise that freedom was lost only because the applicant remained a member of the ADF.

I should add, for completeness, that my view about the second limb of the *Lange* test is the same, with or without the application of the refinements discussed in *McCloy*.

Membership of the ADF, while on service in one form or another, undoubtedly carries with it obligations of obedience to lawful commands, and all the rigour and restrictions of military service but it does not seem to me that it extinguishes either freedom of belief or, while free from military discipline, freedom of expression. It may be the case that members of a full time regular service are rarely (if ever) free to publicly express opinions against the policies of the ADF or the decisions of their superiors but the same cannot always be said about members of Reserves. Such persons are often not on duty. They are private citizens, in substance, when not on duty and not in uniform. Military discipline under the Defence Discipline Act does not apply to them. In my view, their freedom of political communication cannot be burdened at those times.

26 Accordingly, his Honour made orders setting aside the appellant’s decision under reg 85 to terminate the service of the respondent with the ADF.

27 The appellant filed a notice of appeal in this Court on 16 December 2015. Four grounds of appeal are raised. The first is that the primary judge erred in finding that the appellant’s decision to terminate the respondent’s commission as an officer in the ADF infringed the implied freedom. The second is that the primary judge erred by failing to apply the implied freedom test to reg 85 itself, rather than the exercise of discretion under it, which had the effect of treating the implied freedom as a personal right. The validity of the termination decision should only have been assessed as a matter of administrative law, on the appellant’s

argument. The third ground, raised further or in the alternative to the other grounds, advances various reasons why the primary judge erred in failing correctly to apply the test for determining whether the termination decision infringed the implied freedom. The fourth ground contends the primary judge erred insofar as his Honour found that the appellant's decision not to uphold the respondent's Redress of Grievance with respect to the termination decision infringed the implied freedom. The primary judge did not deal with the Redress of Grievance decision separately from the termination decision (see [291] of his Honour's reasons) and no separate order was made about it, although it appears his Honour considered that it suffered from the same error he had identified in the termination decision. The fourth ground was not the subject of separate submissions on appeal.

28 In his written submissions, the appellant combined the first two grounds, and the third ground, into the following central propositions:

42. The appellant's submission here is that:

- 42.1 the primary judge erred in treating the Termination Decision as though it were a legislative instrument, and applying the implied freedom tests to that particular decision – rather, the issue should have been assessed at the level of reg 85 of the Personnel Regulations, which was and is valid (appeal grounds 1 and 2);
- 42.2 alternatively, if the particular decision must satisfy the relevant tests, his Honour erred in holding that it did not do so (appeal grounds 1 and 3).

29 The focus of the appellant's submissions on the appeal was on the first proposition. As for ground 3 of the notice of appeal, which in fact has a number of separately articulated arguments, there was no development in writing or in oral submissions of each of the more detailed attacks set out in that ground. We have proceeded on the basis of the way in which the matter was argued and developed by the Solicitor-General at the hearing of the appeal, which reflects the extract from the appellant's written submissions at [28] above.

30 By way of an amended notice of contention filed on 10 May 2016, the respondent contends that the orders of the primary judge should be affirmed on grounds other than those identified by his Honour, namely:

- 1. The decision to terminate the Respondent was in administrative error on the pleaded grounds other than those found in s.5(1)(d), (e) and (j) of the Administrative Decisions (Judicial Review) Act, *but including the grounds in s. 5(2)(a), (b) and (c)*.
- 2. The decision was also in error in that it declined to hold that the fourth clause of section 116 of the Constitution was impaired in respect of the Respondent.

(Emphasis in original.)

31 In its unparticularised form, and as there was not much further enlightenment from the respondent's written submissions about precisely which administrative law grounds underpinned the amended notice of contention and which parts of s 5 of the AD(JR) Act were invoked in relation to each ground, the Court had little assistance in ascertaining the nature and scope of the respondent's contentions directed at upholding the primary judge's orders. During hearing of the appeal, the respondent's counsel handed up a document which set out the parts of s 5 of the AD(JR) Act upon which the respondent relied for his amended notice of contention, what each argument was, and how it correlated to the respondent's written submissions. We have followed that document below, in the section of these reasons in which we address the administrative law grounds.

32 The thesis underlying the respondent's submissions, both on the appeal and on his notice of contention, is captured in para 4 of the written submissions filed on his behalf:

The argument has been put forward that the respondent [or MAJ Bernard Gaynor] has disobeyed orders, breached policy and has behaved defiantly. We respectfully submit that such assertions are wrong and misconceived and should be rejected. Rather, the facts of this case show that the appellant has sought to classify MAJ Gaynor's political opinions (the expression of which is expressly permitted under ADF policy) as unacceptable behaviour. This is at bottom an attempt by the appellant to take authoritarian measures under the guise of 'discipline' to silence political opinion expressed by a civilian in Australia about Defence's own official participation in political activities (which is expressly forbidden under ADF policy).

RELEVANT LEGISLATIVE PROVISIONS

The Command Structure of the Defence Force

33 The appellant places considerable reliance on the legal and factual features of the Defence Force, and its central attribute as a disciplined organisation based on a command structure. The constituting legislation for the Defence Force is the *Defence Act 1903* (Cth). On 1 July 2016, the *Defence Act* was substantially amended and reorganised by operation of the *Defence Legislation Amendment (First Principles) Act 2015* (Cth). On 1 October 2016, the *Defence (Personnel) Regulations* were repealed and replaced by the *Defence Regulations 2016* (Cth), and the power of the CDF to terminate the service of a member early is now found in reg 24 of the 2016 *Regulations*. References to the *Defence Act* and the *Defence (Personnel) Regulations* in these reasons are to the legislation as it stood at the time of the termination decision. It is therefore convenient to refer to them in the past tense, although some of the provisions referred to may still be in the same, or substantially the same, form.

34 Part III of the *Defence Act 1903* (Cth) established the ADF, which by s 30 was divided into three sections: the Australian Navy, the Australian Army and the Australian Air Force. The Australian Army was then divided into two parts: the Regular Army and the Army Reserve: s 31. Officers in the Army Reserve were still officers within the Australian Army as a whole: see the definition of “officer” in s 4 of the *Defence Act*.

35 The Defence Force was administered jointly by the Secretary to the Department of Defence and the CDF: s 9A(1). The Governor-General appointed the CDF, and also appointed the service chiefs for each of the Army, the Navy and the Air Force: s 9(1). Matters “of command” were relevantly vested in either the CDF, or the chiefs of the Army, Air Force or Navy respectively, by s 9(2) and (5). Defence Instructions (General) could be issued by or with the authority of the CDF or by the Secretary pursuant to s 9A(1) and (2), which provided:

- (1) Subject to section 8, the Secretary and the Chief of the Defence Force shall jointly have the administration of the Defence Force except with respect to:
 - (a) matters falling within the command of the Defence Force by the Chief of the Defence Force or the command of an arm of the Defence Force by the service chief of that arm of the Defence Force; or
 - (b) any other matter specified by the Minister.
- (2) Instructions issued by or with the authority of the Secretary and the Chief of the Defence Force in pursuance of the powers vested in them jointly by virtue of subsection (1) shall be known as Defence Instructions (General).

36 Section 124 of the *Defence Act* contained the regulation making power pursuant to which the *Defence (Personnel) Regulations* were made.

Termination of Service

37 The *Defence (Personnel) Regulations* allowed for a member’s service in the ADF to be terminated for various reasons. Relevantly to the termination of the respondent’s service, the procedure for termination of an officer’s service for “other reasons” was set out in reg 85. Regulation 85 relevantly provided:

85 Termination of service of officer for other reasons

- (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:

- (i) the Defence Force; or
 - (ii) the Chief's Service;
- ...
- (1A) 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:
- ...
- (b) behaviour; or
 - (c) conviction of an offence or a service offence.
- (2) The Governor-General may give the officer a termination notice:
- (a) stating that it is proposed to terminate the officer's service in the Defence Force; and
 - (b) stating the reason for terminating the service; and
 - (c) setting out particulars of the facts and circumstances relating to the reason for terminating the service that is sufficient to allow the officer to prepare a statement of reasons why the service should not be terminated; and
 - (d) inviting the officer to give the Governor-General a written statement of reasons why the service should not be terminated; and
 - (e) specifying a period of at least 28 days after the date of the notice as the period in which the officer may give the statement of reasons.
- ...
- (4) If:
- (a) the officer gives the Governor-General a statement of reasons in the specified period; and
 - (b) having considered the statement, the Governor-General is of the opinion that the reason for terminating the officer's service:
 - (i) has been established; and
 - (ii) has not been affected by a change in circumstances since the termination notice was given to the officer;
- the Governor-General must terminate the officer's service in the Defence Force.
- (5) The Governor-General must not terminate the officer's service under this regulation in any other circumstances.
- (6) If a delegate gives a termination notice to an officer, the delegate must not himself or herself terminate the officer's service under this regulation.

38 Regulation 119 allowed the Governor-General to delegate any of his or her powers (other than the power of delegation) to certain levels of officers. The relevant delegation in this case was in evidence before the primary judge. It provided that, when considering termination of

an Army officer of the rank of Major, the power to issue a termination notice and make a termination decision was delegated only to the CDF and the Chief of Army: see [48] of the primary judge's reasons.

SUMMARY OF THE PARTIES' SUBMISSIONS ON THE IMPLIED FREEDOM

39 As we have noted, the appellant's central contention is that the primary judge considered the implied freedom at the wrong level in that, although the implied freedom is a limitation on legislative power, his Honour considered whether the particular decision made by the appellant to terminate the respondent's service as an officer, with its particular reasons, infringed the implied freedom. Had the primary judge considered only whether reg 85(1)(d) of the *Defence (Personnel) Regulations* contravened the implied freedom, the appellant submits the correct conclusion is that it does not. The appellant also submits there is no occasion to read in a requirement that each decision made under reg 85 should be separately assessed for compliance with the implied freedom.

40 Alternatively, the appellant submits that if it is permissible or necessary to examine the particular exercise of power and measure it against the implied freedom, the appellant's decision to terminate the respondent's service as an officer, and his particular reasons, did not infringe the implied freedom and the primary judge was in error to find that it did.

41 In relation to the first argument, the appellant contends that the test stated in *Lange*, as refined in *Coleman v Power* [2004] HCA 39; 220 CLR 1 and *McCloy*, is formulated to measure legislative acts against the implied freedom. The appellant accepts there are some statements in the authorities to the effect that the implied freedom is also a restriction on executive power (for example, *McCloy* at [114] (Gageler J) and [303] (Gordon J)), but even if there is such a restriction (a proposition he submits need not be determined on this appeal), the implication in the present case was an implication of a limit on legislative power, not executive power. The implication was to be applied to reg 85, and therefore the only available challenge was to the validity of reg 85. There was no internal constraint in reg 85 itself that required a decision-maker to go through an additional *Lange/McCloy* test in each exercise of power. The appellant contended there is no basis to read in such a requirement and to do so would be contrary to the nature of the power, which turns upon the satisfaction of the CDF (or Chief of the relevant Service) as to what is in the interests of that Service or the ADF.

42 The respondent submits that the primary judge was correct in his application of the implied freedom and correctly found that the appellant's decision to terminate the respondent's service as an officer in the ADF impaired the implied freedom.

RESOLUTION

43 The appeal is concerned only with the decision of the appellant to terminate the service of the respondent. The Redress of Grievance decision and the "Quick Assessment" decision (both of which were challenged before the primary judge: see [8] of the primary judge's reasons) have not been separately put in issue by either party on the appeal.

44 Paragraph 1 of the primary judge's orders sets the termination decision aside. Paragraph 290 of the reasons states:

[T]he Termination Decision will be set aside under s 5(1)(d), (e) and (j) of the ADJR Act.

45 However, it is apparent from [3]-[4] of the primary judge's reasons, read with [209] and [289]-[290], that although the power exercised by his Honour was one conferred by s 16 of the AD(JR) Act, and although his Honour makes reference to s 5(1)(d), (e) and (j) of the AD(JR) Act, the sole basis for setting aside the termination decision was his Honour's finding that the decision impaired the freedom of political communication.

46 If the Court upholds the appeal, the appellant does not submit the matter should be remitted to the primary judge, but rather invites the Court to make its own findings on the respondent's constitutional and administrative law arguments. That is the appropriate course in this case.

Did the primary judge err in the "level" at which he applied the *Lange* test? (Grounds 1 and 2)

47 We have concluded the primary judge did err in the level at which he applied the *Lange* test, and this led his Honour to look at the constitutional argument through an incorrect prism – namely, whether the respondent's "right" to freedom of political communication was impermissibly impaired by the termination decision. Essentially, this is ground 2(a) of the notice of appeal. In our opinion, the better view of his Honour's reasons is that the approach of seeing the freedom as an individual right is what then led to the application of the *Lange* test at what the appellant describes as "the wrong level".

48 The proposition that the implied freedom does not involve, nor does it recognise or confer, any personal rights on individuals in the same way the First Amendment to the US Constitution does, is an observation which has been made repeatedly in almost every case dealing the freedom of political communication. In *Unions NSW* at [36], the plurality explained the difference in the following terms:

In addressing this question, it is important to bear in mind that what the *Constitution* protects is not a personal right. A legislative prohibition or restriction on the freedom is not to be understood as affecting a person's right or freedom to engage in political communication, but as affecting communication on those subjects more generally. The freedom is to be understood as addressed to legislative power, not rights, and as effecting a restriction on that power. Thus the question is not whether a person is limited in the way that he or she can express himself or herself, although identification of that limiting effect may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally. The central question is: how does the impugned law affect the freedom?

(Footnotes omitted.)

49 The cases footnoted as authority for the proposition in the first sentence are: *Australian Capital Television* at 150; *Theophanous v Herald & Weekly Times Ltd* [1994] HCA 46; 182 CLR 104 at 125, 149, 162, 166-167 (*Theophanous*); *Cunliffe v Commonwealth* [1994] HCA 44; 182 CLR 272 at 326; *Lange* at 560; *Hogan v Hinch* [2011] HCA 4; 243 CLR 506 at [92]; *Wotton* at [80]; *Attorney-General (SA) v Adelaide City Corporation* [2013] HCA 3; 249 CLR 1 at [166]; *Monis v The Queen* [2013] HCA 4; 249 CLR 92 at [266].

50 Keane J, who wrote separately in *Unions NSW*, made similar observations to the plurality. His Honour said at [111]:

Accordingly, one may say that, if s 96D is not an effective burden on political communication within the federation, the circumstance that it prevents a supporter of a candidate or party from expressing that support by making a political donation will not render it invalid. As Brennan J said in *Australian Capital Television Pty Ltd v The Commonwealth (ACTV)*:

“[T]he extent of any relevant limitation of legislative power is the scope of the relevant freedom. But, unlike freedoms conferred by a Bill of Rights in the American model, the freedom cannot be understood as a personal right the scope of which must be ascertained in order to discover what is left for legislative regulation.”

(Footnote omitted.)

51 Keane J also illustrated (at [118]-[119]) the mirror contention to the one above – namely, asking what kind of communication a person cannot make, and the mirror flaw in that contention:

The defendant submitted that s 96D imposes no effective burden on political communication, in that s 96D does not restrict any communication by the entities or persons that it prohibits from making political donations voicing support for, or opposition to, any party or candidate or any of their policies.

Ironically, the defendant's submission, echoing the plaintiffs' reliance on the First Amendment, replicates the confusion of a personal right of individual expression with the free flow of political communication within the federation. The question whether political communication is effectively burdened is not answered in the negative by the circumstance that an individual is permitted to "construct a particular communication". The issue is as to the effect of the proscriptions upon the free flow of political communication within the federation. And whether the proscriptions burden that flow is not a complicated question. As to the first limb of the *Lange* test, in *Monis v The Queen* Hayne J said that "[t]he expression 'effectively burden' means nothing more complicated than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications".

(Footnotes omitted.)

52 Finally, in *McCloy* at [30] the plurality said:

It has repeatedly been explained, most recently in *Unions NSW*, that the freedom is not a personal right. In *ACTV*, Brennan J said that "the freedom cannot be understood as a personal right the scope of which must be ascertained in order to discover what is left for legislative regulation". The freedom is best understood as a constitutional restriction on legislative power and the question is more generally as to the effect that the impugned legislation has upon the freedom. The EFED Act is not to be approached by viewing the restrictions it imposes upon the plaintiffs' ability to access politicians as a burden on the freedom. The relevant burden is that identified in *Unions NSW*.

(Footnotes omitted.)

53 The primary judge recognised the implied freedom did not confer a personal right: see [231], [241] and [242]. At [242], the primary judge said:

In the present case, those concepts must be accommodated to the fact that reliance on the implied freedom arises principally as a suggested limitation on the extent of the legitimate discretion available under reg 85 of the Personnel Regulations.

54 The reference to "those concepts" is a reference to what the primary judge had extracted from *McCloy* in the previous paragraphs: namely, the three stages of proportionality.

55 In the next paragraph ([243]), his Honour proceeds to apply the principles he has discussed, but in our respectful opinion it is at this stage that a rights-based analysis intrudes. At [243], his Honour says:

Accordingly, in the present case, the question for examination is whether the authority exercised by CDF to terminate the applicant's commission was limited so as to avoid the instructions, policies and orders upon which CDF relied *burdening the right of the applicant to communicate on political matters*. The related question is

whether any *propensity to burden that right* was reasonably appropriate and adapted to serve a legitimate end. In the present case that can be tested by examining the effect or outcomes of the exercise of power, namely, by considering whether termination of the applicant's commission gave effect to a legitimate end of the relevant kind.

(Emphasis added.)

56 From [244] to [248] the primary judge then examines the nature of the statements made, concluding they were political in nature and finding at [248] that "it appears to me that the applicant was attempting to make a public statement of a political kind." To be fair, this line of analysis appears to have been prompted by submissions on behalf of the CDF that the implied freedom was not engaged at all because the respondent's statements were not political in character: a submission which again tends to divert attention towards the making of individual statements in a given situation, and away from the effect of the legislative power under consideration.

57 Again, his Honour's conclusion at [250] on the first limb of the *Lange* test is not about the effect of reg 85(1), but rather about the effect of the particular exercise of power under reg 85(1)(d), and the focus is on a "burden" imposed on the respondent, in relation to his own communications:

In my view, freedom of political communication was burdened by the imposition of the consequence for the applicant that his commission as an officer was terminated.

58 When his Honour turned to the second limb of *Lange*, the rights based approach continued. He spoke of the "applicant's freedom of communication" (at [253]). After examining the termination notice and reasons for decision at [253]-[263], his Honour rejects the CDF's contention that the termination decision turned on the fact the respondent had published the statements in a way or in a context which identified him as a member of the ADF. The primary judge did not accept this was so: his Honour found instead that the expected standard of behaviour against which his conduct was measured was simply that he was a member of the ADF at the time: see [274].

59 The primary judge then summarises (at [276]) his findings about the circumstances in which the respondent made the public statements:

All of his comments were made while the applicant was not on duty, not in uniform and not doing anything connected with the ADF except criticising it and certain of its members. It is clear from the Quick Assessment Report that the applicant had made no particular contribution to his unit since November 2011 and was not really expected to do so again.

60 His Honour returns (at [279]) to this individually-based analysis, encouraged, in our respectful opinion, by his incorrect focus on the respondent's "right" to make such communications:

However, in my view the circumstance that the comments were made in a personal capacity, unconnected with the ADF except by the ongoing formal circumstance of ADF membership, and that the comments were made in the form of communications about political matters which satisfy the first limb of the *Lange* test, raises for resolution whether the decision to terminate the applicant's commission exceeded the statutory authority under reg 85(4) of the Personnel Regulations because it was, in its effect, not reasonably appropriate and adapted to the legitimate end served by reg 85.

61 At [284]-[285], when his Honour is considering the application of the "proportionality test" as set out in *McCloy*, and especially the third stage, he again focuses on the freedom as a right possessed by the respondent:

However, in my view the response did not meet the third element of the test of proportionality stated in *McCloy*. It was not "adequate in its balance" having regard to the fact that the applicant's conduct involved the expression of political opinion, effectively as a private citizen. A contrary view would accept that ADF members have *lost that freedom of political expression*, even when not serving in any active capacity, nor likely to do so again.

In my view, the burden on the exercise by the applicant of *his freedom* of political communication was considerable by reason of its consequence, whatever might be said against the manner of its expression or its content. I cannot accept *that the right to exercise that freedom was lost* only because the applicant remained a member of the ADF.

(Emphasis added.)

62 At [287]:

It may be the case that members of a full time regular service are rarely (if ever) free to publicly express opinions against the policies of the ADF or the decisions of their superiors but the same cannot always be said about members of Reserves. Such persons are often not on duty. They are private citizens, in substance, when not on duty and not in uniform. Military discipline under the Defence Discipline Act does not apply to them. In my view, *their freedom of political communication* cannot be burdened at those times.

(Emphasis added.)

63 In our respectful opinion, it is apparent that although he had recognised the point made in the authorities about the freedom of political communication being a limit on legislative power rather than an individual right, in the application of the *Lange* test, as refined and developed in *Coleman* and *McCloy*, the learned primary judge moved to an analysis of the termination decision which treated the respondent as having a constitutional right to express himself on

political matters, which right had been unduly infringed (in his Honour's view) by the termination decision. That was not the analysis the constitutional question called for.

64 The respondent's submissions on the appeal fall into the same error, by consistently characterising the wrong done to him as his service being terminated for "expression of his political opinion" (see written submissions at [94] and [98]). For example, at [93] of his written submissions, the respondent contends:

When these reasons and the circumstances are distilled, the heart of this matter can be seen. MAJ Gaynor's appointment was not terminated because he was found to have breached lawful general orders, commands or policy. He was not terminated because he was found by a lawfully-established Defence inquiry to have engaged in unacceptable behaviour. Indeed, both disciplinary and administrative inquiries found in his favour. Instead, MAJ Gaynor's appointment was terminated *because he expressed personal political opinions as a civilian contrary to the appellant's views and those of senior officers in the ADF who disagreed with those opinions*. This is an archetypal circumstance for the application of the implied freedom *as the respondent's constitutional guarantee*, and all others in his position. It is the very situation where the freedom is required to give balance and reason to our system of representative and responsible government.

(Emphasis added.)

65 Putting to one side some of the factually inaccurate statements in this paragraph, the emphasised parts clearly posit that the respondent has a constitutional right to express his political opinion, and by terminating his service in the ADF the appellant infringed that right. An argument put in this way is not an argument about the role of the implied freedom of political communication as the authorities have explained it.

66 We note also that aspects of this submission, in common with many of the written and oral submissions put on behalf of the respondent, also tend to invoke the language of unlawful discrimination, although there is no federal anti-discrimination law concerning discrimination on the ground of political opinion. In any event, the proceeding before the primary judge was not a claim of unlawful discrimination.

Why the executive power question does not arise

67 As we have noted, this aspect of the appellant's challenge was connected with the submission that the primary judge treated the implied freedom as if it were a personal right inhering in the respondent. That is because, the appellant submits, the primary judge approached the constitutional question by examining the way in which the appellant exercised the discretion under reg 85 in relation to the respondent, rather than by only assessing whether reg 85 itself

was invalid because, in its operation and effect, it was incompatible with the implied freedom. The respondent submits there was no error in the primary judge applying the implied freedom to the manner in which the termination power was exercised against him.

68 While there are references in the authorities to the implied freedom being a restriction on executive power as well as a restriction on legislative power (for example, *Lange* at 560-561; *Levy v Victoria* [1997] HCA 31; 189 CLR 579 at 594 (Brennan CJ); *Wotton* (see below); *McCloy* at [42] (French CJ, Kiefel, Bell and Keane JJ), [114] (Gageler J) and [303] (Gordon J)), they tend to be general propositions, which have not yet been squarely confronted and teased out in a case where there was no statutory source for the impugned power.

69 In *Lange*, in emphasising that the implied freedom cannot be equated with an individual legal right, the Court expressly included exercises of executive power in the scope and application of the freedom (at 560):

That being so, ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom *by the exercise of legislative or executive power*. 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”. In *Cunliffe v The Commonwealth*, Brennan J pointed out that the freedom confers no rights on individuals and, to the extent that the freedom rests upon implication, that implication defines the nature and extent of the freedom. His Honour said:

“The implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control.”

(Emphasis added, footnotes omitted.)

70 The appellant submits the passages in *Lange* at 560-561 “cut both ways”, and there is some force in that submission. Nevertheless, the tantalising reference to executive power remains.

71 Whether or not, in circumstances of an exercise of executive power, sourced for example only in s 61 of the *Constitution*, and not owing its authority to statute, the implied freedom operates as a limit on an individual exercise of such a power is a question that need not be addressed in this appeal. As the appellant submitted, at [47] of his written submissions, in the present circumstances, the termination power was:

granted by regulations, made pursuant to an Act, in pursuance of the Commonwealth's legislative power. The exercise of legislative power was and is constrained by the implied freedom. The Defence Act could not infringe the implied freedom; nor could regulations made pursuant to it. For the regulations to do so would have the stream rising higher than the source.

72 We accept that is the correct approach. Despite some references to executive power, the test as formulated since *Lange* is generally directed at the exercise of legislative power: see most recently, *McCloy* at [2] and [30]. That is sufficient to dispose of the constitutional issues on this appeal.

The implied freedom as a relevant consideration in the individual exercise of a statutory power conditioned by the freedom

73 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. There are several passages in *Wotton* to this effect, and that case is worth examining because it (like the present proceeding) centred on a challenge to an individual exercise of a discretionary power, in the setting of parole conditions, although there was no administrative law challenge in *Wotton*.

74 At [88] in *Wotton*, Kiefel J (as her Honour then was) described the existence of the implied freedom as a relevant consideration in the exercise of a discretionary power under statute:

Section 132 does not prevent a prisoner communicating with others on matters relating to government and politics. It is directed to the method by which the media and others obtain information or opinions from a prisoner. It does not prohibit interviews or the taking of statements. The limitation it effects is to require approval from the chief executive, whose consideration of the matter must be informed by the objects of the *Corrective Services Act and the existence of the freedom*, and whose refusal is subject to judicial review.

(Emphasis added.)

75 At [21], the plurality made a similar point, although not as obviously by reference to the freedom as a consideration:

As remarked earlier in these reasons, with particular reference to what was said by Brennan J in *Miller*, while the exercise of legislative power may involve the conferral of authority upon an administrative body such as the Parole Board, the *conferral by statute of a power or discretion upon such a body will be constrained by the constitutional restrictions upon the legislative power*, with the result that in this

particular respect the administrative body must not act ultra vires.

(Emphasis added.)

- 76 The reference to Brennan J in *Miller* is a reference to the following passage of his Honour's reasons in *Miller v TCN Channel Nine Pty Ltd* [1986] HCA 60; 161 CLR 556 at 613-614 (speaking of the guarantee in s 92 of the *Constitution*):

Of necessity, the area of the discretion must be large: the nature of the subject to be regulated requires that the discretion be wide. But it is not so wide that considerations foreign to the purpose for which the discretion is conferred can be taken into account. *Nor can the discretion be exercised to discriminate against interstate trade, commerce and intercourse. That is because a discretion must be exercised by the repository of a power in accordance with any applicable law, including s. 92, and, in the absence of a contrary indication, 'wide general words conferring executive and administrative powers should be read as subject to s. 92':* per Dixon, McTiernan and Fullagar JJ in *Wilcox Mofflin Ltd v New South Wales*. In *Inglis v Moore [No 2]* St. John J. and I stated the relevant rule of construction:

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

(Emphasis added, footnotes omitted.)

- 77 Comments to similar effect may be found in *McGinty v Western Australia* [1996] HCA 48; 186 CLR 140 at 288-289 (Gummow J), *Kruger v Commonwealth* [1997] HCA 27; 190 CLR 1 at 157 (Gummow J) and *AMS v AIF* [1999] HCA 26; 199 CLR 160 at [37] (Gleeson CJ, McHugh and Gummow JJ, Hayne J agreeing at [201]).
- 78 The plurality's series of propositions at [22] of *Wotton*, derived from the Commonwealth's submissions in that case, is also important in this context:

The Commonwealth submitted 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 power thereunder in a given case, such as that in this litigation concerning the conditions attached to the Parole Order, does not raise a constitutional question, as distinct from a question of the exercise of statutory power. These submissions, which were supported by Victoria, should be accepted.

79 In submissions on this appeal, the appellant referred to this passage as supporting his proposition that, where the source of power is statutory, dicta of the kind we have set out “merely express the consequence of the limitation applying to legislative power”. It was unclear what was meant by “consequence”, and whether the appellant conceded a proposition to the effect of Kiefel J’s dicta in *Wotton*, or the plurality’s at [21]. In our opinion, the point made by the plurality in relation to proposition (iv) of the Commonwealth submissions recited in [22] was simply that at the level of an individual exercise of power, the question may not be a constitutional one, but rather an administrative law issue.

80 For the purposes of the present appeal that question, interesting as it is, also need not be determined. Even if it is legitimate for administrative law purposes to descend to examine a particular exercise of power by reference to the implied freedom of political communication, the primary judge was not asked to do this by the grounds of review put forward by the respondent on the administrative law side of the challenge. To do so would have required a discussion of whether the appellant had taken into account the implied freedom in the way he exercised his discretion: see *Wotton* at [21] and [88], and *Miller* at 613-614 per Brennan J. That is not because the respondent had a right to express himself on political matters (cf the United States First Amendment cases and the discussions of this in *McCloy* by the plurality at [40]-[42] and by Gageler J at [119]-120)), but rather because an exercise of power which had the effect of unduly, or disproportionately, impairing the freedom of the community (and therefore, its individual members) to give and receive information and opinions on political matters would be an exercise of power beyond the authority conferred by reg 85. Describing the implied freedom as a relevant consideration (as Kiefel J did in *Wotton*) is one way of characterising the nature of the excess of power, although not the only way.

Conclusion on error by the primary judge

81 Given our conclusions it is unnecessary to consider the appellant’s alternative submission (in Ground 3) that even if the primary judge was correct to examine the issue of the exercise of the power in reg 85(1)(d) at the “individual level”, his Honour erred in how he did so. On the basis of the latest expression of the nature and the scope of the freedom in *McCloy* as a limit on legislative power where the source of power is statutory, and in the absence of a clearly articulated ground of judicial review by the respondent commensurate with the dicta in *Wotton*, the issue does not arise.

82 Having identified error in the approach of the primary judge, it is necessary for this Court to determine for itself whether reg 85 was invalid because it burdened the implied freedom (the first limb of *Lange*) and did so in a way which did not meet the tests for the second limb of *Lange*, as refined and developed in *Coleman* and *McCloy*.

Current approach to the freedom of political communication

83 All judgments in *McCloy* confirmed that in order to determine whether an impugned law infringes the implied freedom, the approach set out in *Lange* should be applied.

84 We respectfully agree with the summary of the steps to be undertaken, given by Gageler J in *McCloy* at [125]-[132], which we do not understand to depart from anything in the plurality's summary at [2], unlike later passages of his Honour's reasons (for example at [140]-[155]).

85 Of the first limb of the *Lange* test, his Honour said (at [126]-[127]):

The first step in the *Lange* analysis is to inquire whether, and if so how, the law effectively burdens political communication in its legal or practical operation. "The expression 'effectively burden'", as Hayne J pointed out in *Monis v The Queen* and Keane J reiterated in *Unions NSW*, "means nothing more complicated than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications".

The simplicity of the inquiry should not detract from its importance. The oral argument in this case seemed at times to proceed on the assumption that the first step is perfunctory – no more than a box to be ticked before moving to the second step. If that were the case, the *Lange* analysis would be detached from the function that it was formulated to perform. The first step is critical. If a law does not operate to impose a meaningful restriction on political communication, the supervisory role of the courts is not engaged. If the law does operate to impose a meaningful restriction on political communication, the supervisory role of the courts is engaged to consider the justification for that restriction.

86 At [128], Gageler J described the purpose of the second limb of *Lange*:

The whole point of the second step in the *Lange* analysis is to determine whether the restriction on political communication identified at the first step is consistent with the preservation of the integrity of the system of representative and responsible government established by Chs I and II of the *Constitution*, and of the method of constitutional alteration prescribed by s 128 of the *Constitution*.

87 His Honour then describes (at [130]-[131]) the two stages in the second limb: identifying the object or purpose of the law; and then ascertaining the justification for the restriction on the freedom. As to identifying the object or purpose of the law, his Honour says (at [130]):

The first stage requires that the imposition of the restriction on political communication is *explained* by the law's pursuit of an end which is consistent with preservation of the integrity of the system of representative and responsible

government.

(Emphasis in original.)

88 The object or purpose of the law, his Honour adds (at [132]), is:

...what the law is designed to achieve in fact. Identification of what the law is designed to achieve in fact is akin to identification of the “mischief” which the law is designed to address.

89 Then, as to the second stage of justification, his Honour says (at [131]):

The second stage requires that the restriction on political communication that is imposed by the law be *justified* by the law’s reasonable pursuit of the identified legitimate end.

(Emphasis in original.)

90 It is at this point – how the analysis of justification is to be undertaken, that his Honour’s views diverge from those of the plurality.

91 At [240], the primary judge set out the summary in the plurality’s reasons for judgment in *McCloy*. As the reasons for judgment of Gageler J, Nettle J and Gordon J observe (at [98] and [141], [220]-[222] and [254]-[255], and [336]-[339] respectively), the way the plurality has articulated the role of proportionality (and its component parts) in the second limb of the *Lange* test represents a development of the law as it stood before *McCloy*. The plurality reasons go to some lengths to identify a foundation for this development in dicta from previous implied freedom cases, while also recognising that the development of “proportionality testing” into a three stage analysis cannot be found, in terms, in any earlier decision of the High Court. Nevertheless, the passage quoted by the primary judge and found in *McCloy* at [2] forms part of the ratio of the plurality’s conclusion in *McCloy* and binds judges of this Court. If it is necessary to do so, this Court must apply the three stage proportionality test outlined by the plurality in *McCloy* in relation to the second limb of *Lange*, consisting of (see *McCloy* at [80]-[87]):

- (1) Suitability: “a rational connection between the provision in question and the statute’s legitimate purpose, such that the statute’s purpose can be furthered” (at [80]).
- (2) Necessity: “the availability of other, equally effective, means of achieving the legislative object which have a less restrictive effect on the freedom and which are obvious and compelling” (at [81]).

- (3) Adequacy in balance, said by the plurality to be the most important stage: “It compares the positive effect of realising the law’s proper purpose with the negative effect of the limits on constitutional rights or freedoms. It requires an ‘adequate congruence between the benefits gained by the law’s policy and the harm it may cause’, which is to say, a balance. ... Logically, the greater the restriction on the freedom, the more important the public interest purpose of the legislation must be for the law to be proportionate” (at [87], footnote omitted).

92 Since the decision in *McCloy*, the High Court has made clear that a structured test of the kind set out by the plurality in *McCloy* is not to be imported in a wholesale fashion into every area of constitutional law involving an asserted burden on a protected freedom or value: see *Murphy v Electoral Commissioner* [2016] HCA 36; 90 ALJR 1027 at [37]-[39] (French CJ and Bell J), [65] (Kiefel J), [101] (Gageler J), [202] (Keane J), [245]-[253] (Nettle J), [297]-[303] (Gordon J). The Court emphasised that the particular features of the constitutional and legislative scheme at issue must be analysed to determine whether, how, and to what extent a proportionality analysis should be applied. However, we do not read the observations in *Murphy*, a case dealing with voting rights, as diminishing the force, or the binding effect, of the plurality’s approach in *McCloy* with respect to the implied freedom of political communication.

The nature and purpose of reg 85

93 As the primary judge noted, the *Defence (Personnel) Regulations* dealt with termination of the service of a member of the ADF in a more detailed way than was previously the case under s 16 of the *Defence Act*, when that Act was first made, which provided:

Officers shall hold their appointments during the pleasure of the Governor-General, but the commission of an officer shall not be cancelled without the holder thereof being notified in writing of any complaint or charge made and of any action proposed to be taken against him, nor without his being called upon to show cause in relation thereto. ...

94 The *Defence (Personnel) Regulations* were made under s 124(1)(a) of the *Defence Act*. The regulation with which this appeal is concerned (reg 85) was only applicable to officers. By reg 6(1)(g) it was a requirement of an officer’s service that she or he may have her or his service terminated. Termination could occur, relevantly, in accordance with reg 85, which provided a number of bases for termination. Aside from one (a request for termination having been made by the parents or guardians of a person under 18: reg 85(1)(aa), the reasons for termination all dealt with the fitness and appropriateness of an individual to continue in a

leadership role in the ADF. In the respondent's case, the appellant relied on reg 85(1)(d) – that the Chief of the Army was satisfied it was not in the interests of the Defence Force, or in the interests of the Army, for the respondent to be retained. By reg 85(1A), the satisfaction could be formed, among other things, in relation to the behaviour of an officer. Regulation 85(2)-(4) set out a process for termination that included giving the officer an opportunity to put forward reasons why her or his service should not be terminated.

95 What was the purpose of the termination power in reg 85(1)? As the primary judge suggested at [250] and [253], reg 85 served a disciplinary purpose. Determining to end the service of an individual officer under reg 85 was one mechanism by which the Defence Force was able to maintain the tight and high standards of discipline necessary for any armed force: see *Groves v Commonwealth* [1982] HCA 21; 150 CLR 113 at 117-118 (Gibbs CJ), 130-134 (Stephen, Mason, Aickin and Wilson JJ); *White v Director of Military Prosecutions* [2007] HCA 29; 231 CLR 570 at [19] (Gleeson CJ), [52] and [61] (Gummow, Hayne, Crennan JJ); *Haskins v Commonwealth* [2011] HCA 28; 244 CLR 22 at [67] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

96 The appellant made the following submission which we accept:

The rationale for the strictures imposed upon members of the ADF is 'the crucial and indubitable understanding that personnel must operate in circumstances of grave danger in which reliance upon one another and instantaneous obedience of orders are essential' (*White* at [233] (Callinan J); see also *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at [59] (Gummow J) citing *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 538 (Mason CJ, Wilson and Dawson JJ), 564 (Brennan and Toohey JJ)).

(Errors in citations corrected.)

97 Given that reservists are liable to be called up at any time (see s 50(1)(b) of the *Defence Act*) and are in any event subject to the same disciplinary and hierarchical requirements, there is no basis to view their position any differently. Further, in relation to officers, the need to demonstrate capacity and willingness to operate in a hierarchical environment, even at times of disagreement, is critical.

98 The "interests" of the ADF, or of one of the three Services, encompass an interest in having officers who are prepared to, and do, adhere to the hierarchical requirements of the Defence Force, and who are prepared to, and do, comply with standards set by those in command. Similarly, inefficiency or incompetency in an individual officer (see reg 85(1)(c)), dishonesty (reg 85(1)(e)), and failure to render service when required (reg 85(1)(g)) were all grounds

which incorporated conduct, attitudes or behaviour capable of affecting the discipline of the Defence Force, or of individual Services.

99 Regulation 85 also had purposes other than disciplinary ones, and so much is clear from its express terms. It also had the purpose, as the appellant submitted, of “ensuring and maintaining the effective functioning of the Defence Force”. The grounds that relate to incapacity or unfitness are clear illustrations of this purpose. As the appellant also submits, the matters set out in reg 7(2) and (3) informed the scope and nature of reg 85(1), dealing as they did with standards of behaviour and conduct, and the requirement for a decision-maker to form a view about an officer’s “character” as part of the decision-making process. Thus, a further purpose of reg 85 was to ensure, and enforce, the maintenance of objectively appropriate standards of behaviour and conduct by officers in the Defence Force. Of course, a purpose identified in these terms cannot authorise unlawful discrimination, however this proceeding has never been framed as a case of unlawful discrimination.

100 Regulation 7(2) and (3), read with the terms of reg 85(1)(d), (e) and (f) also suggest that another purpose, connected with those we have identified, was to enable those in control and command of the Defence Force to be confident there was a common substratum of attributes shared by officers of the Defence Force, such as honesty, allegiance and commitment to the interests of the Defence Force as those in command and control of the Defence Force have articulated them. Officers who were unable or unwilling to demonstrate those attributes were exposed to the risk of having their service terminated.

101 There is no doubt that the formation of a state of satisfaction by the Governor-General (or her or his delegate) whether retention of an individual is “in the interests” of the Army, or the ADF, calls for a broad evaluative judgement, and the judgement was reposed in those who have ultimate command responsibilities for the Defence Force: the Governor-General (through s 68 of the *Constitution*) and the CDF (through s 9A of the *Defence Act*). The *Regulations* provided for a system of delegation that ensured decisions were still made by senior officers. As the appellant submitted, the Governor-General as commander in chief must act on the advice of her or his Ministers (*Bateson v Chief of Army* [2012] ADFDAT 3; 263 FLR 409 at [61]) and the CDF is (and was at the time of the termination decision) amenable to direction by the Minister of Defence (s 8 of the *Defence Act*), so that control of ADF ultimately rests with the democratically elected government of the day.

102 Neither the breadth of the discretion, nor its location in regulations dealing with the Defence Force, indicates that in performing its judicial task of supervising for legal error the exercise of a power, a Court should adopt any deference to the opinion formed under reg 85(1)(d). “Deference” is not an appropriate description of the approach an Australian court brings to the exercise of public power: see *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; 199 CLR 135 at [44], where the plurality said:

When stating the position in *Quin*, Brennan J also stressed:

‘The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.’

However, in Australia this situation is the product not of any doctrine of “deference”, but of basic principles of administrative law respecting the exercise of discretionary powers.

(Footnote omitted.)

103 As with any other discretionary power, the Court must recognise the role of the chosen repository, and it will often be the case that the repository for a power is chosen because of a particular position held, and knowledge or experience possessed. In such circumstances, and so that the separation of powers is observed (see *Attorney-General (NSW) v Quin* [1990] HCA 21; 170 CLR 1 at 35-36 (Brennan J)) the Court must be astute not to substitute its own views for those of the repository. Observing that restraint does not affect the Court’s task of determining whether the power was exercised in accordance with Australian law, reasonably and by a fair process, including whether it was exercised without regard to matters extraneous to the scope and subject matter of the power, or matters prohibited by the scheme or by other aspects of Australian law (such as anti-discrimination law). We do not understand the authorities on which the appellant and the primary judge relied (*Shand v Chief of the Army* [1998] FCA 265 at 6 (Burchett J); *Graham v Deputy Chief of Air Force* [2004] FCA 1377 at [39] (Heerey J); *Millar v Bornholt* [2009] FCA 637; 177 FCR 67 at [73] (Logan J)) to say more than this. While whether the retention of, relevantly, an officer, is “in the interests” of the ADF or the Army is capable of being viewed differently depending on the individual occupying the office in which the power is reposed, and is a question on which reasonable minds may differ (see *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 at [131] (Crennan and Bell JJ)), it is not a power which is to be exercised for “personal” reasons by the repository (cf the expression “personal view” used by Burchett J in

Shand at 6). Rather, it is to be exercised for reasons rationally and reasonably connected to the purpose of conferring the power.

The *Lange* test

104 The appellant conceded, and the primary judge found (at [251]) that reg 85 (and more specifically, reg 85(1)(d)) could in its operation or effect burden the implied freedom of political communication. A wide discretionary power to terminate the service of an officer in the ADF is capable of restricting political communication not only between members of the ADF but also between officers of the ADF and the broad Australian community. The role and function of the ADF, and of each of its Service branches, is integral to the functioning of Australia's representative democracy. By s 68 of the *Constitution*, the Governor-General, acting on the advice of her or his Ministers, is the commander in chief and by s 51(vi) the Commonwealth has legislative power in relation to "the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth". Communications about how the ADF, and those in command and control of it, perform their functions; the values they promote and adhere to; the way in which they are or are not considered to be contributing to the maintenance of Australia's representative democracy, including what membership of the armed forces should reflect insofar as the capacity of those forces to perform their respective roles and fulfil what is expected of them by the executive and legislative branches and the Australian community as a whole: all these kinds of communications are an important part of political discussions in this country, ultimately capable of informing electoral choices.

105 In one sense, it might be said that reg 85 did not burden the freedom at all. An officer whose service is terminated remains free to communicate on all these matters. However, what reg 85 was capable of doing was making an officer pay a price for those communications if the communications are considered to be such that it is no longer "in the interests" of the ADF, or one branch of the Service, for a participant in those communications to remain in the ADF or in a particular Service. The price is exposure to the risk (and perhaps the reality) of having her or his service terminated, and to losing a career – to a greater or lesser degree depending on whether the officer is a reservist or a full time member of the ADF. In its operation and effect reg 85 was capable of impairing the freedom and the appellant's concession was properly made.

106 As to the second limb of *Lange*, we have set out our description of the purpose of reg 85 at [93] to [103] above. We see no difficulty with the proposition that the purposes of reg 85 were compatible with the system of representative and responsible government established by the *Constitution*. It is critical to the performance by the armed forces of all their various duties that there be a high level of confidence that officers (who also exercise command and control functions, and serve as leadership models within the ADF) are willing to perform, and capable of performing, the roles assigned to them. That is not limited, as the respondent's submissions might suggest, to officers' competency as soldiers in the field or on active duty. It includes their capacity to operate within the hierarchal structures of the ADF in ways that advance the cohesiveness of the armed forces. Room was deliberately left for broad judgments to be made under reg 85 by those in ultimate command, and it is difficult to see how it could be otherwise. The ends pursued by reg 85, as but one of a number of powers available to control the behaviour and regulate the membership of the ADF, including by termination, were in our opinion consistent with preserving the integrity of the system of representative and responsible government.

107 As to the second stage of the second limb of *Lange*, in our opinion the kind of broad discretion conferred by reg 85 was suitable, necessary, and adequate in balance. There was a rational connection between the terms of reg 85 and the overall purpose of the *Defence (Personnel) Regulations*, to enable control of the membership of the ADF. Broad discretions of the kind for which reg 85 provided, covering a multiplicity of circumstances, and leaving the merits of each case for the judgment of the repositories of the power, as those in control and command of the ADF, within the bounds of Australian law, satisfy the concept of necessity as explained by the plurality in *McCloy*.

108 We consider reg 85 was adequate in its balance. It is not a law that has as its direct purpose the control of communications, let alone the control of public communications. Rather its purpose is directed at the suitability (including suitability of character) of individuals to remain as officers in the ADF. The assessment of suitability, and capacity, required by reg 85 had little to do, directly or indirectly, with the holding, expressing and communicating of political opinions. Indeed, as all the policy material and instructions in evidence before the primary judge demonstrated, the ADF in its contemporary form pursues and encourages diversity in all senses, including diversity of opinions. However it also insists on respect and tolerance, without which diversity cannot flourish. Regulation 85, in particular reg 85(1)(d), read in context, directed attention to the conduct and behaviour of an officer, measured

against her or his suitability – in all respects – to remain as an officer in the service of the ADF. It did not authorise a focus on the holding, expression and communication of a political opinion, in and of itself, as the criterion for determining whether it was in the interests of the ADF for an officer to remain in service. Its focus was on the suitability of an individual to remain as an officer.

109 Although this observation belongs more in the administrative law section of these reasons, we pause to note that, in our opinion, the appellant's reasons demonstrate he understood this distinction, and his focus was on the respondent's conduct and behaviour as reg 85(1)(d) required. This included but was not limited to the tone and content of the respondent's communications and what the appellant considered they established about the respondent's lack of tolerance and respect for fellow officers and other ADF members about whom he was speaking.

110 The kinds of features which the appellant found the respondent's statements and conduct possessed (see the summary at [10]-[12] above) demonstrates that it is not so much the subject matter of the communication (homosexual and transgender members of the ADF, the ADF's attitude to the Sydney Mardi Gras, the perceived risks to the Australian soldiers operating in Islamic countries) which is likely to trigger the exercise of power but rather the tone and attributes of the communication, together with the way it is linked to the ADF and to any contraventions of instruction, policies or practices of the ADF. Those are the matters that go to the suitability of the officer, and the interests of the ADF. The risk of harm to the freedom is commensurately lower.

111 Any restriction of the freedom of political communication likely to result from reg 85 and reg 85(1)(d) in particular would be confined to extreme circumstances, where the conduct and behaviour of an officer is well beyond the bounds of what the ADF can be expected to tolerate in one of its officers, performing as officers do a leadership and role model function (whether reservists or otherwise). The circumstances of the respondent's comments are, in our opinion, aptly described as extreme, including his refusal to accept and abide by orders and directions given to him. Any potential harm to the freedom of political communication is outweighed by the need to reserve to the repository of the power the ability to terminate the service of individuals whose conduct and behaviour places them in a category where their continued presence in the ADF is assessed to be sufficiently serious, in the opinion of the

repository of the power, to justify the considerable step of terminating the service of an officer.

112 Therefore, while the scope of the power in reg 85(1)(d) was wide, in our opinion it was sufficiently confined by the objects and purposes of the statutory scheme in which it appears that it can properly be described as suitable, necessary, and adequate in balance with respect to any burden it imposes on the implied freedom. The power must be exercised in accordance with the limitations to which we have referred and judicial review is available to persons who are affected by an exercise of the power to ensure it is exercised in accordance with law.

The “lawful command” arguments

113 The appellant advanced what appeared to be an alternative submission, or at least submissions said independently to support the exercise of the reg 85(1)(d) power, based on the imperative in an armed force for the maintenance of discipline, and the need to ensure that lawful commands are obeyed. What was and was not a “lawful command” generated several submissions during the course of the appeal. The written reasons of the appellant make it clear that the principal basis for the termination of the respondent’s service was not the failure to obey a lawful command. While the failure is mentioned in the appellant’s reasons at [16(c)-(e)] and [19], the principal basis for the termination of the respondent’s service lay in a broader assessment by the appellant of the respondent’s behaviour and statements on social media, in a context where the respondent made it clear he was a member of the Defence Force.

114 It is not necessary to determine whether a requirement for compliance with a command might, in and of itself, be capable of impairing the freedom of political communication. The respondent’s constitutional challenge was not put in this way in his judicial review application: it was the termination decision that was challenged. In any event, such an argument runs into the difficulties we have identified with the way the respondent’s constitutional arguments were put in the first place: namely, the emphasis on the implied freedom as an individual constitutional right. As we set out at [147]-[154] below, on the administrative law arguments, there is no doubt the primary judge was correct to conclude that the respondent had been given two instructions or directions (which the primary judge characterised as commands), which he disobeyed. We consider it clear those commands were lawful. There was no error of law in the appellant referring to, and relying to some extent on,

the respondent's disobedience to lawful commands in his reasons for terminating the service of the respondent.

Conclusion on the appeal

115 It is sufficient to dispose of the appeal to identify the error in the primary judge's reasoning (see [63] above) and to determine in the appeal that reg 85 was valid (see [112] above). Alternative and broader contentions made by the appellant need not be determined.

116 This conclusion means it is necessary to consider whether the primary judge's orders can nevertheless be supported on the other grounds set out in the notice of contention.

THE NOTICE OF CONTENTION

The respondent's challenge to the termination decision based on s 116 of the *Constitution*

117 This argument was barely developed on the appeal.

118 Section 116 of the *Constitution* provides:

Commonwealth not to legislate in respect of religion

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

119 The primary judge dealt with this aspect of the respondent's arguments at [212]-[221] of his Honour's reasons and in our opinion did so without error.

120 In his notice of contention, the respondent persists with only one of the two aspects of the argument concerning s 116 put to the primary judge. The one he persists with is the prohibition that "no religious test shall be required as a qualification for any office or public trust under the Commonwealth". We note this was the only s 116 ground specified in the originating application to the Court.

121 Section 116 is a limit on legislative power. If it is capable of applying to reg 85, in no sense did reg 85 transgress the prohibition in s 116. Neither by reg 85, nor by any other relevant law was the respondent required to satisfy any religious test to continue as an officer of the Army Reserve. In no sense can the subject matter of the termination decision be said to impose a "religious test" on the respondent.

122 Although the respondent's defence to the show cause notice, and his opposition to his purported termination of his services, was based in part on his attribution of his public statements to the teachings and doctrines of the Roman Catholic Church, and thus to his own religious faith, even if that is accepted for the sake of the s 116 argument, assertions of religious faith or belief do not relieve the respondent from his obligation to comply with ordinary laws: *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* [1983] HCA 40; 154 CLR 120 at 135-136 per Mason ACJ and Brennan J. As their Honours said in that passage "[r]eligious conviction is not a solvent of legal obligation". Absent, perhaps, some arguments based on unlawful discrimination, an officer in the respondent's position cannot rely on his religious beliefs as an excuse for disobeying lawful orders and directions from his superiors, even if, contrary to the position in this case, it had been proven that those beliefs compelled or necessitated the conduct under question.

123 More fundamentally, arguments of this kind are simply too far removed from the proposition that reg 85 required or imposed a religious test on the respondent so as to contravene s 116 of the *Constitution*.

The administrative law grounds raised in the respondent's notice of contention

124 The notice of contention filed by the respondent was uninformative as to any details of the administrative law grounds relied upon to support the primary judge's orders. Being expressed in the way it was – "grounds other than ..." – the notice of contention was somewhat elusive. The Court directed that the respondent's position be clarified and particularised, which it was at the start of the second day of the hearing of the appeal. At that time, the respondent's counsel handed up an amended notice of contention, and a table setting out with more particularity which AD(JR) Act grounds were relied upon, what the argument was and where the matter was dealt with in the respondent's submissions.

125 Terms of the amended notice of contention are extracted at [30] above, but we will set them out again for convenience:

1. The decision to terminate the Respondent was in administrative error on the pleaded grounds other than those found in s.5(1)(d), (e) and (j) of the Administrative Decisions (Judicial Review) Act, *but including the grounds in s. 5(2)(a), (b) and (c)*.
2. The decision was also in error in that it declined to hold that the fourth clause of section 116 of the Constitution was impaired in respect of the Respondent.

(Emphasis in original.)

126 The Court noted that the AD(JR) Act grounds would only be considered if they were raised expressly in the oral or written submissions. The appellant submitted that the considerations grounds, and the personal opinion ground (see below at [132] and [133]), were outside the written submissions and there should be no leave to raise those grounds. We accept that submission. No notice was given of an application to add new administrative law grounds for the first time on appeal. Rather, the submissions were simply made from the bar table and then sought to be incorporated the following day into the notice of contention. This was already a complex appeal and no ad hoc addition of new grounds should be permitted.

127 Otherwise, as we understand the position, the appellant accepted these matters were raised before the primary judge.

128 Nevertheless, if contrary to our conclusion the respondent should be able to raise all of the matters he wishes to, we do not consider any of them should result in the primary judge's orders being upheld. For the sake of completeness, and notwithstanding what we have said at [126] above, we deal with each of the grounds relied upon.

129 The respondent relies on s 5(1)(b) of the AD(JR) Act – failure to observe procedures required by law. There are said to be three failures: “breach” of reg 85(4), being a “change of circumstance[s] including withdrawal of the circumstance that the respondent had disclosed official information”; “breach” of reg 85(6) because there was a “second” termination notice served by the delegate; and a failure to follow the procedure set out in DI(G) PERS 35-3 because there must be an inquiry into unacceptable behaviour before any administrative sanction. The respondent's table referred to DI(G) ADMIN 35-3, however, we assume the respondent intended to refer to DI(G) PERS 35-3, which is the document titled “Management and reporting of unacceptable behaviour”.

130 The respondent then relies on s 5(1)(f) – error of law in the making of the decision, for three propositions. First, that DI(G) PERS 21-1 allows expression of political opinion in a private capacity. Second, that DI(G) ADMIN 08-2 – the social media policy – does not apply to Reserve members who are not in uniform. Third, that DI(G) PERS 50-1, the policy about equity and diversity, required Commanders to create fair and inclusive workplaces, which obligation was not observed in relation to the respondent.

131 The respondent next relies on s 5(1)(h) – the ‘no evidence’ ground under the AD(JR) Act. He makes two contentions. First, that “provision of official information as outlined in

circumstances of [the] first NTSC was not made out”. Second, there was “[n]o evidence that any other commands or orders were breached or disobeyed”. We note here that what the respondent describes by the acronym as “first NTSC” is in fact, as the primary judge found, the only notice of termination. The second document – which the respondent persists in calling a “second” notice of termination – is in fact the Minute produced by General Hurley, which as the primary judge correctly found, at [144]-[145], formed part of the natural justice process afforded to the respondent but was not a second termination notice.

132 Then the respondent relies on s 5(2)(a), the irrelevant considerations ground. He submits the personal opinion of the CDF was an irrelevant consideration. This ground is one the appellant says is new. The respondent further submits, in similar fashion, that the termination notice was based on the “unfounded opinion” of the Chief of Army that the respondent had unreasonably breached orders.

133 Next, three contentions are made that the appellant failed to take account of relevant considerations: s 5(2)(b). The relevant considerations are said to be: the fact there were no adverse findings against the respondent from any disciplinary inquiry; the fact there were no convictions against the respondent for disobeying orders; and the fact the respondent’s conduct occurred “as a civilian”, “not in uniform” and “not on duty”.

134 Finally, the respondent makes two contentions under s 5(2)(c) – an exercise of power for a purpose other than the purposes for which it was conferred. He submits the termination decision was made for the purpose of a “politically correct agenda and cultural change” and secondly for the purpose of the “predilections of the CDF”.

135 We turn to consider these contentions under the AD(JR) Act ground nominated.

Section 5(1)(b)

136 As the appellant submitted, the reasons for the respondent’s termination of service under reg 85(1)(d) did not change during the termination process. The termination notice conformed to the regulation and set out the reason for the termination (not in the interests of the ADF to retain his service as an officer), together with details of the three sets of facts and circumstances giving rise to that reason. The respondent’s conduct was set out. As he was entitled to, the respondent then provided a statement of reasons why his service should not be terminated. This led to a step not required under reg 85: further notice by way of a “Minute” from the CDF, addressing the arguments raised by the respondent in response to the Notice.

The Minute can be found as Annexure B to the primary judge's reasons for judgment. The appellant submitted:

The effect of the Minute was to narrow the issues which had been the subject of the Termination Notice. The points raised by the CDF in the Minute at [7] (AB 288) related to the respondent's ongoing failure to comply with Defence Policy referred to in the Termination Notice at [3] (AB 278-279). A number of policies were identified as relevant in that regard at [4] of the Termination Notice (AB 279).

137 We accept that submission, as well as the further submission that the purpose of the Minute – to respond to the respondent's statement of reasons – was to afford procedural fairness, not deny it.

138 Second, there was no breach of reg 85(6), because the "Minute" was not a second termination notice. The primary judge dealt with this argument at [143]-[149]:

One aspect of this Minute requires immediate, and separate, attention. In the course of argument it was submitted that the heading of the Minute ("Notice to Show Cause for Termination of Appointment") betrayed the fact that it was, in reality, a termination notice served under reg 85(2) of the Personnel Regulations. If the contention were sound it would strike fatally at the Termination Decision because it would be contrary to reg 85(6) for the same delegate of the Governor-General to issue a termination notice under reg 85(2) and make a termination decision under reg 85(4).

However, I am satisfied that the contention should not be accepted. The heading is just that. It represents the subject matter of the Minute by reference to the termination notice dated 30 May 2013, which is identified in the Minute as Reference A.

The evident purpose of the Minute, which refers directly to the applicant's Statement of Reasons dated 27 June 2013, is to disabuse the applicant of the idea that the question of termination (i.e. whether it should occur or not) was likely to be decided by reference to technical arguments of the kind he advanced. Accordingly, paragraph 7 advised the applicant that CDF was less interested in whether any "technical" breach of specific instructions had occurred (DI(G) ADMIN 08-1 and DI(G) ADMIN 08-2) and would place greater weight on whether the public comments revealed inappropriate attitudes and intolerance contrary to current ADF policies and demonstrated an irreconcilable conflict.

CDF was accused in argument of bias and prejudgment, both by reference to this Minute and more generally. It was argued that the Minute of 22 August 2013 reflected an understanding that the contents of the termination notice given by the Chief of Army were unsustainable, and the Minute was a consequent attempt by CDF to "move the goalposts" and to erect a new and different case against the applicant. The argument was based on the idea that abandonment of the (misconceived) criminal charges vindicated and exonerated the applicant. I do not accept any part of this analysis.

Abandonment of the service charges was irrelevant to the reg 85 procedure. The termination notice did not depend upon, or simply reflect, those charges. It was addressed to a much broader concern about the applicant's conduct.

Far from attempting, as it were, to unconsciously find a new and different basis

upon which to deal with the applicant, the Minute from CDF on 22 August 2013 appears to me to have represented a fair attempt to ensure that the applicant did not misunderstand the true nature, or the seriousness, of the matters at issue. Far from supporting a charge of bias or procedural unfairness which was made against CDF, this Minute is cogent evidence against it.

The Minute of 22 August 2013 represented a further, focussed, opportunity for the applicant to address the concerns expressed as a matter of substance. The possibility for him to resign was also expressly left open. The applicant chose to persevere with his resistance to the steps being taken against him.

139 The conclusions of the primary judge are correct.

140 The third contention under s 5(1)(b) – the need for an inquiry process, is answered by the findings we make at [161] below about the reg 85 termination process being a separate, self-contained and independent power. Aside from requirements in the *Regulations* themselves (such as reg 7), no other process was required for the power to be lawfully exercised.

Section 5(1)(f)

141 None of the matters relied upon under this ground demonstrate an error of law by the appellant in making the termination decision.

142 It is correct that at [4] of the termination notice, the following statement is made:

They [the respondent's statements on social media] could also reasonably be considered to be in breach of Defence Instruction (General) Administrative 08-1 *Public Comment and Dissemination of Official Information by Defence Personnel* (DI(G) ADMIN 08-1), Defence Instruction (General) Administrative 08-2 *Use of Social Media by Defence Personnel* (DI(G) ADMIN 08-2) Defence Instruction (General) Personnel 50-1 *Equity and Diversity in the Australian Defence Force* (DI(G) PERS 50-1), CA Directive 15/12 Army Implementation Plan for the Removal of Gender Restrictions, Defence's Pathway to Change Cultural Reform Strategy and the Defence Diversity and Inclusion Statement signed by CDF and Secretary on 13 Mar 13.

143 However, in his reasons for the termination, the appellant acknowledged the respondent was not on duty and so the policies did not apply to him. The appellant dealt with this in the following way (at [17] of the termination reasons):

I have given weight to your status as a Reserve member. I note your view that you posted the material in a personal and civilian capacity, while you were not on duty, in uniform or performing any Reserve service, and that as a result you did not transgress Defence policy with respect to public comment or political activity. 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*.

(Emphasis added.)

144 Thus, it was not any “binding” nature of the policies of the respondent which formed part of the appellant’s reasons for termination, but rather a broader view about the standards of behaviour that an officer could be expected to demonstrate.

145 The appellant made no errors of law of the kind alleged.

Section 5(1)(h)

146 The termination decision is Annexure C to the primary judge’s reasons. This contention turns on the finding in the termination decision (at [3b]) that the respondent’s conduct did not cease “after being ordered to do so on the basis that your public comment was inconsistent with Defence Policies”. The respondent contends there was no such ‘order’. Or, it would appear, his real contention is that the order was not lawful.

147 It is abundantly clear that two instructions, directions or orders (in our opinion the term used is not critical) were given to the respondent. He did not, and could not, deny the fact of these instructions, but disputed their characterisation as a “lawful order”. On 6 February 2013 Lieutenant Colonel Buxton said the following to the respondent (see primary judge’s reasons at [109] where this extract appears):

LTCOL Buxton’s advised that while MAJ Gaynor remained an active reservist and particularly while he was posted to DIntTC, under his command, he was to make no further intemperate or inflammatory remarks on social media. LTCOL Buxton added that even if MAJ Gaynor did not think his remarks to be inflammatory or inappropriate, the broader community had a different view. ...

(Emphasis added.)

148 Then, a little later on 22 March 2013, as the primary judge set out at [33] of his Honour’s reasons, the Deputy Chief of Army (Major General Campbell) wrote to the respondent in the following terms:

Effective immediately, you are to cease posting material in the public domain that identifies you as an Army Officer and which directly seeks to, or can be reasonably expected to, breach Defence policy, contravene ADF values, or which is otherwise not in the interests of Army. Further, you are to remove any such material from your website and social media sites insofar as it can be linked, in any way, to your military service.

(Emphasis added.)

149 The respondent’s argument is that these orders applied to him in his private capacity when not on duty and that as a reservist, the Army could not give commands to him as to what he might do on his own time.

150 We would reject this argument for the same reason the primary judge did at [69]-[74] and [111]-[115]. The primary judge set out at [111]-[115] why he considered both of these communications to the respondent to be lawful orders or commands, and why they provided an adequate foundation for the appellant's finding that the respondent had disobeyed orders he had been given. The primary judge's analysis was as follows:

It is pertinent to point out that the existence of a lawful command in a military structure, such as the ADF, does not depend upon establishing a prior general instruction that it reflects. Orders are no less orders in such a hierarchy, even if they do not repeat an earlier published instruction, such as a DI(G).

Subject to a consideration of the constitutional arguments, I see no reason to doubt the lawfulness of the instructions to which the applicant was subject, or the direct orders he was given.

In *King v Chief of Army* [2012] ADFDAT 4; (2012) 269 FLR 452, the Defence Force Discipline Appeal Tribunal, constituted by Tracey, Mildren and Cowdroy JJ, dealt with an argument that a charge of disobeying an order "not to discuss [a] matter directly with [an identified officer]" during the course of an enquiry was not based on a lawful order. Their Honours said (at [9]):

It was submitted that there was no power within the Defence Act 1903 (Cth) (the Act) or other legislation for the IGADF or anyone appointed by him to issue such a command. It was not contended by the respondent that the power to issue such a command could be found by reference to any specific legislative source of power, such as Defence Instructions to the Australian Defence Force (the ADF) other than the power to issue a command through the rank structure. Counsel for the respondent distinguished General Orders from lawful commands via the rank structure, pointing out that the failure to comply with a General Order is a separate offence under s 29(1) of the DFDA from the offence of disobeying a lawful command contrary to s 27(1) of the DFDA. This is clearly correct. In *Bromet v Oddie* (2002) 78 ALD 320 at 331, Finn J held that the power of a superior officer to command a person lower in rank derived from the common law, citing inter alia *Commonwealth v Quince* (1944) 68 CLR 227 at 254-255 per Williams J. In the latter case, Williams J said (at 255):

Service in the Air Force, as in the naval or military forces, involves in its most absolute form the right of a member superior in rank to give lawful orders to a member inferior in rank, and the obligation of the member inferior in rank to obey those orders.

Finn J's view was upheld on appeal: *Bromet v Oddie* [2003] FCAFC 213 at [110]- [114] per Dowsett J (Spender J concurring). Madgwick J, although in dissent, also recognised the power to give lawful orders through the command structure at [46]. Of course, not all commands given by a superior officer are lawful, especially in peace time. For example, it would not be a lawful command for a superior officer to order the execution of a prisoner of war, absent some lawful authority.

There is no reason to doubt, therefore, that Lt. Col. Buxton's instruction was a lawful order. The more direct and explicit order issued to the applicant by the Deputy Chief of Army on 22 March 2013 (to which I have already referred and will refer again) must also be taken to have been a lawful order in the same sense.

It appears to me to be beyond argument, therefore, that the applicant was given a direct and lawful instruction by his Commanding Officer not to make further contentious statements on social media, whether or not on duty or in uniform, while he remained a member of the ADF. The instruction was in line with the relevant DI(G), which was itself made under the authority of the Defence Act. No remonstrance or protest was made by the applicant in response. I reject any suggestion that DI(G) ADMIN 08-2 was inapplicable because the applicant was not on duty and not in uniform.

151 It is true that the respondent could not be charged with the service offence of disobeying a lawful command under s 27 of the *Defence Force Discipline Act 1982* (Cth). This is because as a reservist who was not, compendiously, on duty he was not subject to that Act as he did not meet the definition of a “defence member” in s 3 thereof. To accept that proposition does not entail that lawful commands cannot be given to off-duty reservists. It simply means that disobedience to such a lawful command is not a disciplinary offence. It does not mean that the order is not lawful.

152 The legality of the commands is not to be tested by trying to locate a source for their issue in some explicit or even implied grant in defence legislation. As Williams J observed in *Commonwealth v Quince* [1944] HCA 1; 68 CLR 227 at 255:

Service in the Air Force, as in the naval or military forces, involves in its most absolute form the right of a member superior in rank to give lawful orders to a member inferior in rank, and the obligation of the member inferior in rank to obey those orders.

153 This was recently re-emphasised by the Defence Force Discipline Appeal Tribunal: *King v Chief of Army* [2012] ADFDAT 4; 269 FLR 452 at [9].

154 There are limits to what might be a lawful command. It is not necessary, however, in this appeal to meditate too long on where the line between lawful and unlawful commands might be drawn. Plainly, an order to commit a war crime would not be a lawful command. In this case, both commands were directed to the overall maintenance of ADF values and policies and the maintenance of disciplinary order. In our opinion, orders of that kind could not be more obviously lawful.

Section 5(2)(a)

155 There is no substance to the contention the appellant took into account irrelevant considerations. The appellant did not take into account his own “unfounded opinion” about a breach of orders by the respondent. It was open to the appellant, as the primary judge held, entirely to view what had occurred as a breach by the respondent of orders or commands, on

two occasions. Given its subject matter and purposes, reg 85 could not be construed as prohibiting consideration of whether an officer breached orders, commands, instructions or directions (if there be a difference between these terms) given to her or him. Quite the opposite: such conduct would clearly be a permissible consideration.

156 It is unclear what the respondent intends to convey by the contention that the appellant impermissibly took into account his “personal opinion”. Regulation 85 was expressed in terms of the satisfaction of the CDF. The termination decision adopts that language. When a statute (or regulation) uses the phrase “satisfaction”, it intends that the repository of the power form a state of mind, which is described as “satisfaction”: *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; 78 CLR 353 at 360 (Dixon J); *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259 at 276-277 (Brennan CJ, Toohey, McHugh and Gummow JJ); *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611 at [113], [131] (Gummow J). Such a task cannot be anything other than personal to the repository of the power, because it is a mental process. However, that is not to say there is any place for personal prejudices, or opinions not required by the statutory framework. There is no basis whatsoever to find that the appellant approached his task with any such preconceptions or subjective opinions outside the framework of reg 85, which as we have noted, was broad in scope, and deliberately so.

Section 5(2)(b)

157 As we have noted, these contentions, as considerations arguments, were not raised before the primary judge, and in our opinion the respondent should not be permitted to raise them now, never having made an application to raise them and sought leave in the usual way, but rather simply asserting them through his counsel in a manner which was altogether unclear until the second day of the hearing.

158 Even if leave were to be granted, over the appellant’s objection, in our opinion they are fully answered by the following submission made by the appellant:

In the Termination Decision, the CDF accepted the respondent’s contention that he was ‘not on duty, in uniform or performing any service for the Army’ at the time of his impugned conduct (see AB 292 [7]). The CDF noted that Lt Col Buxton and Maj Gen Campbell had ‘brought to [the respondent’s] attention’ the appropriateness of his conduct, and that the respondent did not subsequently ‘modify’ his behaviour (see AB 293 [11]; see also AB 295 [16(c)], 296 [17]). That reference was a factual one; it was not making a specific finding of failure to comply with specific lawful orders such as to warrant dismissal. The CDF also noted that the disciplinary action against the respondent had been discontinued and that the Inquiry Officer Inquiry had found

that the respondent had not breached the Unacceptable Behaviour Instruction (AB 294 [14]). The CDF also stated that he accepted that the respondent had not contravened the Public Comment Instruction 'due to your duty status' (AB 296 [17]).

The CDF referred at [16(c)] to the fact that 'you failed to modify your 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' as one of the matters leading him to the conclusion that retention was not in the interests of the Australian Army. Whilst that was no doubt referencing the past warnings and directions by Lt Col Buxton and Maj Gen Campbell, it was to make the point that the respondent had still failed to modify his online behaviour after having been warned. That led to the next point at [16(d)], referring to 'the persistence of your conduct and your submissions in references A and B [i.e. the respondent's submissions] demonstrate that you do not understand or are unable to exercise your responsibilities as an Officer and leader in the Australian Army ...'.

159 The respondent has not established the matters he identifies in this ground (the fact there were no adverse findings against the respondent from any disciplinary inquiry; the fact there were no convictions against the respondent for disobeying orders, and the fact the respondent's conduct occurred "as a civilian", "not in uniform" and "not on duty") were relevant considerations in the *Peko-Wallsend* sense (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24). There is no suggestion in the scope, subject matter or purpose of reg 85 that the appellant was required to take those matters into account. Further, those matters were in any event expressly considered by the appellant: see [7], [9], [13] and [14] of the appellant's reasons for decision. The real complaint is that these matters were not taken into account in a way which resulted in a favourable outcome for the respondent. That is not an argument available on judicial review.

Section 5(2)(c)

160 These grounds rise no higher than an undeveloped attack on the merits of the appellant's decision, by way of a personal attack on the bona fides of the appellant in making the decision. They should be rejected but are deserving of no elaboration.

Regulation 85 was a separate and individual power

161 Some of the respondent's administrative law contentions rely on a premise that other procedures (such as disciplinary procedures) controlled or affected the exercise of the discretion in reg 85. We do not accept that premise. Considerable time was spent in argument on this issue but the basis for the premise did not become any clearer. The text and context of reg 85(1)(d), together with the purposes of reg 85 as we have explained them, make it clear that it was an independent discretionary power conferred on the Governor-General and any

delegates. It did not depend on the undertaking of any other processes or inquiries. It had no other preconditions than those for which the scheme in the regulations provided (see, e.g., reg 7). It contained its own procedural fairness provisions and was not dependent on compliance with procedural fairness provisions attached to other disciplinary processes.

Attacks on the merits of the termination decision

162 The largest proportion of the written and oral submissions made on behalf of the respondent sought, in various ways, to deny the legitimacy of the outcome of the appellant's consideration under reg 85, rather than to challenge its lawfulness. As the primary judge clearly recognised, his task in the face of the myriad of arguments put forward by the respondent, which went more to the outcome than the lawfulness of the exercise of power, was to determine whether on the material before him, and according to a proper construction and understanding of the power in reg 85, the findings made by the appellant and the conclusion reached were open to him. In our opinion there is no doubt they were and the primary judge was correct so to find.

163 We respectfully agree with the primary judge's assessment at [84] concerning the significance and commitment to changes within the ADF and how the appellant's assessment of the respondent's reaction to those changes involved matters of policy and judgement:

There seems little doubt that the authors of the document (who included CDF, General Hurley who terminated the applicant's commission) were striving for a paradigm shift in attitudes. This was a clear example of a deliberate policy initiative that had moved beyond any question of debate about its essential premises and had entered an implementation stage. The applicant's behaviour was, in due course, assessed for his co-operation with initiatives of this sort. Those are quintessentially policy questions where the principles to which I referred earlier must be applied. The assessments of compatibility with the interest of the Army which were brought to bear on the applicant's conduct were judgments for the delegates of the Governor-General to make, not the courts.

164 The primary judge also noted at [91]:

Finally, after some of the applicant's publications, but before others, on 13 March 2013 CDF and the Secretary of the Department of Defence jointly published "A Message from the Secretary and the Chief of the Defence Force", which included the following:

'Diversity' is broader than the labels of gender, age, language, ethnicity, cultural background, disability, sexual orientation and religious beliefs; it is a way of thinking and an approach to delivering the best results. Through diversity we gain the varied perspectives needed to tackle complex problems and come up with innovative solutions. Recognising this Defence is committed to creating an inclusive environment which values, respects and draws on the diverse backgrounds, experiences, knowledge and skills of our

people.

A robust and agile Defence organisation depends on every person in it having the opportunity to contribute fully. Everyone within Defence has a role to play in making this a reality. We must walk the talk and ensure that we encourage diversity at every level, every day.

Our day-to-day activities must promote a fair, equitable, supportive and inclusive working environment that enables all Defence people to perform at a high level and encourages them to stay with us longer.

...

It is expected that all leaders in Defence will champion diversity. To be champions for diversity, all leaders, commanders and managers will:

- advocate the important role of gender diversity in helping to increase organisational performance;
- be an exemplar of positive and visible change by acting as a role model for all staff in regard to diversity;
- regularly communicate the benefits of diversity and its role in organisational success across Defence;
- support initiatives that increase the representation of, and career pathways for, women in the Defence organisation; and
- assist in identifying and implementing targeted diversity initiatives.

165 It is instructive to compare the policy we have extracted at [164] with, for example, the comments made by the respondent about a (superior) transgender officer, reproduced by the primary judge at [127] of his Honour's reasons:

On 16 May 2013, the applicant turned his specific attention to a transgender officer on the staff of the Chief of Army. His comments were personal and offensive. They included the following:

Furthermore, it means that while a bunch of troubled men are rummaging around in your wallet looking for loose change so they can botox their lips and sculpt their adams apples, they are also compromising the nation's ability to defend itself.

The good news is that I'm not sure if they are entitled to Defence funded stockings post their appointment with the clacker. So maybe we can at least be thankful for this small grace.

I am, however, guessing that this will be offset by the fact that the Army is now the employer of choice for those who want to take their cross-dressing career a little further. The Army is so generous, it even offers men unfettered and free access to the ladies' showers while they contemplate the best way to fulfil their sexual identity.

...

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.

While they consider their response, it might be worthwhile for them to remember that [...] has publicly stated that he is still attracted to the ladies. And when he puts on his Army skirt and lipstick, he is allowed to hang out with them in the bathroom.

166 The purpose of extracting this is not to descend into the merits of the appellant's decision, despite the repeated invitations in the respondent's submissions for the Court to do just that. Rather it is to illustrate the kind of standard that was being set by the ADF, at the highest levels, and the content of that standard. Measured against the respondent's statements, it is not difficult to conclude that it was open to the appellant to reach the conclusion that the retention of the respondent in the Army was not in the interests of the Army, given the weight placed on the fundamental changes in attitudes and policy about diversity in the ADF, measured against the content, manner and tone of the respondent's public statements, together with his refusal to desist, while maintaining his position as an officer in the Army Reserve.

167 None of the grounds in the notice of contention succeed.

CONCLUSION

168 The appeal must be allowed. The respondent made a short submission to the effect that he should receive his costs if the appeal was to be dismissed, but did not otherwise make submissions about any different kind of costs order. There is no basis for anything but the usual order as to costs.

I certify that the preceding one hundred and sixty-eight (168) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Perram, Mortimer and Gleeson.

Associate:

Dated: 8 March 2017